

HONOURABLE SRI JUSTICE N. BALAYOGI

CIVIL MISCELLANEOUS APPEAL No.723 OF 2006.

JUDGMENT:

1. This appeal is filed aggrieved over the quantum of compensation awarded in the order dated 03.11.2005 passed in WC.No.22 of 2004 by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-II Circle, Guntur.

2. The contention of the appellant is that the Commissioner erred in awarding only Rs.80,290/- towards compensation for the compound fractures to his both legs below the knee joint and having held that the appellant, during the course of employment sustained permanent partial disability due to the injuries, assessed the loss of earning capacity to the extent of 30% and thereby erred in not granting compensation as claimed for.

It is further contended that the disability assessed by the qualified medical practitioner is always not the same as that of the percentage of loss of earning capacity. The Commissioner ought to have seen that under Section 2(1) of the Workmen's Compensation Act, 1923 (for short 'the Act') the person who sustained partial permanent disability in the accident is permanently incapacitated to do the work what he was earlier doing and it amounts to 100% loss of earning capacity and the compensation has to be assessed by taking into consideration Section 2(1) of the Act. The Commissioner has also failed to award interest from the date of accident till the realization of claim.

3. Now the point that arises for consideration is:

“Whether the Commissioner for Workmen’s Compensation erred in not holding that the claimant should be deemed to have suffered total disablement as defined under Section 2(1)(l) of the Act and consequently he should be treated as having suffered 100% loss of earning capacity?”

The contention of the appellant/claimant is that he cannot be said to be suffering from permanent partial disability, instead the Commissioner ought to have considered him as suffering from total disability as defined under Section 2(1)(l) of the Act. Further contended that the medical opinion of AW.2-doctor is only confined to physical disability and cannot be taken as a measure of percentage of loss of earning capacity and that as the disability suffered by the claimant due to the accident arising out of and in the course of employment permanently incapacitated him to do any work, it should be treated as the claimant suffered 100% loss of earning capacity.

Per contra, there are no arguments being submitted by the respondents.

4. A.W.1 is the claimant who preferred this appeal and contested. There is no counter appeal for contest on behalf of the respondent-Insurance Company. With regard to the findings of the Commissioner for Workmen’s Compensation in W.C.No.22 of 2004, dated 03.11.2005 except contending that the claimant/appellant is permanently disabled as defined under Section 2(1)(l) of the Act and that loss of earning capacity should be assessed at 100%, the claimant/appellant did not dispute other findings of the Commissioner.

5. Therefore the facts undisputed, the findings of the Commissioner for Workmen's Compensation and also the evidence of A.W.1 and material available on record vide Exs.A.1 to A.9 and Exs. X.1 and X.2 evidently show that A.W.1 was employed by the first respondent-Owner as Cleaner on his lorry bearing registration No.AP.30T.2457. With regard to the 'employee and employer' relationship between the appellant/claimant and the first respondent-Owner is concerned, there is Ex.A.4-Copy of Registration Certificate of lorry bearing No. AP.30T.2457, as per which, the first respondent is the registered owner of the said lorry which was insured with the second respondent-Insurance Company under Ex.A.6 Insurance Policy which was in force with effect from 11.09.2003 to the mid night of 10.09.2004 whereas the accident occurred on 09.11.2003 at about 4.00 PM; therefore as on the date of accident, Ex.A.6 policy was in force.

Thus the evidence of A.W.1 read with documentary evidence at Exs.A.4 and A.6 goes to suggest that the first respondent is the owner/insured and second respondent is the insurer of lorry bearing No.AP.30T.2457 under Ex.A.6 policy which was in force as on the date of accident.

In fact the unimpeachable evidence of AW.1 remains unchallenged, though during the cross examination of AW.1 the second respondent was able to elicit that no document was produced showing that as on the date of accident, AW.1 was under the control of the first respondent-owner on offending lorry bearing No.AP 30T.2457, Ex.A.1 copy of FIR and Ex.A.2-copy of charge sheet clearly go to suggest that at the earliest point of time it was mentioned therein that A.W.1 was working under the control of first respondent as cleaner on her lorry bearing No. AP 30T 2457 as on the date of accident and the said lorry

was insured with the second respondent under Ex.A.6 policy which was in force as on the date of accident. Accordingly the employer and employee relationship between the appellant/claimant/AW.1 and first respondent/Owner was established and that the accident occurred during the course his employment while he was on duty.

6. The Commissioner for Workmen's Compensation after elaborate discussion came to the conclusion rightly that the evidence of AW.1 supported by documentary evidence at Exs.A.1 and A.2 well established that AW.1 while working as cleaner on the lorry bearing No. AP 30T.2457 under the control of the first respondent-Owner, the said lorry which was insured with the second respondent met with an accident on 9.11.2003 at about 4.00 PM and that there is employee and employer relationship between the appellant/claimant and first respondent-owner and that the accident occurred out of and during the course of his employment.

7. The evidence of AW.1 coupled with documentary evidence at Exs.A.1 and A.2 well established that on 9.11.2003 while A.W.1 was present on the offending lorry as cleaner and proceeding from Visakhapatnam to Karampudi with the load of coal, the driver of the said lorry drove the same in rash and negligent manner with high speed and hit against a stationed lorry near Reddygudem village . As a result of the said accident, he (AW.1) sustained compound and comminute fractures to his both legs below the knee joint. A.W.2 the doctor treated him in the hospital. As per Ex.X.1-Case sheet maintained by Govt. General Hospital, Guntur and Ex.A.3 Wound Certificate, AW.1 was admitted in the hospital on 10.11.2003 with fracture of t both bones of both the legs distal third with fracture of the medial malleolus of left tibia. AW.1 was managed by operating on both

the legs by introducing intra medullary nail on both sides with screws on 19.11.2003 to the left leg and on 4.12.2003 to the right leg. Subsequently AW.1 was discharged on 19.12.2003. Both legs were applied with POP slab. Check X-rays were taken on 23.03.2005.

8. The oral evidence of AW.2 supported by the documentary evidence at Ex.X.2 would establish that the left leg fractured united with intra medullary nail in side. The right leg also united with intra medullary nail in side. Callus was formed on at fracture side. Fibula bone of both legs was mal united. On further examination of AW.2, it was elicited that knee joint movements were restricted on both sides with restriction of movements of both ankle joints and that in view of the major weight bearing bones fractures with fracture of the medial malleolus of left ankle with restrict of movements of the joints, the percentage of disability was assessed at 30%, which is permanent and partial.

9. During the course of cross examination, A.W.2 stated that at the time of discharge, the condition of AW.1 was satisfactory and that he was advised to follow up treatment. During the course of follow up treatment, it was observed that AW.1 was suffering with 10 to 15 terminal degrees of both knee joints and ankle joints and accordingly disability was assessed at 30% basing on the 10 to 15 degrees of both knee joints and ankle joints. These facts and findings are not disputed by the respondents by adducing any rebuttal evidence.

10. In the case of ***N. SREE RAMULU @ SREE RAMA MURTHY Vs. B. LAKSHMI NARAYANA*** {2013 (5) ALD 249}, this Court having considered and elaborately discussed the case laws in ***PRATAP NARAIN SINGH DEO Vs. SHRINIVAS SABATA*** (AIR 1976 SC 222), ***NATIONAL INSURANCE COMPANY LIMITED Vs. MUBASIR***

AHMED {(2007) 2 SCC 349}, *K.JANARDHAN Vs. UNITED INDIA INSURANCE COMPANY LIMITED* {(2008) 8 SCC 518}, *RAMPRASAD BALMIKI Vs. ANIL KUMAR JAIN* {2008(6) ALD 82 (SC)}, *ORIENTAL INSURANCE COMPANY Vs.MOHD. NASIR* {2010(1) ALD 74 (SC)}, *YADAVA KUMAR Vs.DIVISIONAL MANAGER, NATIONAL INSURANCE COMPANY LIMITED* {(2010) 10 SCC 341}, *PALRAJ Vs. DIVISIONAL CONTROLLER, NEKRTC* {(2010) 10 SCC 347}, *S.SURESH Vs. ORIENTAL INSURANCE COMPANY LIMITED* {(2010) 13 SCC 777}, *RAJ KUMAR Vs. AJAY KUMAR* {(2011) 1 SCC 343}, *MOHAN SONI Vs. RAM AVTAR TOMAR* {(2012) 2 SCC 267}, *NEW INDIA ASSURANCE COMPANY LIMITED, SECUNDERABAD Vs. ABDUL KHADER JILANI @ JILANI* {2007(4) ALT 607}, *PAMARTHI SUBBA RAO Vs.H.RAMA RAO* {2008(3) ALD 650 (DB)}, culled out the following principles:

“(a) All injuries or permanent disabilities arising from injuries do not result in loss of earning capacity.

(b) Where permanent partial disablement results from an injury and the said injury is specified in Schedule I, it would be covered by Section 4(1)(c)(i) of the Act. In such a case, the workman would be entitled to such percentage of compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury;

(c) Where permanent partial disablement results from an injury and the injury is not specified in Schedule I, it would be covered by Section 4(1)(c)(ii) of the Act. In such a case, the workman would be entitled to such percentage of compensation which would have been payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury.

(d) In assessing loss of earning capacity in a case of permanent partial disablement resulting from an injury not specified in the Schedule I, the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I.

(e) The opinion of the medical practitioner as to the percentage of loss of earning capacity would be normally binding on the court where permanent partial disablement results from an injury not specified in Schedule I.

(f) The importance of medical evidence is only in case where disablement in performing duties which the workman was performing earlier cannot be decided without the aid of medical evidence. In case where it can be so decided with or without medical evidence (like amputation of limbs), medical evidence is not relevant and the question of the victim not suffering specified injuries is also not relevant.

(g) Loss of earning capacity is not a substitute for percentage of physical disablement and is only one of the factors taken into account.

(h) 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 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.

(i) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Commissioner/Court with reference to the evidence in entirety.

(j) Where a claimant is a workman who suffered injuries in an accident and his employer either provides for pension after retiring the workman on the grounds of medical invalidation or the dependants of the claimant are given appointment on compassionate grounds, he has a duty to disclose these facts and they would have a material bearing on the ascertainment of the percentage of loss of earning capacity.

(k) It is a question of fact in each case whether there is permanent total disablement on account of the injuries suffered by the claimant. In a given case, the loss of earning capacity caused by an injury can amount to 100% disablement. But, if the injured claimant is in a position to earn a living by doing a job other than the one which he was doing at the time of his accident, he cannot be said to have suffered 100% disability.

(l) 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.”

11. Keeping in view the above principles of law culled out from the decisions of the Apex Court and this Court (supra), irrespective of permanent or partial disability, if the injuries suffered by the appellant/claimant rendered him unfit to work as driver or as the case may be, the Commissioner ought to have assessed the loss of earning capacity at 100% and awarded the compensation on the said basis. In all the cases considered by the High Court wherein most of the claimants or injured were working as drivers and the disability in all those cases was permanent and partial and the disability was assessed by the Commissioner for Workmen's Compensation ranging from 30% to 80%; this Court held that as the injuries suffered by the claimants therein have rendered them unfit to work as driver or as the case may be, which job they were doing at the time of accident, the compensation shall be assessed and paid to them on the basis of loss of earning capacity at 100%.

12. In the case on hand, the evidence of AW.1 which is corroborating the evidence of AW.2 and supported by Ex.A.3 Wound Certificate , Ex.X.1 case sheet and Ex.X.2 X-ray and Ex.A.9 OP Chit issued by CGH, Guntur goes to suggest that PW.1 sustained fractures of both bones of both legs distal third with fracture of the medial malleolus of left tibia and that he undergone surgery on 19.11.2003 to the left leg and on 04.12.2003 to the right leg and he was discharged on 19.12.2005. Ex..X.1 and Ex.X..2 show that left leg fractures united with intra medullary nail in side and the right leg also united with intra medullary nail inside and callus was formed on at fracture side. The Fibula bone of right leg was mal united. The doctor, AW.2 examined A.W.1 at the time of coming for his evidence and found that his (AW.1) right leg was swollen and knee joint movements were restricted on both sides with restriction of movements of both ankle joints and that in view of the major weight bearing bones fractures with fracture of the medial malleolus of left ankle with restrict of movements of the joints, the percentage of disability would be 30%, which is permanent and partial disability.

13. AW.1 in his evidence deposed that after the accident, he was inpatient in the Government General Hospital, Guntur for more than one month and that he underwent two major operations to his both legs and steel rods were inserted to his both legs below the knee. He further deposed that he cannot sit or squat properly due to the restricted movements of both knee joints and hip joints and that he was unable to walk without the help of the crutches; that he cannot work as cleaner of the lorry due to the disability caused in the accident; that he lost his total earning capacity due to the fracture of both legs apart from suffering mental agony. Thus the evidence of AW.1 and AW.2 goes to suggest

that the appellant/claimant/A.W.1 was working as cleaner prior to the accident and after the accident, he was unable to work as cleaner. From the evidence on record, it is clear that the appellant/claimant cannot work as cleaner due to the disability suffered on account of the accident during the course of and out of the employment.

14. The Doctor, A.W.2 only stated in his evidence that the disability suffered by the appellant/claimant is 30% which is permanent and partial. Admittedly the appellant/claimant was working as cleaner. The evidence of AW.1 goes to suggest that he is unable to work as cleaner and that unable to walk without the help of the crutches due to the restricted movements of both knee joints and hip joints and that there is complete loss of earning capacity. But in the cross examination, his evidence is otherwise.

15. The Commissioner under the Workmen's Compensation passed the impugned Award which was challenged by AW.1 claimant by way of this appeal alleging that the Commissioner took the disability and also loss of earning capacity at 30% only. The Apex Court held in the cases before it relating to injuries which were not specified in Schedule I, that such cases are covered by Section 4(1) (c) (ii) Explanation. In terms of the Explanation II, a qualified medical practitioner has to assess the loss of earning capacity having due regard to the percentage of loss of earning capacity in relation to the different injuries in Schedule I. Explanation I also provided that where there is more than one injury, the aggregate has to be taken, so that the amount which would be payable for permanent total disablement is not exceeded. The Apex Court further held that loss of earning capacity is not a substitute for percentage of physical disablement and is one of the

factors taken into account and that the doctor who examined the claimant has to note down the functional disablement and relevant factors relating to loss of earning capacity.

16. In the case on hand, the Commissioner for Workmen's Compensation held that the appellant/claimant suffered 30% disability because of fracture of both legs and that movement of both knee joints are restricted. The Commissioner accepted the disability suffered by the appellant/claimant at 30% based on the evidence of AW.2, doctor. It is to be seen that the disability and earning capacity should not be treated as one and it should vary from each other. In catena of decisions, the Apex Court held that for the purpose of computing the amount of compensation, what is relevant is not only the income earned by the workman but also the extent of purported disability suffered by him. While computing compensation for disabilities being suffered by a workman out of and during the course of his employment, it is the functional disability resulting in loss of earning capacity which is the criteria to be followed in assessing compensation. Since the appellant/claimant has suffered injury which has not been specified in Schedule I, compensation has to be assessed based on percentage of disablement and in the case of an injury not specified in Sch. I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury. Since AW.2 did not speak about the loss of earning capacity and nature of injuries suffered by the appellant/claimant are not specified in Schedule-I, compensation has to be necessarily assessed on the basis of loss of earning capacity caused by the injuries. As both the legs of the appellant/claimant were fractured and steel rods are

inserted in both the legs and also unable to walk without the help of crutches and unable to sit or squat properly due to the restricted movements of both knee joints and hip points, thereby he cannot work as cleaner. Particularly there is no rebuttal evidence from the side of respondents to plead that the appellant./claimant can earn by doing some other work and hence his loss of earning capacity is partial. However, AW.1 in his cross examination deposed that he himself attended the Court and climbed the steps without any assistance.

The Apex Court held that the disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. The assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The evidence of AW.1 is that his both legs were no longer in use because of steel rods inserted in both legs and he is unable to walk without the help of crutches and unable to work as cleaner. Therefore the injuries suffered by him in the alleged accident rendered him unable to do work of cleaner on lorry.

17. In the case of ***NEW INDIA ASSURANCE COMPANY LIMITED, SECUNDERABAD Vs. ABDUL KHADER JILANI @ JILANI*** (supra), a Division Bench of this Court considered the question whether the entries contained in Parts I and II of Schedule I of the Act are relevant for assessing the loss of earning capacity for non-Schedule injuries, particularly in the context of requirement under Explanation II to Section 4(1)(c)(ii) of the Act. The Court held that incapacity of a workman to do the particular work or every work has to be judged with reference to the work with which he was engaged or he was capable of

doing at the time of accident; that there is nothing in the plain language of Section 4(1)(c)(ii) from which it can be inferred that in the case of an injury not specified in Schedule I, the compensation is to be paid keeping in view the entries contained in Parts I and II of Schedule I; and that those entries do not control the exercise of discretion of the competent authority in the matter of award of compensation which is required to be determined keeping in view the loss of earning capacity as assessed by the qualified medical practitioner.

18. In the case on hand, the doctor-AW.2 who treated the appellant/claimant deposed that on examination, the knee joint movements were restricted on both sides with restriction of movements of both ankle joints and that in view of the major weight bearing bones fractures with fracture of the medial malleolus of left ankle with restrict of movements of the joints, the percentage of disability would be 30%, which is permanent and partial and he cannot work as cleaner of the lorry in view of the above injuries. He further deposed that the nails and screws are present in both the legs. AW.1 also deposed in his evidence that he cannot walk without the help of crutches in view of the injuries sustained by him in the accident arising out of and during the course of employment. He underwent major operations to both the legs and steel rods were inserted which are still in existence in both the legs. He further deposed that he cannot sit and squat properly due to the restricted movements of both knee joints and hip joints. He cannot work as Cleaner of the lorry due to the injuries suffered in the accident. As such, he suffered disability owing to the injuries sustained in the accident arising out of and during the course employment. In the case relied on by the petitioner supra, the most of the claimants/injured were drivers and even though the disability was assessed by the

Commissioner ranging from 30% to 60% which was permanent and they were unable to drive the vehicles, the Court considered it as disability suffered by them at 100%. More so, the doctor therein clearly deposed that the loss of earning capacity of the claimants/injured therein was assessed at 100%. In the case on hand, the doctor, AW.2 who treated the appellant/claimant/AW.1 did not speak anything about the loss of earning capacity suffered by the appellant/claimant/AW.1. The Commissioner for Workmen's Compensation took the disability suffered by the appellant/claimant at 30% and also the loss of earning capacity at the same rate, i.e. 30%.

19. During the course of cross examination, P.W.1 himself admitted that he himself attended the Court by climbing the steps without any support. Therefore it can be presumed that he can able to walk and climb the steps without any assistance.

20. At this juncture, a look at Section 4(b) of the Act is necessary, which goes to suggest that where permanent total disablement results from the injury, an amount equal to 60% of the monthly wages of the injured workman multiplied by the relevant factor or an amount of Rs.90,000/- which ever is more can be awarded towards compensation. The doctor, AW.2 basing on documentary evidence at Ex.A.3-wound certificate, Ex.X.1-Case sheet and Ex.X.2-X-ray films deposed that the appellant/claimant suffered 30% disability which is permanent and partial , however, he did not speak about the percentage of loss of earning capacity suffered by the appellant, which is the basis to award compensation.

21. In the facts and circumstances discussed in detail hereinabove, I am of the considered view that the evidence of AW.1 corroborated by the evidence of AW.2 and supported by the material evidence at Ex.A.3, Ex.X.1 and Ex.X.2 makes it clear that the disability suffered by the appellant/claimant can be assessed at 30%, which is permanent and partial and following Section 4(b) of the Act, the loss of earning capacity can be assessed at 60% as the appellant/claimant who was employed as cleaner on the offending lorry suffered injuries in the accident arising out of and during the course of employment and he is capable of doing some other alternate work inasmuch as he can able to walk and climb the steps without any assistance.

22. Accordingly the Civil Miscellaneous Appeal is allowed in part, with costs, while setting aside and modifying the order of the Commissioner, Workmen's Compensation and Assistant Commissioner of Labour-II Circle, Guntur dated 03.11.2005 passed in W.C.No.22 of 2004 by holding that the appellant/claimant suffered disability at 30% which is permanent and partial and in terms of Section 4(b) of the Act, the loss of earning capacity suffered by the appellant/claimant is fixed at 60%.

23. There is a clear finding that in the absence of any concrete proof as to the wages of the appellant/claimant, the Minimum Wages as per G.O.Ms.No. 30, dated 27.7.2000 as on the date of accident is Rs.2,259/- (including VDA) and he being 35 years as on the date of accident, the corresponding factor applicable is Rs.197.06. Following the same, the compensation that can be payable to the appellant/claimant is ($60/100 \times \text{monthly wages} \times \text{age factor} \times \text{loss of}$

earning capacity= $60/100 \times 2259/- \times 197.06 \times 60\%$) = Rs.1,60,257/-
besides stamp duty of Rs.161/-, totalling to Rs.1,60,418/-.

24. The first respondent being the employer and the second respondent being the insurer of the offending lorry are jointly and severally liable to pay the compensation assessed hereinabove. Respondents 1 and 2 shall deposit an amount of Rs.1,60,418/- towards compensation payable to the appellant/claimant by way of Demand Draft drawn in favour of the Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Guntur within 30 days from the date of receipt of a copy of this order. If they fail to deposit the awarded amount hereinabove within 30 days from the date of receipt of this order, they have to pay an interest at the rate of 8% per annum from the date of accident to the date of realisation in addition to a penalty that may be imposed under Section 4-A (3) of the Act.

25. Miscellaneous petitions pending consideration if any in the appeal shall stand closed in consequence.

JUSTICE N. BALAYOGI

Dated 02nd November, 2018.
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