



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/061

Judgment No.: UNDT/2020/119

Date: 15 July 2020

Original: English

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**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

KOLLIE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

A. Ndubuisi Nwabudike

**Counsel for Respondent:**

Alan Gutman, ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant, a former staff member with the United Nations Mission in Liberia (“UNMIL”), contests the Secretary-General’s decision accepting the recommendation of the Advisory Board on Compensation Claims (“ABCC”) awarding USD30,412.29 for a 28 percent permanent loss of function under art. 11.3(c) of Appendix D to the Staff Rules (“Appendix D”) that was applicable at the given time.

2. For the reasons stated below, the application is granted in part.

## **Facts**

3. On 15 November 2005, the Applicant joined UNMIL as a Radio Technician at the G-5 level.

4. On 9 May 2007, the Applicant suffered injuries in a car accident while returning from official travel. From 10 May to 17 June 2007, the Applicant was admitted at a military hospital where he was diagnosed with cervical spine injury with radiculopathy.

5. On 8 July 2007, the Applicant submitted a claim for compensation under the applicable Appendix D.

6. On 4 June 2008, UNMIL Special Investigation Unit submitted an investigation report regarding a car accident involving the Applicant.

7. On 18 December 2012, the ABCC considered the Applicant’s claim at its 461<sup>th</sup> meeting. The ABCC considered various documents including a report from the then Medical Services Division (“MSD”). In the report, MSD advised that the Applicant’s injuries (cervical spine fracture C1 posterior ring and C5/6 subluxation) can be considered to be directly related to the incident and based on the then current medical information, his injuries constitute no permanent loss of function of the

entire person according to the American Medical Association Guides to the Evaluation of Permanent Impairment (“AMA Guides”), Sixth Edition.

8. Based on its review of the file, the ABCC recommended that (a) the Applicant’s injuries be recognized as service-incurred and all medical expenses that are certified by the Medical Director as being directly related to the injuries and reasonable for the treatments/services provided may be reimbursed under Appendix D; and (b) the Applicant has not sustained any degree of permanent loss of function and, thus, his request for compensation under art. 11.3(c) of the applicable Appendix D be denied.

9. On 19 February 2013, on behalf of the Secretary-General, the Controller approved the ABCC’s recommendation. This decision was notified to the Applicant on 20 March 2013.

10. Between 2013 and 2016, the Applicant underwent various medical procedures.

11. In September 2016, the Applicant had a follow-up appointment with a spinal surgeon who recommended a disability assessment.

12. On 7 October 2016, the Applicant underwent a permanent medical impairment evaluation according to the AMA Guides, Sixth Edition. The report dated 25 October 2016 provided that the Applicant suffered a 23 percent permanent loss of function of the whole person due to spinal injuries. The Applicant submitted this report to the ABCC.

13. By memorandum dated 15 December 2016, the ABCC, attaching the report dated 25 October 2016 submitted by the Applicant, requested the Medical Director of MSD to advise the ABCC whether he sustained any degree of a permanent loss of function of the whole person under art. 11.3(c) of the applicable Appendix D and whether such permanent loss of function constitutes partial disability or total disability.

14. By memorandum dated 18 January 2017, MSD advised the ABCC that the Applicant suffered a 28 percent permanent loss of function of the whole person. MSD also advised the ABCC that since the Applicant returned to work and appeared to have suffered no loss of earnings potential in his current role, he does not fall under the disability provisions of either art. 11.1 or art. 11.2 of the applicable Appendix D.

15. On 11 April 2017, the ABCC considered the Applicant's claim at its 500<sup>th</sup> meeting. The ABCC reviewed a memorandum dated 18 January 2017 from the MSD advising that the Applicant's injury constituted a 28 percent permanent loss of function of the whole person and recommended that he be awarded USD30,412.29 for a 28 percent permanent loss of function of the whole person under art. 11.3(c) of the applicable Appendix D.

16. On 16 May 2017, on behalf of the Secretary-General, the Controller approved the ABCC's recommendation. On 19 May 2017, the ABCC sent a memorandum to the Department of Field Support advising that the ABCC awarded compensation under Appendix D and that the Applicant be advised accordingly.

17. On 7 June 2017, the Applicant asked the ABCC to reconsider their recommendation and requested the following:

- a. Substantial upward review of the ABCC's award of lump sum compensation for a 28 percent whole person impairment;
- b. Costs for future medical treatment (air ticket, logging, specialist consultation, and medications);
- c. Costs for recruiting assistance for personal and home care activities in an amount not less than USD2,500 per month;
- d. Award of special disability pension in an amount not less than USD3,000 per month to compensate for loss of future earning;
- e. Compensation for the pain and anguish;

- f. Retroactive payment of all out-of-pocket expenses including past expenses approved by MSD and recently incurred expenses;
- g. Compensation for institutional liability for negligence of UNMIL to provide him with prompt qualified surgical intervention;
- h. The ABCC's recommendation that he be stationed in a United Nations mission or agency in a country with the appropriate facilities and expertise to attend spinal injuries.

18. On 25 and 27 July 2017, the ABCC responded to the Applicant's memo of 7 June 2017 and it was forwarded to the Applicant on 27 July 2017. The ABCC noted that the Applicant seemed to request a future permanent loss of function award and that if his condition worsens in the future, he may submit a medical report, which would be duly considered by MSD for a further award for permanent loss of function. Regarding the issue of gross negligence, pain and suffering, and other compensation, the ABCC informed the Applicant that such compensation is not provided under the applicable Appendix D as it only provides for medical expenses and permanent loss of function compensation.

19. On 22 August 2017, the Applicant sent his response to the 25 July 2017 email communication from the ABCC via UNMIL.

20. On 25 August 2017, the Applicant received the response from the ABCC, which stated that there was nothing more the ABCC could provide or reply to the Applicant and that he may wish to appeal to the Management Evaluation Unit or the Dispute Tribunal. The ABCC added that the ABCC would continue to accept and review future claims.

21. On 2 October 2017, the Applicant filed the present application. As remedy, he requested the following:

- a. The adjusted award for a 28 percent total permanent loss of function of the whole person;

- b. The award of an amount not less than USD2,500 per month for recruiting assistance for personal and home-care activities;
- c. The award of an amount not less than USD100,000 for the continuing pain and anguish;
- d. The retroactive payment of all out-of-pocket expenses for which evidence has been attached and has been approved by the MSD;
- e. The placement of the Applicant in a United Nations mission or agency in a country with the appropriate facility and expertise to attend spinal injuries and opportunity for continued benefit, or alternatively:
  - i. Costs for future medical treatments or in an amount not less than USD25,000 per year to cover the cost of a follow-up treatment in South Africa;
  - ii. In the event that the Applicant is separated from the United Nations, an award of an amount not less than USD3,000 per month for loss of future earnings in the form of special disability pension or a one-off lump sum award for loss of future earnings.

22. On 30 November 2018, following UNMIL's closure on 30 June 2018, the Applicant was separated from the Organization. According to the United Nations Joint Staff Pension Fund, the Applicant's case was not submitted to the Fund for a possible disability benefit and he received a withdrawal settlement upon his separation, which extinguishes all other rights under the Fund's Regulations.

23. The present application was initially filed with the Nairobi Registry, and on 19 July 2019, the case was transferred to the New York Registry. On 21 November 2019, it was reassigned to the undersigned Judge.

24. On 9 June 2020, the Tribunal held a hearing and heard testimonies of Dr. Mike Rowell, Senior Medical Officer, MSD, Mr. Demetri Gounaris, the Secretary of the ABCC, and the Applicant.

25. Thereafter, pursuant to Order No. 101 (NY/2020), the parties submitted closing submissions.

## **Consideration**

### *Receivability*

26. The Respondent raises two issues relating to the receivability of the application. First, the Respondent submits that the application is not receivable arguing that the application was filed more than 90 days from the notification of the contested decision by the ABCC. Second, the Respondent submits that the Applicant's claim of negligence is *res judicata* since it was rejected in *Kollie* UNDT/2019/156, and therefore cannot be relitigated in this case.

### Whether the application was filed timely

27. Under staff rule 11.2(b), a staff member is not required to request a management evaluation of an administrative decision taken pursuant to advice obtained from technical bodies. According to the Appeals Tribunal, the ABCC is such a technical body (see, for instance, *Dahan* 2018-UNAT-861). Staff rule 11.4(b) provides that when a staff member is not required to request a management evaluation under staff rule 11.2(b), a staff member may file an application directly with the Dispute Tribunal within 90 calendar days from the notification of a contested decision.

28. In this case, to determine the date of the notification of the decision triggering the 90-day statutory deadline, the Tribunal will examine the following chronology of the events.

29. On 16 May 2017, the Controller approved the ABCC's recommendation of 11 April 2017, and the ABCC forwarded the decision to the Department of Field Support on 19 May 2017, who was tasked to notify the Applicant of the decision. The record on file does not show on what date the Applicant received the decision, but after receiving the decision at an unknown date, he submitted a letter dated 7 June 2017 to the ABCC requesting the ABCC to reconsider its decision and to grant other reliefs.

30. The ABCC's response to the Applicant's letter of 7 June 2017 was forwarded to the Applicant on 27 July 2017, which stated as follows:

Please be informed that the Advisory Board on Compensation Claims (ABCC) has reviewed [the Applicant's] memo of 7 June 2017 and noted as follows. Please advise [the Applicant] accordingly.

Permanent Loss of Function (PLF) is assessed by Medical Service Division (MSD) based on medical reports submitted by the claimant and pursuant to the standards established in the AMA Guides to Permanent Impairment, sixth edition. [The Applicant] appears to be asking about future PLF awards: if at any time, his condition has worsened, he may submit a medical report documenting such worsening. The report will be submitted to MSD for consideration of whether further PLF has occurred pursuant to the AMA Guides to Permanent Impairment.

[The Applicant] raises the issue of gross negligence, pain and suffering, and other compensation. Liability for gross negligence and other compensation is not provided for under Appendix D to the Staff Rules (or generally by workers' compensation schemes). Appendix D provides for medical expenses and PLF compensation.

...

31. On 22 August 2017, the Applicant submitted further comments to the ABCC, and on 25 August 2017, he received the response from the ABCC, which stated that there was nothing more the ABCC could provide or reply to the Applicant and that the Applicant may wish to appeal to the Management Evaluation Unit or the Dispute Tribunal.

32. In light of the above chronology, the question for the Tribunal is when the decision was notified to the Applicant for the purpose of staff rule 11.4(b).



33. The Respondent claims that the Applicant was notified of the contested decision at least on 7 June 2017 when he acknowledged the receipt of the decision. The Respondent argues that all the further correspondence between the Secretary of the ABCC and the Applicant did not reset the clock.

34. The Tribunal notes that the Controller's approval of the ABCC recommendation on 16 May 2017 only considered the award of permanent loss of function. In the letter of 7 June 2017, the Applicant requested other reliefs that the ABCC had not considered in its recommendation of 11 April 2017. According to the ABCC's response to the Applicant's letter of 7 June 2017, it was stated that the ABCC "has reviewed [the Applicant's] memo of 7 June 2017 and noted as follows" and specifically rejected some of the reliefs requested by the Applicant.

35. Therefore, this additional response from the ABCC communicated to the Applicant on 27 July 2017 was not simply a correspondence between the Secretary of the ABCC and the Applicant. The email clearly indicated that the ABCC reviewed the Applicant's additional requests and rejected them. Therefore, the Tribunal finds that this communication constitutes the notification of the decision on the Applicant's claim under Appendix D.

36. The Tribunal finds that the further communications in August 2017 do not reset the statutory deadline. Not satisfied with the ABCC's response of 27 July 2017, the Applicant reiterated his requests and the ABCC merely reconfirmed the previously communicated decision. Under the clear jurisprudence of the Appeals Tribunal, the reiteration of an administrative decision does not reset the clock with respect to the statutory timelines; rather, the time starts to run from the date the original decision was made (*Sethia* 2010-UNAT-079; *Odio-Benito* 2012-UNAT-196; *Staedtler* 2015-UNAT-546, *Kazazi* 2015-UNAT-557).

37. Accordingly, the Tribunal finds that the decision was notified to the Applicant on 27 July 2017, and the 90-day statutory deadline fell on 25 October 2017. Since the application was filed on 2 October 2017, the application is timely and receivable.

Whether the Applicant's claim of negligence is *res judicata*

38. Next, the Tribunal will consider whether the Applicant's claim of negligence is *res judicata*. The Tribunal agrees with the Respondent that the Applicant's claim of negligence was already adjudicated in *Kollie* UNDT/2019/156 and therefore cannot be relitigated in this case. As the Appeals Tribunal held, "the authority of a final judgment cannot be readily set aside. There must be an end to litigation and the stability of the judicial process requires that final judgments ... not be set aside unless for the gravest of reasons" (*Meron* 2012-UNAT-198, paras. 3 and 26).

39. Accordingly, the Applicant's claim of negligence is not receivable as it is *res judicata*.

*The applicable legal framework and the issues of the case*

40. It is not disputed that the Applicant's injury sustained on 9 May 2007 is service-incurred as decided based on the ABCC's recommendation in 2012. The issue for the Tribunal is whether the Secretary-General's decision on the compensation payment for his injury is correct or whether he is entitled to additional compensation.

41. The Tribunal notes that art. 3 of the applicable Appendix D provides that "[t]he compensation payable under these rules shall be the sole compensation to which any staff member or his dependents shall be entitled in respect of any claim falling within the provisions of these rules". Article 4 provides that "[c]ompensation awarded under these rules is intended to supplement benefits awarded under the Regulations of the Joint Staff Pension Fund". The compensation payments in the event of an injury or illness of a staff member are set forth in arts. 11.1-11.5 of the applicable Appendix D.

42. As the Appeals Tribunal held in *Karseboom* 2015-UNAT-601, paras. 40-47, the Dispute Tribunal's judicial review of the Secretary-General's decision based on the ABCC recommendation is guided by the well-established jurisprudence in

*Sanwidi* 2010-UNAT-084. That is, when judging the validity of the exercise of discretionary authority,

... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

43. When it comes to a medical issue, the Appeals Tribunal held in *Karseboom* 2015-UNAT-601 that the Dispute Tribunal is not competent to make medical findings and therefore, if there is any procedural flaw relating to a medical issue, the Dispute Tribunal must remand the case to a competent medical body.

44. Based on the evidence on file and the parties' submissions, the Tribunal will address the following issues:

- a. Whether the compensation of USD30,412.29 for a 28 percent permanent loss of function of the whole person under art. 11.3(c) of the applicable Appendix D was correctly calculated;
- b. Whether the Administration did not pay any out-of-pocket expenses that had been approved by MSD;
- c. Whether the ABCC correctly determined that the Applicant's injury did not constitute partial or total disability under art. 11. 1 and 11.2 of the applicable Appendix D;
- d. Whether the Applicant is entitled to any other remedies requested, including compensation for future medical treatment and assistance for personal and home care activities, special disability pension, compensation for the pain and anguish, and legal costs.

*The calculation of the compensation for permanent loss of function of the whole person*

45. Article 11.3(a) of the applicable Appendix D provides that “[i]n the case of injury or illness resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum”. According to the schedule set out in art. 11.3(c), in case of the total loss of use, twice the annual amount of the pensionable remuneration at grade P-4, step V is paid. This amount is adjusted by the degree of permanent loss of function.

46. In this case, the Applicant’s compensation for permanent loss of function was calculated as follows:

Calculation of award under Article 11.3(c):

Entitlement: If the maximum General Service net salary at location is less than the minimum General Service net salary at headquarters, then the calculation of the award is as follows:

Minimum GS net salary at HQ x 2 x Pen.Rem. P-4/V x 28% loss  
Maximum GS net salary at HQ

Maximum GS net salary at location = US\$ 24,953

Minimum GS net salary at HQ = US\$ 26,750

Maximum GS net salary at HQ = US\$ 67,242

Pensionable Remuneration P-4/V = US\$ 136,520

$\frac{\$26,750}{\$67,242} \times (2 \times \$136,520) \times 28\%$

$0.3978 \times \$273,040 \times 0.28 = \$30,412.29$

47. The Applicant challenges the amount of the compensation on three different grounds, which the Tribunal will examine in turn.

Calculation of the degree of permanent loss of function

48. First, the Applicant challenges the finding of 28 percent permanent loss of function claiming that Dr. Rowell did not evaluate the Applicant's condition personally and only relied on an incorrect medical report of October 2016, which determined that the Applicant suffered a 23 percent permanent loss of function. Dr. Rowell decided that this calculation was incorrect and changed the permanent loss of function rating from 23 percent to 28 percent. The Applicant claims that MSD's reliance on an inaccurate medical report to determine the degree of permanent loss of function was erroneous.

49. In response, the Respondent submits that the ABCC reasonably relied on Dr. Rowell's advice in determining the Applicant's permanent loss of function. The Respondent submits that Dr. Rowell testified at the hearing that while a mistake was made in the medical report in calculating the percentage of the permanent loss of function, the medical report itself was detailed, consistent and comprehensive and that it contained the necessary medical information to arrive at an accurate calculation.

50. At the hearing, Dr. Rowell explained that there is no requirement for an in-person medical examination of a claimant to determine an impairment rating, and that he relied on a medical report provided by the Applicant who was examined by another doctor. Dr. Rowell explained that the medical report itself was detailed and comprehensive and of high quality, but the evaluating doctor incorrectly stated that the Applicant suffered Class 3 injury, which indicates one level injury, when in fact the Applicant suffered two levels injury and thereby Class 4 injury. This correction of an error resulted in the upward adjustment of an impairment rating from 23 percent to 28 percent.

51. When the Applicant's Counsel questioned whether this impairment rating took into account the pain and the degenerative nature of the Applicant's injury, Dr. Rowell responded that pain is not calculated separately but pain and suffering is inherently part of the evaluation under AMA guides. Dr. Rowell added that if the

Applicant's condition further deteriorates and the Applicant submits additional medical report documenting further impairment, it will be reviewed and additional compensation for permanent loss of function can be made for the worsened medical condition.

52. Having considered the medical report submitted by the Applicant, Dr. Rowell's recommendation on the permanent loss of function, and Dr. Rowell's testimony, the Tribunal does not find any error in the calculation of the degree of the Applicant's permanent loss of function. The Tribunal notes that art. 11.3(a) does not require a medical doctor of MSD to personally examine a claimant and finds that it is reasonable for the ABCC to rely on Dr. Rowell's advice which he formed based on the review of a detailed medical report. Dr. Rowell convincingly explained why he relied on the medical report provided by the Applicant despite an error in the calculation of an impairment rating. The Tribunal does not find there was any procedural flaw with regard to Dr. Rowell's medical advice provided to the ABCC in this matter.

53. Even if the Applicant's condition has further deteriorated and the determination of the degree of permanent loss of function in 2017 is no longer accurate, that does not mean that the decision in 2017 is flawed. As Dr. Rowell explained, the Applicant may submit a supplemental medical report to receive a higher compensation for his permanent loss of function.

54. Therefore, the Tribunal upholds the ABCC's determination of the degree of the Applicant's permanent loss of function.

#### Use of pensionable remuneration scale at the date of injury

55. Second, the Applicant challenges the ABCC's use of 2007 pensionable remuneration scale to calculate the compensation. The Applicant argues that nothing in the text of the applicable Appendix D expressly dictates that pensionable remuneration prevailing at the date of injury should be used. Citing *Laca Diaz* UNDT/2015/066, the Applicant submits that he is entitled to the recalculation of his

compensation using the pensionable remuneration at grade P-4, step V as at 2017 along with applicable interest.

56. In response, the Respondent submits that based on the Secretary of the ABCC's extensive knowledge and experience, he testified that workers compensation schemes calculate reimbursements on the basis of the salary at the time of injury. The Secretary of the ABCC testified that the Organization has consistently followed this principle, and that the General Assembly confirmed this principle when it approved the promulgation of a revised Appendix D on 23 December 2016.

57. The issue of whether the compensation for permanent loss of function should be calculated based on the pensionable remuneration scale at the date of injury or at the date of the decision has been thoroughly analyzed by the Dispute Tribunal in *Laca Diaz*.

58. In *Laca Diaz*, the Dispute Tribunal found that "there is nothing in the text that expressly dictates that pensionable remuneration shall be that prevailing at the date of injury", and "there is no explicit statement or guidance in Appendix D to indicate the relevant or operative date for assessing the pensionable remuneration at grade P-4, step V in any given case". This Tribunal agrees with the analysis in *Laca Diaz*.

59. While the Secretary of the ABCC testified at the hearing that the compensation for permanent loss of function was always calculated at the date of injury, the past practice of the ABCC alone does not determine the meaning of the statutory provision. In fact, the Dispute Tribunal's judgment in *Laca Diaz* departed from this supposedly consistent past practice and ordered that the compensation for permanent loss of function be awarded based on the date of the applicant's maximum medical improvement, which was 21 years after the date of injury. This judgment was not appealed.

60. The Respondent further argues that the General Assembly affirmed the ABCC's past practice when it promulgated a revised Appendix D in 2016. However, a revised Appendix D is not applicable in this case. Further, the Report of the

Secretary-General, which proposed a revision of Appendix D (A/71/258), shows that major changes have been made to Appendix D including in the determination of compensation for permanent loss of function and therefore a revised Appendix D does not provide any guidance on this question.

61. The question is, in the face of the statutory silence and ambiguity, whether the Secretary-General exercised his discretion lawfully by deciding to use the pensionable remuneration scale at the date of injury, which was 10 years before the contested decision was made.

62. As the Dispute Tribunal stated in *Laca Diaz*, under the normal circumstances, the date of injury, date of claim and date of decision would all occur during the application of the same pensionable remuneration scale. However, this was not the case here.

63. In this case, while the Applicant suffered injury and filed a claim in 2007, the Secretary-General's first decision on the Applicant's claim was only made in 2013, more than five years after the date of injury and the date of claim, and this first decision did not award the Applicant any compensation for permanent loss of function. It was only in 2017 that the Applicant was awarded compensation for permanent loss of function based on the medical report of October 2016.

64. In *Laca Diaz*, considering "the extreme passage of time and in fairness to justice and to prevent any iniquity", the Dispute Tribunal ordered that the compensation be calculated based on the date of the applicant's maximum medical improvement, not the date of injury. The Tribunal finds that this case is comparable to *Laca Diaz*.

65. Considering the extreme passage of time (10 years) and the fact that the ABCC initially did not award any compensation for permanent loss of function in 2012 and awarded compensation in 2017 after the medical evaluation of October 2016, the Tribunal finds that the calculation of compensation based on the



pensionable remuneration scale at the date of injury is absurd and unreasonable in this case.

66. Accordingly, the Tribunal decides that the compensation be granted based on the pensionable remuneration scale at the date of the Secretary-General's decision on 16 May 2017.

The adjustment of the compensation for General Service personnel

67. Third, the Applicant challenges the calculation of the compensation, which was adjusted, since the Applicant was General Service personnel. In particular, the ABCC adjusted the compensation based on the following formula in accordance with art. 11.3(c) of the applicable Appendix D:

Entitlement: If the maximum General Service net salary at location is less than the minimum General Service net salary at headquarters, then the calculation of the award is as follows:

$$\frac{\text{Minimum GS net salary at HQ} \times 2 \times \text{Pen.Rem. P-4/V} \times 28\%}{\text{Maximum GS net salary at HQ}}$$

68. Article 11.3(c) provides that "In the case of General Service personnel, manual workers and locally recruited mission personnel ... appropriate adjustments in the amount of compensation provided for in this schedule may be made by the Secretary-General, taking into account the proportion which the staff member's salary or wage bears to Headquarters rates".

69. At the hearing, the Secretary of the ABCC testified that this formula has been always used for General Service and locally recruited mission personnel according to the language of art. 11.3(c) of the applicable Appendix D.

70. The Applicant claims that he is entitled to the 28 percent of twice the pensionable remuneration at the pensionable remuneration scale at the P-4 level, step V. The Applicant claims that having failed to be transparent with regard to the methodology used to reduce the Applicant compensation to US\$30,429.24, the

Respondent is estopped, both in law and in equity, from providing such information after the fact, and therefore cannot effect the adjustment now.

71. The Tribunal finds that the Applicant's claim is without merit. The above-mentioned calculation formula had been included in the ABCC's recommendation and, therefore, it is not true that the Respondent failed to be transparent about the calculation formula. In addition, the Tribunal finds that this calculation formula, while not explicitly included in the statutory language itself, is a reasonable and consistent application of art. 11.3(c) which provided that the amount of compensation for General Service and locally recruited mission personnel may be adjusted "taking into account the proportion which the staff member's salary or wage bears to Headquarters rates". Therefore, the Tribunal finds that the Respondent lawfully reduced the compensation in accordance with art. 11.3(c).

72. In sum, with regard to the compensation for permanent loss of function, the Tribunal holds that the compensation be awarded based on the pensionable remuneration scale at the date of the Secretary-General's decision on 16 May 2017.

*Payment of the out-of-pocket expenses*

73. The Applicant claims that legitimate and verifiable out-of-pocket expenses incurred by the Applicant were never reimbursed by the ABCC despite MSD's approval and acknowledgment of the ABCC.

74. The Respondent submits that the Organization pays for actual out-of-pocket medical expenses incurred by a claimant, and not for future medical expenses or non-medical expenses. In this regard, the Secretary of the ABCC testified at the hearing that in July 2017, he reviewed the Applicant's file and found no outstanding claims for reimbursement of out-of-pocket medical expenses.

75. The record shows that the Applicant sought reimbursement of certain medical and non-medical expenses in 2015-16. According to the record, medical expenses incurred for staff members are first paid by a medical insurance plan and any costs

exceeding the insurance coverage may be paid by the ABCC. In July 2016, in response to an insurance company's inquiry about the Applicant's claim for medical expenses exceeding the insurance plan coverage, the Secretary of the ABCC responded that the ABCC pays medical expenses upon MSD's finding that the expense is related to a service-incurred injury, medically necessary and at a reasonable cost. The Secretary of the ABCC advised that where a medical expense is unusually large or recurring, pre-approval may be sought by MSD.

76. In July 2017, presumably in response to the Applicant's request for reconsideration in June 2017, the ABCC reviewed the Applicant's file for any outstanding claims and determined that there were no outstanding claims for medical expenses. At the hearing, the Secretary of the ABCC testified that the applicable Appendix D does not pay non-medical expenses and that all eligible medical expenses were paid.

77. Both parties produced a number of email exchanges in relation to the Applicant's out-of-pocket expenses. Given the Applicant's medical history, a number of payments were made over time, and during this litigation, there was confusion as to which expenses the Applicant sought reimbursement of. In his closing submission, the Applicant clarifies that he is seeking the reimbursement of expenses as set forth in some annexes appended to the Applicant's submissions (Annexes A20 and A21).

78. In an email of 1 October 2015 (Annex A20), the Applicant sets forth the expenses for which he seeks reimbursement. According to the email, the Applicant incurred expenses for medical consultations, prescribed medications, cervical collars, expenses incurred during follow-up medical visits to Ghana, such as accommodations, telecommunications, meals, etc., and his tuitions. The Applicant submitted the invoices and supporting documents as Annex A21.

79. While the Secretary of the ABCC testified that all eligible medical expenses incurred by the Applicant were reimbursed, there is no record of the ABCC's decision on these specific expenses claimed by the Applicant. Therefore, the Tribunal is unable to review and decide the lawfulness of the ABCC's decision in this regard.

80. Accordingly, the Tribunal remands the Applicant's claim for reimbursement of out-of-pocket expenses as set forth in Annexes A20 and A21 to the ABCC and directs the ABCC to provide a reasoned and itemized decision on the Applicant's reimbursement request for out-of-pocket expenses.

*The compensation for partial or total disability*

81. By memorandum dated 18 January 2017, MSD advised the ABCC that since the Applicant returned to work and appeared to have suffered no loss of earnings potential in his current role, he does not fall under the disability provisions of either art. 11.1 or art. 11.2 of the applicable Appendix D.

82. At the hearing, Dr. Rowell explained that disability is recognized when the injury adversely affects earning capacity. Dr Rowell explained that since the Applicant returned to work and suffered no loss of earnings at the time of the decision, he advised the ABCC that the Applicant was not partially or totally disabled under arts. 11.1-11.2 of the applicable Appendix D.

83. The record shows that the Applicant suffered no loss of earnings since he suffered the injury until his separation from the Organization. Therefore, the Tribunal finds that the Secretary-General lawfully decided that the Applicant was not disabled under arts. 11.1-11.2 of the applicable Appendix D.

84. The Applicant testified at the hearing that since his separation from the Organization, he was not able to secure any employment due to his medical condition, which has further deteriorated. However, this does not mean that the decision made in 2017 in this regard was incorrect as the Applicant was still employed and received full pay at the time of the decision.

85. Accordingly, the Tribunal finds that the Secretary-General correctly determined that the disability provisions under the applicable Appendix D did not apply in the Applicant's case at the time.

*Other remedies*

86. The Applicant claims that he is entitled to compensation for future medical treatment and assistance for personal and home care activities, special disability pension, compensation for the pain and anguish, and legal costs.

87. In the response dated 25 and 27 July 2017, the ABCC informed the Applicant that compensation for future medical treatment and assistance for personal and home care activities, special disability pension, and compensation for the pain and anguish is not provided under the applicable Appendix D as it only provides for medical expenses and permanent loss of function compensation.

88. The Tribunal does not find any error in the ABCC's decision. As art. 3 of the applicable Appendix D provides, the compensation payable under this Appendix D is the sole compensation to which any staff member is entitled for his claim under Appendix D, and the Applicant does not make a case for under what provisions he is entitled to reliefs he requests.

89. The Tribunal notes that arts. 11.1, 11.2, and 11.4 provide annual compensation payments in the case of the finding of total or partial disability. Based on the Applicant's testimony at the hearing, it appears that the Applicant claims that the disability provisions apply in his case considering his medical condition and employment status, but the Tribunal has no competence to make any medical finding in that regard. Therefore, if the Applicant believes that he is entitled to additional compensation under the disability provisions, he may submit a claim with supporting evidence to the ABCC for its consideration.

**Conclusion**

90. In light of the foregoing, the Tribunal DECIDES that:

- a. The Respondent shall pay the Applicant the difference between the amount already paid—USD30,412.29—and the amount recalculated based on

the pensionable remuneration scale at the date of the Secretary-General's decision on 16 May 2017;

b. The ABCC shall provide a reasoned and itemized decision on the Applicant's request for reimbursement of out-of-pocket expenses as set forth in the Annexes A20 and A21;

c. The Applicant's claim for other remedies is rejected;

d. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

*(Signed)*

Judge Joelle Adda

Dated this 15<sup>th</sup> day of July 2020

Entered in the Register on this 15<sup>th</sup> day of July 2020

*(Signed)*

Nerea Suero Fontecha, Registrar, New York