

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

CMA No. 458 of 2006

J U D G M E N T :

This is an appeal filed against the order dated 20.10.2005 in WC.No.77 of 2004 passed by the Commissioner of Workmen's Compensation and Assistant Commissioner of Labour, Eluru.

The facts in brief are as follows:

The applicant was working as Driver under the first opposite party on a monthly salary of Rs.3,500/-. On 13.08.2004 at about 2.00 am., he met with an accident and received multiple injuries near Sithara Centre on Gollapudi Bypass Road, Vijayawada. Since the accident occurred in the course of employment, he filed the application against opposite parties 1 and 2, who are owner of the lorry and the insurer of the lorry respectively claiming compensation of Rs.4,00,000/- for the multiple injuries received by the applicant. First opposite party remained *ex parte* while the second opposite party filed a counter denying the accident, employment, age, wages, mode of accident and what all stated in the claim petition.

The applicant himself was examined as AW.1 and the Doctor, who examined the applicant was examined as AW.2 and he stated that he examined the applicant and found him

to be suffering with 35% disability as a result of fracture of right tibia, calcaneal fracture of left foot, with loss of movement of left ankle. Exs.A.1 to A.5 documents were marked. On behalf of the second opposite party, Ex.B.1- Insurance policy was marked. After considering the documentary and oral evidence, the Commissioner for Workmen's Compensation passed the impugned order, wherein he directed payment of compensation of Rs.4,66,291/- by both the opposite parties 1 and 2 jointly and severally. Aggrieved by the said order, the present appeal is filed.

Heard Sri Kota Subbarao, learned counsel for the appellant and Sri N.Nageswara Rao, learned counsel for the respondents.

The essential ground that is urged in the appeal is that the assessment of loss of earning capacity at 100% is not correct and that the Doctor, who examined the injured in this case has incorrectly issued the disability certificate. According to learned counsel for the appellant, in case of an injury that is not described in the Schedules, the assessment of loss of earning capacity has to be by a qualified medical practitioner. The learned counsel relies upon explanation II to Section 4 of the Workmen's Compensation Act, 1923 which says that in assessing the loss of earning capacity, the qualified medical practitioner should have due regard to the percentage of loss of earning capacity specified in schedule-I.

Therefore, it is the contention of the learned counsel that the Doctor in this case did not assess the loss of disability in a proper manner and even the Commissioner for Workmen's Compensation did not assess the compensation correctly. It is the contention of the learned counsel that the disability could not have been assessed at 100%. In the worst case scenario, according to the learned counsel, the disability and the consequent loss of earning capacity cannot exceed 35%.

The learned counsel relied upon judgments reported in ***New India Assurance Co. Ltd., Hyderabad v. Sammayya***¹, and ***United India Insurance Co., Ltd., v. V.Sudarshan and another***² to contend that the Doctor must assess the loss of earning capacity along with the disability. It is his case that the Doctor merely assessed the disability without assessing the loss of earning capacity. In ***Sammayya's*** case (1 supra), the learned single Judge of this Court remanded the matter back to the Commissioner to assess the loss of earning capacity in addition to the disability assessed. In ***V.Sudarshan's*** case (2 supra), this Court relied upon ***Gona Siva Sankar v. Varaprasad***³ and held that in case the Doctor does not assess the loss of earning capacity, the Commissioner is competent to do the same and remanded the matter directing the Commissioner to determine the loss of earning capacity. However, it is noticed that in ***Gona Siva Sankar's*** case (3) supra, the learned single Judge upheld the

¹ 1995 (3) ALT 470

² 2011 (2) ALD 614

³ 2005 (1) ALD 386

fixation of loss of earning capacity by the Commissioner when the Doctor did not do so. The learned counsel also relied upon ***Pal Raj v. Divisional Controller, North East Karnataka Road Transport Corporation***⁴, wherein the Hon'ble Supreme Court of India was dealing with a case of a Driver, who sustained grievous injuries. According to the worker in that case before the Hon'ble Supreme Court, the loss of earning capacity was 100% and the case was argued on that behalf. On the other hand, the Hon'ble Supreme Court has noticed that with external aid, the mobility of the Driver has improved and he is able to perform certain works. The Hon'ble Supreme Court also noticed that he is gainfully employed after the injury and has secured a job as a peon in the respondent office. Therefore, the Hon'ble Supreme Court concurred with the order passed by the High Court holding that the extent of disability is 20%. The Hon'ble Supreme Court, after an analysis of the evidence, ultimately came to a conclusion that the disability should be fixed at 35% and not 20%. Therefore, this also is a case where the Court itself assessed the evidence. Neither of the last two cases actually support the argument advanced.

In reply thereto, the learned counsel for the respondent submitted that the order passed is a well reasoned order, which considered all the submissions that are made. He pointed out that the cross-examination of AW.1 was not at all

⁴ 2010 ACJ 2859

comprehensive and therefore, the evidence should be deemed to be admitted. He also pointed out that the Doctor was examined as AW.2 and he re-asserted that the disability is 35%. In the cross-examination, in the last few lines, it is clearly asserted by the Doctor that as the applicant has lost his ankle moment, his loss is permanent. Even after physiotherapy or surgery, his recovery may be partial. The learned counsel points out that the assessment of the Doctor is thus based on cogent reasons and that therefore, in line with the judgment reported in ***Pratap Narain Singh Deo V. A.Srinivas Sabata and Another***⁵, which is a judgment of four judges, he urges that the loss of earning capacity should be held to be 100%. The learned counsel for the respondent also draw the attention of this Court to a Division Bench judgment of the Kerala High Court reported in ***Oriental Insurance Co., Ltd., v. Jimmy and another***⁶, wherein the Kerala High Court is considering the very similar case in which the medical practitioner, who examined the worker gave a disability certificate, but did not assess the loss of earning capacity. The Division Bench came to a conclusion that a Doctor need not assess the loss of earning capacity in the certificate itself and can give evidence about the same as well.

In the case of on hand, the evidence of the Doctor is reflected in the previous paragraph, wherein he came to a

⁵ AIR 1976 SC 222

⁶ 2004 ACJ 900

conclusion that the disability of loss of earning capacity is total as far as the profession of the worker is concerned.

This Court finds force in the submission of the learned counsel for the respondent. The lower Court also came to the conclusion that the Doctor's evidence stating that the worker is unable to work as a Driver anymore is not challenged. The assertion of the first witness about his disability and loss of earning capacity was not really challenged in cross-examination. Therefore, there is no material to show that the assessment of damages is wrong or is high. The judgment of **Pratap Narain Singh Deo's** case (4 supra) and the evidence of the Doctor in this particular case, by which he mentions that even after surgery or physiotherapy, the damage cannot be reversed, appears to be correct. In **Gona Siva Sankar's** case (3 supra) also, it was held that unless it is shown that the Commissioner's order is **perverse** or arbitrary, the Court cannot interfere. Depending on the injury and the nature of employment in some cases, an injury to a limb or organ may result in total loss of earning capacity. This Court is of the opinion after a review of the entire evidence in regard that there are no grounds to interfere in this matter.

Therefore, the Civil Miscellaneous Appeal, which is filed by the Insurance Company, 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: 19.01.2018
KLP

