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Region: Scotland

SOCIAL SECURITY ACTS 1975 TO 1984

CLAIM FOR INDUSTRIAL DISABLEMENT BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name:

Appeal Tribunal: Greenock

Case No: 4/5

[ORAL HEARING]

1. This is an adjudication officer's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 17 August 1984 which reversed a decision of the adjudication officer issued on 1 May 1984. Our decision is that prescribed disease No A10 (occupational deafness) is prescribed in relation to the claimant. Accordingly, we direct the adjudication officer to refer the diagnosis question to the adjudicating medical authority.

2. We held an oral hearing of the appeal. The adjudication officer was ably represented by Mr P N Milledge, of the Solicitor's Office of the Department of Health and Social Security. The claimant appeared and presented his own case. As will appear below, however, the crucial issues turned upon somewhat technical arguments in law. To these, naturally, the claimant neither could nor attempted to make any contribution. He was in no way prejudiced thereby, however. The assistance of an amicus curiae had been requested. We express our appreciation of the good offices of the Lord Advocate and the Scottish Office which ensured that we enjoyed the assistance of Mrs Paton of Counsel. Mrs Paton skilfully and attractively deployed every argument which could reasonably be advanced upon the claimant's behalf. In so doing, she in no way compromised her impartiality as amicus. The adjudication officer's case was fully canvassed by Mr Milledge. It was in respect of the other side of the coin that we required, and received, Mrs Paton's assistance. We are grateful to her.

3. For practical purposes the essential facts are not in dispute. The claimant is now aged 62. From 1939 to 1965 (apart from war service) he was employed as a plater by a well-known company of marine engineers. In that occupation he regularly used pneumatic percussive tools on metal. There is no doubt that in respect of the whole of that period prescribed disease No A10 is (as its predecessor, No 48, was) prescribed in relation to him.

4. In March 1965, however, the claimant was appointed to the staff position of fabrication planner - and he remained so employed until 26 August 1983. Until 1982 his operational base was a hardboard hut situated within his employers' light engine shop. It was his duty to allocate work on the shop floor; to tell the workmen exactly what had to be done; to ensure that each job was completed on time; and to arrange the dispatch of the finished products. He was answerable to the production controller. In consequence, he was required to be well

acquainted with the precise progress of all fabrications under way in the shop. As is obvious from the foregoing, he could not properly discharge his duties by sitting all day in his hut. He had to make regular - and often prolonged - tours of the shop floor. In addition to pneumatic percussive tools, the shop contained high-speed grinding tools and drop-forging plant.

5. The hut was on a gallery some 12 feet above shop floor level; but, in horizontal measurement, it was only 2 feet from the fabricating block - in which pneumatic percussive tools were in constant operation. There was no form of sound insulation in the hut. In 1982 the claimant's operational base was changed to a portacabin. The portacabin was on the same level as had been the hut; but it was a few feet further from the fabricating block. It, too, had no form of sound insulation. The prevailing noise level was such that, when members of management came to the hut for discussion with the claimant, the use of the pneumatic percussive tools in the fabricating block was temporarily suspended.

6. The claimant first claimed disablement benefit on account of occupational deafness on 5 November 1981. At that time the relevant prescriptions were:

> "Any occupation involving:
>
> (a) .....
>
> (b) the use of, or supervision of or assistance in the use, of pneumatic percussive tools on metal in the shipbuilding or ship repairing industries; or
>
> (c) the use, or supervision of or assistance in the use, of pneumatic percussive tools on metal, or for drilling rock in quarries or underground, or in coal-mining, for at least an average of one hour per working day ....."

At that time, too, regulation 40(2) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980 [SI 1980 No 377] prescribed that (unless the claimant could satisfy various conditions which this claimant could not satisfy) disablement benefit should not be paid in pursuance of a claim in respect of occupational deafness which was made later than 12 months after the claimant had ceased to be employed in an occupation prescribed in relation to occupational deafness. In respect of that first claim by the claimant, accordingly, the live issue before the adjudicating authorities was whether the claimant's occupation (from 1965 onwards) as a fabrication planner could be regarded as employment in a prescribed occupation.

7. To that question the insurance officer gave a negative answer. On the claimant's appeal, the local tribunal gave a positive answer. The insurance officer carried the case to the Commissioner, who restored the decision of the insurance officer. The Commissioner accepted that the claimant's work as a fabrication planner involved the oversight of work carried out by persons using pneumatic percussive tools on metal; but he could not accept that such work involved the use, or the supervision of or assistance in the use, of such tools. With respect, we entirely agree with that conclusion.

8. With effect from 3 October 1983 the prescriptions which we have set out in paragraph 6 above were revoked and replaced by the following:

> "Any occupation involving:
>
> (a) .....

(b) the use of, or work wholly or mainly in the immediate vicinity of, pneumatic percussive tools on metal in the shipbuilding or ship repairing industries; or

(c) the use of, or work in the immediate vicinity of, pneumatic percussive tools on metal, or for drilling rock in quarries or underground, or in mining coal, for at least an average of one hour per working day ..."

With effect from the same date, regulation 40(2) (see paragraph 6 above) was substituted by a provision the effect of which was to increase from one year to five years the period within which a claim might be brought by a claimant who had ceased working in an occupation prescribed in relation to occupational deafness.

9. On 5 April 1984 the claimant made a further claim for disablement benefit on account of occupational deafness. That is the claim which gave rise to these proceedings - and, of course, it falls to be considered in the light of the aforesaid amendments. It is to be noted at once, accordingly, that the claimant will be able to satisfy the current provisions of regulation 40(2) if he can show that he worked in an occupation prescribed in relation to occupational deafness on any day after 4 April 1979. And the practical effect of that is that the issues in this appeal boil down to the question: Did the claimant, whilst working in and from the hut as a fabrication planner, fall within one or other (or both) of the prescriptions which we have set out in paragraph 8 above?

10. We take the prescription in subparagraph (c) first because, in the circumstances of this appeal, the applicability of that prescription turns upon a point of construction only - and involves no dispute either as to the facts or as to the inferences to be drawn from the facts.

11. Mr Milledge very frankly (and, in our view, very properly) conceded that, if the prescription in subparagraph (c) can be invoked by claimants who are employed in the shipbuilding or ship repairing industries, then this claimant falls within that prescription. For at least an average of one hour per working day he was, when working in and from the hut as a fabrication planner, in the immediate vicinity of pneumatic tools which were being used on metal. (We have inserted the word "used" into our paraphrase in order to render that paraphrase readily intelligible. As was pointed out by the Commissioner in paragraph 11 of Decision R(I)2/85, the wording of the prescription is not grammatical; but it can be construed without making it grammatical.)

12. The opening words of the prescription are couched in general terms: "the use of, or work in the immediate vicinity of, pneumatic percussive tools on metal...". Why, then, does Mr Milledge submit that it is for consideration whether they can be successfully invoked by claimants who are employed in the shipbuilding or ship repairing industries? In the forefront of his argument is the time-hallowed maxim: generalia specialibus non derogant. The prescription in subparagraph (b) is specifically and exclusively directed to employees in the shipbuilding and ship repairing industries. It must be presumed that, so far as pneumatic percussive tools on metal are concerned, subparagraph (b) represents the totality of what such employees can derive from the prescriptions. The legislature cannot have intended the "generality" of subparagraph (c) to derogate from the "speciality" of subparagraph (b).

13. Into the papers were inserted a number of elderly cases from the English Reports - and a very recent case from the Reports of Patent Cases. They were

designed to illuminate the application in practice of the aforesaid maxim. In the event, however, neither Mr Milledge nor Mrs Paton invited us to look at those cases. But Mr Milledge did cite to us a case which is not referred to in the papers: Number 20 Cannon Street Ltd. v Singer & Friedlander Ltd [1974] 2 AER 577. That case turned upon the Counter-Inflation (Business Rents) Order 1972 [SI 1972 No 1850], which formed part of the legislative package with which the then government sought to restrict rises in wages, prices, etc. Paragraph 3 of that Order provided as follows:

> "3. Rent shall not be payable in respect of the standstill period at a rate exceeding the standard rate and, where the terms of any tenancy provide for an increase of rent on or after 6 November 1972, the amount of that increase shall not be payable in respect of the standstill period."

("Standard rate" was defined - in paragraph 2(2) - as being, in the case of a business tenancy which was subsisting on 5 November 1972, the rate at which rent was payable on that date.)

Paragraph 4 of the Order, however, went on to provide as follows:

> "4. Where a business tenancy comes to an end on or after 6 November 1972 and the premises are re-let (whether to the previous tenant or not) the rate at which rent is payable in respect of the standstill period shall not exceed the standard rate, except to the extent that any such excess is properly attributable to a variation in the terms of the tenancy."

14. Those ill-drafted provisions are marred by duplication and self-contradiction. Megarry J (as he then was) dealt with them thus:

> "The role of para 4 gives rise to considerable discussion. Nobody was able to suggest anything that the first limb prohibited which the first limb of para 3 had not already prohibited. Each of the prohibitions was in the same form of providing that rent in respect of the standstill period should not be payable at a rate exceeding the standard rate, and all that the first limb of para 4 did was to take the same prohibition as the first limb of para 3 imposed quite generally and impose it on a limited class of case, namely, where a business tenancy ended after 5 November 1972 and the premises were re-let. To this extent, para 4 seemed merely a partial repetition. Further the limited exception in the second limb is in terms merely an exception from the first limb of para 4, and does nothing to exclude the wider prohibition of para 3. However, to read the two paragraphs literally in this way would produce an absurd result: an excess attributable to variation in the terms of a tenancy would escape the prohibition of para 4 only to be caught by the prohibition of para 3, and so the whole of para 4 would be nugatory, the first limb as being a partial repetition, and the second limb as saving nothing from the prohibition of the order. Accordingly, I think that para 4 must be read as excluding para 3 to the extent of the overlap. In other words, it is para 3 that imposes the general prohibition, but in the limited class of case covered by para 4, it is para 4 and not para 3 that imposes the operative prohibitions, thus carrying with it the exception. In this way effect is given to the whole of both paragraphs. Such an approach bears at least some relationship to the familiar maxim generalia specialibus non derogant. Put formally,

it seems to me that the proper principle to apply if an enactment contains two similar prohibitions, one wide and the other applying only to a limited class of case wholly within the wide prohibition, is to treat the wide prohibition as not applying to cases within the limited prohibition, especially if the limited prohibition is made subject to some exception and the wide prohibition is not." (At pp 582-3)

15. Those comments are lucid and illuminating. But, says Mrs Paton, they do not bear upon the point of construction with which we are faced. We are not in the realm of prohibitions. The two prescriptions before us are, in their nature, enabling. A claimant who can bring himself within either will have laid the foundation stone of his entitlement to benefit. The prescriptions may overlap. But (c), so far from derogating from (b), supplements it. A party is not inhibited from availing himself of a general provision in an enactment merely because he could equally avail himself of a more specific provision in the same enactment. Still less is he inhibited from availing himself of a general provision merely because he is in the contemplation of a specific provision within which he cannot bring himself. Mrs Paton pointed to the lengthy provisions as to the meaning of "factory" set out in section 175 of the Factories Act 1961. Paragraph (k) of subsection (2) reads:

"(k) any premises in which mechanical power is used in connection with the making or repair of articles of metal or wood incidentally to any business carried on by way of trade or for purposes of gain..."

Paragraph (m) reads:

"(m) any premises in which articles are made or prepared incidentally to the carrying on of building operations or works of engineering construction, not being premises in which such operations or works are being carried on....."

One can envisage two situations:

(i) premises in which mechanical power is used in connection with the repair (but not the making or preparation) of articles of metal incidentally to the carrying on of works of engineering construction; and

(ii) premises in which mechanical power is used in connection with the making of articles of metal incidentally to the carrying on of works of engineering construction - those premises being premises in which such works are being carried on.

Each situation would appear to fall plainly within the definition in (k). Neither falls within the definition in (m). Would any court - rhetorically asks Mrs Paton - hold that (k) could not be invoked because (m) deals specifically with processes incidental to works of engineering construction and must, accordingly, be presumed to reflect the totality of the legislature's intentions in respect of such processes and the premises upon which they are carried on?

16. We consider that the answer to Mrs Paton's question must undoubtedly be negative. There is a fortuitous similarity between her example and the prescriptions with which we are directly concerned. In common with the definitions of "factory", the occupations prescribed in relation to occupational deafness have grown up piecemeal over the years - with additions here and amendments there.

There does not seem to us to be any warrant for saying that the insertion (or retention) of a specific provision is intended to derogate (for that is the way round in which it has to be put) from a more general provision. In this case the specific prescription in (b) had its genesis in the National Insurance (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 1974 [SI 1974 No 1414]. The more general prescription in (c) had its genesis in the Social Security (Industrial Injuries) (Prescribed Diseases) Amendment (No 4) Regulations 1979 [SI 1979 No 992]. If it had not been intended that (c) should be invoked by employees in the shipbuilding and ship repairing industries, nothing would have been simpler than to insert a few words making that clear.

17. Is, then, the prescription in (b) now otiose? We think not. A claimant who is employed in a shipyard may be able to bring himself within (b) when he is unable to bring himself within (c). For example, he may be unable to demonstrate that he used a pneumatic percussive tool on metal for at least an average of one hour per working day; but able to demonstrate that he used such a tool sufficiently to bring himself within (b). We quote from paragraph 11 of R(I)2/85:

> "It was held in Decision R(I)1/78 that an occupation involved the use of particular tools in a particular way if the amount of time spent using them was not so negligible that it ought to be disregarded. Two or three ear-splitting bursts per day of noise lasting, say, two minutes each would be quite sufficient."

18. We cannot, moreover, shut our eyes to the historical fact that employees in the shipbuilding and ship repairing industries have been favourably regarded from the day when occupational deafness was first scheduled as a prescribed disease. The original qualifying occupations were confined to employees in those industries and (putting it in general terms) employees in foundries and forging shops (see the 1974 Regulations referred to above). It would be strange indeed if employees in the shipbuilding and ship repairing industries were now found to be in a less favourable position than all other employees who use, or work in the immediate vicinity of, tools used on metal.

19. We hold, accordingly, that the prescription in the first limb of (c) is not to be construed as exclusive of employees in the shipbuilding and ship repairing industries. As we have said (see paragraph 11 above), it follows from Mr Milledge's concessions that the claimant has brought himself within that prescription.

20. We pass now to the prescription in (b). Again, a point of general importance is involved. Lest it be thought that, in view of the conclusion which we have just expressed, we are now moving into the realm of obiter dicta, we call to mind the words of Lord Simonds in Jacobs v London County Council [1950] AC 361:

> "It is not, I think, always easy to determine how far, when several issues are raised in a case and a determination of any one of them is decisive in favour of one or other of the parties, the observations upon other issues are to be regarded as obiter. That is the inevitable result of our system. For while it is the primary duty of a court of justice to dispense justice to litigants, it is its traditional role to do so by means of an exposition of the relevant law. Clearly such a system must be somewhat flexible, with the result that in some cases judges may be criticized for diverging into expositions which could by no means be regarded as relevant to the dispute between the parties; in others other critics may regret that an opportunity has been missed for making an oracular pronouncement upon some legal problem which has long vexed the profession. But,

however this may be, there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. It it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing." (At p 369)

Let us hasten to add, however, that we are not on the point of "making an oracular pronouncement".

21. The local tribunal found that the claimant fell within both the prescription in (b) and the prescription in (c). It went into the evidence very thoroughly and directed itself carefully as to the relevant law. Indeed - if we may say so - its completion of the relevant form AT 3 might well serve as a model. We are left in no doubt either as to the (extensive) evidence which it heard or as to the view which it took of such evidence. That enables us to deal with gratifying brevity with the application of the prescription in (b). Once again, Mr Milledge confined his submission to a single issue of construction. The key phrase is: "....work wholly or mainly in the immediate vicinity of .... etc." If, concedes Mr Milledge, the claimant was, whilst in the hut, "in the immediate vicinity of" the pneumatic percussive tools in the fabrication block, then there is no question but that his work was "wholly or mainly" in such vicinity. And he further concedes that in terms of simple distance the "immediate" vicinity test would be satisfied. But, he urges, the issue is not as simple as that. Between the claimant (whilst in the hut) and the relevant tools there was a hardboard wall. Can one ever be said to be "in the immediate vicinity of" something from which one is separated by a physical structure?

22. Mr Milledge took us to R(I)7/76 - a decision of the then Chief Commissioner. In issue was the construction of what was then prescription (c) - and is now reflected in prescription (d):

"(c) work wholly or mainly in the immediate vicinity of drop-forging, plant or forging press plant engaged in the shaping of hot metal."

In the critical periods the claimant had worked -

(i) in a shop which was 33 yards behind a large forging-press shop, there being a compressor house between the claimant's shop and the forging-press shop; and

(ii) in an area which was a lineal distance of 32 feet from the nearest forging press, the latter being in an adjacent shop separated by walling and screening.

23. The Chief Commissioner disallowed the claim. First, he rejected the argument that the true test was the measured noise level at a claimant's place of work:

"It would involve the statutory authorities, at an early stage of claim, in receiving technical and medical evidence on the area involved, and deciding whether the claimant's presence there carried with it a significant or dangerous exposure risk. It would, in substance, be referring the claimant's working environment, alleged to be in the immediate vicinity of the designated plant, to a test of accoustical definition, which is not what sub-paragraph (c) provides, and which approach was rejected by the Industrial Injuries Advisory Council when they considered possible methods for the definition of the occupational cover: (see paragraph 5461)." (Paragraph 16)

24. The Chief Commissioner then went on to set out what he regarded as the correct approach:

> "17. Whether an occupation involves work in the immediate vicinity of the designated plant is a question of fact in each case. I think it is to be answered firstly by ascertaining the locations, that is to say the area within which the designated plants (which from their nature cover considerable areas) are situated, and the area of the claimant's activities. The question whether the area of work is in the immediate vicinity of the plant then depends in my opinion on the weight to be given to the particular circumstances. The distance at which one area lies from the other may itself be decisive of the question. A second factor may be the physical separation of one area from the other because of intervening buildings, significant, not because of their possible effect on the transmission of noise, but because of their location between the relevant areas, preventing one from being in the immediate vicinity of the other. A further factor, as here in the case of 32 shop and 23 shop, may be the presence of walls and of screening, substantially dividing, enclosing or demarking the two areas lying at a distance apart, though under the same factory roof.
>
> 18. Such an enclosure of an area where drop-forging or forging press plant is operating, with, no doubt, the necessary facilities for access and egress, interposes its structure between that area and other parts of the factory. It marks off and identifies the operational zone of the plant. Within the area of that zone are comprised the sites occupied by the plant, and from the nature of the plant, a surrounding area at least sufficient to permit the operating team to have freedom of movement around the plant, to permit access to it, and to secure its efficient operation. Such area, within which ancillary apparatus e.g. ring rolls and furnaces may be located, is often considerable. In my view it is a circumstance from which the conclusion may, I do not say must, be drawn that the immediate vicinity of the plant does not extend beyond the area enclosed, whether by walling or by screens of whatsoever nature, which mark the limits of the area within which the plant is situated, and its operations take place." (Our emphasis in both places.)

25. We make no apology for the length of the foregoing citation. It says everything which we would wish to say on the issue. It makes clear that -

(a) the question is one of fact, to be decided in the light of the particular circumstances of each case; and

(b) the intervention of a physical structure between a claimant's place of work and the designated plant (or, as in the present case, tools) is a significant factor of which account must be taken - but is in no way decisive of the question.

It must be stressed, however, that at the date of R(I)7/76 drop-forging plant and forging press plant were the only items in respect of which the prescriptions used the phrase "in the immediate vicinity of". As the Chief Commissioner made clear, such plant, with its ancillaries, frequently occupies a considerable area of its own - and that area will often, accordingly, be definitive of "the immediate vicinity". Now that pneumatic percussive tools are in contemplation, that approach will not always be appropriate - for the "area" proper to such tools may be nothing more than a workbench plus a 3 feet perimeter.

26. In the present case we can find no reason for dissenting from the conclusion reached unanimously by the local tribunal. The intervention of the hardboard wall of the hut is certainly a significant factor - and the local tribunal obviously regarded it as such (as, indeed, have we ourselves). But it does not, in our view, outweigh the pure distance factor - which, as the Chief Commissioner said, "may itself be decisive of the question".

27. It follows that the adjudication officer's appeal is disallowed.

(Signed) E. Roderic Bowen
Commissioner

(Signed) H.J. Goodman
Commissioner

(Signed) J. Mitchell
Commissioner

Date: 20 March 1985