

(2008) 12 GUJ CK 0046
In the Gujarat High Court
Case No : First Appeal No. 2069 of 1992

(Minor) Khatuben Musabhai	Vs	APPELLANT
Shriram Oil Mills and others		RESPONDENT

Date of Decision : 04-12-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 8, 9
Workmens Compensation Act, 1923 — Section 2(1)(e)

Citation : (2009) 122 FLR 42

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Trusha K. Patel, for the Appellant; R.R. Marshall, for the Respondent

Final Decision : Allowed

Judgement

H.K. Rathod, J.—Heard learned Advocate Ms. Trusha K. Patel for appellant workman and learned Advocate Mr. R.R. Marshall for

respondent No. 3 Insurance Company Though respondents No. 1 and 2 are served, they have not appeared before this Court either in person or

through an advocate, therefore, this being an old matter. Court is deciding this matter in their absence.

2. Through this appeal, the appellant original workman has challenged award made by Workmen's Compensation Commissioner Rajkot in WC

Application No. 38 of 1989 Exhibit 68 dated 11.2.1991 wherein the WC Commissioner has awarded Rs. 30,853.00 in favour of the respondent

claimant payable by opponents jointly and severally while adjusting amount of Rs. 19775.00 already deposited by opponent No. 3 insurance

company. Under the said award, opponents were directed to pay remaining amount of compensation of Rs. 11078.00 within period upto

25.3.1991. It was also ordered that if the remaining amount of Rs. 11078.00 is not paid by opponents on or before 25.3.1991, then, opponents

have to pay interest on said amount at the rate of 12 per cent per annum from the date of application till realisation thereof in full.

3. Learned Advocate Ms. Trusha Patel for appellant claimant submitted that WC Commissioner has committed gross error in not considering 100

per cent disability in earning capacity though leg upto knee was amputated due to injury received by claimant in accident. She relied upon the

decision of Apex Court in K. Janarthan v. United India Insurance Company Limited and another 2008.(118) FLR 1185 (SC) and submitted that

identical case has been examined by Apex Court while determining percentage of disability and incapacity in earning capacity for computing

compensation wherein 50% disability is prescribed in Sch. I, Pt. II, List 20 for amputation of leg, and it was held by Apex Court that it would

result in 100 per cent disability and incapacity in earning capacity. She further submitted that after accident, an amount of Rs. 19775.00 was

deposited by insurance company but that was not the full amount deposited by company and, therefore, WC Commissioner ought to have

imposed penalty upon the amount of compensation as per Section 4-A of WC Act. She also submitted that the WC Commissioner has committed

gross error in denying 12 per cent interest from the date of accident and, therefore, present appeal is filed.

4. Learned Advocate Mr. Marshall appearing for respondent No. 3 insurance company has submitted that WC Commissioner has rightly

examined matter and as per disability certificate, 60 per cent, as per schedule has rightly calculated and awarded by WC Commissioner and in

doing so, no error has been committed by WC Commissioner and, therefore, no interference is required by this Court.

5. I have considered submissions made by learned advocates for both parties. I have also considered that the claimant is a poor and illiterate

person and due to poverty and compelling circumstances, sent his daughter Khatuben in Oil Mill for cleaning as well as other miscellaneous work

on daily wage of Rs. 15/- and thereafter, opponents had handed over work to daughter of applicant on machinery in oil mill without keeping safety

guard and due to above work, applicant's daughter Khatuben had sustained serious injuries and fracture on her leg on 24.1.1986 and thereafter,

said Khatuben was admitted in private hospital of Dr. R.S. Doshi of Dhoraji and as daughter, of applicant was not feeling well, she was shifted for

further treatment in Irwin Hospitals at Jamnagar where leg of applicant's daughter Khatuben was amputated and thus, daughter of applicant

became permanent disabled person. It was also the case of applicant before WC Commissioner that till the date, opponents have not cared to pay

any compensation to applicant and therefore, applicant has informed opponents by Regd. A.D. Notice to pay up or deposit amount of

compensation of Rs. 1,10,000.00 with interest thereon at the rate of 12 per cent per annum from the date of accident till realisation.

6. Before WC Commissioner, Shri Ram Oil Mills being employer has filed reply raising various objections and opponent No. 2 Jayant Oil Mill has

also filed reply Exhibit 28 and Ram Oil Mills has filed reply at Exhibit 15. Opponent No. 3 National Insurance Company has also filed its

objections vide Exhibit 31 and thereafter, issues were framed by WC Commissioner at Exhibit 32 which have been reproduced by WC

Commissioner in Para 5 of award and answered in Para 6 of award, as under:

5. From the pleadings of the parties, the following issues have been framed at Exhibit 32 for my determination:

(1) Whether the personal injury has been caused to the workman by an accident arising out of and in the course of his employment of the

employer?

(2) Whether the permanent or partial disablement resulted due to said injury? If yes, to what extent?

(3) What is the loss of earning capacity of the workman?

(4) Whether the employer had noticed of the accident?

(5) What were the wages of the workman?

(6) What was the age of the deceased workman?

(7) Whether the workman is entitled to get compensation from the employer? If yes, what amount?

(8) What is the liability of the insurance Company?

(9) Whether the workman is entitled to penalty and/or interest ?

(10) What order?

6. My findings on the above issues are as under:

- (1) In affirmative.
- (2) In affirmative, 60 percent.
- (3) 60 per cent or per schedule.
- (4) In affirmative.
- (5) Rs. 450.00 per month.
- (6) Less than 15 years.
- (7) Yes, Rs. 30853.00 is granted. Rs. 19775.00 is withdrawn, so, Rs. 11078.00 is awarded more.
- (8) Joint liability.
- (9) In negative as per final order.
- (10) As per final order passed below.

6. Thereafter, Commissioner has considered that during the pendency of proceedings before Court, an amount of Rs. 19775.00 was deposited by insurance company before the Labour Court as provisional compensation and accordingly order was passed by Labour Court regarding withdrawal of amount of Rs. 5775.00 and deposit of Rs. 14000.00 in the Branch of Indian Overseas Bank, Dhoraji. Thereafter, Commissioner has considered evidence given on behalf of minor applicant by her father Musa Taiyab at Exhibit 39 who had produced evidence regarding disability of minor Khatunben. Before the WC Commissioner, documents produced by insurance company and applicant side were admitted by both the parties and, therefore, they were exhibited by the WC Commissioner. The only dispute required to be examined by the WC Commissioner was the disability of applicant and for proving disability, Dr. Mahesh Maru was examined for the purpose of expert opinion at Exhibit 59. Certificate given by Doctor is at Exhibit 60 before WC Commissioner. So, there was no dispute between employer and employee about relationship of employee and employer between the parties. It was also not disputed that the accident has occurred during the course of employment as alleged by claimant. Therefore, issue Nos. 1, 2, 4, 5 and 6 were answered accordingly by the WC Commissioner.

7. Dr. Maru who was examined at Exhibit 59 for proving disability of claimant has deposed in clear terms that the applicant can do her work by sitting. It was also deposed by him that he knows regarding provisions and

schedule to WC Act. As per the say of Doctor, that this minor workman has 90 per cent disability as per medical book, so, this workman has a disability of 90 per cent as per law. Doctor was shown law book regarding schedule of the Workmen's Compensation. His attention was drawn towards list of injuries deemed to result in permanent partial disablement. Part II of Schedule I and as per the said schedule, Sr. No. 19, amputation below middle thigh to three and half inches below knee, as per the said schedule, Sr. No. 19, percentage of loss of earning capacity is 60. It was specifically stated by said doctor before the WC Commissioner that as per the book of Dr. Zala, for whole man, disability of this injured workman would be 36 per cent. It was opined by him that if the leg is cut off from knee and is there is a remaining part of 3 inch, then, 60 per cent would be disability but if there is complication in remaining part of leg, then, workman is entitled to get 10 per cent more as per the Indian Manual of Disability Part II, therefore, as per the medical expert's opinion and also as per the schedule fixed under the WC Act, disability of workman was required to be decided by WC Commissioner. Certain decisions were considered by WC Commissioner and thereafter, WC Commissioner has worked out figure on the basis of 60 per cent disability permanent and partial. Before the WC Commissioner, owner - opponents No. 1 and 2 have not come and, therefore, they have not cross examined claimant. Commissioner has decided matter at length giving detailed reasons and ultimately has awarded Rs. 30852.00 as total compensation while directing to adjust amount of Rs. 19775.00 already deposited by insurance company and thereafter to pay Rs. 11078.00 to claimant jointly and severally. I have gone through entire judgment given by the WC Commissioner as if he has been rendering decision in a murder case. Such a lengthy judgment for nothing has been delivered by Commissioner. Small issue ought to have been examined by Commissioner to the point but instead of "that, Commissioner has repeatedly referred to decision as well as evidence of Doctor but not gave immediate finding after considering evidence of doctor. Ultimately awarded only Rs. 30853.00 towards compensation to minor who has received injury in accident during the course of employment. It was not disputed by employer that claimant is not his workman. It was not disputed by employer that claimant has

received injury during the course of employment which resulted in amputation of right leg of claimant Khatunben. Not only that, after giving notice and filing of case for compensation was also deposited in part by insurance company. Thus, occurrence of accident, relationship of an employer and employee and amputation of leg upto knee was not in dispute. In light of these facts, only question required to be examined was whether it can be considered 100 per cent disability or 60 per cent disability. For such a small issue, WC Commissioner has given lengthy judgment and yet I fail to understand reasoning given by WC Commissioner.

8. Recently, this aspect has been examined by Apex Court in K. Janarthan v. United India Insurance Company Limited and another 2008 (118)

FLR 1185 (SC). Relevant discussion made by Apex Court while examining said aspect is reproduced as under:

4. An appeal was thereafter taken to the High Court by the Insurance Company-respondent. The High Court accepted the plea raised in appeal

that as per the Schedule to the Workmen's Compensation Act, the loss of a leg on amputation amounted to a 60% reduction in the earning

capacity and as the doctor had opined to a 65% disability, this figure was to be accepted and accordingly reduced the compensation as already

mentioned above. It is in this circumstance, that the aggrieved claimant has come up to this Court.

The learned counsel for the appellant has raised only one argument during the course of the hearing. He has submitted that the claimant - appellant

being a tanker driver, the loss of his right leg ipso facto meant a total disablement as understood in terms of Section 2(1)(e) of the Workmen's

Compensation Act and as such the appellant was entitled to have his compensation computed on that basis. In support of this plea, the learned

counsel has placed reliance on Pratap Narain Singh Deo v. Srinivas Sabata and another 1976 (32) FLR 92 (SC) = (1976) 1 SCC 289. The cited

case pertained to a carpenter who had suffered an amputation of his left arm from the elbow and this Court held that this amounted to a total

disability as the injury was of such a nature that the claimant had been disabled from all work which he was capable of performing at the time of the

accident. It was observed as under:

5. The expression "total disablement" has been defined in Section 2(1)(e) of

the Act as follows:

(1) "total disablement" means such disablement whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement.

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident.

The Commissioner has examined the question and recorded his finding as follows:

The injured workman in this case is carpenter by profession.... By loss of the left hand above the elbow, he has evidently been rendered unfit for

the work of carpenter as the work of carpentry cannot be done by one hand only.

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to

be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of

Schedule 1, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less

than 4 below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.

6. Applying the ratio of the cited judgment to the facts of the present case we are of the opinion that the appellant herein has also suffered a 100%

disability and incapacity in earning his keep as a tanker driver as his right leg had been amputated from the knee. Additionally, a perusal of Sections

8 and 9 of the Motor Vehicles Act, 1988 would show that the appellant would now be disqualified from even getting a driving licence.

9. Therefore, Commissioner under the WC Act was required to consider not mere disability and amputation of leg upto knee but incapacity to

earning capacity because of the disability. That aspect has been totally lost sight of by the Commissioner and he simply considered permanent

disability 60 per cent but what would be effect of this disability to the earning capacity? That aspect has been simply ignored by the WC

Commissioner and, therefore, according to my opinion, disability which has been received by workman - minor girl in leg, amputation upto knee

ought to have been considered to be 100 per cent incapacity in earning capacity.

Net result is that she is unable to work which she was doing prior to the date of accident, so, same nature of work which she was doing prior to accident would not be done by her after amputation of leg upto knee due to injury suffered by her in accident during the course of employment. That aspect has been ignored by WC Commissioner, therefore, considering aforesaid decision of Apex Court wherein Apex Court has also considered decision in case of Pratap Narain Singh Deo v. Srinivas Sabata 1976 (32) FLR 92 = (1976) 1 SCC 289 = 1976 SC (L&S) 52, according to my opinion, Workman is entitled for 100 per cent compensation on the basis of 100 per cent disability while considering her salary of Rs. 450.00 per month. According to Schedule, relevant factor of 228.54 comes. Therefore, looking to age below 16 and dividing salary of Rs. 450 by 2, one half of salary comes to Rs. 225.00 it comes to Rs. 51521.50.

10. Learned Advocate Ms. Trusha Patel also raised contention that the WC Commissioner has also committed an error in not awarding penalty at the rate of 50%. I have considered this contention. On behalf of employer, nobody has appeared before this Court. Therefore, considering date of accident 24th January, 1986, it is clear that the amount of compensation has not been deposited by employer immediately after accident. Whatever amount deposited by insurance company was deposited not immediately but part of compensation namely Rs. 19,775.00 was deposited by insurance company during the pendency of proceedings before Court which makes it clear that it was not immediately deposited even after notice but after initiation of proceedings before Court, it was deposited. No reason has been assigned by employer for not paying or depositing amount of compensation to claimant immediately after accident within the period prescribed under the law though accident had occurred in their presence. Therefore, according to my opinion, appellant claimant is entitled to penalty at the rate of 50 per cent u/s 4-A of WC Act which comes to Rs. 25710.75 ps. and WC Commissioner has committed an error in not awarding compensation to workman.

11. Learned Advocate Ms. Patel has also raised contention before this Court that the Commissioner has committed gross error in not awarding interest on the amount of compensation from the date of accident though

claimant is entitled for interest since the amount of compensation was not immediately deposited by respondents. I have considered her submission and considering her submission, according to my opinion, compensation was required to be deposited by employer within one month from the date of accident which has not been done by employer, therefore, claimant is entitled for interest after one month from the date of accident as per the provisions of Section 4-A of the WC Act read with Sub-section (3). This Court has considered 12 per cent interest to be granted in favour of claimant. Reason is that no interest has been awarded by Commissioner though no amount of compensation was paid by employer to claimant within one month from the date of accident though it was within the knowledge of employer that claimant has received injury in an accident occurred during the course of employment with him, while working in the Oil Mill on machines which resulted in disability of amputation of leg upto knee. In case of National Insurance Company v. Jayashreeben Nandulal Nerkar (Patil) 2008(3) GLR 2004, this Court (Coram: Hon"ble Mr. Justice M.R. Shah, J.) has examined this question whether the interest is available to claimant from the date of adjudication or within one month from the date of accident. It has been held by this Court that the interest on the amount of compensation is required to be paid on completion of one month from the date of accident which has not been done by employer in the case before hand, therefore, claimant is entitled for interest on the amount of compensation at the rate of 12 per cent per annum within one month from the date of accident till the date of realisation.

12. Therefore, in view of the above discussion, award made by WC Commissioner is required to be modified accordingly since the WC

Commissioner has committed gross error in working out compensation payable to workman on the basis of 60 per cent and not awarded penalty

at the rate of 50% as well, as interest on the amount of compensation within one month from the date of accident which ought to have been done

by the WC Commissioner in view of default on the part of employer in making payment of compensation to claimant within one month from the date of accident.

13. Therefore, in view of above reasons, award made by Workmen's Compensation Commissioner Rajkot in WC Application No. 38 of 1989

Exhibit 68 dated 11.2.1991 is hereby modified and it is declared that the respondents herein are liable to pay Rs. 51521.50 (Rupees fifty one thousand five hundred twenty one and paise fifty only) to claimant as compensation with interest thereon at the rate of 12 per cent per annum as contemplated u/s 4-A(3)(a) of WC Act i.e. with effect from 24.2.1986 after deducting the amount of compensation of Rs. 30853.00 within one month from the date of receipt of copy of this order. It is also declared that the respondents are also liable to pay penalty which comes to Rs. 25710.75 (Rupees twenty five thousand seven hundred ten and paise seventy five only) to claimant within one month from the date of receipt of copy of this order. It is also declared that the appellant claimant is also entitled to have interest on the amount of penalty as aforesaid at the rate of 12 per cent per annum with effect from 24.2.1986. Accordingly, respondents are directed to deposit the aforesaid amount of compensation and penalty together with interest as aforesaid before the WC Commissioner at Rajkot. After realising amounts from respondents, it is directed to WC Commissioner, Rajkot to pay said amount to claimant by way of an account payee cheque drawn in favour of claimant appellant after proper verification.

Accordingly, this appeal is allowed with no order as to costs.