

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

C.M.A.No.301 of 2006

JUDGMENT:

This appeal is filed by a workman against the orders dated 10.11.2005 in W.C.No.75 of 2004 on the file of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-1 Circle, Guntur.

The brief averments of the claim petition are that the applicant was working as a driver in lorry bearing No.AP-7X-4055 belonging to the first respondent herein. He states that an accident occurred on 26.09.2004 in the course of his employment. He was paid wages of a sum of Rs.4,000/- per month. He is totally disabled and unfit for driving and he, therefore, claims compensation for Rs.4,00,000/- with interest etc.

The first opposite party filed counter denying the wages, but he admits the employer and employee relationship. The second opposite party/insurance company denied the entire accident and also denied that there is an employer and employee relationship. The claim for compensation was also denied.

The applicant was examined as AW.1 and Exs.A.1 to A.4 were marked. He states that he worked under first opposite party as a driver for six months prior to the accident, but he did not file any specific proof to show that he was working with wages of Rs.4,000/- per month.

Medical record in this case also reveals that two doctors were examined as AW.2 and AW.3. AW.2 deposed that as a result of the fracture of pubic bone of the applicant the urinary passage tube was also injured. He also deposed that the applicant has to undergo prolonged treatment under him and was undergoing treatment even on the date of the deposition. According to this Doctor, the disability is 30 to 40%.

AW.3 was Assistant Professor of Orthopedics in Guntur Medical College. He deposed that the applicant had a grievous injury in the fracture of his right side femur and also suffered urethral injury and was treated by urologist and implant was also fixed into the leg of the applicant. The Doctor categorically states that AW.1 cannot drive heavy vehicles because of the restriction of hip and knee movement. According to this Doctor, the patient was having a permanent and partial disability of 20%.

The Commissioner for Workmen's Compensation in his impugned order dated 10.11.2005 has considered all the aspects and came to a conclusion that a reading of FIR discloses that lorry bearing No.AP-7X-4055 was involved in the accident. It is also noticed by the Commissioner that the owner of the lorry No.AP-7X-4055 (first opposite party) has admitted the employment. Therefore, the Commissioner came to the conclusion that there was relationship of the employer and employee between first opposite party and

second opposite party. As far as the question of assessment is concerned, the Commissioner for Workmen's Compensation came to the conclusion that the loss of earning capacity is 50%. As the wages paid to the applicant were not proved, the Commissioner adopted the minimum wages which are payable and therefore, came to the conclusion that the wages of the applicant at the time of the accident are Rs.3,774/- per month. By taking into consideration the age, wages and loss of earning capacity, the Commissioner assessed compensation of Rs.2,47,352/- and directed payment of the same within 30 days. It is this order that is assailed in the present appeal.

I have heard the learned counsel, Sri T.S. Rayulu, for the appellant/applicant and V. Venkatarami Reddy, for respondent No.2/Insurance Company.

The contention of the learned counsel for the appellant is that the applicant sustained an injury which was grievous in nature. He also argued that the loss of earning capacity is different from the disability, as specified by the Doctor. His contention is that there is 100% loss of earning capacity in contra distinction to the physical disability noticed and certified by the Doctors. He relies very heavily on the statement made by AW.2 that the applicant cannot drive a heavy vehicle because of the restriction of hip and knee movement. Therefore, relying upon **N. Sree Ramulu and**

others v. B. Lakshmi Narayana (died) and others¹ which is a judgment of the learned single Judge of this Court, he argues that the loss of earning capacity should be assessed as 100% and that therefore, the Commissioner erred in fixing 50%.

In reply to this, the learned standing counsel for the second respondent states that the order of the Commissioner is perfectly valid and correct and that in view of long line of judgments of this Hon'ble High Court and of the Supreme Court of India also, there is a need for positive evidence to show the loss of earning capacity. His submission is that the Doctor can only assess and depose about the accident and the disability whether permanent or partial but the workman will have to adduce evidence to show that he was disabled to such an extent that he could not do "any other job" because of the injury. Loss of earning capacity cannot be equated to the disability as per the learned counsel. In the absence of such evidence from the side of the workman, the learned counsel submits that assessment of the compensation by the Commissioner under Workmen's Compensation cannot be faulted with.

I find substantive force in the submission made by the learned standing counsel for the second respondent/ insurance company. The Hon'ble Supreme Court of India in a case reported in **Raj Kumar v. Ajay Kumar and another**² held in para 13, sub-para (3) that the loss of earning capacity for

¹ 2013 (5) ALD 249

² 2011 ACJ 1

some time will have to be assessed by the Tribunal considering the evidence in its entirety. To the same effect is the judgment reported in ***Palraj v. The Divisional Controller, NEKRTC***³ wherein the Hon'ble Supreme Court noticed that the driver in this case suffered loss of both his legs and was unfit to be a driver and still he was in earning a living as a peon by the respondent. The Hon'ble High Court of Andhra Pradesh also in judgment reported in ***Gorla Obula Reddy v. K. Raj Gopal Reddy and Divisional Manager, United India Insurance Company Limited***⁴ pointed out that the fact that the employee is capable of doing other job notwithstanding the disability in the original job is a factor that has to be taken into account. Thus, 100% loss of earning capacity is a question of fact to be determined in each case.

In the case on hand, this Court finds that the applicant did not make any endeavor to show that he was disabled from carrying out all other jobs including the job of the driver nor did the Insurance Company prove that he was earning a livelihood in another job to lower or to scale down the compensation. In the absence of such evidence, merely on the basis of the statement of the Doctor that he is unable to work as a driver, the compensation cannot be enhanced 100%, as requested by the learned counsel for the appellant.

This Court is of the opinion that the impugned order is a reasoned and well-thought out order which has considered

³ 2010 (10) SCC 347

⁴ 2004 (6) ALD 534

evidence on record and came to a conclusion about the compensation payable. Therefore, there is no ground to interfere with the impugned order.

Accordingly, the Civil Miscellaneous Appeal is dismissed and the impugned order dated 10.11.2005 of the Commissioner for Workmen's Compensation in W.C.No.75 of 2004 is hereby confirmed. However, there shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

Date: 10.11.2017
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D.V.S.S. SOMAYAJULU, J

