

**(2006) 08 GAU CK 0117**  
**In the Gauhati High Court**  
**Case No : FAO No. 15 of 1999**

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Dwijen Kalita and Another

RESPONDENT

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**Date of Decision :** 17-08-2006

**Acts Referred:**

Workmens Compensation Act, 1923 — Section 30, 4

**Citation :** (2008) GLT 336 Supp

**Hon'ble Judges :** Aftab H. Saikia, J

**Bench :** Single Bench

**Advocate :** S. Dutta, K.K. Dey and R. Kaur, for the Appellant; S. Das, for the Respondent

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## Judgement

Aftab H. Saikia, J.—Heard Mr. S. Dutta, learned Counsel for the Appellant and Mr. S. Das, learned Counsel for the Respondents.

2. On perusal of the record, it appears that though the instant appeal preferred u/s 30 of the Workmen's Compensation Act, 1923 (for short, "the Act") was admitted on 19.4.99, no substantial question of law as required under the provision of Section 30 of the Act was formulated.

3. In view of the same, upon hearing the learned Counsel for the parties and also having carefully gone through the impugned judgment and award dated 4.1.99 passed by the learned Commissioner Workmen's Compensation, Guwahati in WC. Case No. 15 of 1997 the following substantial question of law has been formulated to-day itself.

Whether the loss of earning capacity due to the injury not covered by Schedule-I of the Act is required to be assessed by the qualified Medical Practitioner in terms of Section 4(i)(c)(ii) of the Act.

4. Before initiation of consideration of the rival contentions of the learned Counsel representing the parties and discussion to arrive at a proper determination of this substantial question of law formulated as above, it would

necessary and useful to refer to the provision of Section 4(i)(c)(ii) of the Act which is quoted hereunder:

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

. . .

. . .

(c) When permanent partial disablement result from the injury.

(i)...

(ii) In the case of an injury not specified in Schedule-1, such percentage of the compensation payable in the case of permanent total disablement as is proportionate in the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury.

Explanation-I:...

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 in relation to different injuries specified in Schedule-1.

5. In the instant case, the claimant/ Respondent No. 1 while working as "Handiman" met with an accident on 8.3.97 at Barpeta Road Bus Stand while reached thereat on the way from Panbari and as a result of accident, he suffered grievous injury in his right eye which necessitated the operation in the Sankardev Netralaya, Guwahati incurring huge expenses and resultantly he lost his eye sight of the right eye.

6. The learned Commissioner while entertaining the petition considering the relevant medical papers including the medical Certificate issued by the Sankardev Netralaya to the effect that the Petitioner had no visual ability in his right eye, held that loss of earning capacity of the Respondent No. 1 should not be below 70% as permanent disability and accordingly awarded an amount of Rs. 187,076 as just compensation.

7. Dissatisfied with the same, the Insurance Company-Appellant preferred this first appeal against the judgment and award as noted above.

8. Assailing the findings of the learned Commissioner, Mr. Dutta, learned Counsel for the Appellant has rested on his only submission that the learned Commissioner was not justified in assessing the award to the extent of 70% permanent disability without being supported by any evidence of the qualified Medical Practitioner in terms of Section 4(I)(c)(ii) of the Act as quoted above. According to him, the injury in question was not within the injury so enunciated in Schedule-I of the Act. Referring to Sl. No. 25 under Part-II of the said Schedule, the learned Counsel has submitted that the injury of such nature, as in

the case in hand, does not fall under Sl. No. 25 under the heading of other injuries, because as per Sl. No. 25, loss of one eye, without complication, the other being normal, the percentage of such injury would be 40 per cent. In the instant case, it is admitted that the claimant/Respondent No. 1 has lost his eye sight of one eye i.e. right eye with complication when the other being normal and such injury is, therefore, not covered by the Schedule-1. That being so, the learned Commissioner ought to have examined the qualified Medical Practitioner to find out the exact and accurate loss of earning capacity of the claimant/Respondent No. 1.

9. To bolster up his argument Mr. Dutta, has relied on the following decisions of this Court:

1 New India Assurance Co. Ltd. Vs. Sanjit Kumar and Another,

2. New India Assurance Co. Ltd. v. Ratan Das and Anr. M.F.A. 18/2001 disposed of on 9.8.2005.

10. In both the above cited judicial pronouncements, this Court comprehensively ruled that the loss of earning capacity had to be assessed by a qualified Medical Practitioner and it could not be said to be a mere formality. In absence of the evidence of the qualified medical practitioner in that regard, it was not permissible for the Court to find out only from the medical certificate the physical disability of the injured to the extent of loss of earning capacity.

11. Supporting the impugned award, Mr. Das, learned Counsel for the Respondent, on the other hand, has contended that though the injury in question is not covered by Sl. No. 25 of Part II under Schedule, it would be Sl. No. 4 under Part I of the Schedule of the Act which needs to be attracted in the instant case. Sl. No. 4 provides that loss of sight to such an extent as to render the claimant unable to perform any work for which eye-sight is essential and percentage of loss of earning capacity in such case is 100.

12. On consideration of the facts and circumstances of the case as already discussed above, the argument of Mr. Das cannot be accepted because it is an admitted fact that the Respondent No. 1 herein has lost eye sight i.e. only right eye where other eye is being normal and as such Sl. No. 4 of Part-1 cannot be applied herein.

13. Since it is case of loss of one eye, with complications, the other being normal, the same does not come under other injuries as prescribed in Sl. No. 25 and under such circumstances assessment of the qualified medical practitioner is necessary to find out the loss of earning capacity as per Section 4(I)(c)(ii) of the Act.

14. Upon Irving the learned Counsel for the parties and also having regard to the settled law, this Court is of the view that the ends of justice would be satisfied if the matter is remanded to the learned Commissioner for assessment of the compensation afresh after summoning the concerned Doctor to appear before

him and to give opinion with regard to percentage of loss of earning capacity due to loss of eye sight of the right eye. It is ordered accordingly.

15. In view of the above, the impugned judgment and award dated 4.1.99 is hereby set aside and quashed.

16. Record of the case be transmitted to the learned Commissioner, Workmen's Compensation, Guwahati forthwith.

17. The learned Commissioner is directed to record the evidence of the concerned Doctor and pass necessary award as expeditiously as possible and in any case within a period of three months from the date of receipt of the L.C.R.

18. Since the parties are represented by their respective counsel, they are directed to appear before the learned Commissioner, Workmen's Compensation, Guwahati on or before 4.9.06 to obtain necessary orders.

19. With the above observation and directions, this appeal stands disposed of.