COMPENSATION TO WORKMEN FOR INDUSTRIAL INJURIES

THESIS SUBMITTED BY

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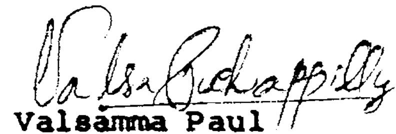
DECLARATION

I do hereby declare that this thesis, entitled 'Compensation to Workmen for Industrial Injuries', has not previously formed the basis of award of any degree, diploma, associateship, fellowship or other similar title or recognition. This research has been carried out by me under the guidance and supervision of Dr.N.S. Chandrasekharan, Professor, Department of Law, Cochin University of Science and Technology.



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C E R T I F I C A T E

This is to certify that this thesis, entitled 'Compensation to Workmen for Industrial Injuries', submitted by Smt.Valsamma Paul for the Degree of Doctor of Philosophy, is the record of bona fide research, carried out by her under my guidance and supervision in the Department of Law, Cochin University of Science and Technology. This thesis or any part thereof has not previously formed the basis of the award of any degree or other similar title or recognition.

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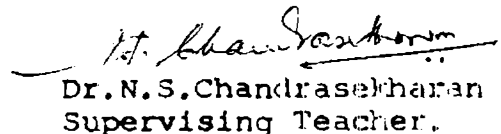

Dr.N.S.Chandrasekharan
Supervising Teacher.

Preface

A research into the law for providing compensation to workmen for industrial injuries is of utmost significance in this era of industrial development. The plethora of cases, relating to the existing law for compensating industrial injuries, made me venture to embark upon an inquiry to find out whether it is adequate to serve the purpose, for which it was enacted. As the adequacy of the law cannot be assessed without probing into the responses of those, for whom it is meant, doctrinal-cum-empirical methodology was adopted for this research.

The thesis is divided into eleven chapters. The introductory chapter emphasizes the need for providing social security to workmen, who sustain industrial injuries, through the medium of compensation. The second chapter is devoted to the evaluation of the different forms of liability for compensating industrial injuries. The conditions, to be fulfilled by a person for becoming entitled to compensation, are discussed in the third chapter. The fourth chapter is meant for the analysis of the scope of compensable industrial injuries. In the fifth chapter, the adequacy of the quantum of compensation payable, the conditions governing its payment and the provisions to ensure payment of compensation under the Workmen's Compensation Act, 1923

are discussed. The compensatory benefits for industrial injuries, available under the Employees' State Insurance Act, 1948, are analysed in the sixth chapter. The seventh chapter deals with the administrative machinery for provision of compensation. The efficacy of the existing machineries for adjudication of disputes, relating to compensation for industrial injuries, is assessed in the eighth chapter. A probe into the effectiveness of the enforcement machinery to ensure the provision of compensation for industrial injuries is made in the ninth chapter. An empirical analysis of the application of the law for compensating industrial injuries is attempted in the tenth chapter. The conclusions and suggestions, emerging from the research, are formulated in the eleventh and the last chapter.

I avail myself of this opportunity to extend my hearty thanks to all those persons, who helped me conduct this research. Words fail me to express my gratitude to Dr.N.S.Chandrasekharan, my supervising teacher, for guiding me efficiently and effectively in the preparation of this thesis, even though he was on sabbatical leave. I am greatly indebted to Mrs. Thankam Chandrasekharan, the wife of my guide, for her hospitality and encouraging advice, which went a long way in helping me finish my thesis. I remember with gratitude and thankfulness Prof.K.N.Chandrasekharan Pillai, the Dean and Head of the Faculty of Law,

for his co-operation and guidance. I express my thanks to Prof.P.Leelakrishnan and other members of the Faculty of Law for their encouragement. I cannot but thank the workmen, trade union officials, employers, officials of the Employees' State Insurance Corporation and Commissioners for Workmen's Compensation, who helped me generously in my empirical study. I would like to place on record my thanks to the library staff of the High Court Library, Ernakulam; the Advocate General's Office Library, Ernakulam; Central Library, Cochin University of Science and Technology and the libraries of the Departments of Applied Economics, Management Studies and Law of Cochin University of Science and Technology. I extend my special thanks to Shri.T.S.Vincent, the library assistant of the Department of Law of Cochin University and Shri. Raj Mohan, the librarian of the High Court Library for their generous service. I thank Mr.K.R.Reghunathan, the research scholar of the Department of Law, for helping me find out certain materials. Finally, I thank Mr.Surendran, who typed my thesis patiently, efficiently and neatly.

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Chapter 1

INTRODUCTION

Industrial Revolution gave birth to the factory system. Substantial replacement of man-power by machine - power took place. Being surrounded by dangerous machinery, workers were exposed to industrial accidents and resultant injuries.[1] With the advance of industrialisation, industrial accidents and injuries are on the increase.[2] Despite employer's vigilance and workers' care, industrial accidents occur, because they are inherent in industrial activity.[3]

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1. Sunil Rai Choudhuri, Social Security in India and Britain (1962), p.2. F.P.Walton said: "The manufacturing countries have become vast noisy workshops, full of whizzing wheels, of electric wires and of dangerous explosives . . . . millions of workmen pass their lives in continual danger. They have to deal at close quarters with complicated machines, to handle terrible explosives, to run the risk of coming in contact with live wires, in a word, to face a thousand perils" See F.P.Walton, "Workmen's Compensation And The Theory of Professional Risk", 11 Col.L.Rev.36 at 39 (1911).

2. Factories with automatic machines continue to pour out maimed or dead victims of accident. See S.N. Johri, "Liability Without Negligence", A.I.R. p.2 (1978). Many of the industrial activities cause harmful side-effects and occupational diseases. For example, air-craft, petroleum, atomic energy, coal-mining and chemical industries use ionic - radiations, which cause genetic damage. Nuisances like noise, vibrations etc. at the work-place cause deafness and blindness. See Muin-Ud-Din Khan, "Protection of Workers - A Continuing Concern", 10 Awards Digest 106, 107; S.C.Srivastava, Social Security and Labour Laws (1985), p.9.

3. F.P.Walton, supra, n.1 at 40.

Workers are confronted with economic insecurity, when their earning capacity is affected by such industrial accidents.[4] In such a situation, it is the duty of the State[5] in a welfare society to provide social security[6] to such a worker because he contributes to the progress of society by his labour.[7] The greater the measure of social security, the better the worker's sense of security and the more rapid the process of national development.[8] Provision of social security to industrial worker is not a waste but a good investment, which will yield good dividends to society.[9] Social security can be provided by society either by

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4. See Sunil Rai Choudhuri, supra, n.1, p.ix; M.R.Mallick, Employees' State Insurance Act (1984), p.1; H.K.Saharay, Industrial and Labour Laws of India (1987), p.260; K.V.Easwara Prasad, "Social Security, Some Basic Aspects", 1 National Labour Institute News Letter 4 (1993).

5. See Constitution of India, Articles 38 and 41.

6. Social security envisages that the members of a community shall be protected by collective action against social risks, causing undue hardship and privation to individuals, whose private resources can seldom be adequate to meet them. See Report of the National Commission on Labour (1969), p.162.

7. P.G.Krishnan, "Social Security : Workmen's Compensation", 13 C.U.L.R. 125 at 130 (1989); Report of the National Commission on Labour, supra, n.6; S.C.Srivastava, supra, n.2; K.D.Srivastava, Employees' State Insurance Act, 1948 (1991), p.6.

8. See Muin-Ud-Din Khan, supra, n.2, p.108.

9. See Report of the National Commission on Labour, supra, n.6; K.D.Srivastava, supra, n.7, p.7.

prevention of accidents or by providing compensation for loss, resulting from accidents. Preventive measures, if applied intelligently, may reduce considerably the number of accidents but cannot totally eradicate them. Accidents are inevitable in industry. The present study is confined to the provision of social security by providing compensation for industrial injuries.

What is meant by 'compensation'? 'Compensation'[10] is derived from the Latin word 'compensare', which means 'weigh together'.[11] It is a method of making good a 'loss', sustained by a person.[12] For this, the 'loss' has to be weighed against the compensation to be given. John Munkman said:

> "We may think of the traditional picture of justice, holding a pair of scales. Into one scale goes the harm or loss sustained; into the other goes the compensation, and the aim of the law is to make the two balance".[13]

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10. The idea, conveyed by the word 'compensation', is expressed by different terms in different laws. In common law, the term used is 'damages', in the Workmen's Compensation Act, 1923, it is 'compensation' and in the Employees' State Insurance Act, 1948, it is 'benefits'.
11. John Munkman, Damages for Personal Injuries and Death (1985), p.3.
12. P.S.Atiyah, Accidents, Compensation and the Law (1975), p.5. Compensation is granted in certain cases not because of what has been lost but because of what the victim has never had in comparison with others in a similar situation, P.S. Atiyah, op.cit., p.480.
13. John Munkman, supra, n.11.

This balancing process makes compensation an equivalent for what has been lost. What has been lost is simply restored by this process.[14] But this type of compensation is possible only in cases of loss of physical property.

How can personal injury like loss of a tip of a finger, sustained by an industrial workman, be compensated? It has to be remembered that compensation can be awarded not merely as an equivalent but also as a substitute or solace for what has been lost.[15] The object here is not to replace what has been lost by some equivalent. On the other hand, it is to enable the victim to obtain a substitute or to solace him for what has happened. This type of compensation is associated with bodily injury.[16] Personal injuries, sustained by industrial workmen, can be compensated in this way only.

For injuries, sustained by workmen in the course of industrial employment, compensation can be given either in the form of money or service. Compensation in money is known as damages.[17] This is the primitive but the usual

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14. P.S. Atiyah, supra, n.12, pp.480, 481. See also Dr.R.G.Chaturvedi, Justice, Natural, Social, Economic and Political (1990), p.778.
15. P.S. Atiyah, op.cit., p.482.
16. Id., p.483.
17. 'Damages' is simply a sum of money, given as compensation for loss or harm of any kind. See John Munkman, supra, n.11, p.1.

form of compensation. The modern concept of compensation is not confined to the provision of damages alone. Since industrial injuries affect the worker physically, compensation in service in the form of medical aid has assumed significance. It helps recover as far as possible the worker's physical capacity. Medical aid is beneficial not only to the worker but also to the employer or the insurer, whose expenses will be less, if the physical capacity of the worker is restored at the earliest. Even the community is benefited, because its burden is lightened by the restoration of the worker's physical capacity.[18] The recent development in the provision of medical aid is the new idea of "rehabilitation". It aims at the maximum restoration of the injured workman's working capacity, thus enabling him to compete again in the labour market.[19] It consists of two stages. The first stage is complete medical care and the second one consists of provision of training facilities for finding new employment.[20]

After the First World War, there was considerable industrial progress in this country. There was an

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18. Manohar R. Idgunji, Social Insurance and India (1948), p.32.

19. Id., pp.32-33.

20. This is especially important for those, who, by virtue of their disablement, must change their occupation. See Manohar R. Idgunji, op.cit., p.33.

unprecedented increase in the number of industrial workers. Problems of labour, including security against industrial injuries, gained attention of government. The influence of the International Labour Organisation[21] made government accelerate steps for ensuring security to industrial workers.[22] This led to the enactment of the Workmen's Compensation Act, 1923, which is based upon the concept of employer's liability.[23] As the entire liability for compensation was cast upon the employer, he began to evade the grip of liability.[24] This led to the enactment of the

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21. The International Labour Organisation was set up in 1919 as an international forum to bring governments, employers and trade unions of member countries together for united action for ensuring social justice to the working class. Its secretariat is in Geneva, Switzerland. It has 154 member countries. See N.Vaidyanathan, ILO Standards (1992), p.1. Through its conventions and recommendations on social security, the ILO has laid down international standards for security against industrial injuries. A convention, if it is ratified by a member country, becomes binding on it. A recommendation is advisory in nature and supplements a convention. N.Vaidyanathan, *op.cit.*, p.3. For a list of ILO conventions and recommendations on social security, see N.Vaidyanathan, *op.cit.*, pp.145-146.

22. The ILO, in one of its meetings, drew the attention of the participants to the fact that India was the only country without any social security measure. This made the government enact the Workmen's Compensation Act immediately. M.R. Mallick, *supra*, n.4, p.7.

23. See *infra*, Chapter 2.

24. *Ibid*.

Employees' State Insurance Act, 1948. It introduced the scheme of sharing of liability by the State, the employer and the workmen.[25] Such a scheme helps prevent the evasion of liability by the employer. A claimant under the Employees' State Insurance Act need only prove that the accident has arisen in the course of employment. On such proof, in the absence of evidence to the contrary, the accident is deemed to have arisen out of employment.[26] The quantum of compensation under the Employees' State Insurance Act, 1948 is also substantially higher than the one under the Workmen's Compensation Act, 1923.[27] The Employees' State Insurance Act, 1948 has, in fact, found out solutions for most of the defects of the Workmen's Compensation Act, 1923. The scope and coverage of these two Acts being different,[28] there are two sets of workmen, one enjoying better and surer social security against industrial injuries than the other. Though the Employees' State Insurance Act, 1948 has improved

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25. Employees' State Insurance Act, 1948, Sections 26(2) and 39. See infra, Chapter 2.

26. Id., Section 51-A; see also infra, Chapter 4.

27. See infra, Chapters 5 and 6.

28. See Employees' State Insurance Act, 1948, Sections 1(4) and (5) and 2(9),; Workmen's Compensation Act, 1923, Section 2(1)(n), read with Schedule II. See also infra, Chapter 3.

upon the Workmen's Compensation Act, 1923, the administration of medical benefit by the State Government has been subject to scathing criticism.[29] Provision of security against industrial injuries has become a multi-dimensional problem. A review of the working of the compensatory system under these two enactments, in theory and practice, is, therefore, warranted.

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29. See G.K. Suresh Babu, "Thalam Thettiya Samoohya Sureksha Pathadhi", Mathrubhumi, November 27 - December 5, 1990.

Chapter 2

FORMS OF LIABILITY OF EMPLOYER

With the spread of industrialisation, there emerged a new class of factory workers. These workers were completely dependent on their wages for their subsistence. Because of this dependency on the wages, these workers were quite helpless, when their receipt of wages was interrupted by industrial injuries.[1] By the latter half of the nineteenth century, the concept of placing the liability for compensation for industrial injuries on the employer evolved.[2] The underlying reason was that the workman had been working for the benefit of the employer.[3] So the latter should be held responsible for the security of the former.[4] If the employer could not prevent industrial injuries to the workman, he should at least compensate the injuries, sustained by the latter.[5]

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1. ILO, Introduction to Social Security (1976), p.3.
2. Id., p.5.
3. Manohar R. Idgunji, Social Insurance and India (1948), p.19. See also F.P. Walton, "Workmen's Compensation And The Theory of Professional Risk", 11 Col.L.Rev. 36 at 40 (1911).
4. Ibid.
5. Ibid.

Liability of employer based on negligence

The concept of employer's liability was first reflected in the tortious[6] liability of the employer under common law.[7] Employer's liability at common law is based upon proof of negligence or fault. The workman should establish negligence on the part of the employer as the cause of the accident, resulting in the injury. But negligence does not give rise to a right of action, unless there is a legal duty to take care.[8] A legal duty to take care, negligent conduct in breach of that duty and damage, caused by that negligent conduct to another person, are the three elements, which together constitute the test of negligence and give rise to an action for damages.[9]

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6. The term 'tort' means a private or civil wrong or injury, for which the court will provide a remedy in the form of an action for damages. See Black's Law Dictionry (1990), p.1489.

7. Liability at common law arises under the ordinary law of the land, as interpreted by the courts. It does not depend upon an Act of Parliament. See John Munkman, Employer's Liability at Common Law (1985), p.2

8. M.A.Millner, Negligence in Modern Law (1967), p.25. Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty, owed to the person, who makes the claim. See Haynes v. Harwood, [1935] 1 K.B.146 at 152, per Greer.L.J.

9. John Munkman, op.cit., p.27. In Bryce v. Swan Hunter Group Plc and Others, [1988] 1 All E.R.659 (Q.B.), although the plaintiff established breaches of duty on the part of each of the defendants, she did not establish that such breach had caused the deceased to contract the disease, which led to his death. For facts of the case, see infra, n.30. See also Page v. Smith, infra, n.10.

The employer is under a legal duty to take care for the safety of his workman, as there is a close and direct relationship between them. The employer invites the workman to enter his premises, use his machinery and follow his methods of work. The legal duty to take care extends only to those cases, where he can foresee the likelihood of injury.[10]

If an employer omits to exercise the degree of care, necessary in the circumstances, he is guilty of negligence. The standard of care, expected from an employer, is that of

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10. See the dictum of Lord Atkin in Donoghue v. Stevenson, [1932] A.C.562 at 580 regarding legal duty to take care. The appellant in this case sought to recover damages from the respondent, a manufacturer of aerated waters, for injuries, she suffered as a result of consuming part of the contents of a bottle of ginger beer, which had been manufactured by the respondents and which contained the decomposed remains of a snail. It was held that the manufacturer is under a legal duty to the ultimate consumer to take reasonable care that the article, manufactured by him, is free from defect, likely to be injurious to health. In Page v. Smith, [1994] 4 All E.R.522 (C.A.), the plaintiff was involved in a collision with the defendant, caused by the latter's negligence. He was unhurt in the collision but the accident caused him to suffer myalgic encephalomyelitis, from which he had suffered for about 20 years. He brought an action against the defendant, claiming damages for chronic M E. It was held that a plaintiff, who claimed damages for nervous shock, resulting from an accident, in which he had escaped physical injury, had to show that psychiatric injury was foreseeable and was of a kind, that would be suffered by a person of ordinary fortitude.

a hypothetical "reasonable man".[11] In general, an employer is expected to keep reasonably abreast of current knowledge, concerning dangers, arising in trade processes. But he is not liable, if by doing so, he would not have been aware of any danger.[12] There are three useful factors, which help to keep the standard of care, expected from an employer, an objective one. These factors are the magnitude of the risk; the practical possibilities and the general practice of competent persons.

Magnitude of the risk depends partly on the probability of an accident occurring and partly on the gravity of the results, if it does occur.[13] The more serious the damage,

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11. The reasonable man is presumed to be free both from over-apprehension and over-confidence. See Glasgow Corpn. v. Muir, [1943] 2 All E.R.44 at 48, per Lord Macmillan.

12. In Graham v. C.W.S.Ltd., [1957] 1 All E.R.654 (Q.B.) the plaintiff was employed by the defendant company in a furniture workshop, in which there was an electric sanding machine. The plaintiff contracted dermatitis as a result of the mahogany dust, produced by the sanding machine. The plaintiff's claim for damages failed, because the defendant had taken reasonable steps to keep their knowledge up-to-date and did not know that the wood dust was a source of danger.

13. For carrying out a task, by which metal particles may strike the eye, goggles may have to be provided for a one-eyed workman, though for a normal workman, the risk could be ignored. This is so, because total blindness is a much graver injury than the loss of one eye. In Paris v. Stepney Borough Council, [1951] A.C.367; [1951] 1 All E.R.42 (H.L.), the appellant was employed as a fitter in the garage of the respondent borough council. The respondents knew that he had only one eye but did not provide goggles to the appellant, as it was not the ordinary practice for employers to supply goggles to

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which will result from an accident, the more thorough are the precautions, which the employer must take.[14] An equipment, through no fault of the employer, may not be entirely satisfactory and may involve some extra risk. The employer is not bound to bring his operations to a standstill because of the extra danger, if he has taken such precautions as are possible.[15] Operations ought not to be stopped or

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(f.n.13 contd.) workmen of garages. While the appellant was removing a bolt on a vehicle, a chip of metal flew off and injured his only one eye, leading to his total blindness. The court held that the respondents owed a special duty of care to the appellant, who had only one eye, whether or not goggles should have been supplied to two-eyed workmen.

14. See Morris v. West Hartlepool Steam Navigation Co. Ltd., [1956] 1 All E.R.385 (H.L.). The appellant was employed by the respondents on a grain ship in preparing the holds so as to be ready to receive grain on arrival at port. In the course of duty, he had to pass a hatch, which was not protected by any guard-rails. He fell through the open hatch and was seriously injured. The respondents were held to be guilty of negligence in not fencing the hatch of the hold, as the consequences of falling into the hold would obviously be serious.

15. See the comment of Asquith, L.J., in Daborn v. Bath Tramways Motor Co. Ltd., [1946] 2 All E.R.333 at 336 (C.A.). D was driving an ambulance with a left hand drive with a large warning notice on the back " . . . No signals". Unwaware of the fact that a motor omnibus was trying to overtake her, she turned towards the right and made a signal with her left hand. A collision occurred between the ambulance and the motor bus and D sustained severe injuries. It was held that in view of the necessity, in time of national emergency, of employing all available transport resources and the inherent limitations of the ambulance in question, D had done all that she could reasonably do in the circumstances and not guilty of negligence but the driver of the motor omnibus was.

slowed down to an unreasonable extent, merely because there is some unavoidable risk.[16] Risks may have to be accepted, where an important object is in view such as the saving of life.[17] But there may be occasions, when the danger is so great that work ought to be suspended or stopped altogether.[18] For example, coal mines in a gassy or fiery state may have to be closed down for a time.[19] In deciding the standard of care to be taken, another factor, to be taken into account, is the practical possibilities. Employers in technical trades are expected to keep in touch with current improvements. But they are not bound to adopt them, until the

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16. In Latimer v. A.E.C. Ltd., [1953] A.C.643; [1953] 2 All E.R.449 (H.L.), a workman, working in a gangway slipped and injured his ankle in the course of duty. The employers were not held liable, as they had taken all reasonable steps for the safety of their servants by spreading saw dust on the slippery floor, so far as supplies permitted.

17. In Watt v. Hertfordshire County Council, [1954] 2 All E.R.368 (C.A.), London Transport Executive lent a jack to the defendants' fire station. Only one vehicle at the station was specially fitted to carry it. While that vehicle was out on other service, the station received an emergency call to save the life of a woman. The officer-in-charge ordered the jack to be loaded on a lorry, the only available vehicle. On the way to the scene of accident, the driver of the lorry had to brake suddenly and the jack moved inside the lorry and injured one of the firemen. It was held that the defendants were under no duty to leave a vehicle specially fitted to carry the jack available at all times and the risk taken was not unduly great in relation to the end to be achieved and, therefore, the defendants were not liable for damages for negligence to the fireman.

18. Latimer v. A.E.C. Ltd., supra, n.16 at 659, per Lord Tucker.

19. John Junkman, op.cit., p.41.

practicability of its adoption has been investigated. To determine the practicability, it is necessary to balance the practical problems in the adoption of safety measures on the one hand against the magnitude of the risk on the other hand. If the former altogether outweighs the risk involved, these measures need not be taken. Marshall v. Gotham Co. Ltd.[20] is a case in point. In gypsum mines, a rare geological phenomenon, known as "slickenside", gave rise to dangerous falls of rock. But systematic propping of the roof would not stop the falls, as the rock would still fall, in smaller pieces, around the props. Systematic propping in every part of such a mine was held to be not "reasonably practicable". Similarly, in Brown v. Rolls Royce Ltd.,[21] failure to provide barrier cream as protection against dermatitis

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20. Marshall v. Gotham Co.Ltd., [1954] A.C.360; [1954] 1 All E.R.937 (H.L.). While working in a gypsum mine, owned by the respondents, a miner was killed by a fall of marl from the roof of the working place. The fall was due to a condition, known as "slickenside". Before the accident, the respondents undertook the usual procedure for making the roofs secure. Slickenside was not detectable by this method and there was no known method of detecting it. It was held that the respondents had done all that was "reasonably practicable" to make the roof secure and, therefore, the appellant was not entitled to recover.

21. [1960] 1 All E.R.577 (H.L.). The appellant was employed by the respondents in a work, which required his hands to be constantly in contact with oil. He contracted dermatitis, as a result of the contact with oil. He brought an action for damages against the respondents for failure to supply him with barrier cream as a protection. The court dismissed the appeal, as the appellant had not proved negligence on the part of the respondents.

was not held to be a negligent act, as the value of such protection was found to be doubtful. In Morris,[22] as the small risk to seamen, engaged in erecting a rope round an open hatchway at sea, was altogether outweighed by the risk to persons, moving near the hatchway, if it were left unguarded in poor light, it was held reasonably practicable to erect the rope.

The general practice is another factor, taken into consideration, in determining the standard of care, expected from an employer. A general practice is not always conclusive of the absence of negligence, because it may go wrong. For instance, motorists may, generally, take the wrong side of the road or take risks in overtaking. Such acts are negligent. So, an employer cannot be said to have taken due care by acting in accordance with general practice. He can defend himself, only if he acted in accordance with the general and approved[23] practice. A general practice

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22. Morris v. West Hartlepool Steam Navigation Co. Ltd., supra, n.14.

23. "Approved" means primarily approved by those, qualified to judge but also approved, in the last resort, by the court itself. See John Munkman, op.cit., p.45. See Thompson and Others v. Smiths Ship Repairers (North Shields) Ltd. and Other actions, [1984] 1 All E.R.881 (Q.B.D.) The plaintiffs were employed as fitters in ship-building and repairing yards over a long period from the 1940's to the 1970's. During their employment in the yards, the plaintiffs were exposed to excessive noise, which progressively impaired their hearing. Upto 1963, there was no effective expert advice on the problem of industrial noise and so the employer's indifference to the problem was in line with common practice

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can be approved, as held in Markland[24] case, only if it is reasonably safe. In Markland case, a burst pipe flooded a road. The flood water had remained undetected for three days, when it froze over and caused an accident. The water authority had carried out checks every seven days, in accordance with general practice. But on the average, fifty bursts a week occurred in the area. So, the general practice, followed by the water authority, was held to be not a reasonable precaution against an obvious danger.

The general practice in the window-cleaning trade was held to be negligent in that no precautions were taken to protect the workmen against loose window-sashes.[25] Similarly,

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(f.n.23 contd.) throughout the industry. But after 1963, expert advice and adequate protective devices were available to the employers. In an action for damages against the employer, it was held that the employer was not negligent upto 1963, when he followed the recognised practice in the industry as a whole, but was liable to pay damages for the period, when he failed to provide adequate protective devices, which were available after 1963.

24. Markland v. Manchester Corporation, [1934] 1 K.B.566 at p.582, per Slesser, L.J. (C.A.).

25. In General Cleaning Contractors Ltd. v. Christmas, [1953] A.C.180 (H.L.), a window-cleaning company had contracted to clean the windows of certain premises. One of the experienced employees of the company fell and sustained injuries, as one of the windows, he was cleaning, was defective. It was held that the employers had negligently failed in their obligation to devise a reasonably safe system of work, since they neither gave instructions to ensure that the windows should be tested before cleaning nor provided any apparatus, such as wedges, to prevent the windows from becoming closed.

when an omnibus crashed, owing to a burst tyre, though the omnibus company had followed the established practice in all respects, they were held negligent by the House of Lords, because they had not instructed their drivers to report incidents, which might cause an unusual type of tyre fracture.[26] A general practice is not sacrosanct, where there is a danger, for which it does not provide adequately.

The duty of an employer towards his workman is to take reasonable care for his workman's safety in all the circumstances of the case.[27] It is one single duty to take all reasonable steps to avoid unnecessary risk to his workmen.[28] For convenience, it is often split up into

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26. Barkway v. South Wales Transport Co. Ltd., [1950] A.C.185; [1950] 1 All E.R.392 (H.L.). The appellant's husband was killed, while travelling as a passenger in the respondents' omnibus. The respondents were held liable for negligence, as the cause of the accident was a defect of the tyre, which might have been discovered by due diligence on the part of the respondents.

27. Paris v. Stepney Borough Council, [1951] A.C.367 at 384, per. Lord Oaksey.

28. In Wilson v. Tyneside Window Cleaning Co., [1958] 2 All E.R.265 (C.A.), a skilled and experienced window-cleaner was frequently sent by his customers to clean the windows of a particular customer. The employers did not inspect the customer's premises each time, they sent window-cleaners there nor did they specifically warn the window-cleaner of particular dangers but they did instruct him to leave uncleaned any window, which presented unusual difficulty. While cleaning a window, of which one of the two handles was missing, the window-cleaner attempted to pull the window down by the remaining handle. The handle broke and he fell and sustained severe injuries. It was held that the employers had taken reasonable care not to subject the plaintiff to unnecessary risk.

different categories, such as safe tools, safe place of work or safe system of work. But it always remains one single duty. If the employer delegates the performance of that duty to another, he remains liable for the failure of that other to exercise reasonable care. This principle holds good, whether the person, employed by the employer, is a servant, a full-time agent or an independent contractor.[29] If the employer is not able to eliminate the risk, he must, at least, take reasonable care to reduce it as far as possible.[30] Where a man is exposed to an unavoidable danger,

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29. Per Parker, L.J. in Davie v. New Merton Board Mills Ltd., [1958] 1 All E.R.67 at 82 (C.A.). A drift, bought by the employers of D from a reputable supplier of tools of this kind, had a defect viz. excessive hardness of the steel. This defect in the drift was not discoverable by reasonable examination by the employers. Owing to the defect in its manufacture, a piece flew off the drift, when it was struck by D in the course of using the tools and he was seriously injured. The employers were held not liable for the injury caused, as they had used reasonable care and skill in providing the tools by buying it from a reputable supplier.

30. In Bryce v. Swan Hunter Group Plc and Others, [1988] 1 All E.R.659 (Q.B.D.), the deceased was employed from 1937 to 1975 in shipyards of the three defendant companies. In the course of his employment, the deceased was exposed to asbestos dust, which caused him mesothelioma, from which he died in 1981. In an action by his widow against the defendant for damages, it was held that the plaintiff had not established that the defendants' breach of duty had caused the deceased to contract the disease. Still, the defendants were held liable for damages, because, although the defendants were not under a duty of care to prevent all exposure of the deceased to dangerous quantities of asbestos dust, they were under a duty to take all reasonably practical steps to reduce the amount of asbestos dust, to which the deceased and his fellow-workers were exposed.

as by working in a high place as a window-cleaner or at a place near a ship's side, where there is no rail, the employer cannot say that the workman must rely upon his own skill and judgment. He must take such safety measures as are practicable.[31] If, despite the exercise of due care, the workman sustains injury through an inherent risk of the employment, he cannot recover damages against the employer, because the employer is not liable in the absence of negligence.[32] The employer's duty of care is owed to each workman as an individual. Therefore, the employer must take into account any special weakness or peculiarity of a workman, such as the fact that he is one-eyed.[33] He owes a lower duty of care to an experienced workman[34] and a higher duty to a workman with insufficient experience, who needs help and supervision.[35]

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31. John Munkman, op.cit., p.81.

32. See Watt v. Hertfordshire County Council, supra, n.17.

33. Paris v. Stepney Borough Council, supra, n.13.

34. Qualcast (Wolverhampton) Ltd. v. Haynes, [1959] A.C.743; [1959] 2 All E.R.38 (H.L.). While handling a ladle of molten metal in a foundry, an experienced moulder was injured, when the ladle slipped, splashing the metal on to his foot. He was not wearing protective spats, though his employers, to his knowledge, kept a stock of them, available for the asking. He had not been ordered or advised to wear them. It was held that the plaintiff was so experienced that he needed no warning and, therefore, there was no negligence on the part of the defendants.

35. Mc Dermid v. Nash Dredging and Reclamation Co. Ltd., [1986] 2 All E.R.676 (C.A.). The plaintiff, who was only eighteen and had only limited experience of dredging operations, was appointed by the defendants as a deckhand in the course of dredging operations, carried out by the

contd. . .

The duty of the employer to provide his workman with a safe place of work requires him to make the place of employment as safe as the exercise of reasonable care would permit.[36] This duty extends not only to the actual place of work, but also to the means of access to and from it.[37] The employer's

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(f.n.35 contd.) defendants and their parent company as a joint enterprise. While working on a tug, owned by the parent company under the control of a tug-master, employed by the parent company, he was seriously injured and his left leg had to be amputated. It was held that since the defendants had put the plaintiff, who was young and inexperienced, under the control of the tug-master, the latter was their agent or delegate and required, on their behalf, to take reasonable care to devise a safe system of work for the plaintiff on the tug and take reasonable care for his safety. The defendants were, therefore, vicariously liable for the tug-master's negligence.

36. Naismith v. London Film Productions Ltd., [1939] 1 All E.R.794 (C.A.). The plaintiff, while employed as a crowd extra in a film studio, had to wear highly inflammable material. Suddenly, she noticed that her foot was on fire. Immediately, she was enveloped in flames and suffered serious injuries. The Court of Appeal held that if the employer provided dangerous equipment, he should take reasonable steps to minimise the danger.

37. See Thomas v. Bristol Aeroplane Co. Ltd., [1954] I W.L.R. 694 (C.A.). The ramp, leading down to the entrance of the defendants' factory, was rendered slippery by frozen snow. The plaintiff, on entering the factory, slipped on a piece of ice, fell and sustained injury. The defendants had maintained a squad of men to prevent such accidents. But there was no maintenance-man on duty till very shortly after the accident, the factory being closed during the week-end. It was held that the defendants had done all that they reasonably could be expected to do, in the circumstances, to see that their entrances were properly maintained.

duty to take reasonable precautions to provide a safe place of work may require him, for example, to provide a safety rail for work on a ledge over a steep drop;[38] a hand-rail on a flight of steps, which, though short, is steep and irregular;[39] a handhold on a roof-crawling ladder, used for carrying buckets;[40] a line of demarcation on a roof, over which a ropeway runs;[41] a safety belt or rope for work, which

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38. Bath v. British Transport Commission, [1954] 2 All E.R. 542 (C.A.). A workman of the defendants was engaged in re-concreting the walls of a dry dock. He fell into the dock below, receiving fatal injuries. The defendants were held liable for negligence to provide a protecting fence or guard-rail.

39. Kimpton v. The Steel Co. of Wales, Ltd., [1960] 2 All E.R.274 (C.A.). In the defendant's factory, there was a set of three steel steps without any hand-rail, which led to a platform. The plaintiff, an electrician, slipped and injured himself, while descending the steps hurriedly to deal with a breakdown in electricity. The defendants were held liable for not providing a handrail.

40. Cavanagh v. Ulster Weaving Co. Ltd., [1960] A.C.145 (H.L.). The plaintiff was seriously injured, when he fell from a crawling ladder without any handrail, whilst carrying a bucket of cement in the course of his employment. It was found that the employer had followed the general practice of the trade for carrying cement on the roof. Still, the employer was held guilty of negligence, since the evidence as to trade practice alone could not be treated as conclusive in favour of the defendants.

41. Quintas v. National Smelting Co. Ltd., [1961] 1 All E.R. 630 (C.A.). For transporting material from one part of the factory to another, the defendants operated an overhead travelling cable-way. While the plaintiff was standing in the route of the cable-way, giving message to the foreman, the cable-way started up and knocked the plaintiff down. The defendants were held liable for not demarcating the area, traversed by the cable-way.

involves moving over steep and slippery altar courses in a dry dock;[42] the re-siting of a points lever, which may endanger a person, riding on the footboard of a railway engine;[43] or even the fencing of an open hatchway between docks at sea.[44] The duty of an employer is to take reasonable care for the safety of his workmen throughout the course of their employment. This duty does not come to an end, because the workmen are sent to work at premises, which do not belong to the employer[45] but to third party.

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42. Hurley v. J.Sanders & Co. Ltd., and Another, [1955] 1 All E.R.833 (Liverpool Assizes). The plaintiff was employed by the first defendants for painting a ship, standing on altar courses. While stepping down the side of the dock to his place of work, the plaintiff slipped and fell, sustaining injuries. It was held that as working on the altar courses was dangerous and the first defendants had not established that it was impracticable to take some precautions such as the provision of a safety belt and line, they were in breach of their common law duty to take reasonable for the safety of their servant.

43. Hicks v. British Transport Commission, [1958] 2 All E.R. 39 (C.A.). The plaintiff was employed by the defendants as a shunter. One day after finishing his shunting work, he rejoined the train by standing on a lower step. As the train moved, he struck a ground lever and fell and was injured severely. It was held that, though the defendants were liable for breach of their common law duty to take care for the plaintiff's safety, the damages, recoverable by the plaintiff, would be reduced by fifty per cent, as there was contributory negligence on his part.

44. Morris v. West Hartlepool Steam Navigation Co. Ltd., supra, n.14.

45. See General Cleaning Contractors Ltd. v. Christmas, supra, n.25. See also Smith v. Austin Lifts Ltd. and Others, [1959] 1 All E.R.80 (H.L.). The appellant was employed as a fitter by the first respondents, who had contracted with the second respondents to maintain a lift on premises, occupied by the second respondents. The machine-house of the lift was in the roof and its

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The employer must take reasonable care to provide his workman with the necessary plant[46] and equipment and maintain them properly. He is liable, quite generally, for the negligence of himself, his servants and his agents in the provision and maintenance of plant. Where there is a proved need for certain plant, the employer will be negligent, if he fails to supply it.[47]

(f.n.45 contd.) left door was in a defective condition. The appellant had reported the defect to the first respondent, who, in turn, had reported to the second respondents. The second respondents did not repair the door and the first respondents neither repaired it nor visited the premises to see, whether the place of work and the access to it were safe. One day, when the appellant tried to enter the machine-house, the left door gave way and the appellant fell and was injured. The first respondents were held liable to the appellant. See also Mc Dermid v. Nash Dredging and Reclamation Co. Ltd., infra, n.63.

46. "Plant" is used in this context as a convenient general term to denote all manner of things, employed in the course of the work. It comprises, for example, such widely divergent objects as scaffold - poles and cart-horses. See John Munkman, op.cit., p.106.

47. Williams v. Birmingham Battery and Metal Company, [1899] 2 Q.B.338 (C.A.). While a workman was, in the course of his employment, descending from an elevated tramway, belonging to his employers, his foot slipped and he fell to the ground, receiving fatal injuries. The employers had provided no ladder or other safe means of ascending to and descending from the tramway. It was held that the defendant was liable for negligence. See also Lovell v. Blundells and T. Albert Crompton & Co. Ltd., [1944] 1 K.B.502. The plaintiff, a boiler-maker found some planks for himself and set up his own staging to carry out an overhaul of boiler tubes on a ship. The employer was held liable for failure to provide planks.

In England, formerly the duty to take reasonable care in the provision of equipment did not make the employer liable for the negligence of a manufacturer or other supplier, since these were not persons, to whom he delegated his duty. The employer's liability depended on, whether he exercised reasonable care in purchase or hire. If an equipment of apparently good quality was bought or hired from a reputable manufacturer or supplier, the employer was not liable for unknown defects.[48] This law was changed by the Employer's Liability (Defective Equipment) Act, 1969. This Act makes an employer liable for negligence, if an employee sustains personal injury in the course of his employment in consequence of a defect in equipment, provided by his employer, though defect may be attributable wholly or partly to the fault of a third party.[49] The Act of 1969, thus, improved the rights

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48. Davie v. New Merton Board Mills Ltd., [1959] A.C.604 (H.L.). While using a drift, manufactured by reputable makers, a particle of metal flew off and struck a maintenance fitter's eye, causing injuries. The employers were held not liable, as they had bought the tool from a reputable source and had no means of discovering its latent defect.

49. See the Employer's Liability (Defective Equipment) Act, 1969, Section 1 (1). See also Knowles v. Liverpool City Council, [1993] 4 All E.R.321 (H.L.). The respondent, employed by the appellant council as a labourer flagger, injured his finger, when a flagstone, he was manhandling, broke, causing him to drop it. The flagstone broke, because of a defect in its manufacture, which could not reasonably have been discovered before the accident. The question, to be decided, was whether flagstone was 'equipment' for the purposes of Section 1 (i) of the Employer's Liability (Defective Equipment) Act, 1969, since 'equipment' referred to 'plant', which comprehended

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of the workman against his employer, in this regard. It made in-roads into the "fault" principle, the basis of liability under common law for personal injury.[50] The principal advantage of the employer's liability under the Act of 1969, from the workman's point of view, is that he is relieved of any need to identify and sue the manufacturer of defective equipment, provided by his employer.[51] But the worker has to prove the "fault" of some third party, leading to a 'defect' in the equipment.[52]

(f.n.49 contd.) such things as tools and machinery, required for the performance of a particular task and did not include articles, produced by the use of plant and machinery. It was held that the flagstone was 'equipment' for the purposes of the 1969 Act, as Section 1 (1) of the Act embraces every article of whatever kind, furnished by the employer for the purpose of his business and not merely for the use of his employees. See also, Coltman and another v. Bibby Tankers Ltd., [1986] 2 All E.R.65 (Q.B.). A ship, owned by the defendant, sank off the coast of Japan. In an action by the plaintiffs, representing the estate of a crew member, for damages under Section 1 of the Employer's Liability (Defective Equipment) Act, 1969, it was held that a ship was 'equipment' for the purposes of Section 1 (3) of that Act.

50. Charlesworth, Negligence (1977), p.634.

51. Winfield and Jolowicz, Tort (1979), pp.175-176.

52. Lord Wedderburn, The Worker and the Law (1986), p.430.

The employer is not bound to provide all the latest safety devices for the safety of his workmen. But he is bound to take reasonable steps to protect them from injury in his service.[53]

The employer is under a duty to provide competent staff. A skilled employee may hold all necessary qualifications and act with reasonable care. But he may be deficient in experience to deal with certain dangerous situations. If accidents occur by their lack of experience, the employer is liable.[54] If a fellow-workman is likely to prove a source of danger to his fellow-employees by his habitual misconduct, the employer is duty-bound to remove the source of danger by dismissal, if necessary.[55]

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53. See Toronto Power Co. Ltd. v. Kate Pakistan, [1915] A.C. 734 (P.C.). A workman was killed by a block, falling from a travelling crane. The accident was caused by the overwinding of the chain, which hoisted the block. There was in existence a safety device, which would have prevented this overwinding. The employer was held liable for not adopting this device.

54. Butler (or Black) and another v. Fife Coal Co. Ltd., [1912] A.C.149 (H.L.). The husband of the pursuer was killed by an outbreak of poisonous gas, while working in the coal-mine of the defendants. It was held that the defendants were liable, as they had failed in their duty to appoint and keep in charge persons, competent to deal with the dangers, arising in the mine.

55. Hudson v. Ridge Manufacturing Co. Ltd., [1957] 2 Q.B.348. One of the defendants' employees had made a nuisance of himself to his fellow-employees, including the plaintiff, a cripple, by persistently engaging in skylarking. One day, this employee indulged in horseplay, trapped up the plaintiff and injured him. The employers were held liable, as they had failed to prevent such behaviour of their employees.

The employer's duty also involves the duty to establish and enforce a proper system or method of working. This system includes such matters as co-ordination of different departments and activities,[56] the lay-out of plant and appliances for special tasks,[57] the method of using particular machines[58] or

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56. Wilsons and Clyde Coal Co. v. English, [1937] 3 All E.R. 628 (H.L.). The haulage plant of a coal-mine was negligently operated by the servant of the coal-mine, while the workmen on the morning shift were leaving the pit, resulting in injury to a miner. In an action by the miner against the coal-mine, it was held that to provide a proper system of working is a paramount duty of the master and if it is delegated by the master to his servant, the former still remains liable.

57. Grantham v. New Zealand Shipping Co. Ltd., [1940] 4 All E.R. 258, (K.B.). The plaintiff was engaged in unloading a cargo of cheese from a hold of the defendants' vessel into a barge, when a crate of cheese slipped from a sling, in which it was being lowered, rolled along the deck and over the side of the vessel and injured the plaintiff, standing in the barge below. A fellow-servant of the plaintiff had been appointed to superintend the unloading and the defendants contended that if there was any negligence, it was the negligence of that fellow-servant in failing to use the ropes and spars. It was held that the negligence, which caused the accident, was that of the defendant in failing to provide a safe method of working and they could not, therefore, avail themselves of the plea of common employment.

58. Kilgollan v. William Cooke & Co. Ltd., [1956] 2 All E.R. 294 (C.A.). The plaintiff was employed as a strander in the defendants' wire-rope factory. She was in charge of a machine, which consisted of a long barrel, which revolved at eight hundred revolutions a minute and which contained some eighteen bobbins, to each of which was attached a strand of wire. As the barrel revolved, the strands were drawn to one end and twisted together into a wire-rope by the rotation of the barrel. The machine was only partially fenced. The plaintiff, who was standing in front of the moving machine, was struck in the eye by a small particle from a broken wire and was blinded. He was held to be entitled to recover damages for negligence from the defendants, because they had knowledge of the risk and reason to foresee injury to their workpeople, as a result of it and had failed to take reasonable care for the safety of the plaintiff.

carrying out particular processes,[59] the instruction and supervision of inexperienced workers[60] and the general conditions of work, covering such things as fire precautions, ventilation, lighting and washing facilities.[61] In setting up and enforcing the system, due care and skill must be

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59. Finch v. Telegraph Construction and Maintenance Co. Ltd., [1949] 1 All E.R.452 (K.B.). A factory workman, while operating a double grinding machine without wearing goggles, suffered an injury in his eye from a piece of metal, sent out by the machine. The employer was held to have failed to provide a safe system of work in not guiding the workmen to use goggles.

60. Bux v. Slough Metals Ltd., [1974] 1 All E.R.262 (C.A.). The plaintiff was employed to remove molten metal from a furnace by means of a ladle in the defendants' factory. He was trained for that work for some weeks and during that time no goggles were provided or worn or instructed to be worn. But later on, goggles began to be provided. But as there was no persuasion or insistence with regard to the use of goggles, the plaintiff stopped using them. While thus working without goggles one day, some of the molten metal was thrown up into his eyes. It was found that the plaintiff would have worn the goggles, if he were instructed to do so in a firm manner with supervision. So the defendants were held liable for breach of their common law duty to maintain a reasonably safe system of work by giving the necessary instructions and enforcing them by supervision. But the damages, the plaintiff could recover, was reduced by 40 percent, considering his contributory negligence.

61. Mc Ghee v. National Coal Board, [1972] 3 All E.R.1008 (H.L.). The respondents provided no adequate washing facilities to the appellant, engaged in cleaning out brick kilns, which exposed him to clouds of abrasive brick dust and caused him dermatitis. The respondents were held liable to the appellant, because the respondents' breach of duty had materially contributed to his injury, in the absence of positive proof by the respondents to the contrary.

exercised by the employer for the safety or the workmen.[62] It is the personal duty of the employer to see to the safety of the system of work. He cannot escape liability by delegating performance of the duty to someone else.[63] Where the workmen are engaged in dangerous operations, the employer does not discharge his duty to provide a safe system merely by the provision of protective equipment. The employer should see that the workmen are instructed to use it or its use made compulsory by proper order.[64] If the harm, liable

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62. John Munkman, op.cit., p.132.

63. Wilsons and Clyde Coal Co. v. English, supra, n.56. See also Mc Dermid v. Nash Dredging and Reclamation Co. Ltd., [1987] 2 All E.R.878 (H.L.). The defendants employed the plaintiff as a deckhand in the course of dredging operations, carried out by them and their parent company. While working on a tug, owned by the parent company under the control of a tug-master, employed by the parent company, he was seriously injured. It was held that the duty to provide a safe system of work was a personal or non-delegable duty, which was broken by the defendants. So the defendants were liable to the plaintiff for damages.

64. Nolan v. Dental Manufacturing Co. Ltd., [1958] 2 All E.R. 449 (Manchester Assizes). The plaintiff, employed by the defendants as a tool-setter, lost his left eye, while sharpening tools without goggles. The defendants were held liable for breach of their common law duty not to expose the plaintiff to unnecessary risk, because the defendants were obliged not only to provide goggles but also to instruct and supervise the workmen so as to make them use the goggles and the defendants had done none of these things. See also Pape v. Cumbria County Council, [1992] 3 All E.R.211 (Q.B.D.). The plaintiff, a cleaner, employed by the defendant, contracted dermatitis from sustained exposure of the skin to the cleaning products. She was held to be entitled to damages, as the defendant had not warned the cleaner of the danger of dermatitis from the sustained exposure of skin to the cleaning products and instructed her to wear the protective gloves, provided at all times.

to occur, if the equipment were not worn, is very serious, the use of protective equipment should be ensured by supervision.[65]

Liability of the employer at common law may arise in more than one way. Liability arises, when injury is caused to a workman by the employer's own negligence. For example, if the employer carries on dangerous industry or operations without establishing a safe method of work and thereby causes injury to his workman, he is personally liable.[66] Liability also arises for the acts of his workmen, which cause injury to the fellow-workman. For example, if one workman injures another by handling a crane carelessly, the employer is liable to compensate the injured workman.[67] This is known as the employer's vicarious liability.[68] Formerly, though the employer was vicariously liable[69] for the acts of his workmen to third parties, he was not so liable to his

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65. Bux v. Slough Metals Ltd., supra, n.60. See also Nolan v. Dental Manufacturing Co. Ltd., supra, n.64.

66. John Munkman, op.cit., p.1.

67. Ibid.

68. Ibid.

69. The doctrine of vicarious liability was set up to protect the interests of strangers on the basis that in the eyes of an outsider, master and servant are one. But it could not be applied to insiders or workers, because they had agreed to accept the risk. See John Munkman, op.cit., p.5.

own workmen for the negligence of the fellow-workmen. This was because of the application of the doctrine of common employment. According to this doctrine, a workman, by his contract of employment, is deemed impliedly to have agreed to run the risk of negligence on the part of fellow-workman in common employment with him.[70] This doctrine was a reflection of the early nineteenth century, dominated by the economic theory of laissez-faire. The theory meant that the welfare of the community was best served by leaving each individual free to pursue his own interests. So, if a workman entered a dangerous employment, he accepted its risks.[71] He had to look after himself, as though he were a free agent. The mere relation of employer and workman did not imply an obligation on the part of the employer to take more care of the workman than he might reasonably be expected to do of himself.[72] The employer had to take only reasonable care

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70. The doctrine was originated by the decision of the House of Lords in Priestley v. Fowler, [1835-42] All E.R. Rep.Ex.449 (Exch.). The plaintiff, employed by a butcher, was directed to take certain goods in a van, driven by another servant of the defendant. Owing to the overloading of the van, one of the wheels of the van gave way and the plaintiff was injured. It was held that the plaintiff was under a duty to act with due diligence to secure his safety, because he knew that the van was overloaded.

71. John Munkman, op.cit., p.3. See also J.N.Mallik, Law of Workmen's Compensation in India (1972), p.IX.

72. Priestley v. Fowler, supra, n.70 at 451, per Lord Abinger C.B.

for the safety of his workman by employing competent fellow-workmen and supervisors.[73] He should not be deemed to have contracted to indemnify the workman against the negligence of a fellow-workman.[74]

The doctrine of common employment resulted in hardship to workers. Workmen, who had never heard of one another nor had the faintest relation with one another, were held to be in common employment. If one was injured by the negligence of the other, the injured had no title to damages.[75] The first breach in England in the application of the doctrine of common employment was made by the Employer's Liability

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73. See Hutchinson v. York, Newcastile and Berwick Rly Co., (1850) 5 Exch.343. In this case, two trains, belonging to the same railway company, had collided. The plaintiff, a railway employee, travelling on duty in one of the trains, brought his action against the company, alleging negligence on the part of both engine-drivers. The company pleaded that both engine-drivers were fellow-servants of the plaintiff and were fit and competent persons. The plea was held good by the court.

74. Young v. Hoffman Mfg. Co., [1907] 2 K.B.646 (C.A.) at 657 per Kennedy, L.J. The plaintiff, a boy of fifteen, was injured through his arm being caught by a circular saw, while working in the defendant's engineering works. The question, to be decided, was whether the defence of common employment could be raised in a case, where the workman had been injured by the negligence of the employer's foreman to give proper instruction. It was held that, where a master employs an inexperienced workman upon dangerous work, it is his duty to instruct and caution him. The master may delegate that duty to a competent person. If he does so, he will not be liable for an injury to the workman, resulting from the negligence of the delegate in not properly instructing him.

75. F.P.Walton, supra, n.3, at p.39.

Act, 1880.[76] This Act, however, excluded the application of the doctrine only in certain specified cases.[77] The Law Reform (Personal Injuries) Act, 1948 finally abolished the doctrine of common employment.[78] Any agreement in a contract of service or apprenticeship or any collateral agreement was declared to be void in so far as it would have the effect of excluding or limiting the liability of the employer for the negligence of fellow-servants.[79] Smith v. British European Airways Corpn.[80] is a case, which illustrates the application of this Act. An airways employee, whilst being carried in an aircraft, was killed in a collision, due to the negligence of his fellow-servant, the pilot. He had entered into a pension scheme, collateral to his contract of service. One of the terms of the scheme was that the employers were not to be liable for damages or any other payment except the benefits under the scheme. This clause was held to be void. An employer, therefore, is liable for

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76. The legislation in India, in this respect, is the Employers' Liability Act, 1938.

77. See Employer's Liability Act, 1880, Sections 1 and 2.

78. See the Law Reform (Personal Injuries) Act, 1948, Section 1 (1).

79. Id., Section 1 (3).

80. [1951] 2 All E.R.737 (K.B.).

the negligence of his workmen towards one another in the same way as he is liable for their negligence towards the world at large.[81] In general, the effect of the Act of 1948 is that the employer's personal liability and his vicarious liability have been integrated into a single general duty. The employer, acting personally or through his workmen or agents, must take reasonable care for the safety of his workman.[82]

During the currency of the Employer's Liability Act, 1880, an attempt was made to defeat its object by introducing the doctrine of common employment under another form viz. the defence of volenti non fit injuria. This defence involved the plea that the workman had voluntarily assumed the risk of dangerous work and, therefore, the employer was not liable. It was raised in Smith v. Baker & Sons.[83] But

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81. John Munkman, op.cit., p.91.

82. Id., pp.1-2; See Broom v. Morgan, [1953] 1 All E.R.849 (C.A.). The plaintiff and her husband were employed by the defendant to manage and work in a beer and wine house. The plaintiff was injured through the negligence of her husband in the course of his employment. It was held that, where a servant, while acting in the scope of his employment, negligently harms another, the fact, that his relationship to the injured person is such that suit canno be brought against him, does not relieve the master from liability, because the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself.

83. [1891] A.C.325 [H.L.] The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane, worked by men, employed by the contractors. The crane lifted stones and at times swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger, to which he was exposed. A stone fell from the crane and injured the plaintiff.

the House of Lords rejected the argument that the plaintiff had taken the risk of injury with his eyes open. They held that it was not enough that the plaintiff, knowing of the risk, carried on with his risk. It must be shown that he consented to take the risk upon himself without compensation.[84] The principle of volenti non fit injuria is now given so narrow an application that it rarely affects a person in relation to his employment.[85]

An accident may be caused by the fault of the employer and the workman's failure to take reasonable care for his own

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84. Ibid.

85. Bowater v. Rowley Regis Borough Council, [1944] 1 All E.R.465 (C.A.). The plaintiff, employed by the defendants for going round the streets, collecting leaves and rubbish, was ordered to take an unruly horse for the purpose. He carried out the order, after protest. The horse ran away and the plaintiff was thrown out of the cart and injured. It was held that volenti non fit injuria did not apply, as it was no part of the plaintiff's employment to manage unruly horses. See also Merrington v. Ironbridge Metal Works Ltd., [1952] 2 All E.R.1101 (Salop Assizes). While fighting a fire at the defendant's factory as a part-time fireman, the plaintiff was injured by a dust explosion, caused by the exceptional danger of fire and explosion, which the defendants had created on the premises by not removing accumulation of aluminium and carbon particles. It was held that volenti non fit injuria applied, only if the plaintiff had consented to assume the risk without compensation, after appreciating fully the dangerous character of the risk. See also Morris v. Murray and another [1990] 3 All E.R.801 (C.A.). A passenger, who appreciated the risk, he was taking in embarking on a joyride with a pilot, whose drunkenness was so extreme that to go on the flight was like engaging in an obviously dangerous operation, was held to be barred by the defence of volenti non fit injuria from claiming damages for personal injury, sustained in a crash, caused by the pilot's negligence, because, in such circumstances, the passenger had, thereby, implicitly waived his right to damages.

safety. Under the old law, in such cases, the employer could free himself of all liability by taking up the defence of contributory negligence.[86] This rule was changed by the Law Reform (Contributory Negligence) Act, 1945.[87] Under this Act, the workman is entitled to recover damages, reduced in amount, according to the extent of his own negligence. Thus, where both parties are to be blamed for an accident, the loss is shared between them, in proportion to their respective degrees of fault.[88] In other words, if the workman's negligence was one of the causes of accident, he is no longer defeated totally, in an action for damages. He gets reduced damages.[89]

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86. Contributory negligence of a workman does not depend upon any duty of care to the employer. A workman is guilty of contributory negligence, if he can foresee that his conduct may expose him to injury. Unless the workman's conduct, though blameworthy, does not contribute to the accident, it is irrelevant. John Munkman, op.cit., pp.601-602.

87. See Law Reports Statutes (1945), p.221

88. W.F. Frank, "Employers' Liability In Great Britain", 18 Law and Contemporary Problems. 320 at 326 (1953).

89. Davies v. Swan Motor Co. (Swanesa) Ltd., [1949] 1 All E.R.620, (C.A.). An employee of the Swanesa Corpn. was, contrary to regulations, riding on steps, attached to the offside of a dust lorry, belonging to the Corporation, when an overtaking omnibus, the property of the defendants, collided with the lorry. The employee was struck by the omnibus and he died. It was held that the driver of the omnibus was guilty of negligence, but the deceased was guilty of contributory negligence, resulting in apportionment of liability. See also the Law Reform (Contributory Negligence) Act, 1945, Section 1 (1).

Under common law, if death of a workman was caused by an industrial injury, the right to sue did not pass on to the heirs or legal representatives of the workman. This principle is commonly known as actio personalis moritur cum persona, which means that a personal action dies with the person. The application of this rule resulted in serious hardship to the dependants of poor persons, dying as a result of accidents. This rule was modified in England by the Fatal Accidents Acts.[90] Now the specified dependants of a deceased workman have a right of action for damages for wrongful act, causing death of the workman.[91] This right of action may include a claim for damages for bereavement.[92]

The concept of employer's liability at English common law, based on employer's fault, was applied in India also.[93] In Elizabeth C. Blanchetta v. Secretary of State for India,[94] the Allahabad High Court imported the doctrine of common employment, prior to 1880 in England. There was a collision

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90. H.K.Saharay, Industrial and Labour Laws of India (1987), p.265; Horatio Vester and Hilary Ann Cartwright, Industrial Injuries (1961), Vol.1, p.4. The Fatal Accidents Acts 1846, 1864 and certain Sections of Fatal Accidents Act, 1959 have been repealed by the Fatal Accidents Act, 1976. See Halsbury's Statutes, (1989), Fourth Edition, Vol.31, p.212.

91. Fatal Accidents Act, 1976, Section 1.

92. Id., Section 1 A.

93. H.K. Saharay, op.cit., p.265.

94. (1912) 9 A.L.J. 173.

between two passenger trains. The deceased was a driver on one of the two engines, which collided. In the suit, filed by the legal representative of the deceased, a Division Bench of the Allahabad High Court held that in this country, where there was no legislation analogous to Employer's Liability Act, a servant had no cause of action against his master for the neglect of another servant in the common employment of the same master notwithstanding the fact that the servant, suffering injury and the servant, whose neglect caused the injury, were in employment of dissimilar nature.[95] A milestone in the field of abrogation of the doctrine of common employment in India was made in the recommendation of the Royal Commission on Labour in India. The Royal Commission regarded both the doctrine of common employment and the doctrine of _volenti non fit injuria_ as inequitable.[96] This paved the way for the Employers' Liability Act, 1938. It abrogated, to a considerable extent, the scope of the doctrine of common employment.[97] However, the Privy Council in

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95. This view was followed in _T.J.Brockle Bank Ltd._ v. _Noor Ahmede_, 42 C.W.N.179. For contrary view, see _Secretary of State_ v. _Rukhminibai_, A.I.R.1937 Nag.354.

96. See the _Report of the Royal Commission on Labour_ (1931), p.314.

97. See the Employers' Liability Act, 1938, Section 3 (d). It reads as follows:-
"Where personal injury is caused to a workman by reason of any act or omission of any person in the service of the employer done or made in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties, a suit for damages in respect of

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Council v. Constance Zena[98] held that the scope of the section in the Act of 1938, abrogating the doctrine of common employment, was limited and the defence of common employment was still available to the employer.[99] The decision of the Privy Council was, mainly, due to ambiguity in the language of the abrogating provision in the Act of 1938.[100] So this provision was substituted by the Amending Act of 1951.[101] Any provision, contained in a contract of service, excluding or limiting the liability of the employer by the application of the doctrine of common employment, was declared void.[102]

(f.n.97 contd.) the injury instituted by the workmen or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer".

98. A.I.R.1950 P.C.22 at 24. In this case, on account of collision, a fireman of one of the colliding engines died and the suit for damages against the Governor General-in-Council was brought by the heirs of the deceased. It was held that Section 3 (d) of the Employers' Liability Act, 1938 does not deprive the employer of the plea of common employment in defence in a suit by a workman for damages. The clause covers and takes away the defence only where the claim is based on two classes of negligence, namely, where the act or omission complained of, was done or made by the fellow-workman (i) in obedience to any rule or bye-law of the employer or (ii) in obedience to particular instructions, given by a person, either by virtue of authority, delegated by the employer in that behalf or in the normal performance of such person's duties.

99. The aforesaid view was followed by the Allahabad High Court in Dominion of India v. Kaniz Fatima, (1961) 2 L.L.J.197 (All.).

100. Supra, n.97.

101. See the Employers' Liability Act, 1938, as amended by the Act of 1951, Section 3 (d).

102. Id., Section 3 A.

Further, the workman's action for damages cannot be defeated by the application of volenti non fit injuria, unless the employer proves that the risk was fully explained to and understood by the workman and the workman voluntarily undertook the same.[103] As under English common law, the employer should take reasonable care for the safety of his workman.[104] He should ensure that the premises, where the men are working, are reasonably safe. His duty, in this respect, is not limited to unusual dangers nor is it discharged by giving warning of the hazard. He should maintain the work premises in as safe condition as reasonable care by a prudent employer can make them.[105]

The Indian Fatal Accidents Act, 1855, largely modelled on the English Fatal Accidents Act of 1846, provides for payment of damages to certain heirs of the deceased person,[106]

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103. Id., Section 4.

104. See Rajan v. Union of India, 1991 (2) K.L.T.604; Official Liquidator v. K.S.E.B., 1990 (1) K.L.T.256.

105. J.F.Pareira v. Eastern Watch Co. Ltd., (1985) 1 L.L.J. 472 (Bom.). A saleman, working in a watch company in the ground floor, was found unconscious in the third floor and died in hospital. It was argued that the saleman's climbing three flights of stairs accelerated his death, which could have been avoided, if lift were provided. It was held that the obligation to provide a safe place for work does not include provision of lift.

106. The action for damages under the Act of 1855 shall be for the benefit of only the husband, wife, parent and child of the deceased. See the Fatal Accidents Act, 1855, Section 1 A. In England, brother, sister, uncle and aunt of the deceased and the issue of such relatives have been included in the list of heirs. See Fatal Accidents Act, 1959, Section 2. The Indian Fatal

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whose death was caused by the tortious act of another.[107] Thus, this Act helps the specified dependants[108] of a deceased workman to claim damages for the death of the latter, provided it was caused by the actionable wrong of the employer.[109]

Thus, attempts, both statutory and judicial, have been made in England and India, from time to time to resist the defences against employer's liability at common law. But nothing was done to change its basis on the employer's fault or negligence. So, employer's liability at common law proved to be of little use to the injured workman, as it was very difficult for the workman to prove the employer's fault in a court of law.[110] Further, before the Industrial Revolution, industrial accidents were caused, generally, by the negligence of the employer or his workmen. A workman,

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(f.n.106 contd.) Accidents Act, 1855 should be amended, including in the list of heirs 'minor brothers and sisters, dependent upon deceased elder brother'. See Dewan Harichand v. Delhi Municipality, A.I.R.1981 Del. 71 at 74 (D.B.).

107. Fatal Accidents Act, 1855, Section 1 A.

108. Ibid.

109. H.K. Saharay, op.cit., p.265.

110. Sunil Rai Choudhuri, Social Security in India and Britain (1962), p.8; J.N. Mallik, supra, n.71; Deepak Bhatnagar, Labour Welfare And Social Security Legislation In India, (1984), p.86.

injured by such accidents had a remedy, though insufficient, at common law, where the basis of employer's liability was his negligence. But, after the Industrial Revolution, industrial accidents began to result from unforeseable mishaps or untoward events, which did not have any connection with the negligence of the employer or his workmen. In such cases, the employer's liability at common law, based on negligence, could not provide a remedy to the injured workman.[111]

Liability of employer in absence of negligence

The insufficiency of the employer's liability at common law to provide adequate relief to workmen for industrial injuries forced the jurists to evolve a new principle of liability that would facilitate recovery of compensation for industrial injuries without the need to prove negligence on the part of the employer, by his workman. This led to the emergence of "the principle of occupational risk". According to it, the employer, who sets up a factory, creates an agency, likely to cause industrial injuries through no fault of his or his workmen. So, when industrial injuries are caused to workman, justice requires the employer to compensat

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111. It was out of the local customs and habits of peaceable life in England that the royal judges, going on assize, gradually developed the common law. They could not be expected to anticipate the changes, brought about by technological developments. Horatio Vester and Hilary Ann Cartwright, op.cit., p.2.

the workman.[112] The employer, that bears the burden of depreciation and destruction of the plant and machinery, has also to bear the burden of repairing the human machine.[113] Upon this principle of occupational risk were founded the Workmen's Compensation Acts of England, starting from the Act of 1897.[114] These Acts introduced the concept of no-fault liability. Accordingly, the employer became liable to compensate his workmen for industrial injuries, whether he was negligent or not. The workman was expected to establish only that he had been injured by an accident 'arising out of and in the course of his employment'.[115] But the

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112. ILO, *supra*, n.1, p.5; *Report of the National Commission on Labour* (1969), p.162.

113. J.N. Mallick, *supra*, n.71, p.4.

114. *Infra*, n.118. ILO, *op.cit.*, p.5; Report of the *National Commission on Labour*, *op.cit.*, p.162; K.D.Srivastava, *Employees' State Insurance Act* (1991), p.7. The workmen's compensation legislation has been justified by other theories like 'social cost', 'social compromise' and 'status' also. See K.L. Bhatia, *Administration Of Workmen's Compensation Law* (1986), p.26; The fact, that a worker was almost remedilless at common law, was not grasped by the legislators of various countries, until late nineteenth century. The publication of 'Das Capital' by Karl Marx and the emergence of trade unions in the late nineteenth century hastened the pace of legislation. K.L. Bhatia, *op.cit.*, pp.20, 21.

115. Workmen's Compensation Act, 1897, Section 1 (1). For discussion of the phrase 'arising out of and in the course of employment', see *infra*, Chapter 4.

workman had no title to compensation, if the accident was due to his serious and wilful default.[116] Thus, the common law doctrine of contributory negligence continued to be a defence to the employer.[117] Where the injury was caused by the personal negligence or wilful act of the employer or of some person, for whose default, the employer was responsible, the workman could either bring an action under common law or claim compensation under the Act.[118] The employer was not

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116. Workmen's Compensation Act, 1897, Section 1 (2) (c). It reads, "If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed". But under the Workmen's Compensation Act of 1906, if the injury, caused by the serious and wilful misconduct of the workman, resulted in his death or serious and permanent disablement, compensation was not disallowed. Workmen's Compensation Act, 1906, Section 1 (2) (c). It reads, "If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed".

117. P.S. Atiyah, Accidents, Compensation and the Law (1975), p.318.

118. Workmen's Compensation Act, 1897, Section 1 (2) (b). It reads, "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid".

liable to pay both common law damages and compensation under the Act.[119] The Workmen's Compensation Acts[120] continued the common law principle of employer's liability. But they contained no provision for compulsory insurance of the liability of the employer. Hence, the receipt of compensation by workmen for industrial injuries was uncertain.[121]

The Insurance Scheme

Insurance on a national basis was introduced in England in 1946. Steps were, then, taken to incorporate industrial insurance into the general system of insurance, in which the State plays an integral part. This has resulted in a series of Acts, known together as the National Insurance (Industrial Injuries) Acts, 1946 to 1960.[122] These Acts

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119. Ibid.

120. i.e. the Act of that name of 1897, 1900, 1906, 1918 and the Acts that may be cited together as the Workmen's Compensation Acts, 1925 to 1945. See Horatio Vester and Hilary Ann Cartwright, op.cit., p.5. The workmen's compensation law was consolidated in the Workmen's Compensation Act, 1925, after a series of amendments. See John Munkman, op.cit., p.16.

121. Sunil Rai Choudhuri, supra, n.110, p.31.

122. i.e. National Insurance (industrial Injuries) Act, 1946, National Insurance (Industrial Injuries) Act, 1948, National Insurance Act, 1951, Family Allowance and National Insurance Act, 1952, National Insurance Act, 1954, Family Allowance and National Insurance Act, 1956, National Insurance Act, 1957, National Insurance (No.2) Act, 1957, Family Allowance and National Insurance Act, 1959, National Insurance Act, 1960 and may be cited together as the National Insurance (Industrial Injuries) Acts, 1946 to 1960, so far as they relate to the 1946 Act. Horatio Vester and Hilary Ann Cartwright, op.cit., p.5.

introduced a new scheme of compulsory insurance against industrial injuries.[123] The scheme is now financed by the National Insurance Fund, which is composed of contributions payable by employers, employees and supplements, provided by the Treasury.[124] The insurance scheme differs fundamentally from the scheme under the Workmen's Compensation Acts in that compensation is payable from the National Insurance Fund.[125] The liability for compensation is shifted from the employer to the Fund.[126] Thus, there is a sharing of liability between the State, the employer and the workman instead of the sole liability of the employer. The principle of social insurance is substituted for the principle of employer's liability. The liability for compensation under the insurance scheme is also based on no-fault theory as the one under the Workmen's Compensation Acts.[127] But it is wider than the one under the latter, because the employer is liable, if an accident, causing personal injury, has arisen

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123. See Halsbury's Laws of England (1982), Fourth Edition Vol.33, p.206. The National Insurance (Industrial Injuries) Acts, 1946 to 1960 were consolidated by the National Insurance (Industrial Injuries) Act, 1965, which, together with its supplementing Acts upto 1974, is now incorporated in the Social Security Act, 1975. Halsbury's Laws of England, supra, n.123, pp.206, 208.

124. Id., p.508.

125. Id., p.360.

126. I.L.O, op.cit., p.12. K.D.Srivastava, op.cit., p.8; Robert M. Ball, Social Security Today and Tomorrow (1978), p.12.

127. Halsbury's Laws of England, supra, n.123, p.364.

in the course of employment. The injured workman need not further prove that the accident has also arisen out of employment, since an accident, arising in the course of employment, is deemed, in the absence of evidence to the contrary, also to have arisen out of employment.[128] The new type of liability, under the social insurance scheme, has superseded the principle of employer's liability under the Workmen's Compensation Acts.[129]

As in England, in India also, the inadequacy of the employer's fault-based liability at common law necessitated creation of a new employer's liability, independent of his fault. The Workmen's Compensation Act, 1923 introduced such no-fault liability of employer for compensation. As under the English Workmen's Compensation Acts, the workman need not prove employer's fault for obtaining compensation

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128. Id., p.371.

129. The new system of social insurance was brought into operation on the 5th July, 1948 by the National Insurance (Industrial Injuries) Act, 1946 (Appointed Day) Order, 1948. On this date, workmen's compensation ceased to be payable in respect of any employment on or after that date and the Workmen's Compensation Acts, 1925-1945 were accordingly repealed. The dividing line between workmen's compensation, on the one hand and social insurance, on the other is drawn in respect of employment before and employment on or after this date. But as incapacity on or after this date may be the result of employment before it, it was provided that the Workmen's Compensation Acts are to continue to apply to cases, where the right to compensation arises or has arisen in respect of employment before this date. Horatio Vester and Hilary Ann Cartwright, op.cit., pp.7-8; See also Halsbury's Laws of England, supra, n.123, p.206.

under the Indian Act of 1923. He can recover compensation, if he proves that he has sustained an accident, arising out of and in the course of employment.[130] But the employer is not liable, if the injury is caused by the worker's being under the influence of drink or drugs or his wilful disobedience of safety rules or wilful removal or disregard of safety guard or device except in the case of injuries, which result in the death of the workman.[131] As under the English Workmen's Compensation Acts, the Indian Act of 1923 does not have any provision for compulsory insurance of employer's liability. Absence of insurance coverage may be a factor, leading to evasion of liability by the employer.[132] The enactment of the Employees' State Insurance Act, 1948 remedies this defect, in so far as those workmen, covered by the Act, get compensatory benefits from the Employees' State Insurance Corporation.[133] Like the National (Industrial

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130. Workmen's Compensation Act, 1923, Section 3 (1). See Works Manager, C. & W. Shop v. Mahabir, A.I.R.1954 All. 132, where it was held that the liability under the Workmen's Compensation Act, 1923 is not a liability, which arises out of tort. It is a liability, which springs out of the relationship of master and servant.

131. Id., Section 3 (1), proviso (b). For the position in England, see supra, n.116.

132. For an example of evasion of liability by the employer under the Workmen's Compensation Act, 1923, see the news item entitled "Azhalinte theeramillah kadalil", Malayala Manorama, August 2, 1994, p.3. One Joseph, who was working in Galaxy Shipping Co., died in the course of his duty, when the ship, in which he was working, sank. Even after the lapse of one year from the date of his death, his dependants could not get any compensation from the company, which is evading its liability by the technique of changing its name.

133. Unlike the National Insurance (Industrial Injuries) Acts of England, the Employees' State Insurance Act, 1948 of India has not superseded the Workmen's Compensation Act, 1923.

Injuries) Acts of England, the Employees' State Insurance Act, 1948 is based upon the principle of social insurance and no-fault liability. It replaced the concept of employer's liability by the one of sharing of liability by the State, the employer and the employee.[134] Thus, it helps prevent the evasion of liability by the employer. Further, the liability under the Act of 1948, like its English counter-part, is wider than the one under the Workmen's Compensation Act of 1923. This is, because the employer is liable on the workman's proving that an accident has arisen in the course of employment. On such proof, in the absence of evidence to the contrary, the accident shall be deemed to have arisen out of employment.[135]

Evaluation of these different forms of liability for compensating industrial injuries makes it evident that the liability under the social insurance scheme is the most be-fitting one, as it eliminates the problem of evasion of liability by the employer by providing for sharing of lia-bility.[136] But in practice, proper sharing of liability by the State cannot be expected, in the absence of any man-datory provision to that effect.[137] So, Section 26 (2) of

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134. Employees' State Insurance Act, 1948, Sections 26 (2) and 39.

135. Id., Section 51-A. See also infra, Chapter 4.

136. Supra, n.134.

137. See Employees' State Insurance Act, 1948, Section 26 (2). It is as follows:-

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the Employees' State Insurance Act, 1948 should be amended, making it obligatory on the part of the State to share the liability. It is also suggested that the Workmen's Compensation Act, 1923 may be amended, providing for compulsory insurance of the liability of the employer so as to ensure the receipt of compensation for industrial injuries by the workmen, covered by the Act.[138] The liability for compensation under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 will arise only in the case of accidents arising in the course of and out of employment. But the operation of a hazardous industry may result in accidents such as escape of poisonous gas, causing injuries to workmen, even when they are reposing in their residential quarters or homes nearby. Such accidents are not accidents, arising in the course of and out of employment, attracting the liability for compensation under the Workmen's Compensation Act, 1923 or the Employees' State Insurance Act, 1948. Workmen, injured by such accidents, are entitled to be compensated just like the other members of the public

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(f.n.137 contd.)

"The Corporation may accept grants, donations and gifts from the Central or any State Governments, local authority, or any individual or body whether incorporated or not, for all or any of the purposes of this Act".

138. *Supra*, n.132.

under the Public Liability Insurance Act, 1991.[139] But the injured workmen of hazardous industries should be treated as different from the general public by providing the former a special statutory remedy, instead of the general one. So the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 may be amended, providing for the liability for compensation for industrial injuries, sustained by workmen in the residential quarters or homes nearby, on account of accidents, resulting from the operation of their hazardous industry.

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139. Act No.6 of 1991. This is an Act to provide for public liability insurance for the purpose of providing immediate relief to the persons, affected by accident occurring, while handling any hazardous substance.

Chapter 3

PERSONS ENTITLED TO COMPENSATION FOR INDUSTRIAL INJURIES

Persons, entitled to compensation[1] for industrial injuries, are given different nomenclature in different laws. Such a person is called a 'servant'[2] under common law; 'workman'[3] under the Workmen's Compensation Act, 1923 and 'employee'[4] under the Employees' State Insurance Act, 1948. In case of death of the servant/workman/employee, his dependants[5] are entitled to compensation.

Under common law, a person, generally, becomes a servant of his master by a contract of service or employment. In exceptional cases, the relationship of master-and-servent results from the loan of a servant by his permanent master

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1. Under common law, 'damages' is used instead of 'compensation'. See supra, Chapter 1.

2. Under common law, employees, entitled to damages, are conveniently described as 'servants', however exalted their status and whatever their type of work may be. John Munkman, Employer's Liability at Common Law (1985), p.1.

3. Workmen's Compensation Act, 1923, Section 2 (1) (n).

4. Employees' State Insurance Act, 1948, Section 2 (9).

5. Fatal Accidents Act, 1855, Section IA; Workmen's Compensation Act, 1923, Section 2 (1) (d); Employees' State Insurance Act, 1948, Section 2 (6-A).

to a temporary one or when one person volunteers to work for another without payment and the latter gives his consent to it.[6]

As under common law, to be a 'workman' under the Workmen's Compensation Act, 1923, there must exist an employer-and-employee relationship,[7] formulated by a contract of employment between a person and his employer.[8] But unlike

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6. John Munkman, supra, n.2, p.84.

7. See Thomas v. Babu, 1995 (1) K.L.T.4 (D.B.). A coconut tree climber, plucking coconuts for 12 persons on payment of one rupee per tree, was held to be not a 'workman' under section 2(1)(n) of the Workmen's Compensation Act 1923, as he was found to be an independent self-employed tree climber without any employer-and-employee relationship between his employer and himself. See also Rebati Gantayat v. Haguru Sethi, 1986 Lab.I.C.1511 (Ori.).

8. This is clear from the use of the words 'employment' and 'employed' in Section 2(1)(n) of the Workmen's Compensation Act, 1923. It is immaterial whether the contract of employment is express or implied, oral or in writing. In the absence of a contract of employment, a person cannot come within the definition of 'workman'. Ganesh Foundry Works v. Bhagwanti & Others, (1985), I L.L.J.95 (P. & H.). In cases of petty workmen, documentary proof of such a contract is not necessary. See C.Muniswamy v. T.Rajmoorthy, 1988 (56) F.L.R.609 (Mad.). Under a contract of service, a man is employed as part of the business and his work is done as an integral part of it. But in a contract for service, the work done is only accessory to the business and not integrated into it. Where the performance of work depends entirely on the skill of the employee, it is a contract for service. Hence, a ship's pilot and a taxi-man are employed under a contract for service, but a ship's master and a chauffeur are all employed under a contract of service. E.S.I.C., Hyderabad v. Maharaja Bar and Restaurant, 1979 Lab.I.C.1147 (A.P.) (D.B.); Gould v. Minister of National Insurance, [1951] 1 K.B.731. Formerly, the control, exercised by the master/employer over the manner of performance of the work, was the guiding factor for deciding whether a 'person' was a 'workman'. Dharangadhara Chemical Works Ltd. v. State of Saurashtra, [1957]

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under common law, a person will not be a 'workman' under the Workmen's Compensation Act, 1923 by the existence of employer-and-employee relationship alone. He must also satisfy the other conditions, specified in the Act. For instance, he must not be one, whose employment is of a casual nature.[9] 'Employment of a casual nature'[10] is employment depending on chance and, therefore, uncertain and irregular.[11] As it is

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(f.n.8 contd.) S.C.R.152; Chintaman Rao v. State of M P., A.I.R.1958 S.C.388; State of Kerala v. V.M.Patel, (1961) I L.L.J.549 (S.C.); Shankar Balajee Waje v. State of Maharashtra, A.I.R.1962 S.C.517. But in Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments, 1974 Lab.I.C.133 (S.C.), the Supreme Court held that control test cannot be treated as the exclusive test, especially in professional work and it is wise to analyse the various relevant factors for deciding, whether a person is a workman/employee.

9. Workmen's Compensation Act, 1923, Section 2(1)(n). Under common law, not only regular industrial servants but also temporary servants, in exceptional cases, are entitled to compensation for industrial injuries, provided a master-and-servant relationship is established. A permanent employer may lend the service of his workmen to a temporary employer. Once the right of control over the workman is transferred from the former to the latter, the latter owes a duty of care to the temporary servant. See Holt v. W.H. Rhodes & Son Ltd., [1949] 1 All E.R.478 (C.A.)

10. It is the employment of the person and not the work, which is to be of a casual nature. See Sitharama Reddiar v. Ayyaswami Gounder, A.I.R. 1956 Mad.212.

11. 'Employment of casual nature' is not defined in the Workmen's Compensation Act, 1923. The expression 'employment of casual nature' is incapable of being exactly defined. See Kochu Velu v. Joseph, 1980 Lab.I.C.902 (Ker.) (D.B.); Raj Rani v. Firm Narsing Dass, A.I.R.1964 Punj.315; Madanlal v. Mangali, A.I.R.1961 Raj.45; Nadirsha Hormusji Sidhwa v. Krishnabai Bala, A.I.R.1936 Bom.199.

depending on chance, it is not based upon any contract of employment.[12] Suppose the owner of a coconut garden engages a person to pluck coconuts regularly once in fifty days. Such an engagement is not an employment of casual nature but of regular nature, since he is regularly employed[13] periodically. A person, regularly employed periodically, is not employed casually.[14] On the other hand, if different persons are engaged on different occasions, that will be a case of casual employment.[15]

Even though a person's employment is of a casual nature, he would fall within the definition of 'workman',[16] under the Workmen's Compensation Act, 1923, if he is employed for the purposes of the employer's trade or business.[17] In order to exclude a person from the definitional net, it has

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12. Sitharama Reddiar v. Ayyaswami Gounder, supra, n.10.

13. See Kochu Velu v. Joseph, supra, n.11.

14. Ibid. See also Kochappan v. Krishnan, (1987) 2 L.L.J.174 (Ker.) (D.B.).

15. Ibid. See also Kochu Velu v. Joseph, supra, n.11.

16. Workmen's Compensation Act, 1923, Section 2(1) (n).

17. Factory Manager, Associated Soap Stone Factory v. Ladki-bai, 1994 Lab. I.C.NOC 17 (M.P.); Asst.Executive Engineer, No.3, Sub-division Bhadra River Left Bank Canal Military Camp Bhadravathi v. H.S. Sunanda and another, 1994 Lab. I.C. NOC 187 (Kant.); Hastimal v. A.Arjunan, (1993) 2 L.L.J. 55 (Mad.); K.Saraswathi v. S.Narayana Swami, 1985 A.C.J.38 (Mad.).

to be shown not only that he is a casual employee but also that he is not engaged for the purposes of the employer's trade or business.[18]

Whether a workman is employed for the employer's trade[19] or business[20] is essentially a question of fact.[21] Suppose

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18. This is because the word "and" occurring in the expression "whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business" in Section 2(1)(n) of the Workmen's Compensation Act, 1923 has to be read conjunctively. See Thomas v. Babu, supra, n.7. In this case, the workman was a coconut tree climber, working for 12 persons and not attached to any particular person as a workman. He sustained an injury in the course of his employment by the defendant, who was not engaged in any business, but was working as a clerk. It was held that the employer was not liable to pay compensation, as the workman was an independent self-employed tree climber and not engaged for the purpose of employer's trade or business. See also Parameswaran v. Parameswaran Nair, 1989 (1) K.L.J. 247 (D.B.); Amri Naran v. Suken Employees' Co-operative Society Ltd., 1987 Lab.I.C.1197 (Guj.); Kochappan v. Krishnan, supra, n.14; Rebati Gantayat v. Haguru Sethi, 1986 Lab.I.C.1511 (Ori.); Vijay Ram v. Chander Prakash, 1981 Lab.I.C.359 (J. & K.); Kochu Velu v. Joseph, supra, n.11; Kamala Devi v. Bengal National Textile Mills Ltd. (1975) 2 L.L.J.81 (P. & H.); Ghasi Ram v. Nannibai, A.I.R. 1960 M.P.267; Sithrama Reddiar v. Ayyaswami Gounder, A.I.R. 1956 Mad.212; Abdul Hussein v. Secretary of State, A.I.R.1933 Rang.244.

19. 'Trade' may be defined as any traffic or commerce or barter of goods either for other goods or for money. See Sitharama Reddiar v. Ayyaswami Gounder, supra, n.18.

20. 'Business' means anything, which occupies the time, attention and labour of a man for the purpose of profit. See Kochu Velu v. Joseph, supra, n.11; S.Mohanlal v. R.Kondiah, (1979) 2 S.C.C.616; Kamala Devi v. Bengal National Textile Mills Ltd., (1975) 2 L.L.J.81 (P. & H.); Sitharama Reddiar v. Ayyaswami Gounder, supra, n.18.

21. Madanlal v. Mangali, A.I.R.1961 Raj.45.

a person invests capital in building a number of houses with a view to obtaining profits by letting the houses on rent. When he employs workmen directly in the construction of such houses, such employment would be for the purposes of his business.[22] So also a workman, engaged for agricultural work by an agriculturist,[23] a mason employed for the construction of godown for storing grain by a grain merchant,[24] a person employed for whitewashing a factory building,[25] persons employed by the P.W.D. for construction works,[26] and persons employed for driving vehicles of the Central Excise Department[27] were all held to be employed for the purposes of the employer's trade or business, but not the workman, engaged by a contractor of the Defence Department for demolition of certain barracks.[28]

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22. Ibid. See also T.Vinayaka Mudaliar v. Mindala Pottiamma, A.I.R. 1953 Mad.432.

23. Kochu Velu v. Joseph, supra, n.11. See also Popatlal v. Bai Lakhu, A.I.R.1952 Sau.74 (D.B.).

24. Hirjibhai Lakhamsibhai v. Damodar, A.I.R.1957 M.P.49 (D.B.)

25. Kamala Devi v. Bengal National Textile Mills Ltd, (1975) 2 L.L.J.81 (P. & H.).

26. See Workmen's Compensation Act, 1923, Section 2(2), which seeks to bring government departments within the purview of the Act. See also Bai Mani v. Exec. Engr., (1986) 2 L.L.J.426 (Guj.); Exec. Engr. Kadana Dam v. Phebiben, 1977 Lab.I.C.1651 (Guj.); Exec. Engr. P.W.D.National Highway Div. v. Girdhari, 1977 Lab.I.C.852 (Raj.); and Satiya v. S.D.O., P.W.D., 1974 Lab.I.C.1516 (M.P.) (D.B.).

27. Union of India v. Mohd. Wasi, 1980 Lab. I.C. NOC 57 (All.).

28. Garrison Engineer v. Guttamma Hanmatdas, 1978 Lab.I.C.878 (Bom.). The Navy engaged a contractor for demolition of

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To be a 'workman' under the Workmen's Compensation Act, 1923, one must either be a railway servant, falling within the category, mentioned in the Act[29] or must be employed in any of the capacities, specified in Schedule II of the Act. A railway servant, not permanently employed in any administrative, district or sub-divisional office of a railway[30] and not employed in any such capacity, as is

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(f.n.28 contd.) certain barracks. The contractor was the highest bidder in the public auction. It was held that the main business of the Defence Department was to defend the country, though incidentally and necessarily it may be required to undertake erection or pulling down of buildings for the defence of the country. The Court did not agree that the activity of pulling down the buildings could be said to be "ordinarily part of the trade or business" of the department.

29. Workmen's Compensation Act, 1923, Section 2(1)(n)(i).

30. The expression "permanently employed in any administrative, district or sub-divisional office of a railway" in Section 2 (1) (n) (i) of the Workmen's Compensation Act contemplates such servants as are required to perform their duties continuously or habitually in the office without any outdoor work and, therefore, not 'workmen' within Section 2 (1) (n) (i). An employee like a peon is not expected to work continuously in the office, as he has to do outdoor work also and, therefore, is a 'workman' for the purposes of Section 2 (1) (n) (i). See Secretary of State v. Mt. Geeta, A.I.R.1938 Nag.91. According to the Law Commission of India, the expression "permanently employed" in an office refers not to permanent or temporary status of workmen, but to the sphere of their duties. It refers to persons, who usually discharge their duties within the four walls of an administrative office, i.e., persons with "intra-mural" functions. Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.41.

specified in Schedule II[31] of the Workmen's Compensation Act, 1923, is a workman. Applying these principles, railway servants such as peons,[32] persons running railway refreshment stall,[33] and railway porters[34] were held to be 'workmen'.

A person, claiming to be a 'workman' for the purposes of the Workmen's Compensation Act, 1923 must, unless he is a railway servant as noted above, prove that he comes under one or other of the employments, set out in Schedule II.[35]

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31. Infra, n.35.

32. Secretary of State v. Mt. Geetha, A.I.R.1938 Nag.91.

33. S.L.Kapoor v. Emperor, A.I.R.1937 Lah. 547.

34. Narayanan v. Southern Railway, (1980) I L.L.J.359 (Ker.) (D.B.).

35. It has to be noted that Section 2(1)(n) of the Workmen's Compensation Act, 1923 has been amended by the Workmen's Compensation (Amendment) Act, 1995 by inserting the following sub-clause after sub-clause (i), namely:-

"(ia) a master, seaman or other member of the crew of a ship;

(b) a captain or other member of the crew of an aircraft;

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle;

(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, company, as the case may be, is registered in India, or"

But this provision will come into force, only on such date as may be specified by the Central Government by notification in the Official Gazette. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 2.

Schedule II to the Workmen's Compensation Act, 1923 gives a list of persons, who are workmen within the

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It is not necessary that the workman should have been employed in the specified activity, mentioned in different items of Schedule II. It is enough, if he is employed to perform any duty, having connection with the specified activity.[36]

(f.n.35 contd.)

meaning of Section 2(1) (n) (ii) of the Act. A Watchman, working under an Official Liquidator of a company, was held to be not falling within the definition of 'workman' under the Workmen's Compensation Act, 1923, as neither section (2 (1) (n) nor Schedule II of the Act includes an employee of Official Liquidator. Official Liquidator v. K.S.E.B., (1990) 2 L.L.J.321 (Ker.). See also Pattammal v. Janakirama kounder, 1975 Lab.I.C.984 (Mad.); Ukhra Farming Corporation Ltd. v. Satubala Badini, A.I.R. 1955 Cal.105. The Amending Act of 1984 removed the wage limit of Rs.1,000/- for the coverage of the Workmen's Compensation Act, 1923. This change extended the benefit of compensation for injury to a large number of workmen, drawing wages, exceeding Rs.1,000/- p.m. See infra, n.67.

36. Amri Naran v. Suken Employees Co-operative Society Ltd., 1987 Lab.I.C. 1197 (Guj.). The deceased workman was in the employment of the respondent society. Motor pumps were installed in the dairy farm of the society for lifting water, which was then collected for the buffaloes, kept in the dairy farm. The work of the deceased was to look after the buffaloes and to milk them. It was held that the deceased's work had direct and definite connection with the farming, carried on with mechanical and/or electrical contrivances. Therefore, it was concluded that the deceased was a workman.

Persons like driver,[37] cleaner[38] and checker[39] of motor vehicles, tractor operator,[40] bus conductor,[41] traffic controller,[42] conservancy coolie,[43] khalasi[44] and person, engaged on repairs of a motor boat[45] were held to be 'workmen' on the ground that they were employed in connection with the operation or maintenance of a motor vehicle or the

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37. Radhamony and Others v. Secretary, Dept.of Home Affairs, (1995) I L.L.J.376 (Ker.) (D.B.). The question for consideration was whether a driver in the Police Department of the State of Kerala was a 'workman' under the Workmen's Compensation Act, 1923. It was held that the driver of a vehicle is covered by the Workmen's Compensation Act, 1923 and so merely because the deceased happened to be the driver of a vehicle of the State, his status as a workman, as defined under the Act, did not undergo any metamorphosis. See also Padam Debi v. Raghunath Ray, A.I.R.1950 Ori.207 (D.B.).

38. Ram Sarup v. Gurdev Singh, 1969 Lab.I.C.371 (Punj.); Saundatti v. Biyamma, (1967) 2 L.L.J.130 (Mys.) (D.B.).

39. Ganesan v. Bhagawathi Amma, 1962 K.L.T.345 (D.B.).

40. New India Assurance Co. Ltd. v. Smt.Fatmabai, 1982 Lab. I.C.732 (M.P.).

41. Pollachi Transport Ltd. v. Arumuga Kounder, A.I.R.1938 Mad.485 (D.B.).

42. Malatibai v. Divl. Controller, A.I.R.1968 Mys.208 (D.B.).

43. His duties were held to be connected with the operation of lorry. Dukhini Rajaharin v. Corpn. of Calcutta, A.I.R.1957 Cal. 653 (D.B.).

44. The khalasi was held to be a workman, being employed for loading and unloading of a truck. Orissa Co-operative Insurance Society Ltd. v. Sarat Chandra Champati, 1976 Lab.I.C.371. (Ori.).

45. Manual D'Silva v. Augustine, 1980 K.L.T.106 (Ker.)(D.B.).

loading or unloading of any such vehicle.[46] Persons, employed in any premises, wherein a manufacturing process[47] is carried on or in any kind of work, incidental to or connected with any such manufacturing process[48] or employed for manufacturing process[49] in any premises, wherein twenty or more persons are employed[50] are 'workmen' for the purposes of the Workmen's Compensation Act, 1923. It is not necessary, to make a person fall within the definition of 'workman',[51] that the manufacturing process should involve some transformation, bringing into existence a commercially different marketable commodity.[52] It is sufficient, if the process brings about

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46. See Workmen's Compensation Act, 1923, Schedule II, clause (1). But a bus-starter, whose duties consisted mainly of maintaining the record in respect of the arrival and departure of buses, was held to be not a 'workman', as his duties were clerical in nature. Bombay Municipality v. Sulochanabai, 1977 Lab.I.C.1735 (Bom.) (D.B.).

47. See Id., Clause (ii).

48. Ibid. A person, employed in a factory, where the manufacturing process was yet to be started, was held to be a 'workman', as he was contributing to the intended manufacturing process. See Juthi Devi v. M/s.Pine Chemicals Ltd., 1989 Lab.I.C.2310 (J. & K.).

49. Id., Clause (iii).

50. Ibid.

51. See Workmen's Compensation Act, 1923, Section 2(1)(n).

52. For the decisions, emphasizing transformation, see E.S.I.C. v. Ram Chander, (1988) 2 L.L.J.141 (S.C.), where tailoring shop was held to be covered by the Employees' State Insurance Act, 1948 on the ground that by stitching, different goods were broughtinto existence.

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a particular result, as a service station does by washing, cleaning or oiling a car.[53] This is because the definition of 'manufacturing process' expressly covers 'oiling', 'washing', 'cleaning' and even 'preserving' or 'storing' of an article.[54] Persons employed in sampling, chemically analysing and packing;[55] treatment of ginger and pepper;[56] milking buffaloes and filling milk in pots;[57] making of bidis;[58] preparation of food and other eatables;[59] extraction of salt

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(f.n.52 contd)
See also E.S.I.C. v. Triplex Dry Cleaner, 1982 Lab.I.C. 944 (P. & H.); Raison Tailors v. E.S.I.C., 1982 Lab.I.C. 947 (P. & H.) and In re A.M.Chinniah, A.I.R.1957 Mad.755. For the definition of manufacturing process, see infra, n.54.

53. E.S.I.C. v. Bhag Singh, 1988 Lab.I.C.1170 (P. & H.) (F.B.); Bharangar Service Station v. E.S.I.C., 1988 Lab. I.C.302 (Cal.) (D.B.); Gateway Auto Services v. E.S.I.C., 1981 Lab.I.C.49 (Bom.).

54. For the purpose of the Workmen's Compensation Act, 1923, Schedule II, Clause (ii), 'manufacturing process' has the the same meaning as in the Factories Act, 1948, Section 2(k). See Workmen's Compensation Act, 1923, Schedule II, Clause (ii). For the purpose of Employees' State Insurance Act, 1948 also, "manufacturing process" has the same meaning. See Employees' State Insurance Act, 1948, Section 2 (14-AA).

55. Lakshmidas Premji, Ghee Merchants v. Regl. Inspector of Factories, A.I.R.1960 A.P.147 (D.B.).

56. Patel v. Inspector of Factories, Alwaye, 1958 K.L.T.43 (D.B.).

57. Amri Naran v. Suken Employees Co-operative Society Ltd., 1987 Lab.I.C.1197 (Guj.).

58. Chintaman Rao v. State of M.P., A.I.R.1958 S.C.388.

59. New Taj Mahal Cafe Ltd., Mangalore v. Inspector of Factories, Mangalore, A.I.R.1956 Mad.600.

from salt-water;[60] cutting of bread into slices;[61] pre-sale ironing of garments with the aid of power[62] and pumping oil[63] have been held to be 'workmen'.

A member of the Armed Forces of the Union and a person, employed in clerical capacity, do not fall within the definition of 'workman'.[64]

Originally, only workers, employed in factories, mines, plantations, docks and ports, tramway services, plantations, mechanically propelled vehicles, major construction works, fire brigade, railways with certain exceptions and masters or seamen of power-driven ships or any ship of fifty or more tons came with the purview of the definition of 'workman' under the Workmen's Compensation Act, 1923. The Act, then, aimed at the inclusion of only those workmen, whose occupations were hazardous and who were engaged in more or less organised industries. The effect of an accident upon a workman or his dependants does not bear any relation to the nature of the establishment, in which he is employed. If a workman of a non-hazardous establishment meets with an accident, the hardship, he and his dependants suffer is

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60. A.H.Bhiwandiwala v. State of Bombay, A.I.R.1962 S.C.29.
61. New Grand High Class Bakery v. E.S.I.C. 1976 Lab.I.C. 1466 (Bom.) (D.B.).
62. E.S.I.C. v. Ram Chander, (1988) 2 L.L.J.141 (S.C); Kalpana Dresses v. E.S.I.C. 1976 Lab.I.C.1791 (Bom.)(D.B.).
63. Gateway Auto Services v. E.S.I.C. 1981 Lab.I.C.49 (Bom.)
64. See Workmen's Compensation Act, 1923, Section 2(1)(n) and Schedule II, Clauses (i), (ii), (v), (x), (xiv), (xviii), (xix) and (xxx).

not any less.[65] So the Government of India greatly enlarged the scope of the definition of 'workman' under the Workmen's Compensation Act, 1923, by replacing the original Schedule II by a new one,[66] and later by removing the wage limit.[67]

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65. See, for a discussion on this aspect, Sunil Rai Choudhuri, Social Security in India and Britain (1962), pp.35-36.

66. See the Workmen's Compensation (Amendment) Act, 1933 (Act No.15 of 1933). By the original Act of 1923, the Government of India was empowered to include, by notification, any other classes of workmen, employed in occupations, declared to be hazardous. This power was transferred by the Government of India to the Provincial Governments in 1937. Since 1950, this power is being exercised by the State Governments as the successors of the latter. See Sunil Rai Choudhuri, op.cit., p.37. See also Workmen's Compensation Act, 1923, Section 2(3). Section 2(3) was amended by the Workmen's Compensation (Amendment) Act, 1995, empowering the Central Government or the State Government to make additions to Schedule II. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 2.

67. See supra, n.35. Prior to the 1984 Amendment of the Workmen's Compensation Act, 1923, an employer was not liable to pay compensation to persons, drawing more than Rs.1000/- p.m., even though such persons were engaged in any one of the hazardous employments, specified in schedule II of the Act and equally facing the risk just as other persons, drawing less than Rs.1000/- p.m. It was unfair and illogical to discriminate persons, facing equal risk by taking the wage factor into consideration. See V.Jaya Surya Rayalu, "Extent of Liability and Principles Determining Compensation under the Workmen's Compensation Act, 1923 - A Critical Survey with Special Reference to the 1984 Amendments", (1989) (1) S.C.J., p.12.

Still the concept of 'workman', entitled to compensation for industrial injuries under the Workmen's Compensation Act, 1923, is not entirely satisfactory. Under common law, every person is a 'servant' if there exists a master-and-servant relationship. But under the Workmen's Compensation Act, 1923, all persons do not become 'workmen', even if there exists master-and-servant relationship. Only certain categories of persons, employed in certain specified employments, are considered 'workmen'.[68] For instance, railway servants, permanently employed in administrative or office work, without any outdoor work, do not fall within the category of 'workman'.[69] If an accident like fire or explosion occurs at the railway premises, there is the possibility of injury to the persons, permanently employed in office work. Sometimes, they may have to go out in response to an emergency situation and take steps to avert danger to passengers/ employees or property of the railway in the course of their employment. In such situations also, they may get injured. But being not 'workmen', they are not entitled to compensation under the Workmen's Compensation Act, 1923.[70] Persons employed in certain specified employments, become 'workmen', only if the number of workers, employed therein, reaches the specified minimum.[71]

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68. Workmen's Compensation Act, 1923, Section 2 (1) (n) and Schedule II.

69. See <u>supra</u>, n.30.

70. See Law Commission of India, <u>Sixty-second Report on the Workmen's Compensation Act, 1923</u> (1974), p.127.

71. Workmen's Compensation Act, 1923, Schedule II, Clauses (xvi), (xviii) and (xxvi).

Agricultural workers, employed by big agriculturists, have to face new hazards, because of the use of modern methods of cultivation. For instance, accidents are caused by the use of power-driven machines for farming. Persons, employed for such farming, are covered by the Workmen's Compensation Act, 1923.[72] Modern agricultural operations, involve, in addition to the use of power-driven machines, the use also of chemical fertilizers, weed-killers, insecticides and pesticides,[73] which cause poisoning and result in various forms of injuries to workmen. But the Act does not cover workmen, engaged in farming, involving the use of these materials.

Persons, employed in clerical capacity, have been excluded from the definition of 'workman' under the Workmen's Compensation Act, 1923.[74] It may be true that persons, employed in clerical capacity, are not so much exposed to industrial injuries as the manual workers are. But the possibility of accidents, causing injury to them, cannot be entirely ruled out. There does not appear to be sufficient justification for excluding clerical staff from the purview of the Act.[75]

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72. Id., Schedule II, Clause (xxix).

73. See Law Commission of India, supra, n.70, p.113.

74. Workmen's Compensation Act, 1923, Schedule II, Clauses (i), (ii), (x), (xiv), (xviii), (xix) and (xxx).

75. See Law Commission of India, supra, n.70, pp.119, 120.

A casual worker does not fall outside the scope of 'workman', as defined in the Act, if he is employed for the purposes of his employer's trade or business. If a casual worker, employed otherwise than for the purposes of his employer's trade or business, is injured in the course of such work, it is not fair to deny him compensation. If a person, employed permanently, is treated as a 'workman', even if he is employed otherwise than for the purpose of his employer's trade or business, a person, employed casually, should not be treated differently. A casual worker, unlike the permanent one, does not have a steady income. The impact of industrial injury on a casual workman is, therefore, more serious than the one on a permanent workman. If there exists a master-and-servant relationship, the person, employed, should be considered a 'workman', even though he is employed casually[76] and for purposes other than his employer's trade or business.

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76. Since the Workmen's Compensation Act, 1923 has been enacted with the objective of imposing an obligation to compensate on a person, who carries on hazardous business for the purposes of his profit, for the sake of protecting workmen, who are obliged to secure employment in such a hazardous trade or business merely to earn their bread, it would be unfair to exclude casual workmen from the benefits of the benevolent Act on the ground of their being employed casually. See Law Commission of India, One hundred and thirty-fourth Law Commission Report on Removing Deficiencies in Certain Provisions of the Workmen's Compensation Act, 1923 (1989), p.27.

Persons, employed in any employment, which requires them to handle snakes for the purpose of extraction of venom or for the purpose of looking after snakes, are engaged in a very hazardous activity. But they are not covered[77] by the Act.

A person becomes an 'employee',[78] entitled to compensatory benefits[79] under the Employees' State Insurance Act, 1948, if he is employed for wages[80] in an establishment or a factory, to which the Act applies, in connection with the work of the establishment or factory, including any work, connected with the administration of the factory or establishment or with the purchase of raw-materials for or distribution or sale of the product of the factory or establishment.[81] The employment may be directly with the principal

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77. Law Commission of India, supra, n.70, p.126.

78. Employees' State Insurance Act, 1948, Section 2 (9).

79. Under the Employees' State Insurance Act, 1948, the term "benefits" is used instead of 'compensation'. See Id., Section 46.

80. Id., Section 2 (22).

81. Id., Section 2 (9). See Spencer & Co. Ltd., Ernakulam v. Reg.Dir., E.S.I.C., Trichur, (1991) 1 L.L.J.541 (Ker.) (D.B.). The appellant company, whose registered office was situated outside Kerala, had two branches in Kerala, one at Ernakulam and the other one at Fort-Cochin. The branch at Ernakulam was covered by the Employees' State Insurance Act, 1948, by a notification, issued by the Government of Kerala. The question was whether employees of the branch at Fort-Cochin fell within the definition of 'employee' under the Act. It was held that they did not, as they were not engaged in work, connected with the work of the branch at Ernakulam.

employer[82] or by or through an immediate employer.[83] The services of an employer may be let on hire by the principal employer. A person, directly employed by the principal employer, becomes an 'employee', if the employment is for any work, incidental or preliminary to or connected with the work of the factory or establishment. The place of work is not

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82. Id., Section 2 (17). The term "principal employer" is defined as follows:-

"(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under [the Factories Act, 1948 (63 of 1948)] , the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed the Head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment".

83. Id., Section 2 (13). The term "immediate employer" is defined as follows:-

"Immediate employer" in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer (and includes a contractor)".

material. It may be done in the factory or establishment or elsewhere. But in the case of a person, employed by or through an immediate employer, the employment must be in the premises of the factory or establishment or under the supervision of the principal employer or his agent,[84] for work, which is ordinarily part of the work or preliminary or incidental to the purpose of the factory or establishment.[85] In the case of an employee, whose services are lent or let on hire to the principal employer, the letting or hiring must be by the person, who has entered into a contract of service with the person, whose services are so lent or let on hire. The employment of such persons by the principal employer must be in or in connection with the work of the factory.[86]

The word "employee",[87] takes in even those workers, employed through the medium of some other employer,[88] though

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84. See C.E.S.C.Ltd. v. Subhash Chandra Bose & Others, A.I.R. 1992 S.C.573. The Supreme Court held that supervision, by principal employer or his agent, of work of employees, appointed by immediate employer, is essential for deciding the existence of employer-employee relationship between principal employer and employees, appointed by immediate employer.

85. See A.I.R.Ltd., Nagpur v. E.S.I.C., 1985 Lab.I.C.1181 (Bom.).

86. Employees' State Insurance Act, 1948, Section 2 (9).

87. Ibid.

88. E.S.I.C. v. Hindustan Cocoa Products Ltd., 1995 (70) F.L.R.233 (Bom.). See also E.S.I.C. v. Harrisons Malayalam (P) Ltd., 1993 (2) K.L.T.714 (S.C.), where employees of the contractor, engaged by the respondent company to execute certain contract, were held to be employees, covered by the Employees' State Insurance Act. See also E.S.I.C. v. Premier Timber Supplies, 1991 (1) K.L.T.554 (D.B.) and R.D., E.S.I.C. v. Ramlal Textiles, (1990) 2 L.L.J.568 (Ker.) (D.B.).

not by the principal employer. It is not material that there is no direct employer-and-employee[89] relationship between the principal employer and the worker.[90] But there should be some type of control or understanding, relating to the business of the factory or establishment between the principal employer and the immediate employer.[91] A person, employed through an immediate employer on the premises of the factory or establishment of the principal employer, is an "employee", irrespective of the fact whether he was working under the supervision of the principal employer or his agent or not.[92] But employees of immediate employer, working outside the factory or the premises of the principal employer, would fall within the definition of "employee", only if they work under the supervision of the principal employer or his agents.[93]

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89. Infra, n.117.

90. Reg.Dir., E.S.I.C. v. Suresh Trading Co., (1990) 1 L.L.J. 348 (Ker.) (D.B.); Reg.Dir., E.S.I.C., Trichur v. Kerala Kaumudi, 1987 Lab.I.C.878 (Ker.) (D.B.); E.S.I.C., Madras v. Bharat Pulverising Mills (P) Ltd., (1979) I L.L.J.343 (Mad.).

91. Where a person carried on repair work of motor vehicles on the premises of a petrol pump and service station with the help of certain persons working independently and was merely a licencee of and not under the control of the firm running the petrol pump, it was held that the persons, employed by him, could not be treated as employees of the firm. E.S.I.C. v. Malhotra & Co., 1981 Lab.I.C.475(P.& H.).

92. Reg.Dir., E.S.I.C. v. P.K.Jacob, 1981 Lab.I.C.237 (Ker.) (D.B.).

93. See Suhas Chandra Bose v. E.S.I.C., 1989 Lab.I.C.776 (Cal.) (D.B.), where the employees of independent contractor,

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The use of the expression "any person employed for wages in or in connection with the work of a factory or establishment" in the definition of 'employee'[94] under the Employees' State Insurance Act, 1948 has widened the scope of the term "employee".[95] As a result, the term "employee" is not confined to workers, engaged in the manufacturing process. A person, engaged in any work, that is incidental or preliminary to or connected with the work of the factory/ establishment, is an 'employee'.[96] Such work need not always

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(f.n.93 contd.) engaged in work of laying cables and overhead electric lines on public highways for the Electric Supply Corporation, were held to be not 'employees' within Section 2(9), there being no supervision by the Corporation on execution of the work. In Calcutta Electric Supply Co.Ltd. v. S.C.Bose, A.I.R.1992 S.C.573, it was held that when the employee works under the eye and gaze of the principal employer or his agent, who scrutinises the quality of his work, detects faults therein and gives directions for remedial measures, finally leading to the satisfactory completion and acceptance of the work, it can be said that there is supervision for the purposes of Section 2(9) of the Employees' State Insurance Act. In R.D., E.S.I.C. v. Ramlal Textiles, (1990) 2 L.L.J.568 (Ker.) (D.B.), it was held that the respondent's right of rejection of substandard cloth, woven by master weavers, to whom yarn was supplied by the respondent, spelled out effective degree of supervision and control.

94. Employees' State Insurance Act, 1948, Section 2 (9).

95. D.G., E.S.I.C. v. Scientific Instruments Co. Ltd., Infra, n.99.

96. See M.P.S.R.T. Corporation Dewas v. E.S.I.C., 1995 (71) F.L.R. (Sum.) 18 (M.P.), where even those employees, doing work, incidental to or connected with the work of a workshop, were held to be covered by Section 2 (9) of the Employees' State Insurance Act, 1948.

have some direct connection with the manufacturing process carried on in the factory/establishment.[97] The person may be working within or outside the factory/establishment[98] or employed for administrative purposes or for purchase of raw-materials or for sale of the finished products.[99] The watch

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97. Reg.Dir., E.S.I.C. v. South India Flour Mills (P) Ltd. 1986 Lab.I.C.1193 (S.C.). The work of construction of additional buildings, required for the expansion of a factory, was held to be ancillary, incidental or having some relevance to the object of the factory.

98. Employees' State Insurance Act, 1948, Section 2 (9) (i). See also R.D., E.S.I.C. v. Ramlal Textiles, (1990) 2 L.L.J.568 (Ker.) (D.B.). The respondent, a firm engaged in the manufacture and sale of handloom textile goods, supplied yarn to master weavers in the locality, who carried the yarn to their work-place and wove cloth either by themselves or other persons, engaged by them. Finished fabrics were returned to the firm, which made payments. Workers, employed by the master weavers, were held to be employees of the firm within the meaning of Section 2 (9) of the Employees' State Insurance Act, 1948, even though work was done by the workers outside the establishment of the respondent because they were engaged in work, which was ordinarily part of the work of the factory and incidental to its purpose, under the supervision of the respondent.

99. Employees' State Insurance Act, 1948, Section 2 (9). In D.G., E.S.I.C. v. Scientific Instruments Co.Ltd., 1995 (70) F.L.R.184 (All.), Employees of respondent company, engaged in sale and distribution of goods, manufactured by the company and foreign companies, in its branch sales offices, were held to be 'employees' under the Employees' State Insurance Act, 1948, as they were employed in connection with the work of the company. But in Cemendia Company Ltd. v. E.S.I.C., 1995 (71) F.L.R.160 (Bom.), it was held that though the employees, working in the Head Office of M/s.Cemendia Company would be covered by the Employees' State Insurance Act, employees, working at different work sites, are not covered by the Act. M/s. Cemendia Company is a construction company, having its head office at Bombay and a workshop, a Soil Testing Laboratory and a godown at Wadala, which is at a distance

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and ward staff; the accounts staff, the administrative staff, the transport staff and the canteen staff;[100] sales clerks;[101] manager;[102] managing director;[103] and director of a company employed as manager;[104] members of editorial and administrative staff of printing press;[105] workers, engaged for maintenance and repair of buildings;[106] workers, engaged for expansion of buildings[107] and employees in the by-products section, where surplus products are converted as well as the workshop,

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(f.n.99 contd.) of about 10-15 kms. from Bombay proper, where the head office is situated. This company takes up construction of buildings all over India. The company's workshop, laboratory and godown at Wadala are treated as one unit and registered as a factory under the Employees' State Insurance Act. The point for determination was whether the employees of the head office of the company at Bombay and those employees of the company, working at different work-sites are covered by the Act. It was held that the employees of the head office are covered by the Act, as they attend to administrative work, incidental to the work of the company's factory at Wadala but the employees at the different works-sites are not, as they are engaged in construction activities and do not do anything, incidental to the work of the factory at Wadala.

100. Modi Industries Ltd. v. E.S.I.C., 1986 (52) F.L.R.196 (All.). See also Royal Talkies v. E.S.I.C., Hyderabad, 1978 Lab.I.C.1245 (S.C.); K.Thiagarajan Chettiar v. E.S.I.C., A.I.R.1963 Mad.361 (D.B.).

101. E.S.I.C., v. T.C.Vermani, 1984 Lab.I.C.1406 (P. & H.); E.S.I.C., v. Prabhulal Brothers, 1974 Lab.I.C.701 (Mad.) (D.B.).

102. E.S.I.C., v. Victory Tile Works, [1973] 44 F.J.R.304 (Ker.) (D.B.).

103. Reg.Dir., E.S.I.C., v. M/s.M. and R. Oils Co. (P) Ltd., 1984 Lab.I.C.844 (Kant.) (D.B.).

104. E.S.I.C., v. M/s.Ashok Plastics (P) Ltd., 1988 Lab.I.C. 793 (Cal.) (D.B.). Non-Ferrous Rolling Mills v. E.S.I.C., 1977 Lab.I.C.1706 (Mad.).

105. Shri.Narakesari Prakashan Ltd. v. E.S.I.C., A.I.R.1984 S.C.1916.

106. R.D., E.S.I.C., v. K.P.Vinod, 1991 (2) K.L.T.138 (D.B.).

107. R.D., E.S.I.C., v. Vijayamohini Mills, 1990 (1) K.L.T. 540 (D.B.).

where the vehicles of the factory are maintained[108] were all held to be 'employees', as defined in the Act.

Before the amendment of the definition of 'employee' in 1966, a member of the office staff was not regarded as an 'employee', as his work is not connected with the manufacturing process.[109] The amendment of the Employees' State Insurance Act in 1966[110] changed this position by specifically providing that all persons, employed on any work, connected with the administration of the factory, are employees.[111] Thus, clerical staff is also included under the umbrella of the definition of "employee". This inclusion is justified, because no manufacturing process can be carried on without the help of office workers. They are necessary for keeping accounts, preparing bills, maintaining records of attendance and correspondence. Office work is closely connected with the work of the factory or establishment. It may be that the risk of employment injury may be greater to a worker, actually engaged in the manufacturing process,

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108. Coimbatore Dist.Co-operative Milk Supply Union Ltd. v. E.S.I.C., 1973 (26) F.L.R.19 (Mad.).

109. See E.S.I.C., Bombay v. Raman (Chittur Harihar Iyer), (1957)I L.L.J.267 (Bom.) (D.B.).

110. Act No.44 of 1966.

111. See The Associated Cement Co.Ltd. v. E.S.I.C. Bombay, 1981 Lab.I.C.1409 (Bom.); E.S.I.C. v. Cochin Co.Pvt.Ltd., 1978 Lab.I.C.1439 (Ker.) (D.B.); Sen Raleigh Ltd. v. E.S.I.C., A.I.R.1977 Cal.165 (F.B.); Indian Jute Co.Ltd. v. E.S.I.C., West Bengal, 1977 Lab.I.C.816 (Cal.) (F.B.) and Grand Iron Works v. E.S.I.C., 1971 (23) FL.R.155(Del.)

compared to the office worker. That does not mean that the office worker, whose work is connected with the manufacturing process, should not be compensated for the employment injury, sustained by him. The plurality of persons, engaged in various activities but brought into the definitional net, is, therefore, considerably wide. Once a factory or establishment falls within the coverage of the Employees' State Insurance Act, 1948, it appears to be the intention of the Act that every employee of the employer, however employed,[112] is to be covered by the Act.

The definition of 'employee'[113] under the Employees' State Insurance Act, 1948 does not make any distinction between a casual or temporary employee and a permanent one,

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112. See Orient Paper Mills, Sambalpur v. R.D., E.S.I.C., Bhubaneswar, 1995 Lab.I.C.212 (Ori.). The appellant, engaged in manufacturing paper and paper board, was covered by the ESI scheme. It was held that persons, carrying out work of afforestation, extraction and collection and supply of bamboos for production of paper, persons working in club, the security guards, cleaners, gardners and labourers, engaged in repair of buildings under contractor were all employees of the appellant, as they were engaged in work, incidental to and connected with the work of the appellant. In M/s. Bombay Wire Healds Mfg. Co. Ltd., v. E.S.I.C., 1986 Lab.I.C.1121 (Bom.) house-wives, doing job-work of threading wires, supplied by factory on piece-rate basis, were held to be not employees, there being no continuity in their engagement for the said work.

113. See Employees' State Insurance Act, 1948, Section 2(9).

even though employees of seasonal factories are excluded.[114] It is wide enough to include even a casual employee,[115] employed for a day for wages, because as per the definition, every person, employed for wages on any work, connected with the work of a factory/establishment, is an employee.[116]

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114. Id., Sections 1(4), 2(19-A). In M/s. Siva Trading Co. v. Secy. to Govt. of India, 1994 Lab.I.C.1593 (P. &. H.) (D.B.), it was held that 'Rice Shellers' are not exclusively engaged in one or more manufacturing processes namely, cotton ginning or manufacture of coffee, indigo etc. under Section 2(19-A) and, hence, do not fall under definition of "seasonal factory".

115. E.S.I.C. v. Premier Timber Supplies, 1991 (1) K.L.T.554 (D.B.); R.D., E.S.I.C. v. Fashion Fabrics, 1990 (2) K.L.T.713 (D.B.); E.S.I.C. v. Vijayamohini Mills, (1990) 2 L.L.J.464 (Ker.) (D.B.); E.S.I.C. v. Suresh Trading Co., 1989 Lab.I.C.833 (Ker.)(D.B.); E.S.I.C. v. Jaipur Enterprises, 1988 (56) F.L.R.207 (Raj.); E.S.I.C. v. P.R.Narhari Rao, 1986 Lab.I.C.1981 (Ker.) (D.B.); E.S.I.C v. South India Flour Mills, (1986) 3 S.C.C. 238; E.S.I.C. v. Ayurvedic Industrial Co-operative Pharmacy, 1980 Lab. I.C.557 (Ker.) (D.B.); E.SI.C. v. Oswall Woollen Mills, 1980 Lab.I.C.1064 (P. &. H.) (F.B.); E.S.I.C. v. Suvarna Saw Mills, 1979 Lab.I.C.1335 (Kant.) (F.B.); A.P.State Electricity Board v. E.S.I.C., 1977 Lab.I.C.316 (A.P.) (D.B.); E.S.I.C. v. Davangere Cottom Mills, (1977) 2 L.L.J.404 (Kant.) (D.B.).

116. The provisions in the Act and the Regulations, lead to the irresistable conclusion that casual employees are governed by the provisions of the Act. See Employees' State Insurance Act, 1948, Sections 2(9), 38 and 39(4); Employees' State Insurance (General) Regulations, 1950, Regulation 36, According to Section 2(9), "employee" means any person, employed for wages in or in connection with the work of a factory or establishment. Section 38 requires that all the employees in factories or establishments, to which this Act applies, shall be insured. Section 39(4) refers to contributions, payable by an employer in respect of an employee, who is employed for part of the wage period or employed under two or more employers during the same wage period. Regulation 36

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As under common law and the Workmen's Compensation Act, 1923, for falling within the coverage of the definition of 'employee' under the Employees' State Insurance Act, 1948, there has to be a contract of service, resulting in the relationship of employee and employer.[117] A person, entering the service of his employer, pursuant to a contract of service, is an employee, though he is employed casually.[118] It is neither the length of time, for which a person serves nor the manner, in which the parties choose to refer to such service, that would be relevant. What would be relevant is whether there was a contract of service. If a contract of service is established, even a share-holder of a co-operative society can be its employee.[119]

(f.n.116 contd.)
provides that the contribution in respect of an employee, employed for part of a wage period, falls due on the last day of such employment. In A.P.State Electricity Board v. E.S.I.C., 1977 Lab.I.C.316 (A.P.) (D.B.) it was held that Section 39(4) establishes that a casual worker is entitled to payment of contribution by the employer towards employer's contribution as well as employees' contribution, though he is employed only for a day or two or a few days in a week.

117. See R.D., E.S.I.C. v. P.R.Narhari Rao, 1986 Lab.I.C.1981 (Ker.) (D.B.); E.S.I.C. v. The Ayurvedic Industrial Co-operative Pharmacy, Puthur, 1980 Lab.I.C.557 (Ker.) (D.B.)

118. R.D., E.S.I.C. v. P.R.Narahari Rao, supra, n.124.

119. K.C.S. Co-operative Society Ltd. v. E.S.I.C., (1989) 2 L.L.J.27 (Ker.) (D.B.); Pondicherry State Weavers' Co-operative Societies Ltd., v. E.S.I.C., 1983 Lab.I.C. 902 (Mad.) (D.B.); E.S.I.C. v. Taj Textiles Industrial Co-operative Society, Calicut, 1980 Lab.I.C.1301 (Ker.) (D.B.).

An apprentice is a trainee, entitled to stipend.[120] He is not a worker, employed for wages.[121] If an apprentice is not a worker, employed for wages, then he/she falls outside the definition of 'employee'.[122] But the 1989 Amendment of the Employees' State Insurance Act[123] has included within the definition of 'employee' apprentices other than those engaged under the Apprentices Act, 1961[124] or under the standing orders of the establishment.

Unlike the definition of 'workman' under the Workmen's Compensation Act, which covers only specified categories of workmen and expressly excludes clerical, administrative and supervisory staff,[125] therefore, the definition of 'employees' under the Employees' State Insurance Act, 1948, covers various categories of employees, who might be working within the premises of a factory/establishment or outside it for the purpose of doing skilled, unskilled, manual, administrative and supervisory work or any work, related to purchase, sale or distribution of goods. It is wider than the definition of 'worker'

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120. See the Apprentices Act, 1961, Section 13.

121. *Id.*, Section 18.

122. Employees' State Insurance Act, 1948, Section 2(9). See *E.S.I.C. v. Maharaja Bar and Restaurant*, 1979 Lab.I.C. 1147 (A.P.) (D.B.); *E.S.I.C. v. Kwality Spinning Mills*, 1976 Lab.I.C.324 (Mad.); *E.S.I.C. v. Tata Engg. and Co.* 1976 Lab.I.C. 1 (S.C.).

123. Act No.29 of 1989.

124. Act No.52 of 1961.

125. See Workmen's Compensation Act, 1923, Section 2(1)(n) and Schedule II.

under the Factories Act, 1948, as it covers employees, whether working inside the factories/establishments or elsewhere.[126] Unlike the Workmen's Compensation Act, 1923, which covers all workers, falling within the definition, irrespective of their salary,[127] the Employees' State Insurance Act, 1948 excludes from its purview employees, receiving salary, exceeding Rs.3000/- p.m.[128] The number of employees, drawing less than Rs.3000/- p.m., is found to be limited in factories.[129] So, even though the definition of 'employee' under the Employees' State Insurance Act, 1948 has a wider coverage,[130] the number of employees of factories, benefited by this Act,

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126. See E.S.I.C. v. Sriramulu Naidu, A.I.R.1960 Mad.248 (D.B.) See also R.B.Sethi and R.N.Dwivedi, Law of Employees' State Insurance (1969), p.xxvii.

127. Workmen's Compensation Act, 1923, Section 2(1)(n), read with Schedule II to the Act.

128. Prior to the 1989 Amendment of the Employees' State Insurance Act, the definition of 'employee' did not cover such of the employees, whose wages (excluding overtime remuneration) exceeded Rs.1600/- p.m. However, by the 1989 Amendment, the power to fix the maximum limit of wages has been delegated to the Central Government. Accordingly, the Central Government has raised the wage limit for coverage of an employee from Rs.1600/- to Rs.3000/-. See Employees' State Insurance (Central) Rules, 1950, Rule 50.

129. Infra, Chapter 10

130. Supra, n.112.

is few. Hence, it is suggested that section 2(9) of the Employees' State Insurance Act, 1948 and Rule 50 of the Employees' State Insurance (Central) Rules, 1950, limiting the coverage of the Act to employees not drawing salary exceeding Rs.3,000/- p.m. may be modified suitably, enhancing the salary limit.

The coverage of workmen, covered by the Workmen's Compensation Act, 1923, may be widened by making it applicable also to railway servants, employed in administrative or office work,[131] persons employed in clerical capacity,[132] casual workers, employed otherwise than for the purposes of employer's trade or business,[133] workers engaged in agriculture in big farms using weed-killers, insecticides and pesticides,[134] persons employed in handling or looking after snakes[135] and taking away the requirement with regard to the number of persons to be employed in certain specified employments.[136]

In the event of death of a 'workman' under the Workmen's Compensation Act, 1923 or an 'employee' under the Employees' State Insurance Act, 1923 or a 'servant' under

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131. Supra, n.69.
132. Supra, n.74.
133. Supra, n.76.
134. Supra, n.73. Workers of this category are included within the definition of 'workman' by the Workmen's Compensation (Amendment) Act, 1995, though this change is not brought into force. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 15.
135. Supra, n.77. Workers of this category are included within the definition of 'workman' by the Workmen's Compensation (Amendment) Act, 1995, though the change is not brought into force. See Ibid.
136. Supra, n.71.

common law, his dependants[137] are entitled to compensation in specified circumstances. Dependants, entitled to compensation, are divided into three categories under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948.[138] The first category covers a widow,

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137. The term 'workman' includes 'dependants' also. See Workmen's Compensation Act, 1923, Section 2(1)(n). See also Employees' State Insurance Act, 1948, Section 52. In Proprietor, Radhakrishna Estate v. Mary, 1995 (70) F.L.R.211 (Kant.) a workman in the estate of the appellant filed an application for compensation for an accidental injury before the Commissioner for Workmen's Compensation. During the pendency of the application, the workman died a natural death. The respondent, the wife of the deceased workman, continued the proceedings before the Commissioner on behalf of her husband. She was held to be entitled to compensation because the right of compensation, claimed by a workman, is transmitted to his heirs on his death. In the event of death of a dependent, his legal representative would be entitled to compensation. See also Gopal Synthetics v. W.C.Commr., Kota, 1995 (70) F.L.R.72 (Raj.); Commr. for Workmen's Compensation v. P.V.Mohanan, (1988) 2 L.L.J. 177 (Ker.) (D.B.); Pasupati Nath Dutt v. Kelvin Jute Mills, A.I.R.1937 Cal.495 (D.B.).

138. See Workmen's Compensation Act, 1923, Section 2(1)(d). It was held in New India Assurance Co. Ltd. v. Nansingh, (1984) 1 L.L.J.186 (M.P.) that the definition of 'dependant' in Section 2(1)(d) of the Workmen's Compensation Act, 1923 is an inclusive one. It does not postulate the exclusion of the dependants of one category by the dependants of the category, preceeding it.

The definition of 'dependant' was inserted in the Employees' State Insurance Act, 1948 by the Amending Act No.44 of 1966 w.e.f.28.1.1968. Prior to the above amendment, the expression 'dependant' in the Employees' State Insurance Act had the same meaning as in the Workmen's Compensation Act, 1923 by virtue of Section 2(24) of the Employees' State Insurance Act. The definition of 'dependant', inserted in the Employees' State Insurance Act, was subsequently amended by Act No.29 of 1989, which substituted the word 'daughter' for the words 'daughter or a widowed mother' and also inserted a new clause '(1-a) a widowed mother'. See Employees' State Insurance Act, 1948, Section 2(6-A).

a minor legitimate son, an unmarried legitimate daughter or a widowed mother.[139] Persons under this category are considered dependants, on merely establishing the specified relationship. It is not necessary to establish that they were, in fact, dependent on the earnings of the deceased workman.[140] The second category covers a son or a daughter, who has attained the age of 18 years and is infirm.[141] Dependants under this category are not entitled to compensation/benefits merely on proof of specified relationship. They have to establish further that they were wholly dependent

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139. Workmen's Compensation Act, 1923, Section 2(1)(d)(i); Employees' State Insurance Act, 1948, Section 2 (6-A) (i), (i-a). Under the Act of 1948, 'adopted son or daughter' is covered unlike under the Act of 1923. The expression 'widowed mother' does not include 'widowed step-mother'. See Manada Debi v. Bengal Bone Mill, A.I.R.1940 Cal.285 (D.B.). But an adoptive widowed mother is covered by Section 2(i)(d)(i) of the Workmen's Compensation Act, 1923. See Addl. Dy. Commr. v. Mt. Laxmibai Naidu, A.I.R.1945 Nag.238. A mother, if a widow, is a dependant, entitled to get compensation, irrespective of whether she was wholly or in part dependent on the earnings of the deceased workman. P.L. Vellaichamy v. Union of India, 1991 Lab.I.C.304 (Mad.); Saraswathi Devi v. Binapani Mahatani, A.I.R. 1968 Pat. 344.

140. Ibid.

141. Workmen's Compensation Act, 1923, Section 2(i)(d)(ii); Employees' State Insurance Act, 1948, Section 2(6-A) (ii). Unlike the Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948, covers 'adopted son or daughter' also.

on the earnings of the deceased workman at the time of his death and that they are infirm.[142] Under the third category of dependants are included a widower;[143] a parent other than a widowed mother;[144] a minor illegitimate son; an unmarried illegitimate daughter; or a daughter legitimate or illegitimate if married and a minor or if widowed and a minor; a minor brother,[145] an unmarried sister; or a widowed sister if a minor;[146] a widowed daughter-in-law; a minor child of a pre-deceased son; a minor child of a pre-deceased daughter;

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142. Ibid.

143. 'Widower' is not included in the list of dependants under the Employees' State Insurance Act, 1948. See Employees' State Insurance Act, 1948, Section 2(6-A).

144. In Bakulabai v. Rajnabai, 1991 Lab.I.C.450 (Bom.), it was held that the mere fact that her husband was doing manual work, could not sustain exclusion of the deceased workman's mother from the scope of 'dependant'. Since the evidence showed that she had been dependent on the earnings of her deceased son, she was covered by Section 2(i) (d) (iii) (b) i.e. "a parent other than a widowed mother". In Mt.Dirji v. Smt.Goalin, A.I.R.1942 Pat.33 (D.B.), it was held that a step-parent is not covered by the expression "parent other than a widowed mother".

145. The term 'minor borther' includes a consanguine brother (In re Dependants of Kartar Singh, A.I.R.1931 Lah.752) and uterine brother (Gen. Mgr., Gwalior Sugar Co. v. Srilal, A.I.R.1958 M.P.133.)

146. A.Alice v. Commr., Workmen's Compensation, Trivandrum, 1987 Lab.I.C.385 (Ker.)(D.B.); Half-sister of a deceased workman was held to be a dependant, as she comes within the meaning of 'unmarried sister'. In Director (T.& M.) D.N.K.Project v. D.Buchitalli, 1987 Lab.I.C.1795 (Ori.) It was held that the expression "an unmarried sister or a widowed sister if a minor" does not cover a major widowed sister.

where no parent of the child is alive; or a paternal grand-parent, if no parent of the worker is alive.[147] Dependants under this category have to prove that they were wholly or in part dependent on the earnings of the deceased workman at the time of his death, in addition to establishing the specified relationship.[148]

The dependants, entitled to compensation under the Workmen's Compensation Act and the Employees' State Insurance Act, are only those relations, who, to some extent, depend upon the deceased person for their daily necessities.[149] Kinship, coupled with dependancy, is thus made the sole criterion for a person to fall within the definition of

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147. Workmen's Compensation Act, 1923, Section 2(1)(d)(iii); Employees' State Insurance Act, 1948, Section 2(6-A)(iii). Unlike the Act of 1923, the Act of 1948 included 'adopted daughter'.

148. Ibid. See Kalia v. Workmen's Compensation Commr., 1988 (57) F.L.R.314 (Raj.). The appellant was awarded compensation on proving that he was dependent on her daughter, employed by a contractor.

149. In Kamal Singh v. E.S.I.C., [1962-63] 22 F.J.R.66 (Punj.) (D.B.), an employee used to hand over his monthly wages to his poor parents. It was held that after his death, his parents were entitled to compensation in accordance with law. When the earnings of the deceased workman were hardly sufficient for his own maintenance and no balance left, which would contribute to the family fund, the parent cannot be said to be a dependant. Dependency is to be decided with respect to the date of death of the workman/employee. The fact that at some future date, the father may have to depend on the earnings of his son is not a relevant consideration. If the father depends on the deceased person at the time of his death, that is a relevant consideration. See St.Joseph's A. &. M.Works v. Maria Soosai Pillai, A.I.R.1953 Mad.206. See also Pappammal v. Subbiah Thevar, [1973] 43 F.J.R.271 (Mad.), where it was held that a child, who was in the mother's womb at the time of its father's death, cannot be said to have been a dependant of the deceased, as the child is not depending on its father at the time of his death.

'dependant'.[150] But certain persons, who, in fact, depend on the deceased person for their daily necessities, are excluded from the purview of 'dependant'. For example, if the son of a deceased workman has attained the age of eighteen years, he is not entitled to get any compensation, unless he is invalid.[151] The son might be pursuing his studies even after the age of eighteen years and, therefore, in need of money. Even otherwise, a son continues to be dependent on his parent, even after the age of eighteen years. Similarly, a widowed daughter[152] or a widowed sister[153] is entitled to compensation, only if she is below eighteen

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150. See B.M.Habeebullah v. Periaswamy, A.I.R.1977 Mad.330 (F.B) The basic principle, underlying the provision, entitling the dependants to claim compensation under the Act, is that there should not be a sudden economic dislocation in the family by reason of death of the workman. The list of dependants is based on certain assumptions as to dependence, having regard to Indian social conditions. See Law Commission of India, Sixty second Report on the Workmen's Compensation Act, 1923 (1974), p.32.

151. Workmen's Compensation Act, 1923, Section 2(i)(d)(ii); Employees' State Insurance Act, 1948, Section 2 (6-A) (ii); Employees State Insurance (Central) Rules, 1950, Rule 58 (1) (A) (b).

152. Workmen's Compensation Act, 1923, Section 2(i)(d)(iii) (c); Employees' State Insurance Act, 1948, Section 2 (6-A)(iii)(b); Employees' State Insurance (Central) Rules, 1950, Rule 58(1)(B)(b)(ii).

153. Workmen's Compensation Act, 1923, Section 2(i)(d)(iii) (d); Employees' State Insurance Act, 1948, Section 2 (6-A) (iii) (c).

years of age.[154] Under the existing law, the chances of a widowed daughter or sister receiving compensation are illusory, since girls do not get married before the age of eighteen years. The exclusion of a widowed daughter/sister from entitlement to compensation on the ground of her being a major viz. above eighteen years, is not justifiable, if she was depending for her livelihood on the earnings of the deceased workman. Further, a 'divorced daughter' is not considered as a dependant under the two Acts.[155] Under the Employees' State Insurance Act, 1948, a widow is entitled to dependant's benefit only until remarriage.[156] But under the Workmen's Compensation Act, 1923, a widow does not become

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154. Workmen's Compensation Act, 1923, Section 2(i)(d)(iii)(c), (d), read with Section 2(i)(ff) of the said Act, which has defined 'minor' as a person, who has not attained the age of 18 years. See also Employees' State Insurance Act, 1948, Section 2(6-A), (b), (c). The term 'minor' is not defined in the Employees' State Insurance Act. But as per the Employees' State Insurance (Central) Rules, 1950, Rule 58(1)(B)(b)(ii), a female dependant, other than a daughter or widow or mother, if widowed, is entitled to dependant's benefit, only until she attains eighteen years of age or remarriage, whichever is earlier.

155. The coverage of the term 'dependant' under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, however, is wider than the one under the Fatal Accidents Act, 1855. Under the Fatal Accidents Act, 1855, 'dependant' covers only wife, husband, parent and child. See Fatal Accidents Act, 1855, Section 1-A. Unlike the Fatal Accidents Act, 1976 of England, the Indian Fatal Accidents Act has excluded minor brothers and sisters, who are actually dependent on an elder brother, from the list of dependants, entitled to damages.

156. Employees' State Insurance (Central) Rules, 1950, Rule 58 (1) (A) (a).

disentitled to receive compensation, even if she remarries.[157] Further, unlike under the Workmen's Compensation Act, 1923, 'adopted son/daughter' has been specifically included in the list of dependants under the Employees' State Insurance Act, 1948.[158] But a 'widower', who is a dependant under the Workmen's Compensation Act, 1923,[159] does not figure as a

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157. Workmen's Compensation Act, 1923, Section 2(i)(d)(i). See Veerappan v. Muthamma Veerappan, 1995 Lab.I.C.484 (Ker.) (D.B.). Parents of a deceased workman challenged the payment of compensation by the Commissioner for Workmen's Compensation to the widow of the deceased on the ground that she is not entitled to compensation, as she has remarried. It was held that remarriage of a widow does not disentitle a widow to compensation, in the absence of any provision to that effect in the Workmen's Compensation Act, 1923. See also Smt.Mankuwarbai v. Kusum Lata, 1988 (56) F.L.R.674 (M.P.); R.B.Moondra & Co. v. Bhanwari, 1970 Lab.I.C.695 (Raj.); Ravuri Kottaya v. Dasari Nagavardhanamma, A.I.R.1962 A.P.42. But under Section 21 of the Hindu Adoptions and Maintenance Act, 1956, a widow remains a dependant within the meaning of that section, so long as she is not married only. According to the Law Commission of India, a widow should be disentitled to compensation on remarriage, as there would be somebody to look after her. See the Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.36.

158. Employees' State Insurance Act, 1948, Section 2 (6-A). But it has to be noted that Section 2 (i) (d) of the Workmen's Compensation Act, 1923 has been amended by the Workmen's Compensation (Amendment) Act, 1995, including 'adopted son/daughter' in the list of dependants. But this Amendment will come into force only on such date as the Central Government may specify by notification in the Official Gazette. See Workmen's Compensation (Amendment) Act, 1995, Sections 1 (2) and 2.

159. Workmen's Compensation Act, 1923, Section 2 (1) (d) (iii) (a).

dependant under the Employees' State Insurance Act, 1948. Though an 'unmarried legitimate daughter' is included in the first category of dependants under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948,[160] unlike under the former Act, under the latter Act, she is not entitled to dependant's benefit after the age of eighteen years, unless she is infirm.[161] Further, unlike under the Workmen's Compensation Act, 1923,[162] under the Employees' State Insurance Act, 1948, dependants, other than a widow or a legitimate or adopted child, are entitled to dependant's benefit, only if the deceased person does not leave behind a widow or a legitimate or adopted child.[163] It is suggested that 'a son' may be considered as a dependant, till he is employed, under both the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948.[164] Provision may

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160. Id., Section 2 (1) (d) (i); Employees' State Insurance Act, 1948, Section 2 (6-A) (1).

161. Employees' State Insurance (Central) Rules, 1950, Rule 58 (1) (A) (c).

162. Supra, n.138.

163. Employees' State Insurance (Central) Rules, 1950, Rule 58 (1) (B). See E.S.I.C. v. Smt.Raj Kali Devi, 1995 (70) F.L.R.405 (All.). Dependant's benefit was denied to the widowed mother of a deceased employee, in the absence of sufficient proof that the deceased did not leave behind a widow or child.

164. Supra, n.151.

also be made in both the Acts for including 'an unborn child'[165] and 'a divorced daughter'[166] till her remarriage in the list of dependants and treating 'a widowed daughter' or 'a widowed sister' as a dependant till her remarriage.[167] Further, clause (1) of Section 2(1)(d) of the Workmen's Compensation Act, 1923 may be amended in such a way that 'a widow' ceases to be a dependant on her remarriage, as under the Employees' State Insurance Act, 1948.[168] 'A widower' may be included in the list of dependants under the Employees' State Insurance Act, 1948, as under the Workmen's Compensation Act, 1923.[169] It is also suggested that Rule 58 of the Employees' State Insurance (Central) Rules, 1950 may be amended in such a way that 'an unmarried daughter' continues to be a dependant under the Employees' State Insurance Act, 1948 till her marriage[170] and parents of the deceased employee, his un-remarried 'divorced daughter', 'widowed daughter' and 'widowed sister' fall within the purview of 'dependant', though the deceased employee has left behind his widow and minor children.

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165. Inclusion of 'unborn child' of the deceased person in the list of dependants was recommended by the Law Commission of India. See Law Commission of India, _Sixty-second Report on the Workmen's Compensation Act, 1923 (1974)_, p.35.

166. _Supra_, n.155.

167. _Supra_, nn.152, 153 and 154.

168. _Supra_, nn.156 and 157.

169. _Supra_, n.159.

170. _Supra_, n.161.

171. _Supra_, n.163.

Chapter 4

COMPENSABLE INDUSTRIAL INJURIES

An industrial workman may sustain injury in respect of his person or property in the course of his employment. The injury may be caused by industrial or non-industrial accidents, occupational or non-occupational diseases, his own fault or natural calamities. All such injuries are not compensable injuries under the Workmen's Compensation Act, 1923 or under the Employees' State Insurance Act, 1948. An injury, sustained by an industrial workman, becomes compensable under these Acts, only if it is a personal injury, caused by an accident or an occupational disease, arising out of and in the course of employment.[1]

The conditions, to be satisfied for making an injury compensable under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, are the following:-

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1. Workmen's Compensation Act, 1923, Section 3(1) and (2); Employees' State Insurance Act, 1948, Section 2 (8). Whereas Section 2(8) of the Employees' State Insurance Act has defined 'employment injury', the Workmen's Compensation Act does not contain any such definition. Under the Employees' State Insurance Act, an injury, sustained by an industrial workman, becomes compensable, only if he is employed in "insurable employment". Under the Employees' State Insurance Act, unlike under the Workmen's Compensation Act, it does not matter, whether the accident or occupational disease, causing the injury, occurred or was contracted within or outside the territorial limits of India.

(1) The injury must be a personal one.

(2) It must have been caused by an accident or occupational disease.

(3) The accident or disease must have arisen out of and in the course of employment.[2]

In the absence of statutory definition of terms like 'personal injury', 'accident', 'occupational disease', 'arising in the course of employment' and 'arising out of employment', their scope has to be understood in the light of judicial decisions. These terms have been imported from the British Workmen's Compensation Acts.[3] Hence, judicial decisions, interpreting these terms, are based on the English decisions. So, the scope of these terms has to be examined in the light of Indian and English decisions

Personal Injury

"Personal injury", for the purposes of the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, means physiological injury.[4] It is not confined to a

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2. Under the Employees' State Insurance Act, 1948, an accident, arising in the course of an insured person's employment, shall be presumed, in the absence of evidence to the contrary, also to have arisen out of that employment. See Employees' State Insurance Act, 1948, Section 51-A. See also E.S.I.C. v. Lakshmi, 1979 Lab.I.C.167 (Ker.) (D.B.).

3. See supra, Chapter 2

4. Sundarbai v. G.M., Ordnance Factory, 1976 Lab.I.C.1163 (M.P.) (D.B.).

visible injury in the shape of some wound.[5] It includes internal injuries[6] and a strain, which causes a chill.[7] It covers diseases also.[8] The aggravation or acceleration of an existing disease by an accident is also covered by the expression 'personal injury'.[9]

All personal injuries, caused by accident, arising out of and in the course of employment, however, are not compensable injuries. Under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, an injury, which does not result in the total or partial disablement of the workman for a period exceeding three days, is not compensable.[10] Further, under the Workmen's Compensation Act, 1923, an injury, not resulting in death, caused by an accident,

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5. Shyama Devi v. E.S.I.C., A.I.R.1964 All. 427 (D.B.).

6. For instance, chest pain, arising during duty after strenuous work for many hours, is an internal injury. See United India Insurance Co.Ltd. v. Yasodhara Amma & another, (1990) 1 L.L.J.387 (Ker.) (D.B.); Kikubhai v. Mafatlal Fine Spg. & Mfg. Co. Ltd., 1981 Lab.I.C.1648 (Guj.) (D.B.).

7. Indian News Chronicle Ltd. v. Mrs.Lazarus, A.I.R.1951 Punj. 102.

8. Mariambai v. Mackinnon Mackenzie & Co., 1968 Lab.I.C. 629 (Bom.); Brintons Ltd. v. Turvey, [1905] A.C.230.

9. Jagadish Prasad v. Modi Lantern Works, A.I.R.1964 All. 323. The injury, caused by the accident in this case, was held to have resulted in permanent partial disablement of the right eye of the workman, which was already diseased before the accident.

10. Workmen's Compensation Act, 1923, Section 3(1), Proviso (a); Employees' State Insurance (Central) Rules, 1950, Rule 57 (1).

directly attributable to the workman having been under the influence of drink or drugs or to the wilful disobedience of the workman to safety rules or to the wilful disregard by the workman of any safety guard or device, is not compensable personal injury.[11]

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11. Workmen's Compensation Act, 1923, Section 3(1), Proviso (b). In Padam Debi v. Raghunath, A.I.R.1950 Ori.207 (D.B.), the husband of the appellant, employed as a motor driver by the respondent, dashed the bus against a tree, while driving at a high speed. The driver and some other passengers sustained fatal injuries. The accident was caused by the rash and negligent driving of the driver. It was held that it could not be said that the accident was brought about by any previous design or wilful act on the part of the driver. The applicability of clause (b) of the proviso to Section 3(1) is limited to those cases, where injury has not resulted in death. Where, however, the injury has resulted in death, the question about disobedience of any rule or order is not material, so long as it can be reasonably held that the accident arose out of and in the course of employment.

    It has to be noted that clause (b) of the proviso to Section 3 (1) of the Workmen's Compensation Act, 1923 is amended by the Workmen's Compensation (Amendment) Act, 1995 by inserting the words "or permanent disablement" after the word "death". But the amendment will come into force only on such date as may be specified by the Central Government by notification in the Official Gazette. See Workmen's Compensation (Amendment) Act, 1995, Sections 1 (2) and 3 (a). Under the Employees' State Insurance Act, 1948, an injury, caused by an accident, happening, while acting in breach of regulations or orders or without instructions from his employer, is compensable personal injury under specified conditions. See Employees' State Insurance Act, 1948, Section 51-B.

Accident

'Accident', for the purposes of the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, is an unexpected event, happening without design on the part of the injured workman.[12] The test for deciding whether an occurrence is an accident, is whether it is unexpected by the injured person[13] and not whether it would be expected by persons other than the injured person.[14] If a particular occurrence is unexpected by the injured person, it does not cease to be an accident, although it is intentionally caused by the author of it or by some act, committed wilfully by him.[15] Self-inflicted injuries cannot be said to have been

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12. Devichben Duda bhai v. Mgr., Liberty Talkies, Porbandar, 1994 Lab.I C.2570 (Guj.); G.S.Talcher Thermal Station v. Bijuli Naik, 1994 Lab.I.C.1379 (Ori.); United India Insurance Co.Ltd. v. Yasodhara Amma and another, (1990) 1 L.L.J.387 (Ker.) (D.B.); Salamabegum v. D.B.Mgr., M.S.C. L.D.B., Beed, (1990) 1 L.L.J.112 (Bom.); Devshi Bhanji Khona v. Smt.Mary Burno, 1985 Lab.I.C.1589 (Ker.) (D.B.); Shri.Sabari Mills v. M.Kulandai, (1984) 1 L.L.J.254 (Mad.) Kikubhai v. Mafatlal Fine Spg. & Mfg. Co.Ltd., 1981 Lab. I.C.1648, (Guj.) (D.B.); Sundar bai v. G.M., Ordnance Factory, 1976 Lab.I.C.1163 (M.P.) (D.B.); Bai Shakri v. New Manek Chowk Mills Co.Ltd., A.I.R.1961 Guj.34; Parwatibai v. Rajkumar Mills, A.I.R.1959 M.P.281; Laxmibai v. Chairman & Trustees, Bombay Port Trust, A.I.R.1954 Bom.180 (D.B.); Padam Debi v. Raghunath Ray, A.I.R.1950 Ori.207; Trim v. Kelley, [1914] A.C.667; Fenton v. Thorley & Co. Ltd., [1903] A.C.443.
13. Trim v. Kelley, supra, n.12; P.S.Atiyah, Accidents, Compensation and the Law (1975), p.3; K.D.Srivastava, Employees' State Insurance Act, (1991), p.182.
14. Sundarbai v. G.M., Ordnance Factory, 1976 Lab.I.C.1163 (M.P.) (D.B.), relying on Clover, Clayton & Co. Ltd., v. Hughes, [1910] A.C.242.
15. Kamalabai v. Divl. Supdt., Central Rly., A.I.R.1971 Bom.

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caused by accident, as 'accident' has to be looked at from the point of view of the person, who suffers from it.[16] The more usual case of an accident is an event, happening externally to a man like an explosion in a mine, a collision, tripping over floor obstacles, fall of a roof, a man falling down from a ladder, an assault, a lightning stroke, bite of an animal or intrusion of foreign body into the eye.[17] The less obvious cases of accident are strain, causing rupture; bursting of an aneurism; failure of the muscular action of the heart; exposure to a draught, causing chill; exertion in a stokehold, causing apopolexy, an invasion of bacilli, causing a disease, or a shock, causing neuresthenia.[18] These are called 'internal accidents'.[19] The common factor, in

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(f.n.15 contd.) 200. The term 'accident' is a relative one. An intentional assault, committed by A on B may not be an accident from A's point of view. But it would not be odd to call the resultant injuries accidental injuries from B's point of view. P.S.Atiyah, op.cit., p.3.

16. In Combat Vehicles and Research Establishment v. D.C. of Labour, 1995 (71) F.L.R.147 (Mad.), a workman jumped from a running train, on his way to the place of work and died. It was held that the sustaining of injuries by the deceased workman in this manner could not be said to be an unexpected event and, therefore, not an accident, which had arisen in the course of and out of employment. But suicide resulting from insanity or mental derangement, consequent on personal injury by accident, has been held to be death, resulting from injury. The claimant must prove that insanity, leading to death, is the direct result of accident. See Mackinnon Mackenzie & Co.Ltd. v. Miss Velma Williams, A.I.R.1964 Cal.94.

17. Bai Shakri v. New Manekchowk Mills Co. Ltd., A.I.R.1961 Guj. 34; Fife Coal Co.Ltd. v. Young, [1940] 2 All E.R.85 (H.L.).

18. See Kikubhai v. Mafatlal Fine Spg. & Mfg.Co.Ltd., 1981 Lab.I.C.1648 (Guj.) (D.B).

19. Fife Coal Co.Ltd., v. Young, supra, n.17. The rupture,

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all cases of accidents, whether external or internal, is some concrete happening[20] at a definite point of time and an incapacity, resulting from the happening.[21] Though an accident must be a particular occurrence, which happens at a particular time, it is not necessary that the workman

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(f.n.19 contd.) which is accident, is at the same time injury, leading to death or incapacity. Thus, in cases of 'internal accidents', 'accident' and 'injury' coincide. It is hardly possible to distinguish in time between accident and injury. Sundarbai v. G.M., Ordnance Factory, 1976 Lab.I.C.1163 (M.P.) (D.B.).

20. It is not enough that the injury shall make its appearance suddenly at a particular time and upon a particular occasion. A workman, who had worked for some time, exposed to lead infection, became suddenly poisoned. This was not held to be an injury by accident in Steel v. Cammel, Laird & Co., [1905] 2 K.B.232. The injury must result from some particular incident in the business. This may be some act, done by him or by some other person or condition encountered, which has, in the course of the sufferer's employment, caused the particular harm. This incident must be shown to have occurred at some reasonably definite time. G.S.Talcher Thermal Station v. Bijuli Naik, 1994 Lab.I.C.1379 (Ori.); Trim v. Kelley, [1914] A.C.667. See also Francis H. Bohlen, "A Problem In The Drafting Of Workmen's Compensation Acts", 25 Harvard Law Review, p.328 at 342-343 (1911-12).

21. Bai Shakri v. New Manekchowk Mills Co.Ltd., A.I.R.1961 Guj.34; Trim v. Kelley, [1914] A.C.667; Steel v. Cammell, Laird & Co., [1905] 2 K.B.232.

should be able to locate it to succeed in his claim. There would be cases, where a series of tiny accidents, each producing some unidentifiable result and operating cumulatively to produce the final condition of injury, would constitute together an accident.[22]

Occupational disease

The Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 provide for compensation for personal injury, caused not only by industrial accidents but also by occupational diseases.[23] The term 'occupational disease' is not defined under these Acts.[24] The third schedule to the

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22. In Deviben Dudabhai v. Mgr., Liberty Talkies, Porbandar, 1994 Lab.I.C.2570 (Guj.), the deceased workman was a door-keeper in a theatre. He worked for 15 hours a day except for a lunch-break of an hour for a long spell of 15 years. It was proved that he used to do the work of two persons. He was suffering from tuberculosis, which was accelerated and aggravated by the strain of his work, leading to his death by heart-failure. It was held that the death of the workman had arisen out of and in the course of employment. It is not necessary that the death should be the result of one accident to make it compensable. The workman may be suffering gradually, due to his work and if the cumulative effect of slight injuries, suffered during a long span of time, is death, such death is compensable injury. See also Bai Shakri v. New Manekchowk Mills Co., A.I.R.1961 Guj.34; Chillu Kahar v. Burn & Co.Ltd., A.I.R. 1953 Cal. 516; Fitz simions v. Ford Motor Co.Ltd., [1946] 1 All E.R.429 (C.A.).

23. Workmen's Compensation Act, 1923, Section 3(2), (2-A), (3) and (4). See also Employees' State Insurance Act, 1948, Section 52-A.

24. Whereas an industrial accident results from a concrete happening at a definite point of time, an occupational disease is caused by a process of exposure of the worker to unhealthy working conditions for a certain time,

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Acts[25] gives a list of occupational diseases along with the employments, likely to cause those diseases. If an employee, while working in any of these employments, contracts any such occupational disease, peculiar to that employment under specified conditions, he shall be deemed to have sustained an injury by accident.[26] In fact, the contracting of a scheduled occupational disease in itself is not an injury by an accident. It is elevated to the position of an injury by an accident only by fiction of law.[27] In addition to

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(f.n.24 contd.) Brenda Barrett, "Employer's Liability for Work-Related Ill-health", 10 Industrial Law Journal, p.101 at p.102 (1981). However, an occupational disease may be said to be caused by accident, if it results from an identifiable occurrence. The final breakthrough, by which the infection, bringing the disease, penetrates the skin, is such an identifiable occurrence. See Horatio Vester and Hilary Ann Cartwright, Industrial Injuries (1961), Vol.I, p.70; Richard Lewis, "Compensation for Occupational Disease", Journal Of Social Welfare Law, p.10 at 11 (1983).

25. The third Schedule to both the Acts is identical, except for the fact that a sixth item has been added in Part C of Schedule III of the Workmen's Compensation Act, 1923 by Notification No.S.O.2615 dated 15-9-1987.

26. Workmen's Compensation Act, 1923, Section 3(2); Employees' State Insurance Act, 1948, Section 52-A (1). In G.M., Orissa State Road Transport Corporation and another v. Sathyabhama seth, 1994 Lab.I.C.NOC 204 (Ori.), a workman died on account of Broncho pulmonary disease. This disease, if caused by cotton, flax hemp and sisal dust, is covered by Part C (3) of the third Schedule. But in this case, the disease was not found to be caused by cotton, flax hemp or sisal dust. So it was held that the third Schedule was not applicable to this case and the claimant was not entitled for compensation.

27. M.R.Mallick, Employees' State Insurance Act, (1984), p.258.

scheduled occupational diseases, the Acts of 1923 and 1948 provide for compensation for other diseases,[28] if they are directly attributable to specific injury by accident, arising out of and in the course of his employment.[29]

Employment

The term "employment" refers to a condition, in which a man is kept occupied in executing any work. It means not only an appointment to any office for the first time but also the continuity of that appointment.[30] "Employment", as used in the phrase "arising out of and in the course of employment",[31] has to be understood in the context of the language, employed therein. It covers not only the nature of the employment but also its character, conditions, obligations, incidents and special risks.[32] Generally, the employment of a workman does not commence, until he has

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28. See Workmen's Compensation Act, 1923, Section 3 (4); Employees' State Insurance Act, 1948, Section 52-A (3).

29. Ibid.

30. Sukhanandan Thakur v. State of Bihar, A.I.R.1957 Pat.617.

31. Workmen's Compensation Act, 1923, Section 3; Employees' State Insurance Act, 1948, Section 2 (8).

32. Nanjamma v. City Muncipal Council, 1982 Lab.I.C.1208 (Kant.) (D.B.); Union of India v. Mrs.Noorjahan, 1979 Lab.I.C.652 (All.); Works Manager, Carriage and Wagon Shop E.I. Rly. v. Mahabir, A.I.R.1954 All. 132; Tobacco Mfrs. (India) Ltd. v. Mrs.Marian Stewart, A.I.R.1950 Cal.164 (D.B.); Central Glass Industries Ltd. v. Abdul Hossain, A.I.R.1948 Cal.12 (D.B.); St.Helen's Colliery Co. v. Hewitson, [1924] A.C.59 (H.L.).

reached the place of his employment and does not continue, when he has left it. In other words, the employment of a workman commences at the end of his journey from home and stops at the commencement of his journey back home.[33]

The workman, on his way to his work and before he enters the employer's premises, is a man and not a "workman" and travels at his own risk.[34] When he is on a public road or a public place or a public transport, he is there as any other member of the public and not in the course of his employment, unless the very nature of his employment makes it necessary for him to be there.[35]

But problems arise, when a workman receives injuries just before his entry to or just after his exit from the place of work or just near the place of his work but not exactly at the place of his work. The natural question in such cases would be: "Was he, at the time of the accident

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33. Sadgunaben Amrutlal and others v. E.S.I.C., 1981 Lab.I.C. 1653 (Guj.) (D.B.); Saurashtra Salt Mfg. Co. v. Bai Valu Raja, (1958) 2 L.L.J. 249 (S.C.).

34. F.P.Walton, "Workmen's Compensation And The Theory Of Professional Risk", 11 Colum. L.Rev., p.36 at 47 (1911).

35. Saurashtra Salt Mfg. Co. v. Bai Valu Raja, (1958) 2 L.L.J. 249 (S.C.), But if his employment were of a kind, which is pursued on the high way, he might be in the course of his employment, while there. See John Stewart and Sons v. Longhurst, [1917] A.C.249 (H.L.). See also E.S.I.C. v. A.Parameswaran, 1977 Lab.I.C.194 (Ker.) (D.B.), When the employee was deputed to play a match in this case, his death in car accident, occurring, while proceeding to the playground was held to be the result of an employment injury.

doing his duty during his normal working hours at his normal working place?" Strictly speaking, the answer would be 'no' and the workman would be without any relief. But to include some of these genuine cases in the course of employment of a workman and give him a relief, the theory of notional extension has been evolved by courts.[36] According to this theory, a workman may be regarded as in the course of his employment, even though he has not reached or has left the premises of his employer.[37]

There can be notional[38] extension in place and time for the entry to and exit[39] from the work-place. There can

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36. See Kamta Prasad Pandey, "Compensable Harm under Workmen's Compensation Act, 1923.- A Comparative Study of the Indian and English Decisions", II J.I.L.I, p.430 at 447 (1969). The doctrine of "Notional Extension of Master's Premises" under the law of Workmen's Compensation can be said to have taken its course of development mainly through three English decisions and one Indian decision: Cremins v. Guest, Keen and Nettlefolds, [1908] 1 K.B.469 (C.A.); St.Helen's Colliery Co. v. Hewitson, [1924] A.C.59 (H.L.); Weaver v. Tredegar Iron and Coal Co.Ltd., [1940] 3 All E.R.157 (H.L.) and General Manager, B.E.S.T. v. Mrs.Agnes, A.I.R.1964 S.C.193. See K.S.Bhatt, "Notional Extension of Master's Premises and Hohfield's Scheme of 'Rights' ", (1971) 1 L.L.J.1.

37. Saurashtra Salt Mgf.Co. v. Bai Valu Raja, infra, n.39.

38. Assumed to be actual or real for a particular purpose. See A.S.Hornby, Oxford Advanced Learner's Dictionary of Current English (1991), p.843.

39. In G.S.Talcher Thermal Station v. Bijuli Naik, 1994 Lab. I.C.1379 (Ori.), the workman died at the factory gate, while coming to join his duty, a couple of minutes, before the starting of shift. It was held that the employer was liable to pay compensation, one of the reasons being that the theory of notional extension was applicable to this case. See also Saurashtra Salt Mgf.Co. v. Bai Valu Raja, (1958) 2 L.L.J.249 (S.C.).

be notional extension to cover interruptions, that occur during the course of employment and journeys in discharge of duty. This is becasue the word 'employment' has a wider meaning than 'work'. A workman can be regarded as in the course of employment not only when he is engaged in his actual work at the employer's premises but also when he is doing something, incidental to it,[40] like proceeding towards his work from one portion of his employer's premises to another or taking rest.[41]

By the application of the theory of notional extension of place to the entry and exit point of the place of employment, the sphere of employment is extended from the employer's premises to the route/vehicle for coming to and leaving the place of employment.[42] This extension is justified by establishing a nexus by logical reasoning between the employment and the accident, happening in the route.

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40. Union of India v. Mrs.Noor Jahan, 1979 Lab.I.C.652 (All.); Works Manager, C. and W. Shop, E.I.R. v. Mahabir, A.I.R. 1954 All. 132; Gane v. Norton Hill Colliery Co., [1909] 2 K.B.539 (C.A.).

41. Shree Krishna Rice and Flour Mills v. Challapalli Chittemma, (1961) 2 L.L.J.260 (A.P.); Weaver v. Tredegar Iron and Coal Co.Ltd., supra, n.36.

42. Maherunisha A. Pathan v. E.S.I.C., (1995) 1 L.L.N.394 (Guj.); Sheela v. E.S.I.C., (1991) 1 L.L.J.247(P. &. H.); The Manager, Rosin and Turpentine Factory v. Ali Beguma, 1988 Lab.I.C. NOC 23 (J. &. K.) (D.B.). Bhagubai v. v. Central Railway, A.I.R.1955 Bom.105 (D.B.); Varadarajulu Naidu v. M.Boyan, A.I.R.1954 Mad.1113 (D.B.); John Stewart and Sons Ltd. v. Longhurst, [1917] A.C.249 (H.L.); Richards v. Morris, [1915] 1 K.B.221 (C.A.).

The fact that at the time, the workman met with the accident, he was on the way to the factory from his home and in the normal course, he would be reporting for duty within a few minutes, is one such reasoning.[43] Another reasoning is that at the time of the accident, the workman was coming to or going from the factory along the recognised/practical route, commonly used by all the workers of the factory.[44] Nexus between employment and accident is established also by the fact that the workman was directly on the way between his place of work and home, at the time of the accident.[45]

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43. TNCS Corpn. Ltd. v. S.Poomalai, (1995) 1 L.L.J.378 (Mad.); Sheela v. E.S.I.C., (1991) 1 L.L.J.247 (P. &. H.); Sadgunaben Amrutlal v. E.S.I.C.,1981 Lab.I.C.1653 (Guj.) (D.B.); R.D., E.S.I.C. v. L.Ranga Rao, 1981 Lab.I.C.1563 (Kant.) (D.B.); Dudhiben Dharamshi v. New Jehangir Vakil Mills Co.Ltd., (1977) 2 L.L.J.194 (Guj.) (D.B.).

44. President, Iron Ore and Mining Works Co-op.Society v. Mungai Bai and Others, 1987 (54) F.L.R.29 (M.P.); Somraju v. Eastern Rly., A.I.R.1961 Cal.297; Works Manager, C. and W.Shop, E.I.Rly. v. Mahabir, A.I.R.1954, All. 132; Rani Bala Seth v. East Indian Rly., A.I.R.1951 Cal.501 (D.B.); Gane v. Norton Hill Colliery Co., [1909] 2 K.B.539 (C.A.).

45. In Steel Authority of India Ltd., Rourkela v. Kanchanbala Mohanty, 1994 Lab.I.C.1528 (Ori.), the workman met with an accident and died, while returning from the place of work. A clause in a settlement between the employer and the workmen of the industrial establishment provides for compensation for accidental injuries, sustained by a workman, while returning from the place of work to his residence by normal route. But in the instant case, the deceased workman was found to have met with his accident at a place, in a direction opposite from the residence of the workman. Hence, the deceased could not be said to be returning from the place of work to his residence by normal route. Therefore, it was held that the claimant was not entitled to compensation on the basis of the theory of notional extension of employer's premises. See also Sathy bhama v. E.S.I.C., 1991 (1) K.L.T.784 (D.B.).

If the workman was coming to or going from his employer's premises by the transport, provided or arranged by the employer and was under an express or implied contractual obligation or practical compulsion to travel by it, the sphere of employment is notionally extended so as to cover the accident, occurring in the route of the vehicle.[46] The sphere of employment can be notionally extended to the place of accident, occurring in the course of journey to and from the place of employment, even though the workman was not using employer's transport but was enjoying only a travel

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46. In M.N.Khan v. Bombay Municipal Corpn., 1982 Lab.I.C.780 (Bom.) (D.B.), the petitioner, a clerk of Bombay Electricity Supply and Transport Committee, run by the Bombay Municipal Corporation, was leaving his place of work for home, after finishing work. While crossing the road, he was knocked down by a taxi and was injured. It was held that the doctrine of notional extension does not automatically apply in a case, where an accident takes place, while the workman is going to or coming from his place of work. The doctrine can apply, only when there is a duty or obligation on the part of the workman to avail himself of the means of transit, offered by the employer, though the said duty may be express or implied in the contract of service. See also Patel Engg. Co. v. Commr. for W.C., 1978 Lab.I.C.1279 (A.P.)(D.B.); B.E.S.T. Undertaking v. Mrs. Agnes, A.I.R.1964 S.C.193; Varadarajulu Naidu v. Masya Boyan, A.I.R.1954 Mad.1113 (D.B.); Weaver v. Tredegar Iron and Coal Co.Ltd., [1940] 3 All. E.R.157 (H.L.); St.Helen's Colliery Co.Ltd., v. Hewitson, [1924] A.C.59 (H.L.); Richards v. Morris, [1915] 1 K.B.221 (C.A. Cremins v. Guest, Keen and Nettlefolds Ltd., [1908] 1 K.B 469 (C.A.).

Under the Employees' State Insurance Act, 1948, as amended by Act No.44 of 1966, an accident, sustained by a workman, while travelling with the express or implied permission of the employer in a vehicle, provided or arranged by the employer, shall be deemed to be an employment injury, whether he was required to travel by it or not. See Employees' State Insurance Act, 1948, Section 51-C.

subsidy.[47] It can also be extended to an accident, occurring, while travelling by a vehicle, which, though he was not obliged to use, was a vehicle which, in the contemplation of the parties, was a normal mode of transport to and from the place of employment.[48] But notional extension of the sphere of employment to journey to and from the place of employment has got its own limits. It can be permitted only upto the point, where the general risks, which the workman shares with the public at large, cease and the particular risks, which are incidental to his employment, commence.[49] But the dividing line is not always easy to discover and it depends upon the facts of each case.[50]

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47. Indian Rare Earths Ltd. v. A.Subaida Beevi, 1981 Lab. I.C.1359 (Ker.) (D.B.); E.S.I.C. v. Suhara Beevi, (1975) 2 L.L.J.255 (Ker.).

48. See E.S.I.C. v. Francis De Costa, 1978 Lab.I.C.925 (Ker.) (D.B.). While the employee was coming by bicycle to the factory, he was hit by the lorry, belonging to the factory and sustained injury. The accident took place at a distance of 1 k.m. away from the factory. It was held that the employee met with the accident in the course of his employment, as at the time of the accident, he was on his way to the factory, through the route, through which normally he had to reach the factory from his home, using the conveyance, which, though he was not legally obliged to use, was a vehicle, which, in the contemplation of the parties, was a normal mode of transport from the employee's residence to the factory.

49. Saurashtra Salt Mfg. Co. v. Bai Valu Raja, supra, n.35. See also Salambegum v. D.B. Mgr., M.S.C.L.D.B.,Beed, (1990) 1 L.L.J.112 (Bom.).

50. Horatio Vester and Hilary Ann Cart wright, Industrial Injuries (1961), Vol.I, p.75. See B.P.Shanmugham v. Union of India and others, 1989 Lab.I.C.NOC 60 (C.A.T.) (Cal.). A railway employee sustained injury, when he

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There can be notional extension of the time of employment before and after the period of work. A workman's employment is not like an electric machine, which may commence functioning immediately by putting on a switch and cease functioning immediately by putting off the switch. It involves a human relationship.[51] A workman, who reaches the place of his work before time, is in the course of his employment, if the period by which he reaches earlier than the actual time of commencement of his work is not unreasonable.[52]

(f.n.50 contd.) reached his destination after completing his work. It was held that the benefit of notional extension of time and place could not be granted to him, as he could not be treated as on duty, when he was injured. But in Sheela v. E.S.I.C., (1991) 1 L.L.J.247 (P. &. H.), the deceased employee met with accident, while he was waiting for local bus to go to his place of work. Here the notional extension of employer's premises was permitted by the court. See also Rajappa v. E.S.I.C., (1992)2 L.L.J. 714 (Kant.) (D.B.). Maherunisha A. Pathan v. E.S.I.C., (1995)1 L.L.N.394 (Guj.).

51. Kamta Prasad Pandey, supra, n.36.

52. See Sharp v. Johnson & Co. Ltd., [1905] 2 K.B.139 (C.A.). In this case, a number of workmen, employed on certain building work at Catford, had to come down from London each day by a train, which brought them to the place of employment about twenty minutes before the time, fixed for commencing work in the morning. One of these workmen, who had come from London one morning, while proceeding to deposit his ticket at the ticket office sustained injuries through accidentally falling into an excavation near the ticket office. It was held that the accident arose out of and in the course of employment, as the workman was permitted to be upon the premises for depositing his ticket about twenty minutes before the time, fixed for commencing work. See also Dudhiben Dharamshi and others v. New Jehangir Vakil Mills Co. Ltd., (1977) 2 L.L.J.194 (Guj.) (D.B.).

As the employment begins a reasonable time before the actual commencement of the work, it continues for a reasonable time even after the actual 'tools down'.[53] This is because it is practically impossible for a workman to leave the employer's premises simultaneously with the cessation of the work.[54]

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53. In Tiruchy v. Kanagambal, 1995 Lab.I.C. NOC 48 (Mad.), the husband of the applicant was employed as a pointsman in the Railways. He was assaulted during early hours after night duty by some unknown persons. He died subsequently as a result of the injuries, sustained by him. It was held that his death was caused by an accident, which had arisen out of and in the course of employment.

54. In John Stewart and Sons v. Longhurst, [1917] A.C.249 (H.L.), a carpenter was employed by John Stewart and Sons Ltd. to repair a barge, lying in a dock, controlled by the Port of London Authority. One night, the carpenter, while returning from the barge after the day's work, fell off the quay in the darkness of the night and was drowned. It was held that the employment of a workman might be regarded as existing before the actual operations of the workman began and might continue, even after the actual work had ceased. The accident was held to have arisen out of and in the course of employment, as it occurred, on his leaving the barge and while he was lawfully on the dock premises on his way out. See also Raj Dulari v. Superintending Engr., P.S.E.B. and another, (1989) 2 L.L.J.132 (P. &. H.). A workman of the Punjab State Electricity Board was engaged in fixing electric wire on the poles on either side of the road, beyond duty hours, as directed by his superiors. A bus, belonging to the Punjab Road Transport Corporation, came at a high speed and dragged the electric wires, hanging on the road. As a result, the pole, on which the workman was working, was broken from the middle and he fell down and died instantaneously. It was held that the deceased was on duty in the course of his employment, when the accident took place, as he was working beyond duty hours, as per the directions of his superiors.

There can be notional extension of the sphere of employment in place and time not only before and after work but also to cover the interruptions, that occur during the course of employment. The course of employment may be temporarily interrupted by tea/meal breaks or periods of leisure. Such interruptions in fact can be softened in such a way that they may not appear to be interruptions in law by the application of the theory of notional extension.[55] For the efficient discharge of his duties, a workman should take refreshments and meals, as and when required. So a workman is in the course of his employment not only while doing his work but also while taking refreshments and meals.[56] But if an employee, with fixed time and place of work, takes his meals or refreshments at a prohibited place or time, he is outside the course of employment.[57] Thus, a workman was

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55. In Reg.Dir., E.S.I.C. v. Mary Cutinho and others, 1994 Lab.I.C.2420 (Bom.), a workman went home nearby during lunch-break to take lunch. While returning to factory, he was knocked down by a vehicle and he died. It was held that the deceased workman had suffered injury, as a result of an accident, arising out of and in the course of employment and his dependants were entitled to compensation. See also J.F.Pareira v. Eastern Watch Co. Ltd., (1985) 1 L.L.J.472 (Bom.).

56. R.D., E.S.I.C., Ahmedabad v. Batulbibi & another, (1988) 2 L.L.J.29 (Guj.); P.E.Davis & Co. v. Kesto Routh, A.I.R. 1968 Cal.129 (D.B.); Public Works Dept. v. Smt.Kausa, A.I.R.1966 M.P.297; Ramabrahmam v. Traffic Manager, Vizag Port, A.I.R.1943 Mad.353 (D.B.); Low or Jackson v. General Steam Fishing Co.Ltd., [1909] A.C.523 (H.L.).

57. S.C.Srivastava, Social Security and Labour Laws (1985), p.84.

held to be not in the course of his employment, as he was injured, while taking his lunch at a prohibited place and during a period, when he was prohibited to remain on the employer's premises.[58] In addition to refreshments and meals, relaxation may improve the output of the worker by relieving him of the tedium of the work. So the sphere of employment of a workman is notionally extended to periods of relaxation also.[59]

Sometimes, a workman may have to do jobs, not assigned to him under his contract of employment. If it has become customary for a workman to do such a particular job by the order of his employer, an accident, sustained, while doing it, can be considered as in the course of employment, by the application of notional extension of the sphere of employment to the period of performance of such job.[60] The extension of the sphere of employment by notional extension in this case is justified, because he is doing the work, as directed by his employer. Further, a workman can be regarded

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58. State of Madras v. Sankiah Thevar, (1959) 1 L.L.J.390 (Mad.).

59. See E.S.I.C. v. Gulab baksh Mulla, 1987 Lab.I.C.141(Bom.)

60. Kamala v. Madras Port Trust, (1966) 1 L.L.J.690 (Mad.). A lascar in the Port Trust was ordered by his dredge-master to fetch his master's dinner from his house. He was knocked down by a lorry on the highway and died on the spot, while returning from his master's house. He was held to be in the course of his employment, as he was acting, as per the orders of his master.

as in the course of his employment, by the theory of notional extension when he is, in an emergency, doing acts, which are entirely different from the work, assigned to him, and which involve new and greater danger and are expressly forbidden to be done under normal conditions. He may be doing such acts, as they are necessary to preserve the employer's property from destruction[61] or to rescue a fellow workman, if such workman is imperilled under circumstances, which will make the employer liable to compensate him.[62] It is enough that the workman honestly believes that an emergency exists, in which his employer's interest requires him to go outside his normal sphere of employment. Even though such emergency did not actually exist and the employer's person or property or interest was not in actual peril, the workman, who sustained injury, while acting with the honest belief that there was such emergency, will be entitled to compensation.[63] The

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61. Ganga Sugar Corpn. Ltd. v. Ram Darshan, 1977 Lab.I.C. 1285 (All.); Bai Chandan v. Godhra Borough Municipality, (1974) 2 L.L.N.296 (Guj.) (D.B.); Federation of Labour Co-operatives Ltd. v. S.Baliah, A.I.R.1962 A.P.69; Ravuri Kotayya v. Dasari Nagavardhanamma, A.I.R.1962 A.P.42; Pandye R.M. v. Automobile Products of India Ltd., A.I.R. 1956 Bom.115 (D.B.).

62. Varkeyachan v. Thomman Thomas, 1979 Lab.I.C.986 (Ker.) (D.B.); Rees v. Thomas, [1899] 1 Q.B.1015 (C.A.). See also Francis H. Bohlen, *supra*, n.20 at p.416.

63. *Ibid*.

pivotal question is whether the workman acts in the interest of his employer in such emergency. If the answer is in the affirmative, he is acting in the course of his employment.[64]

Generally, an injury, sustained by a workman, while he is outside the premises of the employer, cannot be said to be compensable industrial injury, its occurrence being outside the sphere of employment. But it is compensable, if he was so sent outside the premises, on his employer's business, because the theory of notional extension applies and the sphere of employment is extended to the place of performance of such duty.[65] During duty hours, a gangman was asked to shift to another place for work along with other workmen. While going to the other place, he was knocked

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64. J.D. & Co. Oil Mills v. E.S.I.C., A.I.R.1963 A.P.210; Ravuri Kotaya v. Dasari Nagavardhanamma, A.I.R.1962 A.P.42. Under the Employees' State Insurance Act, 1948 an accident, sustained by a workman, while acting in the interest of the employer during emergency, shall be deemed to have arisen out of and in the course of his employment. The workman will be benefitted by the above provision, even if the emergency was supposed and the action was taken outside the actual premises of his employer. See Employees' State Insurance Act, 1948, Section 51-D, added by Act 44 of 1966.

65. See Nagar Palika, Mandsaur v. Bhagwantibai, 1994 Lab.I.C. NOC 171 (M.P.). A temporary worker, while he was going in the jeep of his employer to a place outside the employer's premises, fell down from the jeep and died. It was held that the employer was liable to pay compensation, as his death arose out of and in the course of employment. See also F.P.Walton, supra, n.34 at p.46.

down by a lorry on the public street, and died, as a result of the accident. The accident was held to have occurred in the course of his employment, the accident having taken place, when the deceased was proceeding to discharge his duty at the behest of the employer at the second site.[66]

Sometimes, the nature of the employment is such that the journey becomes part of the sphere of employment. A boy, employed to take tea from a teashop, outside the factory gate to employees of the factory, was returning to the teashop after serving tea. He was caught in the midst of an unruly mob of workmen and was struck by a bullet, fired by the police to disperse the mob. The boy was severely wounded and he died. The accident was held to have arisen out of and in the course of employment, as the employment specially exposed the boy to a general risk.[67]

The concept of the sphere of employment both under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948[68] has been considerably widened by the

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66. Union of India v. Mrs.Noor Jahan, 1979 Lab.I.C.652 (All.) The principle of this case is reflected in other cases like United Insurance Co.Ltd. v. Heera Bai, 1987 (54) F.L.R.507 (M.P.); Hindustan Ice & Cold Storage Co. Ltd. v. Zubeda Bibi, A.I.R.1955 N.U.C.817 (Cal.) and Dennis v. White, 1917 A.C.479 (D.B.) (H.L.).

67. National Iron & Steel Co.Ltd. v. Manorama, A.I.R.1953 Cal.143 (D.B.).

68. Under common law, the sphere of employment is notionally extended to the entry/exit point of the place of employment. It does not go beyond the employer's premises generally. See John Munkman, Employer's Liability at

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application of the theory of notional extension to a wide variety of situations, as mentioned above. It covers the entry and exit points of the place of employment, the route or the vehicle for the journey to and from the place of employment, breaks for meals or refreshments, performance of unassigned work for the purpose of employer's welfare, performance of emergency duty beyond working hours, and journeys in discharge of duty beyond employer's premises. Such extension is justified by the fact that it was the employment, that brought the workman at the particular place of accident. He was not there, like other members of the public, for his own personal purposes.[69] He was there for the purposes of his employment and matters, incidental thereto. In fact, the theory of notional extension has cleared much deal wood, thereby widening the scope of compensable industrial injuries, in accordance with the recommendation of the I.L.O.[70]

(f.n.68 contd.) Common Law (1985), p.99. But notional extension is permitted outside employer's premises, where workmen are sent out on duty outside. See General Cleaning Contractors Ltd. v. Christmas, [1952] 2 All E.R.1110 (H.L.).

69. He would have fallen outside the sphere of notional extension, if had been there for his personal purposes. See G.M., Northern Rly. v. R.R.Nerma, 1979 Lab.I.C.1099 (All.); Saurashtra Salt Mfg. Co. v. Bai Valu Raja, (1958) 2 L.L.J.249 (S.C.); Alderman v. Great Western Rly. Co. [1937] A.C.454 (H.L.); Burma Oil Co.Ltd. v. Ma Hmwe Yin, A.I.R.1935 Rang.428 (D.B.).

70. The Employment Injury Benefits Recommendation No.121 of 1964 of the International Labour Organisation requires each Member to treat the following as industrial accidents:

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Accident arising out of employment

The expression "arising out of employment" emphasizes the existence of a relationship in the shape of cause and effect between employment and accident.[71] The former viz.

(f.n.70 contd.)
(a) accidents, regardless of their cause, sustained during working hours at or near the place of work or at any place where the worker would not have been except for his employment;
(b) accidents sustained within reasonable periods before and after working hours in connection with transporting, cleaning, preparing, securing, conserving, storing and packing work tools or clothes; and
(c) accidents sustained while on the direct way between the place of work and -
(i) the employee's principal or secondary residence; or
(ii) the place where the employee usually takes his meals; or
(iii) the place where he usually receives his remuneration.
See International Labour Organisation, Conventions and Recommendations (1966), p.1095.

71. In G.S.Talcher Thermal Station v. Bijuli Naik, 1994 Lab. I.C.1379 (Ori.), the workman died of heart-attack at the factory gate, while coming to join his duty. The doctor, who treated the workman, on his complaining of chest-pain prior to his death, certified that strenuous work in factory could result in coronary thrombosis. The deceased's suffering from coronary thrombosis and dying of the same had close connection with his strenuous work in the factory. Hence, the employer was held liable to pay compensation. See also Rajappa v. E.S.I.C., (1992) 2 L.L.J.714 (Kant.) (D.B.); Divisional Railway Manager, Kota, v. Shamsadi, 1988 Lab.I.C.605 (Raj.); Dir. (T. & M.) D.N.K.Project v. Smt.D.Buchitalli, 1987 Lab.I.C.1795 (Ori.); Mackinnon Mackenzie & Co. (P) Ltd. v. Ibrahim Mahommad Issak, A.I.R.1970 S.C.1906; Sarat Chatterjee & Co. Ltd. v. Khairunnessa, 1969 Lab.I.C.778 (Cal.) (D.B.); T.D. & Co.Oil Mills v. ESI Corpn., A.I.R.1968 A.P.210; Assam Railways & Trading Co. v. Saraswati Devi, A.I.R. 1963 Ass.127 (F.B.); Ladi Jagannadham v. Padmabati Baurani,

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employment, is the cause and the latter viz., accident, is the effect. A causal connection between employment and accident can be held to exist, if the immediate act, which led to the accident, is not so remote from the sphere of the workman's duties or the performance thereof as to be regarded as something foreign to them.[72]

It is not necessary that there must always be a direct and physical causal connection.[73] Sometimes, depending

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(f.n.71 contd.)
A.I.R.1962 Ori.7; Ravuri Kotayya v. Dasari Nagavardhanamma, A.I.R.1962 A.P.42; Parwati bai v. Rajkumar Mills, A.I.R.1959 M.P.281; Mrs.Santan Fernandes v. B.P.(India) Ltd., A.I.R.1957 Bom.52 (D.B.); Bai Diva Kaluji v. Silver Cotton Mills, A.I.R.1956 Bom.424 (D.B.); Imperial Tobacco Co. v. Salona Bibi, A.I.R.1956 Cal.458 (D.B.); Indian News Chronicle Ltd. v. Mrs.Lazarus, A.I.R.1951 Punj.102; Whittle v. Ebbwvale, Steel, Iron & Co., Ltd., [1936] 2 All E.R.1221 (C.A.); Charles R. Davidson & Co. v. M'Robb L.R., [1918] A.C.304 (H.L.); Riley William Holland & Sons, Ltd., [1911] 1 K.B.1029 (C.A.); Clover, Clayton & Co. Ltd., v. Hughes, [1910] A.C.242 (H.L.); Fitzgerald v. Clark & Son, [1908] 2 K.B.796 (C.A.); Fenton v. Thorley & Co. Ltd., [1903] A.C.443 (H.L.).

72. Ravuri Kotayya v. Dasari Nagavardhanamma, A.I.R.1962 A.P.42; See also Devshi Bhanji Khona v. Mary Burno & Another, 1985 Lab.I.C.1589 (Ker.) (D.B.). The workman was working as a head-load worker under the appellant. Owing to over-exertion, there was a sudden deterioration of his health, which proved fatal. It was held that the death of this workman was caused by an accident, arising out of and in the course of his employment, as his death would not have occurred but for the over-exertion.

73. In Upton v. G.C.Rly. Co., [1924] A.C.302 at 306, Viscount Haldane, observed "Now the expression "arising out of" no doubt imports some kind of causal relation with the employment; but it does not logically necessitate direct or physical causation; . . . . The right given is no remedy for negligence on the part of the employer, but is rather in the nature of an insurance of the workman against certain sorts of accident".

upon other circumstances, even indirect and abstract causal connection may be treated as sufficient.[74]

There are numerous causes of an accident, out of which some are proximate and others remote. Of these, the cause, contemplated for establishing the causal relationship, is the proximate cause and not the remote one.[75] A woman, employed by a fish-curer, while working in a shed, belonging to her employer, was injured by the falling of the roof of the shed, under which she was working. The roof fell, because of the falling of another wall, being constructed on the adjoining land, by its proprietor. The

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74. See United India Insurance Co. Ltd., v. C.S.Gopalakrishnan, 1989 Lab.I.C.1906 (Ker.) (D.B.). The workman, a bus conductor, died, while sleeping in bus during halting hours. There was no clear evidence as to the fact whether the death occurred directly due to the strain and stress of the work, the deceased was doing on the day, previous to the fatal incident. But it could not be denied that the workman was put to great strain and stress in discharging his duties, as the workman was asked to do work for more hours than what he was statutorily bound to do. So the workman was held to have died, as a result of an accident, which had arisen in the course of employment. See also Lawrence v. George Mathews Ltd., [1929] 1 K.B. 1 (C.A.); Thom or Simpson v. Sinclair, [1917] A.C.127 (H.L.).

75. In New India Assurance Co.Ltd., v. G.Krishna Rao and others, 1995 (71) F.L.R.1 (Ori.), the deceased workman, who was engaged in the construction of railway line, was residing in a hut, provided at the work-site by the employer. While the deceased was sleeping in the hut, fire engulfed the hut and she was burnt alive. It was held that though the provision made by the employer for residence of the concerned workman may be an incident of service and the deceased might have slept in the house, made available to her by the employer, such accommodation by itself cannot form the basis to claim compensation on the ground that death by accident was caused out of and in the course of employment. See also Bhagubai v. G.M., Central Rly. (1954) 2 L.L.J.403 (Bom.) (D.B.).

accident was held to have arisen out of her employment on consideration of the proximate cause viz. she happened to be working in the shed at the time of the accident.[76]

Accidents "arising out of employment" envisage such accidents as are either inherent[77] in the employment or incidental[78] to it. In other words, they mean such accidents as are either part of employment or flow from it.[79] When

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76. Thom or Simpson v. Sinclair, [1917] A.C.127 (H.L.) See also Naima Bibi v. Lodhne Colliery Co. Ltd., (1977) 2 L.L.J.69 (Cal.) (D.B.).

77. An accident cannot be said to arise out of employment, unless the risk of such an accident has been even before the accident inherent in the employment to a greater or lesser extent. See Munshi & Co. v. Yeshwant Tukaram, A.I.R.1948 Bom.44 at 45; Vishram Yesu Haldankar v. Dadbabhoy Hormasji & Co. A.I.R.1942 Bom.29; Brooker v. Thomas Borthwick & Sons (P) Ltd., [1933] A.C.669 (P.C.).

78. Oriental Insurance Co. Ltd., v. Nanguli Singh & ANR, (1995) 1 L.L.J.298 (Ori.); Gujarat State Road Transport Corporation v. Bai Jiviben Arjan, 1981 Lab.I.C.86 (Guj.); D.Dharamshi v. New Jahangir Vakil Mills Co., (1977) 2 L.L.J.194 (Guj.) (D.B.); Bhagwanji Murubhai Sodha v. Hindustan Tiles & Cement Industries, (1977) 2 L.L.J.95 (Guj.) (D.B.); Mst.Abida Khatun v. G.M., Diesel Locomotive, (1973) 1 L.L.J.387 (All.) (F.B.); Chowgule & Co. Ltd. v. Smt.Felicidade Rodrigues, 1970 Lab.I.C.1584 (Goa); R.B.Moondra & Co. v. Mst.Bhanwari, 1970 Lab.I.C.695 (Raj.); Smt.Koduri Atchayamma v. Palangi Atchamma, 1969 Lab.I.C. 1415 (A.P.); Mohanlal Prabhuram v. Fine Knitting Mills Co.Ltd., A.I.R.1960 Bom.387; Bhagubai v. G.M., Central Rly.,(1954) 2 L.L.J.403 (Bom.) (D.B.); K.Ramabrahman v. Traffic Manager, Visakapatanam Port, A.I.R.1943 Mad.353 (D.B.)

79. Smt.Leela Devi and another v. Sh. Ram Lal Rahu and another, (1990) 1 L.L.J.364 (H.P.). The deceased was employed as watchman in the Cement Factory of the second respondent as per a contract with the first respondent. He was assigned night duty during winter season. No woollen clothing was provided to the deceased nor any heating arrangement was made at the place of his duty, despite

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an accident is caused directly by the work, a man is employed to do or by the condition of the machinery, plant or premises, such an accident can be said to be inherent in or incidental to employment and, therefore, to have arisen out of employment. For instance, an injury, caused by the aggravation of a pre-existing condition by the strain of work, is incidental to employment and, therefore, can be said to be arising out of it. A night watchman of the Bombay Port Trust complained of chest pain, while on duty and expired within his period of duty. Medical evidence showed that he was suffering from heart disease and the death was caused by the strain of his being on his legs for a long time daily. The death of the workman, caused by the aggravation of his pre-existing disease by the strain of his work, was held to be incidental to employment.[80] But, where an employee of a factory died of heart

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(f.n.79 contd.) request. As a result of the bitter cold, the deceased started having pain in the stomach and died. It was held that the death occurred as a consequence of and in the course of employment. See also Divl.Rly.Mgr., Kota v. Shamsadi, 1988 Lab.I.C.605 (Raj.). The deceased workman was bitten by scorpion in the course of duty. After an operation, he was found to be suffering from tetanus. His death was held to be caused by an accident in the course of and out of employment on the ground that the tetanus was incidental and consequential to scorpion bite in the course of duty.

80. Laxmibai v. Chairman, Bombay Port Trust, A.I.R.1954 Bom. 180 (D.B.). See also Deviben Dudabhai v. Mgr., Liberty Talkies, Porbandar, 1994 Lab.I.C.2570 (Guj.); G.S.Talcher Thermal Station v. Bijuli Naik, 1994 Lab.I.C.1379 (Ori.); United India Insurance Co.Ltd. v. Yasodhara Amma and another, (1990) 1 L.L.J.387 (Ker.); Broach Municipality v. Raiben Chimanlal, 1989 Lab.I.C.73 (Guj) and Director (T. & M.), D.N.K.Project v. D.Buchitalli, 1987 Lab.I.C. 1795 (Ori.).

failure suddenly in the premises of the factory before starting his work, his death was held to be not incidental to employment, as the heart-failure was not the consequence of any stress or strain during actual working.[81] The principle is nicely elucidated by Justice Ramaswami in the following words:

> "If the workman dies as a natural result of the disease from which he was suffering . . . no liability would be fixed upon the employer. But if the employment is a contributory cause or has accelerated the death or if the death was due not only to the disease but the disease coupled with the employment, then it could be said that the death arose out of the employment and the employer would be liable".[82]

While a workman is acting in the course of his employment, he may meet with accident, caused by a stranger's misconduct, skylarking or negligence or a bite by a cat or dog or some natural cause such as sun-stroke, frost-bite or lightning. Accidents of this kind, which arise in the course of employment, do not necessarily arise out of it.[83]

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81. See Ajudee Bai v. E.S.I.C., A.I.R.1959 M.P.338.

82. Mackinnon Mackenzie & Co. v. Rita Fernandez, (1969) 2 L.L.J.812 at 814-815 (S.C.). See also Kikhubhai v. Mafatlal Fine Spinning and Manufacturing Co., 1981 Lab. I.C.1648 (Guj.) (D.B.); Leela Devi v. Ram Lal Rahu, 1989 Lab.I.C.758 (H.P.).

83. In The Special Officer v. Smt.Ayyammal, 1994 Lab.I.C. NOC 386 (Mad.) (D.B.), a worker was stabbed to death by her husband during the course of employment. Evidence

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The test, applied to decide whether such accidents arise out of employment, is to examine whether the employment is the effective cause of the accident by involving special exposure to such risks. If the employment involves special exposure to such risks, the accident, caused by such special exposure, is considered as arising out of it.[84]

Can an accident, faced by a workman, while attempting a prohibited act, be held to be incidental to employment? Under common law, if the workman is doing the work with which he is entrusted by his employer, he does not cease to be acting in the course of his employment, even though he is doing something prohibited.[85] Under the Employees' State Insurance Act, if an accident happens to an injured person, while acting in contravention of any of the provisions of a

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(f.n.83 contd.) on record showed that the deceased worker initially beat her husband and, thereby, provoked him to stab her. It was held that the worker's death was not caused by an accident arising out of employment. But see Tiruchy v. Kanagambal, supra, n.53.

84. Divl.Rly.Mgr. v. Shamsadi, 1988 Lab.I.C.605 (Raj.); E.S.I.C. v. Babulal, 1982 Lab.I.C.468 (M.P.); Naima Bibi v. Lodhne Colliery Co., (1977) 2 L.L.J.69 (Cal.) (D.B.); Mohanlal Prabhuram v. Fine Knitting Mills Co.Ltd., A.I.R. 1960 Bom.387; Nisbet v. Rayne and Burn, [1910] 2 K.B. 689 (C.A.); Challis v. L.&.S.W. Rly. Co., [1905] 2 K.B. 154 (.C.A.); Andrew v. Failsworth Industrial Society Ltd., [1904] 2 K.B.32 (C.A.).

85. Common law insists only that an accident must have arisen in the course of employment. See John Munkman, Employer's Liability at Common Law (1985), 100-101. See National Coal Board v. England, [1954] 1 All E.R.546(H.L.) Laszczyk v. National Coal Board, [1954] 3 All E.R.205 (Manchester Assizes); Stapley v. Gypsum Mines Ltd., [1953] 2 All E.R.478 (H.L.).

statute[86] or of any orders, given by or on behalf of the employer or while acting without instructions from his employer, the accident shall be deemed to arise out of and in the course of insured person's employment, if two conditions are fulfilled. Firstly, the accident should be such as would have been deemed to arise out of and in the course of employment, had the act not been done in contravention of the statute, or orders or without the instructions of his employer. Secondly, the act is done for the purposes of and in connection with the employer's trade or business.[87] Under the Workmen's Compensation Act, such presumption is not applicable, where the injury,resulting from an accident, happening, while acting in violation of rules or regulations of the employer, does not result in his death. Where it results in death, the question of disobedience of any rule or order does not stand in the way of holding the injury, incidental to employment.[88]

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86. For instance, see Factories Act, 1948, Section 111, dealing with obligation of workers to comply with provisions for ensuring health and safety.

87. Employees' State Insurance Act,1948, Section 51-B.

88. Workmen's Compensation Act, 1923, Section 3(1), Proviso (b). Lingam Seetharamiah v. Bijjam Bramaramba, 1969 Lab.I.C.118 (A.P.); Janaki Ammal v. Divl. Engr., Highways, (1956) 2 L.L.J.233 (Mad.); Padam Debi v. Raghunath Ray, A.I.R.1950 Ori.207 (D.B.). See also supra, n.11. 'Disobedience', contemplated by Section 3(1), Proviso (b) involves conduct of a quasi-criminal nature, the intention of doing something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of the probable consequences. So

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When the expression "arising out of" is analysed from the angle of "injuries inherent in or incidental to employment", what is brought to light is nothing but the causal relationship between employment and accident.

It cannot be stated as a correct proposition of the law that all accidents, occurring at the time, and place of employment, arise out of employment.[89] Nor can it be said that accidents, not occurring at the time and place of employment of a workman, can never be accidents, arising out of his employment.[90] If a workman is obliged by the conditions of his employment to be at a particular place at a

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(f.n.88 contd.)
mere disobedience is not sufficient for exempting the employer from liability, because it may be the result of forgetfulness or the result of the impulse of the moment. The concept, embodied in these words, is the antithesis of the idea, imported by the word "accident". See Arya Muni v. Union of India, (1965) 1 L.L.J.24 (All.) Janaki Ammal v. Divl. Engr., Highways, (1956) 2 L.L.J. 233 (Mad.); Bhurangya Coal Co. v. Sahebjan, A.I.R.1956 Pat.299 (D.B.); Lee Shi v. Consolidated Tin Mines, A.I.R. 1939 Rang.428 (D.B.); Allah Bakhush v. Mian Mohammad Allah Baksh, A.I.R.1935 Lahore 670.

89. See The Special Officer v. Smt.Ayyammal and another, 1994 Lab.I.C.NOC 386 (Mad.) (D.B.). For the facts and decision of this case, see supra, n.83. See also Smt. Koduri Atchayamma v. Palangi Atchamma, 1969 Lab.I.C.1415 (A.P.); Mewar Textile Mills v. Kushali Bai, (1960) 2 L.L.J.369 (Raj.); Central Glass Industries v. Abdul Hossain, A.I.R.1948 Cal.12 (D.B.); G.Powell v. Panchu Mokadam, A.I.R.1942 Pat.453 (D.B.).

90. See G.S.Talcher Thermal Station v. Bijuli Naik, 1994 Lab.I.C.1379 (Ori.); Reg.Dir., E.S.I.C. v. Mary Cutinho and others, 1994 Lab.I.C.2420 (Bom.); and Nagar Palika, Mandsaur v. Bhagwantibai, 1994 Lab.I.C. NOC 171 (M.P.).

particular time and exposed to an accident, then, such accident arises out of employment. Though such accident may not have any causal relation to the work of the workman, it is incidental to the particular place, where, by the conditions of his employment, he is obliged to work.[91] The analysis of concept of "arising out of employment" from the angle of "relevancy of time and place" lays bare again the underlying concept of causal connection between employment and accident.

Workers, while performing their duties, sometimes adopt means to accomplish their ends in a way, which are either unwarranted or the adoption of which are liable to increase the risk, involved in the execution of the work. If there is only one mode of doing a particular work and the worker suffers an injury, while performing the work by adopting that mode, the injury will be said to arise both in the course of as well as out of the employment. But if there are various alternative ways of doing the work, the worker is expected to adopt the least risky method.[92]

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91. Ibid.

92. In Stephen v. Cooper, [1929] A.C.570 (H.L.), a farm servant was engaged in driving a reaping machine, drawn by two horses. While driving the machine, a chain, hooked to the backband of one of the horses, became unhooked and had to be re-hooked. The servant, without putting the cutting blade out of gear, attempted by walking along the pole between the horses to refix the chain. The horses suddenly started forward and the servant, losing balance, fell on the blade and was permanently injured. The proper method of refixing the chain was not followed by him. Instead, this dangerous

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The worker should not choose a more risky method and thus add peril to the job. If he acts otherwise, the injury, caused, is on account of added peril[93] and, therefore, does not arise out of employment.[94]

Accidents, falling under the category of "added peril", comprise the following acts of a workman, namely:-

(1) acts outside the sphere of his employment;

(2) acts for his own purpose; and

(3) acts done carelessly or negligently.

Accidents, resulting on account of acts, done for one's own purpose as well as those, falling outside the sphere of one's employment, have been held to be not arising out of employment[95]

(f.n.92 contd.) course was taken. It was held that the injury was sustained by an accident, caused by an added peril, to which the workman exposed himself by his own conduct and not due to an accident, arising out of his employment. See also Lancashire and Yorkshire Rly.Co. v. Highley, [1917] A.C.352 (H.L.).

93. "Added peril" means a peril, voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself. See Lancashire and Yorkshire Rly. v. Highley, [1917] A.C. 352 at 361 per Viscount Haldane.

94. In Devidayal Ralyaram v. Secretary of State, A.I.R.1937 Sind.288 (D.B.), a fitter, who wanted some scrap to make nuts and studs, went under the machine to take it from the scrap heap under the machine, which, when set in motion, caused a permanent injury to his right hand. It was held that the injury arose out of an added peril, to which the fitter had voluntarily and unnecessarily exposed himself and not out of and in the course of employment. See also Gouri Kinkar Bhakat v. Radha Kissen Cotton Mills, A.I.R.1933 Cal.220 (D.B.).

95. Devidayal Ralyaram v. Secretary of State, A.I.R.1937 Sind.288 (D.B.); Gouri Kinkar v. Radha Kissen Cotton Mills A.I.R.1933 Cal.220 (D.B.); Stephen v. Cooper, [1929] A.C. 570 (H.L.); Lancashire and Yorkshire Rly. Co. v. Highley, [1917] A.C.352 (H.L.).

But accidents, resulting from the carelessness or negligence of the workman, may be treated as arising out of his employment, if he has been acting within the sphere of his employment.[96] Workmen are human beings and not machines and, therefore, are subject to human imperfections. No man can be expected to work without ever making a mistake or slip. Imperfections of a workman form the ordinary hazards of employment. Therefore, accidents, arising from them, are treated as arising out of employment.[97] Lord Atkin observed:

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96. In R.B.Moondra & Co. v. Mst.Bhanwari, 1970 Lab.I.C.695 (Raj.), the deceased was employed as a driver on a truck, used for the purpose of carrying petrol in a tank. As the tank was reported to be leaking, he was asked by the employer to enter the tank and see from where it leaked. The deceased entered the tank, which had no petrol in it but was partly filled with water. For detecting the place of leaking, he lighted a match stick. As a result, the tank caught fire and the deceased received burns and died subsequently. It was held that though the deceased acted negligently or rashly, it could not be said that the act done was outside the sphere of his employment. See also G.M., South Eastern Railway v. Radhey Shyam, 1984 (48) F.L.R.493 (M.P.); Challapareddy Ranganayakamma v. K.Venkateswara Rao, 1975 Lab.I.C.1373 (A.P.); Bhurangya Coal Co. Ltd. v. Sahebjan, A.I.R.1956 Pat.299 (D.B.); Harris v. Associated Portland Cement Mfrs. Ltd. [1938] 4 All E.R.831 (H.L.).

97. In Challapareddy Ranganayakamma v. K.Venkateshawara Rao, 1975 Lab.I.C.1373 (A.P.), a lorry driver died in an accident, while driving the lorry. It was held that the mere fact, that he had permitted six passengers to travel in the lorry, which was already carrying a load of 10,150 kgs., did not amount to adding peril to his employment by his own conduct. See also R.B.Moondra & Co. v. Mst. Bhanwari, 1970 Lab.I.C.695 (Raj.).

"Once you have found the work which he is seeking to do to be within his employment, the question of negligence, great or small, is irrelevant and no amount of negligence in doing an employment job can change the workman's action into a non-employment job . . if a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree and is injured by a risk incurred only by that way of doing it, he is entitled to compensation".[98]

The doctrine of notional extension extends the sphere of a man's employment. The doctrine of added peril, on the other hand, purports to limit this sphere.[99] For an act to fall within the sphere of one's employment, it must be ancillary to the employment or a necessary incident of it.[100]

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98. See Harris v. Associated Portland Cement Mfrs. Ltd., [1938] 4 All E.R.831 at 834 (H.L.).

99. K.D.Srivastava, Commentaries on the Workmen's Compensation Act, 1923 (1992), p.159.

100. In Superintending Engr., Parambikulam Aliyar Project, Pollachi v. Andammal, (1983) 2 L.L.J.326 (Mad.), the deceased had to face the agriculturists, who had unauthorisedly diverted the water from the canal to their field, in the course of his employment. He made a complaint to the Junior Engineer about these agriculturists. He had to face the indignant agriculturists again in the course of his employment, when he was killed by them. It was held that the accident, resulting in the death of the deceased, was caused by a peril, which was very closely and intimately linked up with the performance of his duty and not by added peril.

If a workman is doing an act, ancillary to his employment, he must not unnecessarily increase the risk of injury to himself and so the risk of liability to his employer, beyond what is contemplated in his contract of employment. He must not choose an unnecessarily dangerous place for doing his work nor must he do it in an unnecessarily dangerous way. If he acts otherwise, he will go outside the sphere of employment and the resulting injury cannot be considered to be arising out of employment but of added peril.[101]

An accident can, therefore, be said to arise out of the employment of a person, when it is causally connected with something, that is reasonably incidental to the employment or with the nature or the terms or the conditions of the employment. It is not necessary to establish that the workman was engaged in the performance of his duty, at the time of the accident and that the accident was related to such performance. The presence of the workman on the spot of the accident, if such presence itself was attributable to the discharge of his duty, is enough to show that the accident arose out of his employment.[102]

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101. See supra, nn.92, 93 & 94.

102. Salamabegum v. D.B.Mgr., M.S.C.L.D.B., Beed and another, (1990) 1 L.L.J.112 (Bom.); Bhagubai v. Central Rly., Bombay, (1954) 2 L.L.J.403 (Bom.) (D.B.).

Accident arising in the course of employment

If the requirement, that the accident must arise out of the employment, is primarily a matter of causation, the requirement, that the accident must arise in the course of employment, is a matter of the factual scope of the employment in question.[103] An accident can be said to have arisen in the "course of employment" if it took place within the period of employment, while the workman was performing his duties or engaged in doing something, incidental thereto at the place, where he, ordinarily, is required to work.[104] Thus the phrase covers duty, time and place of employment.

There are two trends of judicial decisions, regarding the element of duty. According to the first,[105] to find out whether an accident has arisen in the course of employment or not, it is necessary to find out, whether the workman was doing his duty, at the time of the accident. If he was not doing any such duty, the accident has not arisen in the course of employment. According to the second,[106] "duty" is not relevant. An accident may arise in the course of

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103. K.M.Joseph, "Compensable injury under the workmen's Compensation Act", 1987 Lab.I.C.57; See also F.P.Walton supra, n.63 at 45.

104. State of Rajasthan & ORS v. Smt.Kanta, (1989) 2 L.L.J. 135 (Raj.); Tobacco Mfrs. (India) Ltd. v. Mrs. Marian Stewart, A.I.R.1950 Cal.164 (D.B.).

105. See infra, nn.108, 109.

106. See infra, n.112.

employment, though the workman might not have been doing his duty at the time of the accident.[107]

There is a catena of cases,[108] holding that workmen were acting in the course of their employment on the ground that at the time of the accident, they were doing their duties, for which they were employed. Similarly, there is no paucity of cases,[109] in which workmen have been held not

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107. Kamta Prasad Pandey, op.cit., p.440.

108. Union of India v. Mrs.Noorjahan, 1979 Lab.I.C.652 (All.) Varkeychan v. Thomman, (1979) I L.L.J.373 (Ker.) (D.B.); B.M.Sodha v. Hindustan Tiles & Cement Industries, (1977) 2 L.L.J.95 (Guj.) (D.B.); Satiya v. S.D.O., P.W.D., 1974 Lab.I.C.1516 (M.P.) (D.B.); Assam Rly. and Trading Co. v. Saraswathi Devi, A.I.R.1963 ASS.127 (F.B.); Janaki Ammal v. Divl. Engineer, (1956) 2 L.L.J.233 (Mad.); National Iron & Steel Co. v. Manorama, A.I.R.1953 Cal. 143 (D.B.); Dunn v. A.G.Lockwood & Co. [1947] 1 All E.R. 446 (C.A.); Noble v. Southern Rly. Co., [1940] 2 All E.R.383 (H.L.); Weaver v. Tredegar Iron Co., [1940] 3 All E.R. 157 (H.L.); London and North Eastern Rly. Co. v. Brentnall, [1933] A.C.489 (H.L.); Armstrong, Whitworth & Co. v. Redford, [1920] A.C.757 (H.L.); John Stewart & Son Ltd. v. Longhurst, [1917] A.C.249 (H.L.); Webber v. Wansborough Paper Co.Ltd., [1915] A.C.51 (H.L.).

109. Koduri Atchayamma v. Palangi Atchamma, 1969 Lab.I.C. 1415 (A.P.); Tobacco Mfrs. Ltd. v. Marian Stewart, A.I.R.1950 Cal.164 (D.B.); Alderman v. Great Western Rly. Co., [1937] A.C.454 (H.L.); Devidayal Ralyaram v. Secretary of State, A.I.R.1937 Sind.288 (D.B.); Gouri Kinkar v. Radha Kissen Cotton Mills, A.I.R.1933 Cal. 220 (D.B.); St.Helen's Colliery Co. v. Hewitson, [1924] A.C.59 (H.L.); Charles R. Davidson & Co. v. M'Robb, [1918] A.C.304 (H.L.); Plumb v. Cobden Flour Mills, [1914] A.C.62 (H.L.).

to be acting in the course of employment on the ground that at the time of the accident, they were not doing their duties. So to make his injury compensable, the workman must show that he was, at the time of the accident, causing the injury, engaged in the employer's business or in furthering that business and was not doing something for his own benefit,[110] or that he was doing something in discharge of his duty to his employer, directly or indirectly imposed upon him by his contract of service.[111]

According to the second view, performance of duty is not the pivotal question. A workman, employed by the Public Works Department to work on the Gwalior-Jhansi Road, left the work-site for collecting the salary of the labourers from the office. While he was taking his meals on the way, he was murdered by unknown persons. Though the workman was not doing any duty but taking his meals at the time of the accident, causing his death, he was held to be in the course of his employment, at that time, as he would not have been murdered but for his proceeding to the office.[112]

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110. Janaki Ammal v. Divl. Engineer, (1956) 2 L.L.J.233 (Mad.)

111. National Iron & Steel Co. Ltd. v. Manorama, A.I.R.1953 Cal.143; Tobacco Mfrs. (India) Ltd. v. Mrs. Marian Stewart, A.I.R.1950 Cal.164.

112. See P.W.D., Bhopal v. Smt.Kausa, A.I.R.1966 M.P.297. For other cases, where the workman was held to be in the course of employment, though he was not performing any duty at the time of the accident, See Tiruchy v. Kanagambal, 1995 Lab.I.C.NOC 48 (Mad.); Reg. Dir., E.S.I.C. v. Mary Cutinho and others, 1994 Lab.I.C.2420

contd...

It appears at the first sight that the two views, noted above, are contradictory. But if they are looked in a wider perspective, they mean substantially the same thing. The first view gives a wider and liberal meaning to the word 'duty' and includes within the scope of 'duty' even those cases, which, according to the second view, are included as falling in the course of employment.[113] Lord Atkinson, while emphasizing the element of 'duty' as a determinative factor in the determination of the course of employment,[114] took 'duty' in a wider sense.[115] The second view discarded

(f.n.112 contd.) (Bom.); G.S.Talcher Thermal Station v. Bijuli Naik, 1994 Lab.I.C.1379 (Ori.); Dudhiben Dharamshi and others v. New Jehangir Vakil Mills Ltd., (1977) 2 L.L.J.194 (Guj.) (D.B.); Bhagubai v. Central Railway, (1954) 2 L.L.J.403 (Bom.) (D.B.).

113. Kamta Prasad Pandey, supra, n.36, at 443

114. The test, which must be satisfied to bring an 'accident' in the course of a workman's employment, should be based upon, according to Lord Atkinson, "a duty to the employer arising out of the contract of employment but it is to be borne in mind that the word "employment" as here used covers and includes things belonging to or arising out of it". See St.Helen's Colliery Co. Ltd., v. Hewitson, [1924] A.C.59 at p.71 (H.L.).

115. Lord Atkinson observed:
"For instance, hay makers in a meadow on a very hot day are, I think, doing a thing in the course of their employment, if they go for a short time to get some cool water to drink to enable them to continue the work they are bound to do and without which they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment and sit down on their employer's premises to eat food to enable them to continue their labours". See St.Helen's Colliery Co. Ltd., v. Hewitson, supra, n.114. See also the observation of Lord Dunedin in Charles R. Davidson v. M'Robb, [1918] A.C.304 at 321.

the test of 'duty' to include in the course of employment, accidents like those occurring, while taking meal in a canteen during the lunch-break[116] or staying on the employer's premises during the midday dinner hour and eating his dinner.[117] These circumstances do not amount to discharge of duty, in the strict sense, by the workman, though they can be included in the wider concept of 'duty'.[118]

The scope of 'duty' can be determined properly only by keeping in mind the implication of 'employment'. The concept of 'employment', as noted earlier,[119] is of wider import than that of 'work' or 'duty' in the strict sense. The concept of 'duty', implied in the expression 'in the course of employment' therefore, covers not only the actual work, the workman is employed to do but also matters, incidental to it.[120] A workman may be engaged in doing something

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116. Knight v. Howard Wall Ltd., [1938] 4 All E.R.667 (C.A.).

117. Blovelt v. Sawyer, [1904] 1 K.B.271 (C.A.).

118. See ESI Corpn. v. Lakshmi, 1979 Lab.I.C.167 (Ker.)(D.B.); Union of India v. Mrs.Noorjahan, 1979 Lab.I.C.652 (All.); Patel Engg.Co.Ltd v. Commr. for Workmen's Compensation, 1978 Lab.I.C.1279 (A.P.) (D.B.); Dudhiben Dharamshi v. New Jehangir Vakil Mills, (1977) 2 L.L.J.194 (Guj.)(D.B.); B.E.S.T.Undertaking v. Mrs.Agnes, A.I.R.1964 S.C.193; Shree Krishna Rice & Flour Mills v. Challapalli Chittemma (1961) 2 L.L.J.260 (A.P.); Varadarajulu v. Masaya Boyan, A.I.R.1954 Mad.1113 (D.B.); Rani Bala Seth v. East Indian Rly., A.I.R.1951 Cal.501 (D.B.); Dunn v. A.G.Lockwood, [1947] 1 All E.R.446 (C.A.); Davidson v. Handley Page Ltd., [1945] 1 All E.R.235 (C.A.); Weaver v. Tredegar Iron & Coal Co., [1940] 3 All E.R.157 (H.L.); Richards v. Morris, [1915] 1 K.B.221; Cremins v. Guest, Keen and Nettlefolds, Ltd., [1908] 1 K.B.469 (C.A.).

119. Supra, n.32.

120. K.D.Srivastava, Commentaries on the Employees State Insurance Act (1991), p.193.

outside the scope of his normal duties, for his own purposes, such as having a break, taking refreshments, going to lavatory, taking meals at the canteen or talking with fellow workers. But so long as what he is doing is something, which he is not contractually debarred from doing, it may reasonably be said to be incidental to his actual employment.[121]

The elements of time and place alone, therefore, do not play a decisive role in the determination of the question, whether a particular accident has arisen in the course of employment. The deciding factor is, of course, the element of duty. But the element of duty cannot be stretched to the extent of holding that a lad, employed as a finisher of boots, taking home work, in disobedience of orders, for developing his own skill and sustaining injury by accident, while doing the work at home, has sustained the injury in the course of employment.[122] The application of the elements of 'time' and 'place' to the element of 'duty' in such cases, clarifies the boundaries of the concept of 'in the course of employment'.

The question, whether a personal injury, sustained by a workman, is a compensable industrial injury under the Workmen's Compensation Act, 1923 and the Employees' State Insurance

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121. Regional Director, ESI Corpn. v. Batulbibi, (1988) 2 L.L.J.29 (Guj.); ESI Corpn. v. Gulabbaksh Mulla, 1987 Lab.I.C.141 (Bom.); R. v. Industrial Injuries Commr. exp. AEU, [1966] 1 All E.R.97 (C.A.).

122. Borley v. Ockenden, [1925] 2 K.B.325 (C.A.).

Act, 1948, thus depends upon the interpretation of terms like 'personal injury', 'accident' 'employment' 'accident arising out of employment' and 'accident arising in the course of employment' by the adjudicatory authority.[123] In order that the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 may really help an injured workman in obtaining compensation, it is suggested that the scope of these terms may be defined in these statutes. The term 'personal injury' may be defined in the statutes to include not only external injuries including disfigurement of the body but also internal ones such as injury to the mind, injuries like rupture of a vein, failure of heart and the like.[124] 'Personal injury' may also include diseases, caused by accident[125] and the aggravation of an existing disease by an accident[126] or by the stress and strain of employment.[127] The term 'accident' may be defined in the

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123. For instance in Mst.Abida Khatun v. G.M., Diesel Locomotive, Varanasi, (1973) I L.L.J.387 (All.) (D.B.), a workman was murdered by some unknown person, while going to join his duty. It was held that the employer was not liable to pay compensation, as no nexus between accident and employment was established. But see Bhagubai v. Central Railway, Bombay, (1954) 2 L.L.J.403 (Bom.) (D.B.), where, a workman, who was stabbed by some unknown person on his way to work was held to have suffered an accident, arising out of and in the course of employment.

124. Kikubhai v. Mafatlal Fine Spg. & Mfg. Co., 1981 Lab.I.C. 1648 (Guj.) (D.B.); Smt.Sundarbai v. G.M., Ordnance Factory, 1976 Lab.I.C.1163 (M.P.) (D.B.); Indian News Chronicle Ltd. v. Mrs.Lazarus, A.I.R.1951 Punj.102. See also supra, nn.4, 5 and 6.

125. Supra, n.8.

126. Supra, n.9.

127. Supra, n.80.

two statutes as an unexpected event, happening without design on the part of the injured workman.[128] This unexpected event may be explained as including both external and internal accidents[129] as well as the cumulative effect of a series of tiny accidents.[130] The third Schedule to the Acts covers only certain specified occupational diseases.[131] So it may be deleted and 'occupational disease' may be defined as including all diseases, known to arise out of the exposure to substances or dangerous conditions in processes, trades or occupations.[132] Appropriate changes may also be made in Section 3(2) of the Workmen's Compensation Act, 1923 and Section 52-A(1) of the Employees' State Insurance Act, 1948.[133] The word 'employment' may be defined in the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 as covering not only the nature of the employment but also its character, conditions, obligations, incidents and special risks.[134] Despite the considerable extension of the sphere of employment by the theory of notional extension,[135] courts have taken different approaches with regard to the extension

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128. Supra, n.12.

129. Supra, nn.17, 18 and 19.

130. Supra, n.22.

131. Supra, n.25.

132. See International Labour Organisation, Conventions and Recommendations (1919-1966), p.1095.

133. Supra, n.26.

134. Supra, n.32.

135. Supra, n.37.

of the sphere of employment to the journeys to and from the place of work and treating accidents, occurring during such journeys, as accidents arising in the course of employment.[136] So, it is suggested that 'accident arising in the course of employment' may be defined under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 as including accidents, occurring not only during the period, when a workman/employee is doing the work, actually allotted to him, but also during the time, when he is at a place, where he would not be but for his employment.[137] An explanation clause may be added to this definition so that the following kinds of accidents, namely, (a) accidents, sustained during working hours at or near the place of work or at any place, where the worker would not have been but for his employment; (b) accidents, sustained within reasonable periods before and after working hours, in connection with transporting, cleaning, preparing, securing, conserving, storing and packing work-tools or clothes; and (c) accidents, sustained, while on the direct way between the place of work and a workman's/employee's residence or the place, where the workman/employee usually takes his meals or the place, where he usually receives remuneration shall be regarded as accidents, arising in the course of employment, provided that the workman has not invited such accident. In the case of

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136. Supra, n.123.

137. See Works Manager, C. & W.Shop v. Mahabir, A.I.R.1954 All. 132.

injuries, sustained, while travelling in employer's transport, the theory of notional extension of the sphere of employment applies under the Workmen's Compensation Act, 1923, only if the workman was under an obligation or practical compulsion to use the transport[138] as per judicial decisions. The employees, covered by the Employees' State Insurance Act, 1948, do not have this problem, as the Act has taken away the requirement of obligation to use the transport.[139] The condition of workmen, covered by the Workmen's Compensation Act, 1923, may be ameliorated by incorporating a similar provision in that Act. 'Accident arising out of employment' may be defined under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 as an accident, in which there is a causal connection between the accident and employment.[140] 'Causal connection' may be deemed to exist, if the immediate act, which led to the accident, is not so remote from the sphere of the workman's duties or the performance thereof as to be regarded as something foreign to them.[141]

A workman or his dependant, claiming compensation under the Workmen's Compensation Act, 1923, has to prove two

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138. See _supra_, n.46.

139. _Supra_, n.46. See also _E.S.I.C._ v. _Lakshmi_, 1979 Lab. I.C.167 (Ker.) (D.B.).

140. _Supra_, n.71.

141. _Supra_, n.72.

thing for establishing that his injury is compensable, viz., that (1) the accident, causing the injury, occurred in the course of employment and (2) it arose out of employment.[142] But an employee or his dependant, claiming compensatory benefits under the Employees' State Insurance Act, 1948 need prove only that the accident, causing the injury, has arisen in the course of employment for establishing that, his injury is compensable.[143] This is because, on establishing that the accident arose in the course of employment, a rebuttable presumption arises that the accident arose out of employment also.[144] In order to relieve the workmen, covered by the Workmen's Compensation Act, 1923, of the additional burden of establishing that the accident, causing the injury, arose out of employment, it is suggested that a provision, similar to Section 51-A of the Employees' State Insurance Act, 1948, may be incorporated in the Workmen's Compensation Act, 1923.

Under the Workmen's Compensation Act, 1923, an injury, not resulting in death, caused by an accident, directly attributable to the workman having been under the influence of drink or drugs or to the wilful disobedience of the workman to safety rules or to the wilful disregard by the workman of any safety guard or device is not compensable personal

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142. See M.Mackenzie v. I.M.Issak, A.I.R.1970 S.C.1906; Central Glass Industries Ltd. v. Abdul Hossain, A.I.R. 1948 Cal.12 (D.B.).

143. Supra, n.2.

144. Ibid.

injury.[145] But under the Employees' State Insurance Act, 1948, accidents, happening, while acting in breach of regulations or orders or without employer's instructions, shall be deemed to arise out of and in the course of employment, if the accident would have been deemed so to have arisen, had the act been done properly and the act is done for the purpose of and in connection with the employer's trade or business.[146] It is suggested that a similar provision may be inserted in the Workmen's Compensation Act, 1923 also. Under the Workmen's Compensation Act, 1923, unlike under the Employees' State Insurance Act, 1948, there is no specific provision for treating accidents, sustained by a workman, while taking emergency action in the interest of the employer, as accidents arising out of and in the course of employment, though they are treated so by judicial decisions.[147] In order to avoid unnecessary litigation, it is suggested that a provision, similar to Section 51-D of the Employees' State Insurance Act, 1948 may be inserted in the Workmen's Compensation Act, 1923.

The Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 do not contain any specific provision for treating injuries, resulting from accidents, caused by a stranger's misconduct, or negligence or by natural cause

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145. *Supra*, n.11.

146. *Ibid*.

147. *Supra*, nn.61, 62, 63 and 64.

such as sun-stroke, frost-bite or lightning, as compensable industrial injuries. As per judicial decisions, such injuries are compensable, if the employment involves special exposure to such risks.[148] It is suggested that provision may be inserted in both the Acts for treating such injuries as compensable, provided the workman or the employee would not have met with such accidents but for his employment.

Further, under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, an injury, which does not result in the total or partial disablement of the workman for a period exceeding three days, is not compensable.[149] An injury, sustained by a workman or employee on account of his employment, should be compensated, irrespective of the question whether the disablement, caused by the injury, exceeds three days or not. Hence it is suggested that Section 3(1), Proviso (a) of the Workmen's Compensation Act, 1923 and Rule 57 (1) of the Employees' State Insurance (Central) Rules, 1950 may be amended to achieve that purpose.

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148. Supra, n.84.

149. Supra, n.10.

Chapter 5

PAYMENT OF COMPENSATION FOR INDUSTRIAL INJURIES UNDER THE WORKMEN'S COMPENSATION ACT, 1923

Compensation, payable under the Workmen's Compensation Act, 1923, depends on the extent of injury, resulting from accident. Injury may result in death, permanent total disablement, permanent partial disablement, temporary total disablement and temporary partial disablement.

Permanent total disablement means such disablement as permanently incapacitates a workman for all work, he was capable of performing at the time of the accident, causing such disablement.[1] The question, how the disablement of a workman has to be assessed for deciding, whether his disablement is a permanent total one or not, has been subject to different judicial interpretations, in spite of the above statutory definition. According to one interpretation, if the workman is incapacitated for the work, he was capable

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1. Workmen's Compensation Act, 1923, Section 2(1) (1). Permanent total disablement shall be deemed to result from every injury, specified in Part I of Schedule I 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 percent or more. Ibid. See also Janatha Modern Rice Mills v. G.Satyanarayana, 1995 Lab.I.C.677 (A.P.).

of performing at the time of the accident, he sustains permanent total disablement, though he may be capable enough to obtain some other sort of work.[2] As per another interpretation, a workman can be said to have suffered permanent total disablement, only if the workman is incapacitated for all work and not merely the work, he was performing at the time of the accident.[3] This is because the expression

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2. In National Insurance Co. Ltd. v. Mohd. Saleem Khan and another, (1992) 2 L.L.J.377 (A.P.), a truck collided with a lorry and the driver sustained multiple injuries on both feet and collar bone. The doctor, who treated him, certified that he was not fit to drive any heavy vehicle and assessed his disability as 50%. It was held that the work which the workman was capable of performing at the time of accident, is material to consider whether it is a case of total disablement or not. So if the driver is incapacitated for the work of a driver, he has suffered total disablement, though he can obtain some other work and the disability was assessed as 50% by the doctor. See also New India Assurance Co.Ltd. v. Kotam Appa Rao, 1995 Lab. I.C.1087 (A.P.); Oriental Insurance Co.Ltd. v. Guru Charan Saren, A.I.R.1991 Ori.294; Sidappa v. G.M., K.S.R.T.C., 1988 (57) F.L.R.500 (Kant.) (D.B.); P.K.Parmar v. G.Kenal Construction & ANR, (1985) 1 L.L.J.98 (Guj.) (D.B.); and Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 L.L.J 235 (S.C.).

3. In Shankarlal v. G.M., Central Railway, 1990 A.C.J.1028 (M.P.), a Shunting Master met with an accident, fracturing the bones of his leg, which was ultimately shortened by four inches. This defect rendered him unfit for his original job as well as the alternative job of Power Recorder, which was assigned to him subsequently. In such circumstances, it was held that the workman had suffered permanent total disablement. See also Moti Lal v. Thakur Das, (1985) 2 L.L.N.951; 1985 A.C.J.634 (All.); All India Construction Co.Ltd. v. Munshi Ram, A.I.R.1931 Lah.319.

"for all work"[4] cannot be read as "for the work he was performing at the time of the accident".[5] The first judicial interpretation enables an injured workman to get compensation for permanent total disablement, if he is incapacitated for the particular work, he was engaged in at the time of the accident. His capability to obtain some other work does not affect his title to compensation for permanent total disablement.

On the other hand, according to the second interpretation, unless an injured workman is incapacitated for all work, he was capable of performing at the time of the accident, in addition to the particular work, he was engaged in at the time of the accident, he will not be treated as having suffered permanent total disablement. The second interpretation, hence, throws open before the workman the chances for alternative employment, in addition to compensation for permanent partial disablement.[6]

The incapacity, that is contemplated for deciding whether there is permanent total disablement, is not mere physical incapacity[7] but incapacity to secure employment.

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4. *Supra*, n.1.
5. *G.M., G.I.P.Railway* v. *Shankar*, A.I.R.1950 Nag.201.
6. *Infra*, n.11.
7. *Ahmed Abdul* v. *H.K.Sehgal*, A.I.R.1965 Bom.32.

Earning of wages depends as much on the demand for the workman's labour as it does upon his physical ability to work. If, because of his apparent physical defects, no one will employ him, however efficient he may be, in fact, he has lost the capacity to earn wages, as if he were paralysed in every limb.[8] For example, a man is incapacitated for work, when he has a physical defect, which makes his labour unsaleable in any market, reasonably accessible to him.[9] If, as a result of an accident, an already useless or dead organ like an already blind eye-ball has to be removed, the injury may not, in fact, reduce his capacity to work. But at the same time, he gets stamped with a visible mark of physical deficiency or deformity, which dissuades employers from employing him. Thus, though the capacity of a workman for work may remain quite unimpaired, his eligibility as an employee may be completely lost and his earning capacity destroyed.[10]

Permanent partial disablement is such disablement as reduces a workman's earning capacity in every employment, he was capable of undertaking at the time of the accident,

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8. Canara Public Conveyance Co. v. Usman Khan, (1966) 1 L.L.J. 826 (Mys.). See also Ball v. William Hunt & Sons Ltd., [1912] A.C.496 (H.L.).

9. Per Earl Loreburn, L.C. in Ball v. William Hunt & Sons Ltd., supra, n.8 at 499-500. See also Ahmed Abdul v. H.K.Sehgal, supra, n.7.

10. Sukhai v. Hukan Chand Jute Mills, A.I.R.1957 Cal.601(D.B); Ball v. William Hunt & Sons Ltd., [1912] A.C.496 (H.L.).

causing the disablement.[11] While permanent total disablement affects his very capability to get work, permanent partial disablement affects only the wages for the work done.[12] In other words, while the former makes a workman's labour unsaleable in labour market, the latter makes his labour saleable for less than it would otherwise fetch.[13]

Temporary disablement can also be either total or partial under the Workmen's Compensation Act, 1923.[14] Temporary total disablement is that, which incapacitates a workman temporarily for all work, he was capable of performing at the time of the accident, resulting in such disablement.[15] Temporary partial disablement is such temporary disablement as reduces the earning capacity of a workman in any employment, in which he was engaged at the time of the accident, resulting in the disablement.[16]

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11. Workmen's Compensation Act, 1923, Section 2 (1) (g). Injuries, which shall be deemed to result in permanent partial disablement, are listed in Schedule I, Part II. See also Hutti Gold Mines Co. v. Ratnam, (1965) 2 L.L.J. 20 (Mys.).
12. Moti Lal v. Thakur Das, (1985) 2 L.L.N.951 (All.).
13. See Ball v. William Hunt & Sons Ltd., [1912] A.C.496 at p.500, per Earl Loreburn, L.C.
14. But under the Employees' State Insurance Act, 1948, in the case of temporary disablement, no distinction is made between total and partial. In that Act, 'temporary disablement' means a condition, resulting from an employment injury, which requires medical treatment and renders an employee, temporarily incapable of doing the work, he was doing prior to or at the time of injury. See Employees' State Insurance Act, 1948, Section 2 (21).
15. Workmen's Compensation Act, 1923, Section 2 (1) (l).
16. Id., Section 2 (1) (g).

The amount of compensation, in case of death under the Workmen's Compensation Act, 1923, is an amount, equal to forty percent of the monthly wages[17] of the deceased workman, multiplied by the relevant factor[18] or an amount of twenty thousand rupees, whichever is more.[19] From this

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17. Id., Section 4(1)(a), read with Explanation 11. There are three methods of calculating 'wages'. If the workman has been in the service of the employer during a continuous period of not less than twelve months, immediately preceeding the accident, the monthly wages of the workman shall be one-twelfth of the total wages in the last twelve months of that period. If the whole of the continuous period of service, immediately preceeding the accident, is less than one month, the monthly wages of the workman shall be the average monthly amount, which was being earned by a workman, employed on the same work by the same employer during the twelve months, immediately preceeding the accident or if there was no such workman employed by him, the average monthly amount being earned by a workman, employed on similar work in the locality. In other cases, the monthly wages shall be thirty times the total wages, earned for the last continuous period of service, immediately preceeding the accident, divided by the number of days comprising such period. See Id., Section 5. The formula for calculating 'wages' under the Workmen's Compensation Act, 1923 enables even a temporary worker or one, who has been employed only for a few days, to have the right to claim compensation in the event of an injury. See Sunil Rai Choudhuri, Social Security in India and Britain (1962), p.58.

18. Workmen's Compensation Act, 1923, Section 4(1)(a), read with Explanation I and Schedule IV. The 'relevant factor', in relation to a workman, means the factor, specified in the second column of Schedule IV against the entry in the first column of that Schedule, specifying the number of completed years of the age of the workman on his last birthday, immediately preceeding the date, on which the compensation fell due. With increase in the age, the relevant factor goes on decreasing.

19. Ibid. If a workman meets with an accident and dies at the age of 35 and at that time he draws monthly wages of Rs.900/-, the relevant factor, applicable to his case, is Rs.197/06 and the compensation, payable, is an amount, equal to forty percent of the monthly wages of the

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amount of compensation, payable to the dependants, an amount, not exceeding fifty rupees, is paid by the Commissioner towards funeral expenses to the person, who incurred such expenses.[20]

(f.n.19 contd.) deceased, multiplied by Rs.197/06, the relevant factor.

As per Explanation II to Section 4(1) of the Workmen's Compensation Act, 1923, where the monthly wages of a workman exceed one thousand rupees, his monthly wages for the calculation of compensation shall be deemed to be Rs.1000/- only. The Law Commission of India has emphasized the need to remove the injustice, resulting from treating unequals as equals by deleting Explanation II to Section 4. Further, according to the Commission, having regard to the rise in the cost of living and the resultant fall in the value of money and in view of the upward revision of the minimum wages by 150%, the minimum compensation, in case of death, has to be revised upwards by substituting the figure Rs.50,000/- for Rs.20,000/-. See the Law Commission of India, One Hundred and Thirty Fourth Law Commission Report on Removing Deficiencies in Certain Provisions of the Workmen's Compensation Act, 1923 (1989), pp.33, 35. It has to be noted that the quantum of compensation, payable in case of death, is revised by substituting for the words "forty percent" and "twenty thousand rupees" in Section 4 (i)(a) of the Workmen's Compensation Act, 1923, the words "fifty percent" and "fifty thousand rupees" respectively. But this amendment will come into force only on such date as the Central Government may, by notification in the Official Gazette, specify. See Workmen's Compensation (Amendment) Act, 1995, Sections 1 (2) and 4.

20. Workmen's Compensation Act, 1923, Section 8(4). According to the Law Commission of India, it is not too much to expect the employer to pay for the last rites of a workman, who has lost his life in his employment, to a reasonable extent. So it has recommended that the employer may meet the actual funeral expenses of the deceased workman, subject to an upper limit of a sum, equivalent to two months' wages, in addition to paying compensation as per the Act. See the Law Commission of India, supra, n.19, pp.39,40. It has to be noted that after omitting the words "shall deduct therefrom the actual cost of the workman's funeral expenses, to an amount not exceeding fifty rupees and pay the same to

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In case of the permanent total disablement, the injured workman shall be entitled, under the Workmen's Compensation Act, 1923, to an amount, equal to fifty percent of the monthly wages,[21] multiplied by the relevant

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(f.n.20 contd.) the person by whom such expenses were incurred and" in Section 8(4), a new sub-section (4) is inserted after sub-section (3) of Section 4 of the Workmen's Compensation Act, 1923, requiring the employer, in the event of death of an injured workman, to deposit with the Commissioner a sum of one thousand rupees towards the funeral expenses of the workman, in addition to the compensation under sub-section (1). But this amendment will come into force only on such date as the Central Government may, by notification in the Official Gazette, specify. See Workmen's Compensation (Amendment) Act, 1995, Sections 1 (2), 4 and 6.

21. Workmen's Compensation Act, 1923, Section 4 (1) (b), read with Explanation II. Where the monthly wages of a workman exceed one thousand rupees for calculation of compensation, his monthly wages shall be deemed to be one thousand rupees only. In Bharat Gold Mines Ltd., v. Hanuman and others, (1993) 2 L.L.J.313 (Kant.) (D.B.), a workman, who contracted silicosis, was terminated from service. His employer refused to pay compensation to the workman with reference to the wages on the date of termination of service. It was held that compensation has to be made on the basis of wages, drawn on the date of actual termination of services of workman and not on the date of contracting occupational disease. In B.M. & G. Engineering Factory v. Bahadur Singh, A.I.R. 1955 All. 182 (D.B.), it was held that the term 'wages' has to be interpreted in the light of the definition given in the Workmen's Compensation Act, 1923 and not the one, given in the Payment of Wages Act. The word 'privilege' or 'benefit' in the definition in the Workmen's Compensation Act includes the benefit of 'free accommodation'. In Hindustan Aeronautics Ltd., v. Bone Jan, 1971 (22) F.L.R.308 (Mys.) (D.B.), it was held that the word 'privilege' or 'benefit' covers overtime allowance and outstation allowance and in Luizina Cyril Vaz v. M/s.Caltex (India) Ltd., 1973 (27) F.L.R.320 (Bom.), it was held that the term 'wages' covers food allowance, overseas allowance, devaluation supplement and overtime wages, paid to a seaman. In Chopra Printing Press v. Des Raj, (1964) 1 L.L.J.658 (Punj.), it was held that

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factor[22] or an amount of twenty four thousand rupees, whichever is more.[23] The compensation, payable in the case of permanent total disablement, is, therefore, more than that admissible to dependants in the event of the death of the

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(f.n.21 contd.)
where a workman actually receives wages less than the one prescribed under the Minimum Wages Act, 1948, he would be deemed to be drawing the monthly wages as prescribed by the said Act.

22. Workmen's Compensation Act, 1923, Section 4, Explanation I and Schedule IV. The relevant factor is the same as in the case of death.

23. Id., Section 4 (1) (b). Thus the compensation, payable for permanent total disablement to a workman, aged 35 and drawing a monthly wages of Rs.900/-, would be Rs.88,677/-, being 50 per cent of Rs.900/-, multiplied by Rs.197/06, the relevant factor. Having regard to the rise in the cost of living and the resultant fall in the value of money and in view of the upward revision of the minimum wages by 150%, the Law Commission of India has recommended that the minimum compensation, in case of permanent total disablement, has to be revised by substituting the figure Rs.60,000/- for Rs.24,000/-. See the Law Commission of India, supra, n.19 at p.35.

The quantum of compensation, payable for permanent total disabbement, is revised by substituting for the words "fifty percent" and "twenty four thousand rupees" in Section 4(1)(b) of the Workmen's Compensation Act, 1923, the words "sixty percent" and "sixty thousand rupees" respectively. Explanation II to Section 4(1) of the Act of 1923 is also amended by substituting for the words "one thousand rupees", the words "two thousand rupees". But these amendments will come into force only on such date as the Central Government may, by notification in the Official Gazette, specify. See Workmen's Compensation (Amendment) Act, 1995, Sections 1 (2) and 4.

workman.[24]

For permanent partial disablement, in the case of a scheduled injury,[25] such percentage of the compensation, which would have been payable in the case of permanent total disablement, as is proportionate to the percentage of the loss of earning capacity,[26] specified therein, is payable.[27] In the case of injuries, not specified in Schedule I, such percentage of the compensation, payable in the case of permanent total disablement, as is proportionate to the loss

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24. S.C. Srivastava, Social Security and Labour Laws (1985), p.93.

25. See Workmen's Compensation Act, 1923, Schedule I, Part II

26. The percentage of the loss of earning capacity, stated against the injuries in Part II of Schedule I, is only the minimum to be presumed in each case and the applicant is entitled to prove that the loss of earning capacity was more than the minimum, so prescribed. The Commissioner may come to his own conclusion with regard to the loss of earning capacity in each case on the basis of the evidence, led before him. See Samir U. Parikh v. Sikandar Zahiruddin, 1984 Lab.I.C.521 (Bom.).

27. Thus, if a workman, drawing monthly wages of Rs.900/-, gets Rs.88,677/- as compensation in case of permanent total disablement, the compensation, he is to receive for permanent partial disablement, for example, loss of thumb of one hand, will be 30% of Rs.88,677/- i.e., Rs.26,603/10. See Workmen's Compensation Act, 1923, Schedule I, Part II, Serial No.5; M.L.Kumar, Employer's Liability on Accidents (1992), p.51.

of earning capacity,[28] is payable. Where more injuries than one are caused by the same accident, the amount of compensation, payable for them, shall be aggregated. But the aggregated amount shall not, in any case, exceed the amount, which would have been payable for permanent total disablement.[29]

To claim compensation for scheduled injuries under the Workmen's Compensation Act, 1923, the workman is required only to show that he has suffered injury during the course of employment and that the particular injury falls within the Schedule. But in the case of non-scheduled injuries, the workman must show by leading evidence that he has suffered loss of earning capacity to a particular extent and he would be entitled to compensation, commensurate with the loss of earning capacity, suffered by him.[30]

In the case of scheduled injuries, the extent of loss of earning capacity is determined by the statute itself.[31]

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28. The power to assess the loss of earning capacity, in case of non-scheduled injuries, was conferred upon the medical practitioner by the 1984 amendment of the Workmen's Compensation Act, 1923 (Act No.22 of 1984, Section 3 w.e.f. 1-7-1984.) Prior to the 1984 amendment, the provision, relating to non-scheduled injuries, ran as follows:- "(ii) in the case of an injury not specified in Schedule I such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury" See also infra, nn.40, 41, 42, 43.

29. Workmen's Compensation Act, 1923, Section 4(1) (c), Explanation I.

30. Calcutta Electric Supply Corpn. v. H.C.Das, 1968 Lab.I.C. 779 (Cal.) (D.B.).

31. For example, in case of total loss of vision of a workman,

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So primafacie, no further investigation is needed to find out the extent of loss of earning capacity.[32] But in the case of non-scheduled injuries, the loss of earning capacity is to be assessed by a medical practitioner after the 1984 amendment of the Workmen's Compensation Act, 1923.[33] A medical practitioner may be competent to assess the loss of physical capacity. But the problem is that, though the loss of physical capacity may be relevant in assessing the extent of loss of earning capacity, the former loss is not co-extensive with the latter loss[34] and the former cannot prove the

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(f.n.31 contd.) his compensation has to be assessed in accordance with Item 26 of Part II of Schedule I i.e. at 30% loss of earning capacity. See Katras Jherriah Coal Co. v. Kamakhaya Paul, 1976 Lab.I.C.751 (Cal.) (D.B.). See supra, nn.25, 26 & 27.

32. P.E.Davis & Co. v. Kesto Routh, A.I.R.1968 Cal.129 (D.B.). But in Sidappa v. G.M., K.S.R.T.C., 1988 (57) F.L.R.500 (Kant.) (D.B.), it was held by the Karnataka High Court that though the injury, suffered by a workman, falls under one of the items, specified in Part II of Schedule I, listing injuries, deemed to result in permanent partial disablement, if it is found that there has been permanent total disablement, having regard to the nature of employment, in which the workman concerned was employed, he would be entitled to the compensation in accordance with the IV Schedule. See also Samir U. Parikh v. Sikandar Zahiruddin, supra, n.26.

33. Supra, n.28; infra nn.40, 41.

34. In Janatha Modern Rice Mills v. G.Satyanarayana, 1995 Lab.I.C.677 (A.P.), a helper in a rice mill met with an accident in the course of his work. As a result, his left hand had to be amputated upto below elbow. His loss of earning capacity was assessed by the doctor as 60%. It was held that his loss of earning capacity had to be taken as 100%, instead of 60%, as certified by the doctor, as the workman was not able to work with the

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latter.[35] Earning capacity is the capacity to earn money. Physical incapacity may or may not affect the earning capacity. For example, the weakening or loss of a limb may make it impossible for the affected workman to do his former job, with his former efficiency. So, although he may obtain employment, he is not offered remuneration at the old rate. Here physical incapacity leads to reduction, though not total loss of the earning capacity. On the other hand, the weakening or even loss of a limb may not stand in the way of a workman's obtaining his former employment and his doing it with former efficiency. So there is no loss of earning capacity, despite physical incapacity.[36] Further, loss of earning capacity has inexorable nexus with the type of profession of the workman. For instance, loss of finger of a painter could result in total loss of his earning capacity. But loss of a finger

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(f.n.34 contd.) amputated hand at all. See also United India Insurance Co.Ltd., v. Sethu Madhavan, 1992 (2) K.L.T.702 (D.B.); Sarat Chatterjee & Co. v. Mod. Khalil, 1979 Lab. I.C.401 (Cal.) (D.B.); Ram Naresh Singh v. Lodhna Colliery Co.Ltd., 1973 Lab.I.C.1656 (Cal.) (D.B.); Calcutta Licensed Measures Bengal Chamber of Commerce. v. Md.Hossain A.I.R.1969 Cal. 378 (D.B.); P.E.Davis & Co. v. Kesto Rouch, A.I.R.1968 Cal.129 (D.B.); Calcutta Electric Supply Corporation Ltd., v. Habul Chandra Das, A.I.R.1968 Cal.278(D.B.); Commissioners for the Port of Calcutta v. Prayag Ram, A.I.R.1967 Cal.7 (D.B.); Kali Das Ghosal v. S.K.Mondal, A.I.R.1957 Cal.660 (D.B.).

35. Manager, Khoomtaie Tea Estate v. Ramiya Mal, 1978 Lab.I.C. 139 (Gau.) (D.B.); Bhanora Colliery Co. v. Poda Teli, (1974) 2 L.L.J.520 (Cal.) (D.B.); Calcutta Licensed Measures Bengal Chamber of Commerce v. Md.Hossain, A.I.R.1969 Cal. 378 (D.B.); Commissioners for the Port of Calcutta v. Prayag Ram, A.I.R.1967 Cal.7 (D.B.).

36. Commissioners for the Port of Calcutta v. Prayag Ram, A.I.R.1967 Cal.7 (D.B.).

of a head-load worker need not have that effect.[37] Moreover, earning capacity is different from actual earning. For example, the employer may offer alternative job to the injured workman out of mercy. So the workman may not suffer any loss or reduction in earnings. But this stability in earnings does not imply that there is no loss of earning capacity. This is because he is offered job by the employer out of mercy and not because of the capacity of the workman to do it.[38] The medical practitioner may find it difficult to

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37. United India Insurance Co.Ltd., v. Sethu Madhavan, 1992 (2) K.L.T.702 (D.B.). See also Sarjerao Unkar Jadhav v. Gurindar Singh, (1992) 1 L.L.J.156 (Bom.). A contractor was engaged by the Electricity Board for doing painting work. A workman, employed by the contractor, sustained injuries in the course of his work. His loss of earning capacity was assessed as 20% by the Commissioner. On appeal, the Bombay High Court held that the percentage of loss of earning capacity, as assessed by the Commissioner, was very low, considering the nature of his job. The percentage of loss of earning capacity should not have been assessed with reference to physical incapacity but with reference to the loss in earning capacity in the context of the nature of the job, that he was engaged in, as laid down by the Supreme Court in Pratap Narain Singh Deo v. Shrinivas Sabata, (1976) 1 L.L.J.235. Siddappa v. G.M., K.S.R.T.C., 1988 (57) F.L.R.500 (Kant.) (D.B.) and P.K.Parmar v. G.Kenal Construction & ANR, (1985) 1 L.L.J.98 (Guj.) (D.B.) are other cases, establishing the nexus between loss of earning capacity and the nature of employment of the injured workman.

38. V.Jayaraj, v. Thanthai Periyar Transport Corpn. Ltd., (1989) 2 L.L.J.38 (Mad.). A conductor, working in State-owned Transport Corporation, lost his hearing capacity due to shock, received by him in an accident in the bus, in which he was working. The Commissioner for Workmen's Compensation fixed the loss of earning capacity at 20%, even though the medical certificate showed that there is 100% sensorineural hearing loss on right ear and 73.5% hearing loss on the left ear. On appeal to the High Court

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assess these complex factors, relating to loss of earning capacity.[39] This has led to divergence of opinion as to who should assess the loss of earning capacity. According to one view, the legislative wisdom, empowering the medical practitioner to assess the loss of earning capacity,[40] should be respected. This is because the statute specifically postulates that the compensation, to be awarded for non-scheduled injury, should be proportionate to the loss of earning capacity, as assessed by the qualified medical practitioner. The expression "as assessed by the qualified medical practitioner" is not ambiguous. So the legislature's intention in accepting and recognizing the expert opinion of the medical practitioner cannot be overlooked.[41] But, according to the opposite view, the Commissioner for Workmen's Compensation is the competent authority to assess the loss of earning capacity, as the loss of earning capacity cannot be

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(f.n.38 contd.) of Madras, it was held that the loss of earning capacity has to be calculated in terms of permanent partial disability, which the workman has been subjected to. The fact, that the workman is continued in the employment and gets old wages, will not absolve the employer from paying the compensation. The employer may continue him in the old post and give him old wages by way of grace. But that would not dis-entitle the workman to claim compensation. See also Exec.Engr., P.W.D. v. Narain Lal, 1977 Lab.I.C.1827 (Raj.); Saraswathi Press v. Nand Ram, 1971 Lab.I.C.1341 (All.).

39. United India Insurance Co. Ltd., v. Sethu Madhavan, supra, n.37.

40. Supra, n.33.

41. New India Assurance Co. Ltd., v. T.P.Sreedharan, 1995 Lab.I.C.602 (Ker.) (F.B.).

co-extensive with the physical incapacity but depends upon several other factors, in addition to the physical incapacity.[42] But there is still another view, which reconciles the above mentioned conflicting views. According to this view, normally, the loss of earning capacity, assessed by the qualified medical practitioner, is to be accepted by the Commissioner, after examination of the medical practitioner. However, the Commissioner can disagree with the assessment of loss of earning capacity, made by the qualified medical practitioner and consider other evidence, in special circumstances.[43] Of these three views, the last one is to be preferred.

For temporary disablement, whether total or partial, an injured workman is entitled to half-monthly payment of the sum, equivalent to twenty five percent of the monthly wages of the workman.[44] This means a workman would receive 50% of

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42. United India Insurance Co. Ltd., v. Sethu Madhavan, 1992 (2) K.L.T.702 (D.B.). See also supra, nn.36, 37, 38 & 39. Sadhana P. Pande, "who should determine the loss of earning capacity - the Workmen's Compensation Commissioner or a qualified medical practitioner", 16 C.U.L.R.412 (1992).

43. Oriental Insurance Co.Ltd., v. Tajuddin Abdul Rahim Karanche, 1995 (71) F.L.R.619 (Kant.); Manager, Achoor Estate, H.M.Ltd., v. Pilakkal Nabeesa, 1994 Lab.I.C.1974 (Ker.) (D.B.); D.M., New India Assurance Co. Ltd., Cuttack v. Sarbeswar Patra and another, 1994 Lab.I.C.NOC 253(Ori.)

44. Workmen's Compensation Act, 1923, Section 4 (1) (d). No half-monthly payment shall, in any case, exceed the amount by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of wages, he is earning after the accident. Id., Section 4 (2), Proviso (b).

his monthly wages in a month towards temporary disablement, whatever may be his monthly wages.[45]

Any half-monthly payment may be reviewed by the Commissioner, on the application either of the employer or of the workman.[46] After review, the half-monthly payment may be continued, increased, decreased or ended.[47] If the accident is found to have resulted in permanent disablement, the half-monthly payment will be converted into a lumpsum less the amount, already received by way of half-monthly payment.[48] Any right to receive half-monthly payment may be commuted

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45. This change, brought about by the 1984 Amendment of the Workmen's Compensation Act, 1923 is advantageous to persons drawing higher wages. Previously, persons drawing more than Rs.900/- but not more than Rs.1000/- were eligible for compensation for temporary disablement at the rate of only Rs.175/- per half month i.e. Rs.350/- p.m. But persons drawing Rs.60/- p.m. were eligible to receive Rs.36/-, which was more than half of their monthly wages every fortnight i.e. more than full wages for a month. But after the 1984 Amendment, they are entitled to only half of their wages in a month. The 1984 Amendment has taken away the discrimination between persons drawing lesser wages and those drawing higher wages. V.Jaya Surya Rayalu, 'Extent of Liability and Principles Determining Compensation under the Workmen's Compensation Act, 1923 - A Critical Survey with Special Reference to the 1984 Amendment", 1 S.C.J., 12 at 18-19.(1989) See also Workmen's Compensation Act, 1923, Schedule IV.

46. The application should be accompanied by the certificate of a qualified medical practitioner that there has been a change in the condition of the workman. See Workmen's Compensation Act, 1923, Section 6(1). An application for review may be made without medical certificate in certain cases. Workmen's Compensation Rules, 1924, Rule 3.

47. Workmen's Compensation Act, 1923, Section 6(2).

48. Ibid.

into a lumpsum by the Commissioner.[49]

Thus, under the Workmen's Compensation Act, 1923, in cases of death and permanent disablement, lumpsum payments are granted, depending on the monthly wages and age of the deceased/injured workman. In case of permanent partial disablement, lumpsum payment is made, depending on the monthly wages, age and the percentage of loss of earning capacity. For temporary disablement, whether total or partial, half-monthly payments are made. But the quantum of compensation, payable except for temporary disablement, stands restricted by the provision, limiting the monthly wages for calculation of compensation to Rs.1,000/-.[50] Today, workers in private or government industries generally get more than Rs.1,000/- p.m. as salary. Hence, the quantum of compensation for death and permanent disablement is hardly geared to the actual salary of the workers.[51]

Certain conditions are essential for the payment of compensation under the Workmen's Compensation Act, 1923. The first condition is that the incapacity must be for a period longer than the waiting period of 3 days.[52] Secondly,

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49. Id., Section 7; Workmen's Compensation Rules, 1924, Rule 5

50. Supra, nn.19 and 21.

51. V.Jaya Surya Rayalu, supra, n.45 at 13.

52. Workmen's Compensation Act, 1923, Section 3(1), Proviso (a). Though the idea of a waiting period seems to be in contradiction with the principle of occupational risk,

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the injury, unless it is fatal, must not be due to the influence of drink or drugs or the wilful disobedience by the workman of an order or a safety rule or the wilful removal or disregard of a safety device.[53] Thirdly, notice of the accident[54] has to be given to the employer as soon as

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(f.n.52 contd.) which requires that compensation should begin from the moment, the loss occurs, a waiting period was considered desirable to discourage malingering and reduce the burden, caused by the payment of compensation for minor accidents. The original Workmen's Compensation Act of 1923 prescribed a waiting period of 10 days. As per the recommendation of the Royal Commission, the waiting period was reduced from 10 to 7 days by the Amending Act of 1933. The Amending Act of 1959 has not only allowed dating back for incapacity, lasting for 28 days or more but has also reduced the period from 7 to 3 days in all cases. See Sunil Rai Choudhuri, Social Security in India and Britain (1962), p.42.

53. Workmen's Compensation Act, 1923, Section 3(1), Proviso (b). See M/s.Deep Metal Industries, Chakan v. B.D.Gaikwad, 1995 Lab.I.C.1002 (Bom.). An unskilled workman oiled a machine without closing it, he being not aware of any rules or instructions in this regard. It was held that the workman could not be considered to be wilfully disobedient, as wilful disobedience means some thing more than a mere violation of a rule.

54. 'Notice of accident' in Section 10(1) would mean the notice of the details of the accident and it may not be necessary to set out the details of any ascertained amount of claim. See Chhatiya Devi Gowalin v. Rup Lal Sao, 1978 Lab.I.C. 1368 (Pat.). The words 'notice of accident' do not mean notice of the details of accident. See Ali mohamed v. Shankar, A.I.R.1946 Bom. 169 (D.B.). It is not necessary that there should be notice of every trivial accident. If an accident, too trivial, in the first instance, to require notice, subsequently, develops serious consequences, the obligation to give notice as soon as practicable would be met by giving notice, when the consequences ensue. Until then, there has not really been an accident. Ahmedabad Victoria Iron Works Ltd., v. Maganlal, A.I.R. 1941 Bom.296 (D.B.).

It is possible that the employer may deny receipt of

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practicable[55] after the happening of the accident, in the prescribed manner.[56] But want of or any defect or any irregularity in a notice is not a bar[57] to the entertainment of a claim, if the failure to do so was due to sufficient

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(f.n.54 contd.) notice or may not maintain the required notice - book under sub-section (3), and nice questions of fact, requiring evidence, may then arise. So the giving of notice should be a facility, allowed to the workman and not an obligation, imposed on him. He can avail himself of the facility in order to preserve evidence of his bona fides. But failure to do so should not entail a bar to the claim being entertained. See Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.84.

55. According to the original Act, a notice had to be given to the employer as soon as practicable after the happening of the accident and before the workman voluntarily left the employment, in which he was injured. The Act of 1938, however, deleted the latter requirement. Now notice has only to be given as soon as practicable. See Sunil Rai Choudhuri, Social Security in India and Britain (1962) p.48. No cast-iron rule can be laid down, in regard to what is meant by 'as soon as practicable'. It depends on the circumstances of each case. A notice, given two months after the accident, may, if the victim of the accident is continuously in the hospital, be held to be one, given 'as soon as practicable', Bansidhar v. Ramachandra, A.I.R.1960 M.P.313.

56. Workmen's Compensation Act, 1923, Section 10. The Act prescribes no particular form, in which the notice should be made. However, the obligation to serve the notice suggests that it must be a written notice. See Ahmedabad Victoria Iron Works Ltd. v. Maganlal, A.I.R.1941 Bom.296 (D.B.).

57. Bhagwanji Murubhai Sodha v. Hindustan Tiles and Cement Industries, [1977] 50 F.J.R.97 (Guj.); Central Engg. Corporation v. Dorai Raj, A.I.R.1960 Ori. 39; Bhagwandas v. Pyarelal, A.I.R.1954 M.B.59.

cause[58] or if the employer had knowledge[59] of the accident from any other source at or about the time, when it occurred or if the claim is in respect of the death of a workman, which occurred on the employer's premises.[60] The notice may be served on the employer[61] by delivering it at the

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58. Workmen's Compensation Act, 1923, Section 10(1), Proviso 5. What is 'sufficient cause' within the meaning of S.10 can only be decided in each particular case with reference to the facts and circumstances of that case. See Salamat v. Agent, E.I.R., A.I.R.1938 Cal.348 (D.B.). The fact that the applicant is suffering from typhoid (Brahma Metal and General Engg. Factory v. Bahadur Singh, A.I.R.1955 All. 182 (D.B.)) or illness, resulting in his being a complete wreck after his discharge from the hospital (Pollachi Transport Ltd. v. Arumuga Kounder, A.I.R.1938 Mad.485 (D.B.)) constitutes 'sufficient cause'.

59. Where an injured person, working in a mill, is removed to the hospital for treatment of injury, caused, while working in the mill and after the discharge of that person from the hospital, the management of the mill interviews him, it is reasonable to suppose that the management of the mill knew how the accident had occurred. Fakiragram Rice Mills v. Ramu Indu, A.I.R.1950 Ass.188 (D.B.). See also Divl. Forest Officer, Gwalior v. Baijnatibai, 1994 Lab.I.C.2561 (M.P.) (D.B.); Mohammed Koya v. Balan, (1987) 2 L.L.J.486 (Ker.) (D.B.); Mang. Director, Orissa S.R.T. Corpn. v. Surendra Kumar, 1986 Lab.I.C.1997 (Ori.); Bhagwandas v. Pyarelal, A.I.R.1954 M.B.59; Abbu Bakar Abdul Rahman & Co. v. Narayan, A.I.R.1933 Nag.272.

60. Workmen's Compensation Act, 1923, Section 10(1), Proviso 4. In M/s.Deep Metal Industries, Chakan v. B.D.Gaikwad, 1995 Lab.I.C.1002 (Bom.); entertaining claim for compensation, in the absence of formal notice, was held not legally defective, as accident had taken place inside the factory and to the knowledge of working partner and management had paid medical bills also. See also Makhan Lal Marwari v. Audh Behari, A.I.R.1959 All.586. Originally, notice had to be given in every case of accident. The exceptions were laid down by Section 7(a) of the Amending Act of 1933.

61. It may also be served upon any one of several employers or upon any person, responsible to the employer for the management of any branch of the trade or business, in which the injured workman was employed. Id., Section 10 (2).

residence or any office or place of business of the person concerned or by registered post, addressed to the persons concerned or by entry in the notice-book.[62] Fourthly, claim for compensation must be preferred before the Commissioner for Workmen's Compensation within the prescribed time.[63] Fifthly, the workman must not have instituted a

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62. See Id., Section 10(4). The State Government is empowered to require any specified class of employers to maintain at their premises, at which workmen are employed, a notice-book, in the prescribed form. The notice-book should be readily accessible, at all reasonable times, to an injured workman, employed on the premises and to any person, acting bonafide on his behalf. Id., Section 10(3).
    The Law Commission is of the view that the maintenance of notice-book should be obligatory for all employers. If the workman chooses to give an intimation, he should have available a bound book, in which the intimation will be entered. See Law Commission of India, supra, n.54, p.85.

63. Workmen's Compensation Act, 1923, Section 10(1). Generally, no claim for compensation will be entertained by the Commissioner, on expiry of the prescribed period of limitation. But the Commissioner may entertain and decide any claim to compensation in any case notwithstanding the claim has not been preferred in due time, if he is satisfied that the failure to prefer the claim was due to sufficient cause. See Workmen's Compensation Act, 1923, Section 10(1), Proviso (5). Workman's implicit belief that his employer will settle his claim (M/s.N.Pochiah & Co. v. Mulle Nagabhushanam, A.I.R.1966 A.P.99) was held to be sufficient cause and delay condoned. See also Shahabad Farmers Co-operative Marketing cum-Processing Society Ltd. v. Chajju Ram, 1989 A.C.J. 641 (P. & H.); Sarup Singh v. Mukund Lal, A.I.R. 1960 Punj.119; Brahma Metal and Gen. Engg. Factory v. Bahadur Singh, A.I.R.1955 All. 182 (D.B.). In Mangal Chand v. Forest Dept., Kinnaur, (1985) 1 L.L.J.369 (H.P.), there was one year delay in filing the claim for compensation. The Commissioner refused to condone delay because no "sufficient cause" was shown. It was held by the Himachal Pradesh High Court that pedantic and unpragmatic

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suit in a civil court for damages in respect of his injury.[64] Lastly, if the employer offers to have the workman examined, free of charge, by a qualified medical practitioner, the latter must submit himself for such examination.[65]

Compensation, payable to a workman, whose injury has resulted in his death, or to a woman or a person under a legal disability, is not to be paid otherwise than by deposit

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(f.n.63 contd.)
approach should not be adopted to the matter and the court need not be overstrict in expecting proof of the "sufficient cause", because refusal to condone delay might result in injustice by a meritorious case being thrown out without trial.

64. Id., Section 3(5). A workman can elect to avail himself of any other remedy other than provided by the Act. But he cannot have double payments and the employer is protected from double proceedings. The word "instituted" means "setting on foot an enquiry" and is more than mere filing of claim. Hence, if nothing more than mere filing of claim has been done and it is withdrawn before commencement of proceedings, the workman's dependants are not debarred from instituting suit in Civil Court. See Suppiah Chettiar v. Chinnathurai, A.I.R.1957 Mad. 216. The adoption of this exclusive remedy principle seems to have placed the Indian workman under some disadvantage, compared with his bretheren in England. The latter had till 1948 an alternative remedy under common law and the Employers' Liability Act and now have an additional remedy under the former. See Sunil Rai Choudhuri, op.cit., pp.49-50. See also Law Reform (Personal Injuries) Act, 1948, Section 2.

65. Id., Section 11. The Indian workmen's compensation system puts very great emphasis on the medical examination of workmen by doctors, employed or paid by the employer. The original payment and continuance of compensation depend upon the report of this doctor, unless the workman is able to arrange for his medical examination by a doctor of his own choice. See Sunil Rai Choudhuri, op.cit., pp.50-51.

with the Commissioner for Workmen's Compensation.[66] If any such payment is made directly by an employer to a claimant, that payment is not regarded as a payment of compensation at all.[67] Even equity will not come to rescue an employer to deduct the amount, which he has already paid to the dependants of a deceased workman, from the actual compensation payable by him.[68]

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66. Workmen's Compensation Act, 1923, Section 8(1). Any sum, other than the one mentioned in Section 8(1), amounting to not less than ten rupees, which is payable as compensation, may be deposited with the Commissioner on behalf of the person, entitled thereto. Id., Section 8(2).

67. Id., Section 8(1).

68. However, in the case of a deceased workman, an employer, may make to any dependant advances on account of compensation, not exceeding an aggregate of one hundred rupees. This sum is deducted by the Commissioner from the total compensation and is repaid to the employer. See Id., Section 8(1), Proviso.

    The Law Commission of India has pointed out that it is of little use to make an advance of a petty sum of one hundred rupees in the context of the steep fall in the value of the rupee, on account of inflation in the course of the last six decades. So it has recommended that an amount upto three months' wages should be permitted to be advanced to the dependants, thereby eliminating the need for the upward revision of the existing upper limit of advance from time to time. Law Commission of India, One Hundred and Thirty Fourth Law Commission Report on Removing Deficiencies in Certain Provisions of the Workmen's Compensation Act, 1923 (1989), pp.37, 38.

    The Proviso to Section 8(1) of the Workmen's Compensation Act, 1923 is amended by substituting for the words "not exceeding an aggregate of one hundred rupees, and so much of such aggregate", the words "of an amount equal to three months' wages of such workman and so much of such amount". This amendment, however, will come into force only on such date as the Central Government may specify by notification in the Official Gazette. See Workmen's Compensation (Amendment) Act, 1995, Sections 1 (2) and 6.

The Workmen's Compensation Act, 1923 contains certain provisions to ensure payment of compensation to workmen. One of such provisions is that compensation shall be paid to workmen as soon as it falls due.[69] This is because the right of the injured workman or his heirs to receive compensation gets crystallised, the moment, an accident takes place, causing personal injury.[70] The corresponding liability of the employer to make good this liability also springs forth simultaneously.[71] It is not dependent on the

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69. See Workmen's Compensation Act, 1923, Section 4-A(1).

70. Id., Sections 3(1), 4(1) and 4-A(1). See State of Punjab v. Vidya Devi, 1990 Lab.I.C.742 (P. & H.); P.Venkatanarasayyamma v. S.Subba Laxmi, 1986 Lab.I.C.1389 (A.P.); G.M., Western Railway v. Lala Nanda, 1984 Lab.I.C.245 (Guj.).

71. Saraswathi Press v. Nand Ram, 1971 Lab.I.C.1341 (All.). The above view of the Allahabad High Court was shared by the High Courts of Bombay (Margarida Gomes v. Mackinnon Mackenzie & Co. (P) Ltd., 1968 Lab.I.C.1197 (Bom.)); Rajasthan (Ramlal v. Regional Manager, F.C.I., 1981 Lab.I.C.1281 (Raj.)); Jammu and Kashmir (Vijay Ram v. Janak Raj, 1981 Lab.I.C.143); Karnataka (D.B.) (Supdg. Engineer, K.E.B, Hubli v. Kadappa Malappa Bhairannavar, 1983 Lab.I.C.1712) and Gujarat (G.M., Western Rly. v. Lala Nanda, supra, n.70) However, the High Court of Orissa took the view that compensation falls due only after a notice under S.10-A(i) has been served upon the employer. See Khillo Chandramma v. Hindustan Construction Co.Ltd., 1971 Lab.I.C.135 (Ori.) (D.B.). The law was finally settled in Pratap Narain Singh Deo v. Srinivas Sabata, 1976 Lab.I.C.222, where the Supreme Court held that the employer is liable to pay compensation, as soon as personal injury is caused to the workman by accident, arising out of and in the course of employment. See also P.Venkatanarasayyamma v. S.Subba Laxmi, supra, n.70.

determination of disputes, relating to liability, by the Commissioner.[72]

Even if the employer disputes his liability to pay compensation to the extent, claimed by the workman, he is required to make provisional payment of compensation.[73] He is required to deposit with the Commissioner an amount, based on the extent of liability, he accepts.[74] If the employer is in default in paying the amount within one month from the date it falls due, the Commissioner may[75] direct simple interest at the rate of six percent per annum

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72. P.Venkatanarasayyamma v. S.Subba Laxmi, supra, n.70; U.P.State Transport Corporation v. Abdul Hameed, 1985 (50) F.L.R.92 (All.) (D.B.); Pratap Narain Singh Deo v. Shrinivas Sabata, 1976 Lab.I.C.222 (S.C.); Santoline Fernandes v. Mackinnon Mackenzie & Co., [1968] 34 F.J.R. 124 (Bom.).

73. Workmen's Compensation Act, 1923, Section 4-A(2).

74. Ibid., See also Madan Mohan Varma v. Mohan Lal, 1982 Lab.I.C.1729 (All.).

75. Janatha Modern Rice Mills v. G.Satyanarayana, 1995 Lab. I.C.677 (A.P.). The Commissioner has no discretion as regards the rate of interest. It can only be simple interest at the rate of 6% per annum.

According to the Law Commission of India, the 6% rate of interest has now become outdated with the passage of years, since the provision was introduced. Hence, the Commission has recommended that Section 4-A(3) should be modified by substituting the words "simple interest at the rate of fifteen percent" in place of the words "simple interest at the rate of six percent". See Law Commission of India, One Hundred and Thirty Fourth Law Commission Report on Removing Deficiencies in Certain Provisions of the Workmen's Compensation Act, 1923 (1989), pp.36, 37.

Section 4-A(3) of the Workmen's Compensation Act,

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from the date of accident.[76] If there is no justification for the delay, a further sum not exceeding fifty percent of such sum may be recovered[77] from the employer by way of penalty by the Commissioner.[78] This stringent provision

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(f.n.75 contd.) 1923 is amended, making it obligatory on the part of the Commissioner to recover from the employer simple interest at the rate of twelve percent per annum or at such higher rate, not exceeding the maximum of the lending rates of any scheduled bank, as may be specified by the Central Government, by notification in the Official Gazette, on the amount due from the employer. The interest, recovered, shall be paid to the workman or his dependant. This amendment, however, will come into force only on such date as the Central Government may specify, by notification in the Official Gazette. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 5.

76. Workmen's Compensation Act, 1923, Section 4-A(3). For cases, in which simple interest was ordered, see Gulabdei Ahir v. Union of India, 1989 A.C.J.1072 (Pat.)(D.B.); Bharatkumar Premji Chauhan v. Gurukrupa Aluminium Corpn., 1985 Lab.I.C.1327 (Guj.); Madan Mohan Varma v. Mohan Lal, 1982 Lab.I.C.1729 (All.) (D.B.); Mathura Prasad v. Saiyed Kursheed Ahmad, 1981 Lab.I.C.1601 (All.); Iqbal Shamsuddin Ansari v. Gazi Salauddin Ansari, 1980 Lab.I.C.125 (Bom.) (D.B.); Pratap Narain Singh Deo v. Shrinivas Sabata, 1976 Lab.I.C.222 (S.C.).

77. Imposition of maximum penalty by the Commissioner should be supported by strong reasons. See M/s.Tata Refractories Ltd. v. Srikant Nath, 1994 Lab.I.C.NOC 355 (Ori.).

78. See Workmen's Compensation Act, 1923, Section 4-A(3). In Asst.Engr. (D and M.) R.S.E.B. v. Indira Devi and another, 1995 Lab.I.C.644 (Raj.), it was held that if the Commissioner is satisfied that there is deliberate delay on the part of the employer, then the Commissioner must impose the penalty. See also Divl. Forest Officer, Gwalior v. Baijnatibai, 1994 Lab.I.C.2561 (M.P.) (D.B.); Deviben Dudabhai v. Mgr., Liberty Talkies, Porbandar, 1994 Lab.I.C.2570 (Guj.); Nagar Palika, Mandsour v. Bhagwantibai, 1994 Lab.I.C.NOC 171 (M.P.); Kehar Singh v. State of H.P., 1989 Lab.I.C.NOC 30 (H.P.); Pratap Narain Singh Deo v. Shrinivas Sabata, 1976 Lab.I.C.222 (S.C.); Santoline Fernandes v. Mackinnon Mackenzie & Co.

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prevents an employer from sleeping on his legal duty and thus ensures the immediate payment of compensation.[79] Penalty and interest should not be ordered by the Commissioner in anticipation that the amount of compensation would not be deposited by the employer in time.[80] The discretion to levy a penalty must be exercised by the Commissioner judiciously.[81] The Commissioner cannot refuse to impose penalty merely on the ground that the amount of compensation, though with delay, has been deposited[83] or it has not been claimed by the claimants or the claim has been admitted by the employer, though

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(f.n.78 contd.) [1968] 34 F.J.R.124 (Bom.).
A proviso is added to Section 4-A(3) of the Workmen's Compensation Act, 1923, requiring that an order for the payment of penalty shall not be passed without giving a reasonable opportunity to the employer to show cause, why it should not be passed. A new sub-section (3-A) is added to Section 4-A, requiring the penalty recovered, to be credited to the State Government. This amendment, however, will come into force only on such date as the Central Government may specify, by notification in the Official Gazette. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 5.

79. Divl.Forest Officer, Gwalior v. Baijnatibai, 1994 Lab. I.C.2561 (M.P.) (D.B.). See also H.K.Saharay, Industrial and Labour Laws of India (1987), p.293.

80. New India Assurance Co.Ltd. v. Sailendra Kumar Nayak and others, 1995 (70) F.L.R.204 (Ori.). This was an appeal against an order of the Commissioner for payment of penalty and interest, in case the amount of compensation is not paid or deposited within one month.

81. Judicial exercise of the discretion to levy a penalty involves due consideration of relevant circumstances and giving an opportunity for explaining the cirumstances for the delay. See Oriental Insurance Co.Ltd. v. Jeyaramma, 1989 Lab.I.C.294 (Kant.)(D.B.).

82. Bharatkumar Premji Chauhan v. Gurkrupa Aluminimum Corpn., 1985 Lab.I.C.1327 (Guj.).

83. In Dalip Kaur v. G.M., Northern Rly., (1992) 1 L.L.J.762

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the compensation was not paid[84] or the employer has made some ex gratia payment to the dependants,[85] because the provision, requiring the immediate payment of compensation, is a mandatory one.[86] Interest and penalty, if not imposed by the Commissioner, can be imposed at the appellate stage by the High Court.[87]

No lumpsum or half-monthly payment, payable under the Workmen's Compensation Act, 1923, can be alienated or subjected to attachment nor can it pass to any person other than the workman.[88] This provision protects the workman from money lenders and court attachments.[89]

(f.n.83 contd.) (P. & H.), a workman died on March 17, 1986, while discharging his duties in the Loco DG shed at Bhatinda. Despite service of notice by the applicants on the employers, the latter did not deposit any compensation, whatsoever. The Commissioner held that the widow and daughter of the deceased were entitled to a compensation of Rs.58,480/- with interest at 6% p.a. from the date, they became entitled to this amount, till the date of realisation. But he did not impose penalty on the ground that it was not claimed by the claimants. On appeal the Punjab and Haryana High Court held that a court of law is not to rely upon the relief clause in the petition, while granting appropriate relief and imposed penalty of 35%.

84. Ram Dulari Kalia v. H.P.S.E. Board, 1987 Lab.I.C.748(H.P.).

85. Ibid.

86. Supra, nn.69, 70, 71 and 72.

87. Kehar Singh v. State of H.P, 1989 Lab.I.C.NOC 30 (H.P.).

88. Workmen's Compensation Act, 1923, Section 9.

89. Baksi and Mitra, Workmen's Compensation Act And Other Social Insurance Legislations (1959), p.45; Sunil Rai Choudhuri, op.cit., p.57; Manohar R. Idgunji, Social Insurance and India (1948), p.253.

The employer is liable to pay compensation to a workman, only if there exists an employer-and-employee relationship between the workman and his employer.[90] So, in many cases, persons, who want to get work done, try to avoid the liability for compensation by contracting with someone else to provide labour or to execute the work and then contend that there being no employer-and-employee relationship between the workman, who suffered the injury, and themselves, they are not liable to pay any compensation.[91] The liability of the principal employer for even the contractor's workman[92] prevents such escape from liability. Even though the liability for compensation is ultimately that of the contractor or the intermediary, the injured workman is entitled to recover compensation from the principal.[93]

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90. See supra, Chapter 3

91. See Vijayaraghavan v. Velu, (1973) 1 L.L.J.490 (Ker.) (D.B.).

92. Workmen's Compensation Act, 1923, Section 12.

93. In K.Koodalingam v. Supdt. Engr. & Ors., (1995) 1 L.L.J. 334 (Ker.) (D.B.); Public Works Department of the Government of Kerala engaged a contractor for construction of a canal. Two workmen, employed by the contractor to do the work, died in landslide, while at work. It was held that PWD, the principal employer, was liable to pay compensation and also entitled to be indemnified by the contractor. Contract between the principal and the contractor cannot affect the right of the workman or their dependants to claim compensation from either of them at their option. For other cases on the liability of the principal to compensate contractor's workmen, see

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For fixing liability on the principal employer for compensation,[94] it has to be proved that the execution of the work, in the course of which the workman is injured, should be an ordinary part of that person's trade or business.[95]

(f.n.93 contd.) The Commr., Tirumangalam Municipality v. Nokkammal and Ors., 1995 Lab.I.C.NOC 78 (Mad.); M.D., Orissa State Warehousing Corpn. v. Gitrarani Seal and Another, (1992) 1 L.L.J.619 (Ori.); Sarjerao Unkar Jadhav v. Gurindar Singh, (1992) 1 L.L.J.156 (Bom.).

94. The principal employer is liable for compensation only but not for interest or penalty as per Section 4-A(3). See Sarajerao Unkar Jadhav v. Gurindar Singh, (1992) 1 L.L.J.156 (Bom.).

95. In The Commr., Tirumangalam Municipality v. Nokkammal and others, 1995 Lab.I.C.NOC 78 (Mad.), the municipality entered into a contract with a contractor for construction of latrines. A workman of the contractor died in the course of employment. The municipality was held liable to pay compensation to the dependants of the deceased workman, construction of latrines being part of business of the municipality. The painting of electric poles was held to be not only for the purpose of the electricity supplier's trade or business, but ordinarily a part of his trade or business. See Sarjerao Unkar Jhadav v. Gurindar Singh, 1991 Lab.I.C.689 (Bom.). To constitute 'business', it must be an occupation, profession or calling or a commercial activity. The Travancore Devaswom Board is not doing any business and, hence, does not attract S.12. Travancore Dewaswom Board v. Purushothoman, (1989) 2 L.L.J.114 (Ker.) (D.B.). See also H.L.Kumar, Employer's Liability on Accidents (1992), p.76. Construction of roads, being one of the principal concerns of the PWD of the Government, inviting its serious attention, is "business" within the meaning of S.12. Hence that Department is the principal employer of the labourers, working under a contractor, employed by it. PWD v. Commr., Workmen's Compensation, 1981 Lab.I.C.493 (J. & K.) (D.B.). If a contractor is engaged by the Defence Department for demolition of certain barracks, a worker, engaged by the contractor, cannot hold the said Dept. to be responsible under Section 12(1) of the Act, the main business of the Defence Dept. being to defend the country. Garrison Engineer v. Guttamma, 1978 Lab.I.C.878 (Bom.). The work of loading and unloading of food grains, undertaken by

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If the work, done by the workman, is ordinarily part of the business of a person to execute certain work, then, ordinarily, he will do that work by his own workmen. He is not to escape liability for any accident, that takes place, merely by interposing a contractor.[96] The liability of the principal employer is attracted even in a case, where the contractor is engaged not in the course of but for the purpose of the principal employer's trade or business.[97] Further, before the principal can be made liable, it must be shown that the contractor was entitled to expect such workman to do his work at his orders and he was entitled to dismiss such workman. It must, in short, be proved that there was a contract of service between the workman and the contractor.[98] It has also to be proved that the accident, which gives rise to the liability for compensation, occurred

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(f.n.95 contd.) the FCI, was held to be a part of the trade or business of Corpn., which covers the purchase, storage, movement, transport, distribution and sale of food grains and other food stuffs. Food Corpn. of India v. Rahat Khan, (1973) 2 L.L.J.70 (Del.). The original construction of canals cannot be treated to be outside the ordinary course of business or trade of the Irrigation Department. Sardara Singh v. Sub-Divl. Officer, A.I.R.1963 Punj.217. But where a company carries on the business of manufacturing goods and requires a factory for performing the manufacturing process and the factory requires a chimney, the construction of chimney is no part of the ordinary trade or business of the company. New India Tannis Ltd. v. Aurora Singh, A.I.R.1957 Cal.613 (D.B.).

96. Karnani Industrial Bank v. Ranjan, A.I.R.1933 Cal.63(D.B)

97. See Workmen's Compensation Act, 1923, Section 12 (1).

98. In Lee Shi v. Consolidated Tin Mines, A.I.R.1939 Rang. 428 (D.B.), it was held that where there is only an

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on, in or about the premises,[99] on which the principal has undertaken or usually undertakes to execute the work or which are otherwise under his control or management.[100] It is also required that the accident must have occurred, while the workman was executing the work in the course of his employment.[101]

(f.n.98 contd.)
agreement, by which certain selected persons could come, when they chose, and do work on their own account, which would get for them remuneration from the contractor, the principal is not liable to compensate such workman.

99. The expression 'on, in or about' means either on the land or premises of the employer or the land or premises, where he was engaged with his workman in doing the work or in close proximity to such places. A workman, while returning from the railway station, after unloading rice bags there, was dashed by a lorry and died. It was held that the workman was working on, in or about the premises, which, here, covered not only the premises of the railway station but also the places, covered by the route of the lorry. See Bhuvaneswari Rice Mill v. Mannava Pullayya, A.I.R.1964 A.P.392 (D.B.). In Powell v. Brown, [1899] 1 Q.B.157 (C.A.), the expression 'on, in or about' was construed as being a geographical expression, involving the idea of certain physical continuity to the premises or works in question.

100. G. Sreedharan v. Hindustan Ideal Insurance Corpn. Ltd., 1976 Lab.I.C.732 (A.P.) (D.B.).

101. Vijayaraghavan v. Velu, 1973 Lab.I.C.1520 (Ker.) (D.B.).

The principal, who has paid the compensation,[102] is entitled to be indemnified[103] by the contractor[104] or any other person, from whom the workman could have recovered

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102. The amount of compensation, payable by the principal, has to calculated with reference to the wages of the workman under the employer, by whom he is immediately employed. See Workmen's Compensation Act, 1923, Section 12(1).

103. Indemnity, under the Workmen's Compensation Act, 1923, is co-terminus with compensation. It cannot exceed the amount of compensation. See K.S.E.Board v. M/s.Sundaram Estate, 1987 Lab.I.C.1152 (Ker.) (D.B.). The question of paying indemnity by the insurance company to the assured does not arise under S.12(2) of the Workmen's Compensation Act. See G.Sreedharan v. Hindustan Ideal Insurance Corporation, 1976 Lab.I.C.732 (A.P.) (D.B.).

104. In Binny Ltd. v. Regl. Poultry Officer, 1995 (70) F.L.R. 736 (Ker.), one R.Sobhana filed an application before the Commissioner for Workmen's Compensation, Quilon, alleging that her husband met with an accident, while employed by the petitioner in the work of loading and unloading of "CARE feed" at the Regl. Poultry Farm on Dec.2, 1983. Although notice was served on the respondents, it was not contested. Finally, the Commissioner for Workmen's Compensation, the second respondent, passed an award for realising an amount of Rs.23,100/- with interest thereon and directed the first respondent, the Regional Poultry Officer, to pay the amount to the claimant and further directed the petitioner to indemnify the Regional Poultry Officer under Section 12(2). In pursuance of this order, notice was issued under the Revenue Recovery Act for recovering from the petitioner the amount, paid by the first respondent to the claimant. In an appeal against this, it was held that issuance of notice under the Revenue Recovery Act was justified.

Indemnity will extend only as far as legal liability extends and no further. Where the employer is not liable to pay compensation but still pays out of pity, special grace, magnanimity or liberality, he has no right to recover it from the contractor. There is no legal right to indemnity, if there is no legal liability to give compensation. See State of Madras v. Sankiah Thevar, (1959) 1 L.L.J.390 (Mad.). Further, where the principal has himself been responsible for the situation, leading to the accident, the indemnity may not operate. Regional Manager, F.C.I. v. U.Sabiya Beevees, 1980 Lab.I.C.320 (Ker.) (D.B.).

compensation.[105]

The principle, underlying the liability of the principal employer, is to secure sure and speedy payment of compensation to workmen. A person, who employs others to advance his own business and interest, would be a more promising and certain source of recompense to the injured workman than the contractor, who may be a man of straw and whose straitened circumstances might jeopardise the chances of recovery of such compensation.[106] The workman is, thus, saved from the risks of dealing with the contractors and sub-contractors, who might, at times, be not as reliable as the principal employer, because of their financial instability.[107]

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105. The earlier view was that the contractor, referred to in S.12(2), was the contractor, who contracted directly, with the principal, as defined in S.12(1) and if there was any further subletting of the contract, an indemnity could not be obtained under the Act and must be sought by recourse to the civil court. See Mt.Machuni Bibi v. Jardine Menzies & Co., A.I.R.1928 Cal.399 (D.B.). However, the amendment, made by S.9 of Act XV of 1933, removed this defect and the language of the amended section now leaves no doubt that the indemnity is available against the contractor as well as against any other person, from whom the workman could have recovered compensation. See K.D.Srivastava, Workmen's Compensation Act, 1923 (1992), p.286. But an order, holding the principal liable to pay compensation, does not give the principal an absolute right to claim indemnity from the contractor. Where the contractor is not a party to the order, he is not bound by it and, therefore, it could not make him liable to indemnify the principal. See Patel Engineering Co. v. Chanda Bewa, 1973 Lab.I.C.618 (Ori.).

106. Public Works Department v. Commissioner, Workmen's Compensation, 1981 Lab.I.C.493, 495 (J. & K.) (D.B.).

107. See K.D.Srivastava, supra, n.105, p.8.

If the employer becomes insolvent[108] or the employer, being a company, has commenced to be wound up,[109] the insurer of the employer would be liable for the payment of compensation, provided he has entered into a contract with an insurer, in respect of any liability under the Workmen's Compensation Act, 1923.[110] The insurer, in such circumstances, stands in the shoes of the employer, having the same rights and liabilities of the latter.[111] However, the insurer's liability

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108. Workmen's Compensation Act, 1923, Section 14.

109. Except in the case of the insolvency of the employer or the winding up of the company, the injured workman or his dependants cannot proceed directly against the insurers for the recovery of compensation. National Insurance Co. Ltd. v. Jabunbi & Others, (1985) I L.L.J. 102 (M.P.); G.Sreedharan v. Hindustan Ideal Insurance Corporation, 1976 Lab.I.C.732 (A.P.) (D.B.). S.14 does not enable the insurance company to avoid its liability on the ground that the insured employer has not become insolvent or has made a composition or a scheme of arrangement with his creditors or being a company, the winding up proceeding has not commenced. See United India Fire & General Insurance Co. v. M/s. Machinery Manufacturers Corpn. Ltd. (1986) 2 Kar. L.J.67 (Kant.) (D.B.). The purport of S.14 is only that, in the circumstances mentioned therein, the right of the workman shall not be defeated and the insurer can then be substituted in the place of the insolvent employer. It does not operate as a prohibition against any proceedings before the Commissioner, involving the insurer, who is liable under a contract of insurance to discharge the liability of the employer for compensation. See United India Insurance Co. v. Gangadharan Nair, (1987) I L.L.J.448 (Ker.) (D.B.).

110. Workmen's Compensation Act, Section 14(1). This provision is not applicable to a company, which is wound up voluntarily merely for purposes of reconstruction or of amalgamation with another company. Workmen's Compensation Act, 1923, Section 14(7).

111. Id., Section 14(1). In New India Assurance Co.Ltd., v. Kotam Appa Rao & another, 1995 Lab.I.C.1087 (A.P.), the

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is restricted to his liability to the employer, as per the terms of the policy.[112] If the liability of the insurer to the employer is less than the liability of the employer to the workman, the workman may move for the balance in the insolvency or liquidation proceedings.[113] Where the insurance company defaults in payment of compensation in time, the question, whether the insurer is liable to pay interest and penalty, is subject to conflicting judicial decisions. According to one view, the insurance company is liable only for the payment of compensation and not interest and penalty.[114]

(f.n.111 contd.)
first respondent met with an accident, while driving an oil tanker of the second respondent. As a result of the injuries, caused by the accident, he suffered permanent total disablement, as he cannot drive any vehicle any more. It was held that the injured workman could recover compensation directly from the insurer. See also The Oriental Insurance Co. Ltd. v. Gyasuddin and others, 1995 Lab.I.C. NOC 199 (Raj.). In Oriental Insurance Co. Ltd. v. Guru Charan Saren, A.I.R.1991 Ori.294, it was held that the liability of insurer is restricted to the sum, payable under the Workmen's Compensation Act, 1923.

112. Workmen's Compensation Act, 1923, Section 14(1). See also G.Sreedharan v. Hindustan Ideal Insurance Corpn., 1976 Lab.I.C.732 (A.P.) (D.B.).

113. Workmen's Compensation Act, 1923, Section 14(2).

114. See Oriental Insurance Co.Ltd. v. Hazira Begum, [1995] 87 F.J.R.163 (Kant.); United India Insurance Co. Ltd. v. Shaik Alimuddin, 1995 (70) F.L.R.631 (A.P.); and Oriental Insurance Co. Ltd. v. Jeyaramma, 1989 Lab.I.C. 294 (Kant.) (D.B.).

As per the other view, the insurer is liable to pay interest and penalty also.[115] The latter view lays down a sound principle of law, as the insurer stands in the shoes of the employer, having the same rights and liabilities as those of the latter.[116]

Though the Workmen's Compensation Act, 1923 imposes upon the employers the liability for payment of compensation, it gives them full freedom to decide, how they shall meet the same. There is no provision for compulsory insurance of liability of the employers to ensure payment of compensation.[117] So it cannot be said that the Workmen's Compensation Act provides sufficient protection to the workman, in case of insolvency of an employer or winding up of a company.[118]

An employer may try to avoid the payment of any compensation under the Workmen's Compensation Act, 1923, by transferring his assets. But in the event of such transfer, the amount of compensation, the employer is liable to pay, becomes

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115. See Sheela Rani and others v. Mehar Chand and others, 1993 (67) F.L.R.799 (P. & H.); Khirod Nayak v. Commr. for W.C., 1991 Lab.I.C.2155 (Ori.) (D.B.).

116. Supra, n.111. See also M.M.Ahuja, "Accidents : Compensation and Insurance Liabilities", Lab.I.C., 155 at 156 (1994).

117. Sunil Rai Choudhuri, op.cit., p.58.

118. In such cases, the workman is protected, only if the employer has insured his liability. See Workmen's Compensation Act, 1923, Section 14. See also Baksi and Mitra, supra, n.89, p.58.

the first charge on his immovable assets.[119] The injured workman is, thus, protected against the tendency of the employer to evade his liability for compensation by transfer of his assets.

Some employers may attempt to avoid their liability for compensation under the Workmen's Compensation Act, 1923 by incorporating a term to that effect in the contract of employment. But such terms in the contract of employment are null and void, in so far as they purport to remove or reduce the employer's liability for compensation.[120] Thus the Act protects the ignorant workman, who may be induced by his employer to enter into contract or agreement, relinquishing or reducing his right to compensation under the Act.

Certain employers may accept their liability for compensation, but settle the amount of compensation by agreements with the injured workman. To protect the interest of the workmen in such cases, the Act requires agreements for the payment of a lumpsum as well as compensation, payable to a woman or a person under a legal disability, to be registered

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119. Workmen's Compensation Act, 1923, Section 14-A.

120. Id., Section 17. See also Tulsiram Dewas v. Bhagwan Dewas, 1988 (56) F.L.R.683 (M.P.); Ram Dulari Kalia v. H.P.S.E. Board, Shimla, 1987 Lab.I.C.748 (H.P.); Mohindar Singh v. Dial Singh, 1972 Lab.I.C.1495(P. & H.); Bai Chanchal Ben v. Burjorji Dinshawji Sethna, (1969) 2 L.L.J.357 (Guj.); Federation of Labour Co-operative Ltd., v. S.Baliah, A.I.R.1962 A.P.69; Mrs.Kathleen Dias v. H.M.Coria & Sons, A.I.R.1951 Cal.513 (D.B.).

with the Commissioner for Workmen's Compensation.[121] Before registering such agreements, the Commissioner is expected to enquire into the genuineness of the agreements and satisfy himself that the agreements were not effected by fraud or undue influence or other improper means.[122] This provision protects a gullible workman or woman and persons under legal disability from being exploited by their employers by tempting them to accept a lesser sum than what is legally due.[123] If the employer does not register the agreements, noted above, the employer is liable to pay the full amount of compensation. Unless the Commissioner otherwise directs, the employer is not entitled to deduct more than half of the amount, so paid, from the full amount of compensation, payable.[124] An employer, who fails to register the specified agreements,[125] thus, incurs a heavy loss.

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121. Workmen's Compensation Act, 1923, Section 28; Workmen's Compensation Rules, 1924, Rule 48. In Chhipa v. Bai Sona A.I.R.1929 Bom.68 (D.B.), it was held that Section 28 refers primarily to cases, where the parties have arrived at an agreement, prior to any hearing before the court. It does not refer to a case of agreement, reached between the parties in a contested proceeding before the Commissioner.

122. Workmen's Compensation Act, 1923, Section 28, Proviso(d).

123. See H.L.Kumar, supra, n.95, p.99.

124. Workmen's Compensation Act, 1923, Section 29. See also Bai Chanchalben v. Burjorji Dinshawji Sethna, (1969) 2 L.L.J.357 (Guj.).

125. Supra, n.121.

In the case of fatal accident and serious bodily injury[126] to a workman, the employer has to send a report[127] to the Commissioner[128] within seven days of the occurrence of death or serious bodily injury.[129] This provision aims at prevention of evasion of the liability to pay compensation by the employer in such cases.

In case of claims for compensation, made before the Commissioner for Workmen's Compensation, the Act requires

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126. Workmen's Compensation Act, 1923, Section 10-B (1), Explanation defines 'serious bodily injury' as an injury, which involves or in all probability, will involve the permanent loss of the use of, or permanent injury to any limb or permanent loss of or injury to the sight or hearing or the fracture of any limb or the enforced absence of the injured person from work for a period, exceeding twenty days.

127. Workmen's Compensation Act, 1923, Section 10-B (1) , This requirement to submit reports of fatal accidents and serious bodily injuries applies only where, by any law for the time being in force, notice of accidents, resulting in death or serious bodily injuries, is to be given by the employer to any authority.
According to the Law Commission of India, Section 10-B, which is a useful provision, should apply in every case and not merely where some other law provides for notice of a fatal accident. Section 10-B should be suitably amended for the purpose. See Law Commission of India, supra, n.54, p.86.

128. Where the State Government has so prescribed, the person, required to give the notice, may, instead of sending such report to the Commissioner, send it to the authority, to whom he is required to give the notice. See Workmen's Compensation Act, 1923, Section 10-B (1), Proviso.

129. Workmen's Compensation Act, 1923, Section 10-B (1) ; Workmen's Compensation Rules, 1924, Rule 11.

the Commissioner to grant compensation at the rate, permissible under the Act, in spite of a lesser claim by the workman.[130] The Commissioner has a duty to see that the injured workman gets fair play. He is not to be fettered in any way by the fact that an ignorant injured workman might have claimed a lesser sum in his application.[131]

An analysis of the system for payment of compensation under the Workmen's Compensation Act, 1923, reveals certain defects in the system. The definition of 'permanent total disablement' in the Act is ambiguous. It has invited conflicting judicial interpretations.[132] It is suggested that Section 2(1) (l) of the Workmen's Compensation Act, 1923 may be amended by defining 'permanent total disablement' as a disablement, which makes an injured workman unfit not only for the particular work, he was engaged in but also for all other kinds of work, he was capable of performing at the time of the accident, causing the disablement.

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130. National Insurance Co.Ltd. v. R.Vishnu, 1991 Lab.I.C. 2172 (Kant.) (D.B.); Chhatiya Devi Gowalin v. Rup Lal Sao, 1978 Lab.I.C.1368 (Pat.); K.P.Kurian v. Hindustan Shipping Co., 1975 Lab.I.C.130 (Ker.) (D.B.). For contrary view, see Travancore Devaswom Board v. Purushothoman, (1989) 2 L.L.J.114 (Ker.) (D.B.).

131. Shiv Lal v. Punjab S.E.B., 1991 A.C.J.443 (P. & H.); Mohammed Koya v. Balan, (1987) 2 L.L.J.486 (Ker.)(D.B.); Balavadra Patra v. Chief Engineer, Bhubaneswar, 1987 Lab.I.C.347 (Ori.); Bengal, Burma Steam Navigation Co. Ltd., v. Ramana, A.I.R.1932 Rang.141 (D.B.).

132. Supra, nn.1, 2 and 3.

The amounts of compensation, payable under the Workmen's Compensation Act, 1923 in respect of death and permanent disablement are respectively forty[133] and fifty[134] per cent of the monthly wages of the injured workman, multiplied by the relevant factor, corresponding to the age of the injured workman. The amount of compensation, payable for temporary disablement, is fifty percent of the monthly wages of the injured workman, irrespective of his age.[135] But the position under the Employees' State Insurance Act, 1948 is different. Under this Act, the disablement benefit and the dependant's benefit come approximately to seventy percent of the wages of the workman.[136] It is suggested that the rate of compensation under the Workmen's Compensation Act, 1923 for all cases of disablement and death should be raised to at least seventy percent of the monthly wages of the injured workman, as in the case of the Employees' State Insurance Act, 1948, in view of the rising cost of living.[137]

At present, under the Workmen's Compensation Act, 1923, the monthly wages of the injured workman beyond Rs.1000

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133. <u>Supra</u>, n.17.

134. <u>Supra</u>, n.21.

135. <u>Supra</u>, nn.44 and 45.

136. See <u>infra</u>, Chapter 6

137. See Dr.N.Maheswara Swamy, "Different Facets of the term 'compensation' under the Workmen's Compensation Act, 1923 - An Appraisal", <u>Lab.I.C.</u>, 23 at 26 (1994). See <u>supra</u>, nn.19 and 23 for the revised rates of compensation as per the Workmen's Compensation (Amendment) Act 1995.

is not considered for calculation of compensation. This causes injustice to workmen, drawing higher salary.[138] So Explanation II to Section 4 of the Workmen's Compensation Act, 1923, limiting the monthly wages to Rs.1000/- for the purpose of calculation of compensation should be deleted.[139]

Under the Workmen's Compensation Act, 1923, the amount, payable towards funeral expenses, is only an amount not exceeding fifty rupees. Even this petty amount is deducted from the amount of compensation, payable to the dependants.[140] It is suggested that the employer may meet the actual funeral expenses of the deceased workman, subject to an upper limit of a sum equivalent to two months' wages, in addition to paying compensation as per the Act.

In England, the two basic benefits, namely, disablement benefit and dependant's benefit[141] for industrial injuries, are augmented by supplementary benefits.[142] The

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138. Supra, n.19.

139. See supra, n.23 for the change, effected by the Workmen's Compensation (Amendment) Act, 1995.

140. Supra, n.20. For the change, effected by the Workmen's Compensation (Amendment) Act, 1995, see Ibid.

141. Formerly, there were three basic benefits viz. injury benefit for short-term disability, disablement benefit for permanent or long-term disability and death benefit in fatal injury cases. But injury benefit is abolished w.e.f. 6th April 1983 by the Social Security and Housing Benefits Act, 1982, Section 39(1). See Halsbury's Laws of England, (1982), Vol.33, pp.376, 378.

142. These are (1) dependant's allowances (2) special hardship allowance (3) constant attendance allowance (4) hospital treatment allowance and (5) unemployability supplement. See Halsbury's Laws of England, (1982), Vol.33, p.361.

Workmen's Compensation Act, 1923 does not contain any provision for supplementary benefits as in England. Compensation, in money, cannot replace a part of the body, that has been lost by industrial injuries. Nor can it restore the life of a dead workman. So provision should be made for making good at least the financial loss, suffered by the injured workman and his dependants, as far as possible. Hence, in addition to the provision of compensation at seventy percent of the monthly wages of the injured workman, steps should be taken to introduce supplementary benefits at the rate of not more than ten percent of the wages also in the Workmen's Compensation Act, 1923.[143]

Payment of compensation, based upon the pre-determined percentage of loss of earning capacity in the Schedule, in the case of scheduled injuries, under the Workmen's Compensation Act, 1923,[144] may not always help provide adequate recompense for the loss, actually suffered by the worker. So specific provision, empowering the Commissioner for Workmen's Compensation to vary the percentages of loss of earning capacity in suitable cases, should be introduced.[145]

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143. The International Labour Organisation has recommended that for death or permanent incapacity, at least two-thirds of the workmen's annual earnings and for temporary disablement at least two-thirds of basic earnings are required to be paid to an injured workman. See International Labour Organisation, Conventions and Recommendations, (1966), pp.84, 85.

144. Workmen's Compensation Act, 1923, Section 4 (1) (c), Schedule I.

145. Even though in Samir U. Parikh v. Sikandar Zahiruddin, supra, n.26, it was held that the loss of earning

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The question, who should assess the loss of earning capacity, in case of non-scheduled injuries, causing permanent partial disablement, under the Workmen's Compensation Act, 1923, has become a vexed one after the 1984 amendment of the Act, conferring the power of assessment upon the qualified medical practitioner.[146] It is suggested that the Commissioner for Workmen's Compensation should be statutorily empowered to vary the percentage of loss of earning capacity, as assessed by a medical practitioner, in deserving cases, as the latter may be incompetent to assess the loss of earning capacity, which involves several factors, in addition to loss of physical capacity. The Commissioner may not find it difficult to assess the loss of earning capacity properly, as he is empowered to seek the assistance of one or more persons, having special knowledge of the matter.[147]

Percentage of the loss of earning capacity for the loss of thumb and its metacarpal bone is forty percent under the Workmen's Compensation Act, 1923.[148] But the one for

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(f.n.145 contd.) capacity, mentioned in Schedule I, is the minimum and can be held to be higher on the basis of evidence, it would be better to incorporate such a provision in the statute so that the adverse impact of any contrary judicial decision can be avoided.

146. See supra, nn.40, 41, 42 and 43.

147. Workmen's Compensation Act, 1923, Section 20 (3).

148. Id., Schedule I, Part II, Item No.6. See also Employees' State Insurance Act, 1948, Schedule II, Part II, Item No.12.

the loss from amputation of one foot, resulting in endbearing, is only thirty percent, under the Workmen's Compensation Act, 1923.[149] The loss of a foot, whether more than five inches below the knee or even at the ankle, is certainly more serious than the loss of a thumb and its metacarpal bone. So the percentage of the loss of earning capacity, resulting from amputation of one foot, resulting in end-bearing, should be raised from thirty to fifty percent, under the Workmen's Compensation Act, 1923, as was done under the Employees' State Insurance Act, 1948.[150]

Under the Workmen's Compensation Act, 1923, half-monthly payment for temporary disablement is given now only for five years.[151] Provision may be made in the Act for continuing the half-monthly payment during the entire period of incapacity, as under the Employees' State Insurance Act, 1948.[152]

If the employer does not pay the amount of compensation in time, the simple interest, that he may have to pay, is only 6% per annum. This rate of interest is outdated[153] today.

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149. Workmen's Compensation Act, 1923, Schedule I, Part II, Item No.22.

150. Employees' State Insurance Act, 1948, Schedule II, Part II, Item No.28, subs. by Act 29 of 1989, Section 47 (w.e.f. 20.10.1989).

151. Workmen's Compensation Act, 1923, Section 4(2) (ii).

152. See Employees' State Insurance (Central) Rules, 1950, Rule 57 (1); <u>infra</u>, Chapter 6.

153. See <u>supra</u>, n.75.

Hence, it is suggested that Section 4-A (3) of the Workmen's Compensation Act, 1923 may be amended by substituting the words "simple interest at the rate of fifteen percent" in place of the words "simple interest at the rate of six percent".[154]

It is not clear from the Workmen's Compensation Act, 1923, whether the insurance company is liable to pay interest and penalty, if it fails to pay compensation in time. This has led to conflicting judicial interpretations.[155] Section 4-A (3) of the Workmen's Compensation Act, 1923 may be amended in such a way that the insurer, who steps into the shoes of the employer, is also made liable for payment of interest and penalty.

All employers, covered by the Workmen's Compensation Act, 1923, are not required to maintain notice-book.[156] This creates problems to an injured workman, who gives notice of accident by delivering it at the residence or office of the employer,[157] because the latter may deny receipt of notice. So it is suggested that the giving of notice should not be made obligatory on the injured workman.[158]

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154. For the change, effected by the Workmen's Compensation (Amendment) Act, 1995, see Ibid.

155. Supra, nn.114 and 115.

156. Supra, n.62.

157. Ibid.

158. Supra, n.54.

At present, under the Workmen's Compensation Act, 1923, the liability of the employer to report fatal accidents and serious bodily injuries to the Commissioner for Workmen's Compensation depends upon the existence of some other law,[159] providing for notice of a fatal accident.[160] It is suggested that Section 10-B of the Workmen's Compensation Act, 1923 may be amended in such a way that the liability of the employer to report fatal accidents and serious bodily injuries does not depend upon the existence of some other law.

Unlike the Employees' State Insurance Act, 1948,[161] the Workmen's Compensation Act, 1923 does not contain any provision for medical benefit or rehabilitation of disabled workmen. The International Labour Organisation has recommended the introduction of provisions for vocational re-education of injured workmen in national laws or regulations and requires its members to provide rehabilitation services to disabled workmen.[162] The State of Victoria in Australia

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159. See for example, Section 88(1) of the Factories Act, 1948, requiring the manager of a factory to give notice of certain accidents to the prescribed authority.

160. Supra, n.127.

161. Employees' State Insurance Act, 1948, Sections 19, 56; Employees' State Insurance (General) Regulations, 1950, Regulations 103, 103-B; Employees' State Insurance (Central) Rules, 1950, Rule 23-A. See also infra, Chapter 6.

162. International Labour Organisation, supra, n.143, pp.85, 1088.

has created an Accident Rehabilitation Council to develop policies and standards for rehabilitating injured workers. It not only promotes research into occupational and social rehabilitation but also disseminates information and creates public awareness of such matters. Bonus is paid to employers, who provide continued employment or re-employment to injured workers. Conversely, employers, refusing to re-engage injured workers, are punished.[163] A comprehensive scheme for rehabilitation of injured workers on the above pattern and medical aid should be incorporated in the Workmen's Compensation Act, 1923.

Compensation under the Workmen's Compensation Act, 1923 is now usually paid in cash at the employer's or Commissioner's office.[164] This is inconvenient for the injured workman and his dependants, who may be residing far away from these offices. So provision should be made for the distribution of compensation through local bank or post office without any additional expenditure to the workman and the dependants. The expenses for this purpose should be borne by the employer.

Lumpsum payment of compensation, followed under the Workmen's Compensation Act, 1923,[165] is not advisable, as it

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163. Gordon Hughes, "Changes to the Industrial Accident Compensation System in Victoria", 60 Aust.L.J. 626 at 634-635 (1986).

164. Workmen's Compensation Act, 1923, Section 8.

165. Compensation is paid in lumpsum except in the case of temporary disablement under the Workmen's Compensation Act, 1923. Workmen's Compensation Act, 1923, Section 4.

is likely to be squandered away. Further, in the case of injuries, likely to lead to complications in future, the workman, who has received the lumpsum, will be in trouble, the lumpsum being fixed once for all. So, the lumpsum payment of compensation should be replaced by periodical payments, as under the Employees' State Insurance Act, 1948.[166] Rate of periodical payments should be revised every decade, in accordance with the changes in the cost of living index. Commutation of periodical payments should be permitted only after adequate financial counselling.

In England, before 1948, the injured workman and his survivors had to elect between compensation and damages under common law. But with the passage of the Law Reform (Personal Injuries) Act of 1948,[167] the right to claim damages has become an additional, rather than an alternative remedy. It is now possible for the injured worker in England to claim compensation under statutory law and also to pursue simultaneously a remedy for damages under common law against his employer. He obtains his statutory compensation, irrespective

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166. Employees' State Insurance Act, 1948, Section 46(c) and (d). See also <u>infra</u>, Chapter 6.

167. The issue of the right to damages, being an alternative remedy, was examined by the Departmental Committee on Alternative Remedies (Monckton Committee), set up in 1944. It suggested that the right to damages should not be affected by the introduction of statutory benefit. Accordingly, the Law Reform (Personal Injuries) Act, 1948 made the right to damages an additional remedy. See Sunil Rai Choudhuri, <u>op.cit.</u>, pp.182-183.

of what happens to his suit for damages. If he wins the suit, a deduction, roughly equivalent to half the value of the benefits, received under the statutory law, is made from the total damages, assessed by the court.[168] As two doctrines, which made recovery of damages under common law very difficult for the workers in the past, viz. those of common employment[169] and of contributory negligence,[170] have been abolished, it is possible now for the worker or his representative to realise fairly big damages from employers, if either negligence or breach of statutory duty, on their part, can be established. This right of additional remedy makes the position of the injured worker in England an enviable one.[171] In India, the right to claim damages is barred, if the workman opts for compensation under the statute.[172] Similarly, the right to compensation under the Workmen's Compensation Act, 1923 is barred, if he has filed a suit for damages.[173] This defect in the law should be remedied by making the right to claim damages an additional remedy, as in England. Section 3(5) of the Workmen's Compensation Act, 1923 should be amended to achieve this purpose.

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168. Law Reform (Personal Injuries) Act, 1948, Section 2.
169. Id., Section 1.
170. See Law Reform (Contributory Negligence) Act, 1945; supra, Chapter 2.
171. Sunil Rai Choudhuri, op.cit., p.183.
172. Workmen's Compensation Act, 1923, Section 3(5). See supra, n.71.
173. Ibid.

Chapter 6

COMPENSATORY BENEFITS UNDER THE EMPLOYEES' STATE INSURANCE ACT 1948

Under the Employees' State Insurance Act, 1948, compensation for industrial injuries is given in the form of benefits. These benefits are disablement benefit, dependant's benefit, funeral expenses and medical benefit. Of these benefits, the first three are benefits in the form of money and the last one in the form of medical services.

Disablement benefits are of three types, viz. (a) temporary disablement[1] benefit (b) permanent partial disablement[2] benefit and (c) permanent total disablement[3]

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1. Employees' State Insurance Act, 1948, Section 2 (21). According to this section, "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 injury. Unlike under the Workmen's Compensation Act, 1923, no distinction is made between temporary total disablement and temporary partial disablement. See *supra*, Chapter 5.

2. *Id.*, Section 2(15-A). The definition of permanent partial disablement is the same as under the Workmen's Compensation Act, 1923. See *supra*, Chapter 5.

3. *Id.*, Section 2(15-B.). The definition of permanent total disablement is the same as under the Workmen's Compensation Act, 1923. See *supra*, Chapter 5.

benefit. Temporary disablement benefit is payable, only if the disablement lasts for not less than three days, excluding the day of the accident. If the period of disability exceeds three days, the benefit can be claimed from the first day of the disablement for the whole period of such disablement.[4] There is, thus, no statutory limit, as in the case of the Workmen's Compensation Act, 1923,[5] with regard to the period during which an employee can receive compensation for temporary disablement. Permanent disablement benefit, whether total or partial,[6] is to be

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4. Employees' State Insurance (Central) Rules, 1950, Rule 57 (1).

5. Workmen's Compensation Act, 1923, Section 4(2) (ii). See also <u>supra</u>, Chapter 5

6. In <u>Employees' State Insurance Corporation</u> v. <u>Gopi</u>, (1995) 1 L.L.N.642 (Ker.) (D.B.), a workman was engaged in weaving work in a coir factory, run by a co-operative society. He fell in the course of his work and sustained injury to his back-bone. After treatment, when he returned for work, he was found not fit to do the same work. The Medical Board assessed his loss of earning capacity as 20 percent. On appeal to the Insurance Court, it enhanced the percentage of loss of earning capacity to cent percent. On appeal by the ESI Corporation against the order of the Insurance Court, it was held by the Kerala High Court that if the injured workman can do the work, he was performing just before the accident in a reduced form, the result is one of permanent partial disablement. If he cannot do that work at all, then the result is permanent total disablement. It is not necessary that the employment injury should render the employee totally unfit to do any work, whatsoever, for holding that he is suffering permanent total disablement. See also <u>E.S.I.Corpn.</u> v. <u>Raju</u>, (1995) 1 L.L.N.597 (Ker.) (D.B.); <u>Chhotelal</u> v. <u>R.D., E.S.I.C.</u>, 1989 (58) F.L.R.158 (M.P.); <u>E.S.I.C.</u> v. <u>B.V.Balanarasaraju</u> 1985 Lab.I.C.216 (A.P.) (D.B.); For contrary view, see <u>Mushigiri</u> v. <u>E.S.I.C.</u>, 1988 Lab.I.C.320 (M.P.).

paid, when assessed provisionally, for that period, and when assessed finally, for life.[7]

The daily rate of disablement benefit is forty percent more[8] than the standard benefit rate,[9] applicable to the average daily wages in the contribution period,[10] corresponding to the benefit period,[11] in which the employment injury is sustained. Where an employment injury is sustained before the commencement of the first benefit period in respect of a person, the daily rate of disablement benefit depends on whether the injury is sustained after or before the expiry of the first wage period[12] in the contribution period, in which the injury is sustained. If the injury is sustained after the expiry of the first wage period, the daily rate is forty percent more than the standard benefit rate, applicable to the wage group, in which his average daily wages during

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7. Employees' State Insurance (Central) Rules, 1950, Rule 57 (2).

8. Employees' State Insurance Act, 1948, Section 51, as amended by Act 29 of 1989. See also Employees' State Insurance (Central) Rules, 1950, Rule 57(3)(a). Before the 1989 Amendment, the rate of permanent and temporary disablement benefit was as specified in para 6 of the First Schedule, according to which the daily rate of this benefit was twenty five percent more than the standard benefit rate.

9. _Id._, Rule 54.

10. _Id._, Rules 2 (1-A) and (2-A), inserted by the Employees' State Insurance (Central) Amendment Rules, 1991 (w.e.f. 1-2-1991).

11. _Id._, Rule 2(1-C).

12. Employees' State Insurance Act, 1948, Section 2(23).

that wage period[13] fall. If the injury is sustained before the expiry of the first wage period, the daily rate is forty percent more than the standard benefit rate, applicable to the group, in which wages, which are actually earned or would have been earned, had he worked for a full day on the date of accident, fall.[14] The disablement benefit, calculated in the above manner, is called the "full rate", which comes approximately to 70% of the wages. Both the temporary disablement benefit and permanent total disablement benefit are payable at the full rate.[16]

Permanent partial disablement may be caused by scheduled[17] as well as non-scheduled injuries. For permanent partial disablement, resulting from an injury, specified in Part II of the Second Schedule, the disablement benefit is payable at such percentage of the full rate, payable in the case of permanent total disablement, as specified in the Schedule as being the percentage of the loss of earning capacity, caused by the injury.[18] But the question, whether

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13. See Employees' State Insurance (Central) Rules, 1950, Rule 2 (1-B).

14. _Id_., Rule 57 (3) (b).

15. _Id_., Rule 57 (3), Explanation.

16. _Id_., Rule 57 (4).

17. Employees' State Insurance Act, 1948, Schedule II, Part II.

18. Employees' State Insurance (Central) Rules, 1950, Rule 57 (4) (c).

the payment of disablement benefit for scheduled injuries in conformity with the Second Schedule is justifiable, is subject to conflicting judicial interpretations. According to one view, the payment of disablement benefit, in accordance with the percentage of loss of earning capacity, specified in the Schedule is justifiable and, hence, the Medical Board or the appellate authority[19] is precluded from assessing the percentage of loss of earning capacity, independent of the percentage, specified in the Schedule.[20] According to the opposite view, the Medical Board or the appellate authority is not debarred from estimating the actual loss of earning capacity, as the loss of earning capacity, mentioned in the Second Schedule, is only the minimum.[21] The latter view is more reasonable than the former one, because the payment of disablement benefit, in accordance with the loss of earning capacity, specified in the Schedule, in spite of adequate evidence to prove that the actual percentage of loss of earning capacity is higher than the one in the Schedule, is quite unjustifiable.

For permanent partial disablement, resulting from an injury, not specified in Part II of the Second Schedule, the

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19. Employees' State Insurance Act, 1948, Section 54-A.

20. See E.S.I.C. v. Ameer Hasan, 1980 (41) F.L.R.224 (All.) (D.B.).

21. See E.S.I.C. v. B.V.Balanarasaraju, 1985 Lab.I.C.216 (A.P.) (D.B.).

benefit shall be payable at such percentage of the full rate, payable in the case of permanent total disablement, as is proportionate to the loss of earning capacity,[22] permanently caused by the injury.[23] Where more injuries than one are caused by the same accident, the rate of permanent partial disablement benefit shall be aggregated but not so in any case as to exceed the full rate.[24]

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22. Employees' State Insurance (Central) Rules, 1950, Rule 57(4)(d). The case of any insured person for permanent disablement benefit shall be referred by the Corporation to a Medical Board for assessing the extent of loss of earning capacity. If the insured person or the Corporation is not satisfied with the decision of the Medical Board, the insured person or the Corporation may appeal to the Medical Appeal Tribunal and from there, to the Employees' Insurance Court. Unlike under the Workmen's Compensation Act, 1923, where the loss of earning capacity is assessed by the qualified medical practitioner (supra, Chapter 5), under the Employees' State Insurance Act, 1948, it is done by specially constituted Medical Boards/Tribunals. Employees' State Insurance Act, 1948, Section 54-A; Employees' State Insurance (General) Regulations, 1950, Regulations 72, 73; Employees' State Insurance (Central) Rules, 1950, Rules 20-A, 20-B,

    In Reg.Dir., E.S.I.C. v. S.Saravanam, (1991) 2 L.L.J. 494 (Kant.) (D.B.), it was held that the Medical Board, Medical Appeal Tribunal and the Employees' Insurance Court are not barred from estimating and fixing the percentage of loss of earning capacity of an insured person for determining the extent of disablement benefit, to which such person becomes entitled under the Act for an injury, not specified in the Second Schedule to the Act.

23. In Munshigiri v. E.S.I.C., 1988 Lab.I.C.320 (M.P.), a workman became incapable of even taking food and dressing, owing to employment injury to his right hand. He was held entitled to get compensation for 60% loss of earning capacity, as he was having potential loss of earning capacity, though there was no loss of hand or amputation thereof.

24. Employees' State Insurance (Central) Rules, 1950, Rule 57(4), Explanation.

Certain conditions are to be fulfilled for getting disablement benefit. The injured employee should give notice of the accident, causing the injury. The notice should contain the appropriate particulars. It can be given either orally or in writing to the employer or to a foreman or to the supervising official of the insured person.[25] The notice should be given as soon as practicable after the happening of the accident.[26] On receipt of notice, the employer has to send a report of the accident to the nearest Local Office and the nearest Insurance Medical Officer, in the prescribed form, as soon as practicable and required

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25. No such notice need be given, if the employment injury is caused by an occupational disease, specified in Schedule III to the Workmen's Compensation Act, 1923. Employees' State Insurance (General) Regulations, 1950, Regulation 65 (i), Explanation.

26. Id., Regulation 65 (i). Any such notice, required to be given by the insured person, may be given by some other person, acting on his behalf. Id., Regulation 65 (1), Proviso. An entry of the appropriate particulars of the accident in the Accident Book, made by the insured person or some other person, acting on his behalf, shall be sufficient notice of the accident. Id., Regulation 65 (iii). In the case of notice, otherwise than by an entry in the Accident Book, it is the duty of the employer or any other person, receiving such notice, to make an appropriate entry, regarding the accident in the Accident Book and in the case of oral notice, read out to the person, giving the notice, the particulars of the notice and obtain his signature or thumb impression on the Accident Book. Id., Regulation 67.

under the circumstances.[27] He has also to furnish further particulars of the accident, as may be required by the appropriate office.[28] The injured employee must comply with the directions from the appropriate Regional Office, requiring him to submit himself to a medical examination[29] or to attend any vocational training or industrial rehabilitation courses.[30]

If the employee intends to claim disablement benefit for temporary disablement, he may submit a claim for the benefit, in the prescribed form, together with the appropriate medical certificate, to the appropriate Local Office.[31] The first payment, in respect of temporary disablement benefit, has to be paid not later than one month, after the

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27. Id., Regulation 68. It is not necessary for the employer to report, if the employment injury is caused by an occupational disease, specified in Schedule III to the Workmen's Compensation Act, 1923 but the employer has to furnish necessary information to the appropriate Local Office, on demand. Id., Regulation 68, Proviso III.

28. Id., Regulation 70.

29. c.f. Workmen's Compensation Act, 1923, Section 11. See also supra, Chapter 5.

30. Employees' State Insurance (General) Regulations, 1950, Regulation 71.

31. See Id., Regulations 48, 53, 54, 55, 56, 57, 59, 61 and 63. The authority to certify the eligibility of claimants shall be the appropriate Local Office, in respect of temporary disablement benefit and funeral expenses and the appropriate Regional Office, in respect of permanent disablement and dependant's benefits. Id., Regulation 51.

claim, complete in all respects, is made to the office.[32] An injured employee is not entitled to temporary disablement benefit for the period of strike, except in certain circumstances,[33] nor for the period, for which he gets wages.[34] Temporary disablement benefit may be suspended, if the receipient fails to comply with certain conditions.[35] Temporary disablement benefit cannot be combined with either sickness benefit or maternity benefit. When a person becomes entitled to get more than one of these benefits

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32. Id., Regulation 52 (1) (d). The second and subsequent payments of not only temporary disablement benefit, but also permanent disablement benefit and dependant's benefit are paid either along with the first payment or within the calendar month, following the month, to the while or part of which they relate, whichever is later. Id., Regulation 52 (2).

33. Id., Regulation 99-A. An injured employee is entitled to temporary disablement benefit for the period of strike in the following circumstances:-
   (i) if a person is receiving medical treatment and attendance as an indoor patient in any Employees' State Insurance Hospital or a hospital, recognised by the Employees' State Insurance Corporation for such treatment; or
   (ii) if a person is in receipt of temporary disablement benefit, immediately preceeding the date of commencement of the strike, given by the employees' union to the management of the factory/establishment. Ibid.

34. Employees' State Insurance Act, 1948, Section 63, as amended by Act 29 of 1989, Section 25. The reason is obvious. The condition, precedent for obtaining the temporary disablement benefit, is the incapability of the claimant to do work and receive wages. So the claimant cannot be given the benefit, when the claimant works and receives wages.

35. Employees' State Insurance (General) Regulations, 1950, Regulation 99. See also Employees' State Insurance Act 1948, Section 64.

for the same period, he is entitled to choose one of these benefits.[36]

An employee, declared to be permanently disabled by a Medical Board or by a Medical Appeal Tribunal or an Employees' Insurance Court,[37] has to submit to the appropriate Local Office a claim for permanent disablement benefit.[38] The first instalment of benefit becomes payable not later than one month from the submission of the claim.[39] Though benefits, under the Employees' State Insurance Act, except the medical benefit and funeral expenses, are paid as periodical payments, an insured person, whose permanent disablement benefit has been finally assessed and who has been finally awarded permanent disablement benefit at a rate not exceeding Rs.1.50 per day, may apply for commutation of the periodical payments into a lumpsum[40] within 6 months of the "date

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36. Id., Section 65.

37. Supra, n.22.

38. Employees' State Insurance (General) Regulations, 1950, Regulation 76-A.

39. Id., Regulation 52 (1)(e). Every person, receiving permanent disablement benefit, shall submit at six monthly intervals, with the claim for December and June every year a life certificate. Id., Regulation 107. The appropriate Local Office Manager may require the personal attendance and due identification of the recipient of permanent disablement benefit, once in every six months. Id., Regulation 107-B. But a person, incapacitated by bodily illness or infirmity or a purdanashin lady, is exempted from this requirement. Ibid.

40. Id., Regulation 76-B (1). See also Employees' State Insurance Act, 1948, Section 62, prohibiting commutation, except as provided in the Regulations.

of possible option"[41] and get the benefit, commuted into a lumpsum.[42]

In the event of the death of an injured employee, his dependants are entitled to dependant's benefit.[43] This is irrespective of whether the deceased was in receipt of any periodical payments of temporary disablement benefit for the injury or not.[44] A person, claiming dependant's benefit, has to prove that the death of the deceased employee was the result of the employment injury. The benefit is payable in cash month by month to the specified dependants[45] of the deceased employee as a pension. In case the injured employee dies without leaving behind the specified dependants,[46] the benefit shall be paid to the other dependants of the deceased.[47] The benefit is payable at

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41. Id., Regulation 76-B (2) and (4).

42. The amount of the lumpsum, admissible, is calculated as per Cl. (5) of Regulation 76-B of the Employees' State Insurance (General) Regulations, 1950.

43. Employees' State Insurance Act, 1948, Section 52. If a person dies during any period, for which he is entitled to a cash benefit under this Act, the amount of such benefit upto and including the day of his death shall be paid to any person, nominated by the deceased person in writing in such form as may be specified in the regulations or if there is no such nomination, to the heir or legal representative of the deceased person. See Id., Section 71.

44. Id., Section 52.

45. Id., Section 2 (6-A)(i), (i-a) and (ii), read with Section 52(1).

46. Ibid.

47. Id., Section 52 (2).

such rates and for such periods and subject to such conditions, as prescribed by the Central Government.[48] Prior to the 1989 Amendment of the Employees' State Insurance Act, dependant's benefit was payable, in accordance with the provisions of the First Schedule to the Act, which has been omitted by the Amendment.[49] The only change, brought about by the Central Government after the 1989 Amendment, is that it has increased the daily rate of dependant's benefit and thereby, the full rate. The daily rate of dependant's benefit is now forty percent more than the standard benefit rate,[50] whereas it was only twenty five percent more than the standard benefit rate, according to the First Schedule.[51]

As in the case of disablement benefit, certain formalities are to be complied with for obtaining dependant's benefit also. The death of the deceased employee has to

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48. Id., Section 52, as amended by Act 29 of 1989, Section 21. Employees' State Insurance (Central) Rules, 1950, Rule 58.

49. See Employees' State Insurance Act, 1948, Schedule I, paras 6, 8 and 9, omitted by Amendment Act 29 of 1989.

50. See Employees' State Insurance (Central) Rules, 1950, Rule 58(2). The total amount of dependant's benefit, computed in this manner, amounts approximately to 70% of the wages, like disablement benefit, whereas under the Workmen's Compensation Act, 1923, compensation for death is only 40% of the wages (See supra, Chapter 5).

51. Employees' State Insurance Act, 1948, Schedule I, para 6 before the 1989 Amendment.

be reported to the nearest Local Office and to the nearest dispensary, hospital or other institution, where medical benefit under the Employees' State Insurance Act is available.[52] Reporting is to be done by the employer, if death occurs at the place of employment. It has to be done by a dependant, intending to claim dependant's benefit or any other person, present at the time of death, if death occurs at any other place.[53] Unlike under the Workmen's Compensation Act, 1923, the dead body is not to be disposed of, until it has been examined by an Insurance Medical Officer.[54] This Officer has to issue, free of charge, a death certificate in the prescribed form[55] to the dependants of the deceased and send a report to the appropriate Regional Office.[56] A claim for dependant's benefit has to be submitted to the appropriate Local Office, in the prescribed form.[57] It has

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52. Employees' State Insurance (General) Regulations, 1950, Regulation 77.

53. Ibid.

54. Id., Regulation 78. If an Insurance Medical Officer is unable to arrive for the examination within 12 hours of such death, the body may be disposed of, after obtaining a certificate from any available medical officer. See Id., Regulation 78, Proviso I.

55. Employees' State Insurance Act, 1948, Form 17.

56. Employees' State Insurance (General) Regulations, 1950, Regulation 79.

57. Employees' State Insurance Act, 1948, Form 18.

to be done by the dependant or dependants concerned or by their legal representative or, in case of a minor, by his guardian, supported by proper documents.[58] On receipt of the claim for dependant's benefit, the appropriate Regional Office will ascertain, after proper enquiry, whether there are other persons, entitled to the benefit.[59] If it is found that there are other dependants, the Office should issue them a notice for submission of claims within a period of thirty days from the date of such notice.[60] As soon as after the expiry of the period for submission of claims,[61] the appropriate Regional Office has to intimate the decision of the Corporation, regarding dependant's benefit to each of the dependants or his legal representatives or in the case of a minor, to his guardian.[62] Each dependant, whose claim for dependant's benefit was admitted by the Corporation, has to submit to the appropriate Local

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58. Employees' State Insurance (General) Regulations, 1950, Regulation 80.

59. Id., Regulation 81.

60. Ibid. c.f. Workmen's Compensation Act, 1923, Section 8(4), where the Commissioner sends notice to each of the dependants to appear before him for distribution of compensation, on deposit of compensation in respect of a deceased workman with him, as per Section 8(1).

61. Employees' State Insurance (General) Regulations, 1950, Regulation 81.

62. Id., Regulation 82.

Office a claim for periodical payments of dependant's benefit, in the prescribed form.[63] Such claim may be made by the legal representative of a beneficiary or in the case of a minor, by his guardian.[64]

Dependant's benefit accrues from the date of death.[65] But, if disablement benefit was payable for that date, it accrues from the date, following the date of death.[66] The first instalment of dependant's benefit is payable, not later than 3 months after the submission of the claim in the proper manner.[67]

The Employees' State Insurance Act, 1948, like the Workmen's Compensation Act, 1923,[68] provides for the payment of funeral expenses[69] to the eldest surviving member of the family of the deceased employee to meet the funeral expenses of the deceased.[70] However, where the deceased person did

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63. Id., Regulation 83-A; Employees' State Insurance Act, 1948, Form 18-A. As in the case of disablement benefit, any person, whose claim for dependant's benefit has been admitted, shall submit at six monthly intervals with the claim for December and June every year a life certificate. Id., Regulation 107-A.

64. Id., Regulation 83-A. If the appropriate Regional Office thinks that a child, who is in receipt of dependant's benefit, is being neglected by his guardian, it may appoint another guardian. See Id., Regulation 86.

65. Id., Regulation 83.

66. Ibid.

67. Id., Regulation 52 (i) (f).

68. Workmen's Compensation Act, 1923, Section 8(4).

69. The expression "funeral benefit" in Section 46(f) was substituted by "funeral expenses" by the Amendment Act 29 of 1989, Section 17.

70. Employees' State Insurance Act, 1948, Section 46 (f).

not leave any members of his family at the time of his death, the amount is paid to the person, who actually incurred the funeral expenses.[71] The amount of such payment is one thousand rupees,[72] whereas under the Workmen's Compensation Act, it is only fifty rupees.[73]

Certain formalities have to be observed for claiming funeral expenses also, as in the case of other benefits. The death of the employee has to be reported to his Local Office at the earliest. If death occurs at the place of employment, it is the duty of the employer to report the matter to the Local Office. If it occurs at any other place, the person, entitled to and intending to claim funeral expenses, has to report the death to the Local Office immediately. The said report of death may also be made to the Local Office by any other person, present at the time of death of the injured person.[74] The person, intending to claim funeral expenses, should obtain a death certificate from the

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71. Ibid.

72. Employees' State Insurance (Central) Rules, 1950, Rule 59. The amount of funeral expenses was not to exceed Rs.100/- prior to the 1989 Amendment of the Act (Act 29 of 1989, Section 17(ii)), according to which the amount of such payment shall not exceed such amount as may be prescribed by the Central Government.

73. Supra, n.68.

74. Employees' State Insurance (General) Regulations, 1950, Regulation 95-B.

Insurance Medical Officer, who attended the deceased employee at the time of his death or the Insurance Medical Officer, who examined the dead body of the deceased.[75] He should submit a claim for funeral expenses to the appropriate Local Office, supported by proper documents,[76] within three months of the death of the deceased employee.[77] The funeral expenses, claimed in the above manner, has to be paid not later than 15 days from the date of submission of the claim.[78]

As under the Workmen's Compensation Act, 1923,[79] provision is made for speedy payment of the above mentioned benefits in the form of money. Accordingly, if any of these benefits is not paid by the Local Office within the prescribed time limits,[80] the delay in payment has to be reported

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75. Id., Regulation 95-C. In special circumstances, the Corporation may also accept any other evidence of death, in lieu of death certificate by the Insurance Medical Officer. Id., Regulation 95-D.

76. Id., Regulation 95-E.

77. Employees' State Insurance Act, 1948, Section 46(1)(f), Proviso. The Corporation or any officer or other authorised authority may extend the period of three months in suitable cases. Ibid.

78. Employees' State Insurance (General) Regulations, 1950, Regulation 52 (1) (b).

79. Workmen's Compensation Act, 1923, Section 4-A. See also supra, Chapter 5.

80. Employees' State Insurance (General) Regulations, 1950, Regulation 52 (1) and (2).

to the appropriate Regional Office. Then, it is paid as soon as possible by the Local Office,[81] as per the directions from the Regional Office. Disablement benefit, dependant's benefit and funeral expenses are, generally, paid in cash by the Local Office, on the production of Identity Card[82] by the claimant. Still, they may be paid by other appropriate means like postal money order.[83]

Provision is made for review of dependant's benefit[84] and permanent disablement question.[85] Any decision, awarding dependant's benefit, may be reviewed by the Corporation, if it is satisfied by fresh evidence that the decisions was given in consequence of non-disclosure of material fact or misrepresentation or that the decision is no longer in accordance with the Employees' State Insurance Act, because of changed circumstances.[86] It is obligatory on the part of the appropriate Regional Office to review the payment of

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81. Id., Regulation 52 (3). See Bhagwanti v. E.S.I.C., 1989 Lab.I.C.NOC 2 (P. & H.). The Employees' State Insurance Corporation was directed to pay interest on the dues, outstanding against it.

82. Id., Regulation 2 (k).

83. Id., Regulation 52 (4).

84. Employees' State Insurance Act, 1948, Section 55-A(1). Employees' State Insurance (General) Regulations, 1950, Regulation 84 (1).

85. Employees' State Insurance Act, 1948, Section 55.

86. Id., Section 55-A.

benefit, if an application is made to that effect.[87] Such review can, however, be conducted, only after giving due notice to each of the dependants and giving them an opportunity of being heard.[88] Dependant's benefit may be commenced, continued, increased, reduced or discontinued after the above-mentioned kinds of review.[89] Any permanent disablement question, decided by a Medical Board or Medical Appeal Tribunal, may be reviewed by it, if it is satisfied by fresh evidence that the decision was given in consequence of the non-disclosure or a misrepresentation by the employee or any other person of a material fact.[90] Any assessment of the extent of disablement may also be reviewed by a Medical Board, if it is satisfied that since the making of the assessment, there has been a substantial and unforeseen aggravation of the result of the relevant injury and substantial injustice will be done, if the injury is not reviewed.[91]

In addition to these benefits in the form of money, unlike the Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948 provides for other benefits in the

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87. Employees' State Insurance (General) Regulations, 1950, Regulation 84(1)(a), (b) and (c).

88. Id., Regulation 84 (2).

89. Id., Regulation 84(3). Employees' State Insurance Act, 1948, Section 55-A(2). See also supra, nn.86, 87.

90. Employees' State Insurance Act, 1948, Section 55(1).

91. Id., Section 55(2).

form of services. An injured employee, whose condition requires medical treatment and attendance, is entitled to receive medical benefit[92] upon production of his identity card.[93] He is also entitled to medical benefit during any period, in which he is in receipt of such disablement benefit as does not disentitle him to medical benefit under the regulations.[94] An employee, who ceases to be in insurable employment[95] on account of permanent disablement, continues to receive medical benefit till the date, on which he would have vacated the employment, on attaining the age of superannuation, had he not sustained such permanent disablement.[96] In addition to an injured employee, members of his family

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92. Id., Section 56 (1).

93. Employees' State Insurance (General) Regulations 1950, Regulation 104.

94. Employees' State Insurance Act, 1948, Section 56 (3); Employees' State Insurance (General) Regulations, 1950, Regulation 103. But after the disablement has been declared as a permanent disablement, the person shall not be entitled to medical benefit, if he is not otherwise entitled to such benefit, except in respect of any medical treatment, which may be rendered necessary on account of the employment injury, from which the disablement resulted. Employees' State Insurance (General) Regulations, 1950, Regulation 103, Proviso.

95. Employees' State Insurance Act, 1948, Section 2 (13-A).

96. Id., Section 56 (3), Proviso II; Employees' State Insurance (Central) Rules, 1950, Rule 60.

are also entitled to medical benefit.[97] Medical benefit is given either in the form of outpatient treatment and attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the employee or as in-patient treatment.[98]

Reimbursement of expenses, incurred for medical treatment of injured employees and their family outside Employees' State Insurance hospitals or dispensaries, is permitted under specified conditions.[99] In certain States like Bombay, if an insured person,[100] while on duty in any area, in which the Employees' State Insurance, Act is not in force, sustains an employment injury, the cost of his medical treatment can be reimbursed, subject to certain conditions.[101]

Under the Employees' State Insurance Act, 1948, unlike under the Workmen's Compensation Act, 1923, provisions are made for restoring the loss of earning capacity of an

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97. Employees' State Insurance Act, 1948, Section 99; Employees' State Insurance (General) Regulations, 1950, Regulation 95-A.

98. Employees' State Insurance Act, 1948, Section 56 (2)

99. Id., Section 57(2); Employees' State Insurance (General) Regulations, 1950, Regulation 96-A.

100. Employees' State Insurance Act, 1948, Section 2(14).

101. Bombay Employees' State Insurance (Medical Benefit) Rules, 1954, Rule 3-B.

injured employee not only by the medical and rehabilitative treatment, but also by providing for vocational training/ industrial rehabilitation courses and re-employment.[102]

When a person is entitled to any of the benefits, provided by the Employees' State Insurance Act, 1948, he is not entitled to receive any similar benefit, admissible under the provisions of any other enactment.[103] He is also debarred from claiming compensation under the Workmen's Compensation Act, 1923 or damages under any other law.[104] The

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102. Employees' State Insurance Act, 1948, Sections 19, 56. Employees' State Insurance (Central) Rules, 1950, Rule 23-A; Employees' State Insurance (General) Regulations, 1950, Regulation 71.

103. Employees' State Insurance Act, 1948, Section 61. It does not, however, bar a suit for damages for injuries, due to the negligence of the employer. (P. Asokan v. Western India Plywoods Ltd., 1987 Lab.I.C.310 (Ker.) (F.B.)) or third party (Reg.Director, E.S.I.C., v. D.M. Breweries Ltd., A.I.R.1958 Punj.136). Section 61 does not debar a person, entitled to any benefits, provided by the Act from claiming similar benefits, if any, available under service conditions or by way of customary concession. See Workmen of Rohtas Industries Ltd. v. H.K.Choudhuri, A.I.R.1965 Pat.127 (D.B.). In Hindustan Aeronautics Ltd. v. P.V.Perumal, A.I.R.1972 Mys.255 (D.B.), it was held that Section 61 would not bar a petition, filed under Section 110-A of the Motor Vehicles Act, as the compensation awarded therein is under the Law of Torts and not under an enactment.

104. Id., Section 53. In Associated Electrical Agencies v. Commissioner for Workmen's Compensation & Anr., (1995) 1 L.L.J.368 (Bom.) (D.B.), it was observed that Parliament enacted the Employees' State Insurance Act for conferring more benefits than under the Workmen's Compensation Act viz. sickness benefit, maternity benefit

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The object behind such a bar is to save the employer from facing more than one claim, in relation to the same accident.

Employers are prohibited from using the benefits payable[105] under the Employees' State Insurance Act as an excuse or justification for reducing or discontinuing the wages and benefits, available to the workman, under their conditions of service on the ground of similarity between

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(f.n.104 contd.)
and medical benefit. So it provided that employees, entitled to the benefits under the Employees' State Insurance Act, should not secure double benefit by reference to the Workmen's Compensation Act. Hence, the provisions of the Workmen's Compensation Act stand repealed qua the employers and the employees of the establishment, governed by the Employees' State Insurance Act. In P.Asokan v. Western India Plywoods Ltd., supra, n.103, it was held that Section 53 does not bar a suit for damages for injuries, sustained due to the negligence of the employer. In Annapurna v. G.M., K.S.R.T.C., 1984 Lab.I.C.1355 (Kant.)(D.B.), it was held that the dependants of an insured person, dying of an employment injury, are entitled to benefits under Section 52. Hence, any claim of theirs for damages under the Motor Vehicles Act, in respect of the said injury, is barred by Section 53.

105. The expression "benefits payagle" in Section 72 of the Employees' State Insurance Act must be construed to include not only those benefits, payable in terms of money but also medical benefit. Per Untwalia, J. in Workmen of Rohtas Industries Ltd., v. H.K.Choudhury, A.I.R.1965 Pat.127 at 130 (D.B.).

the two types of benefits.[106] The mere fact, that the employer is liable to make a contribution under the Employees' State Insurance Act, will not help him escape from this prohibition.[107]

Under the Employees' State Insurance Act, 1948, the employer is prohibited to take punitive actions against an employee, who is in receipt of temporary disablement benefit.[108] But, if the conditions of service of any employee so allow, the employer may discharge or reduce, on due notice, an employee, who has been in receipt of temporary disablement

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106. Employees' State Insurance Act, 1948, Section 72. In Workmen of Rohtas Industries Ltd. v. H.K.Choudhuri, A.I.R.1965 Pat.127 (D.B.), it was held that the fact that an insured person is entitled to medical benefit, provided under the Act, does not bar such benefit as he gets from the management as a condition of his service.

107. M/s.Bareilly Holdings Ltd. v. Their Workmen, 1979 Lab. I.C.600 (S.C.).

108. Id., Section 73(1). In M.Ramakrishna v. Bharat Electronics Ltd. and others, [1995] 87 F.J.R.I (Kant.), it was held that, what is prohibited by Section 73(1) is the taking of any penal action against an employee during the period, referred to in the section. The submission of resignation by an employee is a voluntary act, the acceptance of which by the management cannot be deemed to be a penalty or other disciplinary action, prohibited by Section 73. In Municipal Corpn., Bombay v. B.E.S.T. Workers' Union, (1973) 3 S.C.C.546, it was held that Section 73 places an embargo upon the powers of an employer to dismiss, discharge or otherwise punish an employee in the circumstances, mentioned therein. It was held in Mysore Steel Works v. Jitendra Chandra Kar, (1971) 1 L.L.J.543 (S.C.) that the burden is on the workman to claim protection under Section 73. In Buckingham and Carnatic Co. Ltd. v. Venkatiah, 1963 (7) F.L.R.343 (S.C.), it was held that termination of service, following automatically either from a contract or a standing order by virtue of unauthorised absence for the specified period, does not attract Section 73(1).

benefit for a continuous period of six months or more.[109] So long as this provision exists, an employee cannot claim temporary disablement benefit beyond a period of six months, even if his physical condition requires continued enjoyment of the benefit. The object of the Act to provide for benefits to employees in case of employment injury cannot be fully achieved, if a person, disabled by employment injury, is permitted by the regulations to be so discharged from service.

As under the Workmen's Compensation Act, 1923,[110] the right to receive any benefit under the Employees' State Insurance Act, 1948 is neither transferable nor assignable by the recipient. No cash benefit, payable under the Act, is liable to attachment or sale, in execution of any decree or order of a court.[111] The claimants alone are entitled to receive the benefits, because the right to receive the benefits is a personal right. The prohibition against assignment or attachment of benefits prevents all illegal and unfair means to frustrate the object of the Act. It

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109. Employees' State Insurance (General) Regulations, 1950 Regulation 98.

110. Workmen's Compensation Act, 1923, Section 9.

111. Employees' State Insurance Act, 1948, Section 60.

helps to protect effectively the insured against employment injuries.[112]

Prior to the 1989 Amendment of the Employees' State Insurance Act, the rates of disablement benefit and dependant's benefit were as specified in the First Schedule to the Act and funeral benefit was not to exceed a sum of Rs.100.[113] But after the 1989 Amendment, the First Schedule was omitted and the powers to determine the rates of contributions and benefits were conferred upon the Central Government,[114] thus multiplying the powers of the Central Government. Exercising these powers, the Central Government has decreased the rates of contributions by employers and employees.[115] But on the other hand, it has increased the rates of benefits reasonably.[116]

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112. However, on the death of the insured person, his nominee/ heir/legal representative shall get the cash benefit. See Id., Section 71.

113. See infra, n.116.

114. Employees' State Insurance Act, 1948, Section 39 (2), 46 (1)(f), 51 and 52.

115. The employer's contribution has been reduced from "five per cent" to "four percent" of the wages, payable to an employee; and employee's contribution from "two and one-fourth percent" to "one and one-half percent" of the wages, payable to an employee. See Employees' State Insurance Act, 1948, Schedule I, Clause 1, omitted by Act No.29 of 1989; Employees' State Insurance (Central) Rules, 1950, Rule 51.

116. Whereas formerly the daily rate of disablement and dependant's benefits was twenty five percent more than the standard benefit rate, it is now forty percent more than the standard benefit rate. The amount of funeral expenses has been increased from an amount of one hundred to one thousand rupees. See Employees' State Insurance Act, 1948, Schedule I, Clause 6(a), Section 46(1)(f),

contd...

Unlike the Workmen's Compensation Act, 1923, cash benefits under the Employees' State Insurance Act, 1948 are payable in the form of periodical payments.[117] Commutation of these periodical payments was prohibited, prior to the 1989 Amendment of the Act.[118] But the 1989 Amendment has confined the prohibition to disablement benefit only.[119] So the Act does not prevent now a widow, receiving dependant's benefit, from commuting the periodical payments, getting married thereafter, and thus wriggling out of the clutches of law, which denies her dependants' benefit, on remarriage.[120]

Analysis of the provisions, relating to provision of compensatory benefits under the Employees' State Insurance Act, 1948, reveals that the Act contains certain commendable provisions, unlike the Workmen's Compensation Act, 1923.[121]

(f.n.116 contd.) prior to the amendment of the Act, by Act No.29 of 1989; Employees' State Insurance (Central) Rules, 1950, Rules 57(3), 58(2) and 59. See also supra, n.8.

117. See Employees' State Insurance Act, 1948, Section 46(1). But "funeral expenses", which is not to exceed one thousand rupees, is paid in lumpsum.

118. Id., Section 62, prior to the 1989 Amendment.

119. Id., Section 62, as amended by Act 29 of 1989, Section 24 (w.e.f. 20-10-1989). See also Employees' State Insurance (General) Regulations, 1950, Regulation 76-B, which provides for commutation of small periodical payments of permanent disablement benefit.

120. Employees' State Insurance (Central) Rules, 1950, Rule 58(1) A(a).

121. See supra, Chapter 5.

For instance, the loss of earning capacity of an injured employee is assessed by a specially constituted Medical Board/Medical Appeal Tribunal/Employees' Insurance Court under the Employees' State Insurance Act, 1948,[122] whereas it is done by a single medical practitioner under the Workmen's Compensation Act, 1923.[123] Another commendable provision is that, unlike the Workmen's Compensation Act, 1923, which does not contain any provision for review of compensation for permanent disablement, the Employees' State Insurance Act, 1948 contains provision for reviewing any assessment of the extent of permanent disablement, made by a Medical Board, if it is satisfied that since the making of the assessment, there has been a substantial and unforeseen aggravation of the results of the relevant injury.[124] Thirdly, the quantum of compensation in cash under the Employees' State Insurance Act, 1948 is substantially higher than the one under the Workmen's Compensation Act, 1923. This is because the quantum of disablement benefit and dependant's benefit comes to 70% approximately of the wages of the injured employee and the quantum of funeral expenses is one thousand rupees under the Employees' State Insurance

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122. Supra, n.22.

123. Workmen's Compensation Act, 1923, Section 4(1)(c)(ii). See also supra, Chapter 5.

124. Employees' State Insurance Act, 1948, Section 55(2); See also supra, n.91.

Act, 1948,[125] whereas under the Workmen's Compensation Act, 1923, compensation for death is only 40% of the monthly wages of the deceased workman and for disablement, both permanent and temporary, only 50% of the monthly wages of the workman[126] and the amount of funeral expenses, permissible, is only an amount of fifty rupees.[127] Fourthly, unlike the Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948 provides for benefits in the form of services also viz. medical benefit and rehabilitation.[128]

Despite the above-mentioned commendable provisions, there are certain defects in the provisions, relating to provision of compensatory benefits under the Employees' State Insurance Act, 1948. The first of such defects is that under the Employees' State Insurance Act, 1948, the disablement benefit, payable for permanent partial disablement, resulting from a scheduled injury, is proportionate to the percentage of loss of earning capacity, mentioned in Schedule II, Part II, as under the Workmen's Compensation Act, 1923.[129]

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125. Employees' State Insurance (Central) Rules, 1950, Rules 57(3), 58(2), 59. See also supra, n.116.

126. Workmen's Compensation Act, 1923, Section 4(1). See supra, Chapter 5 for the 1995 Amendment, which is not brought into force.

127. Id., Section 8(4). See supra Chapter 5 for the 1995 Amendment, which is not brought into force.

128. Employees' State Insurance Act, 1948, Sections 19, 56; Employees' State Insurance (Central) Rules, 1950, Rules 23-A, 60; Employees' State Insurance (General) Regulation 1950, Regulations 95-A, 103, 103-B.

129. Employees' State Insurance (Central) Rules, 1950, Rule 57(4)(c); Workmen's Compensation Act, 1923, Section 4 (1) (c)(i).

But, the determination of the quantum of disablement benefit, based upon the pre-determined loss of earning capacity in Schedule II, Part II, for permanent partial disablement, may not be fair in all cases.[130] Sometimes, the percentage of the actual loss of earning capacity, sustained by an employee, may be higher than the one, mentioned in Schedule II, Part II. Hence, it is suggested that Rule 57(4)(c) of the Employees' State Insurance (Central) Rules, 1950 should be amended by adding an explanation to the effect that the loss of earning capacity, mentioned in Schedule II, Part II, is the minimum and can be held to be higher on the basis of evidence, led before the tribunal under Section 54-A of the Employees' State Insurance Act, 1948.

The expression "any other law" in Section 53 of the Employees' State Insurance Act, 1948 implies that it includes common law also. This section should be amended by inserting an explanation that the expression "any other law" does not include common law. Otherwise, the said expression is likely to stand in the way of an employee's seeking the alternative remedy, available under common law. It is also suggested that the right to sue for damages under common law should be made an additional remedy under the Employees' State Insurance Act, 1948, as suggested in respect of the Workmen's Compensation Act, 1923.[131]

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130. See _supra_, n.21.

131. See _supra_, Chapter 5

Regulation 98 of the Employees' State Insurance (General) Regulations enables an employer to discharge an employee, who has been in receipt of temporary disablement benefit for a continuous period of six months or more, if permitted by the conditions of service of the employee. This provision, which stands in the way of an employee's receiving temporary disablement benefit beyond a period of six months, should be deleted.

Chapter 7

ADMINISTRATIVE MACHINERY FOR PAYMENT OF COMPENSATION AND PROVISION OF COMPENSATORY BENEFITS

Proper payment of compensation or provision of compensatory benefits for industrial injuries depends, to a great extent, upon the administrative machinery for the same. Payment of compensation under the Workmen's Compensation Act, 1923 is administered by the Commissioner for Workmen's Compensation. He is also responsible for the adjudication of disputes, relating to the payment.[1] Under the Employees' State Insurance Act, 1948, on the other hand, provision of compensatory benefits, other than medical benefit,[2] is administered by the Employees' State Insurance Corporation[3], which is not saddled with the responsibility for adjudication of disputes.[4]

Commissioners for Workmen's Compensation are appointed by the State Government for a specified area.[5]

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1. Workmen's Compensation Act, 1923, Sections 19, 20.
2. For the administration of medical benefit, see infra, nn.69, 70, 71, 72
3. Employees State Insurance Act, 1948, Section 3
4. For adjudication of disputes under the Employees' State Insurance Act, 1948, there is Employees' Insurance Court. Id., Section 74.
5. Where more than one Commissioner has been appointed for any area, the State Government may regulate the distribution of business between them by appropriate orders. See Workmen's Compensation Act, 1923, Section 20(1) & (2).

They have been invested with very wide administrative powers to ensure proper payment of compensation. On receiving information[6] about fatal accidents, the Commissioner may require the employer, by a registered notice, to submit a statement, regarding the accident, with his opinion about his liabilities for compensation.[7] If the employer accepts the liability, he has to deposit the amount of compensation within 30 days of service of the notice.[8] In case he denies his liability, he has to state the grounds,[9] which may be enquired into by the Commissioner.[10] After such

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6. Whatever be the source of information, the Commissioner may issue a notice to the employer. Here, the Commissioner is not to adjudicate any claim but is acting only in his administrative capacity. He need not be satisfied that death has occurred out of or in the course of his employment. See K.D.Srivastava, Workmen's Compensation Act, 1923. (1992), p.266.

7. See Workmen's Compensation Act, 1923, Section 10-A(1). This is only an enabling provision. It confers only a power and imposes no duty on the Commissioner to require statements from employers, regarding fatal accidents. The Law Commission has recommended that the Section should be amended, making it a mandatory duty of the Commissioner to call for statements, whenever a fatal accident occurs and he has information thereof. See Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.85.

8. Workmen's Compensation Act, 1923, Section 10-A(2).

9. Id., Section 10-A(3).

10. Id., Section 10-A(4).
    Under Section 10-A, the Commissioner has no power to determine the amount of compensation and the liability of the employer. He cannot initiate proceeding against the employer suo motu. He can determine compensation, only on an application, made by dependants under Section 10. H.K.Saharay, Industrial and Labour Laws of India (1987), p.297. See also B.R.Roy v. K.T.Nonglyer, A.I.R. 1959 Ass.9 (D.B.).

enquiry, the Commissioner may inform any of the dependants of the deceased workman, that the dependants can prefer claims for compensation.[11] The Commissioner may help them by giving such further information as he may think fit.[12] In case of fatal accidents, the Commissioner may demand a further deposit, if he is satisfied that the sum, deposited by an employer as compensation, is insufficient.[13]

If the amount of any lumpsum, payable as compensation or any compensation, payable to a woman or a person under a legal disability, has been settled by agreement between employer and the person concerned, the employer has to get the agreement, registered by the Commissioner. The Commissioner may refuse to register such agreements, if it appears to him that it has been obtained by fraud or undue influence or other improper means or the agreed amount of compensation is inadequate. In such a case, he may order the payment of the proper sum.[14]

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11. Workmen's Compensation Act, 1923, Section 10-A(4).

12. Ibid.

13. Id., Section 22-A.

14. Id., Section 28; Workmen's Compensation Rules, 1924, Rule 50: A Commissioner must state reasons for refusal to register memorandum of agreement. See Jiyaji rao Cottom Mills Ltd. v. Asharfi Lal Nand Lal, A.I.R.1955 N.U.C.1316 (M.B.).

In the matter of distribution of compensation also, the Commissioner has a significant part to play. It is specifically provided that compensation for death and lumpsum compensation to a woman[15] or a person under a legal disability, can be paid only by deposit with the Commissioner. If such compensation is paid directly by an employer, that is not deemed to be payment of compensation.[16] When the employer has deposited the compensation for fatal injuries with the Commissioner, in accordance with the statutory obligation, the latter calls upon all eligible dependants

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15. According to the Law Commission of India, the net effect of Section 8 (1) & (7) is that compensation, payable to an adult woman, is not necessarily paid to her in cash immediately. It has to be deposited with the Commissioner and after that, its immediate payment to her is subject to the discretion of the Commissioner, who may (if it is not paid immediately) invest it, apply it or otherwise deal with it for the benefit of the woman. Having regard to the advancement in the socio-economic condition of women at the present day, Section 8 (1) has to be modified by giving a discretion to the Commissioner to permit direct payment to the woman by the employer without deposit under sub-section (1), See Law Commission of India, supra, n.7, pp.76, 77.

16. Workmen's Compensation Act, 1923, Section 8(1). But in the case of a deceased workman, an employer may make to any dependant, advances on account of compensation not exceeding an aggregate of one hundred rupees, which shall be repaid to the employer by the Commissioner, after deducting it from the total amount of compensation. Id., Section 8(1), Proviso. In Sona Shah v. Commr. for Workmen's Compensation, 1978 Lab.I.C.576 (J. & K.), it was held that Section 8 is mandatory in nature and has to be followed in letter and spirit.

of the deceased to appear before him.[17] After giving them a hearing, he determines the apportionment of the compensation among them. The Commissioner has the discretion to decide who among them shall receive the compensation and in what proportions.[18] He may also pay the entire amount to any one of the dependants.[19] If he is satisfied, after

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17. In Kunchali Rudrani v. Baby, 1979 Lab.I.C.415 (Ker.) (D.B.), it was held that, although the Commissioner for Workmen's Compensation is outside the ordinary hierarchy of courts, the proceeding before him under Section 8 is quasi-judicial in nature, in so far as he is required and empowered to find out, who all are the dependants of the deceased workman, though actual allotments and the proportion, in which allotments are made, appear to have been left to be decided by him in his direction.

18. Workmen's Compensation Act, 1923, Section 8(5). The undesirability of leaving the matter of selection of the beneficiary and also the extent of compensation, in respect of a victim of a fatal accident, entirely to the unguided discretion of the Commissioner has been strongly criticised by the Law Commission of India. Law Commission of India, One Hundred and Thirty-fourth Law Commission Report on Removing Deficiencies in Certain Provisions of the Workmen's Compensation Act, 1923 (1989), pp.9-11.
    The Law Commission has recommended the insertion of the following proviso below section 8(5) for providing guidelines to the Commissioner. "Provided that in exercising his discretion under this sub-section, the Commissioner shall have due regard to - (i) the nearness of the relationship of the dependant to the deceased; (ii) the means of the dependant and the extent of his dependence on the deceased; (iii) the desirability of ensuring that the amount of compensation is not distributed amongst an excessively large number of persons so as to lead to its being frittered away; and (iv) other relevant considerations". See Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.78.

19. Workmen's Compensation Act, 1923, Section 8(5). Where a Commissioner, in the exercise of his discretion, has

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an enquiry, that there is no eligible dependant, he may repay the money to the employer.[20] When the compensation, deposited with the Commissioner, is payable to a person, other than a woman or a person under legal disability, he has very little option but to pay the money to that person.[21] But, in the case of distribution of compensation to a claimant, who is a woman, or a person under legal disability, the Commissioner is given option either to make the payment

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(f.n.19 contd.) awarded a portion of the compensation to the widowed mother of the deceased, as included in Section 2(1)(d)(i) of the Workmen's Compensation Act, he cannot be said to have acted improperly. See Suramma v. Venkamma, A.I.R.1955 N.U.C.87 (Mad.). While distributing compensation, the Commissioner would have to ascertain the amount of maintenance, that would have been paid to the concerned parties by the deceased workman. In this connection, the relevant facts would be (i) the status of the family of the deceased and his dependants (ii) in the case of a widow, the possibility of a remarriage, in which case the workman would altogether cease to pay any money (iii) the circumstances of the parents and the minor brothers and to what extent, they were provided maintenance by the deceased during his life-time. See Sk. Jumman Sk. Amir v. Shahajahanbi, 1972 Lab.I.C.1226 (Bom.).

20. Id., Section 8(4).

21. Id., Section 8(6). The word "compensation" in this sub-section is wide enough to cover half-monthly payments. So, it was suggested by the Law Commission of India that in the case of half-monthly payments, payment to the adult female should be compulsory and should not depend on the discretion of the Commissioner. See Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.80.

to that person[22] or to invest or apply or otherwise deal with it, for the benefit of that person.[23] While exercising any of these options,[24] the paramount consideration will be the benefit of the dependants, as if the Commissioner himself were their guardian.[25] In the case of any half-monthly payment, payable to any person under a legal disability, the Commissioner may order the payment to be made to any dependant of the workman or to any other person, who, according to the Commissioner, will provide for the welfare of the workman.[26] If the Commissioner is satisfied[27] that

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22. Ibid.

23. Id., Section 8(7); See also Workmen's Compensation Rules 1924, Rule 10, according to which money in the hands of a Commissioner may be invested for the benefit of the dependants of the deceased workman in Government securities or Post Office Cash Certificates or may be deposited in a Post Office Savings Bank.

24. This discretion is vested in the Commissioner and it is not for the High Court to tell how to exercise it, in an appeal from his order. See Ravuri Kotayya v. Dasari Nagavardhanamma & Others, A.I.R.1962 A.P.42

25. See Sunil Rai Choudhuri, Social Security in India and Britain (1962), p.55.

26. Workmen's Compensation Act, 1923, Section 8(7). The word "dependant" in the latter half of the sub-section would create an impression that the sub-section is applicable to cases of death. But that is not the true position. The word 'dependant', as used here, really means a person, who would be a dependant, if the workman died. This should be made clear by proper amendment of section 8(7). See Law Commission of India, supra, n.21, pp.81, 82.

27. This may be on account of neglect of children on the part of a parent or on account of the variation of the circumstances of any dependant or for any other sufficient

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an order of the Commissioner as to the distribution of any sum, paid as compensation or as to the manner, in which any sum, payable to any such dependant, is to be invested, applied or otherwise dealt with, ought to be varied, the Commissioner can vary the order.[28]

The Commissioner is also empowered to review from time to time any half-monthly payment, payable under the Workmen's Compensation Act, 1923.[29] For this, an application has to be made to him either by the employer or by

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(f.n.27 contd.) cause. Id., Section 8(8). But no order, prejudicial to any person, shall be made, unless such person has been given an opportunity of showing cause, why the order should not be made or shall be made in any case, in which it would involve the repayment by a dependant of any sum, already paid to him. Id., Section 8(8), Proviso.

Where other dependants of the deceased workman, who had been awarded compensation, died, the Commissioner's order, varying the original order of distribution of compensation in favour of the sole surviving dependant, was upheld. Such an alteration of the circumstances was within the meaning of section 8(8) of the Workmen's Compensation Act. See Dependents of Rahim Bux v. James Finlay & Co. Ltd., A.I.R.1940 Cal.580 (D.B.). In Basudeo Rai v. Jagarnath Singh, 1987 Lab.I.C.565 (Pat.), it was held that Section 8(8) does not empower the Commissioner to review his earlier judgment on the ground of being erroneous in law.

28. Id., Section 8(8).

29. In Rajbir Singh v. S.K.S Yadav, Commr. for Workmen's Compensation, [1995] 87 F.J.R.150 (Del.)(D.B.), on the question whether the Commissioner for Workmen's Compensation has any power to re-open a case and review the order, awarding compensation on the basis of the facts, occurring after the passing of the award, it was held that the Commissioner has power of review only in respect of order, passed under Section 4(1)(d) in case of temporary disablement and no power of review in respect of compensation, awarded under Section 4(1)(a), (b) and (c) in case of permanent disablement.

the workman, accompanied by the certificate of a qualified medical practitioner that there has been a change in the condition of the workman.[30] On review by the Commissioner, the half-monthly payment may be continued, increased, decreased or ended. If the accident is found to have resulted in permanent disablement, the payment is converted to a lumpsum, after deducting any amount, which the workman has already received by way of half-monthly payments.[31]

The Commissioner has certain powers in connection with the commutation of half-monthly payments also. Right to receive half-monthly payments may be commuted into a lumpsum by agreement between the parties. If the parties

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30. Workmen's Compensation Act, 1923, Section 6(1). Application for review can be made without medical certificate under certain conditions. See Workmen's Compensation Rules, 1923, Rule 3.
    It was pointed out by the Law Commission of India that the Act is silent as to the exact circumstances, in which application for review can be made without medical certificate. So the Act should give some guideance in this regard so as to make the sub-section more self-contained. Some of the important grounds, mentioned in the rules could be mentioned in Section 6 of the Act. with a residuary power to add other circumstances by rules. See Law Commission of India, supra, n.21, p.73.

31. Workmen's Compensation Act, 1923, Section 6(2); Workmen's Compensation Rules, 1924, Rule 4. Section 6 does not empower the Commissioner to review his earlier judgment on the ground of being erroneous in law. See Basudeo Rai v. Jagarnath Singh, 1987 Lab.I.C.565 (Pat.). Review of payments, contemplated by Section 6, is limited to half-monthly payment for temporary disablement. Besides Section 6, there is no other provision under the Act, which empowers the parties to seek a reopening of the question of compensation, whether fixed by an agreement or determined by an award. See Augus Co.Ltd. v. Chouthi, A.I.R.1955 Cal.616 (D.B.).

cannot agree, it can be commuted by application by either party to the Commissioner, after half-monthly payments have been continued for not less than six months.[32] on receipt of an application for commutation, the Commissioner has to award a lumpsum, after making an estimate of the probable duration of the disablement.[33]

Though the Commissioner is vested with several administrative powers, to be exercised for the welfare of workmen, the exercise of such powers depends on his discretion.

The Employees' State Insurance Act, 1948 provides for the establishment of the Employees' State Insurance Corporation for the administration of the compensatory benefits.[34] The Corporation is established by the Central Government, by notification in the Official Gazette.[35] It is a body corporate,[36] having perpetual succession and a

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32. Workmen's Compensation Act, 1923, Section 7.

33. Workmen's Compensation Rules, 1924, Rule 5. The procedure for commutation of compensation should find a place in the Act, instead of in the Rules. So, Section 7 should be amended by adding a sub-section for the purpose. Law Commission of India, supra, n.21, p.74.

34. Employees' State Insurance Act, 1948, Section 3.

35. Id., Section 3(1).

36. The effect of declaration of a body as a 'corporate body' is to make it a separate legal entity. A decree or award, made against a corporate body, is not enforceable against the individual members but only against the assets of the

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common seal.[37] It can sue and be sued in its own name.[38] It represents various interests,[39] unlike the machinery for the administration of compensation under the Workmen's

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(f.n.36 contd.) corporate body. Harihar Prasad v. Bansi Missir, A.I.R.1931 Pat.321 (F.B.). The corporate body, having a separate legal entity, if it transfers its property to a member, it would amount to a sale. Public Prosecutor v. Ramachandrayya, A.I.R.1948 Mad.329.

37. Employees' State Insurance Act, 1948, Section 3(2).

38. Ibid.

39. Id., Section 4. The Corporation shall consist of the following members namely:-

a) a Chairman to be appointed by the Central Government;

b) a Vice-Chairman to be appointed by the Central Government;

c) not more than five persons to be appointed by the Central Government;

d) one person each representing each of the States, in which this Act is in force, to be appointed by the State Government concerned;

e) one person to be appointed by the Central Government to represent the Union Territories;

f) ten persons representing employers to be appointed by the Central Government in consultation with such organisations of employers as may be recognised for the purpose by the Central Government;

g) ten persons representing employees to be appointed by the Central Government in consultation with such organisations of employees as may be recognised for the purpose by the Central Government;

h) two persons representing the medical profession to be appointed by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government;

i) three members of Parliament of whom two shall be members of the House of the People (Lok Sabha) and one shall be a member of the Council of States (Rajya Sabha) elected respectively by the members of the House of the People and the members of the Council of States; and

j) the Director-General of the Corporation, ex-officio See also Employees' State Insurance (Central) Rules, 1950, Rule 2-A.

Compensation Act, 1923.[40]

The main duty of the Corporation is to administer the scheme of benefits, provided in the Employees' State Insurance Act, 1948. As part of this duty, it has to frame the budget for each year, showing the probable receipts and expenditure and submit a copy of the same for the approval of the Central Government.[41] It has also to maintain correct accounts of income and expenditure in the prescribed form,[42] get the accounts audited by the Comptroller and Auditor-General of India,[43] submit annual report of its activities to the Central Government,[44] place the budget, audited accounts and the annual report before the Parliament[45] and get its assets and liabilities valued at intervals of five years by such valuer, appointed with the approval of the Central Government.[46] This sort of total dependence on and accountability to the Central Government affects detrimentally its autonomy and independence.

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40. See Workmen's Compensation Act, 1923, Section 20(1).
41. Employees' State Insurance Act, 1948, Section 32.
42. Id., Section 33.
43. Id., Section 34.
44. Id., Section 35.
45. Id., Section 36.
46. Id., Section 37.

To facilitate the performance of its duty to administer the scheme of benefits, it is saddled with certain powers. For example, it can hold and acquire property, invest money for future use, raise loans and discharge them,[47] determine and demand contributions from evading employers in respect of their employees,[48] recover damages for non-payment or delay in making payment of contributions[49] and promote measures for improvement of the health and the rehabilitation and re-employment of disabled employees.[50] The Corporation has the power to make regulations for the administration of its affairs.[51]

The Standing Committee is the executive body of the Employees' State Insurance Corporation. The members of the Committee are chosen from amongst the members of the Corporation.[52] Subject to the general superintendence and

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47. Id., Section 29.
48. Id., Section 45-A.
49. Id., Section 85-B.
50. Id., Section 19.
51. Id., Section 97. See also Employees' State Insurance (General) Regulations, 1950, Regulation 3.
52. The Standing Committee consists of -
    a) a Chairman, appointed by the Central Government;
    b) three members of the Corporation, appointed by the Central Government;
    bb) three members of the Corporation, representing such three State Governments thereon as the Central Government may specify from time to time;
    c) eight members, elected by the Corporation as follows:
    i) three members from among the members of the Corporation representing employers;

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control of the Corporation, the Standing Committee administers the affairs of the Corporation. For this purpose, the Committee may exercise any of the powers and perform any of the functions of the Corporation. The Corporation lays down the policies and the Standing Committee executes them under the general supervision and control of the Corporation.[53]

A Medical Benefit Council is constituted by the Central Government to advise the Corporation and the Standing Committee, relating to the administration of medical benefit, the certification for the purposes of the grant of benefits and other connected matters.[54] Further, provision is also made for the appointment of Regional Boards, Local Committees,

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(f.n.52 contd.)
- (ii) three members from among the members of the Corporation representing employees;
- (iii) one member from among the members of the Corporation representing the medical profession;
- (iv) one member from among the members of the Corporation, elected by Parliament; and
- (v) the Director-General of the Corporation, *ex officio*.

See Employees' State Insurance Act, 1948, Section 8; Employees' State Insurance (Central) Rules, 1950, Rule 3.

53. Employees' State Insurance Act, 1948, Section 18.

54. *Id.*, Section 22(a). A Medical Benefit Council consists of three official members, namely, the Director-General of Health Services, *ex officio*, as Chairman, a Deputy Director-General of Health Services, appointed by the Central Government and the Medical Commissioner of the Corporation *ex officio*. One member from each of the States other than the Union Territories, in which this Act is in force, to be appointed by the State Government concerned, three members representing the employers, three members representing the employees and three members, of whom not less than one shall be a woman, representing the medical profession, appointed by the Central Government are the other members. See *Id.*, Section 10.

Regional and Local Medical Benefit Councils by the Corporation to decentralize administration.[55]

A Regional Board may be set up for each State or Union Territory by the Chairman of the Corporation.[56] It performs several functions in respect of the region, for which it is set up. It has to perform such administrative or executive functions as may be delegated to it by the Corporation or the Standing Committee, make recommendations, in regard to the changes, advisable in the Act, Rules and Regulations and review from time to time the working of the

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55. Id., Section 25.

56. Employees' State Insurance (General) Regulations, 1950, Regulation 10(1). The Chairman and Vice-Chairman of the Regional Board are to be nominated by the Chairman of the Corporation, in consultation with the State Government or the Administration of the Union Territory. Its other members include one representative of the State or the Union Territory, to be nominated by the State Government or the Administration of the Union Territory, one representative each of the employers and employees, to be nominated by the Chairman of the Corporation in consultation with their respective organisations, recommended by the State Government or the Union Territory, the Administrative Medical Officer or any other Officer, directly in charge of the Employees' State Insurance Scheme in the State or the Union Territory ex officio, the Regional Deputy Medical Commissioner of the Corporation ex officio and the members of the Corporation and the Medical Benefit Council, residing in the area ex officio. The Chairman of the Corporation may, if he considers it to be expedient, nominate additional representatives of employers or employees, not exceeding three from each side, so as to provide for the adequate representation of important organisations, not included in the nominations of the State Government. The Regional Board may co-opt a member of the medical profession in the area, if it considers it desirable. The Regional Director functions as the member-secretary of the Board. See Employees' State Insurance (General) Regulations, 1950, Regulation 10(1), (2) & (3).

Employees' State Insurance Scheme in the State and advise the Corporation and the State Government on measures to improve the working of the Scheme. It has also to look into the general grievances, complaints and difficulties of insured persons and employers; advise the Corporation on matters, referred to it for advice; decide the questions of extension of the Scheme to other categories of establishments; take measures for rehabilitation of permanently disabled employees and adopt special measures to meet peculiar conditions in the area.[57]

A Local Committee can be set up for such area as may be considered appropriate by the Regional Board [58] to

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57. Id., Regulation 10(14)

58. Id., Regulation 10-A(1). A Local Committee consists of the following members, namely:
    (a) a Chairman to be nominated by the Chairman, Regional Board;
    (b) an official of the State to be nominated by the State Government;
    (c) the Administrative Medical Officer-in-charge of the Scheme in the area concerned. ex officio or any other medical officer, nominated by him;
    (d) representatives of employers in the area, not being less than two and not more than four, to be nominated by the Chairman, Regional Board, in consultation with such employers' organisations as may be recommended for the purpose by the State Government;
    (e) an equal number of representatives of employees in the area, to be nominated by the Chairman, Regional Board, in consultation with such organisations of employees as may be recommended for the purpose by the State Government; and
    (f) an official of the Corporation to be nominated by the Director-General, who shall also act as Secretary of the Committee.

    Over and above, unlike in the case of the Corporation,

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perform, in respect of the area, for which it is set up, functions like discussing local problems, in regard to the Employees' State Insurance Scheme; referring complaints to the Regional Director or in the case of complaints, concerning medical benefit, to the State Government and advising the Corporation or the Regional Board on matters, referred to it for advice.[59]

The Corporation has two principal officers, namely, (a) Director-General of the Employees' State Insurance Corporation and (b) Financial Commissioner.[60] They are appointed by the Central Government, in consultation with the Corporation for periods, not exceeding five years at a

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(f.n.58 contd.) the Standing Committee and the Medical Benefit Council but as in the case of the Regional Board, the Chairman, Regional Board, may nominate additional representatives of employers and employees, not exceeding two from each side, to provide for the adequate representation of important organisations, not included in the nominations of the State Government and maintain parity between the number of representatives of such employers and employees. Ibid.

59. Id., Regulation 10-A(9).

60. Employees' State Insurance Act, 1948, Section 16(1), as amended by Act No.29 of 1989. Prior to the 1989 Amendment of the Act, the following were the principal officers of the Corporation:-
(a) Director-General;
(b) an Insurance Commissioner;
(c) a Medical Commissioner;
(d) a Chief Accounts Officer; and
(e) an Actuary.

time.[61] The Director-General is the Chief Executive Officer of the Corporation. The Director-General and the Financial Commissioner are whole-time employees. The Principal Officers are assisted by other staff, appointed by the Corporation.[62]

In order to provide benefits to the insured employees, a fund, called the Employees' State Insurance Fund, is held and administered by the Corporation.[63] This Fund is, mainly, derived from the contributions of employers and employees.[64] It may be supplemented by grants, donations or gifts from the Central Government, State Governments, local authorities or any private body or individuals.[65] The money, received from all sources, is required to be paid to the credit of an account, called the Employees' State Insurance Fund in the Reserve Bank of India or any other bank, approved for the purpose by the Central Government.[66] The account is to be operated on by an official of the Corporation, authorised by the Standing Committee with the approval of the Corporation.[67]

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61. Id., Section 16(1) and (4).

62. Id., Section 17(1) and (2).

63. Id., Section 26(1).

64. Ibid.

65. Id., Section 26(2).

66. Id., Section 26(3); See also Employees State Insurance (Central) Rules, 1950, Rules 21 and 22.

67. Id., Section 26(4); Id., Rule 23(1).

Payment of cash benefits for industrial injuries like disablement benefit, dependant's benefit and funeral expenses is administered by the Local Office of the Corporation.[68] But medical benefit is, generally, administered by the State Government.[69] The nature and extent of the medical treatment, to be provided by the State Government, and sharing the cost thereof are governed by agreements between the State Government and the Corporation.[70] The Corporation is empowered to establish and maintain hospitals and dispensaries and provide medical treatment by agreement with any local authority, private body or individual.[71] It may also provide medical benefit in lieu of the State Government and share its cost with the latter.[72]

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68. Employees' State Insurance (General) Regulations, 1950, Regulation 44. If a benefit payment is not made within the prescribed time, it shall be reported to the appropriate Regional Office and shall be paid as soon as possible. Id., Regulation 52(3).

69. Employees' State Insurance Act, 1948, Section 58. In Deorao Laxman Anande v. Keshav Laxman Borkar, A.I.R. 1958 Bom.314 (D.B.), it was held that Section 58 imposes a liability on the State Government and makes it its primary responsibility to provide medical benefits to insured persons and their families. In making alternative arrangements under the section for medical treatment at the clinics of medical practitioners, the approval of the Corporation is, no doubt, necessary. But, once the approval is obtained, the responsibility for making those arrangements is that of the State Government and not of the Corporation.

70. Id., Section 58(3) and (4).

71. Id., Section 59.

72. Id., Section 59-A.

Whereas the administrative machinery for providing compensatory benefits under the Employees' State Insurance Act, 1948 consists of a net-work of agencies, representing various interests like those of employers, employees, governments and medical profession[73] and is concerned only with administration, the one under the Workmen's Compensation Act is a single agency, representing single interest but discharging both administrative and adjudicatory functions.[74] Of course, the latter has several powers. But they are, generally, discretionary. Further, as the latter agency has to adjudicate upon disputes also, it may refrain from concentrating on the discharge of its discretionary administrative powers. The administrative machinery under the Employees' State Insurance Act, 1948, namely, the Employees' State Insurance Corporation, is admirable in that it represents various interests. But it suffers from over-representation of governmental interest, which will affect its autonomy. It is suggested that in the case of the Corporation, the maximum number of persons, to be appointed by the Central Government, should be reduced from five[75] to two and provision should be made for the inclusion of three

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73. Supra, nn.39, 52, 54, 56, 58.

74. Supra, n.1.

75. Employees' State Insurance Act, 1948, Section 4(c).

experts in Social Security, to be appointed by the Central Government. In the Standing Committee of the Corporation, the number of representatives of the Central Government should be reduced from three[76] to one and provision should be made for the inclusion in the Committee of two experts in Social Security from among the three experts in Social Security in the Corporation. Representatives of employers, employees and the medical profession in the Corporation,[77] Standing Committee,[78] and Medical Benefit Council[79] are appointed by the Central Government, in consultation with such organisations of employers, employees and the medical profession as may be recognised for the purpose by the Central Government. This provision enables representatives of those organisations, affiliated to the ruling party, to be represented in the Corporation, Standing Committee and Medical Benefit Council.[80] It is suggested that Sections 4

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76. Id., Section 8(b).

77. Id., Section 4(f), (g) and (h).

78. Id., Section 8(c) (ii), (iii) and (iv).

79. Id., Section 10(1) (e), (f) and (g).

80. But in the case of Regional Boards and Local Committees, though representatives of employees and employers are nominated by the Chairman of the Corporation, in consultation with such organisations of the employers and the employees as may be recommended for the purpose by the State Government, provision is made for nominating by the Chairman of the Corporation additional representatives of employers and employees to provide for the adequate representation of important organisations, not included in the nominations of the State Government. See Employees' State Insurance (General) Regulations, 1950, Regulations 10(1)(e), Proviso I, 10-A(1)(d), (e), Proviso I.

and 10 of the Employees' State Insurance Act, 1948 may be amended, providing for the appointment of representatives of employers, employees and the medical profession by the Central Government, in consultation with important organisations, having the largest membership. Though the Chairman of the Corporation[81] may continue to be a member, appointed by the Central Government, the Vice-Chairman of the Corporation, instead of being an appointee of the Central Government,[82] may be a non-official, to be elected by rotation from among the representatives of employers and employees in the Corporation by their respective group, for a period of one year at a time.[83]

The Commissioner for Workmen's Compensation under the Workmen's Compensation Act, 1923 should be freed of the burden of the administrative work.[84] The administrative work should be entrusted with an Administrative Council for Workmen's Compensation, consisting of an Administrative Officer, appointed by the State Government and one representative each of employers and workmen, covered by the Workmen's Compensation Act, 1923, selected by the State Government, in consultation with their respective unions, having

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81. Employees' State Insurance Act, 1948, Section 4(a).

82. Id., Section 4(b).

83. S.C.Srivastava, Social Security and Labour Laws (1985), p.232.

84. For the duties of the Commissioner for Workmen's Compensation, see infra, Chapter 8.

the largest membership or in the absence of unions, the representatives of employers and workmen, selected by the State Government. It should be made the mandatory duty of this Administrative Council to require statements from employers regarding fatal accidents,[85] demand a further deposit, if the sum, deposited by the employer as compensation in respect of a workman, whose injury has resulted in death, is insufficient[86] and refuse to register agreements, regarding payment of compensation, if they have been obtained by fraud or undue influence or other improper means or the amount, agreed upon, is inadequate.[87] It is suggested that the distribution of compensation, deposited in respect of a deceased workman, should not be left to the unguided discretion of the proposed Administrative Council, as is done in the case of the Commissioner for Workmen's Compensation.[88] A proviso should be inserted below section 8(5) of the Workmen's Compensation Act, 1923, enabling the Administrative Council to distribute compensation, having due regard to the nearness of the relationship of the dependant to the deceased, the means of the dependant and

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85. Supra, n.7.

86. Supra, n.13.

87. Supra, n.14.

88. Supra, n.18.

the extent of his dependence on the deceased and other relevant considerations.[89] It is also suggested that section 8(1) of the Workmen's Compensation Act, 1923 may be amended, giving a discretion to the Administrative Council to permit direct payment of compensation to an adult woman by the employer, if the Council thinks, on an application made to it by the woman, that the woman is socially and educationally advanced enough to accept direct payment.[90]

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89. <u>Ibid</u>.

90. See <u>supra</u>, n.15.

Chapter 8

ADJUDICATION OF DISPUTES RELATING TO COMPENSATION FOR INDUSTRIAL INJURIES

A workman, who sustains industrial injury, should be given compensation as early as possible. If there is dispute with regard to his claim for compensation, the same should be settled speedily by an adjudicatory machinery. In India, for settling such disputes, special machineries have been created under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948.

Under the Workmen's Compensation Act, 1923, any person can be appointed by the State Government as the Commissioner for Workmen's Compensation for a particular area.[1] The Act does not prescribe any qualifications for a person to be appointed as Commissioner for Workmen's Compensation.[2] The Commissioner for Workmen's Compensation can, however, choose one or more persons, possessing special knowledge of any matter, relating to an inquiry to assist him[3] in holding the inquiry. Such specialist may be

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1. Workmen's Compensation Act, 1923, Section 20(1).
2. Ibid.
3. Id., Section 20(3).

consulted by the Commissioner in his chamber. The parties may not, in such cases, know anything of the advice, given by such specialist. They are not given any chance to cross-examine him.[4]

The jurisdiction of a Commissioner for Workmen's Compensation is confined to claims, relating to accidents, occurring within his area.[5] However, where the workman is

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4. This defect in the law has to be rectified. See Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.102.

5. Workmen's Compensation Act, 1923, Section 21(1). Section 21 is amended by the Workmen's Compensation (Amendment) Act, 1995 by substituting for sub-section (1), the following sub-section, namely:-

"(1) where any matter under this Act is to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder be done by or before the Commissioner for the area in which -

(a) the accident took place which resulted in the injury; or

(b) the workman or in case of his death, the dependant claiming the compensation ordinarily resides; or

(c) the employer has his registered office: Provided that no matter shall be processed before or by a Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned;
Provided further that, where the workman being the master of a ship or a seaman or the captain or a member of the crew of an aircraft or a workman in a motor vehicle or a company, meets with the accident outside India, any such matter may be done by or before a Commissioner for the area in which the owner or agent of the ship, aircraft

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the master of a ship or a seaman, the Commissioner for the area, in which the owner or agent of the ship resides or carries on business, has the jurisdiction to decide the case.[6]

A Commissioner, within whose jurisdiction the accident took place, can transfer any matter, arising out of any proceedings before him, to another Commissioner, whether in the same State or not, either for report or for disposal.[7] For

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(f.n.5 contd.)
or motor vehicle resides or carries on business or the registered office of the company is situate, as the case may be.

(1-A) If a Commissioner, other than the Commissioner with whom any money has been deposited under Section 8, proceeds with a matter under this Act, the former may for the proper disposal of the matter call for transfer of any records or money remaining with the latter and on receipt of such a request, he shall comply with the same".

But this amendment will come into force only on such date as the Central Government may specify by notification in the Official Gazette. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 10. See United India Insurance Co.Ltd. v. Shaik Alimuddin, 1995 (70)F.L.R.631 (A.P.). An accident, causing injury, occurred in Bombay. But claim was made before the Workmen's Compensation Commissioner, Hyderabad. It was held that the order, passed by him, awarding compensation, interest and penalty was liable to be set aside. In National Insurance Co.Ltd. v. R.Vishnu, 1991 Lab.I.C.2172 (Kant.) (D.B.), the claim for compensation was made in a district other than the one, where the accident had taken place. The non-objection of the employer to it was held to amount to acquiescence and consequently, the employer was not allowed to raise the question of jurisdiction at the appellate stage.

6. Id., Section 21(1), Proviso.

7. Id., Section 21(2); Workmen's Compensation Rules, 1924, Rules 44, 45.

effecting this transfer, the Commissioner must be satisfied that the matter can be more conveniently dealt with by the other Commissioner.[8] For transferring any matter, other than a matter, relating to the actual payment to a workman or distribution among dependants of a lumpsum, for disposal, the previous sanction of the State Government is required, in the absence of agreement among all the parties, regarding the transfer.[9] For making an order of transfer, relating to distribution among dependants of a lumpsum, an opportunity for hearing has to be afforded by the Commissioner to the party to the proceedings, who has appeared before him.[10] In addition to the Commissioner, the State Government is also empowered to transfer any matter from one Commissioner to another one.[11] The provision for transfer helps the workman, who finds it difficult to pursue the case, at the place of accident. But if this provision is to benefit the workman, the Commissioner should be empowered to decide the question of transfer, after affording opportunity for hearing

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8. Id., Section 21(2).

9. Id., Section 21(2), Proviso II. This proviso is omitted by the Workmen's Compensation (Amendment) Act, 1995. This omission will, however, come into force only on such date as may be notified by the Central Government. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 10.

10. Workmen's Compensation Act, 1923, Section 21(2), Proviso I.

11. Id., Section 21(5).

to the parties concerned,[12] instead of acting solely upon the sanction of the State Government[13] or on the agreement of all the parties.[14] Even if the State Government does not accord sanction or the employer does not agree, the Commissioner should have the power to transfer a case, where the transfer of proceeding is required, to protect the interests of the workman.

Questions like the liability of any person to pay compensation, the nature and extent of disablement, the amount or duration of compensation, and whether the person injured is or is not a workman, are referred to the Commissioner for settlement.[15] Application for

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12. In National Insurance Co.Ltd. v. Colap Parik, 1995 Lab. I.C.698 (Ori.) (D.B.), it was held that, if any of the parties makes a motion before the Commissioner for transfer of a case from a particular division on the ground that the concerned case has links with cases, filed in another division, the Commissioner should consider all relevant aspects, and pass appropriate orders.

13. In D.M., United India Insurance Co. Ltd., v. Sasikala Sahoo, 1995 Lab.I.C.700 (Ori.), it was held that prior sanction of the State Government is necessary, even if parties to proceedings agree for transfer of proceedings.

14. Workmen's Compensation Act, 1923, Section 21(2), Proviso II.

15. Id., Section 19(1). In Bhanora Colliery v. Poda Teli, (1974) 2 L.L.J.520 (Cal.)(D.B.), it was held that the Commissioner can examine the workman in a particular case, if he feels necessary for the purpose of settling the amount, as he is enjoined to do under section 19.
    The jurisdiction of the Commissioner under S.19(1) of the Workmen's Compensation Act is not confined to the liability of the employer. It extends to the liability of an insurance company under a policy, issued by it for payment of compensation. See Premier Insurance Co. Ltd., v. C.Thomas, (1984) 1 L.L.J.149 (Mad.) (D.B.); Bibhuti Bhusan Mukherjee v. Dinamani Dei (1982) 1 L.L.J.73 (Ori.); Motor Owners' Insurance Co. Ltd. v. Jadavji Keshavji Modi, A.I.R.1981 S.C.2059; United India Fire & General Insurance Co.Ltd. v. Kamalakshi, (1980) 2 L.L.J.408 (Ker.) (D.B.); Sital Prasad v. Afsari Begum, 1977 Lab.I.C.1553 (All.); Kamala Devi v. Navin Kumar, A.I.R.1973 Raj.79. For contrary decisions, see Sudhir Kumar v. Hori, [1981] 59 F.J.R.165 (All.); G.Sreedharan v. Hindustan Ideal Insurance Corpn. Ltd., 1976 Lab.I.C. 732 (A.P.) (D.B.).

settlement[16] of any question can be made to the Commissioner, only if the parties have been unable to settle the same by agreement.[17] The question, whether the parties should make an attempt to settle the matter, before making an application to the Commissioner, is subject to conflicting opinions.[18]

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16. Id., Section 22(1). Section 22 is amended by the Workmen's Compensation (Amendment) Act, 1995 by substituting for "(1) No application for the settlement" the following:-
"(1) Where an accident occurs in respect of which liability to pay compensation under this Act arises, a claim for such compensation may, subject to the provisions of this Act, be made before the Commissioner.
(1-A) Subject to the provisions of sub-section(1), no application for the settlement".
But the amendment will come into force only on such date as the Central Government may, by notification in the Official Gazette, specify. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 11.
In Fabiragram Rice Mills v. Ramu Indu, A.I.R.1950 Ass.188 (D.B.), it was held that Section 22 contemplates an application for settlement, after a claim is made under Section 10.

17. Workmen's Compensation Act, 1923, Section 22(1). But an application by a dependant or dependants for compensation is exempted from the purview of this requirement. Ibid.

18. In C.E.Corporation v. Dorai Raj, A.I.R.1960 Ori.39, it was held that Section 22(1) does not mean that, before the Commissioner can assume jurisdiction, there must be some attempt to agree, which had proved unsuccessful, but it means "if not settled by agreement". In Makhan Lal v. Audh Behari, A.I.R.1959 All.586, it was held that, what the section requires is, that a question actually arose between the parties and was not settled by private agreement. The Law Commission of India has made it clear that there is no obligation on the parties to attempt to settle, before they can proceed to make an application to the Commissioner. See Law Commission of India, supra, n.4, p.103.

The Workmen's Compensation Act, 1923 fosters the settlement of disputes, relating to compensation, by mutual agreement between the parties and discourages unnecessary resort to litigation.[19] So, the parties should make an attempt to settle the question, before proceeding to make an application to the Commissioner. This will help prevent unnecessary financial loss to the workman and reduce the work-load of the Commissioner.

Application for settlement of any matter has to be made to the Commissioner,[20] in the prescribed manner.[21] If

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19. Workmen's Compensation Act, 1923, Section 19(1). See also K.L.Bhatia, Administration of Workmen's Compensation Law (1986), p.151.

20. See Smt.N.M.Salunke v. S.T.Pawar, 1995 (70) F.L.R.360 (Bom.). The appellant's son, an employee of the respondent, died in a tractor accident in the course of employment. The question, to be decided by the High Court, was, whether the claim for compensation before the Commissioner for Workmen's Compensation was barred under Section 110-AA of the Motor Vehicles Act, 1939, in view of the appellant having already filed a claim before the Motor Accident Claims Tribunal, which was dismissed. It was held that the claim under the Workmen's Compensation Act is maintainable before the Commissioner, if the accident took place in the course of employment and the case was remanded to the Commissioner for deciding the remaining issues on merits. In Anthony Lobo v. C.M.Merchand, 1979 Lab.I.C.61.(Bom.), the father of a person, who died in a motor accident, filed an application under Section 110-B of the Motor Vehicles Act for compensation, on behalf of himself as well as of the minor brothers of the deceased. It was held that he was barred from making a subsequent application before the Commissioner for Workmen's Compensation as guardian of the minor brothers of the deceased.

21. See Workmen's Compensation Act, 1923, Section 22(2) See also Workmen's Compensation Rules, 1924, Rule 20.

the applicant is illiterate or, for any other reason, unable to furnish the required information in writing, it has to be prepared under the direction of the Commissioner.[22] This provision helps an illiterate or otherwise disabled applicant in getting justice.[23] It requires the Commissioner not to allow a legitimate claim to be defeated, due to the inability of the applicant, on account of poverty, ignorance or any other disability, to engage a counsel or procure his presence. Under such circumstances, the Commissioner has to render such assistance to the workman as he may legitimately provide, instead of sitting with folded hands or taking simply a hands-off attitude.[24] A workman of a press sustained injury on all the fingers of his right hand, as a result of an accident in the course of his employment. His case before the Commissioner was not represented by any lawyer. The records, desired by him, namely, attendance register, minimum wages register, day book ledger and vouchers for the period from 1978 to 1979, were not produced by the employer. The Commissioner did not compel the employer to

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22. Id., Section 22(3).

23. In Pushpam v. Bonamer Estate, 1988 (1) K.L.T.777 (D.B.), it was held that the statutory duty, cast on the Commissioner by Section 22(3) of the Workmen's Compensation Act, 1923 was completely forgotten by him, when he rejected the application of an illiterate lady for rectification of the date of accident in the application. For details of this case, see infra, n.67. See also Fakiragram Rice Mills v. Ramu Indu, A.I.R.1950 Ass.188 (D.B.)

24. Gian Chand v. Mani Karan, 1989 Lab.I.C.1587 (H.P.).

produce these records. This failure on the part of the Commissioner to compel the production of records was held to be improper.[25]

The Commissioner should not insist on strict compliance of the prescribed form.[26] A claim for compensation, brought before the Commissioner, should not be thrown out simply on the ground that the claim was not made in the prescribed form. This is a defect of procedure, which can be permitted to be rectified by the Commissioner. Once it is rectified, the irregularity is cured.[27]

If the Commissioner is satisfied that the workman is unable, by reason of poverty, to pay the prescribed fees, he may remit any or all of such fees. If the case is decided in favour of the workman, the prescribed fees may be added to the cost of the case and recovered by the Commissioner.[28] Thus, poverty does not stand in the way of a workman's filing an application before the Commissioner.

When the Commissioner exercises jurisdiction, civil courts are debarred from exercising jurisdiction in respect

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25. C.K.Pathrose v. Ammini John Kallookaran, 1989 (58) F.L.R.542 (Ker.) (D.B.).

26. Bhagwandas v. Pyarelal, A.I.R.1954 M.B.59; T.S.Alagappa Mudaliar v. Veerappan Chettiar, A.I.R.1942 Mad.116.

27. Brahma Metal & Gen.Engg. Factory v. Bahadur Singh, A.I.R.1955 All. 182 (D.B.).

28. Workmen's Compensation Rules, 1924, Rule 34.

of matters, falling within the jurisdiction of the Commissioner.[29] The bar of the civil court's jurisdiction is limited to matters, which are required to be disposed of by the Commissioner.[30] It does not affect a suit for damages.[31]

Any appearance,[32] application or act, required to be made or done by a workman before or to a Commissioner, may

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29. See Workmen's Compensation Act, 1923, Section 19(2).

30. In respect of the Central Government employees' claims under the Workmen's Compensation Act, section 19(2) does not bar the jurisdiction of the Central Administrative Tribunal. The Tribunal has concurrent jurisdiction with the Commissioner for Workmen's Compensation in this regard. Union of India v. Sarup Chand Singla, [1989] 9 A.T.C.167 (Chand.) (F.B.). Civil courts will be competent to entertain claims, coming under Section 13 of the Workmen's Compensation Act. Even though the right of indemnity, provided under Section 13 does not exist outside the Act and is a right, specifically conferred by the Act, the fact remains that the statute, while giving a right, has not provided any particular form of remedy. The affected party can, therefore, have recourse to the ordinary civil court and have his or her rights determined. See Trustees, Port of Bombay v. Natwarlal Parekh, 1979 Lab.I.C.272 (Bom.) (D.B.). Trustees of the Port of Madras v. Bombay Co., A.I.R.1967 Mad.318.

31. See Minerals & Chemicals v. Thevan, 1991 (2) K.L.T.564, where it was held that the scope of the Workmen's Compensation Act, 1923, Section 19 is not to take away from the civil court the jurisdiction to give relief in tort but to provide for an alternative remedy for certain classes of persons, in certain circumstances.

32. But for the purposes of examination as a witness, the workman is required to appear personally. See Workmen's Compensation Act, 1923, Section 24.

be made by a legal practitioner, if he can afford to pay his fees.[33] It can also be made by an official of an Insurance Company or a registered Trade Union[34] or by an Inspector[35] or by any other officer, specified by the State Government in this behalf, authorised in writing by such person or with the permission of the Commissioner, by any other person, so authorised.[36] This provision is a great relief to those workmen, who may be so incapacitated that they may not be in a position to appear before or apply to the Commissioner.[37]

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33. Ibid.

34. Section 24 of the Workmen's Compensation Act permits a registered Trade Union to submit an application on behalf of the injured person. Where the application was submitted by the Secretary, Majdoor Congress, Indore, it was held to be a sufficient compliance with Section 24, even though not signed by the injured workman. Registered trade union, for the aforesaid purposes, includes the office-bearers of a registered trade union. See Bhagwandas v. Pyarelal, A.I.R.1954 M.B. 59.

35. Such an Inspector may be one appointed under sub-section (1) of Section 8 of the Factories Act, 1948 or under sub-section (1) of Section 5 of the Mines Act, 1952. See Workmen's Compensation Act, 1923, Section 24.

36. The expression "any other person so authorised" indicates only formal appearance, on behalf of the persons claiming. Nanak Chand Shadiram v. Mahabir, A.I.R.1935 All.408. Thus, in the case of a joint Hindu family, a manager, without any authorisation in writing, is competent to make an application, on behalf of the members of the joint family such as widows and minors. Id., p.410. See also Workmen's Compensation Act, 1923, Section 24.

37. But this provision cannot help the workman, so long as the Commissioners go on favouring only the cases, presented by certain advocates, who happen to be their favourites. See K.L.Bhatia, "Legal Aid To Victims Of Industrial Accidents: An Empirical Study Of The Administration of Workmen's Compensation Law In The States Of Jammu And Kashmir And Punjab", 23 J.I.L.I.120 at 126 (1981).

On receipt of an application,[38] the Commissioner must, first of all, either by himself or by some officer, authorised by the State Government in this behalf, examine the applicant on oath to ascertain, whether there is really a primafacie case.[39] If, after the examination of the applicant on oath, the Commissioner is of the opinion that no case has been made out, he may dismiss the application summarily.[40] Where the Commissioner does not dismiss the application summarily, he should proceed to take evidence.[41]

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38. Workmen's Compensation Act, 1923, Section 22.

39. Workmen's Compensation Rules, 1924, Rule 23. In Ali Akbar v. Java Bengal Line, A.I.R.1937 Cal.697 (D.B.), the Commissioner allowed himself to be influenced into thinking that there was a prima facie case by the fact that there was a doctor's certificate, attached to the application. It was held that there was irregularity of procedure and that the doctor's certificate ought to have been disregarded and the Commissioner should have proceeded, as directed by Rule 23. In Burhwal Sugar Mills Ltd. v. Ramjan, 1982 Lab.I.C.84 (All.), it was held that the evidence, on the basis of which an order for compensation may be passed by the Commissioner, has to be on oath. Section 23 of the Workmen's Compensation Act, 1923 and Rule 23 of the Workmen's Compensation Rules, 1924 specifically refer to examination on oath. Merely placing on record the medical certificate is not enough, as a medical certificate cannot take the place of examination on oath, contemplated under Section 23 and Rule 23. In K.S.Modi v. Bichitrananda Swain, 1974 Lab.I.C.954 (Ori.), it was held that Rule 23 is mandatory and non-compliance with it would vitiate the proceeding. For contrary view, see Taxmaco v. Nandoo, A.I.R.1955 N.U.C.3693 (M.B.).

40. Id., Rule 24. See Singh v. Burma Railways, A.I.R.1939 Rang. 70 (D.B.), where it was held that Rule 21 does not give the Commissioner any power to dismiss the application summarily, unless the applicant has been examined.

41. Id., Rules 25-27. See Bhagwandas v. Pyarelal, A.I.R. 1954 M.B.59, where it was held that Rule 25 gives a

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The Commissioner is not required to record evidence in extenso.[42] However, he cannot decide the case on no materials. He must decide the case on evidence, adduced before him, in an objective manner.[43] So, he must make a

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(f.n.41 contd.) discretion to the Commissioner to hold a preliminary inquiry. It does not make it obligatory to hold a preliminary enquiry in every case. In Singh v. Burma Railways, A.I.R.1939 Rang. 70 (D.B.), it was held that if the opposite party does not file any written statement, the Commissioner has to proceed to examine him upon the claim and reduce the result of examination to writing. Omission to do so is a substantial error in procedure. It was held in K.S.Modi v. Bichitrananda Swain, 1974 Lab.I.C.954 (Ori.) that Rule 27, relating to calling for the appearance and examination of opposite party by the Commissioner, is mandatory and non-compliance with it would vitiate the proceeding.

42. See Workmen's Compensation Act, 1923, Section 25. Though the Commissioner's decisions must be consistent with the general principles of the Evidence Act, he is not bound by procedural technicalities of the Act. See Achoor Estate v. Nabeesa, 1994 Lab.I.C.1974 (Ker.) (D.B.); Union of India v. T.R.Varma, (1958) 2 L.L.J.259 (S.C.)

43. Kunchali Rudrani v. Baby, 1979 Lab.I.C.415 (Ker.)(D.B.), relying on State of Mysore v. S.S.Makapur, A.I.R.1963 S.C.375. See also Parameswaran v. M.K.Parameswaran Nair, 1989 (1) K.L.T.399 (Ker.) (D.B.). The respondent employer produced the muster roll and wages register to prove that the applicant was not employed as a regular cutter. He alleged that only on very rare occasions, the applicant was casually employed, during the absence of the regular cutter, Vasudevan. The Commissioner held that there was no proof that the applicant was employed as a regular cutter. It was held that the Commissioner was not right in holding that the applicant was not a regular workman for the only reason that his name was not mentioned in either of the two registers. He could easily have produced the staff register, relating to minimum wages or examined the regular cutter, Vasudevan or the foreman to prove his case.

brief memorandum of the substance of the evidence of every witness in the course of examination. Such memorandum is, however, required to be written and signed by the Commissioner with his own hand.[44] But if the Commissioner is prevented from making such memorandum, he should cause such memorandum to be made in writing from his dictation and sign the same, after recording the reason for his inability.[45] Medical certificates are the worst form of medical evidence. They, in the absence of examination of the doctors issuing them, are mere hear say evidence and cannot be relied on to arrive at any conclusion.[46] So, an order for payment of

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44. Workmen's Compensation Act, 1923, Section 25.

45. Id., Section 25, Proviso I. It was held in Makhan Lal Marwari v. Audh Behari Lal, A.I.R.1959 All.586 that where the Commissioner attaches a note at the end of each deposition, stating that it has been recorded by his reader at his dictation, owing to his inability to do so, that will be sufficient compliance with Section 25 of the Workmen's Compensation Act, 1923. The Law Commission of India has noted that this restrictive provision follows the corresponding provision in the Code of Civil Procedure. It often causes inconvenience and delay. In view of this, the Commission has suggested that the dictation by the Commissioner shall be provided for, irrespective of any question whether he is able or unable to make the memorandum himself. Law Commission of India, supra, n.4 p.108. It is, however, the duty of the Commissioner to hear evidence himself and decide the dispute. He cannot delegate that power. G.Powell v. Panchu Mokadam A.I.R.1942 Pat.453 (D.B.).

46. In Allied Cargo Motors and another v. S.Manickam, [1995] 87 F.J.R.336 (Mad.), the Commissioner for Workmen's Compensation decided the compensation, payable to a workman for injuries, sustained by him, resulting in amputation of the fourth and fifth toes of his right leg, on the basis of medical certificate to the effect that the

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compensation cannot be founded on medical certificate alone without the statement on oath of the medical practitioner, who issued it.[47] Though, generally, the Commissioner is not to record evidence in extenso, he should do so in the case of the evidence of the medical witness. It has to be

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(f.n.46 contd.) percentage of his loss of earning capacity was 40 percent. It was held that the doctor, who had issued the medical certificate, was not examined by the Commissioner, and, therefore, the medical certificate could be considered only as a hearsay evidence and no decision on the percentage of disability could be taken on the basis of the medical certificate. See also Bengal Coal Co. Ltd., v. Barhan Gope, 1983 Lab.I.C.685 (Cal.) (D.B.).

47. Achoor Estate v. Nabeesa, 1994 Lab.I.C.1974 (Ker.)(D.B.); Commissioner for the Port of Calcutta v. Sk. Muslim, 1983 Lab.I.C.1835 (Cal.) (D.B.); Bengal Coal Co.Ltd. v. Sew Pujan, 1983 Lab.I.C.1285 (Cal.) (D.B.); Bengal Coal Co.Ltd. v. Barhan Gope, 1983 Lab.I.C.685 (Cal.) (D.B.); Bhurhwal Sugar Mills Ltd. v. Ramjan, 1982 Lab.I.C.84 (All.); Vijay Ram v. Chander Prakash, 1981 Lab.I.C.359 (J. & K.); Ali Akbar v. Java Bengal Line, A.I.R.1937 Cal. 697 (D.B.). For contrary view, see D.Venu and Others v. Senen Fernandez, 1995 Lab.I.C.1247 (Ker.) (D.B.). Medical certificate can be accepted by the Commissioner without examining the doctor, as the provisions of the Evidence Act do not apply to proceedings before quasi-judicial tribunals. See also M/s.New India Assurance Co. Ltd. v. Randi Lachaya and another, 1994 Lab.I.C. 2324 (Ori.). Certificate of medical expert as to employees' disability can be accepted by the Commissioner without formal proof of it by examination of the medical expert, on satisfaction that it is genuine, because the technicalities of the Evidence Act are not attracted in a quasi-judicial proceeding, though the general principles of the Act are to be followed. In United India Insurance Co. v. Sethu Madhavan, 1992 (2) K.L.T.702 (D.B.), it was held that certificate of medical practitioner can be admitted in evidence without examining the doctor, who issued the same. This is because administrative and quasi-judicial proceedings are not fettered by technical rules of evidence.

taken down as nearly as may be word for word.[48] The duty of the Commissioner to hear and record the evidence himself, instead of acting on the report of subordinates,[49] and to take special care with regard to medical evidence helps render justice to workmen.

The Commissioner, before whom any proceeding, relating to an injury by accident is pending, can collect further information, relating to the case by local inspection of the place of work or accident and examination of persons.[50] He is also empowered to conduct summary examination of persons, likely to be able to give information, relating to a case, if it is required.[51] The Commissioner can help an injured workman obtain compensation by the proper use of these powers.

Is the Commissioner for Workmen's Compensation a court? In Indian Iron & Steel Co.Ltd. v. Shish Ram,[52] Salil Kumar Datta, J. of the Calcutta High Court pointed out that a tribunal or authority is a court, if certain conditions are satisfied. The conditions, to be satisfied, are the following:-

(1) The source of power of the tribunal or authority should be the State as the fountain of justice.

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48. See Workmen's Compensation Act, 1923, Section 25, Proviso II.

49. G.Powell v. Panchu Mokadam, A.I.R.1942 Pat.453 (D.B.).

50. Workmen's Compensation Rules, 1924, Rules 35 and 36.

51. Id., Rule 37.

52. (1979) 2 L.L.J.94 at 98 (Cal.).

(2) The jurisdiction to adjudicate the *lis* between parties must be conferred on it by law and not by any voluntary act of parties.

(3) The right to move the tribunal or authority has to be conferred on the aggrieved party by law.

(4) The proceeding on the *lis* commences by presentation of the case by the aggrieved party with a corresponding right on the other party to meet the case.

(5) In adjudicating the dispute, the tribunal or authority follows established procedure.

(6) If the dispute is on questions of fact, they are to be ascertained through evidence, supplemented by argument.

(7) If the dispute is on questions of law, there will be submission of arguments on such questions of laws by the parties before such tribunal or authority.

(8) In arriving at its decision, the tribunal or authority acts judicially and according to law, following the principles of natural justice.

(9) The tribunal or authority pronounces judgment, finally disposing of the case

(10) The judgment is authoritative and binding on parties, subject to appeal.

(11) The judgment is enforceable by the tribunal or authority through process of law. All these conditions being satisfied in the case of the Commissioner for Workmen's

Compensation, it was held that the Commissioner is a court.[53]

But the Commissioner for Workmen's Compensation is not a 'court' in the normal hierarchy of courts, as he does not deal with general disputes and deals only with particular disputes under the Workmen's Compensation Act, 1923. He is deemed to be a civil court for certain specific matters.[54] If the Commissioner were a civil court, there was no need for a provision, deeming him to be a civil court. Further, the institution of a suit for damages in respect of industrial injuries in a civil court excludes the jurisdiction of the Commissioner for Workmen's Compensation and vice versa.[55] All these factors show that the Commissioner for Workmen's Compensation is different from a civil court.[56] He is not a civil court, amenable to the revisional jurisdiction of the High Court.[57] He, being not a civil court, is not bound

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53. Id., at pp.98-99. See also Rajiyabi Cosman Sayi v. M.M. and Co. A.I.R.1970 Bom.278 (D.B.); Mt.Dirji v. Smt.Goalin, A.I.R.1941 Pat.65 (F.B.).

54. Workmen's Compensation Act, 1923, Section 23.

55. Id., Section 3(5).

56. Bashir Khan v. Ranger, Social Vaniki, 1994 Lab.I.C. 2410 (Raj.) (D.B.).

57. Code of Civil Procedure, 1908, Section 115. See Bashir Khan v. Ranger, Social Vaniki, 1994 Lab.I.C.2410 (Raj.) (D.B.); K.G.Alphonse v. V.P.Xavier, [1981] 58 F.J.R.281 (Kant.); Yeshwant Rao v. Sampat, A.I.R.1979 M.P.21(F.B.); Nizam Khan v. Commr. for W.C., 1979 Lab.I.C.1430 (A.P.); Century Flour Mills v. Amir Baksh, A.I.R.1937 Sind. 6 (D.B.). For contrary view, see Mangilal v. Chunnilal,

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by the technicalities of the Evidence Act.[58] He is not governed by the provisions of the Civil Procedure Code, 1908 except in certain specified matters.[59] He is only a special quasi-judicial machinery, created to achieve the object of providing compensation to workmen for injury by accident.[60] So he is empowered to mould or even depart from the applicable provisions of the Code of Civil Procedure, 1908[61] to achieve the object of the Act.[62] He is not fettered by the technicalities, pertaining to a civil court.[63] He has to ensure that justice is not sacrificed at the altar of procedural formalities.[64]

(f.n.57 contd.) 1979 Lab.I.C.784 (Raj.) (F.B.); Mohanlal v. Fine Knitting Mills Co.Ltd., A.I.R.1960 Bom.387; Abdul Rashid v. Hanuman Oil & Rice Mill, A.I.R.1951 Ass.88 (D.B.); Mt.Dirji v. Smt.Goalin, A.I.R.1942 Pat.33 (D.B.); Firm G.D.Gianchand v. Abdul Hamid, A.I.R.1938 Lah.855.

58. M/s.New India Assurance Co. Ltd. v. Randi Lachaya and another, 1994 Lab.I.C.2324 (Ori.). See also New India Assurance Co. Ltd. v. Hrusikesh Sahu and another, 1994 Lab.I.C.NOC 408 (Ori.).

59. Workmen's Compensation Act, 1923, Section 23; Workmen's Compensation Rules, 1924, Rule 41.

60. Id., Preamble, Section 19(1). See Kunchali Rudrani v. Baby, 1979 Lab.I.C.415 (Ker.) (D.B.).

61. Id., Section 23; Workmen's Compensation Rules 1924, Rule 41.

62. Id., Rule 41, Provisos (a) and (b).

63. See Parameswaran v. M.K.Parameswaran Nair, 1989 (1) K.L.T.399 (Ker.) (D.B.); Ramanlal Madanlal v. Binapani Debi, A.I.R.1963 Cal.479 (D.B.).

64. K.L.Bhatia, "Administrative Process For Compensation Claims, An Empirical Study Of Administration Of Workmen's Compensation Law in States of Jammu And Kashmir And Punjab" 26 J.I.L.I. 173 (1984).

Even though the Commissioner for Workmen's Compensation is not a civil court, he is empowered by certain judicial powers to achieve the object of the Workmen's Compensation Act, 1923. Such powers include the power to order addition of parties,[65] order substituted service,[66] allow amendment of application,[67] permit amendment of pleadings,[68] grant

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65. Code of Civil Procedure, 1908, Order I, Rule 10. Although, specifically, the provisions of Order I, Rule 10 have not been made applicable to the proceedings under the Workmen's Compensation Act, there is no prohibition in the Act and the Rules that a person cannot be brought on record, subsequent to the filing of the application. Similarly, the principle of Section 151 of the Civil Procedure Code applies to quasi-judicial authorities also and the Commissioner can allow addition of parties. See K.V.Aboo v. Commissioner for Workmen's Compensation (1977) 2 L.L.J.134 (Ker.).

66. In Kalyan Singh v. Dhannaram, 1977 Lab.I.C.NOC 125 (Raj.) it was held that the Commissioner can order substituted service, in accordance with Order V, Rule 20 of the Code of Civil Procedure, 1908 and for this purpose, his satis - faction, that the respondent is evading service, is enough.

67. In Pushpam v. Bonamer Estate, 1988 (1) K.L.T.777 (D.B.), an illiterate lady gave a wrong date of the accident in her application for compensation. She filed an application to correct the date of the accident. But the Commissioner dismissed the same on the ground that he had no jurisdiction to allow such application. It was held that no provision in the Workmen's Compensation Act disabled an authority like the Commissioner from rectifying an apparent error in the application, submitted by an illiterate applicant, whose claim for compensation was denied by the employer.

    Amendment of application can be allowed for proper and effective determination of proceeding. See Bengal Coal Co. Ltd. v. Gour Hari, 1981 Lab.I.C. NOC 131 (Cal.) (D.B.); Bhanora Colliery Equitable Coal Co. Ltd. v. Poda Teli, 1975 Lab.I.C.864 (Cal.) (D.B.).

68. Kay Jay Autu Pvt.Ltd. v. Industrial Tribunal-Cum-Labour and Another, (1993) 2 L.L.J.119 (P. & H.).

adjournment,[69] pass order by consent of parties,[70] and correct bonafide mistakes.[71] Though the Commissioner does not possess the inherent powers of a civil court, conferred by section 151 of the Code of Civil Procedure,[72] the principle of the said section applies to quasi-judicial authorities like the Commissioner.[73] Moreover, the Commissioner has to settle the dispute before him, if it could not be settled by agreement.[74] Therefore, in furtherance of the

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69. In Gian Chand v. Mani Karan, (1990) 1 L.L.J.565 (H.P.), it was held that the power to grant adjournment has to be exercised with vigilance and circumspection. Hence, if the claim cannot be processed further, in the absence of the workman's counsel, the discretion has ordinarily to be exercised in favour of the workman by adjourning the case to enable him to secure the services of a counsel, unless the grant of adjournment is likely to result in grave miscarriage of justice or is occasioned, on account of utter lack of bona fides or diligence on the part of the workman.

70. Chhipa v. Bai Sona, A.I.R.1929 Bom.68 (D.B.).

71. In M/s.Intra Chemicals and Drugs Pvt.Ltd. v. Rupa Narain, 1985 Lab.I.C.519 (P. & H.), through bona fide mistake, the claim for compensation was preferred and allowed under the old Schedule IV. It was held that the Commissioner could, on the claimant's application, modify his order and enhance the amount of compensation, in conformity with the revised Schedule.

72. See In re, Karim Dad, A.I.R.1930 Lah.657 (D.B.).

73. K.V.Aboo v. Commissioner for Workmen's Compensation, (1977) 2 L.L.J.134 (Ker.). For contrary view, see Basudeo Rai v. Jagarnath Singh, 1987 Lab.I.C.565 (Pat.).

74. Workmen's Compensation Act, 1923, Section 19 (1).

powers of settlement, the Commissioner must be presumed to have all the incidental and ancillary powers, in the absence of contrary provision in the Act.[75] However, the Commissioner does not have any power to issue commissions for the examination of witnesses,[76] act on report of subordinates[77] and review his orders.[78]

The Commissioner can submit any question of law for the decision of the High Court.[79] By this provision, the Commissioner helps avoid an appeal and consequent expenses to the parties.

The Workmen's Compensation Act, 1923 provides for an appeal from the order of the Commissioner to the High Court

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75. Bhanora Colliery, Equitable Coal Co.Ltd. v. Poda Teli, 1975 Lab.I.C.864 (Cal.) (D.B.).

76. Brigstock Edulji & Co. v. Gaguji Devji, A.I.R.1930 Sind.221 (D.B.).

77. Cheralodiyil Usankutty v. Kunhipennu, A.I.R.1943 Mad. 608. In G.Powell & Co. v. Panchu Mokadam, A.I.R.1942 Pat.453 (D.B.), the Commissioner gave his decision on the basis of a report, submitted, after local investigation, by a person, deputed for that purpose by the Commissioner. The Patna High Court quashed the decision on the ground that the Commissioner could not delegate his powers and order a subordinate to make reports so as to make the Commissioner's work lighter and easier.

78. Basudeo Rai v. Jagarnath Singh, 1987 Lab.I C.565 (Pat.); Nanak Chand v. Mahabir, A.I.R.1935 All. 408. In Basudeo Rai v. Jagarnath Singh, supra, it was held that the Commissioner's power of review is confined to the circumstances, specified in Sections 6 and 8(8) of the Workmen's Compensation Act, 1923.

79. See Workmen's Compensation Act, 1923, Section 27.

before the expiry of sixty days from the date of the order.[80] An appeal lies only from certain specified orders of the Commissioner.[81] It lies, only if there is a substantial question of law, involved in the appeal.[82] A substantial question of law is involved, when the question of law is not well settled; there is some doubt as to the principle of law

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80. Id., Section 30(2). In Kap Steel v. R.Sasikala, 1990 Lab.I.C.1144 (Kant.) (D.B.), it was held that the period of limitation for an appeal under Section 30 is to be computed from the date of pronouncement of the impugned order and not from the date of communication thereof. In Divl. Mgr., National Insurance Co.Ltd. v. Mani, 1992 (2) K.L.T.954 (D.B.), it was held that the time, taken to obtain certified copy of judgment, is liable to be excluded in computing the period of limitation for the appeal.

81. See Workmen's Compensation Act, 1923, Section 30(1)(a), (aa), (b), (c), (d), (e) and Provisos I and II.

82. See V.Raveendran v. B.Somavally, [1995] 87 F.J.R.369 (Ker.) (D.B.). In practice, the adjective 'substantial' remains an irrelevant ornament. 'Substantial question of law' is nothing but a question of law with the addition of a dignified epithet. See Dr.A.T.Markose, "Judicial Control Of Administrative Action Under Section 30 of the Workmen's Compensation Act, 1923" 1 L.L.J. 1 at VII (1952). In New India Assurance Co.Ltd. v. Hrusikesh Sahu and another, 1994 Lab.I.C. NOC 408 (Ori.), it was held that issues, such as whether a workman sustained injuries in the course of and out of employment, his wages, age and percentage of disability, are findings of fact, based on materials, against which no appeal lies under Section 30. In Factory Manager, Associated Soap Stone Factory, Ratlam v. Ladkibai, 1994 Lab.I.C. NOC 17 (M.P.), it was held that an appeal by the employer against the compensation award was not maintainable, there being sufficient evidence to draw an inference that the accident arose out of and in the course

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involved,[83] a finding of fact is not based on evidence at all;[84] there is a dispute regarding the question whether a person is a workman[85] or whether an accident has arisen out of and in the course of employment;[86] the question involved is of great public importance or is so basic to the operation of the Act itself or it calls for a discussion of different views;[87] or when the Commissioner has acted arbitrarily and

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(f.n.82 contd.) of employment. In Motijhari Devi v. Bindeswari Prasad, A.I.R.1988 Pat.5 (F.B.), it was held that no appeal was maintainable against a finding of fact - the finding that the applicant for compensation failed to prove that she was the widow of the deceased worker.

83. M.L.Burman v. Shyamsunder Sinha, A.I.R.1969 Pat.366; Raj Rani v. Firm Narsing Das Mela Ram, A.I.R.1964 Punj. 315; Bhagwandas v. Pyarelal, A.I.R 1954 M.B.59; Kaikhushroo Ghiara v. C.P.Syndicate Ltd., A.I.R.1949 Bom.134 (D.B.).

84. Depot Manager, A.P.S.R.T.C., Nirmal v. Abdul Sattar, (1995) 2 L.L.J.318 (A.P.); M.D., O.R.T. Co.Ltd., v. S.Rama Mohan Rao, (1988) 1 L.L.J.200 (Ori.); Vijay Ram v. Janak Raj, 1981 Lab.I.C.143 (J. & K.).

85. Raj Rani v. Firm Narsing Das Mela Ram, A.I.R.1964 Punj. 315.

86. K.Saraswathi v. S.Narayana Swami, (1984) 2 M.L.J.173; Dudhiben Dharamshi v. New Jehangir Vakil Mills Co.Ltd., (1977) 2 L.L.J.194 (Guj.) (D.B.). For contrary view, see V.Raveendran v. B.Somavally, [1995] 87 F.J.R.369 (Ker.) (D.B.), where it was held that the question, whether an accident, resulting in injury, took place during the course of employment, is a question of fact, on which no appeal lies under Section 30 of the Workmen's Compensation Act, 1923.

87. N.P.Lalan v. V.A.John, (1972) 2 L.L.J.273 (Ker.); Bai Chanchalben v. Burjorgi Dinshawji Sethna, (1969) 2 L.L.J. 357 (Guj.); Chunilal v. Mehta & Sons Ltd., A.I.R.1962 S.C.1314.

unreasonably.[88] An appeal does not lie, if the parties have agreed to abide by the decision of the Commissioner or the order of the Commissioner gives effect to an agreement of the parties.[89] It does not lie in the case of an order, other than an order, refusing to allow redemption of a half-monthly payment, unless the amount in dispute in the appeal is not less than three hundred rupees.[90] In the case of an order, awarding as compensation a lumpsum or disallowing a claim for a lumpsum,[91] no appeal by an employer is permitted, unless the memorandum of appeal is accompanied by the certificate of deposit of compensation by the employer.[92] The

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88. New India Assurance Co. v. Kaibala Behera and others, 1995 Lab.I.C. NOC 138 (Ori.); New India Assurance Co. Ltd. v. Sailendra Kumar Nayak and others, 1995 (7)) F.L.R. 204 (Ori.); Ramlal v. Regional Manager, F.C.I. 1981 Lab. I.C. 1281 (Raj.).

89. Workmen's Compensation Act, 1923, Section 30(1), Proviso II.

90. Id., Section 30(1), Proviso I.

91. Id., Section 30(1) (a).

92. Id., Section 30(1), Proviso III, added by Section 17 of the Amending Act No.15 of 1933. It is a mandatory provision. See Achoor Estate v. Nabeesa, 1994 Lab.I.C. 1974 (Ker.) (D.B.); Managing Director, Orissa S.R.T. Corpn. v. Surendra Kumar, 1986 Lab.I.C.1997 (Ori.); Nathamuni Gounder v. State of Tamil Nadu, (1986) 2 L.L.J. 423 (Mad.); New India Assurance Co.Ltd. v. M.Jayarama Naik, (1984) I L.L.J.171 (Ker.) (D.B.); Jayanti Shipping Co.Ltd. v. B.Pereira, 1976 Lab.I.C.977 (Goa); Chowgule & Co.Pvt.Ltd. v. Smt.Felicidade Rodrigues, 1970 Lab.I.C. 1584 (Goa); Central Engineering Corpn. v. Dorai Raj, A.I.R.1960 Ori.39; Bihar Journals Ltd. v. Nityanand, A.I.R.1959 Pat.112 (D.B.); Sada Ram v. Chhotu Ram, A.I.R. 1957 H.P.26; Bhurangya Coal Co. v. Sahebjan, A.I.R.1956

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principle, underlying this mandatory provision, is that if the appeal be such that by it, the workman's right to the compensation, awarded to him by the Commissioner, is placed in jeopardy, the workman's interest is protected by the provision for the deposit.[93] But, if instead of the employer an insurance company files the appeal, the question, whether it should comply with the requirement of the deposit of the amount of compensation, has been subject to conflicting judicial interpretations.[94] If the provision for deposit of compensation is to protect the interests of the workmen, the insurance company should also comply with the requirement

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(f.n.92 contd.) Pat.299 (D.B.). Precondition of depositing amount, payable under order, appealed against, is valid and cannot be said to fetter the right or appeal. See M/s.Gokak Mills and another v. The Commr. for Workmen's Compensation, 1994 Lab.I.C. NOC 342 (Kant.) (D.B.); B.P.Nandy v. G.M., E.I.R, A.I.R.1954 Cal.453 (D.B.). The amount, payable under the order, appealed against, does not include the amount, payable by way of penalty or by way of costs. See Kap Steel Ltd. v. R.Sasikala, 1990 Lab.I.C.1144 (Kant.) (D.B.); Sasa Enterprises v. Pramod Kumar, 1983 (46) F.L.R.420 (All.).

93. Narayanan Nair v. Union of India, 1990 (1) K.L.T.907.

94. In New India Assurance Co.Ltd. v. Manorama Sahu, (1993) 2 L.L.J.332 (Ori.), it was held that the insurer is not required to make the deposit of compensation, he being not an employer under Section 3 of the Workmen's Compensation Act, 1923. For contrary view, see United India Insurance Co. Ltd. v. Shaik Alimuddin, 1995 (70) F.L.R. 631 (A.P.); United India Insurance Co. Ltd. v. Ghulam Qadir Dar (1993) 2 L.L.J.9 (J. & K.); New India Assurance Co. Ltd. v. M.Jayarama Naik, 1982 Lab.I.C.1235 (Ker.) (D.B.) and Rajasi Clerk, "Policy Of Appeal Without Deposit 2" Re : S.30 Of The Workmen's Compensation Act", 27 Lab.I.C.34 (1994). But in United India Insurance Co.Ltd. v. Shaik Alimuddin, 1995 (70) F.L.R.631 (A.P.), it was clarified that the insurance company is liable only to deposit the amount of compensation, not the amount of interest and penalty.

to deposit compensation.[95] Further, the provision, requiring the employer to deposit compensation for filing an appeal,[96] becomes meaningless by the provision, empowering the Commissioner to withhold payment of the sum, deposited with him.[97] Merely because the employer has preferred an appeal, it would be unfair to deprive the injured workman or the dependants of the deceased workman of the fruits of the litigation by empowering the Commissioner to withhold payment.[98]

When an appeal lies on a substantial question of law, the whole case is before the High Court and it can go into the question of law and fact independently and pass an order, which the circumstances of the case warrant. It can substitute its own decision for the decision of the Commissioner.[99]

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95. Rajasi Clerk, *supra*, n.94, pp.34, 35.

96. Workmen's Compensation Act, 1923, Section 30 (1), Proviso III.

97. *Id.*, Section 30-A.

98. The Law Commission of India has noted that the existence of Section 30-A of the Workmen's Compensation Act, 1923 is liable to result in injustice, as it may be used by the Commissioner in such a manner that it causes untold hardship to the workman. The Commission has recommended the repeal of this section, as its repeal is not liable to cause any hardship to any party. The employer, filing the appeal, can obtain a stay order from the High Court, if it is required. See Law Commission of India, *infra*, n.180, p.45.

99. *Vijayaraghavan* v. *Velu*, (1973) 1 L.L.J.490 (Ker.) (D.B.). See also S.Parameswaran, "Appellate Jurisdiction in Compensation cases", 13 *C.U.L.R.* 51 at 57 (1989). In *United India Insurance Co.Ltd.* v. *C.S.Gopalakrishnan*, 1989 Lab.I.C.1906 (Ker.) (D.B.), it was held that normally in an appeal against the decision of the Commissioner

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If the Commissioner's order is illegal and without jurisdiction[100] or if there has been a flagrant abuse of power or non-exercise of jurisdiction or an error, apparent on the face of the record and if no appeal lies,[101] the order can be challenged by filing a writ before the High Court under Article 226 of the Constitution.[102] But, if the remedy of an appeal under the statute, which is adequate

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(f.n.99 contd.) for Workmen's Compensation, the appellate Court is bound by the findings of fact and the appeal lies only on a substantial question of law. But the findings of fact of the Commissioner must be based on evidence. If the finding of fact is contrary to the evidence, then the court is not precluded from examining the correctness of the decision, holding that the court is not bound by the findings of fact of the Commissioner.

In Vijayaraghavan v. Velu, supra, it was held that in the case of an appeal against the award of the Commissioner under Section 30, there is no provision in the Act, regarding the practice and procedure, which the High Court should follow in admitting the appeal or deciding it. In the absence of any express provision, the practice and procedure of the Court, deciding the appeal, should be followed.

100. Guru Bachan Singh v. State of Bihar, 1969 Lab.I.C.898 (Pat.) (D.B.).

101. In Sona Shah v. Commr. for W.C., 1978 Lab.I.C.576 (J. & K.), it was held that direct payment of compensation, against the provisions of Section 8, cannot be deemed to be a payment of compensation. If the dependant moves an application before the Commissioner, stating non-receipt of the amount of the Commissioner's award and the Commissioner gives a finding, whether the payment has been made or not, such an order is not covered by Section 30(1) and no appeal lies against it and so a writ petition is maintainable.

102. See Dr.A.T.Markose, supra, n.82.

and efficacious, is available, by-passing it and seeking relief by filing a writ is not permissible.[103]

Just like the Commissioner for Workmen's Compensation, the Employees' Insurance Court under the Employees' State Insurance Act, 1948 is constituted by the State Government for a particular area.[104] It consists of such number of judges as the State Government thinks fit.[105] Any person, who is or has been a judicial officer or is a legal practitioner of five years' standing, is qualified to be a judge of the Employees' Insurance Court.[106] The State Government can appoint the same Court for two or more local areas or two or more Courts for the same local area.[107] If more than one Court is appointed by the State Government for the same local area, the State Government, by general or special order, regulates the distribution of business between them.[108]

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103. Krishna Lime Works v. Presiding Officer, (1990) 1 L.L.J. 302 (Raj.) (D.B.) See also Piara Singh v. Commissioner for Workmen's Compensation, Patiala and another, 1987 Lab.I.C.818 (P. & H.) (D.B.) where it was held that payment of compensation, being condition precedent for entertaining appeal under Section 30 of the Act, is no ground for filing a writ petition.

104. Employees' State Insurance Act, 1948, Section 74 (1). In E.S.I.C. v. Tilak Dhari, 1995 (71) F.L.R.296 (All.) it was held that the power of the State Government to constitute the Employees' Insurance Court includes the power to reconstitute it.

105. Id., Section 74 (2).

106. Id., Section 74(3). In Allahabad Canning Co. v. E.S.I.C, 1982 Lab.I.C.545 (All.) (D.B.), it was held that an Executive Magistrate can be said to be a Judicial Officer.

107. Id., Section 74 (4).

108. Id., Section 74 (5).

Matters, to be decided by the Employees' Insurance Court, include questions or disputes[109] and claims.[110] Questions or disputes may relate to whether any person is an employee, the rate of wages or average daily wages of an employee, the rate of contribution, payable by a principal employer, whether a person is the principal employer in respect of an employee, the right of a person to any benefit, the amount and duration of a benefit, any direction, issued by the Corporation on a review of dependant's benefit[111] and to any other matter in dispute[112] between a principal employer and the Corporation or between a principal employer and an immediate employer or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues.[113] Claims, to be decided

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109. Id., Section 75 (1).

110. Id., Section 75 (2).

111. Id., Section 55-A.

112. In Rohtas Industries v. E.S.I.C., 1975 Lab.I.C.1511 (Pat.), it was held that the phrase "any other matter in dispute" includes residuary matter in dispute. It cannot, however, be enlarged and relied on as an omnibus expression to embrace in its fold the claim of the Corporation, on account of reimbursement from the employer.

113. Employees' State Insurance Act, 1948, Section 75 (1) (a) to (ee) and (g). Clause (f) of Section 75 (1) was omitted by Act No.44 of 1966. In E.S.I.Corporation v. Perfect Potteries Co. (M.P.) Ltd., [1995] 87 F.J.R.374 (M.P.) (D.B.), it was held that the Employees' Insurance Court has jurisdiction to adjudicate on the question of

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by the Employees' Insurance Court, include claim for the recovery of contribution from the principal employer, claim by a principal employer to recover contribution from any immediate employer, claim against a principal employer in case of his failure or neglect to pay any contribution,[114] claim for the recovery of any benefit illegally received by a person[115] and claim for the recovery of any admissible benefit.[116]

(f.n.113 contd.) recovery of damages. In M/s.Siva Trading Co. and others v. Secretary to Govt. of India, 1994 Lab.I.C.1593 (P. & H.) (D.B.), it was held that the question, whether Rice shellers are 'factories' under the Employees' State Insurance Act, 1948, is a question of fact, which cannot be determined in writ proceedings and, therefore, has to be raised before the appropriate forum as provided under Section 75 of the Act. In K.P.Misra v. State of Rajasthan, (1993) 2 L.L.J. 1123 (Raj.), it was held that questions, such as whether a person is an 'employee' or a unit is a 'factory', are questions, which can be decided by the Employees' Insurance Court. When a special court has been established under the provisions of the statute, it will not be appropriate to decide the said dispute by way of a writ petition under Article 226 of the Constitution of India. In E.S.I.C. v. R.P.Gundu, 1983 Lab. I.C.1634 (Bom.), it was held that the question, whether an establishment is a factory or not, is a matter for the exclusive jurisdiction of the Employees' Insurance Court. In Basant Sarkar v. Eagle Rolling Mills, 1964 (8) F.L.R.334 (S.C.), the employer withdrew the medical benefits, given to his employees, on the provisions of the Employees' State Insurance Act being made applicable to them. It was held that the validity of such action was to be challenged before the Employees' Insurance Court.

114. Id., Section 68.

115. Id., Section 70.

116. Id., Section 75(2)(a), (b) and (d) to (f). Clause (c) of Section 75(2) was omitted by Act No.44 of 1966 w.e.f. 28.1.1968.

The aforesaid questions or disputes or claims are to be decided by the Employees' Insurance Court, subject to one condition. If in any proceedings before this Court, a disablement question arises and the decision of the question by a Medical Board or a Medical Appeal Tribunal is necessary for the determination of the claim or question before the Court, it should direct the Corporation to have the question decided by the concerned forum. It should then proceed with the determination of the claim or question, in accordance with the decision of such forum.[117] But this condition need not be complied with by the Court, where an appeal has been filed before it from a decision of the Medical Board or Medical Appeal Tribunal.[118] Further, no matter in

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117. Id., Section 75 (2-A) ins. by Amendment Act No.44 of 1966. In E.S.I.C. v. Hafiz Khan, 1977 Lab.I.C.1175 (Cal.) (D.B.), it was held that the effect of Section 75 (2-A) is that, if the tribunal is not sitting in appeal over the decision of the Medical Board, on an appeal being preferred to it under Section 54-A, the decision of the Medical Board is binding between the parties and the tribunal is bound to make an award in accordance with the said decision. In E.S.I.C. v. Hari Hazra, 1989 Lab.I.C.1792 (Cal.) the Calcutta High Court did not accept the assessment of loss of earning capacity of the respondent, due to partial loss of vision of one eye at 1 percent by the Medical Board, while the loss of earning capacity for such injury is 30% as per the Second Schedule to the Employees' State Insurance Act, 1948. It held that the harmonious construction of Section 75 (2-A) clearly suggests that it is applicable in case of unscheduled injuries only. In the case of a scheduled injury, if the assessment of the Medical Board is not in conformity with that provided in the Schedule, the latter would prevail.

118. Id., Sections 54-A(2), 75 (2-A), Employees' State Insurance (General) Regulations, 1950, Regulations 75

contd...

dispute between a principal employer and the Corporation in respect of any contribution or other dues can be entertained by the Employees Insurance Court, unless the employer has deposited with it fifty percent of the amount due from him, as claimed by the Corporation.[119]

(f.n.118 contd.)
and 76; Employees' State Insurance (Central) Rules, 1950, Rules 20-A, 20-B. See also E.S.I.C. v. Hafiz Khan, 1977 Lab.I.C.1175 (Cal.) (D.B.). Before the insertion of sub-section (2-A) of Section 75 in the Act by the Amending Act No.44 of 1966, the Employees' Insurance Court did not have any power to direct the Corporation to refer any disablement question to the Medical Board. Therefore, if the Corporation did not refer the case of disablement to the Medical Board under Regulation 72 of the Employees' State Insurance (General) Regulations on the plea that the injury sustained was not an employment injury and the aggrieved person came to the Employees' Insurance Court for relief, the latter did not have power to get the said disablement question decided by the Medical Board, if it was found from evidence that the applicant suffered permanent disablement, as a result of employment injury. The Employees' Insurance Court had, however, the power to assess the loss of earning capacity on the available evidence. See M.R.Mallick, Employees' State Insurance Act (1984) pp.315-316. In Vasudevan Nair v. Reg.Dir., E.S.I.C., 1991 (2) K.L.T.284 (D.B.), it was held that where an appeal is filed from the decision of the Medical Board to the Employees' Insurance Court under Section 54-A(2) of the Act, the latter has power to decide the correctness of the determination of the disability of the Medical Board. Though the Insurance Court may not have the expertise, the statute has empowered the Insurance Court to examine the correctness of the certificate, issued by the Medical Board.

119. Id., Section 75 (2-B), ins. by Act No.29 of 1989, Section 29. The court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited. See Id., Section 75 (2-B), Proviso.

The civil court is debarred from deciding any matter to be decided by the Employees' Insurance Court,[120] as in the case of the Commissioner for Workmen's Compensation.[121] This is because, where the liability is created by a statute, the aggrieved party must pursue the special remedy, provided by it. But, if the statutory adjudicatory authority abuses its powers or acts contrary to the provisions of the Act, it can be challenged before the civil court.[122]

The proceedings before an Employees' Insurance Court are to be instituted in the Court, appointed for the local area, in which the insured person was working at the time, the question or dispute arose.[123] Like the Commissioner

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120. Id., Section 75(3). See Ram Parshad v. E.S.I.C., 1988 (57) F.L.R.139 (Del.); E.S.I.C. v. M/s.R.P.Gundu, 1983 Lab.I.C.1634 (Bom.); REGL. DIRECT., E.S.I.C. v. Marikkar ENGRS Ltd., (1982) 1 L.L.J.59 (Ker.). In E.S.I.C. v. Himatram Ramdas, 1970 Lab.I.C.240 (Guj.) (D.B.), it was held that the ouster of jurisdiction cannot commence till the Employees' Insurance Court is established. In Nellimerla Jute Mills Co.Ltd. v. E.S.I.C., A.I.R. 1961 A.P.338 (D.B.), it was held that Sections 74 and 75 of the Employees' State Insurance Act, 1948 indicate that where dispute arises under the provisions of the Act, the matter must be decided by the Employees' Insurance Court and not by a Civil Court. But there is nothing in the Act that prevents a Criminal Court from entertaining a prosecution for contravention of the provisions of the Act.

121. Workmen's Compensation Act, 1923, Section 19(2).

122. Indirakutty v. E.S.I.C., 1980 K.L.T.488; E.S.I.C. v. Himatram Ramdas, 1970 Lab.I.C.240 (Guj.) (D.B.); Firm Radha Kishan v. Ludhiana Municipality, A.I.R.1963 S.C. 1547; Secretary of State v. Mask, & Co., A.I.R.1940 P.C.105.

123. Employees' State Insurance Act, 1948, Section 76(1). See Sree Karpagambal Mills Ltd. v. First Additional City Civil Court (E.S.I.C.Court) And Another, [1995] 87 F.J.R. 239 (Mad.).

for Workmen's Compensation[124], the Employees' Insurance Court can transfer any proceeding to another Court in the same State for disposal, if it is satisfied that the matters, arising out of that proceeding, can be more conveniently dealt with by the other Court.[125] After transferring the case to that Court for disposal, the Employees' Insurance Court should transmit the records of that case forthwith to that Court.[126] The State Government is empowered to transfer a case, pending before an Employees' Insurance Court of that State, to any such Court of another State, with the consent of the State Government[127] of that State. The transferee Court is to continue the proceedings, as if they have been originally instituted in it.[128]

The proceedings before an Employees' Insurance Court are commenced by an application[129] to it, as in the case of the proceedings before the Workmen's Compensation Commissioner.[130] Application to the Employees' Insurance Court can be made within a period of three years from the date, on which the

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124. Workmen's Compensation Act, 1923, Section 21(2).

125. Employees' State Insurance Act, 1948, Section 76(2).

126. Ibid.

127. Id., Section 76(3).

128. Id., Section 76(4).

129. Id., Section 77(1).

130. Workmen's Compensation Act, 1923, Section 22.

cause of action arose,[131] unlike the Workmen's Compensation Act, 1923.[132] The cause of action, in respect of a claim for benefit, arises, only if the insured person[133] or in the case of dependant's benefit, the dependants of the insured person claim that benefit, within a period of twelve months, after the claim became due or within such further period as permitted by the Employees' Insurance Court.[134]

Any application, appearance or act to or before an Employees' Insurance Court may be made or done by a legal practitioner or an officer of a registered trade union, authorised in writing by such person or any other authorised agent of the party with the permission of the Court.[135] The appearance of a person before this Court as a witness must, however, be always personal.[136] As in the case of the Commissioner for Workmen's Compensation,[137] the provision

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131. In Sher Ali Mridha v. Torap Ali, A.I.R.1942 Cal.407, it was held that the expression "cause of action" means all the essential facts, constituting the right and its infringement. See Employees' State Insurance Act, 1948, Section 77(1-A), ins. by Act No.44 of 1966, Section 33.

132. Workmen's Compensation Act, 1923, Section 10(1). Under this Act, the claim for compensation has to be made before the Commissioner within two years from the date of the occurrence of the accident or in case of death, within two years from the date of death.

133. Employees' State Insurance Act, 1948, Section 2(14).

134. Id., Section 77(1-A), Explanation (a).

135. Id., Section 79.

136. Ibid.

137. Workmen's Compensation Act, 1923, Section 24.

for filing application and for appearance or acting through ways, other than by the party in person or through legal practitioner distinguishes the Employees' Insurance Court from a civil court and makes it an informal statutory body.[138]

Just like the Commissioner for Workmen's Compensation, the Employees' Insurance Court can refer any question of law for the decision of the High Court.[139] When a reference is made by the court, it is bound to decide the question, pending before it, in accordance with the decision of the High Court.[140]

Like the Commissioner for Workmen's Compensation,[141] the Employees' Insurance Court is not an ordinary civil court,[142] dealing with general disputes but is a tribunal, specially constituted for the purpose of deciding disputes

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138. Id., Section 27.

139. Employees' State Insurance Act, 1948, Section 81.

140. Ibid.

141. Workmen's Compensation Act, 1923, Section 19(1).

142. Civil Court means 'Court of Civil Judicature, maintained by the State under its constitution to exercise the judicial power of the State. When the Constitution of India speaks of 'Courts' in Articles 136, 227, 228, 233 to 237 or in the Lists, it contemplates 'Courts of Civil Judicature' and not tribunals other than such courts. This is the reason for using both the expressions in Articles 136 and 227. See Kharbanda, Commentaries on Employees' State Insurance Act, 1948 (1993), p.381.

under the Employees' State Insurance Act, 1948.[143] Though it does not have all the powers of a civil court, it does have some powers of a civil court for certain purposes.[144] It is not, however, empowered to decide the vires of the Employees' State Insurance Act, 1948 or the Rules framed thereunder.[145] But the Employees' State Insurance Act, 1948, in conferring upon the Employees' Insurance Court the jurisdiction to adjudicate on disputes under the Act, impliedly granted it the power of doing all such acts and employing all such means as are essentially necessary for discharging its obligation to adjudicate the matter before it effectively.[146] Though, in substance, the Employees' Insurance Court functions

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143. Employees' State Insurance Act, 1948, Sections 74, 75. See Popular Process Studio v. E.S.I.C, A.I.R.1970 Bom. 413 and Reg.Dir., E.S.I.C. v. Ram Lakhan, A.I.R.1960 Punj.559.

144. Id., Section 78(1) and (4). See Reg.Dir., E.S.I.C. v. Shashikant, 1984 Lab.I.C.527 (Bom.) (D.B.); Dhala Tanning Co. v. E.S.I.C., 1974 Lab.I.C.401 (Mad.) and Shalimar Rope Works v. E.S.I.C., 1971 Lab.I.C.1551 (Cal.) (D.B.).

145. E.S.I.C. v. Webb's Motor Scooter Mart, 1971 Lab.I.C. 1290 (Mys.) (D.B.).

146. The inherent powers of the Employees' Insurance Court includes the power to allow amendment of petition (E.S.I.C. v. Arvind Machine Tools, 1981 Lab.I.C.29 (A.P.) (D.B.))and the power to issue an injunction in an appropriate case (M/s.Modi Steels Unit-A v. E.S.I.Court (S.D.M.) Ghaziabad, 1985 Lab.I.C.28 (All.); National Rubber Corporation v. E.S.I.C. [1981] 58 F.J.R.I (P.& H.); Shriram Bearings Ltd. v. E.S.I.C. 1977 Lab.I.C.1482(Pat.) (D.B.) and Agarwal Hardware Industries v. E.S.I.C, (1977) 1 L.L.J.192 (Cal.) (D.B.)). But it was held in E.S.I.C. v. Simson & Mc Coneehy, [1974] 46 F.J.R.364 (Mad.) that the Employees' Insurance Court does not have any inherent power to order restitution under Section 144 of the Civil Procedure Code.

as a court,[147] it is basically only a tribunal, not bound by the provisions of the Code of Civil Procedure, 1908 and of the Evidence Act, 1872. It follows the procedure, prescribed by rules, framed by the State Government.[148] It is not bound by the Limitation Act, 1963.[149] It is not a civil court, subordinate to the High Court within the meaning of Section 115 of the Code of Civil Procedure,[150] just like the Commissioner for Workmen's Compensation.[151]

Appeal against an order of the Employees' Insurance Court lies to the High Court before the expiry of sixty days from the date of the order,[152] if it involves a substantial question of law,[153] as in the case of appeal from an order of the Commissioner for Workmen's Compensation.[154] But this right to appeal is not as restricted as the one under the Workmen's Compensation Act, 1923. Under the Employees'

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147. M/s.Modi Steels Unit-A v. E.S.I.Court (S.D.M.), Ghaziabad, 1985 Lab.I.C.28 (All.).

148. Employees' State Insurance Act, 1948, Section 78(2)

149. Dhala Tanning Co. v. E.S.I.C., 1974 Lab.I.C.401 (Mad.) (D.B.); E.S.I.C., v. A.P.State Electricity Board, 1970 Lab.I.C.921 (A.P.) (D.B.).

150. P.W.M.Tent Factory v. E.S.I.C., [1970] 37 F.J.R.182 (Del.).

151. Supra, n.57.

152. Employees' State Insurance Act, 1948, Section 82(3).

153. Id., Section 82(2). E.S.I.C., v. Cheerans Auto Agencies, 1991 (2) K.L.T. (S.N.) 32 (D.B.).

154. Workmen's Compensation Act, 1923, Section 30.

State Insurance Act, 1948, appeal lies against any order of the Employees' Insurance Court, provided a substantial question of law is involved in the appeal and the appeal is filed before the expiry of sixty days from the date of the order.[155] But, under the Workmen's Compensation Act, 1923, there are other restrictive conditions.[156]

Whereas the Commissioner for Workmen's Compensation decides all disputes, whether medical or non-medical, relating to payment of compensation for industrial injuries under the Workmen's Compensation Act, 1923, under the Employees' State Insurance Act, 1948, for the adjudication of medical disputes, Medical Boards are constituted by the Employees' State Insurance Corporation.[157] These Boards examine disablement questions[158] and decide, whether an insured person is entitled to permanent disablement benefit.[159] Appeals lie from the decision of the Medical Board to the Medical Appeal Tribunal[160] and from there to the Employees' Insurance

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155. Employees' State Insurance Act, 1948, Section 82(2), (3)

156. Supra, nn.81, 89, 90 and 92.

157. Employees' State Insurance (General) Regulations, 1950, Regulation 75.

158. Employees' State Insurance Act, 1948, Section 54.

159. Id., Section 54-A (1).

160. Id., Section 54-A (2) (i); Employees' State Insurance (Central) Rules, 1950, Rule 20-A.

Court[161] or the Employees' Insurance Court directly.[162]

Unlike under the Workmen's Compensation Act, a Special

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161. Id., Section 54-A (2) (i). Employees' State Insurance (Central) Rules, 1950, Rule 20-B. In Ram Awadh v. E.S.I.C., (1995) 1 L.L.N.882 (All.), it was held that the Employees' Insurance Court, while exercising the appellate powers under Section 54-A (2) (i), has to attach due value to the conclusion, arrived at by the Medical Appeal Tribunal on the question of extent of disability. It should not interfere with the conclusions, arrived at by the Medical Appeal Tribunal, except where it finds that the conclusions are based on no valid material or they are perverse or otherwise vitiated by reason of any mistake of law or of fact. In Vasudevan Nair v. R.D., E.S.I.C., 1991 (2) K.L.T. 284 (D.B.), it was held that the Employees' Insurance Court is not a rubber stamp to accept what an expert says before it, because, though the Court may not have the expertise, the statute has empowered it to examine the correctness of the certificate, issued by the Medical Board. See also Chhotelal v. R.D., E.S.I.C., 1989 (58) F.L.R.158 (M.P.), where it was held that the recommendations of the Medical Board are not binding on the Employees' Insurance Court.

162. Id., Section 54-A (2) (ii); Employees' State Insurance (Central) Rules, 1950,Rule 20-B. In E.S.I.C. v. Pushkaran, 1993 (2) K.L.T.187 (D.B.), an employee of M/s.Kerala Spinners Ltd. met with an accident in the course of his employment. After discharge from the hospital, where he was diagnosed as suffering from invertebral disc prolapse, he was examined by the ESI Medical Board, Alleppey. As per its decision, he had 20% permanent disablement. This decision was challenged before the Employees' Insurance Court. In an appeal against the Employees' Insurance Court's order, it was held that 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, not established before it.

Medical Board[163] is constituted for deciding, whether an employment injury is caused by an occupational disease.[164]

Tribunals are created by statutes for adjudicating disputes speedily, cheaply, efficiently and informally. Compared to ordinary law courts, they can help further the objects of the statutes, which created them. The tribunals for the adjudication of disputes, relating to compensation for industrial injuries viz. Commissioner for Workmen's Compensation and Employees' Insurance Court, are remarkable for their informal procedure. Though they are discharging the same functions as those of a court of law, they are not hindered in the discharge of their functions by the procedural formalities in the Code of Civil Procedure, 1908, and Evidence Act, 1872 like ordinary civil courts. Further, any application, appearance, or act, required to be made or done by any person before these tribunals, may be made or done by a trade union official or any other authorised person.[165] This provides relief to an injured workman, who is not financially sound enough to engage a legal practitioner. The Commissioner for Workmen's Compensation goes to the extent

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163. Employees' State Insurance (General) Regulations, 1950, Regulations 74, 75.

164. Employees' State Insurance Act, 1948, Schedule III.

165. Workmen's Compensation Act, 1923, Section 24; Employees' State Insurance Act, 1948, Section 79. See supra, nn.33, 34, 35, 36 and 135.

of helping illiterate persons or persons, unable to furnish the required information in writing and presenting the application[166] for compensation. Both the tribunals may exempt poor applicants from payment of prescribed fees.[167] These provisions enable the tribunals to adjudicate ... disputes quickly, informally and without placing much financial burden on the claimant.

Separate machineries are created by the Employees' State Insurance Act, 1948 for adjudication of non-medical[168] and medical[169] disputes, as in England.[170] Further, in

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166. Workmen's Compensation Act, 1923, Section 22(3). See *supra*, n.22.

167. Workmen's Compensation Rules, 1924, Rule 34; Andhra Pradesh Employees' Insurance Court Rules, 1958, Rule 46; Assam Employees' Insurance Court Rules, 1959, Rule 46; Bihar Employees' Insurance Court Rules, 1952, Rule 46; Bombay Employees' Insurance Courts Rules, 1959, Rule 46; Kerala Employees' Insurance Court Rules, 1958, Rule 46; Madhya Pradesh Employees' Insurance Court Rules, 1963, Rule 44; Meghalaya Employees' State Insurance Court Rules 1980, Rule 46; Orissa Employees' Insurance Court Rules, 1951, Rule 46; Rajasthan Employees' Insurance Court Rules, 1959, Rule 46; Tamil Nadu Employees' Insurance Court Rules, 1951, Rule 46; Uttar Pradesh Employees' Insurance Court Rules, 1952, Rule 46; West Bengal Employees' Insurance Court Rules, 1955, Rule 42.

168. Employees' State Insurance Act, 1948, Section 74. See *supra*, nn.104, 109, 110, 113 and 116.

169. *Id.*, Sections 54, 54-A. See *supra*, n.157.

170. In England, claims for benefits are submitted first to an insurance officer, from whose decision appeal lies to local tribunals and from there to a Social Security Commissioner. Disablement questions are referred by

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the case of medical disputes, a classification is made between disputes, concerning injuries, resulting from occupational accidents and those, resulting from occupational diseases. While the former class of disputes is decided by Medical Boards[171], the latter is done by Special Medical Boards.[172] For the adjudication of non-medical disputes, Employees' Insurance Court, consisting of persons with prescribed qualifications, is constituted.[173]

Under the Workmen's Compensation Act, 1923, a single machinery, Commissioner for Workmen's Compensation,[174] is constituted to adjudicate all disputes, whether non-medical or medical. However, he is empowered to choose one or more persons, possessing special knowledge of any matter, relevant to the matter under inquiry to assist him in holding the inquiry.[175] This helps him resolve disputes, relating to a matter, he is not conservant with. But the parties are not given any opportunity to cross-examine the expert on the

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(f.n.170 contd.) an insurance officer to a medical board, from whose decision an appeal lies to a medical appeal tribunal, from whose decision appeal lies to the Social Security Commissioner on a point of law. See Halsbury's Laws of England (1982), Vol.33, pp.467-471, 483.

171. Employees' State Insurance Act, 1948, Sections 54, 54-A. See supra, nn.158 and 159.

172. Employees' State Insurance (General) Regulations, 1950, Regulations 74, 75. See supra, n.163.

173. Employees' State Insurance Act, 1948, Section 74. See supra, n.143.

174. Workmen's Compensation Act, 1923, Section 19(1). See supra, n.60.

175. Supra, n.3.

opinion, expressed by him. This may affect detrimentally the interest of the parties, especially the injured workman. Therefore, Section 20(3) of the Workmen's Compensation Act, 1923 may be suitably amended, enabling the parties to cross-examine the expert.[176]

The Workmen's Compensation Act, 1923 does not prescribe any qualifications for the post of Commissioner for Workmen's Compensation. It permits the appointment of any person in the post.[177] If any person is appointed in the post, he may not be competent to discharge the quasi-judicial duty, required by the post. So it is suggested that Section 20 (1) of the Workmen's Compensation Act, 1923 may be amended, providing for appointing only a person, who has been a judicial officer for five years or is a legal practitioner of ten years' standing as Commissioner for Workmen's Compensation.

The most important objective behind the establishment of a special tribunal is speedy justice. The Commissioner for Workmen's Compensation has to discharge administrative duties, in addition to adjudicatory ones. At present, generally, Commissioners for Workmen's Compensation and

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176. _Supra_, n.4.

177. _Supra_, nn.1 and 2.

Employees' Insurance Court have to hold sittings at more than one place.[178] These obstacles stand in the way of their rendering speedy justice to injured workman. So, it is suggested that the Commissioner for Workmen's Compensation should be relieved of his administrative duty.[179] Moreover, there should be Commissioner for Workmen's Compensation and Employees' Insurance Court for each district. In those districts, where the incidence of industrial injuries is more, there should be at least two Commissioners for Workmen's Compensation and Employees' Insurance Courts. Provision should be incorporated in both the Workmen's Compensation Act, 1923[180] and the Employees' State Insurance Act, 1948, requiring the adjudicatory authority under the Acts, both original and appellate, to dispose of a case within six months of its institution.

For rendering justice efficiently, it is suggested that the Employees' Insurance Court may consist of an equal number of employers' and employees' representatives, in addition to judges.[181] The employers' and employees'

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178. Information collected from empirical study.

179. See supra, Chapter 7 and infra, Chapter 10.

180. See Law Commission of India, One Hundred and Thirty Fourth Law Commission Report on Removing Deficiencies In Certain Provisions of The Workmen's Compensation Act, 1923 (1989), p.46.

181. See International Labour Organisation, Conventions and Recommendations (1966), p.86.

representatives may be selected by the State Government, in consultation with their respective organisations, having the largest membership. Section 74(2) of the Employees' State Insurance Act, 1948 may be suitably amended for the purpose. Section 20(3) of the Workmen's Compensation Act, 1923 may be amended suitably, requiring the Commissioner for Workmen's Compensation to hear employers' and Workmen's representatives as experts in any case, where the dispute involves a question of an occupational character and, in particular, the question of the degree of incapacity for work.[182]

In England, appeals are permitted from the decision of the lowest tribunal to two higher tribunals.[183] But in India, appeals lie from the Commissioner for Workmen's Compensation and Employees' Insurance Court not to higher tribunals, as in England but to the High Court.[184] This involves delay and heavy expenses for seeking relief through appellate proceedings. It is suggested that appeals from the decisions of these tribunals may lie to higher tribunals, as in England.

Provision should be made under both the Workmen's Compensation Act, 1923 and the Employees' State Insurance

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182. See Id., p.87.

183. Supra, n.170.

184. Workmen's Compensation Act, 1923, Section 30(1); Employees' State Insurance Act, 1948, Section 82(2). Supra, nn.180 and 153.

Act, 1948 for the appointment of an ombudsman, specialised in Social Security Law. He should have free access to official records. The procedure before this authority should be informal and inquisitorial rather than adversarial.

In westerncountries, legal aid is provided to injured workers. In England, legal aid and advice are provided to injured workers under the Legal Aid and Advice Act, 1949. In the Federal Republic of Germany, if the injured worker lacks the financial means to obtain legal advice, the Court may appoint a representative for him at the cost of the State. In France, legal aid is provided by the court at the cost of the insurance institution.[185] In India also, provision should be made for providing compulsory legal aid to injured workmen under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948. In the absence of provision for legal aid, the provisions, conferring rights, may not be of use to injured workmen in all cases. The right to legal aid should be made available to every workman, irrespective of his financial condition. Such a provision would not cast any undue burden on the State, because, in practice, those who can afford to engage private lawyer, will always do so.[186] In each district, there should be at least

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185. Supra, n.37 at 126-127.

186. Law Commission of India, supra, n.4.

one legal practitioner, appointed by the State Government to conduct cases before Commissioner for Workmen's Compensation and Employees' Insurance Court on behalf of injured workmen or their dependants. The High Court should also have an advocate, appointed by the State Government to represent workmen or their dependants before it.[187]

Under the Workmen's Compensation Act, 1923, the question, whether the parties should make an attempt at settlement, before proceeding to submit an application to the Commissioner, is subject to conflicting judicial decisions.[188] If applications are made to the Commissioner without attempting to settle disputes by the parties themselves, that will increase the work-load of the Commissioner and lead to delay in the disposal of cases by him. So, Section 22(1) of the Workmen's Compensation Act, 1923 may be amended, clarifying that the parties should have made an attempt at settlement, before proceeding to submit an application to the Commissioner.

Under the Workmen's Compensation Act, 1923, the claim for compensation has to be preferred before the Commissioner within two years of the occurrence of the accident or in case of death within two years from the date of death.[189]

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187. Id., pp.106, 107.

188. Workmen's Compensation Act, 1923, Section 22(1). See supra, n.18.

189. Id., Section 10(1). The Commissioner may entertain the claim after two years, if he is satisfied that failure to prefer the claim was due to sufficient cause. See Id., Section 10(1), Proviso V. See supra, n.132.

But, under the Employees' State Insurance Act, 1948, the period of limitation for filing an application to the Employees' Insurance Court is three years from the date of the cause of action.[190] The cause of action, in respect of a claim for benefit, arises, when the benefit is claimed within a period of twelve months, after the claim became due or within such further period as the Employees' Insurance Court may allow on reasonable grounds.[191] Thus, an injured employee under the Employees' State Insurance Act, 1948 gets a minimum of at least four years from the date of the accident, causing the injury, for approaching the Employees' Insurance Court. But an injured workman under the Workmen's Compensation Act, 1923 gets only two years for approaching the Commissioner. Entertainment of a claim by the Commissioner after two years, is left to the discretion of the Commissioner.[192] Section 10(1) of the Workmen's Compensation Act, 1923 may, therefore, be amended, enabling an injured workman to prefer a claim for compensation before the Commissioner within three years from the date of the cause of action, which should be held to arise on the date, when the parties fail to reach an agreement, regarding payment of compensation.

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190. Employees' State Insurance Act, 1948, Section 77(1-A). See supra, n.131.

191. Id., Section 77(1-A), Explanation (a). See supra, n.134.

192. Supra, n.189.

Under the Workmen's Compensation Act, 1923, if the Commissioner is prevented from writing the memorandum of evidence himself, he can cause such memorandum to be made in writing from his dictation and sign the same, after recording the reason for his inability to write it himself.[193] Writing of the memorandum by the Commissioner himself may cause delay, the Commissioner being busy. So section 25, Proviso I of the Workmen's Compensation Act, 1923 may be amended, enabling the Commissioner to prepare the memorandum of evidence by dictation, whether he is able or unable to make the memorandum himself.[194]

Under the Employees' State Insurance Act, 1948, appeal lies to the High Court from an order of Employees' Insurance Court, if it involves a substantial question of law.[195] But under the Workmen's Compensation Act, 1923, appeal lies only from certain specified orders of a Commissioner.[196] So it is suggested that Section 30(1) of the Workmen's Compensation Act, 1923 may be amended, providing for appeal from all orders of the Commissioner, if a substantial question of law is involved in them.

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193. Workmen's Compensation Act, 1923, Section 25, Proviso I; See _supra_, n.45.

194. _Ibid_.

195. Employees' State Insurance Act, 1948, Section 82(2). See _supra_, n.153.

196. Workmen's Compensation Act, 1923, Section 30(1) (a) to (e). See _supra_, n.81.

The question, whether the insurance company should comply with the requirement to deposit the amount of compensation payable with the Commissioner for filing an appeal under the Workmen's Compensation Act, 1923,[197] is subject to conflicting judicial decisions.[198] If the employer is liable to comply with the said requirement for filing an appeal, the insurance company, which steps into the shoes of the employer, should also be made liable to comply with the requirement so as to protect the interests of the injured workman. So Proviso III to Section 30(1) of the Workmen's Compensation Act, 1923 may be amended, clarifying that the insurance company also should deposit the amount of compensation, payable under the order appealed against, with the Commissioner, for filing an appeal.

In Proviso III to Section 30(1) of the Workmen's Compensation Act, 1923,[199] reference is made only to an appeal under Section 30(1) (a) i.e., an order, awarding as compensation a lumpsum or disallowing a claim for a lumpsum. Formerly, no appeal was provided against an order, awarding interest or penalty under Section 4-A. Subsequently, subclause (aa) was added to Section 30(1), providing for an

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197. Id., Section 30 (1), Proviso III.

198. Supra, n.94.

199. Supra, n.92.

appeal against an order, awarding interest or penalty under Section 4-A.[200] Now the position is that, while the employer has to deposit the amount of compensation for an appeal under clause (a), he need not do so in respect of an appeal under clause (aa). It is desirable that Provisio III to Section 30 (1) be amended suitably so as to provide for deposit of the amount, payable by way of interest and penalty under Section 4-A, with the Commissioner, for filing an appeal against an order, awarding interest or penalty.[201]

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200. Workmen's Compensation Act, 1923, as amended by Section 15 of Act No.8 of 1959.

201. See Law Commission of India, <u>supra</u>, n.180, pp.43-44

Chapter 9

ENFORCEMENT MACHINERY FOR PROVISION OF COMPENSATION FOR INDUSTRIAL INJURIES

However wonderful legal provisions for the payment of compensation to workmen for industrial injuries may be, they are of little use to an injured workman, in the absence of a proper machinery for their enforcement. So, a study on compensation to workmen for industrial injuries will not be complete without analysing the effectiveness of the enforcement machinery for ensuring the provision of compensation.

Under the Workmen's Compensation Act, 1923, there is no inspectorate to enforce the provisions for providing compensation. In case of fatal accidents, the Commissioner may require from employers statements regarding them.[1] Again, he may recover as an arrear of land revenue any amount of compensation, payable by any person under the Act.[2]

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1. Workmen's Compensation Act, 1923, Section 10-A.

2. Id., Section 31. The Commissioner can proceed suo motu to recover the amount, decided to be deposited in the court, if the amount has not been deposited. See State of Madras v. B.G.P. Lorry Service, A.I.R.1960 Mad.336 (D.B.). The Commissioner has power to enforce the liability of the employer under the Workmen's Compensation Act against the insurer by reference to his liability under Section 96 of the Motor Vehicles Act. See Iqbal Shamsuddin Ansari v. Gazi Salauddin Ansari, 1980 Lab. I.C.125 (Bom.) (D.B.); United India Fire & Gen.Insurance Co.Ltd. v. Kamalakshi, (1980) 2 L.L.J.408 (Ker.) (D.B.); Kamala Devi v. Navinkumar, A.I.R.1973 Raj.79.

But the force of enforcement of these provisions depends on the discretion of the Commissioner.

To enforce the provisions of the Workmen's Compensation Act, 1923 and thus ensure the payment of compensation, penalties[3] are prescribed for the employer for

a) failure to maintain a notice-book;[4]

b) failure to send to the Commissioner statements regarding fatal accidents;[5]

c) failure to send reports of fatal accidents and serious bodily injuries;[6] and

d) failure to submit annual returns as to compensation.[7]

The penalties, prescribed, however, amount to Rs.500/- only.[8] Any employer can pay such penalties and escape the obligations, imposed on him by the Act easily. Therefore, such penalties do not have any deterrent effect. It is no use

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3. Id., Section 18-A. Before a person can be prosecuted and sentenced under Section 18-A of the Workmen's Compensation Act, it must be proved beyond doubt that he is a person, required to submit the return under Section 16, because the liability to submit a return under Section 16 is limited to a person, employing workmen or any specified class of such persons as directed by the State Government by notification in the Official Gazette. See Sheo Shankar Kanodia v. State of Bihar, 1978 Lab.I.C.1479(Pat.)

4. Id., Section 10(3).

5. Id., Section 10-A (1).

6. Id., Section 10-B.

7. Id., Section 16.

8. Id., Section 18-A (1). The Law Commission of India has recommended that the maximum amount of fine should be increased from five hundred rupees to one thousand rupees,

contd...

imposing such penalties, if the failures, for which the penalties are imposed, will not, in whole or in part, be prevented thereby.[9] Further, neither a workman nor a trade union has any right to initiate, of one's own accord, prosecution proceedings. Prosecution can be instituted only by or with the previous sanction of the Commissioner for Workmen's Compensation.[10]

The employer is expected to pay the amount of compensation, as soon as it falls due.[11] If there is a delay of more than a month in paying compensation, the employer has to show sufficient cause for delay, to the satisfaction of the Commissioner. Unless reasons for delay are explained and established, the employer has to pay simple interest at the rate of six percent per annum on the amount and a

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(f.n.8 contd.) having regard to the fall in the value of the rupee, and imprisonment upto six months be added. Further, a new clause (e) should be added, imposing punishment for failure to display extracts of the provisions of the Act, as required by Section 17-A, which is proposed by the Commission. See Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), pp.98-99.

Section 18-A of the Workmen's Compensation Act, 1923 is amended by the Workmen's Compensation (Amendment) Act, 1995, substituting for the words "five hundred", the words "five thousand". The amendment will come into force only on such date as the Central Government may specify by notification. See Workmen's Compensation (Amendment) Act, 1995, Sections 1(2) and 9.

9. Francis H. Bohlen, "A Problem In The Drafting Of Workmen's Compensation Acts", 25 Har.L.Rev.328 at 333 (1911-12)

10. Workmen's Compensation Act, 1923, Section 18-A (2).

11. Id., Section 4-A (1).

further sum not exceeding fifty percent of such amount by way of penalty.[12] Although the penalty, prescribed in this case, may appear to be stringent, the imposition of penalty is left to the discretion of the Commissioner.[13]

Thus, the enforcement machinery under the Workmen's Compensation Act, 1923 is very feeble. This helps the employer evade his liability for compensation.

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12. Id., Section 4-A (3). See S.Unkar Jadhav v. Gurindar Singh, 1991 (62) F.L.R.315 (Bom.); Ramlal v. Commissioner, 1989 (59) F.L.R.61 (Bom.); Raj Dulari v. S.E., P.S.E.B. & ANR., (1989) 2 L.L.J.132 (P. & H.); Asst. Engr., M.P. E.B., Bhind v. Rajendra Singh, 1988 Lab.I.C.1114 (M.P.); Ram Dulari Kalia v. H.P.S.E.Board, 1987 Lab.I.C.748(H.P.); Bai Mani v. Exec. Engr., Irrigation Project Division Six, Baroda, (1986) 2 L.L.J.426 (Guj.); Bharatkumar Premji Chauhan v. Gurkrupa Alluminium Corpn., 1985 Lab.I.C. 1327 (Guj.). No interest is payable on the penalty imposed under section 4-A (3). See Rajan v. Subramonian, 1992 (2) K.L.T.719 (D.B.).

    The Law Commission of India has recommended that it would be desirable to provide for notice to the employer before an order, imposing penalty, is passed. Further, the rate of interest should be raised from 6 percent to 9 percent and the Commissioner should be bound to award interest at that rate in every case, where the employer is in default. See Law Commission of India, supra, n.8, p.67. See also supra, Chapter 5.

13. Madan Mohan Varma v. Mohan Lal, 1982 Lab.I.C.1729 (All.) (D.B.). The discretion to levy a penalty must be exercised judiciously and after due consideration of the relevant circumstances. This also pre-supposes giving of an opportunity to explain the reasons for delay in making payment. See Oriental Insurance Co. Ltd., v. Jeyaramma, 1989 Lab.I.C.294 (Kant.) (D.B.). In Kehar Singh v. State of Himachal Pradesh, 1989 Lab.I.C. NOC 30 (H.P.), it was held that the Commissioner had failed to exercise his jurisdiction to award interest and penalty for the delay, on the part of the respondent, in payment of compensation to the appellant for a personal injury, caused by an industrial injury.

Unlike under the Workmen's Compensation Act, 1923, the employer cannot evade his liability for the provision of compensatory benefits by failure to pay the required contribution under the Employees' State Insurance Act, 1948. Where there is neglect on the part of the principal employer to pay the contribution and the Corporation is satisfied that the principal employer should have paid the contribution, the Corporation has the power to recover either

(i) twice the amount of contribution, which the principal employer failed to pay, or

(ii) the difference between the amount of benefit, paid by the Corporation and the amount, which he would have received on the basis of contribution, paid by the employer, whichever is greater.[14]

Thus, the principal employer is penalised and he is liable to pay more than he would have paid in the ordinary course. The amount, due from the principal employer, may be recovered as arrears of land revenue,[15] as under the Workmen's

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14. Employees' State Insurance Act, 1948, Section 68 (1).

15. Id., Section 45-B, ins. by Act No.44 of 1966. Where an amount is determined under Section 45-A of the Employees' State Insurance Act, the said amount can be recovered under Section 45-B of the Act, even before the dispute, with respect to the same, is decided by the Insurance Court in proceedings under Section 75 of the Act. But in cases, other than the cases under Section 45-A of the Act, the amount cannot be so recovered, till the dispute is decided by the Insurance Court. See M/s.Modi Steels v. E.S.I.C., Kanpur, 1988 Lab.I.C.1518 (All.) (D.B.).

Compensation Act, 1923.[16] It may also be recovered by other modes of recovery like issuing certificate of the due amount to the Recovery Officer[17] or notice to post office/bank/insurance companies, where the principal employer may have invested money.[18]

Prior to the 1966 Amendment of the Act,[19] the Employees' State Insurance Corporation could not recover the ordinary contribution[20] as an arrear of land revenue,[21] though the employer's special contribution[22] could have been so recovered.[23] If the employer with-held registers, books of account or other document or failed to submit returns[24] or failed to furnish the particulars, called for by the Corporation,[25]

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16. Workmen's Compensation Act, 1923, Section 31. See *supra*, n.2.
17. Employees' State Insurance Act, 1948, Sections 45-C to 45-F.
18. *Id.*, Section 45-G.
19. Act No.44 of 1966.
20. See Employees' State Insurance Act, 1948, Section 40.
21. *Id.*, Section 45-B, *supra*, n.15.
22. *Id.*, Section 73-A under Chapter V-A, which consisted of transitory provisions and ceased to be effective from 1st July, 1973, *Vide* Notification No.S.O.173(E) dated 26-3-1973.
23. *Id.*, Section 73-D of Chapter V-A
24. *Id.*, Section 44.
25. *Id.*, Section 44(2).

the latter was at a loss to ascertain the contributions payable by an employer. This difficulty was obviated by the 1966 Amendment of the Act. Now, if the employer fails to maintain, submit or furnish on demand returns, registers or records, the Corporation is empowered to determine the amount of contribution, payable by the principal employer, on the basis of the information, available to it.[26]

Unlike under the Workmen's Compensation Act, 1923, inspectors are appointed under the Employees' State Insurance Act, 1948 for enforcing the legal provisions for providing benefits.[27] The inspector may examine the employer or any other person in charge of the factory/establishment or any person, found in the factory/establishment. He may call for documents or registers.[28] He may even take copies of any

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26. Id., Section 45-A, ins. by Act No.44 of 1966, Section 17 w.e.f.17-6-1967. It is the Regional Director alone, who is empowered to determine the amount under S.45-A. See Asian Paints (India) Ltd. v. E.S.I.C, 1981 Lab.I.C.514 (Bom.). The Corporation is obliged to pass a speaking order, indicating as to how it has determined the amount of contribution and what was the information, available to it, for determining such amount. This section does not confer any unguided or unbridled power on the Corporation. See A.P.Handloom Weavers Co-operative Society v. E.S.I.C., (1988) 2 L.L.J.515 (A.P.); Hindustan Times Ltd. v. E.S.I.C. 1988 (57) F.L.R.599 (Del.); B.M.K. Industries Ltd. v. E.S.I.C., 1979 (39) F.L.R.258 (Bom.) (D.B.).

27. Id., Section 45(1); Employees' State Insurance (General) Regulations, 1950, Regulation 102.

28. Power to call for production of the registers means that the production is to be made on the factory premises. The inspector has no power to call for their production at his office. See State of Saurashtra v. Pitambar Savjibhai, (1954) 1 L.L.J.138 (Sau.) (D.B.). Failure to produce a register by the employer, on demand, is punishable. See Alibhai v. Emperor, A.I.R.1943 Nag.79.

document or register.[29] Every principal employer has to maintain a bound inspection book and be responsible for its production, on demand by an inspector. A note of all irregularities and illegalities, discovered at the time of inspection,indicating therein the action, proposed to be taken against the principal employer together with the orders for their remedy, passed by the inspector, is sent to the principal employer. The latter has to enter the note and orders in the inspection book.[30]

The penalties, for violation of the provisions for ensuring the provision of compensatory benefits for industrial injuries, are more stringent under the Employees' State Insurance Act[31] than under the Workmen's Compensation Act.[32] Thus, a person is punishable with imprisonment for a term, which may extend upto six months or with fine not exceeding two thousand rupees or with both for giving false statement for avoiding any payments.[33] A person, who is guilty of

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29. Employees' State Insurance Act, 1948, Section 45(2)(d).
30. Employees' State Insurance (General) Regulations, 1950, Regulation 102-A (i) and (ii). Every principal employer shall preserve the inspection book, after it is filled for a period of 5 years from the date of the last entry therein. Id., Regulation 102-A (iii).
31. The penalties have been made stringent by Act No.29 of 1989.
32. Supra, n.8.
33. Employees' State Insurance Act, 1948, Section 84. The words 'six months' have been substituted for 'three months' and 'two thousand' for 'five hundred' by Act No.29 of 1989, Section 32 (i) and (ii) w.e.f.20.10.1989.

offences like failure to submit any return,[34] obstructing an inspector in the discharge of his duties,[35] and any contravention of the Act or the rules or the regulations, for which no special penalty is provided, is punishable with imprisonment for a term, which may extend to one year or with fine, which may extend to four thousand rupees, or with both.[36] The punishment for failure to pay contributions is the most stringent. A person, guilty of failure to pay the employee's contribution, is punishable with imprisonment ranging from one to three years and a fine of ten thousand rupees. In any other case of failure to pay contribution, the guilty person is punishable with imprisonment, ranging from six months to three years and a fine of five thousand rupees.[37] A person, who is guilty of repetition of an offence after conviction, is punished with imprisonment for a term, which may extend to two years and a fine of five thousand rupees for every subsequent offence.[38] If the

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34. Id., Section 44.

35. Id., Section 45; Employees' State Insurance (General) Regulations, 1950, Regulations 102, 102-A.

36. Id., Section 85.

37. Ibid. In Nellimerla Jute Mills Co. Ltd., v. E.S.I.C., A.I.R.1961 A.P.338 (D.B.), it was held that there was nothing in the Act to prevent a Criminal Court from entertaining a prosecution under the Act without adjudication of that matter by the Employees' Insurance Court.

38. Id., Section 85-A. The words "two years and with fine of five thousand rupees" have been substituted for "one year, or with fine which may extend to two thousand rupees, or with both" by Act No.29 of 1989'.

subsequent offence is failure by the employer to pay any contribution, the employer is punishable with imprisonment for a term, ranging from two to five years and a fine of twenty five thousand rupees.[39] Where an employer is convicted of an offence for failure to pay any contribution, the court[40] may require him to pay the amount of contribution, in addition to awarding any punishment.[41]

If the person, committing an offence, violating the provisions for ensuring provision of compensatory benefits, is a company, every person, who, at the time of the commission of the offence, was in charge of the company as well as the company will be punished for the offence.[42] Further, if the offence, committed, is attributable to any neglect on the part of any director or manager, secretary or other

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39. Id., Section 85-A, Proviso. In the Proviso, the words "five years but which shall not be less than two years and shall also be liable to fine of twenty five thousand rupees" have been substituted for "one year but which shall not be less than three months and shall also be liable to fine which may extend to four thousand rupees" by Act No.29 of 1989 w.e.f.20.10.1989.

40. No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under the Employees' State Insurance Act, 1948. Id., Section 86(2).

41. Id., Section 85-C.

42. Id., Section 86-A (1). But a person shall not be punished if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Id., Section 86-A (1), Proviso.

officer of the company, such director, manager, secretary or other officer is liable for punishment.[43]

As under the Workmen's Compensation Act, 1923,[44] neither a workman nor a trade union has any right to institute, of one's own accord, proceedings for prosecution for commission of offences under the Employees' State Insurance Act, 1948. Such proceeding can be instituted only by or with the previous sanction of the Insurance Commissioner or other authorised officer of the Corporation.[45]

In addition to prosecution for offences through criminal court, the Corporation may recover damages from the employer by way of penalty for failure to pay contributions or other amounts.[46] The amount of damages, that the Corporation can recover from the employer, is not to exceed the amount of arrears as may be specified in the regulations.[47]

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43. Id., Section 86-A (2).
44. See supra, n.10.
45. Employees' State Insurance Act, 1948, Section 86 (1).
46. Id., Section 85-B(1). See E.S.I.Corporation v. Perfect Potteries Co., [1995] 87 F.J.R.374 (M.P.) (D.B.). In Rameshwar Jute Mills Ltd. v. Union of India, 1986 Lab. I.C.1225 (Pat.) (F.B.), it was held that the Corporation's power under Section 85-B can be delegated to subordinate officers or authorities by virtue of Section 94-A. In E.S.I.C. v. Dhanda Engineers (P) Ltd., 1981 Lab.I.C.658 (P. & H.) (D.B.), it was held that the liability for punishment under Section 85 survives, despite imposition of damages under Section 85-B and payment of interest under Regulation 31-A.
47. Ibid. See also Employees' State Insurance (General) Regulations, 1950, Regulation 31-C. The words "from the employer by way of penalty such damages not exceeding

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Before recovering damages from the employer, the Corporation should give the employer a reasonable opportunity of being heard.[48] His explanation must be duly considered[49] and a speaking order for recovery of damages should be passed, after taking into account all the facts and circumstances.[50] The damages may be recovered from the employer as an arrear of land revenue or other modes of recovery.[51] The provision,

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(f.n.47 contd.) the amount of arrears as may be specified in the regulations" in Section 85-B(1) have been substituted for the words "from the employer such damages not exceeding the amount of arrears as it may think fit to impose" by Act No.29 of 1989.

48. Id., Section 85-B(1), Proviso I. See E.S.I.C. v. Perfect Potteries Co., [1995] 87 F.J.R.374 (M.P.) (D.B.); Rameshwar Jute Mills v. Union of India, 1986 Lab.I.C.1225 (Pat.) (F.B.). An order, passed under Section 85-B, after affording reasonable opportunity of being heard, is not subject to judicial review by the Employees' Insurance Court. See Straw Products Ltd., v. E.S.I.C., 1986 (53) F.L.R.743 (M.P.).

49. E.S.I.C. v. Perfect Potteries Co., supra, n.48. In E.S.I.C. v. Indoflex (P.) Ltd., 1988 (56) F.L.R.109(Raj.), it was held that payment of interest by the employer under Regulation 31-A is no bar to imposition of damages under Section 85-B. In E.S.I.C. v. Meecos Ltd., 1980 K.L.T.179 (D.B.), it was held that the damages, contemplated in Section 85-B, is not compensation for loss on account of the default of a party but in the nature of a penalty, that could be imposed for non-compliance with the statute, and hence, mere absence of proof of loss was no bar to imposing damages under Section 85-B.

50. E.S.I.C. v. Perfect Potteries Co., [1995] 87 F.J.R.374 (M.P.) (D.B.). See also M/s.Prestolite of India Ltd., v. Reg.Dir., A.I.R. 1994 S.C.521; Beama Manufacturers (P.) Ltd. v. E.S.I.C., 1990 (60) F.L.R.743 (Mad.) (D.B.); E.S.I.C. v. Associated Industries (Assam), 1990 Lab.I.C. 195 (Gau.); R.D., E.S.I.C. v. Sakthi Tiles, 1988 (2) K.L.T.280 (D.B.); Rameshwar Jute Mills Ltd. v. Union of India, 1986 Lab.I.C.1225 (Pat.) (F.B.).

51. Employees' State Insurance Act, 1948, Section 85-B(2). In this sub-section, the words "or under Section 45-C to Section 45-I" were added at the end by Act No.29 of 1989, Section 35.

requiring the Corporation to afford opportunity for hearing to the employer and recover only such damages as specified in the regulations[52], prevents the Corporation from resorting to arbitrary exercise of power.[53]

Though the inspector under the Employees' State Insurance Act, 1948 has wide powers of inspection, the question of exercise of such powers is left to the discretion of the inspector.[54] Again, it is true that the penalties for the violation of the provisions for ensuring provision of compensatory benefits have been made stringent by Act No.29 of 1989. But the question, whether the violator should be proceeded against, depends upon the Insurance Commissioner or other authorised officer of the Corporation.[55] As under the Workmen's Compensation Act, 1923,[56] in the Employees' State Insurance Act also, there is nothing that

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52. Supra, nn.47, 48, 49 and 50.

53. For arbitrary exercise of power by the Corporation, see M/s.Hind Arts Press v. E.S.I.C., 1990 Lab.I.C.744 (Kant.) (D.B.), where the Corporation proceeded to levy damages to the extent of 50% and 60% respectively on the employer for delayed payment of contribution for two periods and for further delay, damages to the extent of 100%. It was held that, though the levy of damages for earlier two periods was not arbitrary, the levy of damages to the extent of 100% was and, therefore, ordered the same to be reduced to 60%.

54. Employees' State Insurance Act, 1948, Section 45(2).

55. Id., Section 86 (1).

56. Supra, nn.1, 2 and 13.

compels the Inspector/Insurance Commissioner/authorised officer of the Corporation to switch on the enforcement machinery. It is suggested that Section 45 of the Employees' State Insurance Act, 1948 may be amended empowering the Employees' State Insurance Corporation to constitute in each local office an Inspectorate, consisting of one Inspector, appointed by the Corporation and one employees' representative, selected by the Corporation, in consultation with employees' union, having the largest mrmbership, instead of the existing provision for appointing inspectors.[57] For initiating prosecution for offences, provision may be introduced in the Employees' State Insurance Act, empowering the Corporation to constitute in each local office a Prosecuting Agency, consisting of one authorised official of the Corporation and one employees' representative, selected by the Corporation, in consultation with employees' union, having the largest membership. Conducting inspections regularly and initiating prosecution promptly should be made the mandatory duty of the Inspectorate and Prosecuting Agency respectively.

Provision may be incorporated in the Workmen's Compensation Act, 1923, empowering the State Government to constitute in each district an Inspectorate, consisting of one

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57. See Employees' State Insurance Act, 1948, Section 45.

Inspector, appointed by the State Government and one workers' representative, selected by the State Government, in consultation with workers' organisation, having the largest membership, of employments, covered by the Act and in the absence of any workers' organisation in the employments, covered by the Act, one workers' representative, selected by the State Government and entrust it with the mandatory duty of conducting inspections and enforcing the provisions of the Act. Provision may also be incorporated in the Workmen's Compensation Act, 1923, empowering the State Government to constitute in each district a Prosecuting Agency, consisting of an official, appointed by the State Government and the workers' representative, in the Inspectorate, proposed under the Act. It should be made the mandatory duty of the Prosecuting Agency to initiate prosecutions for offences under this Act.

Chapter 10

EMPIRICAL STUDY ON THE APPLICATION OF THE ACTS FOR COMPENSATING INDUSTRIAL INJURIES

An empirical study, on the application of the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, was conducted for finding out their effectiveness in providing compensation to workmen for industrial injuries. The universe, sampled out for the study, was mainly the Cochin industrial belt in the State of Kerala. The industrial establishments, chosen for study from this universe, do not have a homogeneous character. So it was felt desirable to adopt the stratified random sampling method of research.[1] Each of the industrial establishments was taken as a stratum and from each, a group of five to fifteen workmen/employees[1a] was selected by random sampling. Data were collected by informal personal discussions with the workmen/employees with the help of a schedule of questions. In those cases, where the workmen/employees, interviewed, could not give a clear picture regarding a particular issue, the data, collected from such group of workmen/employees were checked by having personal discussions with another group/trade unions/employers/local offices of the Employees' State

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1. See C.R.Kothari, Research Methodology, Methods and Techniques (1991), pp.76, 77.

1a. Persons, covered by the Employees' State Insurance Act, 1948, are called as 'employees'. See supra, Chapter 3.

Insurance Corporation and thus, the actual position was ascertained.

For enquiring about the application of the Workmen's Compensation Act, 1923, the following categories of workers, covered by the Act,[2] were personally interviewed:-

(1) workmen, engaged in loading and unloading ships;[3]

(2) workmen of ferry boats;[4]

(3) railway servants[5] like luggage porters, licenced coolie

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2. Workmen's Compensation Act, 1923, Section 2 (1) (n), read with Schedule II to the Act.

3. Id., Schedule II, Clause (VII). For studying, how far workmen, engaged in loading and unloading ships, were benefited by the Act, workers of this category, employed by Cochin Port Trust were interviewed. These workers are generally illiterate. They have to carry very heavy loads. Ships, coming to the Port, are time-bound, as they are to leave the Port for some other place by a particular date. So the steve dores of ships offer speed money to the workers and get the work done speedily. Further, they are forced to handle new equipments and work in containers without proper training. Heaviness of the loads, speedy disposal of work and lack of training in handling equipments lead to frequent accidents. The data were collected by discussions with different groups of workers and trade unions.

4. Id., Schedule II, Clause (XVII). The workmen of ferry boats, run by the Kerala Shipping and Inland Navigation Corporation Ltd. and the Kerala State Water Transport Department, both in Cochin were interviewed.

5. Id., Section 2 (1) (n) (i). Railway servants of Cochin (Cochin Harbour Terminus, North and South), Alwaye and Trichur railway stations were interviewed.

porters, gangmen,[6] khalasies,[7] electricians and workmen of the Signal and Telecom Department;

(4) workers, engaged in outdoor work in Railway Mail Service;[8]

(5) workers, engaged in outdoor work in the Post and Telegraph Department;[9]

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6. Gangmen are class IV employees of the Engineering Department of the Indian Railways. They, being illiterate, are the most exploited class of workers of the Railways. They are prone to accidents, as they work on the railway line day/night, irrespective of the condition of the weather. They may be dashed to death by trains, coming without signals. They may get sun-stroke and collapse in the course of work. They are not supplied gloves for cleaning the lines nor kerosene oil and soap for washing their tarred and stained hands. So they may contract skin diseases. Data were collected by discussions with gangmen of Cochin (Cochin Harbar, North and South), Alwaye and Trichur railway stations. It was reported that a gangman, on night duty on a railway line near Cochin, was dashed to death by a train, coming without signals. See Malayala Manorama, June 9, 1994, p.1.

7. Khalasies are also Class IV employees of the Engineering Department of the Indian Railways like gangmen. They include plumbers, brick-layers, carpenters, blacksmiths, painters, cleaners of water tanks and drainage workers of the Railways. They face the risk of falling from heights and getting injured. Cleaners of water tanks may get electric shocks. Drainage khalasies, working without any preventive equipments/gloves, are exposed to the risk of contracting skin diseases. The data were collected by discussions with two different groups of khalasies of Cochin South railway station.

8. Workmen's Compensation Act, 1923, Schedule II, Clause (xiii). Workers of Railway Mail Service, Cochin South railway station were interviewed.

9. Ibid. In addition to the workmen, engaged in outdoor duty in the Head Post Office, Cochin, the workmen of Mail Motor Service, near Cochin South railway station, were interviewed.

(6) workers, engaged in handling and transporting cargo in barges;[10]

(7) linemen and overseers of the Kerala State Electricity Board;[11]

(8) workmen of timber industry;[12]

(9) X-ray technicians;[13]

(10) construction workers of multi-storeyed buildings;[14]

(11) sweepers and cleaners;[15]

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10. Id., Schedule II, Clause (i). The workmen employed by the Kerala Shipping and Inland Navigation Corporation Ltd., Cochin, were interviewed. These workers are exposed to the risk of lung diseases, because of their constant touch with polluting chemicals.

11. Id., Schedule II, Clauses (ix) and (xix). The workmen of this category of the Kerala State Electricity Board, South Kalamassery were interviewed.

12. Id., Schedule II, Clauses (iii), (xxii) and (xxiii). Workmen of T.K.P.Industries, Edappally, Cochin were interviewed.

13. Id., Schedule II, Clause (xxvii). X-ray technicians of Lisie Hospital, Cochin; PVS Hospital, Cochin and Cochin Port Hospital were interviewed. X-ray technicians are exposed to a risky environment. Years of exposure to radium may cause cancer. If wounds and burns occur, due to radiation, healing is very difficult. Accidents may occur, due to electric shock. These workers and their children, generally, suffer from poor health.

14. Id., Schedule II, Clause (viii). Construction workers of T and T Associates, Edappally; Kareem & Co., Kaloor and K.T.Francis, HMT Junction, Kalamassery were interviewed.

15. Id., Schedule II, Clause (x). Sweepers and cleaners of Corporation of Cochin were interviewed.

(12) drivers,[16] conductors and cleaners of vehicles;[17]

(13) linemen and line supervisors of Telephone Exchange;[18]

(14) workers of water purification plant;[19]

(15) workers, engaged in the exhibition of pictures;[20]

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16. Id., Schedule II, Clauses (i) & (xxv). Drivers of Corporation of Cochin, Private and Transport Bus stands, Alwaye were interviewed.

17. Id., Schedule II, Clause (i). Cleaners of vehicles of Corporation of Cochin and conductors and cleaners of buses of Private and Transport Bus stands, Alwaye were interviewed.

18. Id., Schedule II, Clause (ix). Linemen and line supervisors of Telephone Exchange, Alwaye were interviewed. Accidents, like falling and getting electric shocks, are now rare in the Department of Telecommunications, because of the use of insulation coating lines, minimisation of overhead cable lines and the adoption of underground cable system. Still, as the linemen have to keep the telephone receivers close to their ears for a long time for fault repair, the diaphragms of their ears are commonly damaged. As they work in the hot sun without any eye protective devices, their eye-sight is affected. Workers, doing underground jointing work, have to work in tents in dusty and polluted environment for long hours and are, therefore, susceptible to lung diseases. The data were collected by discussions with two groups of workers of this category of the Telephone Exchange, Alwaye.

19. Id., Schedule II, Clause (iii). Workmen of Water Works, Alwaye were interviewed. These workers are likely to get electric shocks, while operating heavy motors and have breathing trouble, while chlorinating water. They have to carry heavy bags of chemicals like alum, walking along slippery floor. So they may fall down and get injured. They are likely to become deaf, as they work in highly noisy atmosphere.

20. Id., Schedule II, Clause (xxi). Workmen of Matha Mathurya Theatre, Alwaye were interviewed.

(16) workmen, engaged in the operation of Light house;[21]

(17) masters and seamen of ships;[22]

(18) workers, engaged in drilling tube-wells;[23]

(19) workers, engaged in blasting and crushing rock;[24]

(20) workers, engaged in operation or maintenance of aircraft;[25]

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21. Id., Schedule II, Clause (xx). Workmen of Light house, Vypeen, Cochin were interviewed. There are only five workers including attender and sweepers, engaged in the operation and maintenance of the Light house in Cochin. Those, who are engaged in outdoor work like cleaning the lantern glass and painting cupola, are likely to fall from the top of the Lighthouse down to the ground. Workers may fall from the vertical ladder inside the Lighthouse from 20 feet height. They are likely to have electric shocks, as they work in contact with high-power electricity (3500 volts). If there is no electricity, either generator or gas has to be used for operating the Lighthouse. During monsoon, it is very difficult to start the generator and this may cause chest pain to the worker. Operation of the Lighthouse by using gas is also equally risky.

22. Id., Schedule II, Clause (vi). Masters and seamen of ship, named M.V.Ubaidullah, an Indian ship, carrying cargo from Cochin to Lakshadweep, were interviewed.

23. Id., Schedule II, Clause (xxx). Workers of the Ground-water Department, Collectorate, Cochin were interviewed. These workers, engaged in drilling tube-wells, do a highly risky job. Accidents, like breaking of oil tanker, air compressor and air hoses, may occur at any time. They are likely to be affected by blindness, pressure, lung and heart diseases, as they work in highly noisy, dusty and polluted environment.

24. Id., Schedule II, Clauses (iv) and (xv). Workers, employed by Thomas Koravakkattu, Kulappuram, Muvattupuzha were interviewed.

25. Id., Schedule II, Clause (xxviii). Workers, engaged in operation or maintenance of aircraft in Airport, Cochin, were interviewed.

(21) workers, engaged in handling or transport of goods in godowns;[26] and

(22) workers of factories.[27]

The chief defect of the Workmen's Compensation Act, 1923 is that it casts the entire liability for compensation on the employer but does not compel him to insure his liability.[28] If the employer insures his liability under the Act, he will not evade his liability. So it was felt necessary to enquire into the question whether the employers of the workmen, chosen for the study on the application of the Workmen's Compensation Act, 1923,[29] have insured their liability for payment of compensation. Of the fifty employers, taken up for study,[30] seventeen are Central Government factories/departments, nine Kerala Government

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26. Id., Schedule II, Clause (xxvi). Workers of the godown of Food Corporation of India, Willingdon Island, Cochin were interviewed.

27. Id., Schedule II, Clauses (ii) and (iii). Workers of factories like Cochin Shipyard Ltd., Cochin-15, Hindusthan Petroleum Corporation Ltd., Cochin-16; Modern Food Industries (India) Ltd., Edappally; Premier Tyres Ltd., Kalamassery; Indian Aluminium Co. Ltd., Udyogamandal; Travancore Cochin Chemicals Ltd., Udyogamandal; Fertilisers and Chemicals Travancore Ltd., Udyogamandal; Hindusthan Insecticides Ltd., Udyogamandal; Travancore Chemicals Manufacturing Ltd., Kalamassery; Hindusthan Machine Tools Ltd., Kalamassery and Tata Oil Mills Ltd., Cochin, not covered by the Employees' State Insurance Act, 1948, were interviewed.

28. See Id., Sections 3 and 14.

29. Supra, nn.3-27.

30. Ibid.

departments/factories, four private factories, two private service institutions, three building contractors and fifteen private individual employers, of whom thirteen are bus owners. The information, collected, is tabulated as follows:-

Table No. I

Sl. No.	Category of employers chosen for study.	Total No.of employers chosen for study.	Total No.of employers who have not insured the liability.	Total No. of employers who have insured the liability.
1	Central Govt. departments/ factories.	17	12	5
2	Kerala Govt. departments/ factories	9	7	2
3	Private factories	4	3	1
4	Private service institutions	2	2	-
5	Building contractors	3	1	2
6	Private indivi- dual employers	2	2	-
7	Private bus owners	13	-	13
		50	27	23

It is found that only five[31] out of the seventeen[32] Central

31. Shipping Corporation of India, Indian Airlines, Modern Food Industries Ltd., Fertilisers and Chemicals Travancore Ltd. and Hindustan Insecticides Ltd.

32. Cochin Port Trust, Railways, Railway Mail Service,

contd...

Government departments/factories, two[33] out of the nine[34] Kerala Government departments/factories and one[35] out of the four private factories[36] have insured their liability. The two private service institutions[37] and the two private individual employers other than bus owners[38] have not insured their liability. Two[39] out of three building contractors[40] and all the private bus owners have insured their liability.

(f.n.32 contd.) Telecommunications, Lighthouse, Post and Telegraph, Shipping Corporation of India, Indian Airlines, Modern Food Industries Ltd., Fertilisers and Chemicals Travancore Ltd., Hindustan Insecticides Ltd., Foor Corporation of India, Hindustan Petroleum Corporation Ltd., Indian Aluminium Company Ltd., Indian Rare Earths Ltd., Hindustan Machine Tools Ltd. and Cochin Shipyard Ltd.

33. Kerala Shipping and Inland Navigation Corporation Ltd. (transporting cargo in barges) and Travancore Cochin Chemicals Ltd.

34. Kerala Shipping and Inland Navigation Corporation Ltd. (running ferry boats), Kerala Shipping and Inland Navigation Corporation Ltd. (transporting cargo in barges), Kerala State Electricity Board, Corporation of Cochin, Kerala Water Authority, Kerala State Road Transport Corporation Ltd., Kerala State Water Transport Department, Kerala State Ground Water Department, and Travancore Cochin Chemicals Ltd.

35. T.K.P. Industries, Edappally.

36. T.K.P. Industries, Edappally; Travancore Chemicals Manufacturing Ltd., Kalamassery and Tata Oil Mills Ltd., Cochin-16.

37. Lisie Hospital, Cochin and PVS Hospital, Cochin.

38. Matha Mathurya theatre, Alwaye and Thomas Koravakkattu, Muvattupuzha.

39. T. & T. Associates, Edappally and Kareem & Co., Kaloor, Cochin.

40. T. & T. Associates, Edappally, Kareem & Co., Kaloor, Cochin and K.T.Francis & Co., Kalamassery.

Additional information, on the issue of insurance of liability of the employer, was collected by verifying the Register of Workmen's Compensation Cases of the offices of the Commissioner for Workmen's Compensation at Ernakulam and Trichur. Fifty six cases, as entered in the Register of Workmen's Compensation Cases, 1992 of the Ernakulam office, were verified. The information, collected, is tabulated below:

Table No.II

Category of employers.	Total No.of employers.	No. of employers who have not insured their liability	No. of employers who have insured their liability
Central Govt. departments/ factories.	8	8	-
Kerala Govt. departments/ factories	4	4	-
Private firms	26	12	14
Private individuals	18	3	15
	56	27	29

It is found that none of the eight Central and four State Government departments/factories, verified, has insured the liability. But out of the twenty six private firms,

verified, fourteen have insured their liability. Coming to private individual employers, out of the eighteen cases, verified, fifteen have insured their liability.

Forty five cases, as entered in the Register of Workmen's Compensation Cases, 1990 of the Office of the Commissioner for Workmen's Compensation, Trichur, were verified. The information, collected, is tabulated below:

Table No.III

Category of employers.	Total No.of employers.	Total No.of employers who have not insured the liability.	Total No. of employers who have insured the liability.
Central Govt. departments/ factories.	-	-	-
Kerala Govt. departments/ factories.	2	2	-
Private firms	2	2	-
Private individuals	41	4	37
	45	8	37

In forty one cases, the employers are private individuals, of whom thirty are owners of vehicles and of these, thirty seven have insured their liability. In the remaining four cases, the employers are two Kerala Government departments/ boards and two private firms and all the four have not insured their liability.

In the absence of provision for compulsory insurance of employer's liability under the Workmen's Compensation Act, 1923, it has to be examined whether the employer tries to evade his liability under the Act. The information, collected for examining this question, is tabulated as follows:-

Table No.IV

Sl. No.	Category of employers taken for study.	Total No. of employers taken for study.	Total No. of employers providing compensation as per the W.C.Act.	Total No. of employers providing compensation in ways other than those in the W.C.Act.*	Total No. of employers not required to provide compensation because of the absence of accidents.	Total No. of employers evading compensation altogether
1	Central Govt. departments/ factories	17	8	8	-	1
2	Kerala Govt. departments/ factories.	9	5	4	-	-
3	Private factories.	4	1	1	-	2
4	Private service institutions	2	-	-	2	-
5	Building contractors	3	2	-	1	-
6	Private employers	2	-	-	2	-
7	Private bus owners	13	13	-	-	-
		50	29	13	5	3

* Ways other than those in the Workmen's Compensation Act, 1923 includes meeting the expenses for medicine, leave with full salary only for temporary disablement and alternative job only for permanent disablement and job for the dependant only, in case of death.

Of the seventeen Central Government departments/ factories, chosen for study, it is found that the workers, engaged in loading and unloading work in the godown of the Food Corporation of India, are not given any compensation at all by their principal employer on the ground that they are casual workers, employed through contractor. In the Department of Telecommunications, though the linemen and line supervisors are not given any compensation in cases of permanent total disablement, they are given other alternative jobs. In certain other Central Government departments/factories like Cochin Port Trust, Indian Railways,[41] Post and Telegraph, Cochin Port Hospital, Light House,

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41. In the Indian Railways, though workmen of the Signal and Telecommunication Department, Electrical Department and even the luggage porters of the Traffic Department are given legally permissible compensation, the class IV employees of the Engineering Department, namely, gangmen and khalasies are exploited. The Department of Railways considers only those injuries of these workers, causing wounds and flow of blood, as injuries on duty. Occupational diseases and collapsing in the course of duty, because of strain of work, are not treated as injuries on duty. Injuries on the way to and from place of work are also disregarded. These workers, being illiterate and not backed by trade unions, are simply disregarded by the management. They are treated just like slaves. Gangmen cannot gather together and fight in unison, as they are scattered on the railway lines. This exploitation of theirs is admitted not only by the different groups of gangmen/khalasies, interviewed in Cochin (Harbour Terminus, South and North), Alwaye and Trichur railway stations but also by workmen of other departments of the Railways.

Indian Aluminium Co. Ltd., and Hindustan Machine Tools Ltd., payment of compensation is not certain. But the injured workmen of these departments/factories are given the cost of medical treatment, leave with salary[42] for temporary disablement and alternative job in cases of permanent total disablement.[43] In Modern Food Industries (India) Ltd. only minor injuries to fingers and legs, which can be cured by medical treatment, have occurred. As the factory has introduced group insurance system against industrial accidents, the receipt of compensation, in the case of serious injuries, need not be doubted. In certain other departments/factories like Cochin Air Port, Cochin Shipyard Ltd., Hindustan Petroleum Corporation Ltd., Fertilisers and Chemicals Travancore Ltd., Hindustan Insecticides Ltd., Indian Rare Earths Ltd., and the Shipping Corporation of India, the employer does not evade his liability for the payment of compensation under the Workmen's Compensation Act, 1923. Whereas Cochin Air Port, Fertilisers and Chemicals Travancore Ltd., Hindustan Insecticides Ltd., and the Shipping Corporation of India have under taken group insurance of their workers,[44] Cochin Shipyard Ltd.

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42. In Hindustan Machine Tools Ltd., for the period of temporary disablement, only half pay salary is granted.

43. Cochin Port Wharf workers are denied even alternative job. In cases of death, dependants are given job, only after years of delay. Gangmen of the Railways are given alternative job, only, after long gap, which leads to service-break and loss of other service benefits. Further the Department of Railways has recently stopped the provision for job for dependants, in case of death on duty.

44. _Supra_, n.31.

Hindustan Petroleum Corporation Ltd., and Indian Rare Earths Ltd., have no group insurance.[45] But in all these establishments, in the event of occurrence of industrial injuries, the entire cost of medical treatment,[46] special leave with salary[47] for the period of temporary disablement and compensation in cases of permanent disablement and death are granted to the injured workman/his dependants.[48] If the workman is incapacitated for the work, he was doing, he is given alternative job.

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45. Supra, n.32.

46. In Cochin Air Port and the Shipping Corporation of India, in addition to the cost of medical treatment, the food expenses, during the period of hospitalisation, are also met by the employer.

47. This special leave is with full salary in all these establishments except in the Shipping Corporation of India, where the seamen are granted only basic salary without allowances and Cochin Shipyard, where leave with half salary only is granted.

48. Dependant is generally given job in case of death by these establishments. But in the Hindustan Petroleum Corporation Ltd., the dependant is to opt any one of the following alternatives:
    1) Dependant will be given employment.
    2) Full salary from the date of death till the date, on which the deceased workman would have retired in due course, if he had not died, at the rate of the salary, the workman was drawing at the time of his death, will be given in lumpsum on the condition that the dependant will not get gratuity and provident fund for the time being but only on the date, the deceased workman would have retired and after the due date of retirement, he will be getting 40% of the salary as pension.
    3) Forty percent of the last drawn salary from the date of death of the workman till the due date of retirement will be given, in which case provident fund and gratuity will be paid along with this salary amount in lumpsum.

Out of the nine Kerala Government departments/factories taken for study, the linemen and line supervisors of the Kerala State Electricity Board, workers of the Water Purification Plant at Alwaye under the control of the Kerala Water Authority, the drivers and cleaners of vehicles and the sweepers and cleaners of the Corporation of Cochin and the drivers and conductors of the Kerala State Road Transport Corporation are not given compensation, in accordance with the Workmen's Compensation Act, 1923. In the Kerala State Electricity Board, the Corporation of Cochin and the Kerala Water Authority Department, if the injured workers of the categories, noted above, are unfit for the work, they have been doing, they may be given alternative job and in case of death, a dependant is given job. The situation, in the Kerala State Road Transport Corporation is different. The Corporation has not insured the staff against industrial accidents. In case of accidents, what the Corporation does, is to see that the loss, incurred by the Corporation by the accident, is recovered from the worker.[49] The workmen of ferry boats, run by the Kerala Shipping and Inland Navigation Corporation Ltd., are found to have sustained only minor

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49. Formerly, those drivers, who lost eyesight by occupational strain, were given job in other categories. Now, even this practice is stopped. Drivers are forced to continue as drivers, despite loss of eye-sight, leading to accidents.

injuries, which can be cured by medical treatment. Accident leave with full salary is granted for the period of temporary disablement, in addition to medical reimbursement. The permanent workmen of both the barges, run by the Kerala Shipping and Inland Navigation Corporation Ltd., and the Kerala Ground Water Department, engaged in the construction of tube wells, the workmen of the ferry boats, run by the Kerala State Water Transport Department and the workmen of the Travancore Cochin Chemicals Ltd., a Kerala Government company are satisfied with the compensation, provided to them by their respective employers for industrial injuries. The Kerala Shipping and Inland Navigation Corporation Ltd., and the Travancore Cochin Chemicals Ltd., have insured their workmen. In case of accidents, leave with full salary[50] is provided, in addition to medical reimbursement, for the period of temporary disablement in all these four establishments. After that, if the workman is declared to be permanently disabled or death ensues, compensation, admissible under the Workmen's Compensation Act, 1923, is provided. If the workman is not medically fit for his previous work, he is given other suitable job.

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50. In Kerala State Water Transport and Ground Water Departments, hospital leave with full salary upto 120 days and half pay thereafter is given to permanent workers for temporary disablement, as per Kerala Service Rules, Article 103.

Tata Oil Mills Ltd., Travancore Chemicals Manufacturing Ltd., Premier Tyers Ltd., and T.K.P.Industries Ltd., are the four private factories, taken up for study.[51] In Travancore Chemicals Manufacturing Ltd., the compensation, provided to workmen, covered by the Workmen's Compensation Act, 1923,[52] for industrial injuries is not at all in compliance with the Act, as the maximum amount of compensation is limited to 80% of 10 days' salary. Premier Tyeres Ltd., also does not grant compensation for industrial injuries to those workmen, covered by the Workmen's Compensation Act, 1923,[53] in accordance with the Act. The factory has, however, insured certain organs of workers of certain risky departments, because of the probability of such organs being affected by accidents.[54] But Tata Oil Mills Ltd., provides compensation to workmen, not covered by the Employees' State Insurance Act, 1948,[55] in accordance with a workmen's compensation scheme, which is on a par with the Employees' State Insurance Scheme.[56] As per

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51. Supra, n.36. In the case of these factories, the Workmen's Compensation Act, 1923 is applicable only to those workers, whose wages exceed Rs.3,000/- and, hence, are not covered by the Employees' State Insurance Act, 1948. See supra, Chapter 6

52. See supra, n.51.

53. Ibid.

54. Both the factory and the workman have to pay equal contributions for this insurance.

55. Supra, n.51.

56. The All India Tata Oil Mills Employees' Federation has entered into an agreement with the management for providing an accident compensation scheme on a par with the Employees' State Insurance Scheme.

this scheme, the company is to grant special leave with full salary for the period of temporary disablement, in addition to meeting the entire medical expense. If temporary disablement is followed by permanent disablement, compensation is paid in lumpsum, according to the rates as permissible under the Employees' State Insurance Scheme. As T.K.P. Industries Ltd., has insured the liability under the Workmen's Compensation Act, 1923, compensation is paid by the insurance company, if accidents occur.

Lisie Hospital, Cochin and PVS Hospital, Cochin[57] are the two private medical service institutions, taken for study. X-ray technicians, employed by these institutions, run the risk of being affected by occupational diseases like cancer.[58] If they happen to be affected by any occupational disease, they do not expect to get any compensation as per the Workmen's Compensation Act, 1923, because of the difficulty of proof and absence of group insurance by these institutions.

T & T Associates, Kareem & Co. and K.T.Francis & Co. are three building contractors, selected for study.[59] Of these, the first two firms have insured their liability for

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57. *Supra*, n.37.

58. *Supra*, n.13.

59. *Supra*, n.40.

compensation under the Workmen's Compensation Act, 1923. So there is no possibility of their evading liability, in the event of occurrence of accidents.

The two private individual employers, taken up for study, are the owner of Matha Mathurya theatre[60] and Thomas Koravakattu, employing workers, engaged in rock blasting operations.[61] The workers, engaged in the exhibition of films in Matha Mathurya theatre, have never met with any accident in the course of their employment for the last several years, entitling them to compensation under the Workmen's Compensation Act, 1923. Workers, engaged in rock blasting operations, are susceptible to accidents at any time, though no accident has occurred, since operations were started recently by the employer, selected for this study. But the employer has not insured his liability for compensation under the Workmen's Compensation Act, 1923. So, in the event of occurrence of accidents, payment of compensation is not certain. It may depend upon the capacity and discretion of the employer, since his workers are ignorant of the provisions of the Workmen's Compensation Act, 1923.

The bus operators[62] are the last group of private employers, taken for study. All of them, having insured

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60. Supra, n.38.

61. Supra, n.24.

62. See Table No.I, Serial No.7.

their liability for compensation, compensation, in accordance with the Workmen's Compensation Act, 1923, is paid by the insurance companies, if accidents occur.

The lumpsum mode of payment of compensation under the Workmen's Compensation Act, 1923 is subject to criticism.[63] However, workers of the different institutions, interviewed, prefer lumpsum payment. Their justification for this preference is that they can either deposit the money in a bank and get interest or make use of the money for any other useful venture, requiring a large sum of money like buying landed property.

Though factors like age and monthly wages of the workman may be relevant in payment of compensation, can the particular department of the workman be a relevant factor? Of the various institutions, studied, the Department of Railways has caught the attention of the researcher as the only institution, meting out differential treatment to workmen, with regard to the payment of compensation for industrial injuries, based upon the department, to which they belong. While electricians (Electrical Department), technicians (Signal and Telecommunication Department) and even luggage porters (Traffic Department) of the Indian Railways are granted, on sustaining injury, duty leave with salary, followed by the payment of

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63. Supra, Chapter 5.

compensation under the Workmen's Compensation Act, 1923, the gangmen and khalasies[64] (Engineering Department) are utterly neglected by the superior officials with regard to the payment of compensation for industrial injuries. As far as these Class IV employees of the Engineering Department are concerned, the sanction of duty leave with salary, and payment of compensation for industrial injuries depends upon the good-will of the railway doctor and the superior officials. These workers have no access to office and superior officials. If they complain, they are likely to be victimized by the officials.

It is also noted that differential treatment is meted out to permanent and casual workmen, with regard to the payment of compensation for industrial injuries under the Workmen's Compensation Act, 1923, in certain government departments. In the Department of Railways, luggage or traffic porters, who are permanent staff of the Railways, are granted duty leave with salary till they are declared medically fit by the railway doctor. If they are not declared medically fit, then disablement is assessed and compensation awarded, as per the Workmen's Compensation Act, 1923. Unlike the traffic porters, the licensed coolie porters of the Railways are not its permanent staff. In case of accidents, they are not given compensation on the ground that they are not permanent workmen of the Railways. Though they are casual

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64. Supra, nn.6 and 7.

workers, they have to be treated as railway servants, they being employed for the purpose of the Railways' trade or business and under the disciplinary control of the Railways.[65] In the Food Corporation of India, casual workers, who have been engaged in loading and unloading work in the godowns for the last 25 to 30 years, are not given any compensation under the Workmen's Compensation Act, 1923, by the Corporation on the ground that they are casual workers, employed through contractor. This is inspite of the fact that the Workmen's Compensation Act, 1923 requires the principal employer to compensate his contractor's workmen, employed for the purpose of the former's trade or business.[66] In the Kerala Shipping and Inland Navigation Corporation Ltd., while the permanent workers, engaged in loading and unloading cargo in barges, are given benefits like leave with full salary, medical reimbursement and compensation, permissible under the Workmen's Compensation Act, 1923 for industrial injuries, the casual workers, who have been working for years together, get nothing but first-aid, in case of industrial injuries. In the Kerala Groundwater Department, while the permanent workers are granted medical reimbursement, leave with salary and compensation, admissible under the Workmen's Compensation Act, 1923, the casual workers, who have been working for years

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65. K.Narayanan v. Divl. Supdt., Southern Railway, 1980 Lab.I.C.776 (Ker.) (D.B.).

66. Workmen's Compensation Act, 1923, Section 12.

together, are not given anything at all. Compared to the government departments, in the factories, as the casual workers are covered by the Employees' State Insurance Act, 1948, their position is secure.

Workmen interviewed for evaluating the efficacy of the Workmen's Compensation Act, 1923, are generally unaware of the existence of the Act. This unawareness, on the part of the workmen, helps the private employers evade the payment of compensation easily. Even in government departments, it is because of the illiteracy of the workers that the wharf workers of the Cochin Port Trust, the gangmen and khalasies of the Department of Railways, the linemen of the Kerala State Electricity Board and the Department of Telecommunications are treated like slaves and exploited by the superior officials.[67] The main reason behind the denial of compensation to the casual workers in different government departments, noted above, is their ignorance of their rights under the Workmen's Compensation Act, 1923.

If trade unions exist for protecting the interests of workers, they should not have permitted the exploitation of the workers, as noted above. Instead of educating the workers about their rights for compensation under the Workmen's Compensation Act, 1923 and espousing their cause, unions are siding with the management. In Cochin Port Trust

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67. Supra, nn.6, 7, 11 and 18.

all the unions are found to be rendering full-time service to the workers in well-furnished offices with all facilities. All of them agree on the point that their management is compensating their workmen for industrial injuries, in accordance with the Workmen's Compensation Act, 1923. But the illiterate wharf workers complain that some of the unions side with the management and force them indirectly to work beyond their capacity. Unions do not know about the accidents, happening to the workers. They do not take pains to see that immediate medical assistance is provided to the injured workers and compensation obtained. Workers of government departments, interviewed, generally, do not believe in unions, which, according to them, are interested only in collecting subscriptions and enriching themselves. Workers of factories do not have much complaints against their unions' stand towards obtaining compensation to injured workmen for industrial injuries under the Workmen's Compensation Act, 1923. In Shipping Corporation of India, Cochin Shipyard Ltd., Travancore Cochin Chemicals Ltd. and Tata Oil Mills Ltd., unions are found to be taking up the issue of receipt of legally admissible compensation for industrial injuries seriously. Unlike in other factories, workers of Cochin Shipyard Ltd. are noted to be acknowledging the service, rendered by their unions in helping them obtain compensation, as per the Workmen's Compensation Act, 1923. Private employers are, generally, understood to be discouraging the growth of

unions by refusing to employ unionised workers. So, in the case of workers of such employers, unions cannot render any help to workers for obtaining compensation under the Workmen's Compensation Act, 1923. But there are also liberal private employers, who do not stand in the way of their workers' obtaining compensation for industrial injuries under the Act with the help of unions.[68]

Another problem with the gangmen of the Department of Railways, the operators of Lighthouse and the tubewell drillers of the Kerala Ground Water Department is that they find it difficult to organise the workers of their category, as their work-places are in different places.[69] This stands in the way of their obtaining compensation under the Workmen's Compensation Act, 1923. In certain other institutions, even if all the workers are at one work-place, there is no unity even among the workers. For instance, the disunity among the wharf workers of Cochin Port Trust helps the employer evade the liability for compensation under the Act.

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68. M/s.Kareem & Co., Kaloor (supra, n.14), for instance, gives cost of medical expenses and half-day payment for the period of disablement, as per the terms of an agreement between the unions and the firm.

69. The gangmen are scattered along the railway lines and cannot collect themselves together. In each lighthouse, there will be only five or six workmen. The group in each lighthouse finds it difficult to have contacts with the groups in other lighthouses. As far as the Ground Water Department is concerned, each district has only one station, thus making impossible the unity of workers of different stations. See also supra, nn.6, 21 and 23.

It is also noted that employees and unions of factories complain about the medical benefit under the Employees' State Insurance Act, 1948. But they are not very much concerned about the compensation for industrial injuries under the Workmen's Compensation Act, 1923, to be provided by the factory to those workers, who are not covered by the Employees' State Insurance Act, 1948.[70] This disinterestedness of the unions prevents the proper implementation of the Workmen's Compensation Act, 1923.

Commissioners for Workmen's Compensation are pivotal in the working of the Workmen's Compensation Act, 1923, they being responsible not only for the adjudication of disputes,[71] under the Act but also for administering the Act.[72] So it was felt necessary to collect data from them, regarding the defects in the implementation of the Act and the ways for rectifying the same. In Kerala, there are seven Commissioners for Workmen's Compensation[73] for fourteen districts.[74] The

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70. Supra, n.51.
71. See Supra, Chapter 8
72. See Supra, Chapter 7
73. Deputy Labour Commissioners are appointed as Commissioners for Workmen's Compensation. These Commissioners are full-time officers.
74. The areas of jurisdiction of these seven Commissioners are as follows:
    1) Trivandrum and Pathanamthitta
    2) Quilon and Alleppey
    3) Kottayam and Idukki
    4) Ernakulam
    5) Trichur and Palghat
    6) Malappuram and Calicut
    7) Cannanore, Kasargod and Wyanad

Ernakulam district, being the most industrialised of all districts in Kerala, is assigned to one Commissioner. In other districts, the number of cases being comparatively less, one Commissioner is to be in charge of two districts and in the northern zone of Kerala, one Commissioner is put in charge of three districts, namely Cannanore, Kasargod and Wyanad. Out of the seven Commissioners for Workmen's Compensation in Kerala, two Commissioners - one for Ernakulam district and the other one for Trichur and Palghat districts - were selected for the purpose of this study. Data, relating to the implementation of the Workmen's Compensation Act, 1923 and the adjudication of cases under the Act, were collected by personal discussions with these Commissioners with a schedule of questions as well as by perusal of the Register for Workmen's Compensation Cases, maintained by the Commissioners, followed by informal discussions with the bench clerks of the Commissioners.

It is understood from the two Commissioners, interviewed, that workers' unawareness of the Workmen's Compensation Act, 1923, the indifference of the unions to the workers' problems and even the reluctance of the employers to report fatal accidents to the Commissioner[75] do not prevent the workers from getting compensation under the Workmen's Compensation Act, 1923, because of the spirit of advocates, shown in taking up

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75. Workmen's Compensation Act, 1923, Section 10-B.

such cases. Advocates, on coming to know of the occurrence of accidents, educate and instigate the workers to file cases.

The tendency on the part of private employers to insure their liability[76] is admitted by the two Commissioners.[77] According to them, except small private employers like those of coconut tappers, workers engaged in rock blasting, digging wells, felling and logging trees, government departments and some factories, most of the private factories/firms/ employers and some of the government factories have insured their liability for compensation. Government departments and big factories can bear the burden of compensation even without insurance, according to the Commissioners. As far as small employers, noted above, are concerned, their liability, according to the Commissioners, should be insured by the government or the government should take up the responsibility for payment of compensation in their case.[78] Otherwise, the Workmen's Compensation Act will be creating a group of small employers, whose condition, after an accident, will be worse than that of the injured workman.

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76. Supra, Tables II and III

77. Insurance company is usually found to be one of the parties in Workmen's Compensation Cases.

78. The Government of Tamil Nadu has instituted the Industrial Accidents Distress Relief Fund for providing compensation to workmen, permanently disabled by injury or to the dependants of those, who are fatally injured in the course of employment in stone breaking, blasting, digging wells or other industries, where the employer does not have the financial capacity for paying compensation under the Workmen's Compensation Act, 1923. Funds will be released from this Fund as per the orders of the Commissioner for Workmen's Compensation. See copy of G.O.MS.No.727, Labour Department dated 11.5.1972.

The main obstacle in the way of speedy disposal of cases under the Workmen's Compensation Act, 1923, according to the Commissioners, is that advocates go on requesting for adjurnment of cases on the ground of natural justice,[79] as they get fee for each appearance and the employers, for whom they are appearing, want to evade their liability for compensation, they having not insured the same. According to the Commissioners, unnecessary adjournments of this sort should be prevented by imposing cost for each adjournment. Examination of police witness and medical witness[80] and constitution of Medical Board in those cases, where the workman objects to medical certificate, issued by the employer's doctor,[81] invite further delay, because they, being busy, may not appear, in spite of repeated reminders. Condonation of delay, in filing cases, also causes delay, because collection of evidence to assess the gravity of the circumstances, responsible for the delay, after years of delay naturally involves further delay. Although, in theory, the proceedings before the Commissioner are intended to be informal, not requiring compliance with all the provisions of the Civil

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79. If there are no adjournments, a case can be disposed of within a span of six months, because what is expected. is only a summary trial without calling for detailed evidence.

80. See <u>supra</u>, Chapter 8

81. The Medical Board, consisting of specialised doctors, is appointed by the District Medical Officer.

Procedure Code, it is, in practice, becoming formal. Above all, automobile cases, which ordinarily should have been filed before the Motor Accidents Claims Tribunal, are now flooding to Commissioners for Workmen's Compensation, because of some restriction, imposed by the Motor Accidents Claim Tribunal recently on the amount of compensation, payable in cash[82] and the comparative delay in the disposal of cases there.

It is noted that though trade unions are empowered to appear before the Commissioner,[83] they do not usually appear before the Commissioner.[84] It is found by the Commissioners that trade union leaders are not as competent as advocates to represent and win cases.

The Schedule of workmen, covered by the Workmen's Compensation Act, 1923[85] is not comprehensive, additions being made from time to time. Though the additions to the Schedule, made by the State Government, reach the Commissioner's office in time, those, that are made by the Central Government, do

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82. In the Motor Accident Claims Tribunal, now the sum of compensation, payable in cash, is restricted to Rs.5000/- only. Formerly, the whole amount was awarded by cheque to the applicant's advocate, who used to exploit the work man. To avoid this, the restriction, noted above, was introduced recently. The balance amount is to be remitted in a specified bank as a fixed deposit in the applicant's account.

83. See *supra*, Chapter 8

84. There are, however, exceptions. In the office of the Commissioner for Workmen's Compensation at Trichur, one Indian National Trade Union Congress (INTUC) trade union leader appears for workmen now and then.

85. Workmen's Compensation Act, 1923, Schedule II

not. It is learnt from the Commissioners that the delay in the receipt of additions to the Schedule, made by the Central Government, makes even admission of cases difficult.

It is understood from the Commissioners that employers, generally, do not take care to report accidents and submit annual returns to the Commissioner.[86] Annual returns of accidents are to be submitted by the employer to the Commissioner for Workmen's Compensation of the concerned district, who, in turn, is to submit a consolidated statement of the annual returns, submitted by the employers, to the Labour Commissioner, Trivandrum, who is the Head of the Labour Department. As no returns are submitted by employers, blank/nil statements are submitted by the Commissioner for Workmen's Compensation to the Labour Commissioner. But the Commissioners are too busy to investigate and pursue such violations of the Workmen's Compensation Act, 1923[87] by the employer and prosecute him. Even if the Commissioners find time to prosecute the guilty employers, the penalties being nominal,[88] will not affect them. So, unless the penalties are made deterrent, prosecuting the employer by the Commissioner becomes meaningless.

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86. Id., Sections 10-B, 16.

87. See Ibid.

88. Id., Section 18-A (1). See also supra, Chapter 9.

Even though the Commissioner for Workmen's Compensation is considered to be equivalent to a District Court and saddled with administrative duty, in addition to adjudication, he is not provided with sufficient staff and other infrastructural facilities, as available in a District Court to meet the requirements of his duties.[89]

For enquiring about the effectiveness of the application of the Employees' State Insurance Act, 1948, thirteen factories of Cochin were selected for study. Out of these, seven are Central Government factories, namely, Hindustan Petroleum Corporation Ltd., Modern Food Industries (India) Ltd., Indian Aluminium Company Ltd., Fertilizers and Chemicals Travancore Ltd., Hindustan Insecticides Ltd., Indian Rare Earths Ltd., and Hindustan Machine Tools Ltd., two under the control of the Kerala Government, namely, Kerala Cooperative Milk Marketing Federation Ltd., and Travancore Cochin Chemicals Ltd., and the remaining four private factories, namely, Premier Tyres Ltd., Chackolas Spinning and Weaving Mills Ltd., Travancore Chemicals Manufacturing Ltd., and Tata Oil Mills Ltd. Only those employees[90] of these

89. For example, at the office of the Commissioner for Workmen's Compensation at Trichur, certified copies of judgements are provided to parties only after two or three months from the date of the order, as the office does not have a xerox-machine and the typewriter, available, is very old and in defective condition.

90. *Supra*, n.1 a

factories, whose salary does not exceed Rs.3,000/- and, therefore, covered by the Employees' State Insurance Act, 1948[91] were made the focus of this study. Employees of Hindustan Petroleum Corporation Ltd., have objected to the application of the Employees' State Insurance Scheme and now there is no such Scheme in the factory. The permanent workers of Travancore Cochin Chemicals Ltd. have been exempted from the application of the Employees' State Insurance Scheme, as the factory has introduced group insurance and company's medical scheme. The recognised unions of Modern Food Industries (India) Ltd. and Fertilisers and Chemicals Travancore Ltd. have obtained stay against the application of the Employees' State Insurance Scheme to the permanent employees of their factories. But the contract employees of these factories are covered by the Employees' State Insurance Scheme. As the scales of pay of employees have been revised, in other factories like Indian Aluminium Co. Ltd., Hindustan Insecticides Ltd., Hindustan Machine Tools Ltd., Kerala Co-operative Milk Marketing Federation Ltd., and Premier Tyres Ltd. the number of employees, covered by the Scheme, is limited. But all the plant employees of Chackolas Spinning and Weaving Mills Ltd., more than half of the total number of employees of Travancore Chemicals

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91. Employees' State Insurance Act, 1948, Section 2(9); Employees' State Insurance (Central) Rules, 1950, Rule 50. See also <u>supra</u>, n.51.

Manufacturing Ltd. and two-thirds of the employees of Tata Oil Mills Ltd. are covered by the Scheme. In those factories, where the Scheme is not applicable now, data were collected by having discussions with the employees/trade unions regarding their past experience of the Scheme.

Though the comparative advantage that the Employees' State Insurance Act, 1948 has over the Workmen's Compensation Act, 1923 is the provision for medical benefit, this provision is found to be not at all advantageous to the employees, in practice. All the employees and office-bearers of trade unions of all the thirteen factories, interviewed,[92] have expressed their dissatisfaction with the administration of medical benefit by the State Government.[93] One of the general complaints is the non-availability of medicines. If medicines are bought from medical shops, as per the prescription of the Employees' State Insurance doctor, the cost of medicines is reimbursed, only after long delay. Experienced and specialised doctors and facilities for super-speciality treatment are not available in Employees' State Insurance hospitals. Even those doctors and the para-medical staff, who are available, are corrupt and undedicated to their profession. As the Employees' State Insurance hospitals are worse than government hospitals, employees, generally, refrain from

92. One hundred employees and twenty trade union leaders were interviewed.

93. Employees' State Insurance Act, 1948, Section 58.

availing of the medical benefit from these hospitals. It is found from discussions with the employees/trade union leaders that the main reason for this sorry state of affairs in Kerala is that the Employees' State Insurance hospitals are under the control of the State Government, which diverts the funds, meant for the medical benefit under the Employees' State Insurance Scheme, for other purposes.

Regarding other employment injury benefits,[94] administered by the local offices of the Employees' State Insurance Corporation, employees and unions of all the factories,[95] except Fertilisers and Chemicals Travancore Ltd., Indian Rare Earths Ltd., Chackolas Spinning and Weaving Mills Ltd. and Travancore Chemicals Manufacturing Ltd. are satisfied. The complaint of the employees of the first two factories is with regard to the long delay, experienced in getting the benefits. The employees of the last two factories complain that they do not get disablement benefit for certain occupational injuries, peculiar to the nature of their employment. For instance, employees of Chackolas Spinning and Weaving Mills Ltd. cannot work, if their fingers sustain slight injuries. But accident reports, regarding such injuries,

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94. See *supra*, Chapter 6

95. Unions of Hindustan Machine Tools Ltd. are divided on the satisfactory administration of other employment injury benefits. While INTUC union has no complaint, CITU union is of the opinion that the receipt of these benefits depends on the influence exerted.

are not accepted by the local office of the Employees' State Insurance Corporation, which cannot understand the peculiar nature of the work of this factory. So, even though employees are disabled for work by slight injuries to fingers, they cannot get any temporary disablement benefit for the same. The problem, experienced by the employees of the Travancore Chemicals Manufacturing Ltd., is that doctors recommend temporary disablement benefit only for visible injuries like deep cuts or wounds, but just neglect invisible injuries like sprains, common among the employees of this factory. Even though the employees are disabled for the work, they were doing, they are declared medically fit by the doctor, thus putting them in trouble.

Data, regarding the application of the Employees' State Insurance Act 1948, were collected from the local offices of the Employees' State Insurance Corporation, because the Corporation is, mainly, responsible for the application of the Act.[96] The local offices at South Kalamassery and Alwaye were sampled out for the purpose. It is found from discussions with the managers and staff of these offices that the Employees State Insurance Corporation is handicapped by certain problems in the proper application of the Act. The first problem is that though it is an autonomous body, it is not actually independent, it being

96. See *supra*, Chapter 7

under the control of the Ministry of Labour. The second problem, faced by the Corporation, is lack of co-operation on the part of employers. The employer is expected to remit contributions and furnish returns, regarding the remittance to the local office of the Employees' State Insurance Corporation in time.[97] In certain cases, though the employer might have collected the contributions, he might not remit them in the bank to the account of the Employees' State Insurance Corporation in due time,[98] but misappropriates the amount by diverting it for other purposes. In certain other cases, though the employer might have remitted the contributions, in the bank, he might not send returns/statements, regarding the daily wages and contributions paid in respect of each employee, to the local office, after the expiry of the contribution period.[99] If returns are not submitted by the employer to the local office in time, the office will be in the dark about the daily wages and other details of the employees. This will stand in the way of their providing benefits to an injured employee in time. There have been many cases of such violations of law by the employer. But now that the penal provisions for such violations have been made more stringent,[100] the employers are

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97. See Employees' State Insurance (General) Regulations, 1950, Regulations 26, 29 and 31.

98. Id., Regulations 29 and 31.

99. Id., Regulation 26. For "contribution period", see Employees' State Insurance (Central) Rules, 1950, Rule 2 (2-A).

100. Employees' State Insurance Act, 1948, Sections 85 to 85-C.

now more vigilant. The third problem is the lack of adequate interest on the part of the State Government. Though the Employees State Insurance Corporation constructs hospitals[101] and bears the lion's share of the administrative expenses, the State Government's approach to the administration of medical benefit affects the reputation of the Employees' State Insurance Scheme.

It is concluded from the above study that workers' ignorance of the law is the main obstacle in the way of their obtaining compensation for industrial injuries under the Workmen's Compensation Act, 1923. The view, expressed by the Commissioners for Workmen's Compensation that illiteracy of the workers does not stand in the way of their obtaining compensation, because of the enthusiasm and spirit of advocates in taking up workmen's compensation cases, cannot be accepted in toto. This is because poor workers cannot afford to get legal assistance from advocates. Gangmen and khalasies of the Railways and workers, engaged in loading/unloading work in Cochin Port Trust would not have been exploited by their employers,[102] if the advocates were generous enough to take up their cases. So it is suggested that provision should be made in the Workmen's Compensation Act, 1923 for inculcating in the workers legal awareness by affixing the

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101. _Id._, Section 59.

102. _Supra,_ nn.3, 6 and 7.

important provisions of the Workmen's Compensation Act, 1923 in the vernacular language compulsorily at the work- places.[103] The inspectorate, proposed for enforcing the Workmen's Compensation Act, 1923,[104] should inspect the work-place to examine, whether this provision is being complied with. It should also be made responsible for inspecting the work-places and finding out, whether workers are exploited by employers by non-payment of compensation.

As the general unions are not concerned about the problems of the workers, exposed to industrial injuries, these workers should organise themselves and have their own category unions. These workers should be educated for the purpose by Workers' Education Programmes, to be conducted by the Inspectorate.[105]

It is found that private employers, covered by the Workmen's Compensation Act, have shown a tendency to insure

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103. Section 32(2)(o) of the Workmen's Compensation Act, 1923 requires the State Government to make rules, requiring the employers to display notices, containing abstracts of the Act. Since the Act is a Central one, it would be much better to have uniformity in the matter throughout the country. So, according to the Law Commission of India, instead of leaving it to the rules, it is desirable that a section should be introduced in the Act, in this respect. See Law Commission of India, Sixty-second Report on the Workmen's Compensation Act, 1923 (1974), p.97.

104. See supra, Chapter 9

105. Ibid.

their liability.[106] To uproot the tendency on the part of other employers to evade their liability, provision should be made in the Workmen's Compensation Act, 1923 for compulsory insurance of liability of all employers.[107] In the case of small employers, who cannot bear even the burden of insurance, it is suggested that the government should take up the responsibility for payment of the insurance premium and thus see that their liability for compensation under the Act is insured.

Majority of the workers, covered by the Workmen's Compensation Act, have supported lumpsum payment of compensation under the Act. It appears that workers are ignorant of the demerits of lumpsum payment. So, the workers should be properly educated by the Inspectorate[108] about the comparative advantages of periodical payments.

It is learnt that the Commissioners are too busy to discharge their administrative duties properly. So, they should be relieved of their administrative duty.[109]

The chief obstacle in the way of the speedy disposal of cases by the Commissioner for Workmen's Compensation is

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106. See <u>supra</u>, Tables II and III

107. <u>Supra</u>, Chapter 2

108. <u>Supra</u>, Chapter 9

109. See also <u>supra</u>, Chapter 7

found to be the tendency on the part of the advocates to get the cases adjourned. It is suggested that the Workmen's Compensation Act, 1923 may be amended, imposing fee upon the parties for each adjournment.

Provision should also be made in the Workmen's Compensation Act, 1923 for the expeditious despatch of amendments to the Workmen's Compensation Act, 1923 and the Workmen's Compensation Rules, 1924 as well as the additions and changes to Schedules to the Act, made from time to time, to the Commissioners for Workmen's Compensation. This will help them mete out justice to an injured workman, as required by the changes in the law.

Because of the general dissatisfaction of the employees, covered by the Employees' State Insurance Act, 1948, with the administration of medical benefit by the State Government, appropriate changes may be made in the Act, making it obligatory on the Employees' State Insurance Corporation to undertake administration of medical benefit in lieu of the State Government.

The Employees' State Insurance Act, 1948 and the Rules may be amended, requiring the employers to provide the employees with sufficient information, in the vernacular language, about the employment injury benefits, available under the Act and the formalities for obtaining the same.[110] This will help the illiterate employees, especially the causal ones, avail of the employment injury benefits.

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110. <u>Supra</u>, Chapter 6

Chapter 11

CONCLUSIONS AND SUGGESTIONS

Evaluation of the different forms of liability for compensating industrial injuries makes it evident that the liability under the social insurance scheme is the most befitting one, as it eliminates the problem of evasion of liability by the employer by providing for sharing of liability. However, proper sharing of liability by the State cannot be expected, in the absence of mandatory provision to that effect in the Employees' State Insurance Act 1948. So, Section 26(2) of the Act should be amended, making it obligatory on the part of the State to share the liability.

Liability for compensation under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 arises only in the case of accidents, arising in the course of and out of employment. But the operation of a hazardous industry may result in accidents such as escape of poisonous gas, causing injuries to workmen, even when they are reposing in their residential quarters or homes nearby. Such accidents are not accidents, arising in the course of and out of employment, attracting the liability for compensation under the Workmen's Compensation Act, 1923 or the Employees' State Insurance Act, 1948. Workmen, injured by such accidents, are entitled to be compensated,

just like other members of the public under the Public Liability Insurance Act, 1991. But the injured workmen of hazardous industries should be treated as different from the members of the general public by providing the former a special statutory remedy, instead of the general one. So, the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 may be amended, providing for liability for compensation for industrial injuries, sustained by workmen in their residential quarters or homes nearby, on account of accidents, resulting from the operation of hazardous industry.

Unlike the definition of 'workman' under the Workmen's Compensation Act, 1923, which covers only specified categories of workmen and expressly excludes clerical, administrative and supervisory staff, the definition of 'employee' under the Employees' State Insurance Act, 1948 covers various categories of employees, who might be working within the premises of a factory/establishment or outside it for the purpose of doing skilled, unskilled, manual, administrative and supervisory work or any work, related to purchase, sale or distribution of goods. It is wider than the definition of 'worker' under the Factories Act, 1948, as it covers employees, whether working inside the factories/establishments or elsewhere. Unlike the Workmen's Compensation Act, 1923, which covers all workers,falling within the definition, irrespective of their salary, the Employees' State Insurance

Act, 1948 excludes from its purview employees, receiving salary, exceeding Rs.3,000/- p.m. The number of employees, drawing less than Rs.3,000/- p.m., is found to be limited in factories. So, even though the definition of 'employee' under the Employees' State Insurance Act, 1948 has a wider coverage, the number of employees of factories, benefited by this Act, is few. Hence, it is suggested that Section 2(9) of the Employees' State Insurance Act, 1948 and Rule 50 of the Employees' State Insurance (Central) Rules, 1950, limiting the coverage of the Act to employees, not drawing salary exceeding Rs.3,000/- p.m., may be modified suitably, enhancing the salary limit.

The coverage of workmen, covered by the Workmen's Compensation Act, 1923, may be widened by making it applicable also to railway servants, employed in administrative or office work, persons employed in clerical capacity and casual workers, employed otherwise than for the purposes of employer's trade or business as well as by taking away the requirement with regard to the number of persons, to be employed in certain specified employments.

The dependants, entitled to compensation under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, are only some of those relations, who, to some extent, depend upon the deceased person for their daily necessities. But certain persons, who, in fact, depend on the deceased person for their daily necessities,

are excluded from the purview of the term 'dependant'. For example, the son of a deceased workman, who has attained the age of eighteen years, is not entitled to get any compensation, unless he is invalid. The son might be pursuing his studies after the age of eighteen years and, therefore, in need of money. Even otherwise, a son continues to be dependent on his parent, even after the age of eighteen years. Similarly, a widowed daughter or a widowed sister is entitled to compensation, only if she is below eighteen years of age. Under the existing law, the chances of a widowed daughter's or sister's receiving compensation are illusory, since girls do not get married before the age of eighteen years. The exclusion of a widowed daughter or sister from entitlement to compensation on the ground of her being a major, viz. above eighteen years, is not justifiable, if she was depending for her livelihood on the earnings of the deceased workman. Further a divorced daughter is not considered as a dependant under the two Acts.

Under the Employees' State Insurance Act, 1948, a widow is entitled to dependant's benefit only until remarriage. But, under the Workmen's Compensation Act, 1923, a widow does not become disentitled to receive compensation, even if she remarries. Further, unlike under the Workmen's Compensation Act, 1923, adopted son and adopted daughter have been specifically included in the list of dependants under the Employees'

State Insurance Act, 1948. But, while a widower is a dependant under the Workmen's Compensation Act, 1923, he does not figure as a dependant under the Employees' State Insurance Act, 1948. Though an unmarried legitimate daughter is included in the first category of dependants under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, unlike under the former Act, under the latter Act, she is not entitled to dependant's benefit after the age of eighteen years, unless she is infirm. Further, unlike under the Workmen's Compensation Act, 1923, dependants, other than a widow or a legitimate or adopted child, are entitled to dependant's benefit under the Employees' State Insurance Act, 1948, only if the deceased person does not leave behind a widow or a legitimate or adopted child.

It is suggested that a son may be considered as a dependant, till he is employed, under both the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948. Provision may also be made in both the Acts for including an unborn child and a divorced daughter till her remarriage in the list of dependants and treating a widowed daughter and a widowed sister as dependants till remarriage. Further, clause (i) of Section 2(i) (d) of the Workmen's Compensation Act, 1923 may be amended in such a way that a widow ceases to be a dependant on her remarriage, as under the Employees' State Insurance Act, 1948. A widower may be included in the list of dependants under the Employees' State Insurance Act,

1948, as under the Workmen's Compensation Act, 1923. It is also suggested that Rule 58 of the Employees' State Insurance (Central) Rules, 1950 may be amended in such a way that an unmarried daughter continues to be a dependant till her re-marriage and parents, unremarried divorced daughter, widowed daughter, and widowed sister of the deceased employee fall within the purview of 'dependant', though the deceased employee has left behind his widow and minor children.

The question, whether a personal injury, sustained by a workman, is a compensable industrial injury under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, depends upon the interpretation of terms like 'personal injury', 'accident', 'employment', 'accident arising out of employment' and 'accident arising in the course of employment' by the adjudicatory authority. In order that the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 may really help an injured workman in obtaining compensation, it is suggested that the scope of these terms may be clearly defined in those statutes.

The term 'personal injury' may be defined in the statutes to include not only external injuries, including disfigurement of the body but also internal ones such as injury to mind and injuries like rupture of a vein. It should also include diseases, caused by accident and aggravation of an existing disease by an accident or by the stress and strain of employment.

The term 'accident' may be defined in the two statutes as an unexpected event, happening without design on the part of the injured workman. 'Unexpected event' may be explained as including not only external accidents like an explosion in a mine, a collision, a man falling down from a ladder or fall of a roof but also internal ones like bursting of an aneurism, failure of the muscular action of the heart or shock, causing neuresthenia as well as the cumulative effect of a series of tiny accidents like needle pricks or mosquito bites on the body.

The Third Schedule to both the Acts covers only certain specified occupational diseases. So, the Third Schedule may be deleted in both the Acts and 'occupational disease' may be defined in both the Acts as including all diseases, known to arise out of the exposure to substances or dangerous conditions in processes, trades or occupations. Appropriate changes may also be made in Section 3(2) of the Workmen's Compensation Act, 1923 and Section 52-A(1) of the Employees' State Insurance Act, 1948.

The word 'employment' may be defined in the two Acts as covering not only the nature of the employment but also its character, conditions, obligations, incidents and special risks.

Despite the considerable extension of the sphere of employment by the theory of notional extension, courts have taken different approaches with regard to the extension of the sphere of employment to the journeys to and from the place

of work and treating accidents, occurring during such journeys as accidents, arising in the course of employment. It is suggested that the expression 'accident arising in the course of employment' may be defined under the two Acts as including accidents, occurring not only during the period, when a workman/employee is doing the work, actually allotted to him but also during the time, when he is at a place, where he would not be but for his employment. An explanation clause may be added to this definition, so that the following kinds of accidents, namely, (a) accidents, sustained during working hours at or near the place of work or at any place, where the worker would not have been but for his employment; (b) accidents, sustained within reasonable periods before and after working hours, in connection with transporting, cleaning, preparing, securing, conserving, storing and packing work-tools or clothes; and (c) accidents, sustained, while on the direct way between the place of work and a workman's/employee's residence or the place, where the workman/employee usually takes his meals or the place, where he usually receives remuneration, shall be regarded as accidents, arising in the course of employment, provided that the workman/employee has not invited such accident.

In the case of injuries sustained, while travelling in employer's transport, the theory of notional extension of the sphere of employment applies under the Workmen's Compensation Act, 1923, as per judicial decisions, only if the workman was

under an obligation or practical compulsion to use the transport. The employees, covered by the Employees' State Insurance Act, 1948, do not have this problem, as the Act has taken away the requirement of such obligation to use the transport. The condition of workmen, covered by the Workmen's Compensation Act, 1923 may be ameliorated by incorporating a similar provision in that Act.

'Accident arising out of employment' may be defined under the two Acts as an accident, in which there is a causal connection between the accident and employment. 'Causal connection' may be deemed to exist, if the immediate act, which led to the accident, is not so remote from the sphere of the workman's duties or the performance thereof as to be regarded as something foreign to them.

A workman or his dependants, claiming compensation under the Workmen's Compensation Act, 1923, has to prove two things for establishing that his injury is compensable, viz., that (1) the accident, causing the injury, occurred in the course of employment and (2) it arose out of employment. But an employee or his dependant, claiming compensatory benefits under the Employees' State Insurance Act, 1948, need prove only that the accident, causing the injury, has arisen in the course of employment for establishing that his injury is compensable. This is because, on establishing that the accident arose in the course of employment, a rebuttable presumption arises that the accident arose out of employment. In order to relieve

which involves several factors, in addition to the loss of physical capacity. The Commissioner may not find it difficult to assess the loss of earning capacity properly, as he is empowered to seek the assistance of one or more persons, having special knowledge of the matter.

Under the Workmen's Compensation Act, 1923, half-monthly payment for temporary disablement is given now only for five years. Provision may be made in the Act for continuing the half-monthly payment during the entire period of incapacity, as under the Employees' State Insurance Act, 1948.

If the employer does not pay the amount of compensation in time, the simple interest, that he may have to pay, is only 6% per annum. This rate of interest is outdated today. Hence, it is suggested that Section 4-A(3) of the Workmen's Compensation Act, 1923 may be amended by substituting the words "simple interest at the rate of fifteen percent" in place of the words "simple interest at the rate of six percent".

It is not clear from the Workmen's Compensation Act, 1923, whether the insurance company is liable to pay interest and penalty, if it fails to pay compensation in time. This has led to conflicting judicial interpretations. Section 4-A (3) of the Workmen's Compensation Act, 1923 may be amended in such a way that the insurer, who steps into the shoes of the employer, is also made liable for payment of interest and penalty.

All employers, covered by the Workmen's Compensation Act, 1923, are not required to maintain notice-book. This creates problems to an injured workman, who gives notice of accident by delivering it at the residence or office of the employer, because the latter may deny receipt of notice. So, it is suggested that the giving of notice should not be made obligatory on the injured workman.

At present, under the Workmen's Compensation Act, 1923, the liability of the employer to report fatal accidents and serious bodily injuries to the Commissioner for Workmen's Compensation depends upon the existence of some other law, providing for notice of a fatal accident. It is suggested that Section 10-B of the Workmen's Compensation Act, 1923 may be amended in such a way that the liability of the employer to report fatal accidents, and serious bodily injuries is created under that Act and does not depend upon the existence of some other law.

Unlike the Employees' State Insurance Act, 1948, the Workmen's Compensation Act, 1923 does not contain any provision for medical benefit or rehabilitation of disabled workmen. The International Labour Organisation has recommended the introduction of provisions for vocational re-education of injured workmen in national laws or regulations and requires its members to provide rehabilitation services to disabled workmen. The State of Victoria in Australia has created an Accident Rehabilitation Council to develop policies

and standards for rehabilitating injured workers. It not only promotes research into occupational and social rehabilitation but also disseminates information and creates public awareness of such matters. Incentives are given to employers, who provide continued employment or re-employment to injured workers. Conversely, employers, refusing to re-engage injured workers, are punished. A comprehensive scheme for rehabilitation of injured workers on the above pattern and medical aid should be incorporated in the Workmen's Compensation Act, 1923.

Compensation under the Workmen's Compensation Act, 1923 is now usually paid in cash at the employer's or Commissioner's office. This is inconvenient for the injured workman and his dependants, who may be residing far away from these offices. So provision should be made for the distribution of compensation through local bank or post office without any additional expenditure to the workman and the dependants. The expenses for this purpose should be borne by the employer.

Lumpsum payment, followed under the Workmen's Compensation Act, 1923, is not advisable, as it is likely to be squandered away. Further, in the case of injuries, likely to lead to complications in future, the workman, who has received the lumpsum, will be in trouble, the lumpsum being fixed once for all. So, the lumpsum payment of compensation should be replaced by periodical payments, as under the Employees' State Insurance Act, 1948. Rate of periodical

payments should be revised every decade, in accordance with the changes in the cost of living index. Commutation of periodical payments should be permitted, only after adequate financial counselling.

In England, before 1948, the injured workman and his dependants had to elect between compensation and damages under common law. But, with the passage of the Law Reform (Personal Injuries) Act, 1948, the right to claim damages has become an additional, rather than an alternative remedy. It is now possible in England for the injured workman to claim compensation under statutory law and also to pursue simultaneously a remedy for damages under common law against his employer. He obtains his statutory compensation, irrespective of what happens to his suit for damages. If he wins the suit, a deduction, roughly equivalent to half the value of the benefits, received under the statutory law, is made from the total damages, assessed by the court. As two of the doctrines, which made recovery of damages under common law very difficult for the workers in the past, namely, those of common employment and contributory negligence have been abolished, it is possible now for the worker or his representative to realise fairly big damages from employers, if either negligence or breach of statutory duty, on their part, can be established. This right of additional remedy makes the position of the injured worker in England an enviable one. In India, the right to claim damages is barred, if the workman opts for comepnsation under the statute. Similarly, the

right to compensation under the Workmen's Compensation Act, 1923 is barred, if he has filed a suit for damages. This defect in the law should be remedied by making the right to claim damages an additional remedy, as in England. Section 3(5) of the Workmen's Compensation Act, 1923 should be amended to achieve this purpose.

Analysis of the provisions for compensatory benefits under the Employees' State Insurance Act, 1948, reveals that the Act contains certain commendable provisions, unlike the Workmen's Compensation Act, 1923. For instance, the loss of earning capacity of an injured employee is assessed by a specially constituted Medical Board/Medical Appeal Tribunal/ Employees' Insurance Court under the Employees' State Insurance Act, 1948, whereas it is done by a single medical practitioner under the Workmen's Compensation Act, 1923. Another commendable provision is that, unlike the Workmen's Compensation Act, 1923, which does not contain any provision for review of compensation for permanent disablement, the Employees' State Insurance Act, 1948 contains provision for reviewing any assessment of the extent of permanent disablement, made by a Medical Board, if it is satisfied that since the making of the assessment, there has been a substantial and unforeseen aggravation of the results of the relevant injury. Thirdly, the quantum of compensation in cash under the Employees' State Insurance Act, 1948 is substantially higher than the one under the Workmen's Compensation Act, 1923. This is because the quantum of disablement benefit and

dependant's benefit comes to 70% approximately of the wages of the injured employee and the quantum of funeral expenses is one thousand rupees under the Employees' State Insurance Act, 1948, whereas under the Workmen's Compensation Act, 1923 compensation for death is only 40% of the monthly wages of the deceased workman and for disablement, both permanent and temporary, only 50% of the monthly wages of the workman and the amount of funeral expenses, permissible, is only an amount of fifty rupees. Fourthly, unlike the Workmen's Compensation Act, 1923, the Employees' State Insurance Act, 1948 provides for benefits in the form of services also viz.medical benefit and rehabilitation.

Despite the above-mentioned commendable provisions, there are certain defects in the system of compensatory benefits under the Employees' State Insurance Act, 1948. The first of such defects is that the disablement benefit, payable for permanent partial disablement, resulting from a scheduled injury, is proportionate to the percentage of loss of earning capacity, mentioned in Schedule II, Part II, as under the Workmen's Compensation Act, 1923. Determination of the quantum of disablement benefit, based upon the pre-determined loss of earning capacity in Schedule II, Part II for permanent partial disablement, may not be fair in all cases. Sometimes, the percentage of the actual loss of earning capacity, sustained by an employee, may be higher than the one, mentioned in Schedule II, Part II. Hence, it is suggested that Rule 57(4)(c) of the Employees' State Insurance (Central) Rules,

1950 should be amended by adding an explanation to the affect that the loss of earning capacity, mentioned in Schedule II, Part II, is the minimum and can be held to be higher on the basis of evidence, led before the tribunal under Section 54-A of the Employees' State Insurance Act, 1948.

The expression "any other law" in Section 53 of the Employees' State Insurance Act, 1948, which bars recovery of damages under other laws, implies that it includes common law also. This section should be amended by inserting an explanation that the expression "any other law" does not include common law. Otherwise, the said expression is likely to stand in the way of an employee's seeking the alternative remedy, available under common law. It is also suggested that the right to sue for damages under common law should be made an additional remedy under the Employees' State Insurance Act, 1948, as suggested in respect of the Workmen's Compensation Act, 1923.

Regulation 98 of the Employees' State Insurance (General) Regulations enables an employer to discharge an employee, who has been in receipt of temporary disablement benefit for a continuous period of six months or more, if permitted by the conditions of service of the employee. This provision, which stands in the way of an employee's receiving temporary disablement benefit beyond a period of six months, should be deleted.

The Employees' State Insurance Act, 1948, like the

Workmen's Compensation Act, 1923 does not contain any provision for supplementary benefits. So, provision should be made in the Act for introducing supplementary benefits, depending upon the consequences of disablement, at the rate of not more than 10% of the monthly wages, as was suggested in the case of the Workmen's Compensation Act, 1923.

Whereas the administrative machinery for providing compensatory benefits under the Employees' State Insurance Act, 1948 consists of a net-work of agencies, representing various interests like those of employers, employees, governments and medical profession and is concerned only with administration, the one under the Workmen's Compensation Act is a single agency, representing single interest but discharging both administrative and adjudicatory functions. Of course, the latter has several powers. But they are, generally, discretionary. Further, as the latter agency has to adjudicate disputes also, it may refrain from concentrating on the discharge of its discretionary administrative powers. The administrative machinery under the Employees' State Insurance Act, 1948, namely, the Employees' State Insurance Corporation, is admirable in that it represents various interests. But it suffers from over-representation of governmental interest, which will affect its autonomy. It is suggested that in the case of the Corporation, the maximum number of persons, to be appointed by the Central Government, should be reduced from five to two and provision should be made for inclusion

of three experts in Social Security, to be appointed by the Central Government. In the Standing Committee of the Corporation, the number of representatives of the Central Government should be reduced from three to one and provision should be made for the inclusion in the Committee of two experts in Social Security from among the three experts in Social Security in the Corporation. Representatives of employers, employees and the medical profession in the Corporation, Standing Committee and Medical Benefit Council are appointed by the Central Government, in consultation with such organisations of employers, employees and the medical profession as may be recognised for the purpose by the Central Government. This provision enables representatives of those organisations, affiliated to the ruling party, to be represented in the Corporation, Standing Committee and Medical Benefit Council.
It is suggested that Sections 4 and 10 of the Employees' State Insurance Act, 1948 may be amended, providing for the appointment of representatives of employers, employees and the medical profession by the Central Government, in consultation with important organisations, having the largest membership. Though the Chairman of the Corporation may continue to be a member, appointed by the Central Government, the Vice-Chairman of the Corporation, instead of being an appointee of the Central Government, may be a non-official, to be elected by rotation from among the representatives of employers and employees in the Corporation by their respective group for a period of one year at a time.

The Commissioner for Workmen's Compensation under the Workmen's Compensation Act, 1923 should be freed of the burden of administrative work. The administrative work of each district should be entrusted with an Administrative Council for Workmen's Compensation, consisting of an Administrative Officer, appointed by the State Government and one representative each of employers and workmen, covered by the Workmen's Compensation Act, 1923, selected by the State Government, in consultation with their respective unions, having the largest membership or in the absence of unions, the representatives of employers and workmen, selected by the State Government. It should be made the mandatory duty of this Administrative Council to require statements from employers regarding fatal accidents, demand a further deposit, if the sum, deposited by the employer as compensation in respect of a workman, whose injury has resulted in death, is insufficient and refuse to register agreements, regarding payment of compensation, if they have been obtained by fraud or undue influence or other improper means or the amount, agreed upon, is inadequate. It is suggested that the distribution of compensation, deposited in respect of a deceased workman, should not be left to the unguided discretion of the proposed Administrative Council, as is done in the case of the Commissioner for Workmen's Compensation now. A proviso should be inserted below Section 8(5) of the Workmen's Compensation Act, 1923, enabling the Administrative Council to distribute compensation, having due

regard to the nearness of the relationship of the dependant to the deceased, the means of the dependant and the extent of his dependence on the deceased and other relevant considerations. It is also suggested that Section 8(1) of the Workmen's Compensation Act, 1923 may be amended, giving a discretion to the Administrative Council to permit direct payment of compensation to an adult woman by the employer, if the Council thinks, on an application made to it by the woman, that the woman is socially and educationally advanced enough to accept direct payment.

The tribunals for the adjudication of disputes, relating to compensation for industrial injuries viz. Commissioner for Workmen's Compensation and Employees' Insurance Court, are remarkable for their informal procedure. Though they are discharging the same functions as those of a court of law, they are not hindered in the discharge of their functions by the procedural formalities like ordinary civil courts. Further, any application, appearance or act, required to be made or done by any person before these tribunals, may be made or done by a trade union official or any other authorised person. This provides relief to an injured workman, who is not financially sound enough to engage a legal practitioner. The Commissioner for Workmen's Compensation goes to the extent of helping illiterate persons or persons, unable to furnish the required information in writing in presenting the application for compensation. Both the tribunals may exempt poor applicants from payment of prescribed fees. These provisions

enable the tribunals to adjudicate disputes quickly, informally and without placing much financial burden on the claimant.

As in England, separate machineries are created by the Employees' State Insurance Act, 1948 for adjudication of non-medical and medical disputes. Further, in the case of medical disputes, a classification is made between disputes, concerning injuries, resulting from occupational accidents and those, resulting from occupational diseases. While the former class of disputes is decided by Medical Boards, the latter is done by Special Medical Boards. For the adjudication of non-medical disputes, Employees' Insurance Court, consisting of persons with prescribed qualifications, is constituted.

Under the Workmen's Compensation Act, 1923, on the other hand, a single machinery, Commissioner for Workmen's Compensation, is constituted to adjudicate all disputes, whether non-medical or medical. However, he is empowered to choose one or more persons, possessing special knowledge of any matter, relevant to the matter under inquiry, to assist him in holding the inquiry. This helps him resolve disputes, relating to a matter, he is not conversant with. But the parties are not given any opportunity to cross-examine the expert on the opinion, expressed by him. This may affect detrimentally the interest of the parties, especially the injured workman. Therefore, Section 20(3) of the Workmen's

Compensation Act, 1923 may be suitably amended, enabling the parties to cross-examine the expert.

The Workmen's Compensation Act, 1923 does not prescribe any qualifications for the post of Commissioner for Workmen's Compensation. It permits the appointment of any person in the post. The person, appointed in the post, has to be competent to discharge the quasi-judicial duty, required by the post. So, it is suggested that Section 20(1) of the Workmen's Compensation Act, 1923 may be amended, providing for appointing only a person, who has been a judicial officer for five years or is a legal practitioner of ten years' standing as Commissioner for Workmen's Compensation.

The most important objective behind the establishment of a special tribunal is speedy justice. The Commissioner for Workmen's Compensation has to discharge administrative duties, in addition to adjudicatory ones. At present generally, Commissioners for Workmen's Compensation and Employees' Insurance Courts have to hold sittings at more than one place. These obstacles stand in the way of their rendering speedy justice to injured workman. So, the Commissioner for Workmen's Compensation should be entrusted with adjudicatory duty only. Moreover, there should be Commissioner for Workmen's Compensation and Employees' Insurance Court for each district. In those districts, where the incidence of industrial injuries is more, there should be at least two Commissioners for Workmen's Compensation and two

Employees' Insurance Courts. Provision should be incorporated in both the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, requiring the adjudicatory authority under the Acts, both original and appellate to dispose of a case within six months of its institution.

For rendering justice efficiently, it is suggested that the Employees' Insurance Court may consist of an equal number of employers' and employees' representatives, in addition to judges. The employers' and employees' representatives may be selected by the State Government, in consultation with their respective organisation, having the largest membership. Section 74(2) of the Employees' State Insurance Act, 1948 may be suitably amended for the purpose. Section 20(3) of the Workmen's Compensation Act, 1923 may be amended suitably, requiring the Commissioner for Workmen's Compensation to hear employers' and workmen's representatives as experts in any case, where the dispute involves a question of an occupational character and in particular, the question of the degree of incapacity for work.

In England, appeals are permitted from the decision of the lowest tribunal to two higher tribunals. But in India, appeals lie from the Commissioner for Workmen's Compensation and Employees' Insurance Court not to higher tribunals as in England but to the High Court. This involves delay and heavy expenses in seeking relief through appellate proceedings. It is suggested that appeals from the decisions of those tribunals may lie to higher tribunals, as in England.

Provision should be made under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948 for the appointment of an ombudsman, specialised in Social Security Law. He should have free access to official records. The procedure before this authority should be informal and inquisitorial rather than adversarial.

In the absence of provision for legal aid, the provisions, conferring right to compensation on injured workmen, may not prove beneficial to them in all cases. So, provision should be made for providing compulsory legal aid to injured workmen under the Workmen's Compensation Act, 1923 and the Employees' State Insurance Act, 1948, as in western countries. In each district, there should be at least one legal practitioner, appointed by the State Government to conduct cases before Commissioner for Workmen's Compensation and Employees' Insurance Court, on behalf of injured workmen or their dependants, who require such service. The High Court should also have an advocate, appointed by the State Government, to represent workmen or their dependants, who need such legal assistance, before it.

Under the Workmen's Compensation Act, 1923, the question whether the parties should make an attempt at settlement, before proceeding to submit an application to the Commissioner, is subject to conflicting decisions. If applications are made to the Commissioner without attempting to settle disputes by the parties themselves, that will increase the work-load

of the Commissioner and lead to delay in the disposal of cases by him. So, Section 22(1) of the Workmen's Compensation Act, 1923 may be amended, clarifying that the parties should have made an attempt at settlement, before proceeding to submit an application to the Commissioner.

Under the Workmen's Compensation Act, 1923, the claim for compensation has to be preferred before the Commissioner within two years of the occurrence of the accident or in case of death, within two years from the date of death. But, under the Employees' State Insurance Act, 1948, the period of limitation for filing an application to the Employees' Insurance Court is three years from the date of the cause of action. The cause of action, in respect of a claim for benefit, arises, when the benefit is claimed within a period of twelve months, after the claim became due or within such further period as the Employees' Insurance Court may allow on reasonable grounds. Thus, an injured employee under the Employees' State Insurance Act, 1948 gets a minimum of at least four years from the date of the accident, causing the injury, for approaching the Employees' Insurance Court. But, an injured workman under the Workmen's Compensation Act, 1923 gets only two years for approaching the Commissioner. Entertainment of a claim by the Commissioner, after two years, is left to the discretion of the Commissioner. Section 10(1) of the Workmen's Compensation Act, 1923 may be amended, enabling an injured workman to prefer a claim for compensation before the Commissioner

within three years from the date of the cause of action, which should be held to arise on the date, when the parties fail to reach an agreement, regarding payment of compensation.

Under the Workmen's Compensation Act, 1923, if the Commissioner is prevented from writing the memorandum of evidence himself, he can cause such memorandum to be made in writing from his dictation and sign the same, after recording the reason for his inability to write it himself. Writing of the memorandum by the Commissioner himself may cause delay, the Commissioner being busy. So Section 25, Proviso I of the Workmen's Compensation Act, 1923 may be amended, enabling the Commissioner to prepare the memorandum of evidence by dictation, whether he is able or unable to make the memorandum himself.

Under the Employees' State Insurance Act, 1948, appeal lies to the High Court from an order of Employees' Insurance Court, if it involves a substantial question of law. But, under the Workmen's Compensation Act, 1923, appeal lies only from certain specified orders of a Commissioner. So, it is suggested that Section 30(1) of the Workmen's Compensation Act, 1923 may be amended, providing for appeal from all orders of the Commissioner, if a substantial question of law is involved in them.

The question, whether the insurance company should comply with the requirement of deposit of the amount of

compensation, payable, with the Commissioner, for filing an appeal under the Workmen's Compensation Act, 1923, is subject to conflicting judicial decisions. If the employer is liable to comply with the said requirement for filing an appeal, the insurance company, which steps into the shoes of the employer, should also be made liable to comply with the requirement so as to protect the interests of the injured workman. So Proviso III to Section 30(1) of the Workmen's Compensation Act, 1923 may be amended, clarifying that the insurance company also should deposit the amount of compensation, payable under the order appealed against, with the Commissioner, for filing an appeal.

In Proviso III to Section 30(1) of the Workmen's Compensation Act, 1923, reference is made only to an appeal under Section 30(1)(a) i.e., an order, awarding as compensation a lumpsum or disallowing a claim for a lumpsum. Formerly, no appeal was provided against an order, awarding interest or penalty under Section 4-A. Subsequently, sub-clause (a a) was added to Section 30(1), providing for an appeal against an order, awarding interest or penalty under Section 4-A. Now the position is that while the employer has to deposit the amount of compensation for an appeal under clause (a), he need not do so in respect of an appeal under clause (aa). It is desirable that Proviso III to Section 30(1) be amended suitably so as to provide for deposit of the amount, payable by way of interest and penalty under

Section 4-A, with the Commissioner, for filing an appeal against an order, awarding interest or penalty.

Though the inspector, under the Employees' State Insurance Act, 1948, has wide powers of inspection, the question of exercise of such powers is left to the discretion of the inspector. The penalties for the violation of the provisions for ensuring provision of compensatory benefits have been made stringent by Act No.29 of 1989. But the question, whether the violator should be proceeded against, depends upon the Insurance Commissioner or other authorised officer of the Corporation. As under the Workmen's Compensation Act, 1923, in the Employees' State Insurance Act also, there is nothing that compels the inspector or Insurance Commissioner or authorised officer of the Corporation to switch on the enforcement machinery. It is suggested that Section 45 of the Employees' State Insurance Act, 1948 may be amended, empowering the Employees' State Insurance Corporation to constitute in each local office an Inspectorate, consisting of one inspector, appointed by the Corporation and one employees' representative, selected by the Corporation, in consultation with employees' union, having the largest membership, instead of the existing provision for appointing inspectors. For initiating prosecution for offences, provision may be incorporated in the Employees' State Insurance Act, 1948, empowering the Corporation to constitute in each local office a Prosecuting Agency, consisting of one authorised

official of the Corporation and one employees' representative, selected by the Corporation, in consultation with employees' union, having the largest membership. Conducting inspections regularly and initiating prosecution promptly should be made the mandatory duty of the Inspectorate and Prosecuting Agency respectively.

Provision may be made in the Workmen's Compensation Act, 1923, empowering the State Government to constitute in each district an Inspectorate, consisting of one inspector, appointed by the State Government and one workers' representative, selected by the State Government, in consultation with workers' organisation, having the largest membership, of employments, covered by the Act and in the absence of any workers' organisation in the employments, covered by the Act, one workers' representative, selected by the State Government and entrust it with the mandatory duty of conducting inspections and enforcing the provisions of the Act. Provision may be incorporated in the Workmen's Compensation Act, 1923, empowering the State Government to constitute in each district a Prosecuting Agency, consisting of an official, appointed by the State Government and the workers' representative, in the Inspectorate, proposed under the Workmen's Compensation Act, 1923. It should be made the mandatory duty of the Prosecuting Agency to institute prosecutions for offences under this Act.

From the empirical study on the application of the Acts for compensating industrial injuries, it is concluded that workers' ignorance of the law is the main obstacle in the way of their obtaining compensation for industrial injuries under the Workmen's Compensation Act, 1923. Hence, it is suggested that provision should be made in the Workmen's Compensation Act, 1923 for inculcating in the workers legal awareness by affixing the important provisions of the Workmen's Compensation Act, 1923, in the vernacular language, compulsorily at the work-place or at the employer's office/ residence/place of business, as the circumstances permit. The inspectorate, proposed for enforcing the Workmen's Compensation Act, 1923, should inspect the work-place or the employer's office/residence/place of business to examine, whether this provision is being complied with. It should also be made responsible for inspecting the work-places and finding out, whether workers are exploited by employers by non-payment of compensation.

As the general unions are not concerned about the problems of the workers, exposed to industrial injuries, these workers should organise themselves and have their own category unions. These workers should be educated for the purpose by Workers' Education Programmes, to be conducted by the Inspectorate.

Private employers, covered by the Workmen's Compensation Act, 1923, have shown a tendency to insure their liability.

To uproot the tendency on the part of other employers to evade their liability, provision should be made in the Workmen's Compensation Act, 1923 for compulsory insurance of liability of all employers. In the case of employers, who cannot bear even the burden of insurance, it is suggested that the government should take up the responsibility for payment of the insurance premium, on their behalf and see that their liability for compensation is insured.

Majority of the workers, covered by the Workmen's Compensation Act, have supported lumpsum payment of compensation under the Act. It appears that workers are ignorant of the demerits of lumpsum payment. So, the workers should be properly educated by the Inspectorate, proposed above, about the comparative advantages of periodical payments.

The chief obstacle, in the way of the speedy disposal of cases by the Commissioner for Workmen's Compensation, is found to be the tendency on the part of the advocates to get the cases adjourned. It is suggested that the Workmen's Compensation Act, 1923 may be amended, imposing fee upon the parties for each adjournment.

It is also suggested that provision may be made in the Workmen's Compensation Act, 1923 for the expeditious despatch of amendments of the Workmen's Compensation Act, 1923, the Workmen's Compensation Rules, 1924 and the Schedules, made from time to time, to the Commissioners for Workmen's Compensation. This will help them mete out justice to an injured

workman, as required by the changes in the law.

Because of the general dissatisfaction of the employees, covered by the Employees' State Insurance Act, 1948, with the administration of medical benefit by the State Government, it is suggested that administration of medical benefit should be undertaken by the Employees' State Insurance Corporation. Appropriate changes may be made in the Employees' State Insurance Act, 1948 for the above purpose.

The Employees' State Insurance Act, 1948 and the Rules may be amended, requiring the employers to provide the employees with necessary information, in the vernacular language, about the employment injury benefits, available under the Employees' State Insurance Act, 1948 and the formalities for obtaining the same. This will help the illiterate employees, especially the casual ones, avail of employment injury benefits.

Changes in the law, on the lines suggested above, are imperative to make the system of compensation for industrial injuries prove effective and beneficial to injured workmen.

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APPENDIX I

Schedule of questions, based upon which discussions were had with trade union officials/employers for assessing the application of the Workmen's Compensation Act, 1923.

1) Have the employers/you insured their/your liability for compensation?
2) Do the employers/you provide compensation for industrial injuries as per the Act?
3) If not, what steps do they/you take to compensate industrial injuries?

APPENDIX II

Schedule of questions, based upon which discussions were had with workmen for assessing the application of the Workmen's Compensation Act, 1923.

1) Do you know about the Workmen's Compensation Act, 1923?

2) Does your employer provide compensation for industrial injuries?

3) How does your employer provide compensation for industrial injuries?

4) Do you experience delay in getting compensation?

5) Do your trade unions help you in obtaining compensation from your employer?

6) What mode of payment of compensation do you prefer?

7) Do you know whether your employer has insured his liability for compensation?

APPENDIX III

Schedule of questions, based upon which discussions were had with Commissioners for Workmen's Compensation for assessing the application of the Workmen's Compensation Act, 1923.

1) What are the obstacles standing in the way of speedy disposal of cases?

2) Do the employers try to evade their liability under the Act?

3) Do the employers show a tendency to insure their liability under the Act?

4) Whether workers' ignorance of the law stands in the way of their obtaining compensation?

5) Whether workers/trade union officials appear before the Commissioner?

APPENDIX IV

Schedule of questions, based upon which discussions were had with employees/trade union officials regarding the compensatory benefits provided under the Employees' State Insurance Act, 1948.

1) How is medical benefit administered by the State Government?

2) Are you benefited by the medical benefit, provided through Employees' State Insurance hospitals by the State Government?

3) How can the administration of medical benefit be improved?

4) Are you benefited by the employment injury benefits, provided through Employees' State Insurance Corporation Local Office?

5) Do you experience any delay/difficulty in obtaining benefits from the Local Office?

APPENDIX V

Schedule of questions, based upon which discussions were had with the staff of the Local Offices of the Employees' State Insurance Corporation for assessing the application of the Employees' State Insurance Act, 1948.

1) What are the roles of the State Government and the Corporation in the administration of medical benefit?

2) What is the reason for the maladministration of medical benefit by the State Government?

3) Do the employers co-operate with the Local Office for the proper administration of disablement and dependants' benefits by the latter?