

(1993) 06 KL CK 0020
In the High Court Of Kerala

Regional Director, Employees" State Insurance Corporation	APPELLANT
Vs	
K.K. Pushkaran	RESPONDENT

Date of Decision : 08-06-1993

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 51, 54, 54A

Citation : (1995) 1 ACC 496

Hon'ble Judges : John Mathew, J

Bench : Single Bench

Judgement

John Mathew, J.—In an appeal u/s 54A(2)(ii) of Employees State Insurance Act, 1948, against the decision of the Medical Board determining the disablement of an insured person, is it proper for the Employees" Insurance Court to determine the percentage of disablement mainly taking into consideration the circumstance that the insured person is practically incapable of doing the work or the employer is not willing to give him any suitable work or that his earning capacity is nil since he is unemployed?

2. This important question arises in this appeal filed by the Regional Director, Employees" State Insurance Corporation, Trichur (hereinafter referred to as "the E.S.I. Corporation"). The appellant before the E.S.I. Court, who is the respondent herein, is hereinafter referred to as "the employee". The employee met with an accident in the course of his employment on 12.12.1987, when he was working as a Winder in Kerala Spinners Ltd. After discharge from the hospital where he was treated, he had complaints of severe pain at the lower portion of his vertebral column which was diagnosed as "intervertebral disc prolapse" which was caused due to the accident. He was examined by the E.S.I. Medical Board, Alleppey. As per Exh.P-5, decision of the Medical Board dated 12.8.1988, he had 20 per cent permanent disablement. He challenged the decision of the Medical Board by filing an appeal before the E.S.I. Court from which this M.F.A. arises.

3. Before the E.S.I. Court the employee examined himself and a Doctor who

issued Exh. P-4, Medical Certificate. He also produced Exhs.P-1 to P-5. The E.S.I. Corporation examined DW-1 who was one of the Doctors in the Medical Board. After the closing of the evidence, the lower Court asked the E.S.I. Corporation to make an enquiry whether any lighter employment could be provided to the employee. After making the enquiry, it was submitted that the employer had informed them that it is not in a position to give any suitable lighter work to the employee. The E.S.I. Court held that the employee is practically incapable of doing the work which will be normally provided to him in his company and so his earning capacity is nil. Therefore, by the order under challenge the Court directed the E.S.I. Corporation to give him full rate of the benefit as if his disability was 100 per cent. The Court also observed that the E.S.I. Corporation may make proportionate deductions as and when it is found that the employee is gainfully employed in any place.

4. The appeal before the E.S.I. Court was one u/s 54A(2)(ii) of the E.S. 1. Act. u/s 54A the employee is given the option either to challenge the decision of the Medical Board before the Medical Appellate Tribunal or before the Employees' Insurance Court. Medical Boards are constituted under Regulation 75 of the Employees' State Insurance (General) Regulations, 1950.

5. Therefore, the E.S.I. Court had to determine the case of the employee for permanent disablement benefit after examining whether the decision of the Medical Board was proper or not. The Court will have to determine the question of disablement keeping in mind Section 54 of the E.S.I. Act which is as follows:

54. Determination of question of disablement.--Any question-

- (a) whether the relevant accident has resulted in permanent disablement; or
- (b) whether the extent of loss of earning capacity can be assessed provisionally or finally; or
- (c) whether the assessment of the proportion of the loss of earning capacity is provisional or final; or
- (d) in the case of provisional assessment, as to the period for which such assessment shall hold good;

shall be determined by a Medical Board constituted in accordance with the provisions of the regulations and any such question shall hereinafter be referred to as "the disablement question".

Since there is no specific provision as to the manner in which the Court is to examine the correctness or otherwise of the report of the Medical Board, the Court will have to decide the question after considering the evidence adduced before it and keeping in mind the provisions of the E.S.I. Act and Regulations.

6. As provided u/s 54A, the E.S.I. Court will have to determine the extent of loss of earning capacity of the insured person. The circumstance that the employer is refusing employment even though the Medical Board determined the employee's

disablement at 20 per cent can only be one of the factors to be taken into account. But it is not safe to overrule the opinion of the Medical Board, members of which are technically qualified to assess the disablement, without further evidence. If the party is unable to produce such evidence before the Court, normally the Court should hold that there is no material to interfere with the finding of the Medical Board. Here the employee is challenging the decision of the Medical Board. The burden of establishing that the finding of the Medical Board was not proper is on the employee. There is very little scope for the Court which is not technically equipped to assess the quantum of disablement or to interfere with the finding of the Medical Board on grounds which are not established before it or on compassionate grounds which cannot be tested by superior Court. Section 51 of the E.S.I. Act which grants disablement benefit to the employees is as follows:

51. Disablement benefit.--Subject to the provisions of this Act and the regulations, if any,-

(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.

Sections 2(15A) and 2(15B) of the E.S.I. Act define permanent partial disablement and permanent total disablement as follows:

2 (15-A) "permanent partial disablement" means such disablement of a permanent nature as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

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

(15-B) "permanent total disablement" means such disablement of a permanent nature as incapacitates an employee 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 I of the Second Schedule 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.

7. From this it is clear that if only the injury is specified in Part I or Part II of the Second Schedule to the Act, the deeming provision contained in Section 15A or

15B of Section 2 will be applicable. Therefore, if the injury is not one specified in either of these parts, the Court will have to examine as to what extent the ingredients of the Sub-sections are established in the case in hand. In other words, whether the employee has suffered permanent partial disablement or permanent total disablement will be a question of fact to be proved before the Court, if the injury is not one specified in the Second Schedule. If such disablement is proved, then in the case of permanent partial disablement the Court has to examine whether the earning capacity of the workman has been reduced in every employment he was capable of undertaking at the time of the accident and not merely the particular employment in which he was engaged at the time of the accident resulting in the disablement. See *Upper Doab Sugar Mills. Ltd. Vs. Daulat Ram, and General Manager G.I.P. Rly. Bombay v. Shanker* AIR 1950 Nag. 201, The Court will have to enter a specific finding that the injury suffered by the employee caused him disablement of a permanent nature which reduces his earning capacity in every employment which he was capable of undertaking at the time of the accident. Sub-section 15A contemplates reduction in the earning capacity and not reduction of the actual earning. This is clear from the fact that the "capacity" itself is determined with reference to every employment which he was capable of undertaking at the time of the accident. Thus the scope of the words used cannot be confined to the job which the employee was doing or carrying on at the time of the accident. The words refer to his capability generally of doing any job to earn his livelihood. See *Munshigiri v. E.S.I. Corporation* 1988 ACJ 932 .

8. In cases where the claim is on the basis that the employee has suffered permanent total disablement as defined u/s 2(15-B) of the Act, if the injury is not one included in the list of injuries in Part I of the Second Schedule, whether the employee has suffered permanent total disablement will be a question of fact to be proved before the Court. The Court has to examine whether the disablement is of such a character that the person concerned is unable to do any work and not only the work which he was doing at the time of the accident. See *General Manager G.I.P. Rly. v. Shanker* AIR 1950 Nag. 201, *All India Construction Co. Ltd. v. Munshi Ram* AIR 1931 Lah 319 and *Hutti Gold Mines Company Vs. Ratnam*, .. The Court will have to enter a specific finding that the N injury suffered by the employee caused him total disablement of a permanent nature whereby he is unable to do any work and not only the work which he was doing at the time of the accident. In arriving at this conclusion the circumstance that the workman has no longer any earning power since no one could be perused to offer him any employment, whatever may be his physical power, will be an important factor to be taken into account. But that should not be the sole criterion.

9. In the present case, the E.S.I. Court has not referred to Exh. P-5, decision of the Medical Board or the evidence of DW. 1 who was one of the members of the Medical Board. According to the decision of the Medical Board, the loss of earning capacity was finally " determined as 20 per cent and was declared to be of a

permanent nature. On the other hand, Exh. P-4, certificate issued on the day previous to the examination of the employee by the Medical Board, does not assess the loss of earning capacity. According to Exh. P-4 he has, pain at lumbo sacral junction with restriction of movement and a positive lasegues sign. The Doctor who issued Exh.P-4 was examined as PW.2. As PW 2 he stated that the employee cannot stand for a long time and cannot carry heavy weight. He cannot be in a" stooping position. Squating will be painful. He can sit in a chair. In cross-examination he stated that he can do the work of coir winding. From a perusal of the Order of the E.S.I. Court, it would appear that the decision turned on the circumstance that the employer is not willing to give him suitable work and so his earning capacity was reduced to nil. We do not think that such an approach was justified. If the employer illegally refuses to give employment to the worker, the Court is not helpless in enforcing the rights of the worker. Therefore, the Court will have to examine whether the employee is unable to do any kind of work. A decision on this point may be arrived at after considering any further evidence that may be adduced by the employee. In case the Court considers it necessary, a further medical examination may be ordered by the Court.

10. Under these circumstances, we are of opinion that the appeal filed by the employee will have to be reconsidered by the E.S.I. Court. Accordingly, we set aside the Order of the E.S.I. Court and remand the case to that Court for fresh consideration and disposal in accordance with law arid in the light of the observations in this judgment. There will be a further direction that the E.S.I. Corporation will pay continue to pay to the employee compensation on the basis of that the employee's disablement is 20 per cent until further Orders of the Court.