

C1 321/1980

HE/MC

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decision C.I. 2/82

1. Our decision is as follows:

- (i) The claimant was employed in employed earner's employment for periods amounting in the aggregate to not less than 20 years and expiring on 3 July 1979 in occupations prescribed in relation to occupational deafness. On 2 and 3 July 1979 his employment was "an occupation involving the use of pneumatic percussive tools on metal for at least an average of 1 hour per working day": Social Security Act 1975, section 76(1) and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980 (S.I. 1980 No. 377), regulation 2(d) and Schedule 1, part I, paragraph 48(c);
- (ii) The claimant's employment on 2 and 3 July 1979 was not "an occupation involving assistance in the use of pneumatic percussive tools on metal for at least an average of 1 hour per working day": Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980, schedule 1 part I paragraph 48(c);
- (iii) The claim for disablement benefit on the ground of occupational deafness made by the claimant on 3 December 1979 was made within 12 months of his ceasing on 3 July 1979 to be employed in an occupation prescribed in relation to occupational deafness (see paragraph (i) above) and was therefore timeous: Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980, regulation 40(2).

The appeal of the insurance officer against the decision of the local tribunal is therefore dismissed.

Decision C.I. 2/82

2. This appeal was the subject of an oral hearing before us on 11 December 1981 at which the insurance officer was represented by Mr R G S Aitken of the Solicitor's Office of the Department of Health and Social Security and the claimant was represented by Mr A G Finn, the district delegate of the claimant's Association, the Amalgamated Society of Boiler Makers, etc. We are indebted to Mr Aitken and to Mr Finn for their considerable assistance to us in the determination of the factual and legal issues in this appeal.

3. The claimant is a man now aged 55 who for some 36 years expiring on 21 July 1978 had worked for a well known engineering company in the north-east of England in various capacities as a boiler-maker plater in the "bridge yard" of that company. His work for that company undoubtedly was an occupation involving the use or supervision of the use of pneumatic percussive tools in the cleaning, dressing or finishing of cast metal or of ingots, billets or blooms and was therefore within the prescription (for occupational deafness) contained in paragraph 48(a) of part I of schedule 1 of the Prescribed Diseases Regulations 1980 (cited in paragraph 1 above). However, he did not make a claim for disablement benefit on account of occupational deafness until 3 December 1979, which was more than 12 months after he had ceased employment with that engineering company on 21 July 1978. So far therefore as founding by reference only to employment with that company the claim was undoubtedly outside the 12 months' limit prescribed by regulation 40(2) of the Prescribed Diseases Regulations. That is an absolute time limit and contains no provision for extension. The regulation has been held by a Tribunal of Commissioners in Decision R(I) 2/79 to be intra vires and thus properly made within the provisions of the empowering legislation.

4. However, the claimant sought to overcome the 12 months' limit by reliance also upon two days work done by him on Monday and Tuesday, 2 and 3 July 1979 for a different engineering company in the north-east, which he contended also fell within the prescription of occupations for occupational deafness in paragraph 48 of the Prescribed Diseases Regulations - and, as a matter of simple chronology, on that footing his claim made on 3 December 1979 would be in time as being within 12 months of the second of those two days' work, i.e. 3 July 1979: for it would not matter that there was a gap between finishing work in the "bridge yard" on 21 July 1978 and restarting work on 2 July 1979. What is therefore an extremely narrow crucial issue has arisen for decision in this case, namely whether those two days' work were or were not in a prescribed occupation. As to that we should say at once that in order to "ring the bell" those two days must in our judgment be shown to have been days of substantial and not merely trivial or colourable fulfilment of the statutory work description relied upon, and that accordingly we reject Mr Finn's submission that it is enough to 'start time running again' that a claimant uses a pneumatic percussive tool at all and that it need not be shown that he had complied with the 'at least one hour per working day' rule in paragraph 48(c) of the 1980 Regulations. We therefore proceed to consider whether the work done by the claimant on 2 and 3 July 1979 came effectively within one of the prescribed occupations for occupational deafness.

5. The work was described by the claimant in his form of claim as that of a boiler-maker (plater) at a place of employment which was an old foundry. The employers at that foundry stated on 18 December 1979 (in reply to a departmental form of enquiry) that the claimant had been employed as a fabricating plater, but that he was not involved in any of the prescribed occupations (they are listed in detail in the form). The company added, "In the two days spent in this company's employ, he was fabricating light fabrications in steel, using burning equipment, welding equipment".

6. A considerable volume of documentary evidence was placed before us concerning the exact nature of the claimant's work on 2 and 3 July 1979, supplemented by the careful report (on form LT3) of the local tribunal as to the evidence given to it. But we need not now refer to that evidence in detail because it has in fact been 'overtaken' by oral evidence given before us at the hearing on 11 December 1981 by the claimant, which we have been able to evaluate with the assistance of valuable technical explanations tendered by the claimant's representative Mr Finn, who has considerable knowledge of processes carried out by 'boiler-makers'. We were also considerably assisted by a drawing, put in evidence by the claimant, of the inside of the old foundry showing the claimant at his work. He is shown joining together by tack welds two pipe-like hollow sections of metal for subsequent working upon by men taking welding tests. The welding tests, it was explained to us, consisted of fully welding together two sections of 'pipe' in prescribed alignment and to prescribed welding standard, later tested by technical inspection and analysis. The welders themselves were undoubtedly using a pneumatic percussive tool, namely a "slagging gun", on metal for at least one hour per day and thus would themselves satisfy the prescription of paragraph 48(c) of the 1980 Regulations.

7. At the local tribunal and prior to the hearing before us, the claimant's case was conducted on the footing that he did not himself use or supervise the use of percussive tools but that he did "assist in the use of" those tools. However, that was incorrect because the claimant's evidence before us established beyond any doubt that in his two days' work preparing some 50 test pieces for the welders' tests he was himself using a slagging gun for a time which must have amounted to at least one hour on each of the two days in question. Indeed, after hearing the claimant's evidence in chief and under cross-examination Mr Aitken conceded this. Our consequent finding of fact would be sufficient to dispose of this appeal but as the case was also extensively argued before us on the footing that the claimant assisted in the use of pneumatic percussive tools, we consider it right to express in reference to the facts before us our unanimous opinion on the construction of the phrase "assisting in the use of" which expression appears several times in paragraph 48 of the 1980 Prescribed Diseases Regulations, although for reasons later below expressed in greater detail we have found as a fact that the claimant in this case, although he himself used a pneumatic percussive tool, cannot be said to have assisted in the use of the pneumatic percussive tools being used by the welders.

Decision C.I. 2/82

8. It is at this point appropriate to set out all those occupations which are now prescribed by paragraph 48 of Schedule 1 (part I) of the 1980 Prescribed Diseases Regulations for occupational deafness. They are as follows:

"Any occupation involving:

- (a) the use, or supervision of or assistance in the use, of pneumatic percussive tools, or the use of high speed grinding tools, in the cleaning, dressing or finishing of cast metal or of ingots, billets or blooms; or
- (b) the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal in the ship building or ship repairing industries; or
- (c) the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal, or for drilling rock in quarries or underground, or in coal-mining, for at least an average of one hour per working day; or
- (d) work wholly or mainly in the immediate vicinity of drop-forging plant (including plant for drop-stamping or drop-hammering) or forging press plant engaged in the shaping of hot metal; or
- (e) work wholly or mainly in rooms or sheds where there are machines engaged in weaving man-made or natural (including mineral) fibres, or in the bulking up of fibres in textile manufacture; or
- (f) the use of machines which cut, shape or clean metal nails; or
- (g) the use of plasma spray guns for the deposition of metal".

9. The only prescription of even potential direct relevance in the present case is that contained in paragraph 48(c) above, i.e. "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"; but we have set out the whole of the prescription for purposes of comparison, as we consider that the construction arrived at in the context of any individual occupation prescribed must be consistent in relation to the others - in particular the others in respect of which also the same formula of words is embodied.

10. The concept of "assistance in the use of pneumatic percussive tools" did not appear in the original prescription for occupational deafness and was introduced only by amending regulations (S.I. 1979 No. 992) as from 3 September 1979. Those amending regulations also introduced in their entirety sub-paragraphs (c), (e) and (f) and (g) of paragraph 48. The words "supervision of or assistance in the use of pneumatic percussive tools" which occur in paragraphs (a), (b) and (c) of paragraph 48 were introduced by the amending regulations in consequence of the majority decision of a Tribunal of Commissioners in R(I) 15/75, to the effect that the words "any occupation involving the use of" could not be taken to extend to a person who himself did not use a pneumatic percussive tool, but only supervised or assisted in its use.

11. The material phrase has now been embodied in the 1980 Prescribed Diseases Regulations. But those are merely consolidating regulations which have reproduced the exact wording of the earlier regulations as amended in 1979. The 1979 amending regulations are expressed to have been made after reference to the Industrial Injuries Advisory Council, and (as was done in Commissioner's Decision C.I. 7/81 (unreported)) though we are concerned to construe the regulations in accordance with the accepted canons of legal construction we regard it as legitimate to look at such Council's Report in point - Cmnd 7266 (July 1978) - as indicative of the mischief to the remedying of which the amendments were directed (see also Black-Clawson International Limited v PapierWerke Walhof-Aschaffenburg AG [1975] A.C. 591). Paragraph 36 of the report is of particular importance and we set it out in full:

"36. The occupations prescribed for occupational deafness limited cover to the actual operator of the tool; in a case of drop-forging or forging press plant, because of the size of the equipment and the operation, this meant the operating team. The close limitation of these definitions has led to problems of interpretation, in particular as to the meaning of the work in the 'immediate vicinity' of drop-forging or forging press plant. Many of these problems have now been resolved and the independent authorities who have had to resolve them in connection with individual claims have adopted what we consider to be a common-sense and practical view of the 'immediate vicinity' relating it both to distance from the operating plant and to the particular circumstances of the case. It has been suggested to us in evidence that the term is too restrictive and cover should be extended to anyone in the vicinity of the forging plant who is subject to its noise. The scheme, however, requires clear and close definitions that carry a reasonable assurance that the numbers coming forward for medical examination will be within the capacity of the audiological services. The proposed extension would be too vague and wide and to have some

Decision C.I. 2/82

order and meaning would require measurement of noise levels and the length of exposure to them, but for reasons which we explain in paragraph 42 we are doubtful about the practicability of that course. The present definition is now well understood and we do not advocate any change. We do, however, consider that the cover in relation to pneumatic percussive tools has proved too restrictive. In some of the processes, in addition to the actual user of the tool, there are others involved who work closely with him and who are equally exposed to the noise of the operation both as to its intensity and duration. Only a small number of workers are excluded by this restriction, but we regard it as an unfortunate anomaly, more especially as some of those it excludes themselves used pneumatic tools before moving to their present work of assisting other users of such tools. We therefore consider that the cover should be extended to include those who directly supervise or assist with the use of the tools thus providing a close parallel with the cover given to the various participants in drop forging. Such an extension of the scheme, bearing in mind the small number of claims which would be engendered, would not prejudice the scope for extension of cover to other, quite separate, occupational groups" (our underlining).

12. Although the subsequent amending regulation, now part of paragraph 48 of the 1980 Regulations, introduced the expression 'supervision of assistance in the use of pneumatic percussive tools' it did not use the word "directly" contained in paragraph 36 of the report.

13. We should here interpose that Mr Finn emphasised to us that with the comparatively rare exception of "block busters" pneumatic percussive tools are by their nature capable of being used by one person only. Moreover a slagging gun was shown to us; and though it produces some 130 decibels of noise when operating it is in fact a comparatively small tool which could only conceivably be used by one person.

14. The question therefore is what can be meant by "assisting in the use of" a pneumatic percussive tool of the ordinary one-man-operated variety?

15. Approaching that question at large we concluded that in the absence of further wording in point the expression "supervision of, or assistance in, the use of pneumatic percussive tools" would in the ordinary meaning of those words import that the activity in issue - be it supervision or assistance - must be both personal and direct in the sense of acting in direct relation to the primary user of the tool, as distinct from acting only indirectly (as, for example, down a chain of intermediate responsibilities). And so regarded the absence of the word "direct" is of no practical significance.

16. In applying that conclusion as regards "assistance" we are strongly reinforced by knowledge that the same conclusion in substance has been reached as regards "supervision", in the same context, by the Tribunal Decision C.I. 14/81.

17. So to hold is not to give a decision which in relation to a "one-man-operated" pneumatic percussive tool must mean that no one can bring himself within the broadened formulation. Our construction would fully accord with the conclusion reached in R(I) 9/81 that a crane driver "assisted in the use of" a pneumatic percussive tool when operating his crane to move, position during the operation of the pneumatic percussive tools upon them, and remove, metal castings. And, whilst each case must be governed by its own particular facts, we can envisage other cases where although no crane is involved the claimant has given direct assistance by means of holding (manually or by means of a machine) metal on which a pneumatic percussive tool was being used or was an indispensable part of a team all acting in concert and contemporaneously in an operation, the principal feature of which was the use of a pneumatic percussive tool.

18. Whilst we do not discern any intended divergence in point of principle between the learned Commissioners who respectively decided decisions C(I) 12/80 (unreported) and R(I) 9/81 we would, however, - on the evidence as reported, and without the more detailed information which would have been before the learned Commissioner - share the doubts expressed in the latter as to the correctness of the actual decision in C(I) 12/80 (unreported), where although the crane driver did not actually use the crane to hold the metal in position whilst the metal was being worked upon by a pneumatic percussive tool the learned Commissioner found as a fact (para 12) that "the dressers depended to a substantial extent upon the crane driver's ability to.... facilitate the dressing by changing the position of the casting as and when required".

19. We should for completeness recall also that the specific work descriptions the subject of the lettered sub-paragraph in the right hand column of (now) Schedule 1 Part 1 of the 1980 Regulations are all led by the introductory heading "any occupation involving". To our minds those words clearly indicate that the prescribed activities need not be the exclusive activity involved in the occupation.

20. However, when we come to apply our conclusions upon the issues of construction to the detailed facts of the instant case (and being in that regard concerned only with the question of "assistance in" the use of pneumatic percussive tools, since there is on the present facts no suggestion of "supervision") we are of clear and unanimous view that the claimant did not on 2 or 3 July 1979 assist in the use of pneumatic percussive tools. His job preceded that of the welders undergoing test just as the job of the red leader in R(I) 15/80 preceded that of the caulkers. It is true that he would go over to individual welders (in a comparatively large area of building) if

Decision C.I. 2/82

they needed his skilled assistance in aligning the two parts of the pipe that were to be welded. Nevertheless his work with the welders was not truly contemporaneous with their use of pneumatic percussive tools but either preceded or followed the particular use by the welders of their own pneumatic percussive tools (slagging guns) and/or welding equipment.

21. Lastly we would record that following the favourable decision of the local tribunal, the "diagnosis question" of whether in fact the claimant was suffering from a sufficiently high degree of hearing loss was referred by the insurance officer (under regulation 27(4) of the 1980 Regulations) to a medical board for determination but that such medical board decided that the claimant did not in fact have a sufficient degree of hearing loss. That has not, however, made our decision upon the present appeal wholly academic, since we have also been told that such medical board decision is under appeal to a medical appeal tribunal. But as to that it is sufficient for us to confirm the reference by the insurance officer of the diagnosis question to the medical authorities.

(Signed) I Edwards-Jones
Commissioner

M J Goodman
Commissioner

R F M Heggs
Commissioner

Commissioners' File: C.I. 321/1980
C I O File: I.O. 5235/I/80
Region: Northern

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