

(2002) 07 KL CK 0081

High Court Of Kerala

Case No: M.F.A. No. 438 of 1991

United India Insurance Co. Ltd.

APPELLANT

Vs

Krishnan

RESPONDENT

Date of Decision: July 23, 2002

Acts Referred:

- Motor Vehicles Act, 1988 - Section 147(1)
- Workmens Compensation Act, 1923 - Section 4A(3)

Citation: (2002) 3 ACC 674

Hon'ble Judges: P.R. Raman, J

Bench: Single Bench

Advocate: Siby Mathew, A.A. Mohammed Nazir and Philip J. Vettickattu, for the Appellant;
T.P. Pankajakshnan and M.P. Ashok Kumar, for the Respondent

Judgement

P.R. Raman, J.

The appellant is the Insurance Company. The respondent herein sustained injuries while in employment, There is no dispute regarding sustainability of the claim for compensation under the Workmen's Compensation Act and it is also not in dispute that it is in the course of employment that the injury sustained. The only question that arise for consideration in this appeal is as to whether the Commissioner in the absence of any assessment of the disability by a Medical Practitioner, could make his own assessment based on the oral evidence of the parties in the case. The Commissioner has referred to a disability certificate which admittedly does not contain the percentage of disability and the loss of earning capacity. It is not in dispute that the injury sustained by the respondent is a non-schedule injury and therefore, the case is covered by Section 4(1)(c)(ii) of the Workmen's Compensation Act. In the case of a non-schedule injury the loss of earning capacity has to be assessed by the qualified Medical Practitioner, as is mandated by this provision itself. Though it is true that the party can get a report from the qualified Medical Practitioner to estimate the loss of earning capacity, no such attempt was seen

made in this case. In the absence of such evidence of a qualified Medical Practitioner and in the light of the Full Bench decision of this Court in *New India Assurance Co. Ltd. v. Sreedharan* 1995 1 KLT 275 I hold that the order of the Commissioner is without jurisdiction.

2. Hence the order impugned is set aside and the matter is remitted for fresh consideration in accordance with law. It is open for both sides to adduce additional evidence calling for report from a qualified Medical Practitioner and the Commissioner shall proceed to determine the compensation based on such assessment.

3. There is yet another point to be considered in this case. As per the order impugned in this appeal, the Commissioner has directed payment of 25% of the award amount as penalty, in case default is committed by the Insurance Company in not paying the amount within a period of one month from the date of receipt of the order. According to the learned counsel for the appellant-Insurance Company, the direction to pay penalty is totally without jurisdiction. He has also placed reliance on the decision of the Supreme Court in *Ved Prakash Garg* 1998 (1) ACJ 1 *Premi Devi and Ors.* interpreting Section 147(1)(b) of the Motor Vehicles Act. In this case, the Supreme Court held that penalty amount imposed upon the insured employer would get out of sweep of the term "liability incurred" by the insured employer as contemplated by the proviso to Section 147(1)(b) of the Motor Vehicles Act as well as by the terms of the insurance policy found in proviso (b) and (c) to Sub-section (1) of Section II thereof. The Apex Court considered on a conjoint operation of the relevant schemes of the Motor Vehicles Act and the Workmen's Compensation Act and came to the conclusion that Insurance Companies will be liable to pay interest, if ordered by the Commissioner. Thus the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Workmen's Compensation Act and not dehors it. It, therefore, cannot be said by the Insurance Company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part of the insured liability of the employer. No question of justification by the insured employer for the delay in such circumstances would arise for consideration. But similar consequence will not follow in a case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4-A(3)(b) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay in payment of the compensation amount he is not liable for his penalty. If ultimately, the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no

justification for such delay on the part of the insured employer and could impose penalty of 50% on the principal amount to be made good by the defaulting employer. But the penalty amount concerned cannot be said that it automatically flows from the main liability incurred by the insured employer under the Compensation Act. To that extent such penalty amount would get out of the sweep of the term "liability incurred" by the insured employer as contemplated by the proviso to Section 147(1)(b) of the Motor Vehicles Act as well as by the terms of the insurance policy.

4. In the above circumstances, the additional amount of penalty imposed on the employer without giving an opportunity of being heard in the matter cannot be fastened on the Insurance Company. As such that part of the order directing penalty is contrary to the principles embodied in the aforesaid decision of the Supreme Court. Accordingly, the Insurance Company is not liable to pay any such penalty. That direction is set aside.

5. The matter is remitted to the Workmen's Compensation Commissioner for fresh consideration in accordance with law and in the light of what is stated above.

The appeal is disposed of as above. There will be no order as to costs.