

* HIGH COURT OF DELHI : NEW DELHI

FAO. No.246/2007 & CM No.8787/2007

% Judgment reserved on: 16th November, 2009

Judgment delivered on: 26th November, 2009

National Insurance Co. Ltd.
Regional Office No.1
Jeevan Bharti
124, Connaught Circus,
New Delhi
And
Divisional Office No.3
Jeevan Vikas Building
30-31A, Asaf Ali Road
New Delhi

...Appellant

Mr. Pradeep Gaur, Adv.

Versus

1. Shri Ranjit Singh @ Rana
C/o AG-401, Sanjay Gandhi Transport Nagar
Delhi.

2. Smt. Harvinder Kaur
W/o. Sh. Dalbir Singh
B-1/185, Paschim Vihar,
New Delhi (Employer)

...Respondents

Nemo.

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

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

V.B.Gupta, J.

Following substantial question of law has been formulated in this case;

“Whether the trial court was authorized to pass order in contravention of Section 4 of the WC Act and ordered the payment of Rs.4,17,508/- instead of 15% which comes to Rs.62,600/- as per the permanent disability?”

2. Before dealing with this question, it would be necessary to mention the brief facts which are as follows;
3. Respondent No.1, was employed as a driver by respondent No.2. On 16th March, 2003, while on duty, respondent No.1 met with an accident and sustained permanent disability to the extent of 15%, as per certificate dated 9th March, 2007 issued by Lok Nayak Hospital.
4. Commissioner Workmen’s Compensation, vide order dated 24th April, 2007 took the disablement for the purpose of compensation as 100% and awarded compensation to the tune of Rs.4,17,508/-. Aggrieved with the decision of the Commissioner, appellant has filed the present appeal.
5. Notice of this appeal was issued to the respondents. Initially counsel for respondents appeared but later on counsel absented.
6. It is contended by learned counsel for appellant that the percentage of disability as mentioned in the certificate is 15%, whereas the Commissioner has assessed the loss of earning capacity to the extent of 100%, which is without any basis and reasoning.

7. Other contention is that the finding of the Commissioner is against the explanation Clause(2) Section 4(c) of Workmen's Compensation Act, 1923 (for short as 'Act').

8. Basic question involved in the present case is as to whether 15% disability for a driver by way of disability certificate issued can be assumed as 100% disability or not.

9. After perusal of the facts and circumstances of the case, no irregularity can be found in the impugned order and appeal is not maintainable for the reasons mentioned hereunder.

10. As far as the determination of amount of compensation is concerned, Section 4 of the Act makes provision for the same. Relevant provision of this Section, as applicable in the present case reads as under;

Section 4(1)(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) 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;

11. In *State of Gujarat v. Rajendra Khodabhai Deshdia & Anr.* 1991 ACJ 638, it has been observed;

“In case of non-scheduled injury falling within the scope of section 4(1)(c)(ii) of the Act the legislature has not fixed any percentage of loss of earning capacity by creating deeming fiction. Therefore, in such type of cases, it will be necessary for the workman to show by leading evidence that as a matter of fact he has suffered loss of earning capacity to a particular extent and that he will be entitled to compensation commensurate with the loss of earning capacity suffered by him. This is essentially a matter of inquiry involving examination of facts and to a great extent guesswork to be made by the Commissioner and the court. However, in both types of cases of injuries, the basic criterion for determination of amount of compensation is the same, i.e., the loss of earning capacity.”

12. In *Pratap Narain Singh Deo. V. Shrinivas Sabata and Anr.*, AIR 1976 SC 222, there was personal injury to a carpenter in the course of employment and there was amputation of left hand above elbow. Since carpenter cannot work with one hand, it was held that disablement is total and not partial. Supreme Court observed;

“It has not been disputed before us that the injury in question was caused to the respondent by an accident which arose out of an 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 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 ½" below tip of olecranon. As will appear, there is no force in this argument.

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

"(1) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement."

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 workman 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 the work of carpenter 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."

13. Similarly, in *Rayapati Venkateswar Rao vs. Mantai Sambasiva Rao and Anr.* (2001 ACJ 2105), it has been observed;

"According to the medical evidence, the applicant cannot perform his duties as a cleaner as he was performing prior to the accident and he has to use a stick to walk, So it is very clear from the evidence and findings of the learned Commissioner that the appellant cannot perform his duties as a cleaner as he was performing on the day of accident and as per the settled legal position as extracted above, it has to be held that when once the workman was incapacitated and unable to perform his duties what he is performing on the day of accident, even though the

physical disability sustained is 20 to 25 per cent, he loses his earning capacity by 100 per cent.”

14. Lastly, in *G. Anjaneyulu v. Alla Seshi Reddy and Anr. 2002 ACJ 1392*, it has been laid down that;

“No doubt this court and the Hon’ble Apex Court in a number of cases held that if the workman is unable to perform his duties as he was performing on the day of accident, his loss of earning capacity should be taken as 100 per cent irrespective of the percentage of disability sustained by the workman.”

15. In the impugned order Commissioner observed;

“As after the operation of his right leg he is not in a position to drive any vehicle what so ever. Although the disability has been assessed as 15% only but keeping in view the nature of profession of claimant it is clear that after this disability the claimant shall not be in a position to perform/drive a heavy duty vehicle like truck/bus etc. Hence, in this case the loss of earning capacity becomes total for which the disablement for the purpose of compensation is taken as 100%.”

16. Disability certificate in the present case clearly states that condition of disability is non progressive. After operation of respondent No.1’s right leg, he is not in a position to drive any vehicle ever again. Since he was a driver by profession, his earning capacity has been lost. He is incapable of earning bread for his family with regard to the nature of his job. The disability has been correctly assessed as 100% since it will lead to 100% loss in the earning capacity of respondent No.1 as a driver.

17. There is no reason to disagree with the above findings of the Commissioner. Moreover, in view of the principle of law laid down in the above referred judgments, no infirmity can be found with the impugned order.

18. The substantial question of law is thus answered in affirmative. With the result, appeal being not maintainable, the same is hereby dismissed.

19. Parties shall bear their own costs.

20. Trial court record be sent back.

+CM No.8787/2007

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21. Dismissed.

26th November, 2009
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V.B.GUPTA, J.