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IN THE HIGH COURT OF DELHI

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FAO.No.352/2006

Gian Singh Appellant
through: Ms. S.Janani, Advocate

VERSUS

Central Ordinance Depot & Anr. Respondents
through: Mr. Jaswinder Singh, Advocate

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DATE OF DECISION

18.03.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**(Oral)

1. Heard learned counsel for the parties.
2. Appellant, an employee of the Central Ordinance Depot, in relation to his work, suffered an accidental injury resulting in the patella bone of the left knee being fractured and consequently removed. As we all know, he or she who loses the patella bone, suffers a handicap in mobility for the reason the movement of the knee is restricted.
3. Admittedly, appellant was working as a storekeeper

at the Central Ordinance Depot. He sought compensation under the Workmen's Compensation Act.

4. At the direction of the Commissioner Workmen's Compensation the appellant got himself examined at DDU Hospital. Vide report dated 10.8.2004 the doctor opined that the disability suffered was permanent and in relation to the whole body was 7.5%.

5. Appellant was aged 57 years when the accident took place. In relation to his wages and the maximum monthly wage at which recompense had to be effected, treating disability to be 7.5%, Commissioner Workmen's Compensation worked out Rs.11,500/- as the sum payable to the appellant. Interest @ 12% per annum on the compensation assessed has been awarded with effect from the date of the accident. Interest has been awarded under Section 4A (3)(a) of the Workmen's Compensation Act 1923.

6. It is urged by learned counsel for the appellant that the compensation payable in case of injury has to be assessed under Section 4 of the Workmen's Compensation Act 1923 and vide clause 'c' thereof, where a permanent partial disablement results from the injury, compensation has to be determined, if injury is specified in para II of Schedule I on such percentage as is enumerated in the schedule. If injury sustained or suffered

is not specified in Schedule I then the compensation has to be assessed on such percentage of the disability as affects the income. However, counsel urges that in the later situation, by virtue of explanation II, in assessing the loss of earning capacity the qualified medical practitioner has to have regards to the percentage of loss of earning capacity in relation to different injuries specified in Schedule I.

7. To appreciate the argument of learned counsel for the appellant Clause 'c' of Sub Section 1 of Section 4 of the Workmen's Compensation Act 1923 needs to be noted. It reads as under:-

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| “(c) Where permanent partial disablement result from the injury | <ul style="list-style-type: none">(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner)¹ |
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¹ The words “(as assessed by the qualified medical practitioner)” were inserted in Section 4 (1) (c) (ii) by Act 22 of 1984

permanently caused by the injury;

Explanation I.- Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

Explanation II.- In assessing the loss of earning capacity for the purpose of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;"

8. As noted hereinabove, the injury i.e. loss of patella bone of the knee of the left leg has been conceded by learned counsel for the appellant as the injury not specified in the schedule. Thus, the compensation has to be worked out with reference to Clause ii of Clause 'c' of Sub Section 1 of Section 4 of the Act.

9. Suffice would it be to state that this compensation has to be a percentage of the permanent disability as assessed by a qualified medical practitioner.

10. The argument that the assessment, by virtue of explanation II, has to be with reference to an injury specified under Schedule I is neither here nor there, in the facts and circumstances of the instant case, for the reason it was the appellant who himself produced the report from a qualified medical practitioner. The appellant relied upon the report. If the appellant had wanted any clarificatory questions to be put

to the author of the report, the appellant ought to have examined the doctor concerned.

11. Further, if I look to entries at serial No.27 to 48 of part II to Schedule I, I note that disablement thereto relate to loss of phalanges, loss of bone, injury to metatarso-phalangeal joint etc. They would be akin to loss of a patella. I note that under entries 27 to 48 the percentage disability varies from 1% (being minimum) to a maximum of 14%.

12. Under the circumstances 7.5% disability in proportion to the whole body being assessed as a result of loss of patella cannot be said to be an unreasonable opinion.

13. It has also to be noted that in the instant case, as a matter of fact, the appellant has suffered no loss of wages for the reason being an employee of the Central Ordinance Factory and working as a storekeeper he continued to work under the employer till retirement at full wages.

14. No case is made out to enhance the compensation.

15. On the second point urged that the Commissioner Workmen's Compensation has illegally denied benefit of penalty to the appellant, counsel urges that notwithstanding all factors available with the employer namely the age of the insured, his monthly wages and percentage of disability, the compensation ought to have been paid by the employer.

16. The submission made by learned counsel for the appellant requires this court to consider Section 4A of the Workmen's Compensation Act 1923 which provides for payment of penalty vide Clause b of Sub Section 3 thereof.

17. Section 4A of the Workmen's Compensation Act 1923 reads as under:-

“4A. Compensation to be paid when due and penalty for default.-(1) Compensation under Section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3) where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty:

PROVIDED that an order for the payment of penalty shall not be passed under Clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.--For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

(3A) The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependant, as the case may be."

18. A perusal of Section 4A shows that 3 situation may arise. Firstly where the employer accepts complete liability. Secondly where employer accepts partial liability and thirdly where the liability needs to be computed. In circumstance one, the employer after accepting liability if does not pay would be liable to be visited with penalty. In the second situation, where having accepted partial liability at least that amount requiring to be paid, on not being paid, the Commissioner Workmen's Compensation would be justified in levying penalty on the admitted partial amount. But in the third scenario, where compensation has to be quantified and assessed the exercise of discretion by the Commissioner Workmen's Compensation has to be a reasoned exercise of discretion.

19. As in the instant case, where computation of the compensation on a partial permanent disability requires an

adjudicatory process to be completed in relation to the opinion of a medical practitioner, suffice would it be to state that the compensation payable would become due when assessed.

20. In the decision reported as 2007 (2) SCALE 455 National Insurance Co. Ltd. Vs. Mubasir Ahmad & Anr. the view taken by me hereinabove pertaining to a permanent partial disability requiring an opinion of a medical practitioner as the sine qua non was considered by the Hon'ble Supreme Court viz-a-viz the issue of levy of penalty. It was held that in cases covered by Section 4(1)(c)(ii) the compensation is payable i.e. due only when determined by the Commissioner Workmen's Compensation.

21. The facts and circumstances of the instant case do not justify levy of penalty. The Commissioner Workmen's Compensation has correctly declined the levy of penalty.

22. The appeal is accordingly dismissed.

23. No costs.

24. TCR be returned forthwith.

March 18, 2008
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PRADEEP NANDRAJOG, J.