IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

TUESDAY, THE 2ND DAY OF JUNE 2015/12TH JYAISHTA, 1937

MFA.No. 110 of 2007 (A)

AGAINST THE ORDER/JUDGMENT IN WCC 67/2004 of W.C.C.,THRISSUR
DATED 19-01-2006

APPELLANT(S)/2ND OPPOSITE PARTY IN THE WC CASE:

UNITED INDIA INSURANCE CO.LTD.,
BRANCH OFFICE, I.G.TOWERS, IIND FLOOR
MAIN ROAD, NENMARA, PALAKKAD
REPRESENTED BY THE ASSISTANT, MANAGER
UNITED INDIA INSURANCE CO.LTD.
REGIONAL OFFICE ERNAKULAM

BY ADV. SRI.A.R.GEORGE

RESPONDENT(S)/APPLICANT & IST OPPOSITE PARTY:

1. MOHAMMED KHAN, S/O.KHADER,
LILLY DIVISION, MANALAROO ESTATE, PADAGIRI P.O.
NELLIYAMPATHY.

2. THE NELLIYAMPATHY TEA & PRODUCE CO.LTD.,
MANALAROO ESTATE, NELLIYAMPATHY
REP. BY ITS MANAGING DIRECTOR.

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 02-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**T.R. RAMACHANDRAN NAIR &**
**K.P. JYOTHINDRANATH, JJ.**

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**M.F.A. (WC Act) No.110 of 2007**

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**Dated this the 2nd day of June, 2015**

**<u>JUDGMENT</u>**

**<u>Ramachandran Nair, J.</u>**

This appeal is filed by the insurance company aggrieved by the order in W.C.C. No.67/2004 on the file of Commissioner for Workmen's Compensation and Deputy Labour Commissioner, Thrissur. Even though service is complete, there is no appearance for the respondents.

2. We heard learned counsel for the insurance company.

3. It is submitted that the disability assessed by the Doctor and adopted by the Commissioner is on a higher side. The actual disability is only 27% and the loss of earning capacity cannot therefore be 60%. it is further pointed out that the Doctor who had issued the certificate is not competent to assess the disability. It is also the case that the monthly income assessed is on a higher side.

4. We find from the records that the Doctor was examined as

A.W.1 and the applicant was examined as A.W.2. Ext.A1 is the copy of the disability certificate and Ext.A2 is the copy of the discharge card. Other documents have been marked by the opposite side as Exts.M1 to M9.

5. The question is whether the percentage of disability has been correctly assessed. Even though learned counsel submitted that the evidence of the Doctor could not have been accepted, we find from the disability certificate that the following disabilities are noted in it:

1. Flaccid right hand handing down from shoulder;
2. Neurasthenia and weakness of portion of right palm;
3. Non-weight bearing with right hand;
4. Not able to write not fit for manual work;
5. $10^{o}$ angulation of shaft of right humerus; and
6. Total motor and sensory loss over right hand coming under the supply of right radial nerve.

The loss of earning capacity is certified as 60%. This is supported by the evidence of the Doctor also. Even though it is submitted that the Doctor has not correctly assessed the disability, no question has been put to the Doctor as to the method adopted by him to assess the disability.

6. In the light of the decision of a Full Bench of this Court in **New India Assurance Company Ltd. v. Sreedharan** (1995(1) KLT 275) wherein it has been noted that "In a case where the report of the qualified medical practitioner certifying loss of earning capacity alone is there and no other evidence is available, Commissioner cannot ignore the report and fix the compensation disregarding it" the Commissioner was right in adopting 60% as the loss of earning capacity.

7. The major dispute is regarding the wages of the applicant. He claimed Rs.4,500/- as monthly salary. The first opposite party is the employer who produced documents and it was contended that the monthly wages is Rs.1,931.50 on an average. But going by the oral evidence of the applicant, in the factory he was getting daily wages at Rs.154/- and in the bungalow it was Rs.78/- per day. Even though the Commissioner calculated it at Rs.3,000/- per month, we will have to adopt it as per the salary certificate and wages certified by the employer. This is so, in the absence of any documentary evidence on the part of the claimant, to show it otherwise.

8. Therefore, even if it is taken as Rs.78/- per day, it will be Rs.2,100/- per month and we adopt the same.

Therefore, the calculation of compensation will be the following:

Rs.2100 x 60/100 = Rs.1,260/-
The age factor for 35 years = 197.06
Rs.1,260/- x 60/100 x 197.06 = Rs.1,48,977.36 which we round off to Rs.1,49,000/-.

The above amount is found to be payable to the first respondent herein along with interest at 12% per annum from 4.5.2003. The appellant/insurance company will pay the amount accordingly.

The appeal is allowed to the above extent. It is submitted that the entire amount has been deposited by the appellant before the Commissioner. After disbursement of the amount due to the first respondent herein, the remaining amount, if any, will be released to the appellant. The parties will suffer their costs in the appeal.

**(T.R. RAMACHANDRAN NAIR, JUDGE.)**

**(K.P. JYOTHINDRANATH,, JUDGE.)**

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