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WMW/GM Commissioner's File: CSI/26/96

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: 581/95/14803

[ORAL HEARING]

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1. This adjudication officer's appeal succeeds but without practical benefit. I hold the decision of the appeal tribunal dated 11 May 1995 to be in error of law and accordingly set it aside. Because I consider it expedient so to do, and in pursuance of section 23(7)(a)(ii) of the Social Security Administration Act 1992, I give the decision which I consider appropriate in the light both of the findings of fact made by the tribunal and those which follow.

2. That decision is to declare that the claimant suffered personal injury by accident arising out of and in the course of his employment and in consequence of his attendance at the incidents listed on document 31 of the bundle. That declaration is made in pursuance of section 44(2) of the Administration Act. The adjudication officer is directed to refer the disablement questions to the medical adjudicating authorities for determination.

3. In June 1994 the claimant sought a declaration of an industrial accident in respect of his coming to suffer from post traumatic stress disorder in consequence of having to attend a series of fatal accidents over the years 1986 to 1993. That declaration was the preliminary to a claim for disablement benefit. An adjudication officer determined that it had not been established that there was either an event which in itself was identifiable as an accident or a particular occasion on which personal injury was suffered by the claimant which could constitute an accident. It is clear from the adjudication officer's submission to the Tribunal that that decision was made upon the basis of the distinction between injury caused by accident and injury caused by process, he concluding that this case fell within the latter category. The adjudication officer, noted correctly, that the onus had been on the claimant to establish his case The claimant appealed to the tribunal.

4. The tribunal considered the evidence. The claimant contended that in consequence of his work as a fire officer he had had from time to time to attend fatal incidents. Those were listed by him at document 8 of the bundle and number about 30 over a period of 22 years. The matter was concentrated before the tribunal, however, upon the basis of the 9 incidents occurring between 1975 and 1991 and listed at document 31. There was no doubt that in 6 of these incidents the claimant had been involved. Although he claimed to have been in

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missing

attendance at all, the Fire Brigade's records could not verify 3 of the incidents, 2 because they pre-dated their current record system. There seems to have been no doubt, for what it is worth, that the claimant suffered from post traumatic stress disorder and certainly I understood at the hearing that there was no dispute that if there was an accident in the statutory sense then it was an industrial accident. The tribunal made these findings of fact only -

> "As a Senior Fire Officer claimant has had to attend many fatal incidents. He was discharged on medical grounds on 03.06.93. He suffers from PTSD [post traumatic stress disorder] and has been found incapable of all work on this ground by BMAS [Benefit Agency Medical Service] Doctor.".

The unanimous decision was -

> "To hold that claimant is incapable of all work due to a series of incidents resulting in industrial injury. The question of loss of faculty and extent of disablement should be referred to the adjudicating medical authorities.".

The reasons given were simply these -

> "The tribunal followed decision CI/554/1992 and R(I)43/55. We held that a series of incident occurred (as given in AT2) and that the claimant suffers from PTSD.".

Against that decision the adjudication officer now appeals, with leave of the chairman.

5. The case came before me for hearing at which the adjudication officer was represented by Mr Neilson, of the Office of The Solicitor in Scotland to the Department of Social Security. The claimant was represented by Mr Hayhoe, of the Free Representation Unit of the Faculty of Advocates on behalf of the Citizens Advice Bureau, Glasgow. I am indebted to both for their careful submissions.

6. Mr Neilson attacked the tribunal decision upon two fronts. It is convenient to deal with the second front first, for, in the event, I understood there to be but formal opposition to it. That point was that by the terms of their decision the tribunal had usurped the jurisdiction of the adjudicating medical authorities contained in section 45 of the Administration Act. In short their use of the words "incapacity for all work" in their decision tended to pre-judge questions of loss of faculty and the degree, if any, of any consequent disablement. On that point alone I accept that the decision was erroneous in law. Indeed there is a further related point, although it is largely a technicality. That is that what the claimant was seeking from the tribunal was a declaration that he had suffered an industrial injury and that is what the form of the decision does not provide.

7. Mr Neilson's main attack was upon the issue of accident against process. He drew attention to the findings of fact about the need for the claimant to attend many fatal incidents and submitted that the tribunal neither in their findings, decision or reasons, used the word "accident". No doubt the claimant's recorded evidence used the word but only in the context that an accident can result from several minor related incidents. It was therefore not clear whether this tribunal had accepted that the incidents, cumulatively or otherwise, had amounted to an accident in law, or whether they had even considered that proposition and, if so, how

they reached their conclusion. He accepted that the tribunal might have been able to come to the same decision in practical terms but there would have had to be more findings and more careful reasoning to justify such a decision. He pointed, as an example, to CI/554/92 where the Commissioner relied heavily upon detailed findings, including medical conclusions, made by a judge arising out of an employer's liability case and whose judgment was before the adjudicating authorities. To refer to a "series of incidents" was simply not enough. The central question was as to whether that series led to a conclusion that there had been a process or an accident.

8. Mr Hayhoe, in a clear and detailed submission, sought to persuade me that the tribunal decision should be left untouched. However, under some pressure, he accepted that its form was incorrect and that the reference to incapacity for work rather than merely "all" work as he would have been prepared to accept, meant that this tribunal had rather exceeded their jurisdiction. He also replied to a criticism by Mr Neilson that the tribunal reasons did not make clear how the tribunal had arrived at their decision, being little more than a recitation of authority, by submitting that whilst an individual claimant might have difficulty in following their reasons here the point was that the losing party before the tribunal should be able to understand how the tribunal had reached their decision and when that was the adjudication officer rather greater understanding of the relevant law and what was involved could be assumed. He referred to R(S)2/83 is support of his proposition. There was a little more in the reasons for this tribunal decision that in the algebraic statement in R(S)2/83. In the passage quoted from R(U)3/80, at paragraph 5, it is recorded that the then Chief Commissioner had said that authority has for some time emphasised why the obligation on tribunals to include in their record of decision a statement of the grounds and of their findings is -

> "...That a claimant ought to be able to see why he has failed, and that those concerned in the event of an appeal to the Commissioner should not be left to guess - as I am now - about the facts found to be material to the decision".

Both cases cited were claimant's appeals and so it was perhaps not surprising that the emphasis was upon the claimant requiring to be able to see why he has failed. For my part I would have thought it was equally important that a claimant be able to see why he has succeeded, and indeed an adjudication officer why he has failed where appropriate, so that grounds of appeal, or opposition thereto, can be properly focused. In any event the particular passage from R(U)3/80 seems to me to indicate that the basic underlying requirement is that those at the stage of an appeal should not be left to guess about matters, or left in the dark. I therefore do not accept that there is any different a test to be applied at this level where a claimant is an appellant as against an adjudication officer. Nonetheless, I think that it is tolerably clear from the tribunal decision that they accepted that the claimant had had to attend many fatal, and from the details elsewhere in the papers no doubt very distressing, incidents. What I think they were trying to say was that the series of incidents amounted to the accident, essentially because it was not possible to say which if any of them rather than the totality of them had caused the claimant's PTSD. I accept Mr Hayhoe's contention that what is said about "series of incidents" in the tribunal decision cannot be other than a link between the series and the consequence. But there is an error of law in that they failed properly to express any conclusion as to whether the series amounted to an accident.

9. Mr Hayhoe sought to distinguish CI/554/92 because it had involved a constant, and in that sense therefore normal, state of pressure which gradually had had an effect on that

claimant's mental or nervous state and, as Mr Commissioner Goodman put it, drove him over the cliff edge. He suffered what I think is best described as a nervous breakdown with severe depression. The Commissioner noted from paragraph 9 of R(I)22/59 that damage to the nervous system may be just as much a personal injury as damage to the rest of the structure of the body. If a nervous injury is caused by accident arising out of and in the course of the claimant's employment, therefore, he may be entitled to injury benefit. In paragraph 11 it is made clear that the Commissioner was concerned to determine whether a trigger that operated on the claimant in September/October 1974 constituted an accident within the meaning of the social security legislation. He contrasted the case before him to that in R(I)43/55. He noted the distinction between the facts of that case and those of the one before him where the claimant had been under a continuing stress at work so that it was the last incident which constituted the cumulative result. And it was only the careful examination, as Mr Neilson drew to my attention, of the judge's analysis of the relevant medical evidence that allowed him to conclude that there then had been an accident at the stage when that claimant realised that he could not cope.

10. My Hayhoe was at pains to persuade me that in the instant case there was not the continual state of affairs as in CI/554/92, but more a series of incidents as in R(I)43/55. That case concerned an individual who had had machinery behind him which kept exploding over some 3 months. He was aware that any such explosion could have been serious. He developed a state of anxiety and depression which to some extent caused an eczema. At paragraph 10 the Commissioner pointed to the four factors necessary to establish either a claim for injury benefit or, as here, a declaration of an industrial accident. At this stage factors 3 and 4 were the important considerations to which Mr Hayhoe devoted attention. Factor 3 required that the injury be caused by accident and 4 that the accident arise out of and be in the course of the employment. Over the 3 months an explosion seems to have occurred 3 or 4 times a week. At all events, it seems to have been a very irregular series of incidents. Each explosion was followed by a feeling of relief because that claimant would know that the machine would need adjustment and would be out of action until that was completed. The Commissioner in finding that the claimant had discharged the onus of proof on him said, at paragraph 12 -

> "I do not think it is established that the explosions which occurred on the last day on which the claimant worked or any other particular explosion contributed in any special degree to the claimant's condition. .... I must hold therefore that the condition was a cumulative result of all the explosions. Each explosion taken by itself would clearly constitute an accident within the meaning [of the then relevant legislation] and it follows that the injury which is their cumulative effect must be held to be injury by accident unless the interval between each explosion was so short that the series of explosions ought to be regarded as a single continuous process.".

That I accept and regard as a proper definition of the distinction between "accident" and "process". Perhaps the best example of "process" is Roberts v Dorothea State Slate Quarries Ltd [1948] 2 All ER at 201: 41BWCC154. The case concerned silicosis and despite an acceptance that it might be regarded as being caused by the blow of particles of silicone upon parts of the lung was held to amount to a process and not an accident, in contrast to Selvage v Burrell (Charles) and Sons Ltd [1921] 1KB355: 13BWCC277. There a girl had sustained numerous cuts and scratches on her hands in the course of her work over a long period. Ultimately she became totally incapacitated as a result of blood poisoning. Under statutory

provisions sufficiently similar to those now in question, it was held that her disease was due not to -

> "...one specific and definite accident but to a series of accidents, each one of which is specific and ascertainable, although its actual influence on the resulting illness cannot be precisely fixed.".

Lord Simonds in Roberts regarded that as the high water mark of a case of accident. He concluded that it was -

> "... just because I find it impossible to say of a sufferer from silicosis that his disease is due to "a series of accidents each one of which is specific and ascertainable" that I cannot admit his claim ...".

11. There have been a number of other cases where the frequency of the incidents and the length of time involved have played a part. In Selvage the girl worked for something like 6 months, or even slightly longer, before she had to give up work and during which she had suffered the cuts which, by reason of poisoning, eventually developed arthritis. It was first held that the last cut amounted to an accident and that the incapacity resulted therefrom, but the Court of Appeal held that there was no evidence to support such a finding but that the evidence was conclusive that it resulted from the cumulative effect of the series of accidents. The fact that no particular accident in itself could be said to be the cause of the incapacity did not prevent a claim for compensation under the workmen's compensation provisions which, like this jurisdiction, required that there be an accident and that it arise out of and in the course of employment. That case rather supports R(I)43/55. But, on the other hand, there is such a case as CI/257/49 (KL), decided by a Tribunal of Commissioners, where an individual had had from time to time to dress a grinder's abrasive wheel with a carborundum stick. The question was whether those separate incidents, taken together and which had resulted in him developing Raynaud's Phenomenon after some 5 years, amounted to an accident. The Tribunal held that it did not. At paragraph 9 they referred to Dorothea where Lord Porter had said -

> "In truth two types of case have not always been sufficiently differentiated. In the one type there is found a single accident followed by a resultant injury ... or a series of specific and ascertainable accident followed by an injury which may be the consequence of any or all of them ... in either case it is immaterial that the time at which the accident happens cannot be located. In the other type there is a continuous process going on substantially from day to day though not necessarily from minute to minute or even from hour to hour, which gradually and over a period of years produces incapacity. In the first of these types the resulting incapacity is held to be injury by accident; in the second it is not.".

The Tribunal concluded at paragraph 11 -

> "In our opinion the effect of the Dorothea case and the earlier decisions, the authority of which was left unimpaired by the Dorothea case, is that the test to be applied to every claim based on incapacity resulting from disease is whether the claimant can show that any incident or series of incidents which could be regarded as accidents according to the popular meaning of that word, caused or contributed to the origin or progress of the disease.".

However one looks for periods of time or separation of incidents I think that these last passages provide the central guide. And the reference therein to "incidents" explains why I think that this tribunal's reference thereto can be taken as pointing towards an accident although they did not quite set that out.

12. The question before me is whether the series of disasters founded upon by the claimant fall to be regarded as accidents. Of course they were in one sense accidents, otherwise the claimant would not have required to attend them. But I think it has to be borne in mind that they were also accidents to him because they were not part of his everyday professional duties; rather they were exceptional incidents and were generally separated by some months if not longer. They were therefore exceptional happenings within the claimant's working routine and the time separation means that a much longer time span may be looked at in order to see the whole series which was involved. The less that incidents are out of the normal and the more that they are closely related in time may make it more difficult to discern a true series of incidents and so an accident or series of accidents as against a process.

13. Finally I should note that were it necessary to assign a date, which for the reasons given above I am satisfied upon authority that it is not, it would seem that the medical report obtained from a psychologist, for litigation purposes and on behalf of the claimant, at documents 5 and 6 tends to indicate that matters in some sense came to a head in September 1990 when Traumatic Stress Disorder was diagnosed by the claimant's general practitioner and when, according to the psychologist, his employers should have become aware of his problems. That ties in rather with the Fire Brigade's record of absence which indicates that from April 1991 the claimant was off briefly for debility, then from February 1992 because of stress and anxiety which led to his retiral in June 1993 in a service injury related discharge. When that is related to the particular incidents in document 31, 4 of them appear to have occurred at or after the time when the general practitioner's diagnosis was made and indeed at or about the time of the initial finding about debility. However I make no formal finding of date since it is unnecessary.

14. The appeal must be allowed but a decision to the effect intended by the tribunal must be substituted.

(Signed)
W M WALKER QC
Commissioner
Date: 14 March 1997