C1 494/1981

C.I. 494/1981 (RHODES) ≡ R(I)6/82

This decision is starred because, on an insurance officer's appeal, it reviews existing Commissioners' decisions and other case law on unexplained or 'spontaneous' accidents at work. The authors of the decisions have, where possible, been consulted by me. I do not consider that my decision makes any new law.

M.J.G.

MJG/MP

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR INJURY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the accident suffered by the claimant on 25 June 1981, though it arose in the course of his employment, did not arise out of that employment. Consequently, injury benefit is not payable to him but he is not required to repay injury benefit paid to him for the inclusive period from 26 June 1981 to 25 July 1981: Social Security Act 1975, sections 50, 56, 86, 107 and 119. The appeal of the insurance officer against the decision of the local tribunal is therefore allowed.

2. The claimant is a man now aged 32. On 25 June 1981 he was at his work as a maintenance engineer in a bakery. He was working on night shift from 10 00 pm to 6 30 am. At 4 00 am on 25 June 1981 he suffered an undoubted accident, which he subsequently described as follows:

> "I was walking round the milling machine in our workshop, on a dry tiled floor. I went outwards on my left ankle and heard a crack. I went to sit down as the pain was quite intense. It was then examined by a first aider who suggested I go to hospital for an X-ray, where a bone was found to be broken. The plaster cast has to remain on for three weeks. As to what made me go over, I don't know, it can happen to anybody really. It is the first time its happened to me and I hope the last, having to get about on crutches is no easy matter as I am an active person."

3. That account of the matter had already been confirmed by the employers in their answers on form BI76 dated 1 July 1981. They described the accident as "/Claimant/ walked over on side of foot - no apparent cause or reason". They confirmed that the accident had been reported to them and that the claimant was observed to be "Painful and swollen inside (L) foot". They also stated in answer to a telephone enquiry by the Department that there was enough room round the milling machine to walk easily. It was not cramped.

There is no allegation that the floor was in any way unsafe.

4. In his grounds of appeal to the local tribunal the claimant stated,

> "I was in the course of my employment on night shift (10.00 pm-8.00 am). I was working on a job on the work bench. I had to go to our supply of nuts/screws etc which was to the right behind the milling machine, it was 4.00 am in the morning. I was in my proper place of work (the engineering workshop)."

At the local tribunal there was evidence given that the claimant was not on bonus or piece work.

5. On that evidence the local tribunal by a majority allowed the claimant's appeal against the decision of the insurance officer that the claimant had not suffered an industrial accident. The majority held that, as well as the accident happening in the course of the employment (which is not in dispute), the accident arose out of the employment (see section 50(1) of the 1975 Act). The dissenting opinion in the local tribunal stated "not accepted that the accident arose out of his work, claimant merely happened to be at work when accident occurred".

6. The insurance officer appealed to the Commissioner against the majority decision of the local tribunal. The appeal was the subject of an oral hearing before me on 7 April 1982. The claimant did not appear, neither was he represented, but the insurance officer was represented by Mr J P Canlin of the Solicitor's Office of the Department of Health and Social Security. I am indebted to Mr Canlin for his assistance at the oral hearing. I also took into account at the hearing, and in considering this decision, the detailed written submissions made by the claimant's association.

7. The essential point in the insurance officer's appeal is contained in paragraph 8 of the written submission of the insurance officer now concerned (dated 20 November 1981), which reads,

> "In a recent reported decision R(I)11/80 the Commissioner held, in a case involving a claimant who fell to the floor and struck his head, that the cause of the fall was irrelevant to the industrial accident question, whether the cause be a risk at the premises, some inherent personal defect or something unexplained. Whilst the principles expressed /in that decision/ are of binding effect on future claims involving identical circumstances they do not, I submit, readily apply themselves to the case of a pathological change not followed by a subsequent chain of events - eg a fall causing additional injury".

8. In addition the insurance officer now concerned submitted (paragraph 9),

> "In the decision on Commissioner's file CI 317/1978 the

Commissioner decided that an accident which befell the claimant while walking to his car in the course of his employment did not arise out of that employment. The claimant had twisted his knee and this had resulted in a fracture of the condyle of the tibia but there was no evidence or contention that the accident arose from any particular function of his employment nor did any site risk (eg a stone) contribute thereto. In the later decision on Commissioner's file CI 439/1979 the Commissioner held that an accident suffered by a claimant who fractured his ankle when his foot 'went under' him while walking across a clear floor was an industrial accident as the accident had arisen out of the claimant's employment. In reaching this decision the Commissioner considered and cited several decisions of the courts but I would respectively observe that in all those cases the claimant sustained injury either by falling on the employer's premises or by those premises falling on him as opposed to the present case where the injury was not caused by coming into contact with any external object".

9. The first matter to be considered in arriving at a decision in a difficult case of this kind is whether or not there is applicable the statutory presumption contained in section 50(3) of the Social Security Act 1975, in the following terms,

> '50(3) ... an accident arising in the course of an employed earner's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment'.

That presumption (then contained in virtually identical words in section 7(4) of the National Insurance (Industrial Injuries) Act 1946) was considered by the Divisional Court in Regina v National Insurance (Industrial Injuries) Commissioner, Ex parte Richardson /1958/ 1 W.L.R. 851 at 855 (printed as an appendix to Commissioner's decision R(I) 21/58). At page 855, the Lord Chief Justice said of the statutory presumption,

> "... if a person proves merely and there is no other evidence except that he suffered an accident in the course of his employment, then it is to be deemed, it is taken to be proved, that it arose out of the employment. But if there is evidence to the contrary by whoever it is given, that is to say, the facts which are before the Commissioner can amount to evidence to the contrary, then the presumption or the deeming disappears, and if once that deeming disappears it is then for the applicant to prove that the accident did arise not only in the course of but also out of his employment ... the words of the section are 'in the absence of evidence to the contrary', and that has been held before now by the Industrial Injuries Commissioners and, in my opinion, quite correctly, to mean no more than this, that if there is evidence before the Commissioner that

the accident does not arise out of or in the course of the employment, then there is no presumption at all and it is left to the parties to prove the case in the ordinary way".

10. In similar vein was a dictum of a Tribunal of Commissioners in R(I) 16/61 where (in paragraph 5 of their decision) the Tribunal said:

> "/The statutory presumption/ was relied on also, but as the facts are known and the question is one of applying the law to them it seems to us that there is no room for the application of /the presumption/"

In decision R(I) 1/64 the learned Commissioner stated (paragraph 9) that "evidence" in the phrase "in the absence of evidence to the contrary" (section 50(3)) meant something more than speculative inference, although it meant something less than "proof".

11. In my judgment those statements of the law apply in this case to make the statutory presumption in section 50(3) of the 1975 Act inapplicable. The facts here are fully known and it is a question therefore of interpreting them in the light of the ordinary test in section 50(1) of the 1975 Act, namely that the accident must be proved on a balance of probabilities to arise out of and in the course of the employment. There is no room for the presumption where all the facts are known, as here, even though the precise manner in which the claimant's ankle bone came to fracture is not known. Nevertheless the circumstances of the occurrence are fully known and, in my judgment, that is clearly "evidence to the contrary", so as to make the presumption inapplicable. I therefore next consider whether the claimant, as well as showing that the accident arose "in the course of" of the employment (which clearly it did), has also shown on the balance of probabilities that it arose "out of" the employment.

12. The phrase "arising out of and in the course of employment" occurred in the Workmen's Compensation Acts, which preceded the National Insurance (Industrial Injuries) Act 1946, and there are consequently many reported decisions of the courts on the meaning of that phrase. The leading cases in this context are reviewed by the learned Commissioner in R(I) 11/80 and also in his unreported decision on Commissioner's file CI 439/1979. There is therefore no need for me to review all the reported cases in this decision except in so far as they are directly material to the present problem. For the sake of completeness I should perhaps add that the only authorities referred to in the unreported decision of the Commissioner which are not also referred to in R(I) 11/80 are Thom v Sinclair /1917/ A.C. 127; Dennis v White /1917/ A.C. 479; Millar v Refuge Assurance Co Ltd 1912 SC 37, 5 BWCC 522; and Harder v Gain and Sons (1916) 9 BWCC 328.

13. In reviewing those latter cases in the unreported decision on file CI 439/1979, the Commissioner referred to the following statement by Lord Dunedin in Millar v Refuge Assurance Co Ltd, "the distinction that is /drawn in some other cases/ is between accidents

which happen to a man, and are, so to speak, brought upon him by his /employment/, and accidents which, although a man may be in one sense upon his /employment/, are just accidents which may happen to everybody. Now, the distinction even between these two classes comes to be very fine ..." The Commissioner then went on to consider the decision of the Privy Council in Brooker v Thomas Borthwick and Sons Ltd /1933/ A.C. 669 and quoted a passage from the opinion of Lord Atkin (at page 677 of the report),

> "But if he /the employee/ is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment ..... So that if the roof or walls fall upon him, or he slips upon the premises, there is no need to make further enquiry as to why the accident happened".

14. That statement by Lord Atkin accurately, in my view, summarises the law on the subject. However, the Commissioner in his unreported decision said that he thought that Lord Atkin's statement "avoids the fine distinction mentioned by Lord Dunedin in Millar's case". That is not, with great respect, in my view correct. The distinction is present in all the cases and nothing said by Lord Atkin obliterates that distinction. There must not only be an "accident" but it must also arise out of the employment. The examples given by Lord Atkin are merely examples of accidents which do arise out of the employment. In each of the cases mentioned by Lord Atkin the employee comes into contact with some part of the employer's premises, plant or machinery. I make this point because the insurance officer was concerned that the learned Commissioner's remark about the avoidance of the fine distinction should be misunderstood and given too wide an interpretation. I agree that it might be susceptible of misunderstanding, hence my above comments.

15. The same Commissioner was the author of decision R(I) 11/80 and in the course of an erudite discussion of the subject, the Commissioner made statements in paragraph 9 of that decision which were accepted by Mr Canlin on behalf of the insurance officer and which I also regard as accurately stating the law on the subject. I set out the statements here because a later passage in R(I) 11/80 (paragraph 11 referred to in paragraph 17 below) caused Mr Canlin some concern and in my judgment it is paragraph 9 of R(I) 11/80 which represents the ratio decidendi of that case. That paragraph reads as follows:

> "It was established under the Workmen's Compensation Acts that where (in what is sometimes called an internal accident) a physiological or pathological change for the worse occurs while a person is at work, such as a fit or a heart attack or a dislocation, that change for the worse is, if caused by the work that is being done itself, injury by accident for the purposes of the section; but that, on the other hand, where one of these happens while a person is at work but not because of his work the change is not itself injury by accident arising out of the employment (see

Oates v Earl Fitzwilliam's Collieries Co [1939] 2 All E.R. 498 at pages 502-3). But in any case if the internal accident causes the person concerned to fall and injure himself then that injury may be injury by accident arising out of the employment even if the change itself was not".

16. That is clearly an accurate statement of the law and is accepted as such by Mr Canlin. Its application to the facts of this present case may cause some difficulties but I deal with that matter below. For the moment I am concerned with the general principles on which the insurance officer asked for elucidation. The learned Commissioner then went on to say (paragraph 9):

> "Thus in one of the cases cited to me ... (Wicks v Dowell and Co Ltd [1905] 2 K.B. 225 ... a workman standing by an open hatchway at work suffered an epileptic fit as a result of which he fell down the hatchway and injured himself and this was held to arise out of his employment. It was undoubtedly a feature of that case on which stress was laid that the claimant's work had put him in a position of danger close to the hatchway and [the insurance officer's representative] submitted that this was a necessary condition of such an accident being treated as arising out of the employment."

17. The learned Commissioner was then concerned to demonstrate that it is not essential for an accident to arise out of the employment that the claimant should be in a place that was inherently dangerous to anyone. He referred to the leading Court of Appeal case of Wilson v Chatterton [1946] K.B. 360, in which a farm worker had had an epileptic fit and fell face downwards in a furrow in which some water was lying and drowned. It was held that that was an accident arising out of and in the course of employment. Speaking about Wilson's case the Commissioner said (paragraph 11 of R(I) 11/80), "This [the furrow] was not a place of special danger".

18. Mr Canlin was concerned about that statement and cited to me the following passage from the judgment of Lord Justice Scott in Wilson's case (at page 364 of the report):

> "There had been wet weather and the furrows in the field had become filled with water. [The employee] was an epileptic. This was known to his employer but we do not think that knowledge increases or that ignorance would diminish the employer's liability. He had an epileptic fit and fell face downwards at a place where there was a rut half full of water. His death was due to asphyxia. No doubt owing to his fit he was unable to move his face out of the water. The place was dangerous to him, though there would have been no danger to a normally healthy person" (my underlining).

19. The point made by Mr Canlin was that in the Wilson case the place was one of special danger to the claimant because of his condition. That is of course perfectly true and when the learned Commissioner said, in R(I) 11/80, "this was not a place of special

danger", he was of course referring only to what Scott L.J. described as "a normally healthy person". The position is, as I understand it, that if a claimant suffers some spontaneous and internal "accident" in the sense of some internal lesion, heart attack, fit, dislocation or broken bone, unconnected with anything in his work which could have precipitated that "accident", then such an "accident" does not arise out of the employment unless the consequences of the lesion, seizure, fit, dislocation etc are such that the claimant, by falling or otherwise, comes into violent contact with some part of the employer's plant, premises, machinery etc. and thereby injures himself. Similarly if in the course of his employment a claimant slips for no particular reason and falls, thereby coming into contact with the employer's premises and injuring himself, the accident will arise out of the employment (see Brooker's case, paragraph 13 above and Upton's case, paragraph 20 below). It is, however, not sufficient for the claimant to suffer accidental injury on the employer's premises or in the place where he is employed to be. There must be some contact with the employer's premises, which causes injury.

20. The remaining question is how the law, as above enunciated, applies to the facts of this case. In Upton v Great Central Railway Co [1924] A.C. 302, an employee of the railway company, while still in the course of his employment, ran across a railway platform in order to board a train. He slipped for no apparent reason, injured his knee, and subsequently died as a result. Viscount Haldane L.C. said (at page 307 of the report),

> "If, in the course of his employment, the workman meets with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed ..... The question is whether circumstances such as I have referred to are to be found among the casual conditions of the accident. These may have amounted to no more than passive and inert surroundings, requisite only to provide circumstances which admitted of the accident being occasioned by his own movement. Active physical causation by the surroundings is not required in order to satisfy what is implied by the expression 'arising out of the employment'." (my underlining)

21. The passage which I have underlined was relied upon in the written submission by the claimant's association, which added,

> "The Insurance Officer now dealing with the case would have us believe that the distinction between Upton and the present case is that Upton fell down and came into contact with something else, i.e. the ground, whereas the claimant did not. Such fine distinctions are not necessary and are contrary to the repeated injunction that these matters are to be approached in a broad commonsense way."

22. Although I well appreciate the point about "fine distinctions", the phrase "arising out of and in the course of employment"

necessarily involves cases on a factual borderline. In my view, this case is one such in that it could be argued that as the claimant was walking on a special errand that he was employed to do, the walking caused the accident, which must therefore be an industrial accident. However, walking, standing, sitting etc are all part of everyday human activity and unless they represent a special danger to a claimant because of some inherent, idiopathic, characteristic of the individual claimant, accidents happening during those activities, even in the course of employment cannot be said to arise out of the employment unless there is the additional factor of an injury by contact with the employer's premises etc. There is no distinction in my view between a heart attack suffered by a sedentary employee and an unexplained bone fracture or dislocation suffered by a walking employee. Neither will constitute an industrial accident unless some aspect of the employment caused the heart attack, the fracture, or the dislocation or they were caused by the employee coming into physical contact with the employer's plant, premises, or machinery. Such, in my view, was the true ratio decidendi of Upton's case and Viscount Haldane L.C., in the passage above-cited (paragraph 20) was concerned to say no more than that it was not necessary to show, so to speak, that the platform came up and hit the claimant. It was sufficient that he came into physical contact with the platform, which was the property of his employers.

23. My conclusion on the facts of this case accords with an unreported decision (on Commissioner's file C.I. 317/1978) which the insurance officer cited to me. There the learned Commissioner held that a claimant who, while walking in the course of his employment, twisted his knee and fractured a bone in his leg, in an unexplained manner not due to any defect in the pavement on which he was walking, had not suffered an industrial accident. The other unreported decision cited to me, on Commissioner's file C.I. 439/1979, to which I have already referred in paragraphs 12-14 above, may not be at variance, as a decision on the facts. There the claimant was walking in the course of his employment when, as he stated,

> "I fell down awkwardly and my left ankle just went under me. No-one else was involved. The floor was clean and that was all there was to it. I've finished up with a broken ankle."

On those facts, the learned Commissioner held there to have been an industrial accident. The decision is justifiable if the claimant's fall on to the floor caused his ankle to break (as may well have been the case) as distinct from the spontaneous and unexplained fracture with which I am concerned in this case.

(Signed) M J Goodman
Commissioner

Date: 9 June 1982

Commissioner's file: C.I. 494/1981
C I O File: I.O. 5222/I/81
Region: Yorkshire and Humberside