

(1989) 05 KAR CK 0013

In the Karnataka High Court

Case No : M.F.A. No's. 300 and 301 of 1988

Regional Director, ESI Corporation

APPELLANT

Vs

S. Saravanam

RESPONDENT

Date of Decision : 31-05-1989

Acts Referred:

Employees State Insurance Act, 1948 — Section 54 A (2) (i), 82 (2)

Citation : (1990) 60 FLR 165 : (1989) ILR (Kar) 3559 : (1990) 1 KarLJ 12 : (1991) 2 LLJ 494

Hon'ble Judges : N. Venkatachala, J;D.P. Hiremath, J

Bench : Division Bench

Judgement

N. Venkatachala, J.—Theses appeals M.F.As. Nos. 300 of 1988 and 301 of 1988, are of the Employees' State Insurance Corporation ("the Corporation") filed u/s 82(2) of the Employees' State Insurance Act, 1948 ("the Act"), against the common order dated September 21, 1987 made in E.S.I. Appeals Nos. 12 of 1986 and 6 of 1986 respectively by the Employees' State Insurance Court ("the ESI Court").

2. Material facts are -

The respondent was a Spinner in a Cotton Mill at Bangalore. He is an "insured person" under the Act. He suffered an employment injury in his left foot on January 23, 1985. He obtained treatment for the injury in an E.S.I. Hospital and was away from work till that injury got healed up. He got temporary disablement benefit from the Corporation in that behalf, as provided for under the Act. Thereafter, on October 30, 1985, he made an application to the Corporation seeking from it permanent disablement benefit pleading that he was entitled to such benefit under the Act respecting the injury which he has sustained. The Corporation referred that application to the Medical Board for assessing the disablement benefit payable to the respondent. The Medical Board took the view that the permanent disablement benefit payable to the respondent was nil and made an order accordingly. The respondent preferred an appeal against that

order, u/s 54-A(2)(i) of the Act to the Appeal Tribunal. That Tribunal, which was assisted by a Medical Assessor and a Labour Assessor, after due enquiry, made an order assessing the loss of earning capacity of the respondent at 18%. The appellant as well as the respondent, who were dissatisfied with the said order, carried it in further appeals, E.S.I. Appeals Nos. 6 of 1986 and 10 of 1986, to the E.S.I. Court. That Court, by its common order dated September 21, 1987 while dismissed the appeal of the Corporation, allowed the appeal of the respondent and held that the loss of his earning capacity was 25%. It is that common order which is appealed against by the Corporation by filing the present two appeals, as stated at the outset.

3. In theses appeals, the Learned Counsel for the appellant Corporation urged that the ESI Court has erred in proceeding on the basis that the case before it was that of a temporary disablement benefit and in fixing the loss of earning capacity of the respondent at 25% on its view that the nature of injury suffered by the respondent and the pain and suffering undergone by him for three months on account of that injury called for such fixation. He further urged that the Medical Board, whichever it may be, cannot assess the permanent disablement benefit payable under the Act to an insured person for an employment injury suffered by him, unless it brings such injury within one or the other of the injuries described in Schedule II to the Act so as to enable it to fix the percentage of loss of earning capacity as mentioned against such injury.

4. The Learned Counsel for the respondent, on the other hand, submitted that no error was committed by the ESI Court in fixing the loss of earning capacity of the respondent having regard to the nature of injury suffered by the respondent and the pain and suffering undergone by him. She also submitted that the provisions of the Act enable the Medical Board, Medical Appeal Tribunal or the ESI Court to find whether the employment injury could fall outside any of the injuries described in Schedule-II to the Act and fix the loss of earning capacity of the injured, having regard to the consequences that flow from such injury.

5. In the light of the said submissions of Learned Counsel appearing for the opposing parties, the points which arise for our consideration and decision, may be formulated thus :

(i) Whether the ESI Court was right in proceeding with the appeal before it on the basis that the case concerned in the appeal was a case of temporary disablement benefit.

(ii) Whether the Medical Board, Medical Appeal Tribunal or the ESI Court deciding upon the "disablement question" is barred from fixing the loss of earning capacity of an insured person due to an employment injury suffered by him, unless it finds that such injury falls within the description of one or the other injury described in Schedule-II to the Act.

(ii) Whether Medical Board, Medical Appeal Tribunal or the ESI Court can fix the percentage of loss of earning capacity of an insured person due to an

employment injury suffered by him, entitling him to permanent disablement benefit under the Act having regard to the nature of the employment injury and the pain and suffering undergone by the insured person because of such injury.

6. Material provisions of the Act, which bear on the above points, can be usefully referred to before dealing with them.

7. Under the Act, disablement resulting from an employment injury sustained by an insured person could be "temporary disablement" or "permanent total disablement" or "permanent partial disablement". Each of the said disablements is defined under clauses (21), (15-B) and (15-A) respectively of Section 2 of Act thus :

(21) "temporary disablement" means a condition resulting from an employment injury which requires medical treatment and renders an employee, as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of the injury.

(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.

(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.

Then, Section 51 of the Act, which entitles the injured person to obtain periodical payments under the Act depending upon the type of disablement suffered by him, reads thus :

"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 for the period of such disablement in accordance with the provisions of the First Schedule.

(b) a person who sustains permanent disablement, whether total or partial, shall be entitled to periodical payment, for such disablement in accordance with the provisions of the First Schedule :

Provided that where permanent disablement, whether total or partial, has been assessed provisionally for a limited period or finally, the benefit provided under the clause shall be payable for the limited period or, as the case may be, for life".

Paragraph-1 of Schedule I to the Act, which provides for the rate at which the disablement benefit shall be payable to the insured person, reads thus

"7. The disablement benefit shall be payable to the insured person as follows :-

- (a) for temporary disablement, at the full rate;
- (b) for permanent total disablement, at the full rate;
- (c) for permanent partial disablement resulting from an injury specified in Part II of the Second Schedule, at such percentage of the full rate which would have been payable in the case of permanent total disablement as is specified in the said Schedule as being the percentage of the loss of earning capacity caused by that injury;
- (d) for permanent disablement resulting from an injury not specified in Part II of the Second Schedule, at such percentage of the full rate payable in the case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury.

Explanation :- Where more injuries than one are caused by the same accident, the rate of benefit payable under clauses (c) and (d) shall be aggregated but not so in any case as to exceed the full rate;

(e) in cases of disablement not covered by clauses (a), (b), (c) and (d), at such rate not exceeding the full rate, as may be provided in the regulations".

There is a statutory declaration made under the proviso to clause (15-B) of Section 2 of the Act as to what employment injuries suffered by an insured person could be regarded as those resulting in permanent disablement and what could be regarded as percentage of loss of earning capacity of the insured person arising on account of such injuries. That proviso reads thus :

"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."

There is a further statutory declaration made under the proviso to clause (15-A) of Section 2 of the Act as to what employment injuries suffered by an insured person could be regarded as those resulting in permanent partial disablement. That proviso reads thus :

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

Coming to the Second Schedule to the Act, Part I thereof contains the list of injuries deemed to result in permanent total disablement. As against each injury referred to therein, percentage of loss of earning capacity is specified as 100. Further, Part-II thereof contains the list of injuries deemed to result in permanent partial disablement. As against each injury referred to therein, percentage of loss of earning capacity not being more than 90 and not being less than 20, is specified.

Next, sub-section (1) of Section 54A of the Act requires the Corporation to refer the case of an insured person seeking permanent disablement benefit to Medical Board to decide the disablement question and assess the loss of earning capacity of such person. Section 54 of the Act enables the Medical Board constituted in accordance with the provisions of the Regulations to determine the question of disablement referred to it by the Corporation and to assess the loss of earning capacity of the insured person. Sub-section (2)(i) thereof enables the insured person or the Corporation, as the case may be, if not satisfied with the decision of the Medical Board, to go up in appeal to the Medical Appeal Tribunal constituted in accordance with the provisions of the Regulations and similarly to go up in further appeal to the ESI Court. However, sub-section (2)(ii) thereof also enables the insured person or the Corporation, as the case may be, if dissatisfied with the decision of the Medical Board, to go up in appeal directly to the ESI Court. Section 55 of the Act, thereafter, provides for review of the decision by the Medical Board or Medical Appeal Tribunal, if there are circumstances warranting such review.

8. We shall now deal with the points formulated earlier, seriatim :

Point (i) : The point is whether the case in appeal before the ESI Court concerned temporary disablement benefit of the insured person (respondent) as stated by it in its order under appeals. The employment injury suffered by the respondent since resulted in temporary disablement as defined in clause (21) of Section 2 of the Act, the respondent did obtain the disablement benefit payable therefore under clause (a) of Section 51 of the Act, being an admitted fact, is adverted to earlier in the course of the narration of material facts of the case. The application which was, therefore, made to the Corporation by the respondent, was to obtain benefit for permanent partial disablement resulting from the employment injury. It is that application which had come up for consideration before the Medical Board, thereafter before the Medical Appeal Tribunal and finally before the ESI Court, is undisputed. In the said state of facts, it has to be held that the ESI Court was under a misconception in proceeding on the basis, as seen from its order under appeals, that the case for consideration before it was that of temporary disablement benefit claimed by the respondent.

Point (ii) : As seen from the provisions of Sections 54 and 54A of the Act, the Medical Board is the original forum provided under the Act to decide the question whether the employment injury suffered by the injured person has resulted in permanent disablement of such person and if so, what is the extent of loss of his earning capacity. If the same matters are reagitated by the aggrieved party before the appellate forum, namely the Medical Appeal Tribunal, that Tribunal has to decide upon them by following the procedure in the Schedule annexed to the Employees' State Insurance (General) Regulations, 1950, contained in the notification dated October 29, 1976. When it comes to the appeal or further appeal before the ESI Court, that Court has to determine the said matters (issues) as an to determine the said provided for under the latter part of sub-

section (2-A) of Section 75 of the Act. The point is whether the Medical Board, Medical Appeal Tribunal or the ESI Court is barred from fixing the percentage of loss of earning capacity of an insured person on account of permanent disablement suffered by him due to employment injury without bringing such injury within one or the other of the injuries described in Second Schedule to the Act.

When the proviso to Clause (15-B) of the Section 2 and Clause (15-A) of Section 2 of the Act are read together, they make it obvious that the employment injuries suffered by an insured person, if comes within the description of any of the injuries specified in the Second Schedule to the Act, are to be recognised as statutory injuries and that percentage of loss of earning capacity of the injured person shall injuries in the Second Schedule. But, when Paragraph 7(d) of the First Schedule states that the disablement benefit shall be payable to the insured person for permanent partial disablement benefit from an injury not specified in Part-II of the Second Schedule, at such percentage of the full rate payable in the case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury and further when Paragraph 7(e) states that in case of disablement not covered by clauses (a), (b), (c) and (d) at such rate not exceeding the full rate as may be provided in the Regulations, it becomes manifest that the Medical Board, Medical Appeal Tribunal or the ESI Court, as the case may be, which has to decide on the question of permanent total disablement or permanent partial disablement resulting from an injury could also find that the particular injury, with which it is concerned, may be one not specified in Part-II of the Second Schedule and decide that the percentage of the loss of earning capacity of the injured person is different from the one found in part-II of the Second Schedule. From this it follows that the Medical Board, Medical Appeal Tribunal or the ESI Court deciding upon the "disablement question" is not barred from estimating and fixing its own percentage of loss of earning capacity of an insured person resulting from an employment injury suffered by him for determining the extent of disablement benefit to which such person becomes entitled under the Act, when it finds that such injury falls outside the description of one or the other injury described in the Second Schedule to the Act.

Point (iii) : The point, which needs consideration here, is as to how the percentage of loss of earning capacity of an insured person resulting from an employment injury could be decided with a view to enable such person to obtain permanent disablement benefit under the Act. When an insured person sustains an employment injury, which falls within the statutory injuries described in Second Schedule to the Act, all that may have to be done is to find out what is the percentage of loss of earning capacity of the injured person provided for such injury statutorily under the Schedule and fix such percentage as the loss of earning capacity of such person so as to enable him to obtain payment of permanent disablement benefit as provided for under the Act. But, when the employment injury suffered by the insured person falls outside the injuries

specified in the Second Schedule to the Act, a question arises as to how to fix the percentage of loss of earning capacity of such person. The nature of employment injury suffered by the insured person and the pain and suffering undergone by him may not, by themselves, be sufficient to decide upon the percentage of loss of earning capacity of such person. It would be so for the reason that the nature of injury and the suffering undergone by the injured may not have always the effect of reducing the earning capacity of the injured person. Sometimes, the nature of injuries suffered by a person and the pains and suffering undergone by him may have little effect or no effect at all on such person's earning capacity. What has to be remembered in this context is, the loss of physical capacity of a person arising from the employment injury suffered by him cannot be equated to the loss of his earning capacity. From this it follows that even if medical evidence as to the nature of employment injury suffered by the insured person and the pain and suffering undergone by him on that account becomes available in a given case to show that there is certain destruction or reduction in the physical capacity of the person concerned, further evidence becomes necessary to show the extent of loss of earning capacity suffered by the insured person on account of such destruction or reduction in the physical capacity. In other words, the further evidence, which may become necessary would be such evidence which would show how much of the earning capacity of the person suffering the employment injury is reduced on account of destruction or reduction in his physical capacity for work. Thus, the percentage of loss of earning capacity of an insured person arising on account of an employment injury not falling in any of the injuries described in the Second Schedule has to be necessarily assessed by the Medical Board, Medical Appeal Tribunal or the ESI Court having regard to the diminution or reduction in his capacity for all work which he was capable of performing but for the employment injury sustained by him since the physical disability suffered by such person on account of employment injury may or may not have the effect of reduction or diminishing his capacity for all work.

9. In the instant case, the ESI Court since has fixed the loss of earning capacity of the respondents at 25% merely stating that it has so fixed having regard to the nature of injury and the pain and suffering undergone by the respondent on account of the employment injury, without reference to the evidence or material on record which indicate the percentage of consequential incapacity of the respondent for all work, such fixation becomes unsustainable as the one based on no evidence or material.

10. In the result, we allow these appeals, set aside the order of the ESI Court under appeals and remit the case to it for taking it back on its record and to decide the same in the light of this decision.

11. Appeal allowed.