INDUSTRIAL INJURIES BENEFIT

Arising out of and in the course of insurable employment—home help—journey to duty point.

The claimant, a home help employed by a county council, was injured when she slipped and fell whilst walking on an icy footpath in a public road on her way to the duty point to which she had been assigned for the day. She was paid for time (in excess of 20 minutes) spent on her journey from her home to her first duty point and similarly for the journey from her last duty point to her home and it was understood that in each case she would travel by a reasonable route.

Held that—

1. the accident suffered by the claimant was not an industrial accident (para 1);

2. there was a clear distinction between a person who is employed to travel, for example a commercial traveller, and a person who has definite hours and a fixed place of work, even though it may not be the same place each day or may be more than one place in any one day (para 14);

3. to travel by a reasonable route was merely a condition for the payment of travelling time and not a duty laid upon the claimant as part of her employment (para 14);

4. the claimant's journey to work was not undertaken in the course of her employment but was preparatory to the performance of her duties (para 15).

The Tribunal of Commissioners considered the question of precedent where previous decisions of Commissioners were referred to and submissions were made as to their persuasive or binding effect, stating that Commissioners' decisions fall into 3 categories:—

(a) unnumbered decisions

(b) numbered decisions

(c) reported decisions

and further described each category.

Held that—

1. Commissioners speak with equal authority and any decision irrespective of category may be cited to a Commissioner, local tribunal or insurance officer (para 19);

2. if a decision decides questions of legal principle it must be followed by insurance officers and local tribunals in a case involving the application of that principle unless the case can be distinguished (para 19);

3. if 2 decisions conflict an insurance officer or local tribunal must—

(a) prefer a decision of a Tribunal of Commissioners constituted under section 16 of the Social Security Act 1975, in preference to a decision of a single Commissioner;

(b) give more weight to a reported decision than to an unreported decision;

(c) subject to (a) and (b) choose between the conflicting decisions and in that event there is no obligation to prefer the earlier to the later or vice versa (para 20);

4. a single Commissioner

(a) follows a decision of a Tribunal of Commissioners unless there are compelling reasons why he should not; and

(b) normally follows the decision of another single Commissioner (para 21);

5. on questions of legal principle an insurance officer local tribunal or Commissioner are bound to follow the decisions of the High Court and superior courts (para 22).

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1. Our decision is that the accident suffered by the claimant on Thursday 29th November 1973 was not an industrial accident and that injury benefit is accordingly not payable to the claimant in respect of it. Repayment is not required of benefit paid to the claimant pursuant to the decision of the local tribunal as no question arises as to her not having used due care and diligence to avoid overpayment.

2. The facts of this case are not in dispute. The claimant at the relevant time was employed by a county council as a home help. As such she was given a weekly programme of work by the county's home help organiser which was sent by post to her home. Ordinarily she would be required to attend each day to help in more than one home (referred to by her employers as a "duty point") but during the week in which the relevant accident occurred she worked throughout her working day at a single duty point, the same place on each day from Monday to Friday.

3. The claimant's working day was from 8.30 a.m. when she was expected to arrive at her first (or only) duty point of the day until 4.30 p.m., when she might leave her last (or only) duty point. The claimant was entitled to be paid for the time at duty points and at the same rate for the time spent in travelling between duty points. She was also paid at the same rate for time in excess of twenty minutes each way spent in travelling between home and her first (or only) duty point and between her last (or only) duty point and home. She was also reimbursed her fares. She made her claim for payment by completing a form prepared by the county council on which she indicated the time of arrival at and departure from duty points, travel time and expenses etc. In practice she hardly ever attended at the council offices, but completed her claim forms at home posting them to the county council, and her wages were sent to her by post at home.

4. The distance between the claimant's home and the duty point at which she worked throughout the relevant week was about six miles. The journey, partly in two buses and partly on foot, occupied 55 minutes, so that the claimant was entitled to 35 minutes' paid travelling time each way. At 8.20 a.m. on the day in question the claimant when ten minutes from her duty point slipped while walking on an icy footpath in a public road and fell, injuring her back. She was not immediately incapacitated for work and she continued as usual to her duty point. During the following week on 5th December 1973 she became incapable of work and claimed injury benefit.

5. The local insurance officer decided that there was not an industrial accident and that injury benefit was not payable. The local tribunal allowed an appeal from this decision and injury benefit was paid for the inclusive period from 8th to 22nd December 1973. In their findings they stated that they had considered all the authorities but could not distinguish the case from Commissioner's Decision C.I. 7/66 (unreported), another case concerning a home help. A reported decision concerning a home help (Commissioner's Decision R(I) 2/67) was brought to their attention but was evidently thought to be less in point. The insurance officer now appeals to the Commissioner and was represented at the oral hearing before us by Mr. Nuttall of the office of the solicitor to the Department of Health and Social Security. The claimant was represented by Lord Gifford of counsel instructed by Messrs. Robin Thompson & Partners, solicitors.

6. The question for decision is whether the claimant's accident arose out of and in the course of her employment in terms of section 48(5)(a) of the National Insurance (Industrial Injuries) Act 1965, now section 107(5)(a) of the Social Security Act 1975. If it arose in the course of her employment then, as it is rightly conceded that it would also have arisen out of the employment, the accident would be an industrial accident.

7. The words "arising out of and in the course of" employment appeared originally in the Workmen's Compensation Acts, and it was established by decisions of the Courts under those Acts (such as *Alderman v. Great Western Railway Company* [1937] A.C. 454) as well as by decisions of the Commissioner under the Industrial Injuries Acts (such as R(I) 3/71) that normally a person's employment begins when he arrives at his place of work and ends when the person leaves it, so that accidents on the journey from home to work before arrival at the place of work or on the journey home from work after departure from it do not arise in the course of the employment.

8. Mr. Nuttall relied primarily on the statement of principle which we cite below in paragraph 11 that the test is whether on the particular journey the claimant was on the one hand travelling in the performance of a duty, or was it on the other hand a journey merely preparatory [or, we would add, subsequent] to the performance of a duty. By this test, he submitted, the claim must fail. Decision C.I. 7/66, he submitted, was wrong unless it was distinguishable on the Commissioner's finding in that case that the home help's occupation was in a sense a visiting or travelling one, and that Decision R(I) 2/67 was to be preferred and governed this case. He emphasised that the Commissioner who gave the Decision C.I. 7/66 had in paragraph 9 of Decision C.I. 21/68 (unreported) accepted the correctness of Decision R(I) 2/67.

9. Lord Gifford placed great reliance on Decision C.I. 7/66 and invited us to follow it. He distinguished it from the later Decision R(I) 2/67 on the

ground that in the former case the claimant was paid for travelling time between home and work (if it exceeded a specific time) whereas in the latter she was not. He contended that the claimant if paid travelling time had a duty to the employer to travel by a reasonable route and so was fulfilling a duty to the employer when travelling to work. He relied also on a later Decision C.I. 21/68 in which the Commissioner had suggested a distinction between short and long journeys and submitted that in the present case the employers had, by differentiating between journeys for which the claimant was paid travelling time and those for which she was not, indicated where the line was to be drawn. He pointed out that the approval of Decision R(I) 2/67 in paragraph 9 of that decision was confined to the case of a home help going to her first appointment and in her home district.

10. Lord Gifford further submitted that in the present case the claimant's home was her base; and that in such a case travel to and from the home base is an instance of travel being incidental to employment, particularly as the claimant was working at a distance from the employers' office without having to report there in person. He also submitted that it was not a necessary feature of a home base that it should be a place of work if it was a point from which the employed person radiated and contended that the duty point was not the claimant's only place of work. In support of his submissions he referred us to Commissioner's Decisions R(I) 22/51, R(I) 38/53, R(I) 55/53, R(I) 18/55 and R(I) 15/60 in which respectively, a commercial traveller, a sales representative, a newspaper representative, an agricultural advisory officer who was from time to time required to visit farmers, and a relief insurance agent were all held to be in the course of their employment while travelling, or doing any acts incidental to travelling, between their home and their first (or only) call or between their last (or only) call and home. He referred also to Decision R(I) 19/57 where a meter collector's journey from home to his first call was held not to be in the course of his employment, and distinguished this case because the meter collector had a place of work at which he had to call daily in order to hand over the money which he had collected and to receive instructions for the following day.

11. In our judgment Mr. Nuttall's submission is right. The principle on which the issue is to be determined has recently been stated by Lord Widgery C.J. in the High Court in *Regina v. National Insurance Commissioner, Ex parte Fieldhouse,* reported as an appendix to Commissioner's Decision R(I) 9/74, who said:—

> "The learned Commissioner . . . proceeds to consider the principle upon which the issue should be determined, and in paragraph 6 of his written decision he says this: "The question whether a person who meets with an accident on the public highway while travelling to or from his home has been the subject of numerous decisions of the Commissioner, I do not propose to enter into a lengthy discussion of them. As a general principle the decision in such cases turns on the answer to the question: 'Was the journey in the course of which the claimant was injured a journey on duty or simply a journey to or from duty?' In a comparatively early decision, [R(I) 18/55], the learned Commissioner put it in this way: 'The question at issue is whether on the particular journey he was travelling in the performance of a duty, or whether the journey was incidental to the performance of that duty and not merely preparatory to the performance of it. That question can be determined only by looking at

all the circumstances of the case. The fact that a man is paid travelling time or travelling expenses, taken by itself, does not prove that he is travelling in the course of his employment; it may be no more than a means of recompensing him for having the inconvenience of travelling'."

I pause there to observe that the test posed for himself by the Commissioner is accepted by both Counsel as correct, and in my judgment is correct. One can express the legal issue thus: it is whether on the particular journey he was travelling in the performance of a duty or whether he was travelling incidental to the performance of a duty, or whether on the other hand his journey was merely preparatory to the performance of the duty."

This is the test in the case of a journey to work, and an analogous test is relevant in the case of the journey from work. So long as the test applied is correct the question whether a journey is made in the course of employment is one of fact.

12. Applying this test to the present case we ask the question whether the claimant's journey to work on the day of the accident was made in fulfilment of an express or implied obligation of her employment or was it incidental to that employment? Whatever may be the position where a person is employed to work for some of his time at home, we do not think that it is in general helpful to consider whether, because a person for his own convenience performs minor functions connected with his work at home which he could equally perform elsewhere, his home is his base. Indeed in Decision R(I) 18/55 the decision went in favour of the claimant notwithstanding an express finding (in paragraph 9) that the claimant did not normally use his home as his base. Equally in our opinion the length of journey, long or short, is not material to the question whether it is in the course of an employment. We think that the doubts on this point expressed by the Commissioner in Decision R(I) 3/71 were well founded.

13. Approaching the matter in this way one would have no difficulty in finding that a commercial traveller, for instance, is employed to travel and call on customers and is in the course of his employment when travelling. Other cases may be less clear but whenever it is found that the duties of an employed person include either regularly or from time to time travelling to and interviewing or calling on customers or others at times or in a sequence, which it is in his discretion to decide in the area of his operations, there is some evidence on which a finding can be based that such travelling is in the course of his employment. In this connection we refer, as well as to the cases cited by Lord Gifford, to Decision R(I) 4/70.

14. On the other hand, as was pointed out in paragraph 10 of Decision R(I) 2/67, there is a clear distinction between these cases and that of a person who has definite hours and a fixed place of work, even though it may not be the same place each day, or indeed even though it be more than one place in any one day. In the present case we reject both Lord Gifford's criticism of paragraph 10 above referred to and his submission that because the employers paid for the claimant's travelling time above twenty minutes she had a duty to travel by a reasonable route. In our judgment it was simply a condition for payment of travelling time that she should so travel.

15. The primary question is what was the scope and ambit of the claimant's employment, or put more simply, what was she employed to do?

In our judgment the claimant was employed, not to visit or travel, but to work as a home help at the duty points at which the council instructed her to work and present herself there at the proper time. She had fixed hours of work and fixed places of work where her duties were to be performed. On the day of her accident she had only one place of work, but we do not think the position would have been different if the claimant had been directed to go to a second duty point later in the day. Her journey to work was not, as we find, undertaken in the course of her employment but was preparatory to the performance of her duties. In our judgment Decision R(I) 2/67 was correct and Decision C.I. 7/66 should not be followed.

16. In the present case the local tribunal preferred an unreported decision to a reported decision, and we heard submissions on behalf of both the insurance officer and the claimant on the question of precedent which makes it appropriate to state the position where previous decisions of Commissioners are referred to and submissions are made as to their persuasive or binding effect.

17. There have been nearly 60,000 Commissioners' decisions since 1948, and they fall into the following categories (a) unnumbered decisions (b) numbered decisions and (c) reported decisions.

(a) Unnumbered decisions which represent the vast majority of decided cases comprise those in which well established principles of law have been applied to the facts as found or in which the sole issues have been of fact. They were not thought by their authors to reflect any unusual circumstances or to contribute to the development of the law, save in some cases to reinforce accepted lines of authority.

(b) Numbered decisions are those to which the Commissioner concerned has had a number allocated with a prefix beginning with the letter 'C'. This ensures a limited distribution of the decision as being of interest, either on its facts, or because it develops the application of some legal principle or because it is the first decision applying the provisions of some statute or regulation, or simply because the Commissioner for some reason wishes his decision to receive a wider distribution than that given to unnumbered decisions, which are identified by the number of the Commissioner's file (also prefixed 'C') at the foot of the decision.

(c) Reported decisions are those selected for reporting. They are so selected by the Chief Commissioner from numbered decisions and are primarily so selected if he is satisfied that they deal with questions of legal principle and that they command the assent of at least a majority of the Commissioners. Reported decisions are printed by Her Majesty's Stationery Office having a number with a prefix beginning with the letter 'R' and are available to the public once printed. They are collected together in bound volumes available at intervals of four years. They are distributed to all insurance officers and local tribunals and gain added weight after publication in so far as they are applied and followed without criticism. About 2,000 Commissioners' decisions have been reported since 1948. A digest of these decisions is also published by Her Majesty's Stationery Office.

18. In addition to single Commissioner's decisions, decisions may be given by a Tribunal of three Commissioners nominated in accordance

with what is now section 116 of the Social Security Act 1975 to decide a question of law of special difficulty. Such decisions are almost invariably reported.

19. Commissioners speak with equal authority. All their decisions whether unnumbered, numbered or reported may be cited to Commissioners, local tribunals and insurance officers. Where they decide questions of legal principle they must be followed by insurance officers and local tribunals in cases involving the application of that principle, unless they can be distinguished. It should be borne in mind that similarity in underlying facts does not automatically give rise to similarity in the principle to be applied and questions of fact should not be elevated into questions of legal principle.

20. If confronted with decisions which conflict, insurance officers and local tribunals must prefer the decision of a Tribunal of Commissioners (whether a unanimous or majority decision) to that of a single Commissioner. A reported decision, for the reasons given in paragraph 17(c), should *prima facie* be given more weight than an unreported decision. Subject to the foregoing insurance officers and local tribunals must choose between conflicting decisions and there is no obligation on them to prefer the earlier to the later or *vice versa.*

21. In so far as the Commissioners are concerned, on questions of legal principle, a single Commissioner follows a decision of a Tribunal of Commissioners unless there are compelling reasons why he should not, as, for instance, a decision of superior Courts affecting the legal principles involved. A single Commissioner in the interests of comity and to secure certainty and avoid confusion on questions of legal principle normally follows the decisions of other single Commissioners (see Decisions R(G) 3/62 and R(I) 23/63). It is recognised however that a slavish adherence to this could lead to the perpetuation of error and he is not bound to do so.

22. The insurance officer, local tribunals and Commissioners on questions of legal principle are all bound to follow the decisions of the High Court and Superior Courts.

23. Our decision on the appeal is that the claimant's accident on 29th November 1973 was not an industrial accident and the insurance officer's appeal is accordingly allowed.

(Signed) R. J. A. Temple
Chief Commissioner

(Signed) J. S. Watson
Commissioner

(Signed) J. G. Monroe
Commissioner