

**Adverse industrial accident decision—position with regard to review—
Industrial Injuries Act, sections 49 and 50(1) and proviso**

On 12.1.57 the claimant applied for a declaration that he had suffered an industrial accident on 5.3.55. On 28.1.57 the insurance officer decided that—

“ There was not an industrial accident on the ground that the claimant did not suffer personal injury by accident.”

Subsequent claims for disablement benefit and applications for further industrial accident declarations in respect of the alleged accident on 5.3.55 were rejected on the ground that they could not succeed unless the insurance officer's decision of 28.1.57 was reviewed and that the proviso to section 50(1) of the Act precluded that decision from being reviewed. Eventually, the claimant appealed to the Commissioner from the decision of a local appeal tribunal refusing to grant him a declaration that there had been an industrial accident on 5.3.55.

Held by a tribunal of Commissioners :—

1. That the insurance officer's decision of 28.1.57 was not a decision to which the proviso to section 50 (1) of the Act applied because he had not decided the question whether or not an accident was an industrial accident (i.e. whether or not the requirements of paragraphs (a), (b) and (c) of section 49(5) of the Act were satisfied in relation to an accident whereby personal injury was caused) but simply the preliminary questions whether there was an accident whereby personal injury was caused.
2. That nevertheless the insurance officer's decision of 28.1.57 could not be reviewed (i.e. reconsidered) because there was no evidence that it had been given in ignorance of, or mistake as to, a material fact or that there had been any relevant change of circumstances, and that even if the decision could have been reviewed there would have been no grounds for revising (i.e. altering) it.

The Commissioners consider and discuss sections 49 and 50(1) of the Act and the form of industrial accident decisions.

1. Our decision is that the decision of the insurance officer dated the 28th January 1957 was not “ a decision that an accident was not an industrial accident ” within the meaning of the proviso to section 50(1) of the National Insurance (Industrial Injuries) Act, 1946 (as amended), so as to be precluded from review by virtue of the said proviso : but that the said decision cannot be reviewed, on the ground that the conditions of review set forth in the said section 50(1) are not satisfied.

2. The claimant's case is that on the 5th March 1955, in the course of his duties as a part-time fireman, he was bending down and rolling up a fire hose, wearing a belt which was too tight and of which he had complained, when he felt a pain in the stomach.

3. It was not till the 12th January 1957 that he first took proceedings based on that incident and applied for a declaration “ that the alleged accident was an industrial accident ”. Enquiries were made of the employers, who stated that they had no knowledge of any accident and none had been reported at any time. The claimant's benefit history sheet showed that he had received sickness benefit from the 9th April to the 14th May 1955 and from the 14th June to the 27th July 1955 on account of influenza and from the 27th October 1956 to the date of his application in January 1957 by reason of myalgia. The claimant suffers from a disability which makes it very difficult to understand what he is saying, and he can neither read nor write. On the 24th January 1957, however, he signed a statement, after it had been read over to him and he had agreed with all that had been

R(T) 11/62

written in it. According to this statement, he claimed that his present incapacity was due to the alleged injury on the 5th March 1955; that he mentioned it to a policeman in the street (at the time) but did not know his name; that he reported it to the fire station about six weeks after the accident, but they refused to give him a form to fill in; and that he first saw his doctor about the 9th April 1955 but did not mention any injury to the doctor. On the 28th January 1957 the insurance officer decided: "There was not an industrial accident on the ground that the claimant did not suffer personal injury by accident."

4. In 1958 the claimant claimed disablement benefit in respect of the same accident, but the insurance officer decided: "On 28.1.57 the insurance officer disallowed the claimant's claim to have suffered an industrial accident on 5th March 1955. The claim dated 23.4.58 for disablement benefit which is based on that occurrence or incident is disallowed accordingly." The claimant tried unsuccessfully to obtain leave to appeal out of time to the local appeal tribunal against this decision.

5. In 1959 the claimant again applied for a declaration that the accident of the 5th March 1955 was an industrial accident. The local insurance officer disallowed this application in exactly the same terms as in paragraph 4. The claimant again tried unsuccessfully to appeal out of time to the local appeal tribunal against this decision.

6. In 1960 he again claimed disablement benefit but was told that no further action could be taken.

7. Finally, on the 8th February 1961 the claimant again claimed a declaration that the accident of the 5th March 1955 was an industrial accident. The local insurance officer on the 23rd February 1961 decided: "On 28.1.57 it was decided that the claimant did not suffer an industrial accident on 5.3.55. The further application dated 8.2.61 for a declaration of industrial accident which is based on that alleged event is accordingly refused." It is this decision which is the basis of the present appeal. The insurance officer's submission to the local appeal tribunal did not deal with the case on its merits but contained the following: "Since the decision of the insurance officer made on 28.1.57 was never reversed either by review (because it was not subject to review, under section 50) or by appeal, the tribunal is asked to declare the decision of 23.2.61 to be correct. . . ." The tribunal evidently took great pains with the matter, and they adjourned the case in order that the papers might be read over and explained to the claimant. They recorded their findings of fact simply as "as stated" and unanimously decided that there was not an industrial accident on the ground that there was no evidence of industrial accident.

8. The claimant appealed to the Commissioner. As it has appeared from this and other cases that there is doubt as to the extent of the limitation imposed on the right of review by the proviso to section 50(1) of the Act, the appeal was heard orally by a tribunal of three in accordance with regulations made under section 42(2)(a) of the Act. Although the claimant personally was the appellant, a representative of his association was good enough to attend the hearing, where he presented the appellant's case with great frankness. The appeal appears to us to raise a question of great importance to many claimants.

- 9. To establish a claim for injury or disablement benefit the claimant

must prove among other things that he suffered personal injury by accident (section 7). Where a person suffers personal injury by accident but for some reason is not entitled to benefit or does not wish to claim it, section 49 of the Act may enable him to establish his rights for the future by obtaining a declaration that the accident was an industrial accident. Subject to the provisions of the Act as to appeal and review, a declaration that an accident was or was not an industrial accident is conclusive for the purposes of any claim for benefit in respect of that accident (section 49(4)). Section 49(5) provides as follows : " For the purposes of this section, an accident whereby a person suffers personal injury shall be deemed, in relation to him, to be an industrial accident if—

- (a) it arises out of and in the course of his employment ;
- (b) that employment is insurable employment ; and
- (c) payment of benefit is not, under the provisions of Part II of this Act, precluded because the accident happened while he was outside Great Britain ;

and references in the following provisions of this Act to an industrial accident shall be construed accordingly."

10. Claims for benefit and questions as to the right to a declaration that an accident was an industrial accident are to be decided by the statutory authorities (the insurance officer, the local appeal tribunal or the Commissioner) (section 36(2)), whose decision is final (section 36(3)). A decision of the statutory authorities may be reviewed if (so far as relevant to this case) (a) the reviewing authority is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact ; or (b) there has been any relevant change of circumstances since the decision was given (section 50(1)). But this subsection is followed by a proviso : " Provided that a decision that an accident was not an industrial accident shall not be subject to review, . . . "

11. Where an insurance officer decides any question adversely to the claimant the claimant must be given reasons for the decision in writing, and a local tribunal must always record the grounds of their decision (see regulations 14 and 19 of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 [S.I. 1948 No. 1299]).

12. In the present case the insurance officer had decided on the 28th January 1957 that there was not an industrial accident. So long as that decision stood, any claim for benefit based on the same alleged accident and any claim for a declaration that there had been an industrial accident on the same occasion must necessarily fail. It is impossible to have in existence two decisions contradicting each other. The various claims and applications made by the claimant in 1958, 1959, 1960 and 1961, if treated as fresh claims, were manifestly hopeless. The only way in which the claimant's case could be even arguable was if it was an application for a review of the decision of the 28th January 1957. Claimants, however, and indeed many others, frequently do not appreciate the distinction between a fresh claim and an application for a review nor the reasons why in some circumstances one is appropriate and the other is not. In view of this a practice has grown up, to the great advantage of claimants, whereby, although a claim is in form a claim for benefit or for a declaration it may be treated as being also an application for a review. We think that in this case at every stage it would have been proper to follow this practice, but

it is not clear to us whether the question was put before the local appeal tribunal on this basis, nor is it clear to us from their grounds of decision on what basis they dealt with it.

13. If this appeal is to succeed, in our judgment it is necessary for the claimant to obtain a favourable decision on each of three questions namely :—

1. whether, the decision of the 28th January 1957 is precluded from review by the proviso to section 50(1) ;
2. if it is not so precluded, whether the conditions contained in section 50(1)(a) or (b) are fulfilled, so that the decision may be reviewed i.e. so that it may be reconsidered ; and
3. if it may be reconsidered, whether on reconsideration that decision should be altered or not.

14. The decision of the 28th January 1957, whose terms are stated at the end of paragraph 3 (above), follows exactly a precedent No. 704 contained in a volume of forms of decision supplied for the use of insurance officers. Obviously, therefore, nothing said in this decision should be construed as a criticism of the insurance officer for giving a decision in that form. It begins with the words " There was not an industrial accident " and not with the words " The accident was not an industrial accident. " In these circumstances in our judgment the decision is subject to review and is not covered by the proviso to section 50(1) for the following reasons. Subsection (5) of section 49 describes what is to be deemed (for the purposes of section 50 amongst others) to be an industrial accident. In our judgment subsection (5) may be regarded as falling into two distinct parts divided by the words " shall be deemed, in relation to him, to be an industrial accident if ". Logically, the first questions for decision are those arising under the first part : whether an accident happened at all, or whether the claimant suffered personal injury, or whether the claimant suffered personal injury by accident. (This list is not exhaustive.) In our judgment a decision on any of these questions only is not a decision that an accident was or was not an industrial accident. It is merely a decision of the preliminary question whether an accident or personal injury happened at all. Such a decision is therefore not excluded from review by the proviso to section 50(1). On the other hand a decision that " there was not an industrial accident because the accident did not arise out of and in the course of the claimant's employment " (cf. No. 701 in the volume of precedents) would be a decision of a question arising under the second part of subsection (5) and would therefore be covered by the proviso to section 50(1) and would not be reviewable. (Nothing said in this decision should be taken as in any way preventing the insurance officer from giving a decision on a question arising under the second part of subsection (5), e.g. that the accident did not arise out of the employment or that it happened outside Great Britain, without giving a decision on any question arising under the first part e.g. whether there was any personal injury.) The distinction drawn in this paragraph is a fine one. But it is in accordance with Decisions C.I. 112/51 and C.I. 73/57 (not reported). And in our judgment the proviso to section 50(1), which takes away in certain circumstances the right of review conferred by the earlier part of the section, must be construed strictly.

15. At the oral hearing before us the legal representative of the insurance officer contended that the form of Decision No. 704 should be altered, both by omitting the words " there was not an industrial accident because ",

which he said were liable to cause confusion by giving the impression that the case was covered by the proviso to section 50(1), and by separating the findings so as to show whether the ground of decision was that the claimant did not suffer personal injury or that he did not suffer an accident. Beyond saying as follows however we do not think it right to give any advice or directions as to the form of such decisions in future. It is clear that to comply with the regulations the decision must give its grounds. We hope that, as a result of this decision, in future it will be clear beyond any doubt that a decision in the form of No. 704, either in its present form or divided as suggested by the insurance officer's representative, is reviewable, if one of the conditions preceding the proviso to section 50(1) is satisfied. We hope, therefore, that if this form continues to be used (and there must be countless decisions in that form in existence already) there will be no doubt about the right of review. As to division, the present case appears to us to be one where the questions of personal injury and accident are so closely related that there can be no real harm in the form used, though in other cases it might well be desirable to give as the ground either that there was no personal injury or that there was no accident (or both).

16. The second question on which the claimant must obtain a favourable decision, if this appeal is to succeed, is that the decision of the 28th January 1957 was given in ignorance of, or was based on a mistake as to, some material fact, or there has been any relevant change of circumstances since the decision was given. The claimant's representative was unable to point to any specific material fact, and although there is now further evidence as to the claimant's medical condition since January 1957, it does not in our opinion throw any light on the question whether he suffered personal injury by accident in March 1955. Having fully considered all the evidence we are unable to hold that he has satisfied one of the conditions for review contained in section 50(1)(a) or (b).

17. Even if that question could have been answered favourably to the claimant, it would in our judgment still be impossible to decide in his favour on the third question, namely, whether the decision of the 28th January 1957 should be altered. The claimant's representative, who has great experience in these matters, told us frankly that he had great difficulty in suggesting that in the circumstances of this case there had been personal injury by accident. We have fully considered all the evidence on this and find it impossible to hold that there was. Even assuming that the claimant felt a pain in his stomach whilst rolling up a hose when he was wearing a tight belt, the facts remain that he was not off work until about a month later, and then only because of influenza, that when he first saw his doctor he did not tell him of any injury, that he did not report the matter to his employers until long after the event, and that it was not until nearly two years afterwards that he first instituted proceedings. The various medical examinations have produced no evidence of any specific injury to his stomach and his representative did not contend that there was any corroboration of the claimant's view that he suffered injury on the occasion in question. We therefore find it impossible to hold that he has established that on that occasion he suffered any physiological change for the worse, which constitutes personal injury for the purposes of the Act.

18. The claimant's appeal must be dismissed.