

(1978) 05 MP CK 0002

In the Madhya Pradesh High Court

Case No : Civ. Miscellaneous Appeal No. 46 of 1971

Employees' State Insurance Corporation

APPELLANT

Vs

J.C. Dhariwal and Another

RESPONDENT

Date of Decision : 05-05-1978

Acts Referred:

Employees State Insurance Act, 1948 — Section 15A, 15B, 2, 2(8), 66

Factories Act, 1948 — Section 21

Workmens Compensation Act, 1923 — Section 3, 4

Citation : (1978) ACJ 457

Hon'ble Judges : A.R. Naokar, J

Bench : Single Bench

Advocate : J.P. Diwan, for the Appellant; S.K. Dubey, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Navkar, J.—This is an appeal u/s 82 of the Employees' State Insurance Act against the order dated 19-1-1971 passed by Shri Krishna Das Shah, Presiding Officer of the Labour Court, Gwalior in Case No. 11/63.

2. The Employees' State Insurance Corporation, Gwalior submitted an application u/s 66 of the Employees' State Insurance Act (hereinafter referred to as the Act) before the Labour Court, alleging that the Appellant is statutory body incorporated under the Act and Mr. N.S. Bawa was the Manager of the Corporation; Respondent No. 2 is a factory and Respondent No. 1 is the principal employer.

3. Hari Singh is an employee of the Respondents and he is insured with the Appellant. On 18.9.1962, Hari Singh, while testing the tightness of the cloth on Stenter Machine, his cloth accidentally entangled with the rotating shaft with the result that his testicles got entangled in the shafting and he sustained severe injuries. The accident occurred because the shafting was not covered by any safety guard which was mandatory u/s 21 of the Factories Act. The injury to Hari Singh was an employment injury and caused due to negligence of the

Respondents for not providing the safety guards. The Medical Board has permanently assessed the loss of earning capacity of Hari Singh at 10%. The Appellant has paid Rs. 379.24 to Hari Singh as temporary disablement benefit from 18.9.1962 to 28.2.1963 and Rs. 121.41 as permanent disablement benefit from 1.3.1963 to 6.8.1964. The Appellant has to pay permanent disablement benefit to Hari Singh for his life. Thus, the actuarial present value of which amounts to Rs. 1,295/-. The Respondents are liable to reimburse to Appellant of the above amount totalling to Rs. 1,795/- u/s of the Act.

4. The Respondents denied all allegations. The Labour Court framed issues and after taking evidence, gave an award to the effect that it allowed the sum of Rs. 379.24 in favour of the Appellant, but refused rest of the claim.

5. The refusal of the claim is based on the ground that even though disablement injury is proved, it is not proved by evidence that the earning capacity of Hari Singh has diminished.

6. Before me, the Employees' State Insurance Corporation, Gwalior has filed an appeal and Respondents J.C. Mills and others have filed the cross-objection.

7. I have heard learned Counsel on both the sides. The case arises when Sections 66 and 67 of the Act were not repealed with effect from 17th June, 1967. Similarly, Section 15-A and 15-B in Section 2 were added subsequently. On the basis of this, the learned Counsel for the Appellant submits before me that it was not essential for the Corporation to prove that there was any reduction in earning capacity. Section 66 of the Act says that there should be an employment injury. The definition of "Employment injury" is given in Section 2(8) of the Act which is as under:

"Employment injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment in a factory or establishment to which this Act applies, which injury or occupational disease would entitle such employee to compensation under the Workmen's Compensation Act, 1923 (VIII of 1923), if he was a workman within the meaning of the said Act.

That, in terms, refers to Workmen's Compensation Act of 1923 and says that the injury should entitle such employee to compensation under the Workmen's Compensation Act of 1923. Therefore, we will have to see whether any compensation can be paid under Workmen's Compensation Act, 1923 for an injury which is sustained by Hari Singh. Section 3 of the Workmen's Compensation Act, 1923 says that the employer is liable for the compensation. If a personal injury is caused to workman by accident arising out of and in the course of his employment his employer shall be liable to pay compensation in accordance with the provisions of this Chapter. From this, we will have to go to Section 4 thereof which deals with the amount of compensation. The relevant portion is Section 4 which reads as under:

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of a permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury.

So, taking all the sections together, the main thing is that if there is loss of earning capacity caused by the injury, then under the Workmen's Compensation Act, 1923, the employer will be liable if that injury is not specified in Schedule I of Part II. The injury sustained by Hari Singh is not included in Schedule I Part II. Therefore, it will be governed by Section 4(ii), as mentioned above. So, the submission made by the learned Counsel for the Appellant that there is no need to prove reduction in earning capacity cannot be accepted.

8. It is true that the Medical Board has given a certificate that the disablement of Hari Singh is 10%. But, that itself will not entitle him to any compensation, because it has come in evidence also that there is no reduction in his pay or the amount he was earning formerly.

9. Unless it is proved that there is reduction in earning capacity, no compensation can be paid only on the basis of disablement to the extent of 10%. I will refer, in this connection, to Calcutta High Court judgment in Calcutta Electric Supply Corporation Ltd. Vs. Habul Chandra Das, , in which it is held that: "No compensation can be granted for any physical disability unless there is loss of earning capacity. It is only in the case of scheduled injury that such loss is presumed. Where the injury is of a type not specified in the schedule the workman must prove the loss of earning capacity, if any, as a matter of fact. It cannot be proved by mere medical evidence. It must be proved by evidence which establishes that the workman is, as a result of the injury, unable to earn as much as he did before. This is a question of fact and has to be proved by evidence like any other question of fact."

10. The other citation is Allahabad High Court judgment in Upper India Sugar Mills Ltd. Vs. Kartara, , which says: "There may be cases in which physical incapacity is suffered but without any loss of earning capacity. In such a case the workman will not be entitled to any compensation".

11. The third case is the Calcutta High Court judgment in Bhanora Colliery, etc., Co. Vs. Poda Teli, in which it is held: "Medical evidence is not conclusive or decisive in determining loss of earning capacity--Loss of earning capacity should be proportionate to the loss of earning capacity caused by the injuries."

12. In this case, there is no proof that there is loss of earning capacity because of disablement and therefore, the Labour Court rightly rejected the claim as far as Rs. 1,295/- is concerned. The claim for Rs. 125.45 is also not proved by the Appellant Petitioner. Therefore, the finding by the Labour Court is also correct.

13. Now, I have to deal with the cross-objection filed by the Respondents. The submission before me of the learned Counsel is that because there was negligence on the part of the worker in not observing and obeying the

instructions given to him and as he himself was negligent in putting a towel around him and not putting the proper dress, the Company is not liable. I think this submission cannot be accepted. According to Section 21 of the Factories Act, it is an absolute duty to put guard on moving parts which are dangerous. Here, in evidence, it has come that no guards were put on these moving parts. Therefore, the liability u/s 21 of the Factories Act is absolute. It is also not proved that Hari Singh was provided with the dress. Neither instructions are proved. On the contrary, the documents show that the Company has accepted that the accident happened because there were no guards. From the evidence also, it is not proved that Hari Singh was negligent. Regarding negligence of Hari Singh, at the first instance when the report is made, the Company has made no grievance. Therefore, the finding of the trial Court that the Company is liable to pay temporary disablement amount of Rs. 379.25 and that Hari Singh was in the hospital from 18.9.1962 to 28.2.1963 which is proved by Ex. P/3 to P/9, are correct and I confirm those findings.

14. In the result, the appeal and the cross-objection fail and they are dismissed without costs.