Bulch, 185
[5 Hunt]

Commissioner's file: CI 207 2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal. For the reasons below, I set aside the decision of the tribunal as erroneous in law. With the agreement of the parties, I replace it with the decision that the tribunal should have made. This is:

> **Appeal allowed. The appellant was engaged in a prescribed occupation for the prescribed disease A11 in respect of his claim for industrial injuries disablement benefit for that disease. The claim is referred to the Secretary of State to determine the remaining aspects of the claim.**

2 The claimant and appellant (Mr W) is appealing with my permission against the decision of the Plymouth appeal tribunal on 25 March 2003 under reference U 03 200 2002 01808. I heard this appeal at Plymouth Combined Court Centre on 24 January 2004. Mr W, who was present, was represented by Dr David Thomas of counsel, instructed for the GMB Union. The Secretary of State was represented by Mr Victor Lewis of the Office of the Solicitor to the Department for Work and Pensions. The case was originally listed to be heard with appeals from other employees of the same employer who were making the same claim. In the event this is the only appeal that came to a hearing.

REASONS FOR THIS DECISION

The civil litigation

3 Unusually, this case arises from other litigation. In a lengthy judgment given after a full hearing in 2002 His Honour Judge Overend decided that the claimant and other employees working with him in a factory making beds were suffering from vibration white finger. Further, at least in the case of Mr W, the disease had been acquired solely because of his work and without fault on his part. Further again, the employer was liable in damages for its negligence in allowing this to happen. Mr W no longer works in the bedding industry. He had to give up his job as a result of the vibration white finger and is no longer employed by the employer. I am told that that also went to a tribunal which found that the employer had wrongfully terminated Mr W's employment. While those cases form the background to this case, neither specifically decides the key questions in this appeal.

4 Unlike many claims about vibration white finger, this is one where there is no doubt that Mr W has the disease and that he has it because, and only because, of his work. The issue here is different. It is whether the work Mr W (and his colleagues) did was of a kind that was prescribed by the industrial injury insurance scheme's regulations. Only if it is so prescribed can he receive industrial injuries disablement benefit. The Secretary of State concluded that Mr W was not covered by the scheme. This may have reflected that there have been no previous reported instances of employees suffering from vibration white finger as a result of work in the bedding industry.

The tribunal decision

5 The tribunal upheld the decision of the Secretary of State. It was one of a small series of such decisions by local tribunals about claims by claimants working in the same employment as Mr W. There was an oral hearing but there is only the briefest of record of proceedings. Although the tribunal gave a full statement, it does not contain the findings of fact necessary to determine this case. Nor can those findings, or the evidence on which such findings would be based, be drawn from the decision notice or record of proceedings. For that reason I agreed at the oral hearing with both parties that the decision of the tribunal was inadequate and must be set aside.

The law

6 Mr W suffers from what is commonly termed vibration white finger. The question is whether it is the prescribed disease A11 of that name. For his problem to be within the insurance categories for disablement benefit for that disease, he must show two things. First, he must show that he was working in one of the insured forms of work. Second, he must show that the disease is so extensive as to meet the statutory minimum levels of disease for insured cover. It is clear that Mr W has the disease, but no formal decision has been taken about how extensive it is. This is because, in the view of the Secretary of State and the tribunal, he was not working in a "prescribed occupation" or relevant form of work.

7 The only question for me is whether that decision is right. Was the claimant working in a prescribed occupation? More technically, did the work he was doing involve him in one of the occupations listed as prescribed in Part I of Schedule 1 to the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985 No 967) as amended to the relevant date of claim?

8 The occupations within the prescription for prescribed disease A11 are:

> "Any occupation involving:
>
> (a) the use of hand-held chain saws in forestry; or
>
> (b) the use of hand-held rotary tools in grinding or in the sanding or polishing of metal, or the holding of material being ground, or metal being sanded or polished, by rotary tools; or
>
> **(c) the use of hand-held percussive metal-working tools, or the holding of metal being worked upon by percussive tools, in riveting, caulking, chipping, hammering, fettling, or swaging; or**
>
> (d) the use of hand-held powered percussive drills or hand-held powered percussive hammers in mining, quarrying, demolition, or on roads or footpaths, including road construction; or
>
> (e) the holding of material being worked upon by pounding machines in shoe manufacture."

The regulations contain no definitions of any of these terms, although some assistance can be gained from other provisions in the same Schedule.

9 It is agreed by both parties that of these categories only (c) (in bold above) can be relevant as a matter of fact. I set the full list out because my task includes interpreting part of that list, and I consider that this should be done by reference not to isolated words in the list but by reference to the list as a whole.

10 Nothing in the list refers directly to the bedding industry. As mentioned above, this is not surprising as I am told that it is the first recorded instance of the disease in that industry.

11 It is submitted for Mr W that the rules do cover him in a broader sense. The tools with which he was working and the processes in which he was involved, it is contented, are within category (c) above if that is read properly.

12 The approach to be taken in interpreting and applying these rules was discussed by the Court of Appeal in *Secretary of State v Davis,* [2001] EWCA Civ 105, R(I) 2/01. The case concerned category (a) of the list above, work in forestry. The parties were disputing whether particular work was "in forestry". Commissioners, including myself, had given this provision inconsistent interpretations. Some Commissioners gave the phrase a narrow meaning, and others a wide meaning. The Court of Appeal endorsed the wide meaning. It did so because it adopted a purposive construction of the rules.

13 Giving the leading judgment, Rix LJ gave the following reason for doing this:

> It seems to me that while the words "in forestry" in the statutory phrase are plainly intended as some form of limitation, it would be wrong to give to those words too narrow a definition when one considers the purpose of the statute, which was to provide compensation for those who suffered the prescribed disease as a result of their occupation. There is great danger that, if too narrow a definition is adopted, then the very persons who fall within the purpose of the statutory protection would fall outside the definition.

Mummery LJ adopted Rix LJ's reasons. He also expressed agreement with the Commissioner's decision under appeal, where the Commissioner also relied on a purposive approach under which "the definitions of prescribed occupations should not be artificially narrowed." Holman J agreed with Mummery LJ.

14 I agree with Dr. Thomas that that is the approach I should take. But it also has a converse: the scheme should also not be artificially widened. In avoiding both, the Court of Appeal took the view I have followed above that interpretation should be by looking at the prescription as a whole, rather than by isolating individual words within it. The question to be decided is therefore whether what the claimant actually did in his work came within the proper meaning of the words of category (c) for prescribed disease A11.

The claimant's work

15 I heard a detailed description of what the claimant and similarly employed workers did from two witnesses: Mr W and the current head of engineering at the employer (also the individual now responsible for health and safety at the factory). I also had the benefit of a factual report made for the county court action and of seeing

extensively illustrated catalogues of the employer's bedding products. While the evidence of the head of engineering was more technically expressed than that of Mr W, they both otherwise described in corresponding detail the operations performed by Mr W and others that led to his suffering vibration white finger.

16 Judge Overend was satisfied on the extensive evidence before him that the main cause of the problems was the use of a tool called a "rammer" by those who used it (and, I am told, an automatic staple gun by its manufacturer). That was how the parties also put it to me. As it was described to me, it is a specialised gun or percussive propulsion tool held vertically in both hands by the employee. The fixing is a form of heavy staple, or U/V shaped piece of heavy metal wire with sharp ends. The employee loads about 100 of these into the rammer so that the ends point down. The employee aligns the rammer nozzle precisely to a specific point on a bed base and then pulls a trigger to drive a fixing into the base. The nozzle has a groove on it. This is placed over two pieces of metal aligned below it. These are the edge of one of the bed springs and a bounding metal strip that holds the bed springs together. (These are known together as a Bonnell base). When the trigger is pulled, it releases a burst of compressed air into the cylinder of the rammer and on to something that strikes the fixing so as to drive it down the cylinder and through the nozzle. By driving fixings on to the metal and wood bases at even points round the edge of the Bonnell base, the Bonnell base is firmly attached to the wooden base, so forming the structure of a divan bed. The fixings are fired in very quick succession, with about 80 fixings being driven into the average bed. The whole process is very fast and is measured in seconds rather than minutes.

17 In reply to questions, both witnesses told me that, so far as they knew, no particular technical or other specialised terms were used in the bedding industry to describe this process. Turning to the terms of category (c), they both told me that the terms "caulking", "chipping", "fettling" and "swaging" were not known by either of them to have any relevance to the task. Nor did they describe it as "riveting" or "hammering". Nor did they describe it by any other similar single identifying operative verb. It was "firing" or "driving" fixings or staples, or something similar. Nonetheless, Dr Thomas contended that what was in fact happening was riveting or hammering by tools that fell within the prescription. Mr Lewis contended, quite simply, that as a matter of fact it was not.

Using hand held percussive metal-working tools for riveting and hammering

18 Unlike the other four terms, "to rivet" and "to hammer" are verbs in wide usage with several shades of meaning. An individual can be "riveted to the spot" by fright, or "riveted" to a seat by a particularly spectacular play, film or sporting event. In this context "to rivet" involves the process of putting a bolt through a prepared hole in metal sheets, and then hammering the end of the bolt to flatten it, so attaching the metal sheets together. The relevance to the industrial disease is that the effects on the hands of the person using percussive tools to flatten the rivets are such as to shake the hands sufficiently to cause damage to the blood vessels in the hands and thereby the loss of blood flow and blanching known as vibration white finger. I am satisfied that what happened here was not in that sense, even when interpreted widely, riveting.

19 Was it, as Commissioners asked when granting permission to appeal in the cases originally linked to this, hammering? We know from the county court judgment that the

percussive effect of the tools that had to be used, together with their cold temperature, had the effect of causing vibration white finger.

20 "To hammer" has an even wider range of possible meanings than "to rivet". Indeed, the essential operation in riveting is hammering the rivet. That is also an aspect, as I understand it, of caulking, which in this context is the process of ramming material between two sheets of metal to form a basis for closing the gap between them so as to render it weatherproof or waterproof. In my childhood it was used (in Kent at least) to refer to the process of caulking clinker-built boats or - using the same skills - clinker-built houses (built with overlapping timber planks, the gaps between which were caulked with oakum or something similar then sealed with pitch or tar). In this context it is limited to processes involving percussive tools and metal. Nevertheless, caulking involves working not only with metal but with other materials and metal together. Swaging and chipping, at least when done with percussive tools, also appear to involve in part specialised forms of what could generally be described as hammering, using the tools necessary to chip (or remove small parts of the item chipped), and swage (turning, grooving, shaping, or bending the item). For completeness, "fettling" again has a range of meanings - as in the comment that some animal or thing is in fine fettle, or has been fettled well - but in its technical meaning refers to knocking edges off a piece of casting. That again would appear to involve a form of hammering.

21 The other element in the prescription is either that the worker must be using a hand-held percussive metal-working tool or must be holding metal worked upon by (both hand-held and non-hand-held) percussive tools. In this case the employees held the tool in both hands, and it was undoubtedly percussive. That is of course part of the reason why Mr W came to suffer from vibration white finger.

22 Was the tool metal-working? The words are hyphenated. Some of the papers before me omitted the hyphen and so appeared to change the meaning of the term. It clearly refers to a tool for working with metal, not a metal tool for working with. This appears to have been an element in the decision of the Secretary of State. The view is that as the bed bases were wood not metal (the beds in question being divan beds), Mr W was not working with metal but wood. Dr Thomas resisted this strongly on the basis of the evidence of both witnesses. The work involved three pieces of metal being brought together and attached to the wood: the fixing, the spring and the metal band. Further, the fixing was often bent by the process, and the metal band and spring might at the same time be pushed into shape by the fixing. I accept Dr Thomas' argument. I do so partly because, as I have mentioned above, caulking is a process also involving both metallic and non-metallic substances, so the scope of category (c) is not limited to working **only** with metal. In this particular action, there were two separate metal items being attached by a third metal item to the wood. Further, the rammer is used to cause the fixing to impact on the other metal items, driving them, as well as the fixing, on to the wood. There is a metal-on-metal-on-metal element in the action. I was also told that the action may cause the fixing to be bent to fit the other metal. That is in my view sufficient, taking a practical view on these facts, to bring the tool within the category of metalworking tools.

23 Was the rammer used for hammering? The term is not defined in the regulations. Although neither party referred me to it, I looked at the report of the Industrial Injuries Advisory Council that led to the prescription. This was Cmnd 8350 of

September 1981. The report deals only briefly with occupational cover in paragraphs 16 and 17. The Council decided against making prescription by reference to vibration exposure because of difficulties in measuring this. Instead, it opted for recommending certain specified tools or occupations. "In order to concentrate on those people exposed to the greatest risk of VWF, prescription should be in terms of the use of certain specified tools in certain specified occupations." It then makes recommendations that include the precise wording now in category (c). Beyond that there is no guidance in the report about why the Council chose those particular terms.

24 I turn to the standard dictionary definitions. "To hammer" is relevantly defined by the Oxford English Dictionary as meaning to strike, beat or drive with or as with a hammer. The definition in the Chambers Dictionary is essentially the same, again referring to actions "as if with a hammer". When using the rammer to drive or fire the fixing into the bed base did the claimant strike, beat or drive the fixing with or as if with a hammer? On the evidence I heard, that is as a matter of fact precisely what Mr W and others did with the rammer. They used it to drive the fixing into the wood, so securing the other pieces of metal to the wood, in place of hammering the fixing home by hand. The rammer is an automated way of striking or driving the fixing with considerable force on to the other pieces of metal and into the wood with one action rather than the repeated actions that a non-powered hammer would require.

25 From the above, I conclude that as a matter of fact the actions undertaken by Mr W and similar employees when using the rammer in the way described above fall within the terms of category (c) of the prescribed occupations for prescribed disease A11, vibration white finger.

26 The appeal therefore succeeds. However, that does not of itself decide the claimant's entitlement to industrial injuries disablement benefit. It is clear from the county court decision that the claimant has vibration white finger, but it is not clear how extensive that is, nor what level of disablement results from it. I must refer the matter to the Secretary of State to decide the other aspects of the claimant's claim.

27 I add one final point. My decision depends in part on the careful findings of Judge Overend. It is a pity that the tribunal did not also use that decision. At the same time, and in part for this reason, this decision is essentially one of fact about a particular manufacturing process.

David Williams
Commissioner

31 January 2005

[Signed on the original on the date shown]