C1 39/1983

DGR/JCB

SOCIAL SECURITY ACTS 1975 TO 1982

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that prescribed disease Number 48 (known as "occupational deafness") is prescribed in relation to the claimant because he satisfies both regulations 2(d) and 40(2) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980, [S.I. 1980 No 377].

2. This is an appeal by the claimant's association against the majority decision of the local tribunal confirming the insurance officer's decision shown in box 1 of form LT2. The claimant asked for an oral hearing, a request to which I acceded, and at that hearing he was represented by Mr K Orme of the Association of Scientific Technical and Managerial Staffs, and the insurance officer by Mr D J Ellis of the Chief Insurance Officer's Office. I am indebted to them both for their submissions.

3. On 5 October 1981 the claimant made a claim for disablement benefit in respect of prescribed disease Number 48 known as "occupational deafness". It is not in dispute that the claimant had for more than 20 years been employed in an occupation involving the use of presses making cycle components. Moreover, he had been so employed during the 12 months period immediately preceding the date of his claim. The real question at issue is whether or not this occupation is a prescribed one. If it is, then he has satisfied both regulation 2(d) and regulation 40(2) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980. In support of his contention that his occupation is prescribed, the claimant relies on paragraph 48(c) of Schedule 1 to the Regulations. In other words, he argues that his occupation involves "the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal, ... for at least an average of one hour per working day".

4. It is not in dispute that for the prescribed period of 20 years and for the period of 12 months prior to the date of his claim the claimant was using a press on metal and that he did so for at least an

average of one hour per working day. The real question is whether the press constitutes a pneumatic percussive tool, and as its percussive nature is not being challenged, the only matters outstanding are whether it is a tool, and, if so, whether it is pneumatic.

5. On the question whether or not the press is a tool, it has to be borne in mind that the dimensions of the overall structure are not inconsiderable. The equipment is approximately 12 feet high (4 feet of this being underground) 6 feet in width and 3 feet in depth. However, these measurements really denote a frame, which holds the press itself, and the press so held punches, shapes or cuts an area ranging only from 8 inches to 18 inches in diameter. I am satisfied on the evidence that the claimant was really working on a machine tool, that is a tool driven by a machine.

6. Some years ago it would have been held that a press of the kind under consideration was not a tool. Emphasis was then on whether the relevant equipment could be operated manually (see R(I) 8/76). However, in recent years the former approach has been modified to take account of advancing technology (see for example the unreported Decision C.S.I. 5/77) and, in my judgment, the present position is governed by the Decision in R(I) 13/80. At paragraph 10 of the latter decision the present Chief Commissioner observed as follows,

> "On the question whether /the vertical surface grinder, measuring about 6 metres by 1.6 metres/ was a tool within the meaning of the regulation Mr McAlpine rejected the definition of tool expressed in decision R(I) 8/76 on the ground that it was too restrictive and was inconsistent with modern engineering practice. He opined that the vertical spindle surface grinder was a machine tool, that is to say a tool driven by a machine. He pointed out that this interpretation was consistent with the description applied within the engineering industry where apparently machines of this type are referred to as machine tools. He rejected the test of a tool being hand held as being unduly restrictive."

7. The above approach was accepted by the learned Commissioner. At paragraph 11 he said,

> " ... I accept the evidence of Mr McAlpine and I am satisfied that this vertical spindle surface grinder was a tool within the meaning of paragraph 48."

Likewise, I am satisfied that the press in the present case, albeit held in a frame of large dimensions, is a machine tool, but nevertheless a tool within the meaning of paragraph 48 of Schedule 1 to the Regulations.

8. A more difficult point is whether or not the tool is pneumatic within the paragraph. The evidence shows overwhelmingly that the power which serves to operate the press is derived essentially from compressed air. Without this source of power, the press simply would not operate. However, there is a difficulty. For the flywheel is electrically driven, and without the operation of the flywheel the press would be unable to function. In other words, the press is dependent upon two sources of power, compressed air and electricity. In those circumstances can it be said to be penumatic within paragraph 48?

9. In my judgment, whether a tool is pneumatic is a question of fact. I do not think that a tool's partial dependence on power other than compressed air necessarily means that it cannot be regarded as pneumatic. One has to look at its essential nature and determine whether the driving force is predominantly compressed air or something else. Present-day technology tends to employ in the case of a particular item of equipment more than one source of power. For example, a gas-boiler designed to provide central heating in a domestic house is generally dependent on an electrical pump to achieve its purpose. However, it would be something of an affront to commonsense to regard the system as anything other than gas-operated. Again a motor car is regarded as essentially petrol-driven, albeit it is dependent on electricity for starting and for the operation of its fuel pump or pumps. Again, I am told, a 'pneumatic drill' used on road work relies on electricity to start it, but no one would regard such a drill as operated otherwise than pneumatically. Its very name indicates the essential nature of the tool.

10. In the present case, although the press is dependent on electricity for the purposes of operating the flywheel, nevertheless I am satisfied that the predominant operating force emanates from the use of compressed air. In particular, the percussive element is provided by this particular source of power. I am satisfied, then, that on the facts the press in this case must be regarded as essentially pneumatic, and as such falls within paragraph 48.

11. It follows from what has been said above that the claimant had at the date of claim been using a pneumatic percussive tool for more than 20 years and within 12 months of the date of claim, and that he therefore satisfies regulations 2(d) and 40(2) of the Regulations. It will be for the medical authorities to decide the diagnosis disablement questions in accordance with regulations 26(5) and 27(4).

12. I allow this appeal.

(Signed) D G Rice
Commissioner

Date: 2 June 1983

Commissioner's File: C.I. 11/1983
C I O File: I.O. 5174/I/82
Region: Midlands

JSW/BOS

SOCIAL SECURITY ACTS 1975 TO 1982

CLAIM FOR INDUSTRIAL INJURY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that on or about 28 October 1981 the claimant did not suffer personal injury caused by accident arising out of and in the course of his employment as provided by sections 50(1) and 107(5) of the Social Security Act 1975. Injury benefit is not therefore payable.

2. This appeal by the claimant's association is against the unanimous decision of the local tribunal with leave granted by a chairman of the tribunal. The claim is for injury benefit and not merely for a declaration that an alleged accident was an industrial accident. The claimant was employed as a "RSC one" by British Rail Engineering Ltd. On 9 November 1981 he claimed injury benefit on a medical statement by his doctor who advised him to refrain from work from 7 to 14 November 1981 on a diagnosis of painful neck. He made further claims for benefit for the period 16 to 18 November 1981 by reason of painful neck and painful stiff neck. He attributes his incapacity to an alleged injury sustained at work on 28 October 1981 when he was working in the iron foundry because he was working in a draught and claims that this resulted in his suffering from a very painful neck which rendered him incapable of work.

3. There is an increasing tendency for claims to be made for injury benefit, or a declaration that an event was an industrial accident, solely on the ground that the claimant suffered some deterioration in his health which, it is claimed, resulted from his work or simply while he was at work. Support for such a claim is sometimes sought from the dicta of Clauson L J (delivering the judgment of the court) in Oates v Earl Fitzwilliam's Collieries Co [1939] 2 All ER 498 at p 502 in which he said -

> "In our judgment, a physiological injury or change occurring in the course of a man's employment by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of his employment, and this is so even though the injury or change be occasioned partly, or even mainly, by the progress or development of an existing disease if the work he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence."

The citation refers to "injury by accident" resulting in the physiological injury or change. Under the former Workmens' Compensation Acts, there were a number of decisions of the House of Lords dealing with the phrase "personal injury caused by accident", which were, and still are, operative words in dealing with whether or not there has been an industrial accident. It was pointed out in Warner v Couchman /1912/ AC 35 at p 38 that the statute does not refer to "an accident". It is legitimate to look for guidance to the decisions of the Courts under the earlier Acts (per Lord Denning MR in R v Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union (No 2) /1966/ 2 QB 31 at p 45, also reported as an appendix to Decision R(I) 4/66). In Fenton v J Thorley and Co Ltd /1903/ AC 443, Lord MacNaghten, at p 448 observed that "accident" and "injury" - that is injury by accident - appear to be used as convertible terms and he concluded that ".... the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed." Lord Shand, agreeing, at p 451, said that the word "accident" ".... denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence". Lord Lindley, at p 453, said that - "The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss". That "accident" and "injury" may in certain circumstances be interchangeable i.e. that the injury may be the accident and vice versa, see R v Deputy Industrial Injuries Commissioner Ex parte Amalgamated Engineering Union, in re Dowling (sub nom Minister of Social Security and Amalgamated Engineering Union) /1967/ AC 725 per Lord Hodson at p 750C and Lord Wilberforce at p 758, C to E. (Also reported as an appendix to Decision R(I) 16/66).

4. Not every event which occurs at work or as the result of work is necessarily an accident. In the present appeal the claimant claims either that injury, or perhaps a change in his physical condition, resulted from accident simply because he worked in a draught of air. He has not alleged that there was an unlooked for mishap or an untoward event on any particular occasion. Persons work in all kinds of conditions of heat and cold and weather. Should a worker catch a head cold at work or contract influenza or some infectious disease from a fellow worker, that is not "accident" either as an event so identifiable or as a personal injury constituting "accident". Similarly, spontaneous interventions, such as a heart attack or onset of pain due to a physical condition from which a person is suffering (Decision R(I) 1/76) or a physiological change in a person's condition which might occur at any time, whether the person is at work or elsewhere, does not constitute accident unless it is associated with an event or a particular occasion occurring "by reason of the work", which is either identifiable as accident or would constitute "an accident".

5. In the present case, the claimant, according to his doctor, was suffering from cervical spondylosis owing to degenerative changes in his neck. In respect of some changes in a person's physical state, arising from industrial processes, to which the words "personal injury caused by accident" have no application, provision is made by section 76 of the Act that a disease or injury may be prescribed in relation to an employed earner. Cervical spondylosis is not a prescribed disease. That condition was not caused or precipitated by a draught and it was not an event identifiable as accident or a particular occasion on which injury was suffered which would constitute accident. I am encouraged in the opinion I have formed by Decision C.I. 244/50 (KL), which was a similar case, in which a bus driver became incapable of work by reason of conjunctivitis alleged to have been caused by draught. The claimant was driving a new type of bus, the driving cab of which had a ventilator so constructed that the air struck the ceiling of the cab and was driven down onto the driver's head. The learned Commissioner stated that he could not find any incident or series of incidents which could be regarded as accidents causing personal injury. In my judgment, in the present appeal, there was no event or personal injury which could be described either as constituting accident or as having been caused by accident: a continuous draught can not be regarded as an event, or a series of events, causing personal injury.

6. The appeal of the claimant's association is dismissed.

(Signed) J S Watson
Commissioner

Date: 31 May 1983

Commissioner's File: C.I. 39/1983
C I O File: I.O. 5257/I/82
Region: North West (Manchester)