

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

C.M.A.No.446 of 2009

JUDGMENT:

This appeal is filed against the orders dated 12.08.2008 in W.C. Case No.40 of 2007 passed by the Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Kadapa.

The brief facts of the case are that the applicant was working as a driver on the Lorry bearing No.AP04-T-5164 belonging to opposite party No.1. Opposite party No.2 is the insurer of the lorry. Stating that the said lorry met with a motor vehicle accident on 01.09.2004; that the applicant sustained fracture injuries of both bones of right leg; that he was getting wages of Rs.4,000/- per month by the date of accident; the applicant filed WC No.40 of 2007 praying for compensation of Rs.4,67,136/- for the injuries sustained during and in the course of employment. Opposite party No.1 remained *ex parte* while the second opposite party filed his counter denying the averments and the claim and that the compensation claimed by the applicant is high and without any basis.

During the course of trial, the applicant examined himself as AW.1 and marked Exs.A.1 to A.7. The Doctor, who treated the injured-applicant, was examined as AW.2. After considering the entire oral and documentary evidence, the Commissioner for Workmen's Compensation, Kadapa passed

the impugned order, wherein he directed the payment of compensation of Rs.2,24,109/- by both the opposite parties 1 and 2 jointly and severally. Aggrieved by the said order, the insurance company filed the present appeal.

Heard Smt. Kalpana Ekbote, learned standing counsel for the appellant/insurance company and Sri Naseeb Afshan, learned counsel for the respondent/applicant.

The learned counsel for the appellant strongly urges that the order of the lower Court was wrong and contrary to the evidence. Her contention is that the assessment of loss of earning capacity as 100% is totally incorrect and is contrary to the evidence on record, particularly the medical evidence. This is the essential ground that is urged in the appeal.

On the other hand, learned counsel for the respondent/applicant strongly supports the finding and states that loss of earning capacity cannot be equated to the medical disability. He argues that even though the medical disability assessed as 55%, the employee in question is totally able to work and therefore, according to him, the assessment of loss of earning capacity is correct and valid.

In this case, there is no serious dispute about the occurrence of the accident or about the other factors that were considered by the Commissioner in coming to his conclusion. The issue in controversy is about the loss of earning capacity. The oral evidence of AW.1 is not very clear about the loss of earning capacity. There is a simple assertion

that he sustained “permanent disability” and lost his total earning capacity and lost the employment as driver. The cross-examination on this point is also not very clear. Even the disability certificate is not issued by a medical board but is issued by a private practicing Doctor.

The Doctor, who is a private practitioner and treated the applicant, was examined as AW.2. Even his cross-examination is also very cursory and brief. The fact that is deposed in the chief examination is that he saw the applicant on 15.03.2008 whereas the accident in question occurred almost four years earlier in September 2004.

As per the medical certificate issued which is marked as Ex.A.5, the Doctor found tenderness over the right leg, muscle weakness in the right leg, one inch shortening of the right leg, the movement of the right knee and ankle were restricted as limping present. This was the finding of the Doctor, as a result of the examination of the witness in March, 2008. Basing on this, the Commissioner came to the conclusion that there is 100% loss of disability.

The learned counsel for the appellant is right in her submission that the evidence in this case is not enough to justify that there is 100% loss of earning. The one inch shortening of the right leg is now a permanent disability as pointed out by her, but the rest of the diagnosis viz., the tenderness of the muscles stiffness/restriction of movement etc. could be due to various intermediary precipitating

factors. She is also right in pointing out that 100% disability can be assessed when there is an amputation of the leg or total loss of a limb by which the driver would be prevented from carrying out his vocation. The mere fact that there is one inch shortening of the leg cannot lead to a conclusion that there is 100% disability. The time gap between the injuries and the medical certificate, according to the learned counsel for the appellant is another factor which should be considered before accepting the Doctor's assessment.

This Court agrees with the submissions made by the learned counsel for the appellant and does not wish to rely on the Doctor's Certificate. In ***United India Insurance Co., Ltd., Secunderabad v. S.K. Razak and another***¹, it was held in para-36 that the opinion of the Doctor has evidentiary value, but it cannot be treated as the gospel, the Court has to carefully examine the nature of injuries and evaluate the opinion of the Doctor. This Court also agrees with the judgment of ***S.K. Razak*** and is of the opinion that the learned counsel for the appellant is right in her submission that the opinion of the Doctor in this case does not inspire confidence.

Therefore, this Court holds that the order passed in W.C.No.40 of 2007 is liable to be modified. Accordingly, the award/order dated 12.08.2008 in W.C. Case No.40 of 2007 passed by the Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Kadapa is modified

¹ 2015 (4) ALD 291

holding that the disability is only 55% and not 100%, as decided by the lower Court.

With this modification, the appeal is allowed. Miscellaneous petitions, if any, pending in this appeal shall stand closed. However, there shall be no order as to costs.

D.V.S.S. SOMAYAJULU, J

Date: 21.12.2017
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