

(1998) 08 DEL CK 0025

In the Delhi High Court

Case No : FAO No. 74/95

Raja Ram

APPELLANT

Vs

Employees' State Insurance Corporation

RESPONDENT

Date of Decision : 11-08-1998

Acts Referred:

Citation : (1998) 5 AD 353 : (1998) 75 DLT 266 : (1998) 47 DRJ 90

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : Mr. Jagat Arora, for the Appellant; Mr. N.S. Bajwa and Mr. Harpreet Singh, for the Respondent

Judgement

C.M. Nayar, J.—The present appeal is directed against the order passed by Shri J.K. Pali, Senior Sub Judge Delhi in ESIC case No.193/89. The appeal was directed against the order of Medical Appellate Tribunal dated June 30, 1989 on the ground that the appellant during the course of his duty on January 11, 1989 suffered injury in his left index finger, thereby his left index finger at terminal phalanx was amputated. He remained under treatment from January 11, 1989 to February 10, 1989 at ESI Hospital, Basai Darapur and ESI Dispensary, Shakti Nagar, Delhi and became fit to join duty on February 11, 1989. The appellant obviously suffered amputation with loss of bones. The injury was classified at item No. 35 in Part II of Schedule II, and, Therefore, he was held entitled to disability benefit 9% instead of 1%. The medical board found that the injury to the left index finger recovered completely and the assessment of earning capacity was held nil.

2. The appellant preferred an appeal before the Medical Appellate Tribunal and the Tribunal enhanced the disablement benefits from Nil to 1% but the appellant claimed that the said benefit may be enhanced from 1% to 9% because the appellant had suffered a complete and permanent loss of use of limb or member which may be deemed to be equivalent to loss of that limb.

3. The following issues were framed on the basis of pleadings :-

"1. Whether the petitioner suffered scheduled injury as alleged by him ?

2. Whether the petitioner is entitled to the enhanced benefit as claimed by him ?

3. Relief."

4. The learned Senior Sub-Judge examined the evidence on record and held in paragraph 10 as follows :-

"The above decision of the medical evidence reveals that PW1 does not confirm that the injury on the right index finger of the appellant is one as fracture or amputation at the proximal or there is any loss of bone to the finger of the appellant. There is no other evidence on record. The question of disability benefit can only to be granted on the basis of the medical evidence on record, which is lacking in the present case. From the medical evidence on record, it cannot be said that the petitioner has suffered a schedule injury as mentioned at item No. 35 in Schedule II as claimed in the appeal. Therefore, the question of entitlement of the petitioner/appellant to enhance benefits does not arise. Both the issues are decided in negative against the petitioner and in favor of the respondent.

Relief

In view of my findings on issues above, the appeal is dismissed. Parties are however left to bear their own costs."

5. The claim of the appellant as a consequence was disallowed. The learned counsel for parties state the compensation of 28 paise per day is granted u/s 51 of the State Employees Insurance Act, 1948 which read as follows :-

"Section 51 : Disablement benefit: subject to the provisions of this Act

(a) a person who sustains temporary disablement for not less than three days (excluding the day of accident), shall be entitled to periodical payment [at such rates and for such period and subject to such conditions as may be prescribed by the Central Government];

(b) a person who sustains permanent disablement, whether total or partial, shall be entitled to periodical payment [at such rates and for such period and subject to such conditions as may be prescribed by the Central Government]."

6. The Second Schedule to the Act deals with the list of injuries under different heads and part II, Section "A" relates to the "fingers of right or left hand, Index finger". Entry 35 reads as under:-

Sl.No. Description of injury Percentage of loss of earning capacity 35. One phalanx 9 7. The learned counsel for appellant has contended that the Award has been made on wrong interpretation of law and has placed reliance on a judgment of this Court in F.A.O. No.50/87 (Hari Chand Vs. E.S.I.C) decided on March 14, 1990. The operative portion reads as follows :

"It is asserted in the judgment itself that according to the record of the Medical Board, there was partial loss of pulp of terminal phalanx.

The injury was sustained, admittedly, in the index finger of the left hand. Reliance is placed by the workman on the provisions of second Schedule, Item 36 of the Employees' State Insurance Act, 1948 which deals with fingers of the left hand and specifically the index finger and it reads as follows :

"Guillotine amputation of tip without loss of bone. Percentage of loss of earning capacity 5%."

Guillotine amputation of tip without loss of bone indicates that there is only loss of flesh and no loss of bone. The flesh which is lost is the last phalange of the index finger. It is not disputed that there is partial loss of pulp of terminal phalanx. This being the case, owing to the statutory provision, the Medical Board could only grant what was provided for in the Second Schedule. The Medical Board has no power to alter the percentage of loss which stands determined by the Statute.

In this view of the matter, the learned Judge below has gone wrong in awarding disablement benefit 3%. In view of item 36 of the Second Schedule of the Employees' State Insurance Act, 1948, the appellant is entitled to disablement benefit 5% of loss of earning capacity.

The percentage of loss having been determined by me in terms of item 36 of the Second Schedule, I further direct the authorities concerned to determine the loss in money terms and pay the same in accordance with law. Payment be made within a period of one month.

The appellant is also entitled to costs in this Court and courts below. I quantify the costs as Rs.500/-."

8. Similarly, in the present case the Board could not have awarded 1% compensation as there is no such percentage which is fixed for the type of injury which the appellant has suffered. Following the law as stated above the appellant is liable to succeed. The appellant is entitled to claim the enhanced benefit at the rate of 9% instead of 1% in accordance with item 35 of the Second Schedule of the Employees State Insurance Act, 1948. It is regrettable that the Government does not expeditiously grant relief in such cases without the intervention of the Courts. In the present case the appellant has continued to fight from the date he suffered the injury in the year 1989 and no solution was found by the respondent till date particularly when the amount which can be awarded in law is so small. The matter was adjourned by this Court for grant of payment to the appellant in terms of the provision of the Act but there was no response. In view of the aforesaid reasons, the appeal is allowed. The appellant is also entitled to costs which are quantified at Rs. 5,000/-. The amount as now awarded shall be disbursed to the appellant within six weeks from today.