Industrial Accident — Whether Arose Out of Claimant's Employment Largely A Question [illegible] Of Fact

55/96

MJG/mf/1/W/SAR

Commissioner's File: CI/289/1994

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 26 October 1993 as that decision is not erroneous in law; Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant a man born on 29 February 1955. The appeal is against the unanimous decision of a social security appeal tribunal dated 26 October 1993 which dismissed the claimant's appeal from a decision of the adjudication officer issued on 4 March 1993 to the effect that "there was not an industrial accident because the accident [on 6 March 1987] did not arise out of and in the course of the claimant's employment ... Social Security Contributions & Benefits Act 1992 Section 94(1) and (2)."

3. The facts briefly were summarised by the adjudication officer for the tribunal as follows,

> "[The claimant] submitted an accident declaration form on 22.10.92 stating he was suffering from Post Traumatic Stress Syndrome as the result of an incident on 6.3.87. The incident was as follows: He was listening to the radio as he drove his lorry on the motorway when he heard a newsflash reporting the Zeebrugge Ferry disaster [i.e. the accident to the Herald of Free Enterprise]. He had used the ferry regularly. In fact he had been on the same ferry route - but not the same ferry - the night before the disaster, and he knew many of the drivers who used it and members of the crew who lost their lives. He says his mood changed, immediately from

being happy and carefree to being depressed and upset. [The claimant] maintains that listening to the radio was necessary in his employment as he had to listen out for traffic delays etc. as he drove along and therefore believes that the accident arose out of and in the course of his employment."

4. The adjudication officer's submission to the tribunal read as follows,

"I would not dispute that on 6.3.87 [the claimant] suffered a shock, on hearing of the ferry disaster which later resulted in Post Traumatic Stress Syndrome. However, in order to succeed in this claim he is required to show that at the time of the accident he was in the course of his employment and that the accident arose out of that employment. A person may suffer shock or fright while at work through witnessing or learning of an occurrence of a tragic nature and although he may not have been involved in the occurrence himself the shock or fright and its after-effects may be found to constitute personal injury by accident arising in the course of his employment. The decision on whether it also arises 'out of employment' would depend on whether there was a material connection between the occurrence and the employment."

I accept that broad-brush picture of the law on the subject as being correct.

5. The social security appeal tribunal made the following findings of fact,

"1. It was common ground and accepted that the appellant had suffered Post Traumatic Stress Syndrome on 6.3.87 as a result of hearing of the Herald Free Enterprise ferry disaster whilst driving his lorry. The accident had therefore happened in the course of his employment.

2. As to the primary fact in issue, the tribunal found as a question of fact that the accident did not arise out of the appellant's employment and was not therefore an industrial accident.

3. Whilst the tribunal accepted that it may have been in the interests of the appellant and his employers for him to listen to the radio to hear amongst other things road traffic reports, this could not be regarded as an essential condition of his employment."

6. The tribunal's reasons for decision included the following,

"In deciding that the accident did not arise out of the appellant's employment, the tribunal took the view that the accident i.e. the shock resulting in post traumatic stress

syndrome suffered by the appellant would have occurred wherever he had heard the news of the sinking of the Herald of Free Enterprise, whether it was at home or in the street or elsewhere. It was merely coincidental that he happened to hear the awful news which involved the death of fellow lorry drivers and colleagues when he was driving his lorry home having crossed the Channel the previous night on another ferry. The tribunal has not found listening to the radio was incidental to and part of the appellant's employment. It was true that the appellant would not have suffered the degree of shock he did if he had not been a lorry driver acquainted with those involved in the Herald of Free Enterprise accident but the shock of the accident would have occurred wherever the appellant was at the time he heard the news. The tribunal relied upon the Commissioners decisions R(I)62/53 and R(I)22/59 in deciding that the accident did not arise out of the course of the appellant's employment. The shock of hearing of the accident was obviously different to a case of an appellant actually present at an accident during the course of his employment and suffered shock when witnessing the same as in decision CI/387/98 (unreported). The accident was in the course of the appellant's employment but it did not arise out of it and it was not therefore an industrial accident."

7. I accept that reasoning by the tribunal as correct in law and I consider that the tribunal's decision should stand. There is some slight difficulty over the use by the tribunal in its reasons of the sentence, "the tribunal has not found that listening to the radio was incidental to and part of the appellant's employment", whereas in their actual findings of fact the tribunal had put the matter differently i.e.,

> "Whilst the tribunal accepted that it may have been in the interests of the appellant and his employers for him to listen to the radio to hear amongst other things road traffic reports, this could not be regarded as an essential condition of his employment."

However, I think the apparent inconsistency between these statements is more apparent than real. In any event I do not think that the issues in this case really turn on whether or not the claimant was required to listen to the radio while he was driving his lorry or even if listening was incidental to the employment. The more general reasoning adopted by the tribunal is in my view correct and I have therefore upheld the tribunal's decision.

8. In a case like this a decision whether or not an accident arose out of the employment, within the meaning of section 94(1) of the Social Security Contributions and Benefits Act 1992, is really a question largely of fact. Appeal to the Commissioner from the decision of the social security appeal tribunal lies only on its being shown that the tribunal erred in law (Social Security

Administration Act 1992, section 23). I have no power to interfere with purely factual conclusions of the tribunal. In this case I consider that the tribunal's finding that the accident did not arise out of the appellant's employment was essentially factual. I should add though that, even if it were to be regarded as a finding of mixed fact and law, I would agree with the way in which the tribunal interpreted the law and applied it to the facts in this case. The presumption in section 94 (3) of the Social Security Contributions and Benefits Act 1992 that, "an accident arising in the course of an employed earner's employment shall be taken , in the absence of evidence to the contrary, also to have arisen out of that employment" does not assist the claimant , since all the relevant facts are known and there is no room for the operation of the presumption. In any event, the facts demonstrate "evidence to the contrary".

9. On such issues, it is not always profitable to consider other Commissioners' decisions, reported or not, as they tend to depend on their own facts. However, as well as the cases to which the tribunal referred, I will mention two unreported Commissioners' decisions because the claimant has relied upon them. The first of those is on file CI/387/1988 where another Commissioner held that where a claimant suffered mental trauma on seeing a workmate who was dying from angiosarcoma [cancer] of the liver because of his having worked with vinyl chloride monomer could successfully assert that the mental shock thus caused was an accident arising out of his employment. At paragraph 11 of that decision, the learned Commissioner said,

> "The established facts before me are that the accident was the sighting of the colleague. I have considered whether the sighting was a common risk, but it seems to me that the character of the claimant's employment intensified the risk. He worked under the same conditions as his stricken colleague. Because of this the risk of suffering shock was greater than that of member of the public."

10. In that particular case, the claimant himself had worked for many years with vinyl chloride monomer and therefore was himself at potential risk of developing cancer of the liver. It is small wonder that when he saw his colleague in such a bad state that the claimant suffered shock. But that is not the same as the facts of the present case. Admittedly the claimant had had to use the same ferry crossing but he had successfully made the trips. Any danger there might have been from the ferry sailing had gone as soon as the claimant had driven off the ferry. There was no continuing risk such as the continuing risk of cancer in the decision on file CI/387/1988 nor was there necessarily any such risk in the future, particularly as the claimant could reasonably assume that the occurrence of the disaster would cause further safety precautions to be taken.

11. The other decision to which reference has been made is a decision which I gave on file CI/536/1992. There again the facts

were very different and concerned a care assistant in a residential home who in the course of her work was under considerable stress and in fact suffered a stroke while she was at work (though asleep in bed). In that case, I simply dismissed the adjudication officer's appeal against a favourable decision of the social security appeal tribunal that the stroke was an accident arising out of the course of the employment. But again, I stressed that to some extent the issues were purely factual. There is in my view no parallel between the facts of that case and the facts of the present case.

12. It follows that I must dismiss the appeal, although this does not in any way indicate any lack of sympathy for the claimant in the undoubted mental illness which he has suffered as a result not only of hearing of the Herald of Free Enterprise disaster but apparently of some other matters which are referred to in the psychiatrist's report of 16 October 1992. I also notice that in his letter of appeal dated 9 April 1993 the claimant referred to the possibility of another industrial accident of a quite different nature while he was driving his lorry on 10 March 1987. I do not know what has happened about his application for a declaration of industrial accident in relation to that. It goes without saying that my having dismissed the present appeal does not in any way affect the proceedings in relation to the other accident.

(Signed)

M.J. GOODMAN
Commissioner

(Date) 13 August 1996