

*Workmen Compensation - Lesser Incapacity Allowance*

JGMI/HJD/T/CH

Commissioner's File: CSI/2/95

**SOCIAL SECURITY ADMINISTRATION ACT 1992**

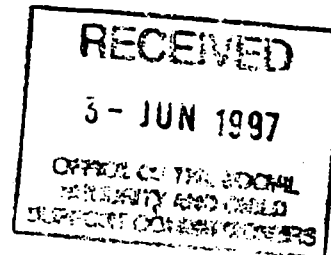
**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW**

**DECISION OF SOCIAL SECURITY COMMISSIONER**

**Name:**

**Social Security Appeal Tribunal: Glasgow**

**Case No: 553 09104**



1. My decision is that the decision of the social security appeal tribunal dated 11 November 1994 is erroneous in law and is set aside. The decision which I give in its place is that lesser incapacity allowance under the Workmen's Compensation (Supplementation) Scheme 1982 is not payable to the claimant for the reasons given hereunder.

2. This is an appeal by the claimant with leave on a question of law against the above-mentioned decision of a social security appeal tribunal who upheld the decision of an adjudication officer who found the claimant not entitled to an allowance under the above-mentioned Scheme. The circumstances of the case as narrated by the adjudication officer were as follows:-

"1. On 16 May 1994 form WS1A was received requesting a form to claim benefit under the Workmen's Compensation (Supplementation) (WC(Supp)) Scheme.

2. The claim form WS 70 was sent to [the claimant] on 17 May 1994 with a letter explaining that the WC (Supp) Scheme gives extra payments to people who have been entitled to weekly payments of Workmen's Compensation under the Workmen's Compensation Acts from their employer, at some time since 1 March 1966.

3. The completed claim form and accompanying letter were received on 19 May 1994. [The claimant] stated that he had an accident in June 1943 whilst he was employed at the Royal Ordnance Factory, Bishopton, Renfrewshire. As a result of the accident [the claimant] suffered the amputation of his right ring finger. [The claimant] stated that he was not in receipt of weekly payments of Workmen's Compensation, and that he had not received a lump sum compensation payment."

3. The Workmen's Compensation (Supplementation) Scheme enables certain additional allowances to be paid to supplement the amount of workmen's

compensation payable in respect of accidents prior to the introduction of the industrial injuries legislation with effect from 5 July 1948. The allowance in question in this case is lesser incapacity allowance under paragraph 5 of the Scheme. The Social Security Contributions and Benefits Act 1992 provides in paragraph 2(4) of Schedule 8:-

“(4) A lesser incapacity allowance -

(a) shall not be payable to any person in respect of any period unless there is or may be expected to be (or, but for the cesser at a time after 1 March 1966 of that person’s entitlement to Workmen’s Compensation, would or might be expected to have been) payable to that person in respect of that period either a weekly payment by way of basic allowance or a weekly payment by way of Workmen’s Compensation which is not a notional payment;”

Article 5(1) of the Workmen’s Compensation (Supplementation) Scheme provides as follows:-

“Subject to the following provisions of this scheme, a lesser incapacity allowance shall be payable out of money provided by Parliament to a person, not being a person entitled to a major incapacity allowance, who was immediately before 1 March 1966 receiving an allowance payable by virtue of a scheme under the 1951 Act in force at that time, or who is or has since the commencement of the 1965 Act been entitled or may be expected to be entitled to a basic allowance or to weekly payments by way of workmen’s compensation, other than notional payments for any period during which he is either totally or partially incapable of work as a result of the relevant injury or disease, and is ordinarily resident in the United Kingdom.”

4. The claimant was never in receipt of workmen’s compensation in respect of his accident and his employers at the time at the Royal Ordnance Factory have no record of an accident to the claimant and there is therefore no question of an admission of any liability by them for the accident. The social security appeal tribunal found those facts established. Explaining their decision to refuse the claimant’s appeal the tribunal said:-

“The claim necessarily fails because the claimant has not since 1 March 1966 been entitled to weekly payments by way of Workmen’s Compensation. This in turn was no doubt brought about by the failure of his employers, The Royal Ordnance Factory to admit liability. The appellant does not satisfy the Regulations contained in Social Security (Contributions and Benefits Act 1992) Schedule 8, Sections 2(1) and (4).”

5. The tribunal decision does not fully explain the claimant’s inability to qualify for a lesser incapacity allowance. Although the claimant accepted that he had never been in receipt of workmen’s compensation it was argued on his behalf that he could demonstrate entitlement to Workmen’s Compensation by leading evidence to

establish his employer's liability for his accident and also to establish that he had suffered a loss of earnings through injury. The tribunal decision partially explains the claimant's lack of actual entitlement but fails to explain why the claimant's case seeking to establish liability and loss of earnings by means of evidence to the tribunal could not be accepted.

6. The decision of the tribunal is therefore inadequately reasoned and is on that ground erroneous in law. I set that decision aside. Dealing with the question of establishing an entitlement to workmen's compensation where none has actually been paid, the adjudication officer now concerned has submitted as follows:-

"13. The claimant states that there is no mention in the relevant legislation of the requirement (sic) that there be a declaration of liability by the employer and a loss of earnings due to the injury in order to accept that there is entitlement to weekly payments of Workman's Compensation, even though no payments have been made. Accordingly the claimant contends that it was open to the tribunal to accept the oral evidence that both he and his wife could have given to establish liability and loss of earnings in respect of the accident.

14. It is submitted that entitlement to weekly payments of Workman's Compensation is purely a matter between the employer and employee. The adjudicating authorities cannot determine entitlement to Workman's Compensation because there is no legislation that would allow them to do so. Accordingly the matter is outwith the jurisdiction of the tribunal as an adjudicating body."

I have come to the conclusion that the submission of the adjudication officer now concerned is correct and that accordingly there is no possibility of establishing entitlement to the lesser incapacity allowance by leading evidence to seek to meet the conditions of paragraph 5. There is accordingly no point in my referring this case for a rehearing. It is expedient for me to substitute my own decision for that of the tribunal.

7. Paragraph 5(1) of the Scheme, quoted above, dealing with the lesser incapacity allowance covers 3 possible cases. The first is that of a person who was receiving an allowance under an earlier scheme before 1 March 1966. The second is a person who is or has been entitled to payments of a basic allowance or a weekly payment of workmen's compensation since the commencement of the 1965 Act on 1 March 1966. Neither of these possibilities apply to the claimant. The third possible case arises from the words "or who may be expected to be entitled" to workmen's compensation. In order to fulfill such an expectation of entitlement however there would require to be an admission of liability by the employer as well as proof of loss of earnings through the injury. The claimant's representative sought an opportunity to meet these requirements of liability and loss by evidence. However the question of liability for the accident of 1943 is solely a question between the claimant and his employers. There is no provision which would permit that question to be adjudicated upon under the Supplementation Scheme to which of course the employer is not a party. Accordingly a critical feature necessary to the establishment of an "expectation of

entitlement" is absent and cannot be supplied by adjudication upon evidence under the Scheme.

8. For these more detailed reasons therefore the decision of the adjudication officer must be upheld. It follows that for practical purposes the claimant's appeal fails.

(signed )

J G Mitchell  
Commissioner

Date: 18 January 1996