

**(2008) 10 GUJ CK 0015**  
**In the Gujarat High Court**  
**Case No : First Appeal No. 4954 of 2008**

New India Assurance Co. Ltd.

APPELLANT

Vs

Karsan Ramabhai Rabari and Another

RESPONDENT

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**Date of Decision :** 16-10-2008

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 8, 9  
Workmens Compensation Act, 1923 — Section 2(1), 4(1)

**Citation :** (2009) 1 GLH 671

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

**Bench :** Single Bench

**Advocate :** K.V. Gadhia, s 1, for the Appellant; Mehul Sharad Shah and Suresh M. Shah for Defendants 1, for the Respondent

**Final Decision :** Dismissed

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## Judgement

H.K. Rathod, J.—Heard learned advocate Mr. KV Gadhia on behalf of appellant.

2. The appellant insurance company has challenged order passed by Workmen Compensation Commissioner, Kachchh at Bhuj in Workmen Compensation Application No. 108/1996 (New) No. 191/1993 (old) and 1/90 (old) dated 26/3/2004. The Commissioner under the Workmen Compensation Act has awarded Rs. 1,06,785/- with 6% interest and 50% penalty to employer, which is to be deposited within a period of 30 days from date of order. The insurance company has deposited Rs. 1,95,564/- before Workmen Compensation Commissioner, Bhuj dated 16/9/2004.

3. Learned advocate Mr. Gadhia vehemently submitted that Commissioner has committed gross error in relying upon medical certificate produced by respondent claimant vide exh 41 mark 39/4 from Dr. Suresh Rudani. Dr. Rudani has certified 36% permanent physical disability of right lower extremity. Dr. Rudani has made endorsement in medical certificate dated 8/2/2003 that as per history given by patient, he was driver prior to accident, but he can not drive heavy vehicle.

4. Learned advocate Mr. Gadhia submitted that in cross examination Dr. Rudani has made clarification that claimant can drive light vehicle, but simultaneously he made further clarification that at present what is physical condition of claimant he will not give any opinion and he may not be able to say anything. On the basis of aforesaid evidence before Commissioner, learned advocate Mr. Gadhia submitted that Commissioner has not considered cross examination of Dr. Rudani and come to conclusion that claimant has become unfit for driving vehicle and on that basis compensation has been awarded.

5. He also submitted that u/s 4(1)(c)(ii) for non-schedule injury, medical certificate should have to be relied by Commissioner. Except that, learned advocate Mr. Gadhia has not raised other contention before this Court.

6. The medical certificate given by Dr. Rudani, the contention thereof quoted as under at exh 41:

#### CERTIFICATE

This is to certify that Shri Karsan Rama Rabari, aged 40 years had come to my hospital for evaluation of physical impairment.

H/O Vehicular accident on 24/4/1989.

Injuries and Fractures sustained

- Fracture Tibia Fibula Rt.

Treatment given:

- He was treated at G. K. General Hospital at Bhuj.
- Debridment of wound was done.
- Reduction was done under S.A.
- P.O.P. was cast.
- He was treated as an indoor patient from 24/4/1989 to 5/5/1989.

4. C/O.

- Pain while walking.
- Swelling over Rt. Ankle during standing / walking.
- difficulty in sitting cross legged and squatting.
- Limp Gait.

5. O/E.

- Tenderness over Fracture site.
- Swelling over ankle +.

- Not able to sit cross legged and squat.
- Healed 3?? scar over Rt. Side forehead.
- 2?? healed irregular scar over Ant. Lat aspect of Rt. Side forearm.
- Rt. Knee and Rt. Ankle movement restricted.
- MOVEMENT LOST BY
- Rt. Knee
- Flexion 40% 14%
- Extension 0%
- Rt. Ankle
- Dorshi Flexion 10% 4%
- Planter Flexion 20% 7%
- Inversion 20% 4%
- Eversion 10% 2%
- Power Grade IV 5%

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36%

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#### Permanent Physical Disability:

The above accidental injuries have resulted into permanent physical disability 36% of Right Lower Extremity.

As per the history given by patient, the patient was driver prior to accident. He can not drive heavy vehicle.

7. I have considered contention raised by learned advocate Mr. Gadhia and I have perused order passed by Workmen Compensation Commissioner as referred above. The accident occurred on 24/4/1989, when claimant was aged about 27 years. The Commissioner has considered medical certificate vide exh 41 where 36% permanent disability is found by Dr. Rudani and considering evidence of claimant by Commissioner that due to said permanent injury in right leg, he is not able to drive any kind of vehicle. That evidence of claimant was taken into account and also considering that claimant can drive light vehicle as per cross examination of Dr. Rudani.

8. The Commissioner has come to conclusion that in right leg there is 36% permanent disability, so claimant is not able to drive any vehicle. At the time of accident on 24/4/1989, claimant was working as driver of Truck No. GTY-6389.

Meaning thereby that claimant was driver of heavy vehicle means goods vehicle. The law on this aspect is very clear that if an employee who became unfit because of receiving injury during course of employment and if he was not able to do work which was done by him prior to accident, then it consider to be unfit for work which was performing by employee and that has to be considered unfit on the basis of which he was work earlier. It amounts to 100% disability.

9. Looking to facts of this case, Commissioner has rightly relied upon exh 41 medical certificate of Dr. Rudani. According to certificate given by Dr. Rudani, claimant can not drive heavy vehicle. So, contention raised by learned advocate Mr. Gadhia that because of none schedule injury u/s 4(1)(c)(ii), medical certificate must have to be believed and Commissioner can not pass any order contrary to medical certificate, can not be accepted as medical certificate issued by Dr. Rudani, where specific endorsement made by him that claimant can not drive heavy vehicle, which was driven by him prior to date of accident. Therefore, claimant has become unfit to drive heavy vehicle that aspect has been taken into account by Commissioner.

10. Recently, this aspect has been examined by Division Bench of Andra Pradesh High Court that driver of Lowry received injury in accident during course of employment and disability received being permanent not able to work as driver then it considered to be 100% disability a referred in case of Parmarthi Subba Rao v. H. Rama Rao and Anr reported in 2008 LIC 2897. Relevant observation made in para 22, 25, 26 and 27.

22. it is significant to note that it was held .... compensation has to be paid keeping in view the lose of earning capacity as assessed by the qualified medical practitioner and the Court's decision to award compensation is not controlled by the entries contained in parts-I and II of Scheduled I. The finding that court's discretion to Award compensation is not controlled in Paragraphs-I and II, makes it clear that, irrespective of the injuries being not covered by Parts -I and II of Scheduled I, a finding that the workman suffered total disability can be given No doubt, the decision refers to the above finding being given only on the basis of medical evidence.

25. In view of the various decisions referred in Jilanis Case (Supra), as well as the Reference order, as already referred by us, when on the basis of the medical evidence, 100% disability can be decided without the victim suffering any injuries specified in Schedule - I, on the medical officer certifying that the victim suffered 100% disability; there is no question of such benefit being extended in the case of persons who suffered injuries which would definitely indicate total disablement to do the work, which the workman was capable of performing at the time of the accident. Only in cases where it would not be possible to decide 100% disability without medical evidence or where the victim did not suffer sufficient injuries mentioned in scheduled I, the question of relying on medical evidence would arise and when once that question can be decided without medical evidence, life of a case imputation of leg of driver, as in this case, there

is no need of relying on medical evidence or on specified injuries.

26. The crucial question is not of specified injuries, but whether there was total disability to do the work, which the workman was doing at the time of accident. The importance of medical evidence is only in the case where such disablement can not be decided without head of medical evidence and in case where the position can be decided with or without medical evidence life amputation of limbs, where decision can be taken with regard to the working capacity of workman, the medical evidence is not relevant and the question of the victim not suffering specified injuries is also not relevant. This point is amply clarified by the Division Bench of Jilani's case (supra), wherein it was observed that the Court's discretion to award compensation is not controlled by the injuries contained in parts I and II of Schedule I.

27. In all the above circumstances, the reference is answered as follows Sin spite of that being no sufferance of injuries mentioned in para 1 of schedule I or communication of injuries as mentioned in para 2 of Schedule I, if there is 100% disability to do the work , the workman was doing earlier, it has to be treated that workman has suffered 100% disability??. The reference is answered accordingly.

11. Recently, the Apex Court has considered same aspect in case of Janardhan, K. v. United India Insurance Co. Ltd and Anr. reported in 2008 II LLJ 96. The relevant observation made in para 3 and 4 are quoted as under:

53. 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 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 Vs. Srinivas Sabata and Another, 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 "Stotal 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.

12. 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.

13. 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 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.

14. 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.

15. Therefore, in light of this back ground, according to my opinion, Commissioner has rightly examined matter on the basis of evidence. There is no dispute raised by insurance company about injury received by claimant during course of employment and he was working at relevant time as a driver of heavy vehicle and there was no certificate issued by Dr. Rudani to drive heavy vehicle as a driver. Merely getting clue from cross examination of Doctor has no meaning because claimant is able to drive light vehicle whether while driving light vehicle he can maintain family or not that is real question which is to be considered rightly by Commissioner. The 100% earning capacity is lost by workman due to injury as certified by Dr. Rudani.

16. Considering reasoning given by Commissioner, no error is committed which would require interference by this Court.

17. Hence there is no substance in the present appeal. Accordingly, present first appeal is dismissed.

18. The Workmen Compensation Commissioner is directed to pay Rs. 1,95,564/- to respondents claimant by A/c payee cheque in his name without any further delay, if it is not disbursed by Commissioner so far.