

(2008) 01 OHC CK 0074
In the Orissa High Court

National Insurance Co. Ltd.

APPELLANT

Vs

Sri Dinesh @ Vinesh Chandra Sharma and Others

RESPONDENT

Date of Decision : 18-01-2008

Acts Referred:

Employees Compensation Act, 1923 — Section 2, 4

Citation : (2008) 105 CLT 814 : (2008) 117 FLR 321 : (2008) 1 OLR 511 Supp

Hon'ble Judges : I. Mahanty, J

Bench : Single Bench

Judgement

1. Mahanty, J.—In this appeal, the Appellant-National Insurance Co. Ltd. has sought to challenge the Judgment dated 22.11.2006 passed by the Commissioner for Workmen's Compensation-Cum-Assistant Labour Commissioner, Cuttack in W.C Case No. 205-D/1997 awarding a sum of Rs. 1,49,746/- and further directing to recover the same from Respondent No. 2 within thirty days failing which, it would carry interest at the rate of 12% per annum from the date of filing of the claim application, i.e., 18.8.1997 till the date of deposit of the awarded amount.

2. Dr. A.K. Rath, Learned Counsel for the Appellant-Insurance Company, inter alia, contends that in the absence of any assessment pertaining to loss of earning capacity of the claimant by the doctor examined by the claimant, the Commissioner of Workmen's Compensation ought not to have suo motu assessed the loss of earning capacity to be 75%. Especially, when the doctor was examined by the Insurance Company, it had assessed the loss of earning capacity to be 45%. Dr. Rath further raises an issue to the effect that whether the Commissioner for Workmen's Compensation has jurisdiction and competence to award the interest of 12% per annum in liability fixed in the Insurance company.

3. Learned Counsel for the claimant on the other hand submitted that the claimant sustained complex compound fractures of his right thigh and below his knee alongwith other multiple injuries and was treated in S.C.B. Medical College

and Hospital, Cuttack as an indoor patient for a period of 25 days and, therefore, on his discharge, he was further treated as an indoor patient at Haryana. He further asserts that the claimant has undergone three operations and despite of such treatment, he being unable to move from his bed has become completely incapable to perform his duty as a driver. Learned Counsel for the claimant further assests that the claim case was proved by P.W.4, the treating physician who by submitting his examination report vide Ext.9 deposed that due to the aforesaid accidental injuries, the claimant has sustained permanent disability to the extent of 50% and as such, he was no longer capable to drive any vehicle, which was the claimants only source of his livelihood,

4. On the other hand, the contesting Insurance Company had also examined the claimant through their Orthopaedic doctor who has given evidence as O.P.W. No. 1 to the effect that the present condition of the claimant is only fit for sedentary type of works like telephone or lift operator and, therefore, he assessed the permanent loss of earning capacity at 45%.

5. In the face of such contradictory evidence, the Commissioner of Workmen's Compensation placed eliance upon the decision of this Court reported in 2004(3) T.A.C. 794 and came to hold that the nature of the injuries and disability of the claimants is such that he became completely disabled to do his duty as a driver and hence since the claimant is no longer capable of earning his livelihood as a driver, the percentage of disability in such cases must be deemed to be 100% in terms of the definition of the term "total disablement" provided u/s 2(1)(I) of the Workmen's Compensation Act, 1923. The Commissioner came to hold that even the evidence of the contesting Insurance Company's doctor is to the effect that the claimant is incapable of driving in future and, therefore, came to determine the loss of earning capacity of the claimant to be 75%.

6. Dr. Rath, placed reliance upon Section 4(1)(c)(ii) of the Workmen's Compensation Act, which is quoted below:

Amount of compensation.-(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:

(a) Where death An amount equal to fifty per results from cent of the monthly wages of the injury the deceased workman multiplied by the relevant factor;

or An amount of eighty thousand rupees whichever is more; (c) Where (ii) in the case of an injury not permanent specified in Schedule I, such partial percentage of the compensation disablement payable in the case of permanent result from total disablement as the injury is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

Explanation II.- In assessing the loss of earning capacity for the purpose of Sub-clause (ii), 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;

7. Relying upon the aforesaid provision, Dr. Rath submitted that the Commissioner for Workmen's Compensation was bound by the assessment made by a qualified medical practitioner to the extent of permanent total disability as a proportion to the loss of earning capacity "as assessed by qualified medical practitioner". He submits that while the claimant was examined by a qualified medical practitioner on its behalf, the said doctor in his evidence stated that the claimant had suffered permanent disability to the extent of 50% and that it was no longer safe for him to drive any vehicle but the said witness had failed to assess/determine the loss of earning capacity of the claimant. In any event, the permanent disability having been determined by the claimant's doctor to be 50%, the consequential loss of earning capacity has to be deemed to be 50% and not 75% as determined by the Commissioner. Dr. Rath further contended that the Insurance Company's doctor had given evidence to the effect that the loss of earning capacity is 45% and, therefore, the same should have accepted by the Commissioner.

8. Sri R. Mishra, Learned Counsel for the Respondent-claimant, on the other hand, while placing reliance upon the Judgment of our own High Court referred hereinabove also placed reliance upon the definition of the term of "total disablement" which is contained in Section 2(1) which is quoted herein below:

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

(Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent. Or more;)

Sri Mishra submitted that since the claimant has been incapacitated to an extent that he no longer is able to drive a vehicle, which he was otherwise capable of at the time of accident. Such disablement though determined as 50% by the treating physician or 45% by the contesting Insurance Company's. Doctor, makes no difference, inasmuch as, the claimant case ought to be treated as case of "total disablement". He further asserts that the determination of 75% for loss of earning capacity by the Commissioner for Workmen's Compensation was just proper in the facts and circumstances of the case.

9. Considering the rival contentions advanced by the Learned Counsel for the parties and considering the statutory requirement, it is clear that u/s 4(1)(c)(ii), requires the assessment of loss of earning capacity by a qualified medical practitioner. It is of course trite to state that such assessment by the qualified medical Practitioner should be lawful and proper to the extent of computing the extent of permanent disablement. It is also a fact that the claimant's treating

physician has given evidence that the claimant has sustained permanent disability to the extent of 50% and it is also a fact that the contesting Insurance Company's doctor has permitted loss of earning capacity at 45%. The claimant who was a driver at the time of accident can, in fact, no longer drive a vehicle safely and this fact was also been concurred to by the evidence of the doctor of the contesting Insurance Company. Therefore, I am of the view that irrespective of the extent of permanent disability, the injuries suffered by the claimant as such qualify to be treated as "total disablement".

10. Therefore, in my considered view, the claimant's doctor V-having determined the claimant's disability to an extent of 50% in terms of Section 4(1)(c)(ii), the loss of earning capacity is to be "proportionate to such permanent total disablement" and, therefore, the amount of compensation is to be recomputed on the basis of the formula applied by the Workmen's Compensation Commissioner by reducing the loss of earning capacity percentage from 75% to 50% which is given below:

$$900 \times 207.98 \times 50 = \text{Rs. } 93,591.00 \text{ ----- } 100$$

This amount is rounded upto Rupees 1 lakh, which is determined to be the amount of compensation to which the claimant is entitled.

11. In so far as the second contention raised by the Insurance Company regarding the payment of interest, it is clear that the direction has been made to pay the compensation amount and the direction for payment of interest would be operative only in the event, the Insurance Company fails to deposit the awarded amount within the period of 30 days. I am of the view that this direction no more survives for consideration, since it is stated by the Learned Counsel for the Insurance Company, that the awarded amount has, in fact, been deposited by the Insurance Company before the Commissioner for Workmen's Compensation, Cuttack. Once such awarded amount has been deposited within the period directed, no question of payment of interest thereon would, obviously, arise and consequentially no-question of challenge to the same would survive.

12. As a consequence of the findings as noted hereinabove the appeal is partly allowed to the extent that the compensation amount is redetermined to a sum of Rs. 1 lakh. Since the Insurance Company has deposited the entire awarded sum before the Commissioner for Workmen's Compensation, the appeal is disposed of with a direction that a sum of Rs. 1,00,000/-(Rupees one lakh) and interest accrued thereon shall be released in favour of the claimant and the balance compensation amount deposited along with the interest accrued thereon shall be refunded in favour of the Appellant-Insurance Company.

13. With the aforesaid directions, this appeal is partly allowed to the extent indicated above.