C1 132/1980

JSW/BW

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INDUSTRIAL INJURY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.I. 11/81

1. My decision is that the accident sustained by the claimant on 29 January 1979 in which he suffered personal injury did not arise 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. The claimant, then aged 60, was employed as a merchant seaman. On 29 January 1979 he was employed on a Channel ferry, then moored in Princess Alexandra Dock, Southampton. He has stated that the vessel was loading continental lorries all day and was due to sail at 2200 hours. At about 2000 hours he went ashore to purchase a bottle of lemonade for himself. He obtained this from a dock shop, which is open to the general public. He returned by way of a car park and, instead of using the recognised means of access to the vessel, he attempted to board by what he has described as a 'short cut', which he has stated has been used as a method of boarding by crew members for many years.

3. At some stage he entered part of the dock area which is not open to the public at large. Adjacent to where the vessel was berthed is a link span, which is the loading ramp for vehicles between the vessel and the dock. The link span is lowered or raised according to the state of the tide and belongs to the dock board. The evidence is that the link span is only to be used by authorised dock board staff. There was no notice to that effect but that does not mean that it was available to everyone as a means of access to the ship. Certainly there is no evidence that members of the ship's crew were authorised or required to be on the link span or to use it.

4. The method by which the claimant attempted to return to the ship was by ascending a ladder fixed to the link span base, walking across the base and then descending a ladder fixed to the dock wall in order to reach the link span platform, from which presumably he would have entered the vessel by the vehicle ramp. The maximum gap between the bottom of the ladder and the platform was 18 inches. While descending the ladder

fixed to the dock wall, the claimant fell and injured himself on the railings of the platform and then fell into the water from which he was rescued by shipmates who heard the splash and heard him shout. The accident happened at about 2030 hours.

5. There is no suggestion that the normal gangway for access to and from ship and shore was not in place and available to the claimant. It was stated by the chief officer, dated 3 May 1979, that the claimant had gone ashore to buy a bottle of lemonade without asking permission. However, in an interview with an inspector of the Department, the area fleet personnel manager is reported as having said that it was not normal for the chief officer to insist that the men stay on board ship if they were given a break. As the men did not have to ask permission there is nothing in the staff rules about this. The claimant has stated that on the day of the accident, owing to the British lorry drivers strike, continental lorries were being loaded at irregular intervals, which meant that crew had to have a break from work when convenient. He has also stated that, until the time of his accident, no crewmember had to get permission to go ashore in his break period. Inview of the personnel manager's statement, the insurance officer dealing with the appeal does not dispute that the claimant was on an official break at the time and did not need permission to leave the vessel.

6. It seems to be a fairly common fallacy that, if an employer gives permission to an employee to do something or to go somewhere, that imports the course of the employment. It may do so if the permission is to do work or to go somewhere not normally involved in the scope of the person's employment: but permission for the claimant to go somewhere or to do something for his own purposes does not bring an employee in the course of his employment or retain him in it. In the present case, the claimant's purpose in leaving the ship was to buy a bottle of lemonade for himself and was not so connected with his employment as to be incidental to it. Compare Decision R(I)4/79 in which a bus driver was held not to be in the course of his employment when injured while crossing a public highway on the way to a canteen provided by his employers. Whether or not the claimant had, or had to ask for, permission to go ashore does not affect the situation in this case. I find that he was not in the course of his employment when he was ashore in order to visit the dock shop for his own personal purposes.

7. The submission by the claimant's trade union seems to be that a seaman, while on ship's articles, is in the course of his employment during the whole time he is in the ship or in a dock area. It may be that he is in the course of his employment during the time he is aboard, unless an accident occurs when he is in part of the vessel in which his duties do not require him to be or when he is doing something entirely for his own purposes unconnected with his duties or with matters incidental to his employment. In Charles R Davidson and Co. v M' Robb or Officer [1918] A.C. 304, it was decided that "in the course of the

employment" does not mean during the currency of the engagement but means in the course of the work which the workman is employed to do and what is incident to it: and absence on leave for the workman's own purposes is an interruption of the employment. That and other authorities and the principle were referred to in R v National Insurance Commissioner, Ex parte Michael [1977] ICR 121, also reported as an appendix to Decision R(I) 5/75, in which Roskill L J said, at pages 131D and 301 respectively -

> "The crucial effect of the decisions is, for present purposes, that for an injury to qualify for industrial benefit that injury must have been suffered in the course of the work (my italics) which the injured person is employed to do, or be incidental to that work. It is not enough that the injury should have been suffered during the currency of the employee's contract of service".

8. In Black v Owners of SS 'Hesperides' (1929) 22 BWCC 295, a sailor, who was on shore leave from his ship, returned to the ship by walking over barges which lay between it and the quay, and, while doing so, fell into the water and was drowned. The employers had provided a boat and a boatman for members of the crew to get from and to the ship, but most of the crew used the way over the barges, and that was acquiesced in by the officers. The Court of Appeal, in upholding the County Court Judge, held that, at the time of the accident, the deceased workman was under no obligation to his employers to return to the ship by the means that he used and was not in the course of his employment in so doing. In St Helens Colliery Company Ltd v Hewitson [1924] AC 59 at p. 71, Lord Atkinson said that a workman is acting in the course of his employment when he is engaged 'in doing something he was employed to do'. That test has been followed in innumerable cases. In Parker v Owners of ship Black Rock [1915] AC 725, a case in which a fireman on board a steam ship went ashore to buy provisions for himself, Lord Sumner, at p. 731, said that the point was made that the accident could be brought within those cases in which a man, having gone on shore for his own lawful purposes, is returning to his ship and has so nearly approached the means of access to the ship as to make it reasonable to hold that he has returned to the sphere in which his employment operates and therefore that the accident arises out of the employment. The House of Lords decided in that case that the accident was not one arising out of and in the course of the employment. In Decision R(I) 3/53, a seaman returning from shore leave slipped and injured himself as he was about to step from a jetty leading from the quay into a boat provided by the employers to take him back to the ship. The quay and the jetty were open to the public. It was held that the accident arose out of and in the course of the employment. The boat was the means of access provided to the ship by the employers and the claimant had so nearly approached the means of access as to make it reasonable to hold that he had returned to the sphere in which his employment operated.

9. There were many reported decisions under the former Workmen's Compensation Acts, a feature which has been criticised. It has to be remembered that ultimately, applying the right principles, it is a question of fact whether at the time of an accident a claimant is in the course of his employment and not whether he would have been if the accident had occurred in other circumstances at some other place and time. Matters incidental to an employment are also included in the course of the employment but the words 'reasonably incidental' are not part of the statute and should be limited to cases at the premises where the employee works and not extended to other cases without careful consideration. (per Lord Denning MR in Michael's case at p.294 in the supplement to Decision R(I) 5/75).

10. The local tribunal disallowed the claimant's appeal by a majority, one member stating that he felt the accident arose out of and in the course of the maritime employment. No reasons were given and the dissenting member might have considered that it was so because the accident happened during the currency of the articles and so of the claimant's engagement. For reasons I have stated, in my opinion, the majority of the tribunal were right in disallowing the appeal.

11. The claimant's appeal is dismissed.

(Signed) J S Watson
Commissioner

Date: 21 May 1981

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