
(1995) 06 OHC CK 0008

In the Orissa High Court

The Divisional Manager, Representing United India Insurance
Company Ltd.

APPELLANT

Vs

Kamesh Chandra Patra and Another

RESPONDENT

Date of Decision : 22-06-1995

Acts Referred:

Employees Compensation Act, 1923 — Section 2, 30, 4

Citation : (1996) 1 ACC 460

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Judgement

A. Pasayat, J.—The award of compensation made by the Commissioner for Workmen's Compensation, Ganjam, Barhampur (in short, the "Commissioner") while disposing of a claim petition filed by respondent No. 1 (hereinafter referred to as the "claimant") is subject-matter of challenge in this appeal u/s 30 of the Workmen's Compensation Act, 1923 (in short, the "Act").

2. The claim petition by the claimant was filed with the following averments:

Claimant was conductor of a bus bearing registration No. OSS 8586, owned by respondent No. 2 (hereinafter referred to as the "owner"). On 24.2.1994 at about noon time the said bus was plying from Gaiba to Rayagada. While the claimant was collecting fare from the passengers, suddenly the back gate of the bus flew open and he fell down from the running bus. He was admitted in the private dispensary of Dr. Ranga Rao of Banerjee Clinic at Parlathamudi by the conductor and cleaner of the bus bearing registration No. OSP 1963, and afterwards he was shifted to M.K.S.S. Medical College Hospital for better treatment. As a result of the accident, he sustained multiple injuries on different parts of his body, mainly on the left eyebrow and left thigh. He was unable to walk without the aid of clutches and unable to do any work without assistance. Injuries sustained by him in the accident led to his permanent disability. He was getting Rs. 1500/- per month towards wages in addition to fooding expenses. He was aged 32 years at the time of accident. Though he claimed compensation

from the owner, he was paid only Rs. 10,000-towards treatment, but no compensation was paid towards his disability. The owner filed written statement denying the liability to pay compensation on the ground that though the accident took place in course of employment of the claimant in the vehicle, he had arranged his treatment at Berhampur and met expenses of more than Rs. 10,000/-. According to him, monthly wages of the claimant was Rs. 1,000/- excluding daily feeding expenses of Rs. 20/-. It was stated that the bus bearing registration No. OSS 8586 was subject matter of insurance with M/s. United India Insurance Co. Ltd. (hereinafter referred to as the "insurer"), the appellant in this appeal, and therefore, liability if any was to be indemnified by the insurer.

3. The claimant examined two witnesses, i.e., the cleaner of the bus (OSP 1863) and himself. Discharge certificates of the claimant dated 25.2.1991 and 26.9.1991 were produced. The transfer certificate from the school where he was studying was filed to prove his age. The owner examined the cleaner of the vehicle (OSS 8586) belonging to him. The Commissioner directed the Professor and Head of the Department of Orthopaedics, M.K. C.C. Medical College Hospital, Berham pur to examine the claimant and issue disability certificate. The Commissioner held that the accident took place in course of employment of the claimant and his disability was to the extent of 70%. Accordingly, a sum of Rs. 71,347.90 was awarded as compensation.

4. It is submitted by the learned Counsel for insurer that the course adopted by the Commissioner was rather unusual. Interestingly, the Doctor who allegedly issued the disability certificate was not examined as a witness. In any event the percentage of disability cannot be equated with the percentage of loss of earning capacity, as they are conceptually different. In the aforesaid premises, the award as made is, therefore, not sustainable. The learned Counsel for the claimant on the other hand supported the award.

5. The accident took place on 24.2.1994 and one of the discharge certificates was issued on 25.2.1991. Obviously, therefore, there was no prolonged treatment in the hospital. Interestingly there is no material placed to show that the matter was investigated by the police. The claimant made some evasive statements that the matter was not reported to the Police. Even if that be the fact, the attending Physician must have intimated the Police Authorities because the injuries were claimed to have been sustained by the accident. The Commissioner seems to have lost sight of this fact. There is no reason indicated as to why the Doctor who issued the disability certificate was not examined as a witness. Loss of earning capacity is not the same as the percentage of physical disability. They are conceptually and materially different. Section 4(1)(a)(ii) as well as Explanation II appended thereto refer to loss of earning capacity by a qualified Medical Practitioner. The expression "qualified Medical Practitioner, has been defined in Section 2(1)(i) of the Act. The Doctor who assesses the loss of earning capacity should be examined as a witness in the case, unless compelling reasons existed to make a departure. If that is done he can justify, if required,

the basis of his assessment of loss of earning capacity. The case at hand is not of that nature because no reason has been indicated for non-examination of the Doctor who issued the disability certificate. Further no reason or basis has been indicated by the Commissioner for fixing the loss of earning capacity at 70%. There is no material or document even to show the nature of injuries sustained. The award made by the Commissioner, therefore, is not sustainable and accordingly, is set aside. The matter is remitted back to the Commissioner for fresh adjudication. The parties are directed to appear before the Commissioner on 30.8.1995 when he shall fix up a date for fresh adjudication of the case.

The appeal is allowed to the extent indicated above.