

(2009) 06 KL CK 0087
In the High Court Of Kerala
Case No : INS. Appeal No. 55 of 2006

E.S.I. Corporation

APPELLANT

Vs

K.B. Pushpa

RESPONDENT

Date of Decision : 23-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114
Employees State Insurance (General) Regulations, 1950 — Regulation 75
Employees State Insurance Act, 1948 — Section 54A, 54A(2), 55, 55(1), 55(2)

Citation : (2009) 16 KLJ 827 : (2009) 3 KLT 562

Hon'ble Judges : M.L. Joseph Francis, J;K.M. Joseph, J

Bench : Division Bench

Advocate : T.V. Ajayakumar, for the Appellant; P. Ramakrishana, for the Respondent

Final Decision : Allowed

Judgement

K.M. Joseph, J.—This is an Appeal filed by the ESI Corporation u/s 82(2) of the Employees' State Insurance Act (hereinafter referred to as the Act). Reference to brief facts leading to the Appeal is as under.

The respondent met with an accident on 6.12.2002 while working in the factory causing injury to her left foot. She was paid temporary disablement benefit from 7.12.2002 to 5.3.2003 and from 7.3.2003 to 18.6.2003. On 19.6.2003, the Medical Referee who examined her, opined termination of temporary disablement benefit with effect from 19.6.2003. Accordingly, temporary disablement benefit was not paid thereafter. But, she was paid sickness benefit from 21.6.03 to 30.6.03 and from 1.7.04 to 31.12.04. On 16.7.2004 the Medical Board assessed 2 per cent permanent partial disability. The respondent challenged the above decision by filing I.C.A. No. 5/04. She prayed for declaration of 50 per cent permanent disability. It is this Appeal which came to be disposed of by the impugned order, in the order impugned, the El Court found that the assessment is not proper and the matter has to be referred to the Medical Board for review.

The Court also directed the appellant to restore the temporary disablement benefit and refer the respondent to the Medical Board constituted with the medical experts preferably from Medical College Hospital or from the State Health Service for reassessing her loss of earning capacity.

2. The substantial questions of law purportedly raised are as follows:

(i) Whether the direction of the learned E.I. Court to constitute Medical Board with Medical Experts preferably from Medical College Hospital or from State Health Service for reassessing loss of earning capacity of the respondent is not violative of Section 54A and Regulation 75 of the ESIC (General) Regulations

(ii) In view of the finding of the learned E.I. Court that the case of the respondent has to be once again referred to the Medical Board for review, the further direction issued by the learned E.I. Court to constitute Medical Board with Medical Experts preferably from Medical College Hospital or from State Health Service for assessing LEC is not violative of the provision contained in Section 55 of the E.S.I. Act and Section 114 and Order XLII of C.P.C.?

3. Heard the learned Counsel for the appellant and also the learned Counsel appearing for the respondent. Learned Counsel for the appellant would refer us to Sections 54A and 55 of the Act. He also referred to Regulation 75 of the Regulations. He would contend that what is contemplated by the Court by the impugned order was a review, finding that the assessment by the Medical Board was not correct. If that is so, it was bound to send it back to the Medical Board constituted under Regulation 75. He would submit that this would come u/s 55 of the Act. Learned Counsel for the respondent, on the other hand, would submit that no substantial question of law arises. It is further submitted that this is a case where the assessment of loss of earning capacity was found to be erroneous.

4. The first question to be considered is whether a power of review u/s 55 is attracted. Section 55(1) contemplates a review by the Medical Board or a Medical Appeal Tribunal, as the case may be, if there is fresh evidence that the decision as originally given by them was as a result of non-disclosure or misrepresentation by the employee or any other person of a material fact and whether it is fraudulent or not. Clearly, this provision is inapplicable to the facts of this case. The further contention of the learned Counsel for the appellant that it may attract Sub-section (2) also does not appear to be correct. Sub-section (2) contemplates an assessment being made by way of review by the Medical Board when it is satisfied that since the making of the assessment, there has been a substantial and unforeseen aggravation of the results of the relevant injury. We are of the view that the case at hand does not involve a substantial and unforeseen aggravation of the results of the relevant injury since the making of the assessment. Therefore, clearly, learned Counsel for the appellant may not be justified in pointing out that the review is one which is covered by the provisions of Section 55 per se. It is to be noted that Section 54A provides for referring the case of any insured person by the Corporation to a Medical Board. Either the

insured person or the Corporation being dissatisfied with the decision of the Medical Board has two choices. The aggrieved party may appeal to the Medical Appeal Tribunal constituted under the Regulations or under Sub-section (2) of Section 54A, it may appeal to the E.I. Court directly. In this case, what has happened is that feeling, aggrieved by the per centage fixed by the Medical Board, the respondent has directly appealed to the E.I. Court. If that is so, we would have to consider the power of the E.I. Court. Matters to be decided by the E.I. Court are as adumbrated in Section 75. Sub-section (2A) of the said provision being relevant is extracted hereunder.

75. Matters to be decided by Employees' Insurance Court-(2A): If in any proceedings-before the Employees' Insurance Court, a disablement question arises and the decision of a medical board or a medical appeal tribunal has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the medical appeal tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under Sub-section (2) of Section 54A in which case, the Employees' Insurance Court may itself determine all the issues arising before it.

5. The powers of the E.I. Courts are as mentioned in Section 78 of the Act. The order of the E.I. Court is to be treated as a decree of a civil court. The E.I. Courts have been given certain powers which are available to a civil court. For all practical purposes, Issues which are germane are to be dealt with by the E. I. Court as is clear from Sub-section 3 of Section 75. Therefore, when the matter came up before the E.I. Court in an Appeal u/s 54A, certainly the E.I. Court has the power to decide the matter on the basis of the evidence adduced before it. The evidence may include the evidence of Experts adduced before it in such a manner so as to establish before it that the relief which is sought may be granted. In an Appeal from the decision of the Medical Board, the E.I. Court would certainly have the power to call for reappraisal or re-assessment or consider such evidence which would show that a reassessment is warranted. It may also have the incidental power to remit the matter back to the very same medical board for a review. This is a power which flows from Section 54A as when the Court refers it back to the medical board, it is doing it in the course of the exercise of the appellate powers with which it is vested. It may be that circumstances co-exist as are to be found either in Sub-section (1) or Sub-section (2) of Section 55. We notice also that in an Appeal to the Medical Appeal Tribunal, the Medical Appeal Tribunal has the power to get expert evidence. No doubt, such power is not specifically mentioned in respect of E.I. court, but that does not mean that the Court would have the power which is given to the Tribunal. The reason being that the said power must be incidental to the main power for deciding the correctness of the assessment made by the medical

board, the decision being challenged in an appeal. But, in this case, we notice that without assigning any reason and after finding that the matter has to go for review by the medical board, the E.I. Court has directed a review by a medical Board constituted with medical experts preferably from Medical College Hospital or from the State Health Service. No doubt, the word used "preferably" may not enjoin any peremptoriness in the same direction. But, when it decides the matter to be sent for review, it may not be open to the E.I. Court to further direct "preferably by Experts" mentioned already. We cannot say that there is no question of law as such, as the question of law relates to the power of the E.I. Court, hi the light of this discussion, we allow the Appeal to the extent of deleting the direction that the appellant may constitute a Medical Board with medical experts preferably from Medical College Hospital or from the State Health Service. The medical board shall be constituted as per the direction of the Court at the earliest and the assessment done as aforesaid.