

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CMA No.320 of 2006

ORDER:

This is an appeal filed by the injured workmen challenging the orders dated 31.01.2006 in WC.Case No.25 of 2004 on the file of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour.II Circle, Guntur.

The application is filed by one Kota Venkata Rao. He states that he sustained an injury arising out of and in the course of employment while he was working on a lorry bearing No.AP 16V 8188. The said injury is supposed to have occurred on 25.09.2002. The opposite party No.1 chosen to remain *ex- parte*, while opposite party No.2, which is the Insurance Company, denied most of the averments made in the application. They denied the employer/employee relationship, denied the accident and also the extent of the injury.

The Commissioner for Workmen's Compensation, Guntur, after noticing the evidence on record, came to the conclusion that there was an employer/employee relationship. The age was also determined as 17 years on the basis of the record of the Government hospital. The minimum wages were adopted with reference to GO.Ms.No.30 dated 27.07.2000. As far as loss of earning capacity is

concerned, the Commissioner relied upon the deposition of the Doctor, who assessed the disability as 25% and consequently, assessed loss of earning capacity as also 25%. Based on all the above, the Commissioner came to a conclusion that the compensation payable is Rs.68,486/-. He directed the same should be paid by opposite parties 1 and 2. It is this order that is assailed in the appeal.

Heard learned counsel Sri N.Subba Rao for the appellant and Sri Ramachandra Reddy Gadi for the respondent.

The appeal is filed by the workmen essentially questioning the assessment of loss of earning capacity. The loss of earning capacity was assessed as 25%. It is this finding that is essentially assailed in the appeal.

It is the contention of the learned counsel for the appellant that as the injured was found to be unfit for the work he was doing/performing at the time of the accident, he should be given 100% loss of earning capacity as a lorry driver. Learned counsel cited the judgment of **S.Suresh v. Oriental Insurance Company Limited**¹ and argued that the assessment should have been 100%.

In reply to this, the learned counsel for the respondent pointed out that the evidence of the Doctor-opposite party No.2, which is very critical and was rightly relied upon by the lower Court/Commissioner. Learned counsel pointed out

¹ (2010) 13 SCC 777

that the injuries in this case are not as serious as the injuries in the case before the Hon'ble Supreme Court of India. In the present case, the Doctor, who examined the worker was examined as AW.2. The Doctor noticed and deposed that "at present he cannot work as a cleaner as there is a wound on the foot". He also deposed in his cross-examination as follows:

"The ankle movement of the patient is normal. Basing on the Orthopaedic Manual for assessment of disability, I put the disability as 25% in view of the present condition of the patient. The patient can as well attend to his normal duties. The patient can attend to duties having some light work and can earn for his lively hood. It is not true to say that the patient is not having disability of 25% and he is having only 10%. As the patient did not take proper care of the wound, it is not healed."

Therefore, the learned counsel pointed out that assessment of damages by the Tribunal is correct and that no interference is called for.

As rightly pointed out by the learned counsel in the case before the Supreme Court, there was an amputation of the right leg of the employee below the knee as a result of which he could not do the work. Same is not the case in the present appeal. As was held in a number of judgments in ***N.Sree Ramulu @ Sree Rama Murethy v. B.Lakshmi Narayana***

and another², Nakka Rambabu Vs. O. Akka Rao³, and National Insurance Company Limited, Ananthapur v. D.Sivasankar and another⁴.

Loss of earning capacity is not the same as the disability. The Court has to assess the evidence and see the profession of the claimant, the work he was carrying on prior to the accident etc., and the incapacity caused in the job etc. The worker also has a duty to disclose that he was not in a position to do any other job because of the injury. It is a question of fact in each case and no straight jacket formula is there. The evidence in this case does not point to a 100% loss in earning capacity.

For all the reasons stated above, the appeal is dismissed. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date:15.11.2017
KLP

² 2013 (5) ALD 249

³ 2015 ALD (4) 50

⁴ 2006 (4) ALD 398