

**THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY**  
**CMA No.484 of 2005**

**JUDGMENT:**

1                This appeal is filed challenging the award dated 31.01.2005 passed in W.C.No.9 of 2004 on the file of Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-II Circle, Guntur whereunder the Commissioner awarded compensation of Rs.1,33,575/- as against the claim of Rs.2,50,000/- claimed by the applicant.

2                For the sake of convenience, the parties to this appeal, will hereinafter be referred as they are arrayed before the lower authority.

3                In spite of service of notice, the respondents did not choose to appear and contest the matter. Hence I am inclined to dispose of the appeal on merits in the absence of the respondents.

4                The facts, which are relevant, for disposal of the present appeal are as follows:

The applicant worked as a cleaner on the lorry bearing No.AP 28 T 9779, which belongs to the first respondent. On 09.04.2003 at about 4.00 AM, the applicant was proceeding on the said lorry from Vijayawada to Nellore as a cleaner. When the lorry reached Anjaneyaswamy statue on bye-pass road on Etukuru road, the driver of the lorry drove the same in a rash and negligent manner and hit a stationed lorry. Due to the accident, the applicant sustained fracture to both legs and took treatment in Government General Hospital, Guntur for a long time. The Station House Officer, Taluq Police station, Guntur registered a

case in Cr.No.99 of 2003 against the driver of the lorry. Due to the fracture, the applicant was unable to attend the work of cleaner, thereby lost his earning capacity. As on the date of accident, the crime vehicle bearing No.AP 28 T 9779, which belongs to the first respondent was insured with the second respondent. Hence the applicant filed the claim petition seeking compensation of Rs.2,50,000/- from the respondent Nos.1 and 2 jointly and severally.

5               The first respondent remained *ex parte*. Second respondent opposed the claim by way of filing counter denying all the material averments made in the claim petition.

6               Basing on the rival contentions, the Commissioner framed two issues. During the course of enquiry, on behalf of the applicant A.Ws.1 and 2 were examined and Exs.A.1 to A.11 were marked. On behalf of the respondents no oral or documentary evidence was adduced.

7               Basing on the material available on record, the Commissioner allowed the petition in part by awarding an amount of Rs.1,33,575/- as compensation payable to the applicant by way of demand draft drawn in favour of the Commissioner for Workmen's Compensation & Deputy Commissioner of Labour, Guntur within 30 days and if they fail to deposit the awarded amount, within 30 days from the date of receipt of the order, they have to pay an interest @ 8% p.a. from the date of accident till the date of realisation in addition to a penalty that may be imposed under Section 4-A (3) of the Act.

8               As stated supra, not being satisfied with the amount of compensation awarded, the applicant filed the present appeal.

9           The contention of the learned counsel for the applicant is two fold:

i.           The learned Commissioner misconstrued the scope of Section 2 (l) of the Workmen's Compensation Act and awarded meagre amount of compensation.

ii.          The learned Commissioner failed to appreciate the evidence of the doctor (A.W.2) in right perspective and hence the finding of the Lower Authority is not sustainable either on facts or on law.

10          In view of the submissions made by the learned counsel for the parties, the following two questions arise for consideration in this appeal:

a .           Whether the fractures sustained by the applicant incapacitated him to attend the work, which he used to attend prior to the accident?

b.          Whether the disability incurred by the applicant leads to loss of 100% earning capacity?

11          It is an admitted fact that the applicant sustained injuries in the road accident that took place on 09.04.2003. By the date of accident, the applicant was working as cleaner on the lorry of the first respondent, which was insured with the second respondent.

12          To substantiate the argument, the learned counsel for the applicant has drawn my attention to the ratio laid down in **N.Sree Ramulu @ Sree Rama Murthy Vs. B. Lakshmi**

**Narayana and another**<sup>[1]</sup> wherein this Court held at para No.26 as follows:

26.          The following principles can be culled out from the above decisions of the Supreme Court and this Court:

(a) All injuries or permanent disabilities arising from injuries do not result in loss of earning capacity.

(b) Where permanent partial disablement results from an injury and the said injury is specified in Schedule I, it would be covered by Section 4(1)(c)(i) of the Act. In such a case, the workman would be entitled to such percentage of 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;

(c) Where permanent partial disablement results from an injury and the injury is not specified in Schedule I, it would be covered by Section 4(1)(c)(ii) of the Act. In such a case, the workman would be entitled to such percentage of compensation which would have been 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.

(d) In assessing loss of earning capacity in a case of permanent partial disablement resulting from an injury not specified in the Schedule I, 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.

(e) The opinion of the medical practitioner as to the percentage of loss of earning capacity would be normally binding on the court where permanent partial disablement results from an injury not specified in Schedule I.

(f) The importance of medical evidence is only in case where disablement in performing duties which the workman was performing earlier cannot be decided without the aid of medical evidence. In case where it can be so decided with or without medical evidence (like amputation of limbs), medical evidence is not relevant and the question of the victim not suffering specified injuries is also not relevant.

(g) Loss of earning capacity is not a substitute for percentage of physical disablement and is only one of the factors taken into account.

(h) The loss of earning capacity arising from a permanent disability may be different from the percentage of permanent disability. Equating the percentage of loss of earning capacity to the percentage of permanent disability would result in the award of either too low or too high a compensation. What requires to be assessed is the effect of permanent disability on the earning capacity of the injured. This involves ascertainment of what activities the claimant can carry on in spite of permanent disability and what he could not do as a result of the permanent disability; ascertainment of his avocation, profession and nature of work before the accident and also his age; and finding out whether he is totally disabled from earning any kind of livelihood (or) whether in spite of permanent disability, he can still effectively carry on the activities and functions, which he was earlier carrying on (or) 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. In para.14 of Raj Kumar (17 supra) and in para.8 of Mohan Soni (25 supra) appropriate guidance is available.

(i) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Commissioner/Court with reference to the evidence in entirety.

(j) Where a claimant is a workman who suffered injuries in an

accident and his employer either provides for pension after retiring the workman on the grounds of medical invalidation or the dependants of the claimant are given appointment on compassionate grounds, he has a duty to disclose these facts and they would have a material bearing on the ascertainment of the percentage of loss of earning capacity.

(k) It is a question of fact in each case whether there is permanent total disablement on account of the injuries suffered by the claimant. In a given case, the loss of earning capacity caused by an injury can amount to 100% disablement. But, if the injured claimant is in a position to earn a living by doing a job other than the one which he was doing at the time of his accident, he cannot be said to have suffered 100% disability.

(l) Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection (as in the case of persons covered by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income.

13        Let me consider the facts of the case on hand in the light of the above principle. As per the oral testimony of A.W.1, he sustained fracture to both legs. The oral testimony of the doctor (A.W.2) coupled with Ex.A.3 wound certificate, Ex.A.10 case sheet and Ex.A.11 X-Ray film clearly reveals that the applicant sustained fracture of left femur and right tibia. The applicant underwent operation on 30.04.2003 and interlocking nail was done to left femur. As per the oral testimony of A.W.2, the applicant incurred 45% to 50% disability. In the chief examination A.W.2 deposed that the applicant cannot work as a lorry cleaner as per the case sheet. Interestingly, in the cross examination he deposed that if the patient had undergone the physiotherapy as advised by the doctors, the disability would have been less. Thus it is clear that if the applicant had followed the advice of the doctors, the percentage of disability may be less than 45% to 50%. A.W.2 further deposed that the applicant can

work as lorry cleaner with difficulty. Even as per the testimony of A.W.2, the applicant can discharge the duties of cleaner, of course, with some difficulty. The material available on record clinchingly establishes that the applicant had not incurred permanent disability of such a nature incapacitating him to earn any thing. Even as per the testimony of A.W.2, he can attend the work, which he used to attend prior to the accident with some difficulty. Having regard to the facts and circumstances of the case, and also in view of the principle enunciated in the case cited supra, I am unable to accede to the contention of the learned counsel for the applicant that the applicant was incapacitated to earn anything or to attend the work of cleaner.

14           The learned Commissioner of Labour assessed the wages of the applicant basing on G.O.Ms.No.30, dated 27.07.2000. The learned counsel for the applicant is also not disputing the monthly income of the applicant as assessed by the Commissioner. By the date of accident, the applicant was aged about 18 years. Therefore, the Commissioner has taken the corresponding factor as 226.38.

15           While deciding the cases pertaining to the workmen, the approach of the Court must be pragmatic and not pedantic. When two views are possible basing on the facts pleaded and proved, the Court has to take the view, which is beneficial to the workmen. Even as per the testimony of A.S.2, the applicant incurred 45% to 50% disability. The Commissioner has taken the disability of 45%. It is a known fact that no lorry owner can engage a person as a cleaner with disability of 45% to 50%. Even if such person is engaged by owner of lorry, he may not get wages like other persons. Taking into consideration the material

available on record and the plight of the applicant, I am of the considered view that the percentage of disability incurred by the applicant can be taken as 50% to meet the ends of justice. Thus, if the disability is taken as 50%, the applicant is entitled to Rs.1,48,120/- as compensation ( $\text{Rs.2181} \times \frac{60}{100} \times 226.38 \times \frac{50}{100}$ ).

16 In the result, the appeal is allowed in part enhancing the compensation from Rs.1,33,575/- to Rs.1,48,120/- directing the respondent Nos.1 and 2 to pay the same to the applicant jointly and severally. No order as to costs. Consequently, miscellaneous petition if any pending in this miscellaneous appeal shall stand closed. No order as to costs.

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***T. SUNIL CHOWDARY, J***

***Date: 26.06.2015***

***Kvsn***

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[\[1\]](#) 2013 (5) ALD 249