

IN THE HIGH COURT OF DELHI

FAO No.345/2007

Oriental Insurance Co. Ltd Appellant
! through: Mr.L.K.Tyagi, Advocate

VERSUS

\$ Nausad & Anr. Respondents
^ through: None.

RESERVED ON: 5.03.2008

% DATE OF DECISION: 10.03.2008

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

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

: **PRADEEP NANDRAJOG, J.**

1. Present appeal has been preferred by the insurance company under Section 30 of the Workmen's Compensation Act, 1923 challenging the award dated 12.07.07 passed by the Commissioner Workmen's Compensation, Delhi.

2. By the impugned award, respondent no.1 Sh. Nausad (hereinafter referred to as the workman) has been awarded a sum of Rs.5,24,328/- as compensation along with interest @ 12% per annum.

3. Admitted facts which are necessary to be noted are that the workman was employed by the respondent no.2 Sh. Abdul as a driver. On 01.07.04 while on duty and driving a tractor bearing no.UP-17-A-5640 in respect whereof respondent no.2 had obtained an

insurance cover, the workman sustained multiple injuries due to a road accident. As a result the left hand of the workman above the wrist had to be amputated. The workman was aged 24 years at the time of the accident and his last drawn wages were Rs.4,000/- per month.

4. Workman filed a claim petition before the Commissioner Workmen's Compensation, Delhi claiming compensation. Appellant was impleaded as a respondent being the insurer of the tractor.

5. Medical Board, Bhagpat, U.P. assessed the disability suffered by the workman at 65% in relation to the whole body. However noting the avocation of the workman, injury suffered by him and effect of the injury on the ability of the workman to perform in his avocation, the Commissioner Workmen's Compensation had treated the disability suffered by the workman at 100% i.e total disability.

6. Insurance company has challenged the award limited to the extent claiming that the disability suffered by the workman was 'permanent partial disablement' and therefore the compensation payable to the workman had to be determined with reference to Section 4(1)(c) read with Schedule I of the Workmen's Compensation Act, 1923.

7. Before noting the arguments advanced by the learned counsel for the insurance company it is relevant to have a look at the scheme of the Workmen's Compensation Act, 1923.

8. Chapter II of the Act deals with Workmen's Compensation. Section 3 provides that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his

employer shall be liable to pay compensation in accordance with the provisions of Chapter II. Section 4 provides as to how compensation should be determined where the injuries have resulted in: (i) death; (ii) permanent total disablement; (iii) permanent partial disablement, specified in Part II of Schedule I to the Act; (iv) permanent partial disablement not specified in Schedule I to the Act; and (v) temporary disablement. Provisions of Section 4 as are relevant for determination of the present case are being extracted hereinunder:

4. Amount of compensation.-(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

- (a) xxxx xxxx
- (b) Where permanent total disablement results from the injury an amount equal to [sixty per cent] of the monthly wages of the injured workman multiplied by the relevant factor;
or
an amount of [ninety thousand rupees] whichever is more;

Explanation I.- For the purposes of clause (a) and clause (b) “relevant factor” in relation to a workman means the factor specified in the second column, of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.

Explanation II.- Where the monthly wages of a workman exceed [four thousand rupees], his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be [four thousand rupees] only;

- (c) Where permanent partial disablement result from the injury (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 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;”

9. Three types of disabilities are provided under Section 4 i.e. permanent total disablement, permanent partial disablement and temporary disablement.

10. Temporary disablement is dealt with in Section 4(1)(d) and needs no elaboration as irrespective of whether such disablement is total or partial, the compensation is the same as per the formula specified in the Act.

11. Section 2(1)(l) defines ‘total disablement’ as under:-

“total disablement' means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement;

¹ The words “(as assessed by the qualified medical practitioner)” were inserted in Section 4 (1) (c) (ii) by Act 22 of 1984

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate combination of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more."

12. Clause (b) of Sub-section (1) of Section 4 deals with determination of compensation in cases of permanent total disablement resulting from employment injury. What is to be determined under Section 4(1)(b) is whether the injuries suffered by the workman have in fact resulted in permanent total disablement or not. There is no need to decide the percentage of loss of earning capacity as a consequence of such permanent total disablement. It is assumed that the loss of earning capacity is 100% when there is permanent total disablement. Clause (b) of Section 4(1) does not contemplate any assessment by a Qualified Medical Practitioner.

13. Section 2(1)(g) defines 'partial disablement' as under: -

"'partial disablement' means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time;

Provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement". (Underlining emphasized)

14. Clause (c) of Section 4(1) deals with determination of compensation in cases of permanent partial disablement. Recourse to Section 4(1)(c) is warranted either when the workman claims compensation alleging that employment injury has resulted in

permanent partial disablement or when the Commissioner does not accept a claim of permanent total disablement and decides that the disablement is only partial. Clause (c) makes a distinction between the extent of physical disability and the extent of loss of earning capacity. In the case of permanent partial disablement, the compensation depends not on the extent of permanent partial disablement, but on the loss of earning capacity resulting from such permanent partial disablement. Where the injuries resulting in permanent partial disablement are those specified in Part II of Schedule I, then the percentage of loss of earning capacity is as specified in the said schedule. Where permanent partial disablement has arisen from injuries which are not specified in Part II of Schedule I, then the percentage of loss of earning capacity resulting therefrom has to be determined by the Commissioner on the basis of the assessment made by the Qualified Medical Practitioner.

15. First argument advanced by the learned counsel for the insurance company was that the Commissioner Workmen's Compensation erred in assessing disability suffered by the workman on the basis of his avocation. According to the learned counsel, the words '*as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement*' employed in the Section 2(1)(l) of the Workmen's Compensation Act make it clear that in order to determine whether an injury results in total disablement, whether of a temporary or permanent nature, all the work which he was capable of performing at the time of the accident is

to be seen and not only the work which we was performing at the time of the accident. Reliance was placed upon the judgment of the Full Bench of the Karnataka High Court in the decision reported as Shivalinga Shivanagowda Patil v Erappa Bassapa Bhavihala 2004 ACJ 333.

16. Learned counsel for the insurance company next argued that since the injury suffered by the workman falls in Part II of the Schedule I to the Workmen's Compensation Act, 1923 the disability suffered by the workman must be held to be 'permanent partial disablement' as provided in the proviso to the Section 2(1)(g) of the Workmen's Compensation Act and compensation payable to the workman had to be determined as per Section 4(1)(c)(i) of the Workmen's Compensation Act.

17. Learned counsel for the insurance company lastly argued that even if the injury suffered by the workman is taken to be an unscheduled injury the compensation payable to the workman had to be determined as per Section 4(1)(c)(ii) of the Workmen's Compensation Act and the disability certificate issued by the Medical Board.

18. The first question i.e. whether disablement has to be assessed with reference to the work which the workman was performing at the time of the accident, or with reference to his capacity to do any other work after he has sustained the disability, in my opinion stands answered by their Lordships of the Hon'ble Supreme Court.

19. In the decision reported as Pratap Narain Singh v. Shrinivas AIR 1976 SC 222 it was held as under:-

“4. It has not been disputed before us that the injury in question was caused to the respondent by an accident which arose out of and in the course of his employment with the appellant. It is also not in dispute that the injury resulted in amputation of his left arm at the elbow. It has however been argued that the injury did not result in permanent total disablement of the respondent, and that the Commissioner committed a gross error of law in taking that view as there was only partial disablement within the meaning of Section 2(1)(g) of the Act which should have been deemed to have resulted in permanent partial disablement of the nature referred to in item 3 of Part II of Schedule I of the Act. This argument has been advanced on the ground that the amputation was from 8" from tip of acromion and less than 4 1/2" below tip of olecranon. As will appear, there is no force in this argument.

5. The expression "total disablement" has been defined in Section 2(i)(1) of the Act as follows:

“(1) XXX”

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

“The injured workmen in this case is carpenter by profession.....By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as he work of carpentry cannot be done by one hand only.”

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4 1/2" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.” (Underlining emphasized).

20. The Hon'ble Supreme Court has made it crystal clear that whether a workman suffered total disablement or not has to be assessed with reference to the work which the workman was performing at the time of the accident and not with reference to his capacity to do any other work after he has sustained the disability. If a workman becomes incapable of performing duties which he was engaged to perform before the accident, there is total disablement as far as the workman is concerned and the mere fact that he may be capable of performing some other work is totally irrelevant.

21. The afore-noted ratio laid down by the Supreme Court in Pratap Narain's case (supra) was followed in under-noted judgments:-

I K.P. Hanumantha Gowda & Anr v Devaraju & Anr 1996 ACJ 1253.

II National Insurance Company v Mohd. Saleem Khan & Anr 1992 II LLJ 377(AP).

III Punambhai Khodabhai v G. Kennel Construction 1985 1 LLJ 98 (Guj).

22. In para 25 of the Shivalinga's case (supra) relied upon by learned counsel for the appellant it was observed as under:-

“25(iii) Determination of the loss of earning capacity has to be with reference to "all the work" which the workman was capable of performing at the time of the accident resulting in such disablement and not with reference to the work which the workman was performing at the time of the accident. However, this is subject to the condition that in case the workman establishes by acceptable evidence that after the injury not only he is not able to do the work which he was performing before the accident but he is not able to do any other work, the loss of earning capacity could be assessed on the basis of such evidence.”

23. A perusal of the Shivalinga's case (supra) shows that in para 19 the judgment of the Supreme Court in Pratap Narain's case (supra) was noted.

24. Para 11.5 of the Shivalinga's case (supra) reads as under:-

“The Supreme Court in the case of *Amar Nath Singh v Continental Construction Ltd*, 2001 ACJ 643(SC), while referring to *Pratap Narain Singh Deo v Srinivas Sabata*, 1976 ACJ 141 (SC), held that the decision turned on its own facts and, therefore, the principles therein cannot be extended to the present case”.

25. Relevant part of para 20 of the Shivalinga's case (supra) reads as under:-

“The cases relied upon are not applicable as the Apex Court has nowhere said that the Commissioner has no jurisdiction. As discussed, strictly speaking, all the aforesaid decisions were rendered on facts and no law as such has been laid down.....”

26. Probably in coming to the conclusion that no law has been laid down by the Supreme Court in Pratap Narain's case (supra) Full Bench of the Karnataka High Court has been influenced by the judgment of the Supreme Court in Amar Nath's case (supra).

27. In Amar Nath's case (supra) appellant who had lost his left eye made a claim as having lost his complete vision in that eye but medically it was assessed that loss of vision was only 80%. Noting Item no.4 in Part I of Schedule I Commissioner Workmen's Compensation assessed the disability suffered by the appellant as 100%. On an appeal noting Item no.26 in Part II of Schedule I the High Court reduced the disability suffered by the appellant to 30%. The Hon'ble Supreme Court noted that the appellant had himself claimed that he was fit for work and that there was evidence disclosing the same. Thus there was

a categorical finding that the avocation/job/work which the appellant was performing before the accident was not effected because of the disability suffered by him. The ethos of Pratap Narain's case (supra) was the effect of the disability suffered by a workman on the avocation/job/work performed by him before the accident. In such circumstances it was held that Pratap Narain's case (supra) was based on its own facts.

28. In Amar Nathi's case (supra) the Supreme Court distinguished its earlier decision in Pratap Narain's case and did not hold that no ratio emerges from the said case.

29. With all due respect I differ with the decision of the Full Bench of the Karnataka High Court in Shivalinga's case (supra) as it has not examined Pratap Narain's case in its correct perspective.

30. I further note that interpreting the words '*all work which he was capable of performing at the time of the accident*' as referring to something other than the job or work which a workman was doing at the time of the accident would lead to strange results. Take for instance, a driver who has completed his secondary education becomes a paraplegic on account of injuries sustained by him in an accident may still be able to move around in a wheel chair and be capable of doing some work that could be done with his hands such as, he may be able to work as a clerk or proof reader or even packer in a factory. Does that mean that employment injury making him a paraplegic is not total but partial disablement? Even blind persons are gainfully employed nowadays. If capacity to do "any work" should be the test, there can be no total disablement at all, in most cases.

31. The Workmen's Compensation Act, 1923 is a social welfare legislation enacted for the interest of the workman. It is settled law that if any particular provision of the Act is capable of two interpretations, that which is more favorable to the person for whose benefit the legislature in its wisdom has legislated it, has to be adopted.

32. In view of the above discussion and particularly in the light of decision of the Supreme Court in Pratap Narain's case (supra) I find no merits in the first argument advanced by the learned counsel for the insurance company.

33. Second argument advanced by the learned counsel for the insurance company is that the combined effect of proviso to Section 2(1)(g) and Part II of Schedule I is that the injuries enumerated under Part II of Schedule I have to be taken as resulting in 'permanent partial disablement' and therefore compensation has to be determined with reference to Section 4(1)(c)(i) and percentage of loss of earning capacity as provided under Part II of Schedule I.

34. Item no.4 of Part II of Schedule I reads as under:-

“Loss of hand or of the thumb and four fingers of one hand or amputation from 11.43 cms below the tip of olecranon”.

35. Percentage of loss of earning capacity for injuries falling under Item no.4 is provided as 60%.

36. In the instant case workman has suffered amputation of his left hand above the wrist. Therefore, the injury suffered by him falls in Item no.4 of Part II of Schedule I.

37. Even if for sake of arguments it is accepted that the combined effect of proviso to Section 2(1)(g) and Part II of Schedule I is

that the injuries enumerated under Part II of Schedule I have to be taken as resulting in 'permanent partial disablement', the question is whether the Commissioner's Workmen Compensation while determining loss of earning capacity is bound by the percentage of loss of earning capacity provided under Part II of Schedule I or he can go beyond the Schedule to determine the loss of earning capacity.

38. The answer to afore-noted question is to be found in under-noted judgments:-

I Siddappa v General Manager, KSRTC ILR 1988 Kar 136:- In said case, a driver had suffered an injury which incapacitated him from driving. The Commissioner found that the injury was one falling under Part II of Schedule I and accordingly assessed the permanent partial disablement as 60%. The workman contended before this Court that even in regard to an injury suffered by workman specified in Part II of Schedule-I, having regard to the nature of the job in which he was employed, there was permanent total disablement. It was held that on proving such permanent total disablement, notwithstanding the fact that the injury suffered by a workman is one of those specified in Part II of Schedule I, he would be entitled to the compensation on the basis of total disablement.

II National Insurance Company Ltd v Vishnu & Anr ILR 1991 Kar 2406:- In said case, a driver suffered injury in a motor accident resulting in amputation of left leg below the knee. There was no dispute that workman became totally disabled for continuing in his employment as driver. The said injury was described as Item 20 in Part II of Schedule I for which the percentage of loss of earning capacity to

the said injury is specified as 50%. The question that was considered was, whether the workman was entitled to plead and prove that he had suffered a higher percentage of disability or total disability or whether the loss of earning capacity should be restricted to 50% mentioned against Entry 20 in Part II of Schedule I. The Court held that the question as to whether a particular workman had suffered partial disablement or total disablement should depend upon the nature of employment. It was further held that in respect of cases specified in part II of Schedule I, percentage of loss of earning capacity as specified therein should be accepted and compensation should be awarded on that basis where there was no proof to the contrary, but the workman is not barred from proving that he has suffered a higher percentage of loss of earning capacity.

III New India Assurance Company Ltd v Subhas 2005 ACJ 479:- In said case, while examining Section 4(1)(c) of the Workmen's Compensation Act, 1923 it was held that where the injuries resulting in the permanent partial disablement are those specified in Part II of Schedule I, then the percentage of loss of earning capacity is as specified in the said schedule. But, it is open to the workman, to establish by evidence, a higher percentage of loss of earning capacity, than what is specified in the said schedule.

IV Shivalinga Shivanagowda Patil & Ors v Erappa Bassapa Bhavihala & Ors 2004 ACJ 33:- In said case, it was held that even if the injury complained falls within Part II of Schedule I if evidence is adduced to show that such an injury has resulted in permanent total disablement, it is open to the Commissioner to consider the loss of

earning capacity and to hold that notwithstanding what is contained in Part II of Schedule I, the injury in question has resulted in permanent total disablement.

39. In the instant case, admittedly the workman was employed as a driver and he suffered amputation of his left hand. It cannot be disputed that it is impossible to drive a vehicle with one hand only.

40. Noting the judgments referred in para 38 above, the disability suffered by the workman and his avocation, I can safely hold that notwithstanding Part II of Schedule I the loss of earning capacity suffered by the workman is 100%.

41. In case the compensation is re-calculated as per Section 4(1)(c)(i) and the percentage of loss of earning capacity is taken at 100% the compensation payable would again come to Rs.5,24,328/-. Therefore second argument advanced by the learned counsel for the insurance company is of no consequence.

42. Last argument advanced by the learned counsel for the insurance company that compensation had to be determined with reference to the Section 4(1)(c)(ii) and the disability certificate issued by the Medical Board. Much emphasis was placed by the counsel on the fact that in the year 1984 Section 4(1)(c)(ii) was amended and that the decision in Pratap Narain's case was rendered by the Supreme Court prior to the amendment of Section 4(1)(c)(ii).

43. As regards the said argument suffice would it be to note that Section 4(1)(c)(ii) applies only in case of unscheduled injuries. As already noted injury suffered by the workman is a scheduled injury, therefore Section 4(1)(c)(ii) has no application whatsoever to the

present case.

44. In view of above discussion I find no infirmity in the impugned award dated 12.07.07.

45. The appeal is dismissed.

46. Award dated 12.07.07 passed by the Commissioner Workmen's Compensation is affirmed.

47. No costs.

March 10, 2008
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PRADEEP NANDRAJOG
JUDGE