

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 293/2004**

% **10th October, 2011**

NEW INDIA ASSURANCE CO. LTD. Appellant

Through: Mr. Pankaj Seth, Advocate.

VERSUS

SH. SATVIR VERMA & ORS Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this first appeal under Section 30 of the Employee's Compensation Act, 1923, is to the impugned order of the Commissioner Workmen's Compensation dated 9.8.2004. By the impugned order, the Commissioner Workmen's Compensation has awarded compensation of Rs.2,68,800/- to the respondent no.1/workman.

2. The facts of the case are that the workman was employed with the respondent no.2 herein as a helper for the truck bearing no. DL-1G-9120, getting a salary of Rs.1,000/- per month along with Rs.25 per day as diet

money. On 2.7.1996, the truck which was loaded with timber was being unloaded and during this process, the Dala/body of the truck broke down resulting in the timber falling over the workman and the workman suffering injuries. As per the case of the workman, besides spending amount on the treatment, he suffered injuries to both his legs which had to be operated. An iron rod was stated to be fixed in the right leg. It was alleged that the income of the workman had ceased and he was on the verge of starvation, which resulted in filing of the claim petition.

3. The defences of the appellant/Insurance Company before the Commissioner were basically three fold, and which aspects have also been argued before me:-

(i) As per the medical certificate filed Ex.PW1/1, the injury was only 30% with respect to the legs i.e. it is not the case of 100% disability qua the work which was undertaken by the workman as a helper.

It was argued that in view of the decision of the Supreme Court in the case of ***Raj Kumar Vs. Ajay Kumar (2011) 1 SCC 343***, the 30% disability as per the medical certificate was not to be taken at 100% qua the whole body because the workman could still work as a helper albeit his earning capacity can be said to have been reduced.

(ii) The Commissioner ought to have taken the pay of the workman on his admission at Rs.1750/- p.m and not the minimum wages of Rs.2000/- p.m.

(iii) The Insurance Company is not liable to pay interest on the compensation which has been awarded by the Commissioner Workmen's Compensation, and even if, the interest could have been awarded, the same only could be awarded 30 days after adjudication of the Commissioner Workmen's Compensation and not 30 days after the date of the accident.

4. So far as the third argument is concerned, these aspects are now covered by a judgment of this court in the case of the appellant-Insurance Company itself being ***New India Assurance Company Ltd. Vs. Satyawati & Ors. 2011 (123) DRJ 612***. In the decision in the case of ***Satyawati (supra)***, I have held that the liability towards interest cannot be denied unless there is a specific clause in the policy absolving the insurance company such liability. I have also held in the decision of ***Satyawati (supra)*** relying upon the decision of a Division Bench of four judges of the Supreme Court in ***Pratap Narain Singh Deo Vs. Srinivas Sabata & Anr., 1976 (6) SCC 289*** that interest would be payable 30 days after the date of the accident if the compensation is not paid within a period of 30 days from the date of the accident and not that the interest will be payable 30 days after the date of the adjudication by the Commissioner Workmen's Compensation.

5. So far as the first argument urged on behalf of the appellant is concerned, in my opinion, the same is well founded. The Supreme Court in the case of ***Raj Kumar (Supra)*** has held that the effect of the permanent

total disability must not be taken as loss of 100% of the earning capacity of the workman, unless it really results in such consequences. Meaning thereby, what has to be seen is actually loss of earning capacity as a result of the permanent partial disablement. The ratio of the decision in **Raj Kumar (supra)** has been culled out in the report as under:-

“The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine the loss of dependency).

Arvind Kumar Mishra v. New India Assurance Co. Ltd. (2010) 10 SCC 254; (2010) 3 SCC (Cri) 1258; *Yadava Kumar v. National Insurance Co. Ltd.*, (2010) 10 SCC 341; (2010) 3 SCC (Cri) 1285, relied on

The Tribunal has to first decide whether there is any permanent disability and the extent of such permanent disability. The Tribunal should consider and decide with reference to the evidence:

- (i) whether the disablement is permanent or temporary;
- (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

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The Tribunal has proceeded on the basis that the permanent disability of the injured claimant was 45% and the loss of his future earning capacity was also 45%. The Tribunal overlooked the fact that the disability certificate referred to 45% disability with reference to the left lower limb and not in regard to the entire body. The said extent of permanent disability of the limb could not be considered to be the functional disability of the body nor could it be assumed to result in a prevented him from carrying on his avocation as a cheese vendor. Therefore, the permanent functional disability of the body assessed as 25% and the loss of future earning capacity as 20%."

6. A reading of the aforesaid paras shows that what has to be seen is the permanent functional disability of the body as a whole taken along with the loss of future earning capacity. If we look at the medical certificate filed before the Commissioner Workmen's Compensation, the same only talks of disability to the extent of 30% in the legs. Therefore, it is not a case that there is a 30% disability either qua the whole body or the workman is not able to 100% perform the work of a helper which he was doing prior to the accident. It will therefore have to be seen as to what would be the loss to the income earning capacity of the workman as a result of the medical certificate Ex.PW1/1.

In my opinion, considering the facts of the case, and especially, the affidavit by way of evidence which is filed by the workman in which he only deposes that his legs have become weak, shows that the Commissioner Workmen's Compensation has erred in giving of 100% loss earning capacity. As per the facts of the present case, and the detailed reasons given below, the loss of income generating capacity should be taken as 50% only and not 100%, inasmuch as, the workman can still do the work of a helper of a truck though of course his mobility would surely be affected as a result of weakening of his limbs. The facts of this case are not such that it is not that the workman cannot do the work of helper of the truck and which was job he was performing when the accident took place or any other similar job.

7. Compensation is calculated with respect to the permanent partial disablement in terms of Section 4(1)(c)(ii) of the Employee's Compensation Act. In terms of Section 4(1)(b), for permanent total disablement, the compensation which is calculated is 60% of the figure arrived at by multiplying with the relevant factor and the income of the workman. In terms of Section 4(1) (c) (ii), the compensation is a percentage of the compensation determined as per Section 4(1)(b) i.e. less than 100% of what is provided under Section 4(1)(b). Thus whereas the calculation of the compensation in terms of Section 4(1)(b) contains three ingredients, calculation of compensation in terms of Section 4(1) (c) (ii) will have a 4th ingredient i.e., a lesser percentage (less than 100%) of the amount which is calculated to be payable in terms of Section 4(1) (b). Since, in the facts of this case there is only 30% disability with respect to legs, as per the medical certificate Ex.PW1/1, therefore at best the loss of earning capacity would only be 50% compensation payable in terms of the formula contained in Section 4(1) (b) i.e., a lesser percentage of 50% or a lesser amount of 50% then as would be payable for compensation which is calculated under Section 4(1)(b). In order to fix, what should be the lesser percentage of the total compensation payable under Section 4(1)(b), for the purpose of arriving at the compensation for Section 4(1) (c) (ii), we must, and therefore I have, taken into consideration some of the entries which are contained in part-II of Schedule-I of the Act. The reason for this is that the different entries

provided in part II gives the percentage of loss earning capacity from 1% to 90% in terms of the injuries/eventualities/type of accidents which are contained in these entries. Entry No.20 is relevant because it deals with amputation below the knee with stump exceeding 8.89 cm but not exceeding 12.70 cm. In terms of this entry, the percentage of loss earning capacity is also taken as only 50% of the compensation which would be payable when calculated in terms of Section 4(1) (b). Similar such entries are entry nos. 21 and 22 which deal with amputation below knee with stump exceeding 12.07 cm and amputation of one foot resulting in end bearing. Since in the present case, there is no amputation of any of the legs i.e. the workman can use both the legs though with a 30% disability, accordingly, at the very best, compensation which can be allowed is 50% of the compensation which would be payable in terms of the entries nos. 20 to 22 of part II of the Schedule of the Act. The formula and its application for determining of compensation for being paid to the respondent/workman is as under:-

- (i) The compensation, as per the formula under Section 4(1) (b) multiplied by percentage.
- (ii) Rs.2000/-multiplied by 224 multiplied by 60% multiplied by 50%.
- (iii) The compensation therefore works out to Rs.1,34,400/-.

8. Learned counsel for the appellant has also argued that the Commissioner Workmen's Compensation has wrongly taken the pay of the

workman at Rs.2,000/- per month because as per the case of the workman himself, he was only earning Rs.1750/- per month. This issue however cannot be very strongly argued on behalf of the appellant, inasmuch as the counsel for the appellant agrees that various learned Single Judges of this court have, in decisions, pertaining to Motor Vehicles Act, 1988 held that liability with respect to a motor vehicle accident being statutory in nature, it is the minimum wages of the workman which should be taken. In any case, there is not too much of an issue qua this aspect inasmuch as whereas the Commissioner Workmen's Compensation has taken the pay at Rs.2,000/- p.m. and the appellant is claiming the same only at Rs.1750/- p.m. In my opinion, this issue of a minor difference of Rs. 250/- p.m. does not raise any substantial question of law for the impugned judgment to be interfered with and existence of which substantial question of law is a sine qua non as per Section 30 of the Act.

9. Accordingly, the compensation which will be payable to the workman will be Rs. 1,34,400/- along with interest at 9% per annum simple payable 30 days after the date of the accident and till date of payment. I note that vide order of this court dated 1.10.2004, the principal amount was directed to be released to the workman. Considering the fact that the compensation which will be allowable to the workman in terms of today judgment will stand partially reduced, the workman will be entitled to release of the balance compensation, if any, which is deposited with the Commissioner after making

due calculations in terms of the present judgment and if there has to be a refund, the appellant is at liberty to recover such amount as per the procedure prescribed in law.

10. The appeal is accordingly disposed of, leaving the parties to bear their own costs.

OCTOBER 10, 2011
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VALMIKI J. MEHTA, J.