

**(2011) 01 DEL CK 0138**  
**In the Delhi High Court**  
**Case No : FAO 264 of 2010**

National Insurance Company Ltd.

APPELLANT

Vs

Hari Om and Another

RESPONDENT

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**Date of Decision :** 20-01-2011

**Acts Referred:**

**Citation :** (2011) 129 FLR 529 : (2011) LLR 428

**Hon'ble Judges :** Mool Chand Garg, J

**Bench :** Single Bench

**Advocate :** L.K. Tyagi, for the Appellant; R.K. Nain, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Mool Chand Garg, J.—This appeal arises out of an order dated 13.05.2010 passed by the Additional Commissioner under the Employees Compensation Act (hereinafter referred to as "the Commissioner") in case No. WC/113/NW/07/1065-66, whereby the Id. Commissioner has awarded the injury compensation of Rs. 5,12,775/- in favour of Respondent No. 1/claimant and against the insurance company.

2. The facts as stated in the claim petition preferred by the claimant/Respondent No. 1 before the Commissioner was that the Respondent No. 1 was employed as a driver on vehicle bearing No. UP 16H 9369 Eicher 1095 owned by Respondent No. 2 and was insured with the insurance company. On 27.8.2007 while going from Delhi to Ghaziabad for getting the vehicle loaded with Newspapers of Times of India, the said vehicle collided with another vehicle, as a result of which Respondent No. 1 sustained injuries, which led to registration of FIR No. 357/2007 at Police Station Vivek Vihar. The Commissioner has taken the income of the Respondent No. 1/claimant at Rs. 3,940/- on the basis of minimum wages. His age was taken as 25 years. The Commissioner has noted that as per the disability certificate issued by Hindu Rao Hospital, the Respondent No. 1/claimant has sustained 13% permanent disability but the Commissioner has relied upon

the certificate issued by a medical practitioner, who certified that the claimant being driver, he will not be able to drive HMV in future and therefore, his earning capacity has reduced by 100% and on that basis he passed the impugned awarded dated 13.05.2010 directing the insurance company to deposit compensation of Rs. 5,12,775/- for 100% permanent disability in favour Respondent No. 1.

3. The substantial questions of law which arise for consideration before this Court are as under:

1. Whether the Commissioner can rely upon the disability certificate issued by a medical practitioner unless it is duly proved as per law specifically when the certificate issued by the Medical Board of a Government Hospital was on record according to which the Respondent claimant has sustained the disability to the extent of 13% only?

2. Whether the Commissioner could have passed the award for 100% loss of earning capacity, specifically when there was a certificate on record issued by the medical board of a Government Hospital according to which the Respondent claimant has sustained the disability to the extent of 13% only?

4. As far as the determination of amount of compensation is concerned, Section 4 of the Act makes provision for the same. Relevant provision of this Section, as applicable in the present case, reads as under:

Section 4(1)(c)-Where permanent partial disablement result from the injury-

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the 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; and

(ii) in the case of an injury not specified in Schedule 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;

Explanation I.-Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

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;

5. In Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, , there was personal injury to a carpenter in the course of employment and there was amputation of left hand above elbow. Since carpenter cannot work with one

hand, it was held that disablement is total and not partial. The Apex Court observed:

It has not been disputed before us that the injury in question was caused to the Respondent by an accident which arose out of an in the course of his employment with the Appellant. It is also not in dispute that the injury resulted in amputation of his left arm at the elbow. It has however been argued that injury did not result in permanent total disablement of the Respondent, and that the Commissioner committed a gross error of law in taking that view as there was only partial disablement within the meaning of Section 2(1)(g) of the Act which should have been deemed to have resulted in permanent partial disablement of the nature referred to in Item 3 of Part II of Schedule I of the Act. This argument has been advanced on the ground that the amputation was from 8" from tip of acromion and less than 4 1/2" below tip of olecranon. As will appear, there is no force in this argument.

The expression "total disablement" has been defined in Section 2(1)(I) 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 carpenter 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.

6. Similarly, in Rayapati Venkateswara Rao Vs. Mantai Sambasiva Rao and Another, , it has been observed;

According to the medical evidence, the applicant cannot perform his duties as a cleaner as he was performing prior to the accident and he has to use a stick to walk, So it is very clear from the evidence and findings of the learned Commissioner that the Appellant cannot perform his duties as a cleaner as he was performing on the day of accident and as per the settled legal position as extracted above, it has to be held that when once the workman was incapacitated and unable to perform his duties what he is performing on the day of accident, even though the physical disability sustained is 20 to 25 per cent, he loses his earning capacity by 100 per cent.

7. Lastly, in G. Anjaneyulu Vs. Alla Seshi Reddy and Another, , it has been laid down that:

No doubt this Court and the Hon"ble Apex Court in a number of cases held that if the workman is unable to perform his duties as he was performing on the day of accident, his loss of earning capacity should be taken as 100 per cent irrespective of the percentage of disability sustained by the workman.

8. According to the Respondents, there is a notification issued by the Directorate of Health Services dated 14.05.2009, whereby several doctors have been declared to be "Qualified Medical Practitioners Certifying Surgeons". The said notification reads as under:

DIRECTORATE OF HEALTH SERVICES

Delhi 14th May, 2009

The Chief Secretary GNCT of Delhi is pleased to declare following Doctor as "Qualified Medical Practitioners Certifying Surgeons" under provisions of Workmen's Compensation Act, 1923 and Motor Transport Workers Act, 1981 to provide disablement certificate/loss of earning capacity .....

- (a) Dr. Neeraj Gupta
- (b) Dr. Vimla Verma
- (c) Dr. K.S. Bhagotia
- (d) Dr. K.B. Gupta
- (e) Dr. Ruma Sarkar
- (f) Dr. T.K. Joshi
- (g) Dr. Rachna Gupta
- (h) Dr. D. Bhattacharyya
- (i) Dr. Sugufta Vij
- (j)

By order and on behalf of Chief Secretary Delhi

Dr. Murari Lal, Director

9. It is submitted that the above notification has been issued in view of the definition of "qualified practitioner" as defined u/s 2 (1) (i) of Workmen's Compensation Act, which reads as under:

qualified medical practitioner means any persons registered under any [Central Act, Provincial Act, or an Act of the Legislature of a State] providing for maintenance of a register of medical practitioners, or, in any area where no such last-mentioned Act is in force, any person declared by the State Government, by notification in the Official Gazette, to be a qualified medical practitioner for the purpose of this Act;

10. It is, therefore, submitted by the Respondents, that in view of the aforesaid notification issued by the competent authority, the certificate issued by the qualified medical practitioner was the only certificate which could have been taken into consideration by the concerned Commissioner and the said certificate has been rightly taken into consideration by the Commissioner for deciding the quantum of disability by the Respondent. It is thus submitted that the calculation of the compensation by the Commissioner in this case was appropriate and does not call for any interference by this Court.

11. The certificate issued by the qualified medical practitioner given in this case by Dr. K.B. Gupta, one of the Certifying Surgeons, reads as under:

This is to certify that Sh. Hari Om, S/o Sh. Nek Ram, aged 25 yrs at the time of the accident, male, is a case of Physical Disablement due to personal injuries i.e. Compound Fracture Shaft Femur Rt. With Communicated Intra-articular Fracture Rt. Knee of upper and of Tibia and Fibula with large degloving injury Lt. leg with fracture base of Rt. 1st Metatarsal with fracture of lateral nasal bone with multiple lacerated wounds on face including both upper eyelids i.e. extensive degloving injury of Lt. upper eyelid, some skin loss of Lt. Upper eyelid on medical side. There was no history of loss of consciousness or vomiting. Bleeding from nose present. He was taken to Dr. Hedgewar Arogya Sansthan Karkardooma, Delhi -110032 on 27.08.2007 i.e. on the day of the accident itself which took place when the said workman was driving a HMV and hit another HMV from behind. After first-aid he was taken to Max Balaji Hospital where he was admitted on 27.08.2007 and discharged on 05.09.2007. Procedures performed at Max Balaji Hospital are:

(A) Ortho: (1) Debridement of wound with open reduction and Internal Fixation of femur Rt. With Inter-locking nailings. 2) Closed reduction and internal Fixation of Intra-Articular Fracture Tibia with Cannulated screws and K wires with above knee POP Slab (Rt.) 3) Debridement of wound Lt. Leg.

(B) Plastic Surgeon Procedures:

(1) Debridement of all facial wounds with repair of Lt. upper eyelid.

(2) Repair of forehead wound. 3) Reduction of nasal bone fracture with dorsum management of nasal wound with flaps.

On examination: the workman still complains of difficulty in bending and straightening of Rt. Knee joint, climbing the stairs and on reading/looking at an object for long, his Rt. Eye gets redness with watering of the eye. He can walk without support but there is a gross limp present on Rt. Side as he is unable to take his weight on Rt. Lower leg due to pain even after two years and four months of the accident. There is a three inches longitudinal scar present on middle of lateral aspect of Rt. Thigh, scar on upper eyelid (Rt.) lateral half, scar on left upper eyelid with shortening of Lt. upper eyelid, longitudinal scar on bridge of nose, horizontal scar below nasal septum and 1 1/2 inch horizontal scar

on forehead (right of mid line)

Recent X-rays (04.01.2010) reveal: (a) X-ray Rt. Thigh with knee joint: Intramedullary nail is in place. Intercondyler region is aligned by screws. B) X-ray Rt. Leg: old united type of fracture mid shaft of right tibia and lower third of shaft of right fibula. Intramedullary nail is seen in position. There is slight osteoporosis of bones in ankle region. C) X-ray Rt. Foot: No obvious focal bony injury seen. D) X-ray nasal bone: No obvious focal bony injury seen.

The employment of the said worker at the time of the accident was that of a HMV Driver. As explained above it is obvious that the effects of the said injuries have reduced the earning capacity of the said workman for all work which he was capable of performing at the time of the accident i.e. as HMV Driver by 100% (One hundred per cent) permanently as he will not be able to drive a HMV in future.

12. On the strength of the aforesaid certificate and the provisions of law discussed above, Respondent submits that the order passed by the Commissioner does not suffer from any infirmity and, therefore, the appeal may be dismissed.

13. At this stage, it would be appropriate to take note of some of the observations made by the Commissioner in the impugned order which shows that the Commissioner has based his award while granting the claim compensation as per Section 4(1)(c) and 4(1)(d) of the Workmen's Compensation Act and the certificate of disability issued by the qualified Medical Practitioner. The relevant observations are as under:

6. On the basis of the documents placed on record- FIR, MLC and other relevant documents the factum of accident cannot be denied. There is no contra evidence to that effect. On the request of the applicant the matter was referred to the Qualified and notified Medical Practitioner for assessment of loss of earning capacity second time and 100% earning capacity loss is declared by the Doctor whereas previously disability was shown as 13% by the Hindu Rao Hospital.

7. I have gone through the pleadings of the parties and the documents available in the case and I give my findings as under:

8. The case of the applicant is that he was posted as driver on vehicle No. UP-16H-9369 and the vehicle was contracted for the supply of Newspaper-Time of India and when he was not his way for the purpose of that occupation all of a sudden another vehicle emerged just ahead of this vehicle and he applied instant brakes and due to that this vehicle ran into the said vehicle and the front portion of this vehicle hit that from the back of that vehicle. The front portion of this vehicle was totally damaged and driver who was driver of the said vehicle i.e. applicant sustained extensive injuries on his body, his legs were crushed. He was immediately taken to Hospital by the police van available nearby. He has further stated that he has spent two lacs on his treatment. Under these circumstances,

and on the basis of the documents, I hold that the injury to the applicant has been caused while driving the vehicle bearing No. UP-16H-9369. Hence it is held that the injuries were caused out of and during the course of employment, the liability of Respondent No. 1 is established. As the Respondent has taken an insurance cover and has paid additional premium for workmen on the vehicle, the Respondent No. 2 i.e. insurance is liable to indemnify the owner. The workman was assessed as to reduction in his loss of earning capacity by a doctor specially notified for the purpose and it has been assessed that the person is no more capable of taking up the occupation of driving, much less the transport vehicle. Hence it was total reduction in the earning capacity.

9. In the given situation, when the applicant sustained injuries out of and during the course of employment and by virtue of injury caused to claimant due to accident, he is incapable of doing the work of driving and assessed as he lost 100% earning capacity by the doctor under the Act, I am taking loss of earning capacity as 100% in place of 13%. He was drawing wages @ Rs. 4500/- ( Rs. 3,000 per month, Rs. 1500/- per month for night allowances plus Rs. 50/- per day as food allowances - food allowances held to be part of the wages - Divisional Manager New India v. Manorama 2006 ACJ 1048 but there is no documentary proof submitted on record either by claimant or Respondent No. 1, hence wages of employee fixed under Minimum Wages Act, 1948 is adopted as wages of claimant for the purpose of calculation of injury compensation which is Rs. 3940/-. He was aged 25 years at the time of accident. The entitlement for the injury compensation is as under:  $216.91 \times 3940 \times 60 \times 100 / 100 \times 100 = 5,12,775.24 = 5,12,775/-$

10. The Respondent/management is also being issued show-cause notice as to why interest and penalty should not be imposed upon the Respondent/management.

11. The Respondent/management No. 2 is directed to deposit the above amount of injury compensation being insurer of Respondent No. 1 with this Court within 30 days from the date of this order failing which the same shall be recovered by way of land revenue.

14. At this juncture, it would also be appropriate to take note of few judgments relied upon by the Respondent for justifying the award. Reliance has been placed on the judgment of the Apex Court in the case of K. Janardhan Vs. United India Insurance Co. Ltd. and Another, , wherein it has been held:

Workmen's Compensation Act, 1923, Section 4(1)(b) and 2(1)(1) read with Schedule I, part II, item 19 - Total disablement - compensation -tanker driver-suffered amputation of right leg up to knee joint - Doctor opined disability at 65 per cent - Commissioner allowed compensation at 100 per cent loss of earning capacity - High Court found that a per Schedule I, amputation of leg amounted to 60 per cent loss in earning capacity and reduced the compensation accordingly - Whether the tanker driver who has suffered amputation of right leg from knee

has suffered total disablement and 100 per cent loss in his earning capacity - Held yes; he is even disqualified from getting a driving licence; Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, (Supreme Court) followed]

15. Another judgment cited by the Respondent is the judgment delivered in FAO No. 246/2007 titled as National Insurance Co. v. Ranjit and Anr., wherein 15% disablement is held to be 100% loss of earning capacity as the person found to be unfit to drive a vehicle.

16. As far as the Appellants are concerned, they have not filed any written submissions. They only rely upon a judgment delivered by the Apex Court in Civil Appeal No. 8981/2010 titled as Raj Kumar v. Ajay Kumar and Anr. decided on 18.10.2010. However, the said judgment is not given under the provisions of Workmen's Compensation Act but has been given under the provisions of Motor Vehicle Act, and, therefore, the said judgment cannot be of any help to the case of the Respondent.

17. Taking note of the various provisions of the Workmen's Compensation Act as quoted above, the notification issued by the competent authority regarding Qualified Medical Practitioners, the certificate given in this case by the Qualified Medical Practitioner as noted by the Commissioner, the judgments cited at bar on behalf of the Respondent and as relied upon by the Respondent in written submissions, I find no infirmity in the impugned order passed by the Commissioner and accordingly, find no reason to interfere with the orders passed by the Commissioner in this case awarding the compensation of Rs. 5,12,775/-by treating the Respondent having suffered 100% disability as opined by the Qualified Medical Practitioner. The appeal is, therefore, dismissed.

CM No. 12774/2010

Interim order stands vacated.

Application stands disposed of.