

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

C.M.A.No.43 of 2006

JUDGMENT:

This Civil Miscellaneous Appeal is filed by the Oriental Insurance Company Limited questioning the order dated 23.11.2005 passed in WC No.3 of 2004 by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Tirupati.

The case of the applicant before the Commissioner is that he was working as a driver on vehicle No.AP03-V-2892 belonging to first opposite party and insured with second opposite party. The applicant states that he met with an accident in the intervening night of 07.03.2003. After he sustained injuries, he took treatment and thereafter filed the WC case seeking compensation of Rs.2,00,000/- for the injuries sustained.

The first opposite party remained *ex parte*. The second opposite party filed a counter denying the entire case. The matter then went to trial. For the applicant, two witnesses, A.Ws.1 & 2 were examined and Exs.A.1 to A.15 were marked. For the opposite parties, no oral evidence introduced and only a copy of the insurance policy was marked as Ex.B.1. After the trial was concluded, the Commissioner passed the impugned order awarding compensation of Rs.4,72,944/- along with the interest. It is this order that is now assailed in the appeal by the Insurance Company.

This Court heard Sri Naresh Byrapaneni, learned counsel for the appellant/insurance company and Sri A. Chandraiah Naidu, learned counsel for the first respondent/applicant.

The essential issues that were raised and urged very vehemently during the course of submissions by the learned counsel for the appellant are that i) the Medical Board certified the disability only as 30% and the loss of earning capacity that was assessed is exorbitantly high and ii) alternatively, wages of the driver should have been fixed under G.O.Ms.No.30, Labour, Employment, Training and Factories (Lab-II), dated 27-7-2000 and not under G.O.Ms.No.81, dated 02.12.2000. Consequently, the learned counsel argued that the total compensation payable is only $\text{Rs.}3,647/- \times 60/100 \times 63.53715 = \text{Rs.}1,39,032/-$. His argument is that G.O.Ms.No.30 relating to Public Motor Transport should only be considered and that the Doctor's assessment should be taken on the basis for assessment in loss of earning capacity.

In reply thereto, the learned counsel for the first respondent/applicant argued that the percentage of physical disability cannot be equated to the loss of earning capacity and even a small injury can result in a permanent disablement. In this case, he relies on the Doctor's evidence to justify the assessment of loss of earning capacity as 100%.

This Court after hearing both the counsel and after considering the record notices that Ex.A.14 is the certificate dated 18.11.2014 issued by the Doctor in question, who clearly opined that the applicant cannot walk or stand without support; that he also cannot squat and sit cross legged and that cannot perform any hard work. The Doctor was examined as AW.2 on 09.08.2005. He clearly deposed that the applicant cannot perform any hard work, that he cannot walk or stand for a long time without any support. He also deposed that the applicant cannot drive heavy vehicles like four wheelers and that his right knee joint is not stable during walking and standing. Suggestions were put to the Doctor that his evidence is not correct. A suggestion was also put to the Doctor that the percentage fixed by him is excessive. Other than this, there is no substantial cross-examination of AW.2. There is no evidence or medical evidence to the contrary also to show that the evidence of AW.2-Doctor was wrong. A perusal of the lower Court record also reveals that the lower Court considered various judgments including the cases reported in **Samala Gangahdar v. Ch. Gangaram**¹, **National Insurance Co. Ltd. v. Mohd. Saleem Khan**² and **New India Assurance Co. Ltd. v. K. Appa Rao**³. In all these cases, the loss of earning capacity was assessed at 100%, even though the Doctors evidence of

¹ 2004 (5) ALT 115

² 1991 (2) APLJ 337

³ 1995 (1) ALT 499

disability was lesser. In this case, the Doctor's evidence leads to the conclusion that the applicant cannot work as a driver anymore.

The learned counsel for the appellant/insurance company relied upon a judgment of the High Court of Kerala reported in ***United India Insurance Co. Ltd. v. Selvaraj⁴*** and argued that the medical certificate cannot be used as the basis for coming to a conclusion that the loss of earning capacity is 100%. In reply thereto, the learned counsel for the first respondent/applicant cited two judgments of the Hon'ble Supreme Court of India in i) ***K. Janardhan v. United India Insurance Co. Ltd.*** and ii) ***Mohan Soni v. Ram Avtar Tomar*** and argued that loss of earning capacity is correctly assessed. The passage extracted from the case of ***Mohan Soni*** (supra) is in fact an answer to the appellant's argument. The Hon'ble Supreme Court of India held as follows:

"In the context of loss of future earning, any physical disability resulting from an accident has to be judged with reference to the nature of work being performed by the person suffering the disability. This is the basic premise and once that is grasped, it clearly follows that the same injury or loss may affect two different persons in different ways. Take the case of a marginal farmer who does his cultivation work himself and ploughs his land with his own two hands; or the puller of a cycle-rickshaw, one of the main means of transport in hundreds of small towns all over the country. The loss of one of the legs either to the marginal farmer or the cycle-rickshaw-puller would be the end of the road insofar as their earning capacity is concerned. But in case of a person engaged in some kind of desk work in an office, the loss of a leg may not have the same effect. The loss of a leg or for that matter the loss of any limb to anyone is bound to have very traumatic effects on one's personal, family or social life but the loss of one of the legs to a person working in the office would not interfere with his work/earning capacity in the same degree as in the case of a marginal farmer or a cycle-rickshaw-puller.

⁴ 2017 ACJ 47

It is all very well to theoretically talk about a cart puller changing his work and becoming a vegetable vendor. But the computation of compensation payable to a victim of motor accident who suffered some serious permanent disability resulting from the loss of a limb etc. should not take into account such indeterminate factors. Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection (as in the case of persons covered by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income. The loss of earning capacity of the appellant, according to us, may be as high as 100% but in no case it would be less than 90%. We, accordingly, find and hold that the compensation for the loss of appellant's future earnings must be computed on that basis."

(emphasis supplied)

In this case, this Court notices that apart from making suggestions, there is no positive evidence introduced to scale down the compensation that is awarded. This Court therefore concurs with the findings of the lower Court on this issue.

The other aspect urged is that the lower Court erred in relying upon G.O.Ms.No.81 instead of G.O.Ms.No.30. As per the learned counsel for the appellant/insurance company, G.O.Ms.No.30 applies to the facts and circumstances of the case on hand and that therefore, the lower Court erred in relying upon G.O.Ms.No.81.

This Court finds that the applicant in question is a driver of Tipper and not the driver of a public motor transport vehicle. The tipper in question is a vehicle belonging to the first opposite party. Therefore, this Court holds that the

Commissioner of Workmen's Compensation rightly relied upon G.O.Ms.No.81.

This Court on an examination of the facts and circumstances notices that the order of the Commissioner is a reasoned order passed after considering all the facts and the law on this subject. In fact, the impugned order reveals that the Commissioner took pains to correctly assess the facts before coming to a conclusion that the unstable right knee and injuries sustained by the applicant have permanently disabled him from working as as a driver and from carrying out his profession as before. In view of all the above, this Court comes to a conclusion that the impugned order is correct and valid and there is no scope for interference by this Court.

Hence, the Civil Miscellaneous Appeal is dismissed and the order dated 23.11.2005 passed in WC No.3 of 2004 by the Commissiner for Workmen's Compensation and Asstistant Commissioner of Labour, Tirupati, is confirmed. However, there shall be no order as to costs. As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 16.04.2018
Isn