Madhya Pradesh High Court
Shankarlal vs General Manager, Central Railway ... on 14 March, 1990
Equivalent citations: 1990 ACJ 1028, (1999) IIILLJ 273 MP
Author: S Dubey
Bench: S Dubey
JUDGMENT S.K. Dubey, J.

1. The appellant, aggrieved of the award passed by the Commissioner for Workmen's Compensation, Gwalior, (for short 'the Commissioner') on September 8, 1959, awarding 25 per cent of the permanent total disability, has preferred this appeal under Section 30 of Workmen's Compensation Act, 1923, (for short 'the Act').

2. The circumstances giving rise to this appeal are : The appellant, a Shunting Master in the Central Railway at Gwalior, during the course of his employment, on December 24, 1973, met with an accident, as a result of which he got a fracture in right tibia and fibula of right leg. He was treated in Railway Hospital and then in the J.A. Group of Hospitals, Gwalior for a period of five years for comminuted fracture lower 1/3rd tibia with a gap and a big septic wound in the lower third of right leg with loss of skin, projecting sequestrated bone pieces. During his treatment the appellant was also referred for skin-grafting and subsequent reconstructive procedures, but the condition of the appellant could not improve. After all treatments, the fracture remained malunited resulting in shortening of the leg by 4". Exh. P-10, a medical certificate, shows swelling on two shins with discharge extending from lower third of right lower limb to toes, movement at ankle joint absent, flexion by 50 per cent present and painful.

3. The Medical Board of the Central Railway examined him on November 21, 1978 and assessed the loss of earning capacity at 20 per cent of permanent partial disablement, as the injury was a non-scheduled injury. In the opinion of the employer, the appellant was not in a position to perform his original job of Shunting Master, hence, he was offered an alternative job of Power Recorder. The appellant could not perform this job also, as the floor of the room in which he was to sit to perform this job was a marble floor, on which he was not in a position to walk even with the help of his crutches; hence, requested to assign any other job at a place where he can move with the help of crutches, but the respondent refused. Ultimately, the appellant served a notice under Section 80. Civil procedure Code for payment of Rs. 14,000/- as compensation for permanent total disablement.

4. As the compensation was not paid, the appellant filed an application under Section 3 of the Act for compensation in Form H (sic.) under Rule 20 before the Commissioner, which was resisted by the respondent railway. After enquiry, the Commissioner held that the appellant is unfit to do his original job, but the injury being non-scheduled one, compensation according to Schedule IV of the Act for permanent total disablement was not awarded, the loss of earning capacity was increased from 20 per cent to 25 per cent and compensation of Rs. 3,500/- was awarded with a penalty of 20 per cent.

5. Mr. A.K. Upadhyaya and Mr. B.L. Gupta, learned Counsel for the parties, were heard at length. After hearing the learned counsel and perusing the record, I am of the opinion that the learned

Commissioner erred in not awarding compensation treating the case to be one of permanent total disablement for the reasons stated hereinafter.

6. It is not disputed that the appellant who was engaged as a Shunting Master, after the accident, was not in a condition to do his original job of Shunting Master and was unfit for the same. In the circumstances, it has to be determined whether the disability was a total disability or a partial disability. Sections 2(1)(g) and 2(1) (0 of the Act define 'partial disablement' and 'total disablement' which are quoted in extenso : "Section 2(1). In this Act, unless there is anything repugnant in the subject or context--

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(g) 'partial disablement' means, where the disablement is of a temporary nature. Such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time :

Provided that every injury specified in Part II of Schedule 1 shall be deemed to result in permanent partial disablement ;

XXX XXX XXX (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 resulting in such disablement :

Provided that permanent total disablement shall be deemed to result from every injury specified in Part 1 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".

From the above, it is apparent that the incapacity is to be judged in relation to the work in which the workman was engaged. No doubt, for a claim of non-scheduled injury not specified in Schedule I vide Clause (ii) of Section 4(1)(c) of the Act, a strict construction of the provisions of Section 4 imposes a duty on the Court to determine percentage of loss of the earning capacity of the workman as a result of permanent partial disablement. Further, a surgeon or a doctor can estimate only the loss of physical capacity for work but the opinion of such expert witness, which is admissible, cannot be the only consideration for determining the loss of earning capacity. The loss of earning capacity is to be estimated naturally by some other person, and in the case of master and servant, the master, i.e., the employer, who has the opportunity to see the workman's work both before and after the accident. It is an admitted fact that the appellant was unfit to do the job of Shunting Master, and that is why he was offered an alternative job, but the circumstances and the evidence on record clearly establish that the appellant was not able to perform even the duties of that alternative assignment because his leg became useless. In the circumstances, it was not a permanent partial disablement but was a total disablement. The injured who was engaged as a Shunting Master,

because of the injury, was rendered unfit for the work of Shunting Master.

7. The Apex Court in Pratap Narain Singh Deo v. Shrinivas Sabata (1976-I-LLJ-235) while considering a case of a carpenter, who in the course of his employment sustained injuries, as a result of which his left arm above elbow was amputated, held that he became unfit and that the disablement was total and not partial.

8. A Division Bench of this Court in case of Madhya Pradesh State Road Transport Corpn. v. Jabbar Khan, 1985 MPWN 222, held that driver whose left thigh was fractured, and who received injuries in head, his leg shortened by 3", in the circumstances, was not in a position to do any work, the disability was 100 per cent and not partial.

9. This Court in Babu Khan v. Kamal Sethi, 1988 (56) FLR 460, while considering a case of a driver who received a non-scheduled injury, has held that the incapacity is to be judged in relation to the work for which the workman was employed, and the workman was totally unfit to perform his work as a driver, the disablement was total and not partial.

10. In case of Factory Manager, J.C. Mills v. Employees' State Insurance Corpn., Gwalior, 1987 JLJ 281, this Court while considering a case under the Employees' State Insurance Act, 1948, determined the loss of earning capacity as total and held that actual amputation is not necessary even if the injury is not covered by item 3 of Part II of Schedule I of the Act ; Note appended to the Schedule clarifies that if there is a complete loss of use of any limb or member referred to in this Schedule, it shall be deemed to be the equivalent of the loss of that limb or member.

11. A Division Bench of Gujarat High Court in case of Punambhai Khodabhai Parmar v. G. Kenel Construction, (1985-I-LLJ-98) (Gujarat), considering a case of driver who suffered disability in the right hand fingers, elbow and right thigh in an accident and was rendered unfit to do the work of a driver, assessed disablement as total. In case of Kochu Velu v. Purakkattu Joseph, 1984 ACJ 630 (Kerala), Division Bench of Kerala High Court held that the workman, a coconut climber, who fell down from a coconut tree and sustained compound fracture of radius and ulna left and developed non-union of radius and ulna with partial loss of function of fingers, could not climb trees due to loss of fingers, the disablement was total and not 50 per cent as assessed by the doctor.

12. Therefore, from the definitions of 'partial disablement' and 'total disablement' and the decisions referred to above, in a case where injury is a non-scheduled one and there is no amputation, incapacity to work is to be judged in relation to the work for which the workman was engaged at the time of accident and not that such a workman could work on another job of lighter duties assigned to him after the accident, on the same pay and emoluments which he was drawing at the time of accident. As a result of the above discussion and the facts which are borne out from record. I am of the opinion that there is no partial disablement either of 20 per cent or of 25 per cent, but is total disablement of 100 per cent and, hence, the appellant is entitled to full compensation of Rs. 14,000/- with proportionate penalty of 25 per cent and also interest on the said amount at the rate of 6 per cent per annum from the date of accident till payment.

13. The contention of Mr. Gupta, learned counsel for respondent, that the respondent offered him a lighter job which the appellant could have done, but has not done and absented, hence, he is entitled only to the extent of loss of earning capacity as determined by the Commissioner and not more than that, has no merit. Suffice it to say that the Act provides security to the workman who receives partial or total incapacity. This protection is independent of the act of grace or mercy which the employer might show to the workman. In our country which is a welfare State, the protection, cannot be allowed to rest on the mercy of the employer. If the employer does so, it is commendable and is to be appreciated, but the workman cannot be deprived or be compelled to accept lesser compensation than the one provided under the Act.

14. Mr. Gupta also pressed his cross objections and contended that penalty imposed was not justified. In this respect, Section 4A of the Act is mandatory and is in clear terms, which lays down that employer is bound to deposit the compensation as soon as it falls due under Section 4 of the Act. Within one month from the date of accident no compensation was deposited in accordance with Section 4 of the Act nor any provisional payments were made in accordance with Section 4-A(2) of the Act : hence, there was no justification for not depositing the compensation : therefore the penalty of 20 per cent imposed was justified, the law is very clear on this point as laid down by the highest judicial pronouncement in Pratap Narain Singh Deo's case, (supra).

15. The respondent neither deposited nor paid, the compensation within one month from the date it fell due, nor made any provisional payments even, under Section 4-A(3) the respondent/ employer is liable to pay interest also at the rate of 6 per cent per annum on the amount of compensation as awarded by this Court from the date of accident till payment, besides penalty of 20 per cent.

16. In the result, the appeal is allowed with costs. Counsel's fee Rs. 500/- if already certified. It is also directed that the respondent shall deposit the amount before the Commissioner within a period of two months from today, failing which the employer shall be liable to pay interest on the said amount at,the rate of 12 per cent per annum till payment.