INDUSTRIAL DISABLEMENT BENEFIT

Prescribed Disease—occupational deafness—meaning of the term "underground"—effect of a change in the law before final determination of a claim.

At an oral hearing on 18.1.84 the Commissioner considered a claim made on 20.10.81 which, for the satisfaction of the "20 year test", relied, in part, upon work involving the use of pneumatic percussive tools on rock in trenches, and other sites below ground level. The claimant maintained that this work took place "underground" and was, in consequence, prescribed.

Held that:

1. in the context of paragraph 48(c) of the Schedule of Prescribed Diseases (as it then was) the term "underground" is restricted to a place where the surface of the earth is physically immediately above and which is thus not open to the air (paragraphs 6—8);

2. the claim could not succeed under the regulations in force at the time it was made. However, being an open-ended claim it continued until its final determination and consequently from 3.10.83 the Commissioner was entitled to apply to it the change in the law which came into force on that day (paragraphs 9—10).

1. My decision is as follows:

(i) The decision of the insurance officer dated 18 November 1981 disallowing disablement benefit on account of occupational deafness (prescribed disease No 48) was properly reviewed because it was given in ignorance of a material fact, namely that the claimant had had periods of employment other than those specified in his claim form dated 20 October 1981, which could constitute employment in prescribed occupations: Social Security Act 1975, section 104(1)(a).

(ii) The decision of the insurance officer dated 25 May 1982 and the decision of the local tribunal dated 17 February 1983, both refusing to revise on review the said decision of the insurance officer (dated 18 November 1981) were correct on the law as it then was (i.e. before the coming into operation of the Amendment Regulations of 1983—see below): Social Security Act 1975, sections 76 and 77 and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980, [S.I. 1980 No 377], regulations 2(d) and Schedule 1, Part I, paragraph 48.

(iii) Nevertheless, I hold that prescribed disease No 48 (now No A10) is prescribed in relation to the claimant from 3 October 1983: Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980, regulation 2(d) and Schedule 1, Part I, paragraph A10 as amended and substituted by the Social Security (Industrial Injuries) (Prescribed Diseases) Amendment (No 2) Regulations 1983, [S.I. 1983 No 1094], regulations 2 and 3.

(iv) I direct the insurance officer to refer to the appropriate medical authority the diagnosis and disablement questions therefore arising: Social Security Act 1975, section 108 and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1980 (as amended), regulations 25, 26(5) and 27.

The claimant's appeal against the decision of the local tribunal is therefore allowed but only from 3 October 1983 onwards. In all other respects, the decision of the local tribunal is confirmed.

2. This is an appeal to the Commissioner by the claimant, a man born on 6 October 1920, against the majority decision of a local tribunal dated

17 February 1983, affirming the local insurance officer's refusal, on review, to revise an earlier decision of an insurance officer to the effect that occupational deafness was not prescribed in relation to the claimant, having regard to his claim dated 20 October 1981 and to additional information supplied by him subsequently. The appeal was the subject of an oral hearing before me on 18 January 1984 at which the claimant was present and gave evidence to me and was represented by Mr. F. Whitty of the Transport and General Workers' Union. The insurance officer was represented by Mr. P. Wickham. I am indebted to Mr. Whitty and to Mr. Wickham for their assistance to me at the hearing.

3. The claimant made a written claim for disablement benefit for prescribed disease No 48 (now A10)—occupational deafness—on form B.I. 100 (OD) on 20 October 1981. On that form he stated that his employment had been from 1966 to date for an engineering company (S Ltd.) as a welder, plater, and grinder. Subsequent enquiries by the Department of those employers elicited the information that the period of employment was from 8 April 1969 up to the date of claim 20 October 1981 and continuing. They stated that the claimant was employed as a welder/fitter using a high speed grinder to clean off metal weld etc. I need not go into detail into the facts because it has been rightly conceded by the insurance officer now concerned that that period of employment with S Ltd. was in an occupation prescribed for occupational deafness, in that the claimant was using a high speed grinding tool for cleaning cast metal (see sub-paragraph (a) of paragraph 48 of the 1980 Regulations). The problem is that even today the claimant cannot show twenty years in that employment with S Ltd. (he is still working there), twenty years being the minimum aggregate period required by regulation 2(d) of the 1980 Regulations until amended by the 1983 Amendment Regulations (see below).

4. Consequently at the local tribunal the claimant sought to complete the twenty year period by contending that his employments, with a cable company (B Ltd.) from 1947 to 1949 and from 1964 to 1968, and with a construction company (T Ltd.) from 1962 to 1964 were also in prescribed occupations. That contention was reiterated before me by Mr. Whitty in an attempt to show that the claimant satisfied the twenty years' rule, with the result that he would (subject of course to the medical authorities holding him to have the requisite degree of deafness) be entitled to disablement benefit as from the date of his claim 20 October 1981 and not merely from 3 October 1983 (when the Amendment Regulations came into force—see below). I cannot accept that contention for the reasons given below.

5. Mr. Whitty limited his submission (in my view quite properly on the facts and the evidence given to me) to a contention that the work of the claimant with B Ltd. and T Ltd. had involved the claimant in "any occupation involving...the use...of pneumatic percussive tools...for drilling rock...underground...for at least an average of one hour per working day". (1980 Regulations, before amendments by the Amendment Regulations of 1983). In support of that contention, the claimant gave evidence to me that his work with B Ltd. was that of a mobile compressor operator. He had to use a jack-hammer (a pneumatic percussive tool) for an average of at least an hour a day on such jobs as excavating trenches through solid rock up to 12 ft deep, e.g. to lay pipes for water supplies for reservoirs. When working with T Ltd. he had been involved in the operating of compressors and jack-hammers for at least an average of one hour per day on the construction of motorways. That involved the making of drains and other portions of the motorway through solid rock and his work could well be some feet below the actual ground level.

6. There is no doubt that for an average of at least an hour a day the claimant was, during his employments with B Ltd. and T Ltd. in an occupation involving "the use of a pneumatic percussive tool for drilling rock" and the only question is whether that was done "underground" (1980 Regulations, paragraph 48(c)). I note that the claimant told the local tribunal in his evidence to them "I did not work... underground" but I am quite prepared to accept that he had not given his mind fully to this particular question nor understood its legal significance. On the appeal to the Commissioner, the claimant's association submitted that the claimant's work below ground level in e.g. 12 ft deep trenches, did constitute work "underground", citing definitions of the word "under" in the Concise Oxford Dictionary, indicating that the word "under" may be used in a sense which does not necessarily predicate something physically above. However what is involved here is not the definition of the word "under" but the definition of the word "underground". In the context of paragraph 48(c) of the 1980 Regulations, the word "underground" is used adverbally and the Shorter Oxford Dictionary defines the word in that sense as meaning "below the surface of the ground". That in my view restricts "underground" to a place where the surface of the earth is physically immediately above, e.g. in the normal case of a tunnel underground, not visible from ground level. I do not accept that the word "underground" can also mean, in paragraph 48(c), "below ground level but nevertheless open to the air".

7. Mr. Whitty also urged upon me that the word "underground" must not necessarily be given its ordinary dictionary meaning but ought to have a technical construction in the light of the context and purpose of paragraph 48(c) of the 1980 Regulations, citing reported Commissioner's Decision R(I) 13/80 (paragraph 11). However, looking at the whole context in which the word "underground" occurs in paragraph 48(c) i.e., "for drilling rock in quarries or underground, or in coal-mining...", I see nothing to indicate that the word "underground" should have any technical or artificial meaning other than that of its ordinary dictionary meaning. Mr. Wickham drew my attention to the 1975 report of the Industrial Injuries Advisory Council (Command 7266—p 26, para 46), which referred to the necessity for extension of the prescription and did not use the word "underground" but referred to places where there was likely to be excessive noise reverberation. But I must construe the regulation as it was ultimately made with its use of the word "underground", although I well appreciate that the reverberation of a pneumatic percussive tool in a 12 ft deep trench, even if that trench is open to the air, would be very considerable. Nevertheless, I do not consider that that justifies me in giving the word "underground" in paragraph 48(c) an artificial meaning which clearly neither by its ordinary definition nor in its context can it bear.

8. In support of his contention that the claimant's work in deep trenches open to the air could be work "underground", Mr. Whitty also cited to me the definitions of "mine" and "quarry" in section 180(1) and (2) of the Mines and Quarries Act 1954. Those definitions are of course included in that Act for the purposes of that Act alone but I am prepared to accept that they do give a general indication of what may be a mine or a quarry. Both definitions in fact commence by referring to "an excavation or system of excavations made for the purpose of, or in connection with..." followed by a definition of mining or quarrying. Mining is defined as "the getting, wholly or substantially by means involving the employment of persons below ground, of minerals...". As I understand Mr. Whitty's point, he submitted that the reference to "an excavation or system of excavations" indicates that the legislature in the 1954 Act had in mind that mining and quarrying could well include the preliminary or introductory excavations, even if they were open to the air. Even if this is so, and I express no opinion

on it, it does not appear to me to alter the fact that the word "underground" in paragraph 48(c) of the 1980 Regulations is in a separate category from "coal-mining" or work in "quarries". Even if "mining" or "quarrying" in paragraph 48(c) have a wide meaning (and I express no opinion on that point), those words and "underground" are not necessarily *ejusdem generis* (of the same class).

9. The further question then arises whether the coming into operation on 3 October 1983 of the Social Security (Industrial Injuries) (Prescribed Diseases) Amendment (No 2) Regulations 1983, [S.I. 1983 No. 1094] between the date of the local tribunal's decision on 17 February 1983 and the date of my Decision in any way assists the claimant in his appeal. Regulation 3(1) of the Amendment Regulations substitutes a new regulation 2(d) in the 1980 Regulations, which in effect reduces to 10 years from 20 years the aggregate periods of employment in prescribed occupation(s) which are a pre-requisite of a successful claim. The claimant undoubtedly had *ten* years in a prescribed occupation, namely his work with S Ltd., and the question is whether the change in the law can benefit him from the coming into operation on 3 October 1983 of the Amendment Regulations. His claim was made on 20 October 1981, the insurance officer's decision was given on 25 May 1982, and the local tribunal's decision was given on 17 February 1983, all before the coming into operation on 3 October 1983 of the Amendment Regulations. Those Regulations themselves contain no express provision on this point and there is no transitional regulation. I accept the concurring submissions of Mr. Whitty and Mr. Wickham that the Amendment Regulations do apply to the claimant as from 3 October 1983. A further question is whether I can in this Decision apply the Amendment Regulations to a case where the claim was made on 20 October 1981, long before those Regulations came into operation. Mr. Whitty and Mr. Wickham both submitted to me that I did have such power, Mr. Wickham citing to me the reported Decision of a Tribunal of Commissioners in R(S) 1/83 and also section 102(1) of the Social Security Act 1975, which provides,

> "102.—(1) Where a question under this Act first arises in the course of an appeal to...a Commissioner, the...Commissioner may, if he thinks fit, proceed to determine the question notwithstanding that it has not been considered by an insurance officer."

10. I accept Mr. Whitty and Mr. Wickham's submissions. The claim of 20 October 1981, being "open-ended", is to be regarded as continuing—see paragraph 9 of R(S) 1/83, where the Tribunal said that "where...an open-ended claim has been made the claimant should be treated as continuing his claim until final determination of it. It will therefore persist during appeal procedure until a final decision is made..." (cf R(I) 17/56, where a point similar to the present one was assumed by the Commissioner). As the claim still exists at the date of this decision, I am entitled to apply to it the law in force at the date of my decision, for it is settled that an appeal to the Commissioner in this jurisdiction constitutes a complete re-hearing of all issues of law and fact (contrast section 102(1) of the 1975 Act and *Wilson v Dagnall* [1972] 1 Q.B.509; [1972] 2 All E.R.44, where the Court of Appeal would not apply a "supervening" Act but that Court does not of course 're-hear'). I therefore hold that occupational deafness is prescribed in relation to the claimant by reason of his ten years' employment with S Ltd. but only as from 3 October 1983. I have already held (above) that occupational deafness was not prescribed in relation to the claimant under the unamended 1980 Regulations and was not therefore prescribed for him for any period prior to 3 October 1983.

(Signed) M. J. Goodman
Commissioner