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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 allow the claimant's appeal from the decision of the social security appeal tribunal dated 9 January 1996, as that decision is erroneous in law and I set it aside. My decision is that on 23 August 1994 the claimant suffered personal injury by accident arising out of and in the course of his employment, being employed earner's employment, and is entitled to a declaration of an industrial accident accordingly: Social Security Contributions and Benefits Act 1992, section 94; Social Security Administration Act 1992, sections 44(2) and (6) and 60(3). I direct the adjudication officer to refer the disablement question to the appropriate adjudicating medical authority: Social Security (Adjudication) Regulations 1995, regulation 29.

2. This is an appeal to the Commissioner by the claimant, a man born on 21 February 1962. The appeal is against the unanimous decision of a social security appeal tribunal dated 9 January 1996, which dismissed the claimant's appeal from a decision of an adjudication officer issued on 8 April 1995 refusing a declaration of an industrial accident to the claimant in respect of an incident which occurred to him in his work as a senior prison officer on 23 August 1994 at approximately 10.45 am. Details of that incident are given below.

3. On my direction the appeal was the subject of an oral hearing before me on 8 January 1997 at which the claimant was present and addressed me. He was represented by Mr Nugent of Counsel. The adjudication officer was represented by

Miss Fisher of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to all those persons for their assistance to me at the hearing.

4. The tribunal took detailed evidence from the claimant and made the following findings of fact,

"... [the claimant] had been in the prison service for 11 years prior to the incident and at [the particular prison in question] for 4 years; that prior to the incident [the claimant] had not been in any stressful situations, was very happy working for the prison service and looking forward to continuing with his career and being promoted in due course; that he had in the past as a prison officer had to face a number of varying situations including being the subject of abuse and threats and having to restrain violent prisoners all without any undue effect upon him; that as a prison officer he was responsible for up to 80 other officers in connection with everything that affected the prison regime; that the prisoner was well known throughout the prison service as being a difficult, violent, immensely powerful man with a mental problem who wished to be on his own, who had been known to take prisoner officers hostage and he was not allowed to remain more than 28 days in any one prison; that [the claimant] was in the category A section of [the prison] which is in effect a prison within a prison; that when [the prisoner was transferred to the prison the claimant] saw him on a daily basis for about a week being in charge of his activities including playing badminton with him; that [the claimant] treated him with caution as he was bigger and more powerful than he was; that during the morning of 23.8.94 [the prisoner] was becoming very concerned over the fact that some of his property including letters important to him had not apparently been forwarded from his previous prison; that it was the practice that when [the prisoner] was being interviewed other prison officers were also present apart from the interviewing officer; that [the claimant] believed that when [the prisoner was at another prison] as many as 6 prison officers were present; that during the discussion on 23.8.94 there were 2 additional officers present; that during the discussion [the prisoner] was in possession of a jug of boiling water used to make tea for himself; that during the course of the discussions [the prisoner] was holding the jug of boiling water, became extremely agitated and was in an eyeball to eyeball confrontation with [the claimant] and was raging at him for over a full minute; that [the claimant] believed it was possible he would have the boiling water thrown at him or be dragged into an empty cell; that during all this and in spite of his fears [the claimant] maintained a cool composure ultimately placating [the prisoner]; that as a result of

that and what [the claimant] believed to be a lack of care or consideration from the prison service, he was subsequently medically retired; that the two prison officers who witnessed the incident have not replied to [the claimant's] request for corroboration of it; that [the claimant] did not consider that there was any need to record the incident at the time in view of [the prisoner's] reputation."

5. I ought to add that there was in fact before the tribunal a letter from another prison officer who said,

"I did not witness the actual incident but prior to it I was talking to [the claimant]. He appeared to be his normal, cheerful, laid back self. The following morning I spoke to [the claimant] again. This time he was completely different i.e. he appeared completely withdrawn and not exactly with it (spaced out). I have been an acquaintance of [the claimant] for approximately 18 months and have never seen him like this before."

6. There was also medical evidence from the claimant's GP and from a Counsellor attached to the surgery, the Counsellor's letter (dated 11 October 1995) stating,

"On first meeting I found [the claimant] to be suffering from anxiety, a poor sleep pattern, poor concentration and flashbacks of a traumatic incident. It is my opinion that these symptoms were caused by the incident which took place in .. prison on 23 August 1994. The symptoms, together with the fact that this patient was in a life threatening situation, resulted in him suffering a post traumatic stress reaction. Although his symptoms have been more persistent than I at first expected from my initial diagnosis, I do not consider that he has suffered a post traumatic stress disorder."

The last sentence, of course, goes to the question of degree of disablement not to causation of the symptoms.

7. Further, at the hearing before me on 8 January 1996, there was put in evidence a copy of a detailed report (dated 20 August 1997) prepared by a Consultant Psychiatrist. After describing the claimant's symptoms, the psychiatrist came to the conclusion that they had been brought on by the incident with the prisoner in question on 23 August 1994.

8. After making its findings of fact, the tribunal gave the following reasons for dismissing the claimant's appeal,

"The tribunal carefully considered all that [the claimant] had to say and had no reason to doubt all that had happened and as to why notwithstanding many years in the job he felt he could no longer cope with it.

However, the tribunal had to consider whether the incident that occurred on 23.8.94 could be properly described as an accident i.e.:-

- (i) an event which in itself is identifiable as an accident or;
- (ii) a particular occasion on which personal injury was suffered by [the claimant] which would constitute an accident.

An accident is an unforeseen occurrence. This was not an unforeseen occurrence. On the contrary it was a foreseeable occurrence. There were 2 prison officers in addition to [the claimant] in attendance in case there were problems. [The prisoner in question] was well known in the prison service for being violent and dangerous. [The claimant] was prepared for that. It is part of a prisoner officer's job to be able to cope with help if necessary with any difficulties that arise. It was always anticipated with [the prisoner in question] that there could be problems and on that basis if and when anticipated problems arise they cannot, in the tribunal's view, be classed as accident." (My underlining.)

9. The adjudication officer now concerned, in a written submission dated 15 January 1997, supports the claimant's appeal and submits that the claimant had indeed suffered an industrial accident, citing R(I) 42/53 where, to quote the submission,

".. the Commissioner held that where an engine driver suffered a fright when he was signalled to make an emergency stop with his engine his subsequent death from a coronary thrombosis resulted from injury caused by accident."

and R(I) 43/55 where, to quote the submission,

".. the claimant worked in a machine shop in the vicinity of a machine which repeatedly produced small explosions any one of which might have led to a more serious explosion. He developed a psychoneurotic condition which the Commissioner held to be the result of injury by accident."

10. The adjudication officer then further submits,

".. that although the prisoner was known to be dangerous this does not make the incident foreseeable. The claimant believed himself to be in danger and suffered a fright which resulted in pathological change for the worse which [was] in the form of psychological damage. According to R(I) 42/53 and R(I) 43/55 the incident did

constitute an industrial accident. I submit that the decision of the tribunal is contrary to accepted case law and is erroneous. I therefore support the claimant in this appeal."

11. I accept that submission as being a correct analysis of the facts. Although the claimant may have been prepared for ordinary acts of aggression by prisoners this particular incident which the claimant has established and of which he has established the medical consequences was probably not within the normal range of foreseeability. However, even if that is an incorrect inference from the facts and what occurred was within the normal range of foreseeability, that does not of itself in my judgment necessarily prevent the incident in question being an accident. Both Counsel at the hearing before me accepted this after I drew their attention to summary of the case law to be found in Ogus Barendt and Wikeley's "Law of Social Security" 4th Edition at page 303, where the learned authors state as follows,

"The starting point must be Lord MacNaghten's famous dictum in 1903 [Fenton v. J Thorley and Co Ltd [1903] A.C. 443 at 448], [i.e.] 'The expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed'. But 'popular' meanings are notoriously unreliable and as critics have pointed out, nowhere more so than in this context. It soon became clear that Lord MacNaghten's definition was neither accurate nor sufficient. In the first place, while it was construed to exclude deliberate acts by the injured party himself, it has been held to include a deliberate, even unlawful, act of a third party. The point was decided in Trim Joint District School v. Kelly [1914] A.C. 661 at 681, in which pupils assaulted and killed a schoolmaster responsible for discipline. Secondly, the phrase 'not expected' could not be taken seriously. An event need not be unforeseeable or exceptional to constitute an 'accident' [Clover, Clayton and Co Ltd v. Hughes [1910] A.C. 242; CWI6/49]. To take a frequently encountered example, claimants who incapacitate themselves by heavy exertions do not have to prove that the strain was violent or exceptional for their job." (My underlining).

I accept that quoted passage as being a correct statement of the law (see also the Northern Ireland decision R 1/81(II)). But the tribunal's reasons for decision (particularly the underlined portion) have underlined and which I have set out in paragraph 8 above are inconsistent with it. For that reason also I must set the tribunal's decision aside as being erroneous in law.

12. It was agreed by both parties at the hearing that I should not, if I found the tribunal's decision to be erroneous in law, remit the matter back to another tribunal but should deal with the case myself under my powers under section 23 of the 1992 Act. I therefore proceed to do so. I conclude that on the proved and exceptional facts of this case the claimant has shown that there was an incident outside the normal range of his duties on 23 August 1994 at the prison in question which did constitute an industrial accident, albeit that because of the violent nature of the prisoner in question it might have been foreseeable. Not only does his own testimony, which was accepted by the tribunal and was not questioned before me at the hearing, demonstrate this but the medical evidence is also strongly to the same effect. Consequently on the special facts of this case he is entitled to the declaration of industrial accident which he seeks.

13. I ought however to emphasise that cases of psychological injury or stress reaction resulting from the normal incidents of an occupation (and certain occupations have more than others eg. those of policeman and firemen) will not normally involve an "accident" arising out of and in the course of employment (1992 Act, 1994). Thus a policeman who is assaulted by a person he is seeking to arrest would not normally have suffered an "accident". The accepted legal meaning of "accident", broad though it may be, does not extend in my view so far.

14. In the above-cited case of Trim School Board v. Kelly [1914] A.C. 667, Lord Loreburn said (pp.680-81)

"A good deal was said about the word 'accident'. Etymologically, the word means something which happens - a rendering which is not very helpful. We are to construe it in the popular sense, as plain people would understand it, but we are also to construe it in its setting, in the context, and in the light of the purpose which appears from the Act itself. Now, there is no single rigid meaning in the common use of the word. Mankind have taken the liberty of using it, as they use so many other words, not in any exact sense but in a somewhat confused way, or rather in a variety of ways. We say that someone met a friend in the street quite by accident, as opposed to appointment, or omitted to mention something by accident, as opposed to intention, or that he is disabled by accident, as opposed to disease, or made a discovery by accident, as opposed to research or reasoned experiment. When people use this word they are usually thinking of some definite event which is unexpected, but it is not so always, for you might say of a person that he is foolish as a rule and wise only by accident. Again, the same thing, when occurring to a man in one kind of employment would not be called accident but would be so described if it occurred

to another not similarly employed. A soldier shot in battle is not killed by accident, in common parlance. An inhabitant trying to escape from the field might be shot by accident. It makes all the difference that the occupation of the two was different. In short, the common meaning of this word is ruled neither by logic nor by etymology, but by custom, and no formula will precisely express its usage for all cases." (My underlining.)

15. I apply those words here. They are of course binding on me as the House of Lords in that case were deciding the same point as I am called upon to decide (the same expression having occurred in the Workmen's Compensation Acts). The passage which I have underlined states the point in question. A prison officer or someone in a similar occupation must expect certain dangerous incidents of that employment, which if they occur, cannot properly be described as an "accident". That is not because, as the tribunal in this case said, they are foreseeable. It is because they simply do not come within the meaning, in the particular factual context, of the word "accident".

16. It follows that my decision is no warrant for any proposition that disablement benefit can be claimed for "accident arising out of and in the course of the employment", by those involved in occupations, where unfortunately the risk of injury from members of the public or from persons with whom they have to deal is a relative common-place. However, on the special facts of this case, and for a number of reasons (factual and medical) the claimant has in my view shown that what occurred to him on the day in question was so much out of the normal run of things and so unusual, even for a senior prison officer dealing with a violent inmate that, just on balance, the claimant has shown that he did suffer an industrial "accident". I have granted him a declaration accordingly.

(Signed) M J Goodman
Commissioner

(Date) 22 January 1998