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PANDIMAN PHILIPPINES Inc.
P&I Correspondent in the Philippines

Topics of interest relating to the Philippine Maritime Industry and Shipping

120/240 Days change in case management

Understanding recent developments by the Supreme Court and how to limit potential exposure in legal claims by correct case management. (This update supersedes our ALON of 25th of January 2018)

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The 120 / 240 Day Issue – respecting the parameters of the Employment Contract

Background (A brief history of the issue)

This is now a long running issue (over ten years) and there has been a recent resurgence of cases from the Supreme Court (SC) causing concern as ship owners are being found liable for total disability. This is even happening when a seafarer has reached "fit to work" status and the cases having been dismissed at NLRC and Court of Appeal level can be overturned by the Supreme Court (SC) because of it's position, that if medical treatment has exceeded 120 days a seafarer will be classed as totally disabled.

What is the actual issue?

It is not really complicated or a mystery, but deeply frustrating and the effects are serious to ship owners and comes down to the power of the Philippine courts position and interpretation of the Standard Employment contract compared to the position of the maritime industry. The standard employment contract (SEC) being the Philippines Overseas Employment Administration (POEA) contract for Filipino seafarers serving on international vessels, the current version full title;

STANDARD TERMS AND CONDITIONS GOVERNING THE EMPLOYMENT OF FILIPINO SEAFARERS ON-BOARD OCEAN-GOING VESSELS

Came into effect on the 12th November 2010

It is in Section 20 that the reference to medical treatment and sick wages (120 days) is found, we reproduce below for ease of reference we have highlighted the pertinent part;

SECTION 20B. COMPENSATION AND BENEFITS FOR INJURY OR ILLNESS

1. *Upon sign-off from the vessel for medical treatment, the seafarer is entitled to sickness allowance equivalent to his basic wage until he is declared fit to work or the degree of permanent disability has been assessed by the company-designated physician but in no case shall this period exceed one hundred twenty (120) days.*

   For this purpose, the seafarer shall submit himself to a post-employment medical examination by a company-designated physician within three working days upon his return except when he is physically incapacitated to do so, in which case, a written notice to the agency within the same period is deemed as compliance. Failure of the seafarer to comply with the mandatory reporting requirement shall result in his forfeiture of the right to claim the above benefits.

   If a doctor appointed by the seafarer disagrees with the assessment, a third doctor may be agreed jointly between the Employer and the seafarer. The third doctor's decision shall be final and binding on both parties.

The POEA contract also states in;

Section 20 A. COMPENSATION AND BENEFITS

3. *It is understood and agreed that the benefits mentioned above shall be separate and distinct from, and will be in addition to whatever benefits which the seafarer is entitled to under Philippine laws from the Social Security System, Overseas Workers Welfare Administration, Employee's Compensation Commission, Philippine Health Insurance Corporation and Pag-ibig, if applicable*.

The position of the industry is that the POEA contract stands alone, distinct and separate from other benefits provided under Philippine law or any private medical life insurance or pension a seafarer may have. In regards to Section 20B item 3 above (highlighted in yellow) then the position of the maritime industry is that the ship owners obligation is

- To provide sick wages up to 120 days.
- Provide medical treatment until a seafarer has been assessed by the company designated physician as having reached maximum medical cure or fit to work.

Medical treatment for example, a spinal injury or even simple Tuberculosis (TB) where recommended treatment is for 6 months, will exceed the benchmark of the 120days (4 months) specified as sick wages. While the maritime industries position is that there is no defined time (number of days) as to the owners obligation for medical treatment or assessment of disability, we need to be aware of the position adopted by the courts, who have (inappropriately), placed owners liability for total disability in juxtaposition with the period for sick wages.

Under the POEA contract, disability is based **solely** upon the grading medical assessment of the attending company designated physician CDP).

What is the courts position?

The argument by the Supreme Court is that they have interpreted Section 20B item 3 (highlighted in yellow above) as one directive. That basic wage will equate to a monthly sick wage and shall be applied for 120 days and that the owner's obligation to provide medical treatment up to maximum medical cure or fit to work will be done within this 120 day period, otherwise after such a period the seafarer will be deemed to be permanently disabled.

This position was modified 10 years ago in a case where one SC justice adopted a different position, this was the ***Vergara vs. Hammonia Maritime Services, Inc. et al***. (G.R. No. 172933, 6 October 2008) (Pandiman)

However, with this case of *Vergara*, the Supreme Court held that a temporary total disability only becomes permanent when so declared by the company physician within the periods he is allowed to do so, ***or upon the expiration of the maximum 240-day medical treatment period*** without a declaration of either fitness to work or the existence of a permanent disability. If the initial 120-day treatment or temporary total disability period is exceeded, the company-designated doctor can still make a declaration within the extended 240-day period that the seafarer is fit to work.

The above case made direct reference to the **Labour Code of the Philippines**, where we reproduce for ease of reference;

Rule X – Temporary Total Disability

Section 2. Period of entitlement (a) The income benefit shall be paid beginning of the first such day of such disability. If caused by an injury or ill sickness it shall not be paid longer than 120 consecutive days except where such injury or sickness still requires medical attendance beyond 120 days but not to exceed 240 days from onset of disability in which case benefit for temporary total disability shall be paid. However, the system may declare the total and permanent status at any time after 120 days of continuous temporary total disability as may be warranted by the degree of actual loss or impairment of physical or mental functions determined by the system.

The separation and distinction of the POEA contract and the Labour Code of the Philippines was explained by the Department of Labour and Employment (DOLE) Department Order No. 4, Series of 2000, which emphasized the Department's objective of ensuring the continued employment of the Filipino seafarers and maintaining the Philippine

global comparative advantage in ship manning. The Standard Terms and Conditions Governing the Employment of Filipino Seafarer On Board Ocean-Going Vessels was amended to achieve these visions and design. The then new standard terms and conditions reflected the consensus of all stakeholders as determined through several tripartite consultations conducted by the POEA. It was created for the simple purpose of serving the peculiar and special needs of seafarers. It governs the contractual relationship between the seafarer and the employer. Hence, any claim by virtue of the said contractual relationship should be governed by the terms and conditions of the contract.

The provisions of the Labor Code apply only to disability benefit claims under the Social Security System. The separate distinction of the claims under the Social Security System and under the POEA contract is evident, Section 20(3) of the POEA contract states that the benefits under the POEA contract shall be separate and distinct from, and will be in addition to whatever benefits which the seafarer is entitled to under Philippine laws from the Social Security System, Compensation Commission, Philippine Health Insurance Corporation and Pag-ibig.

The POEA is a government approved contract and is a contract made directly between the seafarer and the ship owner, who is represented by a local (POEA approved) manning agency. Again the industries position being that the POEA should be the binding contract which is separate and distinct. Where the Vergara case extended the time from 120 t0 240 days and appears to help, in essence it is a completely different position than that we as an industry are trying to establish, that the POEA is separate and distinct and that disability is based on a medical grading not the number of days.

How to avoid unnecessary exposure – case management

Recent changes by the Supreme Court

While the provisions of the POEA should be clear and distinct this year and the Supreme Court has ruled that procedures in line with the Labour Code of The Philippines must be adhered too.

The Supreme Court commented that;

"The most controversial issues that concern seafarers are the so-called 120 day or 240 day rules for the determination of disability."

Previously In *Robelito Malinis Talaroc v. Arpaphil Shipping Corporation* (G.R. No. 223731, 30 August 2017), the Supreme Court summarised the guidelines as follows:

- *The company-designated physician must issue a medical assessment on the seafarer's disability grading within a period of 120 days from the time the seafarer reported to him;*
- *If the company-designated physician fails to give his assessment within the period of 120 days, without any justifiable reason, then the seafarer's disability becomes permanent and total;*
- *If the company-designated physician fails to give his assessment within the period of 120 days with a sufficient justification (e.g., seafarer required further medical treatment or seafarer was uncooperative), then the period of diagnosis and treatment shall be extended to 240 days. The employer has the burden to prove that the company-designated physician has sufficient justification to extend the period; and*
- *If the company-designated physician still fails to give his assessment within the extended period of 240 days, then the seafarer's disability becomes permanent and total, regardless of any justification*

In decisions this year by the SC the above has been reiterated many times and further stated;

"In following the foregoing guidelines, it must be emphasized that the company-designated physician must not only "issue" a final medical assessment of the seafarer's medical condition. He must also- and the court cannot emphasize enough "give his assessment to the seafarer concerned. That is to say that the seafarer must be fully and properly informed of his medical condition. The results of his/her medical examinations, the treatments extended to him/her, the diagnosis and prognosis, if needed and, of course his/her disability grading must be fully explained to him/her by no less than the company designated physician."

The Supreme Court (SC) then goes on and emphasizes its point how the seafarer should be informed by bold underline type;

"In this regard, the company designated physician is mandated to issue a medical certificate, which should be personally received by the seafarer, or, if not practicable, sent to him/her by any other means sanctioned by present rules

It is important to also clarify the courts perception of Compnay-Designated Physician CDP, it is not sufficient for a medical coordinator in a general medical update to comment on further treatment. As 120 days is approached the actual specialist attending to the seafarer must place in writing justifying the requirement for further medical treatment and the interim disability grading at that time. Documents provided only by a medical coordinator have not been given weight in court.

In the past is was thought that obtaining an "interim medical assessment" was essential and in theory would "cap" owners liability. In handling thousands of cases we have never seen a court refer to an interim assessment as a material fact. The key is that before 120 days elapses is that the CDP places clearly in writing the justification for extended treatment to allow the "gateway of a further 120 days" (240 in total). If this is missing the court will award total disability irrespective of an interim assessment. In discussion with our lawyers an interim assessment may actually be detrimental and wrongly give the seafarer the impression that he is already totally disabled and go off and file a case. The important and only factor for the court is justification of extended treatment, this should also be understood by the seafarer that his treatment is still on going.

We (**Pandiman)** have a monitoring system that ensures a justification assessment for ongoing treatment is obtained and evaluated to protect the owner and P&I Clubs position thereby providing a "gateway into a further 120 day period (240 days in total, eight (8) months). In the vast majority of cases this period will be sufficient to have fully managed the case to either;

1. The medical condition being resolved or
2. Maximum medical cure having been attained and a final disability grading given

We still however within the industry observe cases where ship owners have been exposed to total disability because certain key steps have not been addressed. This we observe in what we call "secondhand cases". This is not to say a manning agent has not acted in the owners best interest, but is the result of not understanding the potential exposure and the consequences. We observed last year too many **secondhand cases** (*cases initially handled by a manning agency, unfavourable decision at the labour court, owner informed and case becoming a P&I case, with Pandiman being brought in at a late stage)* wherein the manning agency believing that as long as a seafarer is receiving the correct treatment everything is OK. That despite successful medical treatment (medical condition resolved or reached maximum medical cure) the seafarer still filed a claim for disability at the labour courts.

Unfortunately reality is that too many seafarers do not want to accept a position that their condition has been resolved or the actual and true disability grading as established by the Company Designated Physician (CDP). Seafarers file cases demanding to be Grade 1 (total disability). It is at this point that good case management of the initial stages of the case will determine a correct outcome or unfortunately the ship owner being exposed to an award of total disability because the progression of the treatment up to and through the 120 day period was not correctly documented. In these cases the 120 day period was passed with no justification for further treatment and the courts have awarded total disability based on this.

Therefore we have a very clear case management in place

Key WAYPOINTS needed;

First Stage 120 Days

- When we are appointed on a case we need to ensure that the start date for 120days is clearly identified.
- Experience from recent court decisions is that it is imperative if we are to remove any ambiguity in how a case is handled that clear decisions are made at the right time and very importantly how those decisions are recorded.
- The first "way-point" should be discussed at 90 days and by 110 days an actual decision already made and documented. This means that discussions with the doctors/specialists and the club and owner must all take place before.
- On the 110th day a decision must have been recorded and documented, if it is the specialists (CDP) opinion that there needs to be continued medical treatment than this must be very clearly explained in a detailed written report that needs to ensure;
    1. Why further medical treatment is needed
    2. What exact treatment is needed
    3. Prognosis
- "interim assessment" is not needed as this might trigger the seafarer to think he has a claim, the court is not interested in an interim assessment but is looking for the justification of CDP why further medical treatment is needed.
- The specialists detailed report is the documented legal gateway that allows a second period of 120 days to be available, this must be by the specialist.

Second Stage 240 days

- This second stage is an area that it is crucial that in each and every case we are methodical.
- At 220 days a decision needs to be established and very importantly it needs documenting how the case management is to be completed, this will be in one of two ways; 1) Fit To Work or 2) Residual Disability with grading.
- The first scenario is "Fit To Work". This area has been a conundrum for over seven (7) years as we have tried various sentences and a Fit To Work Certificate. Recent decisions at the higher courts clearly establish that a sentence or a certificate alone is insufficient to satisfy the courts. The statement "Fit To Work" was attacked by claimants lawyers and seafarers when we would declare someone Fit To Work who had recovered from a broken leg but then failed their PEME with and illness issue unrelated such as a heart disease. The seafarer and his counsel claiming we had said the seafarer was "Fit To Work".

- This was countered with trying to use the sentence “The seafarer’s condition for which he was repatriated has now been resolved”, the courts have not been happy with this. It appears the courts are looking for very specific events to be documented.

- In the case of Fit To Work, the specialist needs to provide a very detailed report explaining clearly;
    1. The medical condition which resulted in the repatriation.
    2. What treatment was provided and why.
    3. The specialists findings and explanation as to why the seafarer is now Fit To Work.
- The second scenario requires even more documentation, this is where there will be a residual disability.

- Again this point needs to reached by 220 where in the last 20 days everything can be documented correctly, to stress again by 220 days there should have been communications with the specialists and Club and owner and at 220 days we know if we are looking at FTW or Disability.

- By 230 Days we need to have a specialist report establishing;
    1. The medical condition which resulted in repatriation
    2. what treatment was provided and why
    3. The assessment of disability and why the particular grade this must be in great detail.

- Between 230 Day and 235 Day we need to have met with the seafarer and;
    1. Ensure we have explained to him, his disability and why.
    2. Provided him with a copy of the final report, this might require an acknowledgement for that he has received and understood. This needs to be documented.
    3. A written letter and copy of final report to his address through recorded delivery.

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