
(2011) 02 OHC CK 0024
In the Orissa High Court
Case No : F.A.O. No. 393 of 2010

D.M. New India Assurance Co. Ltd.

APPELLANT

Vs

Puspakanti Praharaj and Another

RESPONDENT

Date of Decision : 01-02-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 15

Citation : (2011) 111 CLT 792 : (2011) 1 ILR (Ori) 460

Hon'ble Judges : S.C. Parija, J

Bench : Single Bench

Judgement

S.C. Parija, J.—This appeal by the Appellant-Insurance Company is directed against the judgment/award dated 18.6.2010, passed by the Commissioner for Workmen's Compensation, Orissa, Bhubaneswar, in of D. M., New India Assurance v. P. Praharaj W.C. Case No. 18 2001, awarding an amount of Rs. 4,89,240/-as compensation, to be deposited within one month, failing which penalty and interest will be imposed as per the provisions of the W.C. Act, 1923.

2. The main contention of the learned Counsel for the Appellant is that the Commissioner has assessed the loss of earning capacity of the claimant at 100% in a mechanical manner and without application of mind, especially when the treating physician (OPW 1) had stated in his evidence that there exists osteomyelitis and intermittently the claimant may face difficulty with pain. It is further submitted that as the claimant had only suffered fracture injuries and had been operated upon and the Medical Board as well as the treating Doctor had assessed the physical disability at 45%, the Commissioner erred in assessing the loss of earning capacity of the claimant at 100% and calculating the compensation amount on that basis.

3. Learned Counsel for the Appellant further submits that as the Driving Licence bearing No. 4472/86, issued by the Licensing Authority, Bhubaneswar, had been renewed on 19.7.2001, about one year and three months after the date of the accident, the injured claimant was not completely disabled and therefore the

Commissioner erred in assessing the loss of earning capacity of the claimant at 100%. In this regard, it is submitted that as the claimant as the driver of a heavy goods vehicle (truck) was required to furnish medical certificate in proof of his ability to drive such a vehicle, at the time of renewal of the driving licence, the same goes to show that the claimant did not suffer 100% loss of earning capacity. It is further submitted that the assessment of the loss of earning capacity by the Commissioner has been mechanically arrived at without any basis and without considering the nature and extent of the disability suffered by the claimant due to the accident.

4. Learned Counsel for the claimant-Respondent No. 2 vehemently submits that as the claimant was a driver of a heavy goods vehicle (truck) and suffered fracture of right ankle and another fracture in the thigh bone and had to undergo repeated operations and there was shortening of his leg and restriction in the movement, the Commissioner has rightly assessed the loss of earning capacity of the injured claimant at 100%. As regard the renewal of the driving licence obtained by the injured claimant, learned Counsel submits that the same has been obtained by the owner of the vehicle for availing claim from the insurer and that the injured claimant is not in a physical position to drive a heavy vehicle. On a perusal of the impugned award, it is seen that after the accident, the injured claimant was taken to Dhenkanal District Headquarters Hospital and thereafter he was shifted to SCB Medical College and Hospital, Cuttack, where he was admitted to the Orthopedic Department as an indoor patient on 21.4.2000 and his lower right leg was operated. Subsequently, on 28.4.2000 his right thigh was operated and rod was placed in the right leg and that he remained under treatment for about one and half months. The claimant had examined his doctor (OPW 1), who in his evidence had stated that there was a fracture in the right leg near ankle and another fracture in the thigh bone. OPW 1 had further opined that the claimant had all the injuries which were fractures and grievous in nature and he had not treated the claimant entirely, but only the ankle part of the injury. OPW 1 further deposed that there was stiffness of knee joint and shortening of leg and that the claimant was suffering from ulcer of bone because of open fracture injuries. OPW 1 also stated in his cross-examination that since there exists osteomyelitis, the claimant may intermittently face difficulty with pain. He accordingly agreed with the Medical Board that the claimant suffered physical disability of 45%.

5. The Commissioner on the basis of such evidence on record has come to hold that the injured claimant, due to the injuries, has suffered permanent disablement resulting in 100% loss of earning capacity. The relevant findings of the Commissioner is extracted below:

xxx xxx The applicant is a driver of goods vehicle and in my view it is quite impossible on his part to drive the heavy vehicle in such condition of his right leg. It is a clear case of 100% professional disability although the Medical Board has given 45% physical disability. The applicant cannot work as a driver as he

has become almost invalid and is suffering from pain and suffering due to the injuries sustained and is walking with help of crutch. Some judicial decisions have been relied upon by the applicant viz. (1) 207 2002 (1) TAC, page-772 (A.P) reported in Raypati Venkteswar Rao -Versus-Mantai Sambasiva Rao and another, where the injured cleaner sustained compound fracture of his right leg, steel rod inserted during operation, doctors evidence that he sustained 20% to 25% physical disability and used a stick to walk, commissioner holding the loss of earning capacity at 70% turned to 100% by the Hon''ble High Court, because the workman was incapacitated and unable to perform his duties. Another decision i.e. G.V. Venketesh Babu and Anr. v. Krishna Kumar 2002(3) TAC (Kan) , where the workman a loader in lorry sustained grievous injuries, Doctor assessed loss of earning capacity at 55%, commissioner concluded that the workman sustained total, permanent disablement of 100%, which has been confirmed by the Hon''ble High Court and in the decision in Amarnath Singh -Vrs-Continental Constructions Limited, in TAC 446 (S.C) has been discussed and the Hon''ble Apex Court have clearly enunciated that permanent D.M., New India Assurance v. P. Praharaj total disablement is to be judged from the point of view of the job which the workman was doing and if the disablement renders him unfit to do the job, the disablement is total and not partial. In view of this I hold that this is a case of permanent total disablement amounting to 100% loss of earning capacity.

6. In a recent decision, the apex Court in the case of Raj Kumar Vs. Ajay Kumar and Another, , while dealing with the question as to what would constitute a permanent disability and its effect on the earning capacity of an injured person, has observed as under:

9. The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100%.

10. Where the claimant suffers a permanent disability as a result of injuries, 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 Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the

percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) 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.

7. The apex Court accordingly summarised the principles for determining the disability and loss of earning capacity of an injured-claimant as under:

19. We may now summarise the principles discussed above:

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

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).

(iii) 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 Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

8. D.M., New India Assurance v. P. Praharaj As regard the injured claimant

obtaining renewal of Driving Licence bearing No. 4472/86, which has been renewed on 19.7.2001 up to 18.7.2004, it is seen that Section 15 of the M.V. Act, 1988, requires that where renewal of a driving licence to drive a transport vehicle has been applied, the same shall be accompanied by a medical certificate to show that the applicant does not suffer from any disability, which is likely to affect his driving. In the present case, the injured claimant having availed renewal of his driving licence on 19.7.2001, which is about one year and three months after the date of the accident, which took place on 13.4.2000, it cannot be said that the injured claimant had suffered 100% loss of earning capacity. The plea of the learned Counsel for the claimant that the owner has got the driving licence renewed for the purpose of availing claim from the insurer cannot be accepted. In any case, the said fact has not been taken into consideration by the Commissioner while assessing the loss of earning capacity suffered by the claimant.

9. In view of the above, the impugned award is set aside and the matter is remitted back to the Commissioner for Workmen's Compensation, Bhubaneswar, to dispose of the same afresh, after giving opportunity of hearing to the parties. It is open for the parties to adduce further evidence in support of their respective cases and take all such pleas as are available to them in law, which shall be considered by the Commissioner on its own merit and in accordance with law, keeping in view the aforesaid principles laid down by the apex Court in Raj Kumar case (supra). If necessary, the Commissioner may direct the claimant to appear before the Medical Board for ascertaining the exact nature and extent of his disability and to what extent the same would affect his earning capacity.

10. As the claim is of the year 2001, the Commissioner shall do well to dispose of the matter as expeditiously as possible, preferably within a period of three months from the date of receipt of copy of this order. FAO is accordingly disposed of. Appeal disposed of.