



Plurality of Actions in Case of a Work Accident.

BY: JORGE PAREDES | LAWYER | FEBRUARY 2021

In august 2018 a 19-year old man joined a company which makes timber product. Subsequently in **November 2018**, without him being duly trained, he was entrusted the cutting of timber and cleaning of the machine used for the said work. While the above worker was trying to remove a stuck piece of timber, the band saw cutting machine started to operate pressing his right hand which resulted in the amputation of four fingers and a part of the palm of the hand. Because of the serious injuries he was taken to the closest medical center by the emergency personnel who provided him with preliminary medical aid. **In december 2019** once his rehabilitation treatment was complete, the mutual insurance company issued a resolution whereby the injured worker was declared to be 40% disabled.

LEGAL SITUATION

In january 2019 the injured worker filed a claim for compensation for damage against his employer holding them liable for the amputation of his four fingers and a part of the palm of his right hand. **The sum sued totaled CLP 500,000,000** for pain and suffering. He did not claim for loss of income. **In november 2019** the labor court upheld the suit by awarding damages against his employer for the sum of CLP 75,000,000 regarding pain and suffering. No court costs were awarded. The above ruling was subsequently upheld by the Court of Appeals and in August 2020 by the Supreme Court.

In april 2020, in addition to the previous suit for pain and suffering the worker filed a new lawsuit for CLP 50,000,000 claiming for loss of income resulting from the accident, a concept which had not been previously claimed.

In september 2019, the lawsuit was dismissed by the labor court, without awarding any court costs, grounded on the fact that there was not any certainty whatsoever as to the loss of income concept. Subsequently, **in november 2020**, the remedy of annulment filed by the plaintiff was upheld by the Court of Appeals by issuing the relevant ruling. The above ruling sentenced the employer to pay the sum of CLP 57,000,000 for loss of income, with no court costs, which was upheld in **January 2021** by the Supreme Court thereby causing the ruling issued by the Court of Appeals to become final and binding. No court costs were awarded.

FILING OF MANY LAWSUITS BECAUSE OF WORK ACCIDENTS

The first issue which attracts our attention is the upward trend by plaintiffs to bring legal actions separately as a consequence of a work accident by filing lawsuits for pain and suffering and then, through another suit - which is mostly filed at the same court - to seek compensation for loss of income. Plaintiffs' lawyers ground the above strategy on the fact that in many cases our Courthouses reject loss of income because of the uncertainty / lack of certainty thereof at the time when a lawsuit is filed, because of the long period of time taken by mutual insurance companies to determine someone's disability. Therefore, once the claimants' lawyers notice that when seeking pain and suffering and loss of income together our courthouses award damages for global sums focused only on the first of the above juridical damages, they start to separate the lawsuits by filing a suit for pain and suffering and then another one for loss of income.

Defendants' lawyers initially claimed for inadequacy of simultaneous or successive lawsuits grounded, on one hand, on the existence of a previous suit (*lis pendens*) and *res judicata*, on the other. Albeit in some cases such grounds were upheld by rejecting the possibility of the plaintiffs filing separate lawsuits for pain and suffering and loss of income, the previous rulings show an upward trend to uphold the filing of these actions separately.

What are the legal grounds for upholding the adequacy of separate legal actions for pain and suffering and loss of income? Based upon previous rulings, the court's reasoning is that in practice different juridical damages are being sued and so they could be sought and compensated separately. Consequently, pleadings based on substantial grounds like *res judicata* and the ones based on procedural grounds like *lis pendens* would not be attainable.

GUIDELINES TO DETERMINE PAIN AND SUFFERING AND LOSS OF INCOME

The second issue to be addressed here is determination of pain and suffering and loss of income.

As far as the former concept is concerned, the ruling issued by the labor court stated the following: *"As regards determination of the pain and suffering amount, the current status of the matter in dispute under jurisprudence can be summed up in the following causes, which as a way of example are quoted hereafter: a) ruling for CLP 100,000,000 for pain and suffering as a consequence of an accident where the worker's four fingers were amputated; b) ruling for the sum of CLP 50,000,000 for severance of four fingers; and c), hearing held at the same court seeking CLP 18,500,000 for amputation of the plaintiff's right thumb"*.

What is the criterion used for determining an amount for pain and suffering that could be deduced from the above quote? It seems that for this court the value of pain and suffering resulting from the loss of a finger is approximately CLP 18,500,000, which resulted in a global amount of CLP 75,000,000 for the loss of four fingers. As a matter of fact, if we average the two first rulings regarding amputation of 4 fingers, we obtain the sum of CLP 75,000,000, which if divided by four, i.e.; the quantity of amputated fingers, we obtain CLP 18,500,000. The above sum, besides, is in well line with what was determined by the same court regarding the same

defendant in a previous case for the loss of a finger. Generally speaking, the above mathematic criterion has its reasoning, except for the “*original sin*” of failing to provide guidelines or a criterion as to how the sum of CLP 18.5000.000 for an amputated finger was reached. In addition, the above criterion was agreed by the Court of Appeals by stating that the accident that gave rise to the amputation was not an isolated incident in respect of the defendant inasmuch as it occurred close to a similar accident. On that basis the court is of the opinion that the ruling issued by the courthouse did not breach the law, because it was prudently determined and backed up by jurisprudence which allowed them to contextualize compensation parameters for this concept.

As far as loss of income is concerned, it was dismissed by the instance court by stating that the proof furnished was not enough, because the estimation of the plaintiff’s possible work life it and of itself does not suffice to infer and determine the sums he would have ceased to earn in the future. There are some eventualities like diseases, dismissals or termination of contract of employments regarding the task which he was hired for that would undermine the calculation made during the trial. However, the above reasoning was not agreed by the Court of Appeals which set out that the instance court confused loss of income with the “*quantum*” or amount of the repair of the said damage; the defendant’s action or negligent omission and the cause and effect relationship between them are proven as well as the victim’s income and activity, and so it would not be advisable to deny loss of income only because of the difficulty in estimating its extension. Under such terms then, “... *the conclusion reached of rejecting loss of income is not logically grounded on the assumptions it is based on, because there was damage which translated into 40% of the loss of earning capacity and, if that is true, then the plaintiff must be indemnified. In short, the above syllogism shall not apply unless a logical contradiction is committed - asserting something to then denying the conclusion inferred therefrom.*”

With regards to the calculation of loss of income, the court based upon the following reasoning: from the worker’s monthly salary of CLP 293,310 a 10% is deduced for the victim’s personal needs thus leaving a salary of CLP 263,979. Then, a 40% of that amount is calculated in accordance with the establish disability level and so the net monthly salary he would have lost as future income amounted to CLP 105,592. The above sum is then multiplied by 540 (45 years and eight months until his age of retirement) which results in the final sum of CLP 57,864,416, which was set by the Court as loss of income.