

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

CMA No. 1220 of 2008

JUDGMENT :

This is an appeal filed against the order dated 05.12.2005 in WC.No.24 of 2004 passed by the Commissioner of Workmen's Compensation and Assistant Commissioner of Labour, Nellore.

The applicant before the lower Court is a Driver of the lorry bearing No.AP U 9786. The said lorry belongs to opposite party No.1 and is insured with opposite party No.2. The case of the applicant is that while he was driving the lorry, on 09.07.2004 at about 3.00 a.m., the lorry dashed against a stationary trailer on the road near Kakathiya Restaurant of Singarayakonda of Addanki Mandal, as a result, his right leg was amputated up to below the knee and thus he became permanently disabled. Claiming that the accident occurred during and in the course of employment, the present application was filed seeking compensation of Rs.3,50,000/- from both opposite party Nos.1 and 2. Opposite party No.2 filed a counter denying the entire accident and what all stated in the claim petition.

The applicant himself was examined as AW.1 and on his behalf, Exs.A.1 to A.10 were marked. He also examined one Doctor-AW.2, who assessed his physical disability and also

the loss of earning capacity. On behalf of the opposite party No.2, no one was examined and Ex.B.1-the copy of insurance policy was marked.

After assessing the evidence, the Commissioner came to a conclusion that the accident occurred during and in the course of employment and he directed opposite party Nos.1 and 2 to pay compensation of Rs.1,78,026/-. It is this order that is assailed in the present appeal by the driver/applicant.

Heard Sri N.Subba Rao, learned counsel for the appellant and Smt. M.Bhaakara Lakshmi, learned counsel for the respondents.

Learned counsel for the petitioner points out that this is a case of amputation of leg below the knee and that therefore, the Commissioner should have awarded 100% as loss of earning capacity. According to the learned counsel, the assessment of loss of earning capacity as 50% is wrong.

On the contrary, the learned counsel for the respondents points out that the assessment by the lower Court is correct and that the same is according to the schedule fixed in the Workmen's Compensation Act, 1923 (for short 'the Act') itself. According to the learned counsel for respondent in Schedule-I, part 2 of the Act itself, for amputation below the knee, the loss of earning capacity is 50%. Therefore, he contends that the assessment is correct.

He states that the Court cannot award anything more than what is stipulated in the Act itself.

The learned counsel for the appellant points out that the percentage of disability is to be assessed on the basis of the fact that the workman cannot drive vehicles anymore and he is unfit for his occupation. This was the assessment of the Doctor and also the evidence of the Doctor. Therefore, according to the learned counsel, as the workman cannot drive any vehicle as is totally unfit for his previous occupation, the loss of earning capacity is to be treated as 100%.

Learned counsel for the appellant also invites the attention of the Court to the four Judges decision of the Hon'ble Supreme Court of India in ***Pratap Narain Singh Deo V. A.Srinivas Sabata and Another***¹, wherein the Hon'ble Supreme Court held that if an employee is unfit for occupation that he was doing when the loss of earning capacity qua that employment is to be treated as 100%. He also relied upon ***Pamarthi Subba Rao v. H. Rama Rao and National Insurance Co. Ltd.***² and ***New India Assurance Company Ltd. v. Abdul Khader Jilani @ Jilani and Anohter***³.

In ***Pratap Narayan Singh***'s case and ***K. Janardhan v. United India Insurance Co. Ltd. and Another***⁴, the Hon'ble

¹ AIR 1976 SC 222

² 2008(3) ALD 650

³ 2007 (4) ALT 607

⁴ (2008) II LLJ 960 SC

Supreme Court has held that the assessment of loss of earning capacity is in relation to the work that the employee was discharging prior to the accident.

This Court finds substantial strength in the argument of the learned counsel for the appellant that because of the loss/amputation of the leg, the applicant will not be eligible to drive a vehicle. Therefore, as far as his loss of earning capacity in relation to the work he is doing is concerned, it is 100%.

For this reason, this Court holds that the assessment of loss of earning capacity is wrong in this case. The Commissioner should have assessed the loss of earning capacity as 100% treating the injury as permanent total disablement. Therefore, as per Section 4(b) of the Act, an amount equal to 60% of the monthly wage is to be multiplied by the relevant factor. The appeal is hence allowed with this direction and the order of the lower Court is modified. The opposite parties are directed to deposit the balance of the compensation within 30 days from the date of receipt of a copy of this order with interest at 12% on the difference in compensation from the date of the lower Court order till the date of deposit. If the deposit is not made as ordered, the consequent stipulated in Section 4 of the Act shall follow. There were no other points raised in the appeal nor was anything else argued on the other points. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 24.01.2018
KLP

