rance Act 1966 subject to variations in a Schedule not relevant to this case. Accordingly the procedure for appealing against an insurance officer's decision is in respect of both benefits the same, namely the procedure under the National Insurance Act 1965. Under that Act an appeal against a decision of an insurance officer must be brought within twenty-one days after the date of the decision "or within such further time as the chairman of the local tribunal may for good cause allow" (section 69(2)). There is no right of appeal direct from a decision of an insurance officer to the Commissioner, nor is there a right of appeal to the Commissioner from a refusal by a chairman of a local tribunal to extend the time. The only right of appeal to the Commissioner so far as relevant to this case is "from any decision of a local tribunal" (section 70(1)). The result is that whether one regards these proceedings as an attempt to appeal to the Commissioner from an insurance officer's decision direct or from a refusal of an extension of time by the chairman, the Commissioner has no jurisdiction to entertain the proceedings and they are a nullity. This is in accordance with Decision R(I) 44/59, which was decided under the industrial injuries procedure before 1966 which was in all relevant respects identical with the present procedure.

6. This would have been the position even if there had been merely an application to the chairman and a refusal by him. It is unnecessary to consider whether the claimant's solicitors had a right to reinstate their application after it had been withdrawn.

7. The claimant's purported appeal is therefore a nullity and I have no jurisdiction to entertain it.

(Signed) R. G. Micklethwait
Chief Commissioner.

R(I) 7/73 17.4.73

INDUSTRIAL INJURIES BENEFIT

Personal injury—Effect of section 5 of the National Insurance Act 1972.

A foundry labourer engaged on an unusual job loading pieces of scrap metal experienced pain when travelling home after completing work and was later found to be suffering from a left inguinal hernia.

Held that as the claimant had not proved he suffered either personal injury or accident arising out of and in the course of his employment, he was not entitled to either injury benefit or a declaration of an industrial accident. Effect of section 5 of the National Insurance Act 1972 discussed with particular reference to those cases where proof of accident continues to depend on proof of personal injury.

---

1. My decision is that the claimant has not proved that he suffered either personal injury or accident (arising out of and in the course of his employment) on 3rd January 1970, and he is not entitled to either injury benefit or a declaration of an industrial accident.

2. His case is briefly as follows. He was working as a labourer in a foundry at Crawley but living in South London. On the morning of Saturday the 3rd January 1970 he and another man were engaged in a somewhat unusual

rush job loading as many as possible of certain metal objects on to a dumper. The objects were scrap material varying in shape, size and weight. Many weighed 60 lb. but some more and many less. Many of them were of awkward shapes. Whilst doing this work the claimant felt no pain and was not aware of anything amiss. Having finished his shift at noon he was travelling back to London in a coach when although there was no incident during that journey he began to feel pains which at different times he has described as "across the lower abdomen which spread round to the back", and "round his waist and down to the groin". At home he took some tablets to ease the pain but continued to feel it during the week-end from time to time. On Monday, 5th January 1970, he went to work but was unable to work because of the pain and reported the accident to the works sister who advised him to see his doctor if it did not get better. He saw his doctor; he told me that this would have been on Tuesday 6th January, at which visit the doctor diagnosed a small left inguinal hernia. He was off work for some weeks. His doctor advised him to go for examination to a hospital, but he did not do so at that time as he went home to Jamaica for a visit. On his return from Jamaica he was fitted with a truss. The hernia was eventually dealt with satisfactorily by an operation in April 1972.

3. The only medical evidence supporting his case comes from the hospital, where the opinion was recorded in November 1972 that the findings were compatible with his story of onset of the hernia at work lifting a heavy weight.

4. A report was obtained from the employers. They stated that they were satisfied that an accident happened on the Saturday morning, and in reply to the question what injuries were observed at the time of the accident they answered pain in left groin. (This is manifestly incorrect. The claimant has repeatedly made clear that he felt no pain at the time of the alleged accident.) The employers stated also that the accident was reported at 8.10 a.m. on 6th January (i.e. the Tuesday, not the Monday). A report based on the records of the practice of the claimant's general practitioner has been obtained. According to this the claimant's doctor first saw him on 8th January (i.e. the Thursday, not the Tuesday) when he was complaining of "low back pain--no note of cause". It was not till later that pain in the groin was recorded and not until 2nd February 1970 that any reference was made to the possibility of a hernia. The medical certificates have long since been destroyed, but the Department's records indicate that the cause of incapacity which covered the period from 8th January to 4th February 1970 was back strain and that the incapacity commenced four days after the Saturday and in the interim the claimant had continued to do his normal work. On 4th March 1970 he was examined by an examining medical officer of the Department of Health and Social Security who expressed unfavourable opinions on the questions whether recent incapacity had resulted from the occurrence described and whether there had been any personal injury as a result of it. (The claimant told him that he first saw his doctor on the Tuesday.) The claimant's benefit record shows that in the past he had been off work on a number of occasions with asthma or bronchitis, though as the claimant has pointed out he had not claimed for incapacity due to these causes since 1968. The medical officer thought it more likely that the hernia had been caused by these recurrent attacks than by lifting. He confirmed the presence of a small left inguinal hernia only detectable that day after coughing and causing pain which was worse when the claimant coughed.

5. The claimant was paid sickness benefit for the period of incapacity early in 1970 but his claim for injury benefit was disallowed by the insurance officer on 6th March 1970. The claimant did not then appeal. He first did so two years later in May 1972.

6. Whilst the claimant's appeal against the local tribunal's adverse decision was pending a statement of medical evidence was prepared by a senior medical officer of the Department. He also attended the hearing before me and having heard the claimant's account of the matter there and having studied all the papers he adhered firmly to the opinion expressed in his written statement that it was unlikely that the incident described either caused or aggravated the inguinal hernia or the injury to the back. He attached great importance to the fact that the claimant was not aware of anything untoward at the time.

7. I have considered the evidence in this case carefully and with sympathy. I formed the impression from the claimant's oral evidence that he was an honest man who was trying to tell me what he could remember of events a good time ago. I accept his evidence that he first felt pains in the abdominal region in the coach. It is tempting on this basis to take the common sense view which the claimant does that it is altogether too much of a coincidence for those pains to have started then if he had not done some injury to himself at work. On the other hand the balance of medical evidence is in my judgment strongly against him. I do not think that the time relationship between the Saturday and the beginning of incapacity is as close as the claimant thinks. The opinion expressed in the hospital report is no more than that the lifting could have caused the onset of the hernia. We do not know whether the person who gave the opinion was aware that the claimant felt absolutely nothing at the time. The senior medical officer attaches great importance to that point, and both his view and that of the examining medical officer are unfavourable to the claimant's case. I am afraid that my conclusion on the whole matter is that, the burden of proof being on the claimant, it is really a matter of speculation whether anything that happened on the Saturday morning either caused the hernia or any other injury or aggravated any condition which already existed. His appeal therefore cannot succeed.

8. I must explain the reasons for the form of my decision in paragraph 1 above and the relevance of proof of personal injury in a case of this type in the light of section 5 of the National Insurance Act 1972. Under the legislation in force before that Act, namely the National Insurance (Industrial Injuries) Acts 1946 and 1965, a person was not entitled to *any* remedy under the legislation unless personal injury by accident was proved on balance of probabilities to the satisfaction of the statutory authorities (the insurance officer, the local tribunal and the Commissioner). If it was proved and incapacity resulting from it was also proved the claimant was entitled to injury benefit for a limited period. He still is. If personal injury by accident was proved and loss of faculty and resulting disability were found by the medical board or medical appeal tribunal, then he was entitled to disablement benefit for a period which could be much longer. He still is. If it was proved that there was personal injury by accident but it was not proved that there was either incapacity or loss of faculty, nevertheless the claimant could be granted a declaration of an industrial accident under section 48(2) of the 1965 Act and the corresponding earlier provision. But he could not be granted a declaration without proof of personal injury. Such a declaration would help him if incapacity or loss of faculty developed later.

9. All this of course is qualified by the fact that other conditions had to be fulfilled; the employment had to be insurable under the above Acts and the accident had to be one arising out of and in the course of the employment.

10. The 1972 Act neither repealed nor amended section 48, but section 5(2)(b) of the 1972 Act makes the important difference that now a declaration of an industrial accident can be recorded without proof of personal injury. For example if something accidentally falls on a man at work and there is nothing to show whether any ill effects have resulted (i.e. there is no evidence of injury) he cannot obtain an award of injury benefit or disablement benefit, but he can now protect his future position by obtaining a declaration of an industrial accident under section 48(2) by virtue of the power now contained in section 5(2)(b) (cf. Decisions C.I. 17/72 and C.S.I. 6/72 (not reported)).

11. There are however cases where proof of accident depends on proof of injury. (See *Minister of Social Security v. Amalgamated Engineering Union* [1967] 1 A.C. 725.) This is such a case. If in this case the claimant had proved that whilst at work he sustained the hernia or an existing herniation was extended, or if he had proved that he strained his back at work, in either case he would have proved personal injury, and since whatever happened would have been unintended and unexpected he would thereby have proved accident also. (In that event the accident would obviously have arisen out of and in the course of his employment.) As however I am not satisfied that he has proved personal injury and there was no other accident in the absence of injury, he has not proved accident. Proof of injury and proof of accident therefore in a case of this type stand or fall together. In such a case therefore it is still a practical necessity to consider, on the question whether the claimant is entitled to a declaration, whether there was any personal injury. Secondly, in this case there is a claim for injury benefit, which always did and still does depend on proof of personal injury.

12. The claimant's appeal must be dismissed.

(Signed) R. G. Micklethwait
Chief Commissioner