C1 215/1981

T/JW

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INDUSTRIAL INJURY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.I. 15/81

1. The decision of the Tribunal is that the accident sustained by the claimant on 31 October 1980 did not arise out of and in the course of the claimant's employment.

2. The claimant is a senior Disablement Resettlement Officer of the Department of Employment who lives at West Worthing and whose employment involves in addition to work at his main base office at Worthing calling at other job centres and paying domiciliary visits to disabled persons in his area (which covers Sussex and Surrey and extends at least as far as Aldershot). He does not work fixed hours but adjusts them to the duties that he has to perform. On 30 October 1980 his work took him to Guildford, where he attended a case conference about a particular disabled person and a decision was taken that he (the claimant) should see the disabled person concerned. Arrangements were then made that the claimant should interview him at the Aldershot employment office on the following day. He returned home that evening with or without calling back at his Worthing office. On the following morning he started out by car for Aldershot. As his home was slightly nearer to Aldershot than his office he intended to travel direct from his home to Aldershot. He did not get there, however, because at a roundabout at Broadbridge Heath (on a direct route from Worthing to Aldershot) his stationary car was struck in the rear by a following vehicle. He sustained injuries to his head and neck.

3. The claimant applied for a declaration that he had sustained an industrial accident, but this was refused by the insurance officer. He appealed successfully against this refusal to the local tribunal, who granted the declaration sought. The insurance officer now appeals to the Commissioner. He was represented at the oral hearing before us by Mr J P Canlin of the Solicitor's Office of the Department of Health and Social Security. The claimant presented his own case.

4. The question for decision is whether in terms of section 50(1) of the Social Security Act 1975 the accident arose "out of and in the course of" the claimant's employment, words which formerly appeared in

successive Workmen's Compensation Acts. It is accepted in this case that if the accident arose in the course of the claimant's employment it also arose out of it. The matter has been brought before a Tribunal of Commissioners because it is understood that a number of recent decisions have given rise to confusion and difficulty of application by those giving decisions on claims for benefit; see, for example, unreported Decisions CSI 1/80 and CSI 3/80 and the decision of a Divisional Court in Regina v National Insurance Commissioner, Ex parte Reed (reported as an Appendix to Decision R(I) 7/80). We have to confirm, however, that though we recognise that it is desirable where possible to lay down rules that present no difficulty of application in particular cases, it is, in the field of accidents to persons travelling to or from their work, impracticable to do more than indicate guide lines. We draw attention to the following passage from the speech of Lord Wright in one such case under the Workmen's Compensation Acts (Weaver v Tredegar Iron and Coal Company Ltd [1940] AC 955 at pages 975-6):-

> "The words of the Act are very general, no doubt designedly so. Experience has shown how infinitely various may be the facts to which the words are to be applied. Lord Buckmaster in Stewart's case [[1917] AC 249] uttered a warning against the mistake involved in attempting to define a fixed boundary between the cases that are within the statute and those which are without. "This", he said "it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case on particular facts is or is not within the meaning of the phrase". The realities of each case must be regarded."

5. In Decision R(I) 18/55, a case concerning an accident sustained by an agricultural advisory officer on a journey between his home and his first call of the day, the Commissioner (at paragraph 10) stated the question to be decided in the following terms:-

> "The question at issue is whether on the particular journey he was travelling in the performance of a duty, or whether the journey was incidental to the performance of that duty and not merely preparatory to the performance of it."

A correlative question could be propounded in relation to journeys from work. Asking himself that question, the Commissioner in that case decided that the claimant before him was from the moment when he left his home fulfilling an implied term of his contract of service and he allowed the claim. The Commissioner's statement of the question in that case was cited with approval and applied in Decision R(I) 9/74, a case about a relief petrol-filling station manager who worked as relief in one week in Surrey and was required to serve in Derbyshire in the following week, and who met with a road accident on his way from Surrey to Derbyshire on the direct route between the two places. He was at the time intending to go home for the intervening week-end as his home lay close to the direct road. The Commissioner asked himself the question above cited and answered it adversely to the claimant. An application for an Order of Certiorari to bring up and quash the decision was made to the

High Court who in their judgment (reported as an appendix to the Decision under the title Regina v National Insurance Commissioner Ex parte Fieldhouse) expressly approved the statement of the question as propounded in Decision R(I) 18/55, and held that, the Commissioner having applied the right test to the facts before him, the decision could not be disturbed. It is a fair inference from the terms of the judgment that they would not have disturbed it if the Commissioner had on the facts decided the case the other way. In other words they considered that it was for the tribunal of fact to draw the necessary inferences from the primary facts found, and that so long as the conclusion was not perverse an appellate tribunal concerned only with the question whether the decision was or was not erroneous in point of law could not disturb it.

6. Unfortunately the question so propounded does little more than state the problem with which the determining authorities are confronted and offers little guidance on how to solve it. We consider that more help on this is provided by the decision of the Court of Appeal in Vandyke v Fender [1970] 2 QB 292, a decision on the words "arising out of and in the course of" employment contained in a policy of insurance. Lord Denning MR after emphasising that the words should be given the same meaning as had been attributed to the same words in decisions under the Workmen's Compensation Acts said (at page 305):-

> "The two leading cases most apposite for present purposes are St Helens Colliery Co. Ltd v Hewitson [1924] AC 59; and Weaver v Tredegar Iron & Coal Co.Ltd [1940] AC 955. They show, to my mind quite conclusively, that when a man is going to or coming from work, along a public road as a passenger in a vehicle provided by his employer, he is not then in the course of his employment - unless he is obliged by the terms of his employment to travel in that vehicle. It is not enough that he should have the right to travel in the vehicle, or be permitted to travel in it. He must have an obligation to travel in it. Else he is not in the course of his employment. That distinction must be maintained: for otherwise there would be no certainty in this branch of the law."

7. That statement was made with special reference to the facts of the case but the principle of it is in our judgment not confined to cases where a claimant is travelling to or from work as a passenger in a vehicle provided by his employer. It may be his own vehicle, he may be driving it, and he may not be in or on a vehicle at all. The journey to or from work is not a journey in the course of employment unless the claimant is fulfilling a duty to his employer in undertaking it at the time or in the manner in which he is doing so. This last exception (which is in effect acknowledged to be valid by the terms of section 53(1)(a) of the Social Security Act 1975) precludes the laying down of an inflexible rule on the subject, but it is not an exception that is to be lightly extended.

8. The clearest instances of the exception arise in cases where the employer or his agent has expressly instructed or requested the claimant to make the journey at the time and in the manner in which he does so

(see for instance Decisions R(I) 27/54 and R(I) 27/56 and the recent decision of the Court of Appeal, distinguishing Vandyke v Fender supra, in Pattison v Costain & Press (Overseas) Ltd. [1979] 2 Lloyds L R 204). Other examples are where the employer has made an arrangement with the claimant for the latter to convey other employees to work with him, when the employer concerned (but not, apart from section 53 of the Social Security Act 1975, the employees conveyed) is in the course of his employment; see Decision R(I) 8/51. A third instance is where the employee is on the instructions or at the request of the employer carrying goods (other than his working tools or working papers, as to which see paragraph 11 below) to or from work with him; see Shepherdson v Hayward (1940) 333 BWCC 57 and Decision R(I) 17/51. The cases which give rise to more difficulty are those which like the present involve a person with peripatetic duties who is given by his employer a measure of discretion as to the arrangement of his working hours and travelling. It was recognised in Decision R(I) 4/70, which concerned a civil servant whose duties entailed both his working in his office and in visiting persons in their homes, that a person with such a discretion may be in the course of his employment when he is acting within that discretion. Decision R(I) 18/55 above referred to was no doubt decided on this basis. There may in such cases be a narrow distinction to be drawn between the circumstances in which such a person exercising such discretion is properly to be regarded as giving instructions to himself on behalf of his employer and those in which he is to be regarded as taking a personal decision with which his employer is not concerned. This is a question of fact, and two different persons considering the same facts may well draw different inferences.

9. The basic rule is that a person ordinarily commences the course of his employment when he arrives at his first or only place of work and terminates it when he leaves his last or only place of work. He may reach it earlier or leave it later if he has some mission or errand to perform for his employer at some place on his way to or from work (see Lye v British & Argentine Meat Co (1923) Ltd (1927)20 BWCC 341, Stokes v Fox (1932)25 BWCC 371 and Woodcock v Chester Co-Operative Society Ltd (1941 34 BWCC 173). The general rule above stated is well illustrated by the cases upon home helps, who save in special circumstances are regarded as in the course of their employment only from the time of arrival at their first call and then remain on duty until they leave their last call including any period of travel without diversions (authorised or unauthorised) for their own purposes from one call to the next; see Decision R(I) 12/75.

10. Where there is a break in the employment (whether quite short as for lunch) or longer as at the end of the day's work) the employee terminates the course of his employment on leaving the working premises, unless exceptionally he is regarded as remaining on duty during the break. In Reed's case referred to in paragraph 4 above, the Divisional Court set aside the decision of the Commissioner who applied the above rule to a police sergeant who had charge of his station and went home for lunch (which he was authorised to do) because the Court made a finding or drew an inference not made or drawn by the Commissioner that the claimant remained on duty in charge of his station throughout.

11. In the present case the claimant finished work at one place on 30 October and was due to start work on the following day at another place, and he could not perform his duty to his employers without making the journey from the one place to the other. If he had done so without any diversion he would have been in the course of his employment throughout the journey. Where in such a case there is a diversion for a meal or a night's rest the person leaves the course of his employment during the diversion, unless it is specifically directed by his employer or he has a discretion and ought properly to be regarded as having in the exercise of that discretion directed himself to make the diversion. More commonly in these cases a person with such a discretion will be regarded as having simply taken a personal decision on the way he will occupy himself during his free time between the end of the first spell of work and the beginning of the next. In Fieldhouse's case the Commissioner regarded the claimant as on his way home for the week-end and treated the fact that he was incidentally making his way from one place of employment to another as merely fortuitous. In the two cases the subject of decision CSI 1/80 and CSI 3/80 the Commissioners took the view that the journeys on which the accidents happended although in each case such journey was between the claimant's home and place of work were in substance journeys which were indissolubly bound up with the employee's work. We do not say that we should necessarily have reached the same conclusion on the facts, but we do not consider that either decision was erroneous in law.

12. It is impracticable in the light of the authorities binding on us to lay down hard and fast rules. The most that we can do is to point (not exhaustively) to circumstances that ought or ought not to be taken into account. It is well known that the fact that the accident occurs during the claimant's normal working hours, or that the employer is paying the cost of travelling or for the time spent in travelling does not automatically mean that the claimant is in the course of his employment (see decision R(I) 18/55 at paragraph 10) nor does the fact that the journey is a long one (see R(I) 12/75 at paragraph 12; or that the claimant is taking with him tools or papers with or on which he is to work (whether the property of himself or of his employer)(see Decision R(I) 78/53). Further we do not think that a journey which would not be in the course of a claimant's employment if undertaken direct from home is converted into a journey in the course of employment by the making of a token call at the claimant's normal base of work before commencing the journey, nor does the failure to make such a call prejudice a claimant. It is clearly relevant in determining whether a claimant is to be regarded as giving instructions to himself in the exercise of a discretion to consider whether the exercise of the discretion is reasonable.

13. In the present case the claimant worked at Guildford on the day preceding the accident and was due to work at Aldershot on the following day. He travelled home in between. Two of the members of the Tribunal have reached the clear conclusion (the other member of the Tribunal entertaining more doubt but not dissenting from the conclusion) that on the application of the above principles to the facts of this case the accident did not occur in the course of the claimant's employment. The claimant was not employed, as is a lorry driver, to travel nor was his work essentially

peripatetic in character so as to link travel and the fulfilment or his duties indissolubly together (the evidence shows that the claimant had a regular office but was sporadically required to leave that office and work elsewhere(. In so far as the claimant used the public highway his position was no different from that of any other member of the public. He was not directed to commence his journey to Aldershot at any particular time or to proceed by any particular route or by any particular method of transport. All that was required of him on the day of the accident was that he should present himself at the appointed time at the Aldershot employment office. In so far as he was not as a matter of practice subject to any specific direction by anybody, but was left to exercise his own discretion as to how he was to fulfil his duties, we do not see any reason why he should in the exercise of his discretion have directed himself to leave home at any particular time or to go by any particular route or by any particular method of transport. At the time of the accident the claimant was merely on the way to work. The journey was not on duty but to duty. Accordingly the accident did not arise in the course of the claimant's employment. The insurance officer's appeal is allowed.

(Signed) I O Griffiths
Chief Commissioner

(Signed) J G Monroe
Commissioner

(Signed) D G Rice
Commissioner

Date: 8 September 1981

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