

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

C.M.A.No.90 of 2007

JUDGMENT:

This Civil Miscellaneous Appeal is filed by the applicant challenging the order dated 29.05.2004 passed in W.C.No.68 of 1999 on the file of the Court of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Vijayawada, Krishna District.

2. The applicant in this case is a railway employee and was working as a Grade-I Welder. On 22.04.1991 when he was sent on deputation to Yellahanka, he sustained a fracture injury. Thereafter, he was treated for the injuries initially at Yellahanka and later at Railway Hospital, Vijayawada. Claiming that the injury caused him a permanent disablement, this case is filed seeking compensation of Rs.1,00,000/- with interest etc.

3. The opposite parties are the Union of India (OP.1) and the Deputy Chief Mechanical Engineer, Wagon Workshop (OP.2). The second opposite party filed a counter stating that for the entire period of injury, the injured was given leave. Later, when he was found fit for the duty, he was re-employed. According to the opposite parties of the accident, for the period of treatment; full wages from the date of the accident were given by the railways. The doctors of the railway hospital also found that he was fit for employment and therefore, he was absorbed and taken back into his

original duty as a welder. Therefore, their contention is that there is no permanent damage at all and for the period in which he was not working, the applicant workman has been paid full wages. They state that without working he has been paid. Therefore, the respondents submit that there is no loss whatsoever much less loss of earning capacity.

4. The railways also argued that in view of the examination by the railway doctors, the subsequent certificate issued by AW.2 is not valid and does not deserve to be considered.

5. On behalf of the applicant, AWs.1 & 2 were examined and Exs.A.1 to A.5 were marked. On behalf of the opposite parties, no witness was examined and also no documents were marked.

6. After considering the oral and documentary evidence, the Commissioner passed an order dismissing the claim in its entirety, vide his orders dated 29.05.2004, which is the order impugned in the present appeal.

7. This Court has heard Sri Srinivas Emani, learned counsel for the appellant/applicant and Sri T.S. Venkata Ramana, learned counsel for the respondents/Railways.

8. It is the submission of the learned counsel for the appellant that the lower Court committed a grave error in not awarding the compensation and in negating the evidence of AW.2-Doctor, who gave the medical certificate. The learned counsel relied upon a Division Bench judgment of this Court

reported in ***Charan Singh and others v. G. Vittal Reddy and others***¹ and argued that it is not necessary that only the Doctor who treated the workman should be examined to prove the percentage of disability. It is his contention that the very same Doctor who treated the applicant need not be examined and that the certificate given by a trained medical professional should be given due respect.

9. This Court on an examination on this issue finds that the applicant himself agreed that railway doctors considered him fit for the same old job. He clearly deposed that “it is true that after treatment; observation and examination of the Doctor, I was considered fit for the same old job”. This court is of the opinion that if the applicant wanted to discard the earlier doctor’s certificate and rely upon the Ex.A.4 disability certificate, a duty was cast upon the applicant to point out the errors in the earlier assessment. The same was not done. The learned counsel for the respondents also rightly points out that the applicant had accepted the railway doctor’s evaluation and joined his job. Having derived the benefit of the said doctor’s certification, he cannot now say that the certification was wrong and that as per the private doctor’s certificate, there is a disability of 50%. This Court agrees with the submission of the learned counsel for the respondents. There is no material available to show that the railway doctor’s certificate is not correct or that the

¹ 2003 (1) An.W.R. 741 (DB) (AP)

assessment is wrong. In these circumstances, this Court holds that after certification by the railway Doctor, the applicant joined the job and enjoyed the pay and perks. Therefore, he cannot contend that the earlier certification is wrong and that the subsequent certificate should be considered. His conduct clearly estops him from raising a claim now.

10. The other larger issue that falls for consideration is whether the applicant is entitled to compensation under the Workmen's Compensation Act. It is an admitted fact that in this case that the entire period in which the applicant had some difficulty due to the accident was treated as 'on duty' by the respondents. The deposition of the applicant is very clear. He agrees that he was paid full salary for the entire period treating it as on duty. He also agrees that even though he was initially posted in a lesser post there is no reduction in his salary. He also agrees that after treatment and examination by the railway Doctor he was considered fit for the same old job. He was posted in the same post also. Therefore, this Court finds that there is absolutely no monetary loss to the applicant. Even more interesting and important are the two admissions in the cross-examination of AW.1 viz., a) it is true that compensation is based on disability and b) it is true that I am not fit for compensation. These two admissions of the applicant are directly against his current claim.

11. In addition, it is also important to note that the entire scheme of compensation under the Workmen's Compensation Act proceeds on the basis of injury arising out of and in the course of employment and the consequent loss of earning capacity. The entire scheme of the Act, the schedules and various sections make it clear that compensation under the Workmen's Compensation Act can be awarded in case the applicant sustained loss of earning capacity. A rough and ready method has been evolved by the legislature, which has fixed the percentages to be adopted along with the multipliers for determining the loss of earning capacity. Schedule-I (part-I and Part-II) deal with percentage of loss of earning capacity only. Even for non-schedule injuries also, the medical practitioner shall have 'regard' to the percentage of loss of earning capacity as per schedule-I (Explanation-II). The entire scheme of the Act does not provide for payment of compensation for pain and suffering, mental agony etc. Therefore, where the employee/injured-applicant has not suffered any disability consequent on the accident and has not suffered a loss of 'earning capacity', as per the scheme of the Workmen's Compensation Act, he is not entitled to compensation.

12. The learned counsel for the respondents cited a judgment of the Madras High Court reported in case of the ***Divisional Manager, United India Insurance Co. Ltd., Madurai***

*v. Thomas*². Basing on this case, it was argued that the employee is entitled to compensation if he is continuing to do the same job. This judgment of the Madurai Bench of Madras High Court in the opinion of this Court runs contrary to the very scheme of the Workmen Compensation Act.

13. In addition, in assessing the loss of earning capacity, the fact that he was employed elsewhere would also be a factor in refusing the compensation and/or reducing the compensation and/or reducing the compensation. This Court took the view that the fact that the employee was an employed in another job or a similar job is a factor for reduction of the compensation. The judgment reported in *Palraj v. the Divisional Controller, NEKRTC*³ is relevant here. The discussion of the learned single Judge in *N. Sree Ramulu and Others v. B. Lakshmi Narayana (died) and Others*⁴ at para 25 (h) is also relevant.

“The loss of earning capacity arising from a permanent disability may be different from the percentage of permanent disability. Equating the percentage of loss of earning capacity to the percentage of permanent disability would result in the award of either too low or too high a compensation. What requires to be assessed is the effect of permanent disability on the earning capacity of the injured. This involves ascertainment of what activities the claimant can carry on in spite of permanent disability and what he could not do as a result of the permanent disability; ascertainment of his avocation, profession and nature of work before the accident and also his age; and finding out whether he is totally disabled from earning any kind of

² 2015 (0) Supreme (Madras) 972

³ 2010 (10) SCC 347

⁴ 2013 (5) ALD 249

livelihood (or) whether in spite of permanent disability, he can still effectively carry on the activities and functions, which he was earlier carrying on (or) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. In para. 14 of Raj Kumar (17 supra) and in para. 8 of Mohan Soni (25 supra) appropriate guidance is available.

14. In the case on hand, it is admitted that the employee was paid the entire salary due to him when he was not working and later he was absorbed in the same job again. Therefore, this Court holds that there is no loss of 'earning capacity', more so, in the future as his old job and pay are fully restored.

15. In view of the scheme of things under Workmen Compensation Act, this Court cannot award compensation on any other ground except the loss of earning capacity. The workman in question had an option of filing a suit or other proceedings in which he may have eligible for general damages etc. Since he has opted for a remedy under Workmen Compensation Act, he is not entitled to any compensation in terms of the Act in this case. His conduct in accepting the Railway doctor's assessment and joining the job disentitles him to seek any further compensation on the basis of another certificate. He also filed the present application in May, 1994, which is almost two years after his old post was given back. His conduct therefore estops him from making this claim.

16. Therefore, for all the above reasons, the Civil Miscellaneous Appeal is dismissed. However, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 14.02.2018
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