

INDUSTRIAL DISABLEMENT BENEFIT

Special Hardship Allowance—cutting machine operator suffering from PD 48—Occupational Deafness—incapacity for regular occupation.

The claimant, a 50 year old cutting machine operator, receiving disablement benefit in respect of prescribed disease No 48 (occupational deafness) claimed special hardship allowance. He maintained that he was incapable of his regular occupation not because he was physically unable to perform the tasks of that occupation but because he wished to avoid the risk of further hearing loss and thereby total deafness.

Held that:—

1. the principle in paragraphs 8–10 of decision R(I) 15/74 should extend to include, for the purposes of section 60 of the Act, that incapacity is acceptable if the claimant cannot work in his regular occupation without danger to himself or others; (paragraph 10);
2. that “danger to himself” covers injury by process no less than injury by accident; (paragraph 10).

1. My decision is as follows:—

- (a) The claimant is disqualified for receiving the increase of disablement benefit, commonly called special hardship allowance, provided for in section 60 of the Social Security Act 1975 for any period earlier than 17 November 1976.
- (b) The conditions of subsection (1) of that section are satisfied by the claimant in relation to the inclusive period 17 November 1976 to 29 January 1980.
- (c) The weekly rate or rates at which special hardship allowance is payable to the claimant for the above mentioned period are to be determined as provided in paragraph 19 below.

2. This is an appeal by the claimant from a decision of the local tribunal holding that special hardship allowance is not payable to him from and including 1 September 1976. I have heard the appeal at an oral hearing at which the claimant attended and gave evidence and was represented by Mr Andrew Bano, of Counsel, instructed by Messrs Brian Thompson & Partners, and the insurance officer was represented by Mr N. Butt, of the solicitor's office of the Department of Health and Social Security.

3. The claimant, who is a man aged 50, worked for many years as a cutting machine operator in the fork shop of certain employers, and that is his regular occupation for the purposes of his claims to special hardship allowance. It is a very noisy occupation and on 24 June 1976 he claimed disablement benefit on the ground that he had developed prescribed disease No 48 (occupational deafness). His claim succeeded and on 11 November 1976 a medical board found that he had been suffering from the disease since the date of his claim and assessed his disablement provisionally at 40 per cent from then until 24 June 1981.

4. The claimant is completely deaf in the right ear and partially deaf in the left ear in which he wears a hearing aid. It is not, therefore, surprising that he decided to change his occupation rather than risk further hearing loss. This he did by seeking a less noisy employment with the same employers and he became a storekeeper with them, beginning the new employment on 23 August 1976. Unfortunately he did not claim special hardship allowance until 11 February 1977, so that an award of the allowance cannot be made to him for any day earlier than 17 November 1976 unless he had “good cause” for his delay. And Mr Bano conceded that he could not contend that such cause existed.

5. If the claim is to succeed the qualifying conditions now enacted in section 60(1) of the Social Security Act 1975 must be fulfilled. The critical condition requires that the person concerned be incapacitated for his regular occupation and he must be so incapacitated "as the result of the relevant loss of faculty". The phrase "the relevant loss of faculty" means the disabling factor in the injury sustained by the person in his relevant industrial accident or in his disease where, as in this case, he has developed a prescribed disease. What constitutes the relevant loss of faculty is for the medical authorities to say: *R v Industrial Injuries Commissioner, Ex parte Ward* [1965] 2 QB 112; [1964] 3 All E R 907; Appendix to R(I) 7/64. In practice they do not define it, but they state its effects on the person concerned by describing the ways in which he is handicapped by it. In the present case, there is no doubt that the only handicap caused to the claimant by the relevant loss of faculty consists of diminished hearing capacity.

6. The claimant is physically able to perform the tasks of his regular occupation. There is evidence to this effect from his employers which he himself has never denied. His reason for seeking alternative employment when he did was simply that he wished to avoid the risk of further hearing loss and above all the risk of total deafness. There is no question of his suffering from any mental illness nor, of course, was anything of the sort indicated in the findings of the medical board which assessed his disablement. His attitude was and is rational and sensible. Accordingly, the problem is to determine whether his reluctance to resume the regular occupation is in some way sanctioned by or included in his relevant loss of faculty.

7. There have been a number of reported Commissioner's Decisions bearing on that problem, and their inter-relationship and effect were most ably debated at the hearing of this appeal. For present purposes the most important is the most recent of them, R(I) 15/74, in which all save one (R(I) 45/54) of the earlier decisions were discussed. That decision (R(I) 15/74) dealt with the case of a coal miner (power loader) whose industrial accident had impaired his vision in one eye. His claim to special hardship allowance was allowed on the principle that if by reason of his physical condition a man cannot work in his regular occupation without danger to himself or others, then he should be regarded as incapable of following that occupation. No doubt the physical condition of the person concerned was emphasised in order to distinguish the principle to be applied from that relied on in R(I) 66/52, a majority decision of a Tribunal of Commissioners in which reliance had been placed on the mental condition of the person then concerned, a young coal miner who had lost the sight of one eye and was apprehensive of total blindness.

8. Mr Butt did not dissent from the principle formulated in R(I) 15/74 but submitted, and I accept, that whether a sufficient danger exists to invoke its application must be objectively judged. Mr Bano's submission was consistent with this conclusion. He submitted that a distinction should be drawn between cases involving "a perceived risk" (i.e. a risk of which the apprehension may not be justified) and those involving an actual risk, and he placed the case dealt with in R(I) 66/52 in the former and the present case in the latter category.

I must therefore determine whether, judged objectively, there would have been danger of injury to the claimant or others if he had returned to his regular occupation of cutting machine operator. There is no evidence of danger to others and, in the circumstances, the question is limited to danger to the claimant himself.

9. In an exceptionally full and well expressed decision the local tribunal held that there was no such danger on the ground that the risk of an increase of the claimant's deafness could not constitute a "danger to himself" within the meaning of the principle applied in R(I) 15/74. They were influenced by evidence from the employers' personnel officer and by the fact that the claimant had not received medical advice to leave his regular occupation but had acted on his own responsibility.

10. I have to disagree with the local tribunal both on their interpretation of the principle applicable, and on their assessment of the evidence. I see no justification for confining the "danger to himself" referred to in that principle to the risk of accidental injury. In my view, all manner of injury is covered by it including injury by process, provided, of course, that it is occupationally caused. And, having regard to the claimant's existing loss of hearing the gravity of even a small further such loss is obvious.

As to the evidence of the personnel officer, this is contained in a brief statement made to and recorded by an inspector of the Department of Health and Social Security; the personnel officer did not attend the local tribunal's hearing. He stated that the claimant's capacity for his regular occupation was not impaired and that there would be no possibility of his deafness causing injury to himself or others if he returned to it. He made no mention of any risk to the claimant of incurring further hearing loss, and I infer that he gave no consideration to that risk. Accordingly, I regard his evidence as irrelevant.

11. The lack of medical advice to the claimant perhaps requires explanation. I questioned the claimant as to the medical advice he had received, and he told me that he had received no advice from his doctors and that they had not even told him that his deafness was due to his occupation, although he inferred from a consultant's attitude in 1975 or early 1976 that this was the case. At the relevant time, however, the claimant had not yet been provided with a hearing aid, and I have come to the conclusion that there was a failure of communication between him and his doctors perhaps due partly to his deafness and partly to his unfamiliarity with the ways of medical men.

12. The local tribunal were, however, in fact presented with medical evidence justifying after the event the claimant's decision to seek alternative employment. It is to be found in the report dated 24 June 1977 of a medical board advising on the claimant's claim to special hardship allowance. They advised that he was not capable of his regular occupation, that the relevant loss of faculty contributed materially to that incapacity, that the reasons for this advice consisted of "Extreme deafness", and that the incapacity for the regular occupation was likely to be permanent. They advised also that the relevant loss of faculty imposed on the claimant the limitation that he should not work in noise. Whether or not the board were right to advise that the claimant was incapable of his regular occupation, they evidently considered that there were medical grounds for his avoiding exposure to the noise experienced in it.

13. The claimant's decision to seek employment alternative to his regular occupation was finally brought about by an alarming attack of vertigo in July 1976. When he made the change the risk of further hearing loss which he would have incurred if he had continued in that occupation was undoubtedly very great; more a certainty than a risk. But I still have to consider whether it would have continued so. This question is linked with the subject of protective devices. The claimant worked for 33 years in the regular occupation and during that period was never provided by the employers or anybody else either with any form of protection against noise or with any advice as to the risk of hearing loss which he ran. However,

when he started work as a storekeeper he found ear muffs stocked in the stores. None had ever been used in the fork shop when the claimant was working in the regular occupation, but he told me that some have since been taken into use there. I have to consider, therefore, whether their use diminishes the risk of hearing loss to such an extent as to make it insubstantial.

14. Evidence bearing on this point is contained in two reports written since the local tribunal's decision by Professor R. R. A. Coles, a consultant in audiological medicine. These were not written for the purposes of the present proceedings. The first is dated 5 June 1978 and contains the following passage:—

“The sad thing about this case was that not only was the deafness unnecessary in the first place (if his employers had taken reasonable precautions. . .) but his change of job once he was deafened was still unnecessary had ear protectors been provided and appropriate advice given. I recall, when I examined [the claimant] on 1.12.77, wondering whether to advise him that he could safely go back to his job if he wore protectors; in the event, I thought it better to say nothing as. . .he would probably not receive the supervision needed and I did not want to advise him to go back to a noise-hazardous situation where I could not be 100% sure that he would be adequately protected. . .”

In his second report dated 12 April 1979 Professor Coles returned to the subject of ear protection and the following are extracts from this report:—

“On a more scientific plane, it is true that ear protection is not the whole answer. A lot of things can go wrong, e.g. ill-fitting of earplugs, damage to the seals of ear muffs, failure to understand or be instructed precisely as to when to wear plugs or muffs. This is why current Health and Safety Executive. . .policy is towards engineering control of the noise in the first place rather than relying on the vagaries of ear protection. . .

Finally, it may be relevant to point out that the wearing of ear protection may itself introduce some hazards even in normally-hearing persons. Scientific evidence, including some of my own research, has shown that hearing of speech and warning sounds, etc. may be considerably reduced (often in a dangerous way) by the wearing of ear protectors. . .”

15. Professor Coles seems to blow hot and cold on the subject of the efficacy of ear protectors. But my conclusion on the evidence presented to me, including his reports, is that it would be unsafe to hold that the claimant could, from some date on or after 17 November 1976 have followed his regular occupation without substantial risk of further hearing loss if he had been provided with appropriate protective devices. Nor have I satisfactory evidence that he would have been so provided. Consequently, I hold that, objectively considered, there has hitherto been a sufficient risk of injury to the claimant in his regular occupation to invoke the principle of R(I) 15/74.

16. I turn to consider whether the qualifying conditions of section 60(1) of the Social Security Act 1975, are satisfied by the claimant. Because of the possibility that the risk of injury to him may at some stage be rendered insubstantial by the provision of ear protection devices, I refrain from holding that his incapacity for his regular occupation is likely to be permanent. However, on the facts which I have already found I hold that since 24 June 1976, the date of his development of prescribed disease No 48, he has been continuously so incapacitated. In the circumstances of this case, that date falls to be substituted for the end of the injury benefit period: see

regulation 16(b) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 [S.I. 1975 No 1537]. In fact the claimant may have worked in his regular occupation for a brief period after 24 June 1976 but, in my view, he is nevertheless to be regarded as incapacitated for it on the principle of R(I) 15/74. The period was very brief because he was on holiday for part of July 1976 and he was off work owing to sickness from 13 July to 21 August 1976.

17. The next question is whether he has been similarly incapacitated for an employment of equivalent standard to the regular occupation. The only alternative employment suggested as suitable for the claimant is the one he is following, that of a storekeeper. Evidence enabling a comparison to be made between the standards of remuneration of the regular occupation and this employment is lacking in the case papers. But in his evidence at the hearing of this appeal the claimant satisfied me that the employment of storekeeper is not of equivalent standard to the regular occupation. Accordingly, I hold that the claimant satisfies the so-called "continuous conditions" of section 60(1) of the Social Security Act 1975.

18. In principle, therefore, I find that an award of special hardship allowance should be made to the claimant for a period beginning on 17 November 1976, and I consider that 29 January 1980 is a suitable terminal date for such period. Upon the claimant claiming a renewal of the allowance, the insurance officer will be able, if necessary, to investigate and present evidence concerning the provision of ear muffs and their efficiency in reducing the risk of hearing loss. But, in my view, if the insurance officer thinks it right to contest a claim by the claimant to such a renewal it will be for him to show that the risk to the claimant of further hearing loss is too insubstantial to invoke the principle of R(I) 15/74.

19. There remains the question of the rate or rates at which the allowance should be awarded to the claimant. This has to be determined in accordance with the provisions of section 60(6) of the Social Security Act 1975. Unfortunately, the figures of earnings included in the case papers are inadequate to enable me to apply those provisions and I must therefore adopt an unusual course. I shall remit the matter to the local insurance officer for the determination of the rate or rates of the award, and in doing so I have in mind that it may be possible for the officer and the claimant to agree on the figures. If there is any difficulty the matter should be referred to me again and I hope to be able to deal with it without the need to reconvene the oral hearing. I should perhaps add for the claimant's information that it sometimes happens that a person is held to satisfy the qualifying conditions of section 60(1) but is found to be entitled to a nil award when the provisions of section 60(6) are applied.

20. For the reasons which I have explained I allow this appeal and give the decision set out in paragraph 1 above.

(Signed) R. S. Lazarus
Commissioner