IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.219 OF 2015

Shriram General Insurance Company
Limited, E-8, Epip Ricco Industrial
Area, Sitapura-302 022. .... Appellant

- Versus -

1. Deepachand @ Avinash S/o Manoharlal
   Suryawanshi, Room No.52,
   Near Ambica House, LBS Marg,
   Mulund West, Mumbai-400 080.

2. Bhagwan R. Somaya,
   G-9, Barrack No.5, Mulund Colony,
   Zulala Road, Mulund West,
   Mumbai-400 080. .... Respondents

Mr. Nikhil Mehta i/b M/s. KMC Legal Venture for
the Appellant-Insurance Company.
Mr. V.M. Parkar for Respondent No.1/Ori. Claimant.

**CORAM:** MRS. MRIDULA BHATKAR, J.

**DATE :** FEBRUARY 24, 2016

**ORAL JUDGMENT:**

1. Not on Board. The first appeal is taken up for hearing and final disposal, by consent and on the request of

learned counsel appearing for the parties.

2. In this first appeal, the Insurance Company has challenged the Judgment and Award dated 30-6-2014 passed by the Commissioner for WC & Judge, Third Labour Court, Mumbai in Application (WCA) No.589/C-156 of 2011, thereby directing the Insurance Company to pay compensation of Rs.7,48,728/- with 12% simple interest from the date of the accident i.e., 10-6-2011 till realization of the amount.

3. Respondent No.1 is the original claimant who was employed as a Driver with respondent No.2 on his motor vehicle i.e., Tempo bearing No.MH-03/AH-715. On 10-6-2011 when he was on duty and driving, the vehicle met with an accident wherein he sustained grievous injuries, i.e. crush injury over left hand, fracture of 1st metacarpal, CLW over left palm, CLW over left thumb, CLW over left cheek and multiple CLWs on right forearm. He was issued a certificate that he has suffered partial permanent disability of 50%. The disability certificate issued by the R.M.O. of KEM Hospital certified the disability as 48%.

However, the Labour Court relied on the evidence of Medical Officer Dr. Naresh Khanna who has deposed that though there is disability of 48%, there is 100% loss in the earning capacity of the original claimant and the Doctor gave an admission in the cross-examination that the original claimant cannot work as a Driver in future. The original claimant at the relevant time was drawing a salary of Rs.6,000/- per month and was aged 30 years. The Labour Court as per the Schedule of the Workmen's Compensation Act, holding 100% loss of income, fixed the compensation at Rs.7,48,728/-. Hence, this challenge by the Insurance Company.

4. The learned counsel for the Insurance Company has submitted that relationship of the respondent No.2 with respondent No.1 as employer-employee, as also the salary of the original claimant are not seriously contested and these facts are proved by the original claimant. So these aspects need not be discussed. The only point which is to be decided is, whether 50% of the physical disability, as certified by the doctors considering the nature of the job of the original claimant can be

treated as loss of 100% earning capacity?

5. The learned counsel for the Insurance Company has produced an Extract of the Driving Licence issued by the R.T.O. showing that the Driving Licence of the original claimant which expired on 20-4-2013 was renewed on 7-10-2014 and was valid till 20-4-2030 and the Award was passed on 30-6-2014. He submitted that it is a subsequent development and therefore this document is produced before the Court to show that the original claimant is capable of driving the vehicle. He further submitted that 50% loss of earning capacity based on the medical certificate is disputed by the Insurance Company and therefore the appeal is to be allowed.

6. The learned counsel for the original claimant has countered the submissions of the learned counsel for the Insurance Company. He relied on the injury certificate issued by the R.M.O. of the KEM Hospital which shows 48% physical disability and the accident alone has caused his incapacity to work. He further submitted that the Insurance Company has not

examined any witness to show that the loss of capacity to earn is 100%. In support of his submissions, he relied upon the ratio laid down in the Judgment of a single Judge of this Court in the case of **National Insurance Co. Ltd. v. Rama and others**, reported in 2007 ACJ 1105.

7. As mentioned earlier, most of the facts are proved and the only issue to be dealt by this Court is, whether 48% physical disability will lead to loss of 100% earning capacity in view of the nature of the work of the original claimant?

8. The original claimant is a Driver and he had sustained injuries on face, fracture of metacarpal bone, crush injury to his left hand, etc.. Thus, as per the medical certificate issued by the KEM Hospital in the year 2012, there was swelling and pain and difficulty in the movement of left hand. The movement of fingers of the left hand are also restricted. It is to be noted that his left hand do show that it is functional, though there was a fracture to the left hand. In the case of National Insurance Co. Ltd. v. Rama and others (supra), the learned

single Judge has held that once the disability due to injuries is proved through qualified medical practitioner, then the burden shifts on the Insurance Company to bring evidence of rebuttal. Thus the ratio cannot be disputed subject to the claimant to prove the percentage of disability and which in the present case is not 100% but is shown as 48%. To assess the percentage of functional disability on the basis of the physical disability and the nature of the injuries and the nature of the job, common sense and wisdom has to be used. The original claimant is a Driver and had sustained injuries to his left hand. It has become non-functional upto to 48%. It is not the case of the original claimant that the injury so sustained to his hand has led to its amputation but it was a fracture of the metacarpal bone of left hand. The fact that his driving licence is renewed after the Award was passed is not denied. Under such circumstances, by no stretch of imagination it can be said that the original claimant has lost his 100% capacity to earn his livelihood by using the skill of driving. The Insurance Company has not tendered any further evidence to dislodge the medical evidence that there is no 48% disability. Therefore, the medical certificate showing 48% disability is to be accepted. The original claimant is a Driver and therefore he may drive for a short distance and may not be in a position to drive comfortably and with the same skill for a long route and longer time and therefore I am inclined to accept, in addition to 48%, more 27% loss of his earning capacity due to his physical disability and therefore it is held that the loss of earning capacity of 100% is brought down to 75% of loss of earning capacity.

9. In view of the above, the appeal is partly allowed. The impugned Judgment and Award is to be modified by substituting 75% in the place of 100% loss of earning capacity and accordingly fresh calculation as per the Schedule of the Workmen's Compensation Act be made.

10. It is informed by the learned counsel for the Insurance Company that the Insurance Company has deposited Rs.10,49,040/-. Needless to say, in view of the above, the original claimant now is entitled to claim and withdraw 75% of

the said amount, including 25% of the amount which is already withdrawn and the Insurance Company is entitled to claim refund of the balance 25% of the said amount. If at all any interest has accrued on the amount of Rs.10,49,040/-, the amount of interest is also to be distributed as 75% and 25%.

11. The appeal stands disposed of in the above terms.

(MRIDULA BHATKAR, J.)