

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.03.2017

CORAM:

THE HONOURABLE Dr. JUSTICE S.VIMALA

C.M.A.No.903 of 2014

M.Kaliannan

... Appellant / claimant

versus

1. M.S.Kalyanasundaram  
respondent

... 1<sup>st</sup> respondent/1<sup>st</sup>

2. United India Insurance Co. Ltd.  
1170, Mettur Road, 2<sup>nd</sup> Floor,  
Muthiah Complex, Erode - 638 011.

... 2<sup>nd</sup> respondent/2<sup>nd</sup> respondent

Prayer : This Appeal filed under Section 30 of the Workmen's Compensation Act, 1923, against the order dated 30.08.2013 made in W.C.No.123 of 2008 on the file of the Workmen's Compensation Commissioner-cum-Deputy commissioner of Labour, Salem.

|               |   |                   |
|---------------|---|-------------------|
| For Appellant | : | Mr.C.Kulanthaivel |
| For R-1       | : | No appearance     |
| For R2        | : | Mr.T.Ravichandran |

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the claimant raising the following substantial questions of law.`

i) Whether the claimant/appellant was given sufficient opportunity, notice and intimation to appear before the Medical Board at Erode to assess the disability and loss of earning power of the claimant who sustained grievous injuries arising out of the accident dated 27.09.2007?

ii) Whether the Workmen's Commissioner was correct in holding that there was no loss of earning power to the claimant/appellant merely because he failed to appear before the Medical Board when admittedly the claimant has produced necessary documents and evidences to prove his disability and loss of earning power?

Iii) Whether the Workmen's Commissioner was right and had power to compel the claimant to subject himself for assessment of his disability and loss of earning power with the medical board without disputing or disproving the documents and evidences produced by the claimant to prove his disability and loss of earning power?

2. It is the case of the claimant that he was engaged as Driver in the vehicle, i.e. Ambassador car, bearing Reg.No.TN47D 2767 and on 27.09.2017, in the course of his official duties, at 12.30 p.m., while he was driving the car from Erode to Perundurai, the driver who was driving the vehicle belonging to the Transport Corporation bearing Reg.No.TN43N 0346, came in a rash and negligent manner and hit against him, causing fracture of bone in the right leg, apart from causing simple injuries all over the body; he took treatment at Erode KMCH Hospital and thereafter, referred to Coimbatore KMCH Hospital, where he was admitted as in-patient for one month and surgery was performed twice on the claimant. Alleging that he cannot carry loads, stand and walk for a long distance and there is consequent disablement upon his earning capacity, the claimant has filed a claim petition for compensation before the Workmen's Compensation Commissioner-cum-Deputy commissioner of Labour, Salem.

3. The Doctor, who examined the claimant at Kovai Medical College and Hospital has noted the following injuries, which reads as under:

"Wounds or injuries found on the person of a male calling himself Mr.Kaliannan.M, S/o.Mr.Muthusamy (late) aged 37 years (Thirty seven) an inhabitant of No.4/15, Moopatampalayam, Devanakunchi Post, Thiruchengode, Namakkal District, and accompanied by Mrs.Malathi (wife) for report at to certain nature of injuries said to have been caused on 27.09.07 and to be due to RTA (was travelling in a car, which was hit by a bus-Erode to Perundurai road near Mettukadai about 12.30 p.m. 27.09.07) first aid at KMCH, Erode and later treated at KGM Hospital, chinniampalayam, Coimbatore.

I am of opinion that

1. Swelling, tenderness, defirmity (R) thigh Xrays - Segmental, comminuted fracture mid shaft of (R) femur, Undisplaced basicervical fracture neck of (R) femur.

2. Multiple lacerated wounds over (R) arm, (L) knee injury (1) Grievous in nature."

4. The observations are made in the discharge summary, which was filed as Ex.P8. It is relevant to extract the observations made in the discharge summary, issued by KMCH, Coimbatore :-

"Patient Name : Mr.Kaliannan.M., Age : 37 Years/M  
Admitted on 27.09.2007, Discharged on : 29.09.2007  
Final Diagnosis:

Closed Segmental Comminuted Fracture mid shaft  
fracture right femur  
Undisplaced Basicervical fracture neck femur right  
Soft tissue injuries right arm."

5. P.W.2-Dr.R.Krishnamoorthy, M.S.Ortho., D.Ortho., has been examined to speak about the percentage of the disability and loss of earning capacity. He has certified the disablement at 34%. During the cross of examination, he has stated that the disablement given at 31% is with reference to reduction of movement of hip while sitting and 3% of disablement on account of pain. During cross examination, a suggestion was made that 31% of disablement as suggested by him is on the higher side. Inasmuch as 3% disablement has been assessed on account of pain, it is safe to conclude that the claimant suffered disability of 30%.

4. The main grievance of the learned counsel for the second respondent is that though petitioner/claimant was referred to the Medical Board, but the claimant did not appear before the Medical Board and, therefore, the Tribunal is right in giving an observation that the claim cannot be entertained.

5. The learned counsel appearing for the claimant submits that even though there is an observation that he did not appear before the Medical Board on 30.10.2012, 21.11.2012 and 04.12.2012, the claimant was not informed regarding the necessity of appearing before the Erode Medical Board, instead, direction was issued for his appearance before the Medical Board at Salem and not before Erode and that is the reason for his non-appearance before the Medical Board. Mere non-appearance of the claimant before the Medical Board, there cannot be a finding that there is no loss of earning capacity and the finding requires to be set aside.

6. The first and primary question for consideration is whether there was a necessity at all to refer the claimant for medical opinion.

7. On behalf of the claimant, the Doctor has been examined to speak about the percentage of the disability. As noticed above, the doctor, not only through oral evidence, but also through documentary evidence, has spoken about the disability suffered by the claimant. The documentary evidence is a self-explanatory document, which speaks about the disability suffered by the claimant and the consequences of the said disability.

8. It is for the Insurance Company to establish that the evidence of the Doctor is either correct or wrong and the percentage of disability is excessive through cross examination.

Except putting a mere suggestion to the doctor that the percentage of disability suffered is excessive, the insurance company cannot hide behind the reference of the claimant to the Medical Board and his non-appearance before the Medical Board as an evidence to say that no disability has been suffered by the claimant or that there is no loss of earning capacity.

9. It cannot be said that the claimant could not be referred to Medical Board, but, at the same time, before there is an order referring the claimant to Medical Board, it is for the Insurance Company to establish that there was no disablement at all. The other course open to the Insurance Company is to bring any Doctor to examine the claimant before the Tribunal and to assess his disability and place the opinion of the doctor before the Tribunal. Had the Insurance Company taken those steps to assess the disablement of the claimant, the Court can consider the opinion given by the two doctors to arrive at a finding as to the disablement suffered by the claimant. However, no steps have not been taken by the Insurance Company. When medical opinion is available on record, both oral and documentary, which is subjected to cross examination, it may not be appropriate for the Tribunal to reject that evidence, without there being contra evidence to dispute the same. In such view of the matter, this Court is of the considered view that the finding rendered by the Tribunal that there is no disability and consequently there is no loss of earning capacity, deserves to be set aside.

10. The fact remains that the claimant suffered fracture and implant has been used during surgery. The use of implant would suggest that the fracture is neither complex nor simple and it is a compound fracture. Therefore, the fracture would certainly affect loss of earning capacity of the claimant which is estimated by the doctor at 31%. Based on an overall appreciation of the oral and documentary evidence available before this Court and considering margin of error, this Court fixes the disability at 30%, based on which compensation needs to be quantified.

11. The Tribunal has fixed the income of the claimant at Rs.4,000/-. Considering the same and also considering the age of the claimant at 37 years at the time of accident, by adopting the relevant factor, the compensation is quantified at Rs.1,38,340/-.

12. Accordingly, the Civil Miscellaneous Appeal is allowed, awarding the compensation of Rs.1,38,340/- to the claimant. No costs. The 2<sup>nd</sup> respondent/Insurance Company is directed to deposit the compensation of Rs.1,38,340/- awarded by this Court along with interest to the credit of the claim petition within a

period of four weeks from the date of receipt of a copy of this order. The award amount will carry interest of 12% which shall be computed after the expiry of 30 days from the date of accident till the date of deposit. On such deposit being made, the Tribunal/Workmen Compensation Commissioner shall transfer the same directly to the bank account of the claimant through RTGS within a period of two weeks thereafter. The claimant shall pay the necessary court fee, if any, before receiving a copy of the judgment.

Sd/-  
Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

ogy/GLN

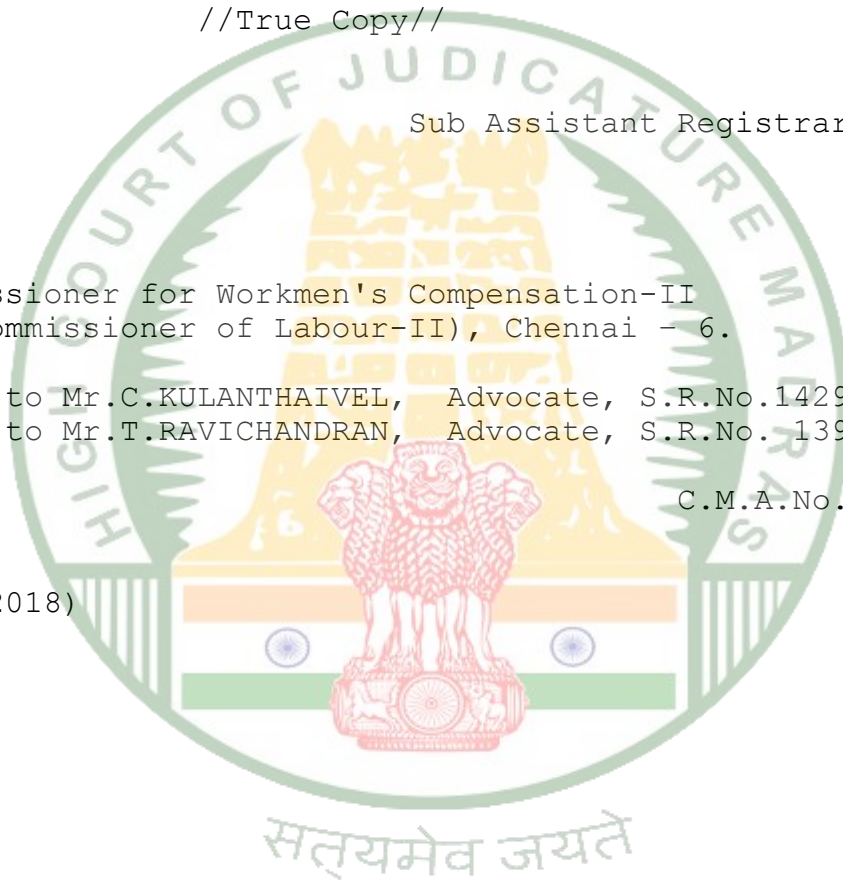
To

The Commissioner for Workmen's Compensation-II  
(Deputy Commissioner of Labour-II), Chennai - 6.

+1cc to Mr.C.KULANTHAIVEL, Advocate, S.R.No.14297  
+1cc to Mr.T.RAVICHANDRAN, Advocate, S.R.No. 13993

C.M.A.No.903 of 2014

MG (CO)  
TR(21/03/2018)



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