

## CHAPTER 11

# Industrial injuries: reduced earnings allowance (formerly special hardship allowance)

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## CHAPTER 11

## Industrial injuries: reduced earnings allowance (formerly special hardship allowance)

### Part 1: Regular occupation

*Section 60 of the Social Security Act 1975 and Part III of the Social Security (Industrial Injuries) (Benefit) Regulations 1975 (“the Act” and “the regulations”)*

#### 1 Determination of what is a person’s regular occupation

- i What is a person’s regular occupation must be considered in the light of his employment history. If he voluntarily abandons one occupation and starts another that may become his regular occupation, but if he does so on account of ill-health his former occupation may remain his regular occupation. Thus when, owing to ill-health, an underground worker at a colliery became a surface worker it was held that the former was the regular occupation. See also R(I) 5/52 and R(I) 18/60, *infra* 11.1.1 xi. CI 80/49
- ii The relevant date to be considered when it is being determined what is a person’s regular occupation is the date at which the industrial accident happened or, if the claim is based on incapacity due to a prescribed disease, the date of development of the disease. A platemaker was disabled by pneumoconiosis and four months after the date determined as the date of development of the disease he retired from regular employment. It was held that his regular occupation was that of platemaker. See also CWI 29/49, CWI 8/50, R(I) 10/54 and R(I) 11/65, and compare R(I) 44/56 and R(I) 4/60, *infra* 11.1.5 iv. CI 258/49
- iii On account of bronchitis an underground coal-cutter changed his occupation to light work, whereafter he worked underground with the same employers as a hauler-driver. Years later he developed pneumoconiosis and it was held by a tribunal of Commissioners, affirming CI 258/49, that his regular occupation was that of a hauler-driver. See also and compare R(I) 88/52. CI 440/50 (T)
- iv “Occupation” in the expression “regular occupation” means “gainful occupation”. Thus the regular occupation of a married woman who had paid employment for two days a week as a domestic help and spent the rest of her time on unpaid duties as a housewife was held by a tribunal of Commissioners to be the occupation of a paid domestic help. See also *infra* 11.1.3 i and compare R(I) 33/58, *infra* 11.1.3 vi. CI 441/50 (T)
- v The length of time a person has been following an occupation is irrelevant if it is his regular occupation in the sense that it is what he intends regularly to do. A man was employed for ten years as an assistant hitcher in a coal-mine and after a period of time was offered promotion to banksman, but he would not accept that employment because of ill-health. He developed pneumoconiosis while working as an assistant hitcher and it was held that that was his regular occupation “commanding (as an adjunct) a right of advancement to banksman when occupation should arise”. See paras. 7 and 8 and compare CI 442/50, *infra* 11.1.2 ii and R(I) 18/60, *infra* 11.1.1 xi. CWI 55/50
- vi Where a man has followed an occupation for nearly three years, even though interrupted by periods of ill-health, the *prima facie* inference is that it has become his regular occupation. See R(I) 34/51. R(I) 22/52

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- R(I) 43/52 vii A coal-miner was employed as a shifter and also on occasions worked as a member of a coal-cutting team. As a result of an industrial accident he became unable to do the latter work, but it was held that his regular occupation included working as a shifter or coal-cutter according to the employer's requirements. See also *infra* 11.1.3 iii.
- R(I) 44/52 viii A man who had been a bus driver for some years took employment as a storekeeper to obtain higher wages. A week later he was injured in an industrial accident and it was held that his occupation as a storekeeper was experimental only and that his regular occupation was that of a bus driver.
- R(I) 65/54 ix When the fact of continuous employment in the same occupation for a number of years gives rise to a *prima facie* inference that that is a person's regular occupation it is for that person to displace it. Thus when a man had served an apprenticeship and been employed as a riveter for some years, but voluntarily took other employment as a labourer, which was his occupation when he met with an industrial accident, it was held that his regular occupation was that of a labourer. See also and compare R(I) 9/55.
- R(I) 15/56 (T) x The expression "regular occupation" is not confined to insurable employment. Accordingly a jobbing builder who renovated property for a farmer, but also worked as a farm labourer to help with the harvest, for which period only contributions were paid by him as an employed person, it was held by a tribunal of Commissioners that his regular occupation was as a self-employed man. R(I) 54/54 was overruled.
- R(I) 18/60 xi A miner was suspended from employment in the mines and received compensation under the Workmen's Compensation Act on account of pneumoconiosis. His employment history showed that he had no employment for six years and that he had then had one day's work only, prior to which he had been incapable of work by reason of pneumoconiosis for 2½ years. It was held that he had no regular occupation.
- R(I) 11/65 xii When he met with an industrial accident a man was employed partly as a storeman, partly as a boiler attendant and partly as an assistant to a fitter. After reorganisation his duties as storeman became full-time. It was held that his regular occupation was that of a storekeeper, boiler attendant and fitter's assistant combined. See also *infra* 11.4.5 iii.
- R(I) 4/69 xiii A storeman developed prescribed disease No. 42 and changed to work as a porter, but the symptoms of the disease recurred and he suffered from a fresh outbreak of the disease. It was held that his regular occupation fell to be determined by reference to the date of the first outbreak and that it was, therefore, that of a storeman.
- R(I) 6/75 xiv The question what was a person's regular occupation is one of fact and the particular label attached to it by employers or employees is not conclusive; nor is it governed by trade union rules or understandings. See para. 12 and see also *infra* 11.1.2 vii.



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## 2 Effect of injury or disease during period of training

- C.I. 93/49 i A leather sorter was injured during the last week of a course of training to become a pressman. It was held that his regular occupation had become that of a pressman.
- C.I. 442/50 (T) ii After leaving school a boy aged 19 had various employments for 3 years and then became a trainee coal-miner, intended mining to be his permanent occupation. While still training he developed prescribed disease no. 24 and it was held by a Tribunal of Commissioners that his regular occupation was that of a trainee coal-miner. See also R(I) 6/57.
- R(I) 31/58 iii A student nurse who had completed 2 years' training and obtained a tuberculosis certificate which allowed her to work as a staff nurse in sanatoria only because incapacitated by reason of tuberculosis. She intended to continue her studies to become a state registered nurse and there was no evidence that she had abandoned nursing permanently. It was held that her regular occupation was the occupation she was following at the date of the development of the prescribed disease; viz full-time nurse with tuberculosis certificate. See paragraphs 9-12.
- R(I) 3/60 iv A boy of 15 met with an industrial accident while employed as an office boy with a view to becoming apprenticed as an armature winder with the same employers. It was held that if he had a regular occupation at the time of the accident it was that of office boy or clerical worker. See also R(I) 4/60, *infra* 11.1.5 iv.
- R(I) 22/60 v After an industrial accident a boy of 17 who had been employed as a haulier at a colliery was employed as a screenhand, but contended that he had lost prospects of promotion and that he had entered the industry as a trainee coal-face worker. It was held that this regular occupation was that of a trainee coal-face worker with reasonable prospects of advancement. Compare R(I) 44/51, *infra* 11.1.5 i.
- R(I) 1/63 vi The fact that a regular occupation would come to an end shortly after the date of development of a prescribed disease must be disregarded. A man of 52 entered employment in a calico printing works as a trainee impressioner and worked as a trainee for 10 weeks, at the end of which he was found to be suffering from prescribed disease no. 42. He was incapable of work for a time, after which he was again employed by the same employers on other work for 6 months when he became employed as a night-watchman. It was held that his regular occupation was that of a trainee impressioner.
- R(I) 6/75 vii A boy of 17 who was badly burned in an industrial accident contended that he was a trainee or apprentice carpenter at the time of the accident. The employers described him as a junior worker with prospects of advancement. It was held that his regular occupation was that of a trainee carpenter and that a special hardship allowance was payable to him on the basis of a comparison between what he would be earning as a carpenter and what he earned in fact. As to factors to be taken into account when it is being considered what is a person's regular occupation, see paragraphs 11-13.



**3 Subsidiary occupation**

- C.I. 441/50 (T) i 'Subsidiary occupation' means 'gainful occupation'. Thus a married woman who had 2 days' paid employment, but for the rest of her time was unpaid housewife, was held not to have a subsidiary occupation within the meaning of (what is now) section 60(2)(a) of the Act. See paragraph 12 and see also *supra* 11.1.1 iv.
- R(I) 48/51 ii After an industrial accident a tram-tipper at a colliery returned to work as a slag picker at the same rate of wages, but contented that his regular occupation consisted not only of tram-tipping, but also of unloading timber as an overtime duty, which he could no longer do. It was held timber-unloading was a subsidiary occupation and did not form part of his regular occupation. See paragraph 5-6 and see also C.W.I. 30/50 and R(I) 45/51.
- R(I) 43/52 iii A miner whose regular occupation was that a shifter, and on occasions as a member of a coal-cutting team, was injured in an industrial accident and as a result was unable to do the latter work, as he had done before the accident. It was held that the latter was not a subsidiary occupation and could not be disregarded.
- R(I) 58/54 iv A man was able to resume his regular occupation of a foreman in a factory after an industrial accident, but was unable to take part, as he had done formerly, in the works fire brigade, of which he was a voluntary member. In consequence he suffered financial loss, but it was held that membership of the fire brigade was not part of his regular occupation.
- R(I) 24/55 v Before meeting with an industrial accident a miner had worked as a colliery repairer and at weekends as a shaftsman. He was unable to return to either occupation after the accident, but was employed as a haulage motor-man, when his earnings were less than the aggregate of his 2 former occupations. It was held that his regulation occupation embraced both the former occupations and that work as a shaftsman did not fall to be disregarded as a subsidiary occupation. See also R(I) 10/65.
- R(I) 33/58 vi A married woman who was chiefly engaged in her household duties had, for 15 years before meeting with an industrial accident, been regularly employed as a part-time shop assistant for one evening each week and as a totalisator operator for another evening each week. It was held that she had a result occupation consisting of 2 equal part-time employments and that neither was subsidiary to the other.
- R(I) 13/62 vii Membership of a colliery civil defence scheme which occupied about 6 hours each week and was paid at overtime rates was held to constitute a subsidiary occupation for a colliery supply transporter.

**4 Effect of retirement**

- C.I. 258/49 i A man was in receipt of disablement benefit on account of pneumoconiosis, the date of development of which was determined to be 20th December. He retired from

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his regular employment 3 months later and it was held that he continued to be entitled to a special hardship allowance.

- ii A coal-miner who was in receipt of a special hardship allowance was held by a Tribunal of Commissioners to continue to be entitled to the allowance after he was compulsorily retired from working in the mines at the age of 65. See also 11.4.8 *v below*. R(I) 14/62 (T)

**5 Reasonable prospects of advancement**

*Section 60(2)-(3) of the Act.*

- i The expression 'reasonable prospects of advancement' means reasonable prospects of advancement in the particular occupation or employment under consideration. Thus a haulage hand in a colliery, aged 20, who returned to work after an industrial accident with out loss of earnings was held not to have reasonable prospects of promotion to a ripper at the coal-face. See also CWI 55/50 and compare R(I) 53/52. R(I) 44/51
- ii A heavy labourer in a coal-mine was injured in an industrial accident while learning to be a packer. It was held that he had had reasonable prospects of advancement when he met with the accident. See and compare R(I) 25/53. R(I) 2/52
- iii A boy of 17 who was employed as an engine cleaner became unfit as a result of an industrial accident for work on the footplate, for which he had become qualified. He was reduced from the grade of fireman to that of engine cleaner, but it was held that his regular occupation was as a member of the 'footplate staff' and that his prospects of advancement within that sphere had to be taken into account. See also and compare R(I) 29/55. R(I) 52/53
- iv A young man who worked in a coal-mine completed a course of training to become a coal-face worker and, pending a vacancy for such employment, was employed as a material man. When so employed he met with an industrial accident as a result of which he became permanently incapable of work at the coal-face. It was held that his regular occupation was that of a trainee coal-face worker and that his prospects of advancement at the coal-face must be taken into account. R(I) 4/60
- v No award of special hardship allowance can be made on the basis of loss of prospects of advancement before the date on which promotion would probably have occurred. A man aged 21 whose regular occupation was that of a reeler in a paper mill contracted prescribed disease no. 42 and subsequently contended that, because of the disease, he had been deprived of his normal prospects of advancement. It was held that, although he had been so deprived of his normal prospects of advancement. It was held that, although he had been so deprived, it was not proved on the evidence that it was likely that he would have been promoted during the period to which his claim related if he had not contracted the disease. See paragraphs 8-10. R(I) 10/63

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- R(I) 8/67 vi A shipwright grade B contracted prescribed disease no. 42, whereafter he continued to be employed in that grade on restricted duties, but without reduction of his basic wage. His contention that his regular occupation should be treated as extending to and including, employment as a shipwright grade A and that he should be treated as being incapable of following that occupation was accepted. See paragraph 13 as to the scope and the fact of (what is now) section 60(3) of the Act. See also R(I) 12/81 *below*.
- R(I) 8/73 vii When the predominant factor in advancement in a claimant's occupation or profession is that a selectivity he will rarely be able successfully to invoke (what is now) section 60(3) of the Act. Thus a man employed as a town planning assistant by a country borough met with an industrial accident shortly before he was due to take up an appointment to a more senior post with a country council and the appointment was subsequently cancelled. When he eventually assumed work with the county borough he did so in a higher grade, but not such a high grade as the post he had been unable to take up. It was held that he was not assisted by section 14(3) of the National Insurance (Industrial Injuries) Act 1965 (now section 60(3) of the Act) since there was no evidence that persons in his position were normally advanced to the grade represented by the cancelled appointment. See also R(I) 8/80 *below*. Approved and followed in R(S) 3/84.
- R(I) 8/80 viii At the time of developing pneumoconiosis in 1953 a miner was employed as a deputy. He was promoted to undermanager by selection but later became an assistant manager for health reasons. Held section 60(3) of the Act only applies in cases where a person is deprived of prospects of advancement. It did not apply in this case where promotion took place. See also CI 258/49, 11.1.1 ii and R(I) 8/73, 11.1.5 vii *above*.
- R(I) 12/81 ix A cotton mill worker who had contracted byssinosis in his regular employment was not, for that reason, among those workers offered employment at a higher rate of pay in a more modern factory run by his employers. The new job did not involve extra skills but covered wider functions and involved shift working. This work did not constitute advancement for the purposes of section 60(2) and (3) but would have been sideways move to a different occupation. R(I) 8/67 noted.

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## Part 2: Relevant loss of faculty

### 1 Function of the medical authorities

i The question under (what is now) s. 60 of the Act is whether a person is incapable of following his regular occupation ‘as a result of the relevant loss of faculty’, and in order to decide that question it is necessary to consider what that loss of faculty is and at what degree the resulting disablement has been assessed, both of which questions are ‘disablement questions’ which fall to be decided by the medical authorities as provided by section 108 of the Act. See also 11.2.2 *vi below*, and see R(I) 64/52, paragraph 6, as to effect of an assessment for life; see also R(I) 20/59. R(I) 26/60

ii It is for the medical authorities alone to decide whether the relevant accident has caused loss of faculty and in what that loss consists. They make a forecast of the probable future effect of the relevant loss of faculty, but it is for the statutory authorities to decide what are the actual physical effects of such loss of faculty. See paras. 10-11 adopted by Lord Parker L.C.J. in *R. v. the Industrial Injuries Commissioner, ex parte Ward* printed as an Appendix to R(I) 7/64, and see also 18.1.2 *i below*. R(I) 2/65

iii A claimant had been awarded disablement benefit. The final assessment of the relevant loss of faculty was made in June 1982 and was 10 per cent of life. The claimant was then awarded special hardship allowance for one year. At the end of the year a consultant orthopaedic surgeon reported to the effect that the claimant’s incapacity resulted and had always resulted from a rheumatoid condition and not from any relevant loss of faculty. In consequence the claimant’s allowance was disallowed. The Commissioner held that, although the adjudicating authorities were not bound by the prognosis of the medical authorities, but were free to admit evidence that the disability forecast by the medical authorities had ceased to exist, notwithstanding a life assessment of disablement, it was not open to the adjudicating authorities to admit evidence inconsistent with the medical authorities’ decision that the condition was the result of the relevant accident. He further held that the report of the surgeon in this case did not merely constitute an opinion that the disablement had not lasted for the period forecast, but was an opinion which was inconsistent with the finding that the claimant’s injury was a partly relevant condition. He accordingly held that the surgeon’s report could not be admitted as evidence and that special hardship allowance continued to be payable. (*R. v. Commissioner, ex parte Ward*, [1965] 2 QB 112, R(I) 7/64, Appendix, followed). R(I) 4/85

### 2 Whether incapacity results from a relevant loss of faculty

i A colliery horse-keeper who became incapable of work as a result of an industrial accident was awarded a special hardship allowance, but in the opinion of a medical board his incapacity for following his regular occupation was due to old age and not to the relevant loss of faculty. It was pointed out that section 14 of the National Insurance (Industrial Injuries) Act 1946 (now s. 60 of the Act of 1975) did not say ‘solely’ as the result of the relevant loss of faculty and the further award of a special hardship allowance was made. Compare R(I) 63/53. R(I) 29/51

ii A bricklayer’s labourer fractured his skull in an industrial accident and some years later the question arose whether his admitted incapacity for work continued to be the result of the relevant injury or whether it was due to natural deterioration of age. It was held to be due to the former. Compare R(I) 26/52. R(I) 56/51

iii A man who contracted prescribed disease No. 24(b) (now No. 42) was unable to return to his regular occupation, and although he was capable of following alternative employment such employment could not be found for him. His inability to obtain alternative employment was not because of the relevant loss of faculty and it was held that a special hardship allowance was not payable to him. R(I) 29/53

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- R(I) 49/54 iv An underground colliery worker injured his foot in an industrial accident and a medical board - and on appeal the MAT - decided that rheumatoid arthritis was an unconnected condition. It was held that the claimant's incapacity was due to that condition and was not the result of the relevant loss of faculty. *See* para. 8 as to the relevant and effect of unconnected conditions.
- R(I) 17/59 v In order to bring himself within (what is now) s. 60 of the Act of 1975 it is not necessary for a claimant to prove that his total condition is due wholly or even mainly to the accident. If there subsists an incapacity which is not negligible, and results from the relevant loss of faculty, he is entitled to succeed notwithstanding some far more serious incapacity has supervened. A miner had a life assessment for what was described as a partly relevant condition of injury to his knee with an offset for pre-existing arthritis and it was held that the major part of his disability was due to the accident, was substantial and rendered him incapable of work. *See* para. 15. Compare R(I) 24/60.
- R(I) 26/60 vi A medical board, and on appeal a medical appeal tribunal, agreed that injury to head and neck was a condition fully relevant to a claimant's industrial accident but also that there was a large, and unrelated, functional element. It was held that the statutory authorities were bound by the medical appeal tribunal's decision and that the functional condition was not part of the relevant loss of faculty. Compare R(I) 32/59, 11.2.3 v, *below*.
- R(I) 5/84 vii A claimant who had suffered a head injury while at work had been assessed as 10% disabled for life and had been awarded disablement benefit and special hardship allowance. Some 2½ years later, following a consultant's report intimating that the claimant did not then have any specific loss of faculty and that his disability was due to his psychiatric state, special hardship allowance was therefore disallowed. The Commissioner, before whom this case subsequently came for leave to appeal, called for a psychiatric opinion to deal with particular questions which he considered had not been adequately answered in the existing medical evidence. A consultant psychiatrist then expressed the opinion that the relevant accident had materially contributed and was the original precipitant to the claimant's psychologic condition. On this question was raised as to whether 'an incapacity which results from a condition .... that itself results from the relevant loss of faculty is incapacity resulting from the relevant loss of faculty (at one remove) ....'. A Tribunal of Commissioners held that it was incumbent on the medical authorities to state unequivocally the full extent of the relevant loss of faculty and that it was not open to the statutory authorities to treat an incapacity as resulting from the relevant loss of faculty if this comes about only because it arises out of a condition which results from the relevant loss of faculty (paras. 8 and 9). (R(I) 12/80 followed: R(I) 66/52 not followed.) *See* R(I) 12/80, 11.2.3v *below* and R(I) 66/52, 11.2.3i, *below*.

**3 Psychological effect of the relevant loss of faculty and fear of further injury**

- R(I) 66/52 (T) i An underground miner, aged 21, who lost the vision of his left eye as a result of an industrial accident would not resume his regular occupation because of the risk of injury to his right eye. It was held by the majority of Tribunal of Commissioners that, although the claimant's incapacity to follow his regular occupation was not the physical consequence of the relevant loss of faculty, it was nevertheless, in the circumstances, due to a reasonable decision on his part resulting from the relevant loss of faculty. *See* para. 16 where the fact of the claimant's youth is emphasised and *see* also para. 18 where the fact of the claimant's youth is emphasised and *see* also para. 18 where it was said that the decision would not necessarily be applicable to risks other than total blindness. *See also* and compare R(I) 85/52. *See also* R(I) 5/84, 11.2.2 vii *above* and 11.2.3 vi *below*.

- ii A foundry moulder who lost his left eye through industrial accident would not resume his regular occupation for fear of injury to his right eye. It was held that, although there were reasonable grounds for the claimant's fear, which alone would bring his case within the principle of R(I) 66/52, there was also additional evidence that his reluctance to return to his regular occupation was the result of an uncontrollable nervousness which was a direct consequence of the relevant injury and that a special hardship allowance was payable. R(I) 45/54
- iii In the case of a man aged 63 who suffered partial loss of sight of an eye the relevant loss of faculty was found to be defective vision of the left eye. He did not return to his regular occupation for fear of losing his sight of his right eye, but it was held that he was not incapable of following his regular occupation since the total loss of vision of his good eye would not have resulted in total blindness. See paras. 7-8 where R(I) 66/52 is distinguished and reference is made to other decisions. R(I) 8/56
- iv A collier suffered multiple lacerations on his face and shoulders in a shot-firing incident in a low seam in the mine. It was held, distinguishing the three decisions referred to above, that the functional neurosis from which the claimant was suffering as a result of a terrifying experience rendered him incapable of following his regular occupation. R(I) 32/59
- v A claimant, who suffered two accidents in his regular occupation cutting meal carcasses, suffered a loss of faculty and disablement but was not physical incapable of that occupation. In the absence of any medical finding that his loss of faculty included a mental condition, he did not satisfy the conditions for entitlement to special hardship allowance. R(I) 66/52, 11.2.3 i *above* and R(I) 15/74, 11.3.1 xii *below* discussed and distinguished. See also R(I) 5/84, 11.2.2 vii *above* and 11.2.3 vi *below*. R(I) 12/80
- vi A claimant who had suffered a head injury while at work had been assessed as 10% disabled life and had been awarded disablement benefit and special hardship allowance. Some 2½ years later, following a consultant's report intimating that the claimant did not then have any specific loss of faculty and that his disability was due to his psychiatric state, special hardship allowance and thereafter disallowed. The Commissioner, before whom this case subsequently came for leave to appeal, called for a psychiatric opinion to deal with particular questions which he considered and have not been adequately answered in the existing medical evidence. A consultant psychiatrist then expressed the opinion that the relevant accident had materially contributed and was the original precipitant to the claimant's psychological condition. On this the question was raised as to whether 'an incapacity which results from a condition. . . that itself results from the relevant loss of faculty is incapacity resulting from the relevant loss of faculty (at one remove). . .' A Tribunal of Commissioners held that it was incumbent on the medical authorities to state unequivocally the full extent of the relevant loss of faculty and that it was not open to the statutory authorities to treat an incapacity as result from the relevant loss of faculty if this comes about only because it arises out of a condition which itself results from the relevant loss of faculty (paras. 8 and 9). (R(I) 12/80 followed; R(I) 66/52 not followed). See R(I) 12/80, 11.2.3 v *above* and R(I) 66/52, 11.2.3 i *above*. R(I) 5/84 (T)

#### 4 Determination of the date of onset of a prescribed disease

- i A Commissioner decided that a determination for disablement benefit purposes that a claimant did not have a PD was not binding on a claim to REA. A claimant is entitled to claim REA without first obtaining disablement benefit or even claiming it. The Secretary of State appealed to the CA who overturned the Commissioner's decision. For a further synopsis of the Commissioner's decision see 9.7.3 ii. For a synopsis of the CA's judgment see 18.6.2 xxvii. R(I) 2/03
- ii A Commissioner held a finding as to a date of onset of a PD made in a disablement benefit case was conclusive for the purposes of a later claim for REA by virtue of reg 6(1) of the Social Security (Industrial Injuries) (PD) Regs 1985. A decision of 7 November 2000 R(I) 2/04

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incorporated a finding that the date of onset of the PD had been 1 January 1991 and that finding was binding for the purposes of the REA claim before the tribunal sitting 7 January 2002. The claimant disputed the date of onset and said he first “had trouble” with his hands in 1988. The Commissioner held that where a claimant contends that he first suffered from the disease from a date earlier than the accepted date of onset then the DM may consider supersession but is not bound to do so. See also 9.7.3 ii.

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## Part 3: Entitlement

*S 60(1) of the Act*

### 1 Is incapable of following his regular occupation

- i If a person cannot obtain employment in his regular field of labour, as a result of the relevant loss of faculty, he is unable to fulfil all the ordinary requirements of employments in that field of labour, he is incapable of following his regular occupation. See also 11.3.3 i, *below* and compare R(I) 4/77, 11.3.1 xiii, *below*. CI 443/50 (T)
- ii A married woman who was employed as a catering assistant hurt her knee in an industrial accident and on her return to work was only able to work 24 hours a week instead of 44 hours as she had done formerly. It was held by a Tribunal of Commissioners that she was incapable of following her regular occupation. CI 444/50 (T)
- iii An underground worker at a colliery was crushed between a derailed tub and a door frame, with the result that when he resumed his employment he was unable to work as many shifts as he had done formerly. It was held by a Tribunal of Commissioners that, since his employers had given him back his job from motives of charity, he was incapable of following his regular occupation. See also CEI 59/50. CI 445/50 (T)
- iv A stevedore who was employed in a group A was transferred as a result of an industrial accident to work in group C. It was held by a Tribunal of Commissioners that, although a change from group A to group C was not conclusive evidence that a man was incapable of following his regular occupation, the claimant's capacity for work was so restricted as a result of the accident that he was incapable of following his regular occupation of a stevedore group A. R(I) 28/51 (T)
- v As the result of an industrial accident a Grade III process worker in a Royal Ordnance Factory was unable to earn the same incentive bonus as he had done formerly, although he continued to be paid the same basic wage. It was held that he was incapable of following his regular occupation since the work he was then employed to do was clearly a different occupation from that which he had done before the accident. R(I) 66/51
- vi After a period of incapacity resulting from an industrial accident a hand riveter in the shipbuilding industry was certified to be fit for light work, and thereupon registered for employment as a hand driver. A medical board was of the opinion that he was fit for his regular occupation, but the claimant's doctor certified him to be fit for light work only. It was held that registration for work as a hand riveter did not necessarily mean that he was fit for that work and nor was the opinion of the medical board as to his fitness for his regular occupation conclusive. On the balance of evidence it was held that he was incapable of following his regular occupation. See also 11.3.4 i, *below*. R(I) 80/51
- vii As a result of an injury to his shoulder in an industrial accident a glass blower was unable to work for the prolonged periods he had formerly worked or to work as a member of a team as he had done previously. It was held that he was incapable of following his regular occupation. R(I) 1/52
- viii A man's work as a stoneman involved erecting girders, packing stones, heaving, lifting, drilling holes, timbering and repairing timber. After an industrial accident he returned to that work in a team of 'bargain men', but his colleagues performed the heavier parts of the work for him and in consequence of his limited contribution the weekly earnings of each member of the team were reduced. It was held that the claimant was incapable of following his regular occupation. See also 11.3.4 ii, *below*. R(I) 39/52



I.I. Special hardship allowance: entitlement conditions

11.3.1-2

xi A joiner who, before meeting with an industrial accident, had been mainly employed on outside or housing scheme joinery was unable to do outside work as a result of the accident and in consequence was deprived of the opportunity for earning overtime payments. It was held that he was incapable of following his regular occupation. See also 11.3.4 viii *below*. R(I) 39/55

x A colliery banksman, whose usual duties were not heavy, voluntarily worked an overtime shift on alternative Fridays on heavy work. Following the accident the relevant loss of faculty for a time prevented the claimant from working the overtime shift although he was capable of performing his usual duties. It was held that the course of dealing over many years between the claimant and his employers had established an implied agreement that the claimant would be employed every other Friday on the overtime shift which therefore fell to be regarded as part of his regular occupation. The claimant was entitled to special hardship allowance for the period he was incapable of work the overtime shift. Decision CI 443/50, 11.3.1 i *above*, distinguished. R(I) 10/65

xi A collector who worked 44 hours a week and covered his area by using a bicycle injured his foot in an industrial accident and as a consequence was given a smaller area to work because he could no longer use his bicycle. His basis wages was the same as it had been before the accident, but his earnings by way of commission were reduced and it was held that he was incapable of following his regular occupation. R(I) 6/66

xii If by reason of his physical condition a man could not work in his regular occupation without danger to himself or others he should be regarded as being incapable of following that occupation. Thus a coal-miner who suffered an impairment of vision in his right eye as a result of an industrial accident was held to be incapable of following his regular occupation of a power loader. See also R(I) 2/81. R(I) 15/74

xiii In relation to a piece-worker the test for determining whether a person is incapable of following his regular occupation should be whether he is, as the result of the relevant loss of faculty, incapable of attaining the standard of remuneration (determined in accordance with *R. v. National Insurance Commissioner, Ex parte Mellors, 18.1.1 viii below*) of his regular occupation or of any employment of an equivalent standard that is suitable in his case (see paragraphs 9-10). Thus a machine seamstress whose left index fingers was injured in an industrial accident, and who had been paid entirely at piece-work rates before the accident, was held to be entitled to special hardship allowance on the ground that she was incapable of attaining the standard of an ordinary worker in her regular occupation. R(I) 4/77

xiv A machine operator remained physically capable of working in his regular employment but suffered from occupational deafness PD48 and ran the risk of further damaging his hearing. It was found that he was incapable of working in his regular occupation without danger to himself. The words 'danger to himself' applied to injury by process as well as injury by accident. R(I) 15/74 paragraphs 8-10 applied. R(I) 2/81

**2 Whether incapacity for a regular occupation is likely to be permanent**

i A man returned to work in his previous employment as a packer after an industrial accident, but contended that he was only capable of light packing, whereas before the accident he had been engaged in heavy packing. It was held that, even if the occupation of packer ought to be regarded as divisible, there was no evidence that he was likely to be permanently incapable of following his regular occupation. CI 89/50

- R(I) 7/53      ii      A man's entitlement to a special hardship allowance depended upon whether he was likely to remain permanently incapable of following his regular occupation of a collier. He had agreed to undergo an operation for removal of a torn cartilage and it was agreed that, if the operation was successful, he would ultimately be able to return to work in his regular occupation, but there was no certainty that the operation would be completely successful. It was held that the question to be decided was one of probability and that the medical evidence suggested that the claimant was not likely to remain permanently incapable of following his regular occupation. See R(I) 11.3.2 iv *below*.
- R(I) 17/54      ii      A medical board decided that a man's relevant loss of faculty was not likely to be permanent and it was held that the board's decision was binding on the statutory authorities. But it is for the judicial authorities to decide whether a person is likely to be permanently incapable of following his regular occupation.
- R(I) 2/86      iv      An injury to his ankle, the relevant loss of faculty, was likely to make the claimant permanently incapable of resuming his regular occupation unless he underwent an operation, which he was unwilling to do. As the operation was not of a minor character his refusal could not be held against him (regulation 40(6) of the SS (General Benefit) Regs 1982), and his capacity for any occupation or employment had to be judged as it was and not as it might be if he underwent the operation. The likelihood of any incapacity being permanent if there was no operation had to be judged by reference among other things not only to the likelihood (or the reverse) of the operation being a success but also to the likelihood (or the reverse) of the claimant being unwilling to undergo it.

### **3      Is not incapable of following his regular occupation**

- CI 443/50  
(T)      i      If a person is able to do his old job except that, as a result of the relevant loss of faculty, he cannot work overtime he should not be regarded as incapable of following his regular occupation unless, as a result of this inability, he cannot comply with the ordinary requirements of employers in this regular field of labour. A tool-room fitter in a large steel works injured his foot in an industrial accident and for 8 weeks after his return to work was unable to work overtime. It was held by a Tribunal of Commissioners that he was not incapable of following his regular occupation. Compare R(I) 4/77, 11.3.1 xiii *above*.
- CI 446/50  
(T)      ii      A farm worker fractured his wrist and, when he returned to farm work after the accident, he could not fall in with the other men on piece-work although he was able to earn the same standard wage as he was paid formerly. It was held by a Tribunal of Commissioners that he was not incapable of following his regular occupation. See also CI 447/50 and CI 448/50.
- R(I) 48/51      iii      After an industrial accident a tram-tipper at a colliery returned to work as a slag picker on the coal belt at the same rate of wages and with the same opportunity for working overtime and he had had previously. He was held not to be incapable of following his regular occupation.
- R(I) 58/53      iv      A man suffering from pneumoconiosis returned to his regular occupation of pumpsman in a colliery, but was unable to work shifts on Sundays and more Saturdays because no transport was then available to take him to his place of work, to which he was unable to walk because of his disability. It was held that, although he was not able to work the normal shifts of a pumpsman because of inaccessible position of the pump-room at his particular colliery, that did not prove that he was incapable of fulfilling all the ordinary requirements of employers in his field of labour.

*1.1. Special hardship allowance: entitlement conditions*

11.3.3-4

- v A woman's regular occupation was that of a ring spinner, but as the result of an industrial accident she was unable to operate the same number of 'sides' as she had done formerly. Her output and wages were therefore reduced, but it was held that she was following the occupation of ring spinner, albeit less productively, and could not, therefore, be held to be incapable of her regular occupation. R(I) 3/55
- vi A coal-miner was in receipt of disablement benefit together with an increase thereof on account of special hardship following an industrial accident. Subsequently he was awarded disablement benefit in respect of pneumoconiosis which would have rendered him incapable of following his regular occupation if he had not already been so incapable as the result of the industrial accident. It was held that he could not be treated as being incapable of following his regular occupation as a result of pneumoconiosis during the time he remained so incapable as the result of the industrial accident. See also R(I) 4/83 (para 4). R(I) 2/56
- vii A plasterer suffered from defective vision of his right eye as the result of an industrial accident, but continued to be employed as a plasterer for various periods until he gave up that occupation through fear of injuring his left eye. It was held that he had not proved that, by reason of the relevant loss of faculty, he was incapable of following his regular occupation since he had demonstrated that binocular vision was not essential for a plasterer; nor would he become totally blind if he lost the sight of his left eye since his right eye was only partially affected. See also R(I) 8/56. R(I) 6/59
- viii After an industrial accident a hosiery trimmer who worked on woollen goods continued in the same employment, but was unable to work on a new process of trimming synthetic goods because of his disability. Trimmers of synthetics require a higher degree of skill, were paid higher wages and had better opportunities of employment than trimmers of woollen goods, but it was held that the claimant had failed to prove that, as the result of the relevant loss of faculty, he incapable of following his regular occupation (see paragraphs 12-14). R(I) 10/59
- ix A claimant for special hardship allowance, a paviour, had suffered two industrial accidents - one in 1977 and the other in 1978 - each resulting in strain to the right groin. In June 1989 he claimed the allowance in respect of the second accident and was awarded the allowance on the grounds that by reason of the relevant loss of faculty he was incapable of his regular occupation as a paviour. He later claimed the allowance in respect of the first accident for the same reasons. It was not disputed that by reason of his first accident he had become permanently incapable of following that occupation and the Commissioner, in considering how to treat the benefit paid in respect of the second accident, held that, where the regular occupation at the date of the first accident was one which the claimant had become permanently incapable of following by reason of the relevant loss of faculty due to the second accident (paragraph 4). See also R(I) and 11.7.1 *i below*. R(I) 4/83

**4 Is incapable of following suitable employment of standard equivalent to that of his regular occupation**

- i After a period of incapacity due to an industrial accident a hand riveter who was certified by his doctor to be fit for light work only registered for employment as a hand riveter, but was held to be entitled to a special hardship allowance since it did not follow that, because of registration, he was incapable of following employment of a standard equivalent to that of his regular occupation. See also 11.3.1 *vi above* and see CI 205/50 and R(I) 2/52. R(I) 80/51

- R(I) 39/52      ii      A stone man in a colliery was unable to do heavy work as the result of an industrial accident, with the result that the earnings of the team of which was a member were reduced. He was held to be incapable of following employment of an equivalent standard to that of his regular occupation. See also 11.3.1 viii *above*.
- R(I) 42/52      iii      If a man obtains employment in a recognised occupation and stays in it for some months the reasonable inference is that his earnings are a proper measure of his earning capacity, but there may be exceptional cases. Thus an iron-moulder met with an industrial accident and subsequently because employed for a time as a night-shift foreman and light labourer. That employment came to an end, however, and it was held, for the reasons given at paragraph 4 of the decision, that he was incapable of equivalent standard employment. See also R(I) 27/57.
- R(I) 73/52      iv      An apprentice mining engineer injured his back as a result of an industrial accident and became permanently incapable of following that employment. He then began a course of study at the Royal College of Music with the intention of becoming a professional singer and for a time earned as much as he would have earned as a mining engineer. It was held that the employment he had as a singer was exceptional standard to that of his regular occupation.
- R(I) 5/53      v      A farm worker was rendered permanently incapable of his regular occupation as a result of an industrial accident and obtained employment as a checker during the sugar beet season, when he earned more than he would have earned in his regular occupation. When the reason was over, however, he was only able to get lower-paid work than that of his regular occupation, and it was held that he was incapable of following equivalent standard employment. See paragraphs 5-7 and see also R(I) 76/52.
- R(I) 26/53      vi      A man whose regular employment was that of a joiner lost the use of his left hand in an industrial accident. but although he became permanently incapable of following his regular occupation, he worked for two periods totalling 9½ months and earned more than he would have done in his regular occupation, but only because he was helped by his mates. It was held that he was not able to fulfil the ordinary requirements of employers in his field of labour and that he was incapable of following equivalent standard employment.
- R(I) 94/53      vii      Although a person may be physically able to do all the work involved in an occupation he may, nevertheless, be held to be incapable of following that occupation if, in a true sense, he is barred from following it because of a physical condition resulting from the relevant accident. Thus, a nursing assistant who had recovered from a condition which resulted from an accident at work, but, because of her susceptibility to recurrent attacks of the condition caused by the accident, was held to be incapable of following employment of an equivalent standard to that of her regular occupation.
- R(I) 39/55      viii      A joiner whose post-accident employment was restricted to inside bench work which afforded no opportunities for overtime was held to be incapable of following employment of an equivalent standard to that of his regular occupation. See also 11.3.1 ix *above*.
- R(I) 7/58      ix      A small-arms examiner became incapable of work as a result of prescribed disease No. 24(b) (now No. 42) and, when he resumed his employment, he was able to examine dry articles only. Later such work was no longer available for him and he transferred to other employment at a lower wage. It was held that his ability to do specially selected work was not proof of his capability to follow employment of an equivalent standard to that of his regular occupation.

11. Special hardship allowance: entitlement conditions

11.3.4-5

x A limited period of high earnings in exceptional circumstances does not show that in the normal course a person is capable of equivalent standard employment; nor does the most remunerative employment a person has followed after an industrial accident necessarily indicate the amount he is capable of earning. (See paragraph 8). But see also the criticism of paragraph 7 of the decision in R(I) 5/69.

R(I) 45/61

xi It was said (See paragraph 8) that section 14(1) of the National Insurance (Industrial Injuries) Act 1965 (now section 60(1) of the Act) 'provides two alternative sets of conditions, commonly and conveniently called respectively "the permanent conditions" and "the continuous conditions", one of which has to be satisfied if title to special hardship allowance is to be established', but the effect of a decision that a claimant is capable of following employment of an equivalent standard over a particular period is not to shut him out for ever from the benefit of (what is now) section 60(1) of the Act and paragraph 7 of R(I) 45/61, 11.3.4 x *above*, should no longer be relied upon.

R(I) 5/69

xii A married woman, employed as a machine operator, injured her back in an industrial accident and as a result became permanently incapable of following that occupation, which was her regular occupation. Various alternative employments were suggested, but she contended that she could not do the work involved in any of them because, in addition to her back injury, she was blind in one eye. It was held that, subject to satisfactorily medical evidence in support of those contentions, the claimant could be held to be incapable of following suitable employment of an equivalent standard of that of her regular occupation. See also R(I) 22/61 and R(I) 29/52.

R(I) 1/74

### **5 Is not incapable of following suitable employment of an equivalent standard to that of his regular occupation**

i An underground worker in a coal-mine, aged 76, who suffered from pneumoconiosis changed his regular occupation to light work at the same wage, but a few months later was discharged in pursuant of the policy of the Coal Board not to employ men over the age of 70. It was held that it was the policy of the Board and not the relevant loss of faculty which prevented the claimant from following employment of an equivalent standard to that of his regular occupation. See also R(I) 55/512 and R(I) 69/54.

R(I) 37/51

ii In order to determine whether a man is, or is not, incapable of following an employment it is necessary to examine the full circumstances in which he is employed, and in comparing the standard of remuneration in the result and in the alternative employments what has to be considered is the actual earnings in each case. A steel worker developed a hernia as the result of an industrial accident but was able to continue to follow his regular occupation for some 20 months before having an operation, although during that period he was unable to do any heavy work and relied on the help of his workmates. After the operation he resumed employment on light work with reduced earnings. It was held by a Tribunal of Commissioners that during the period between the industrial accident and the operation the claimant had not been incapable of following employment of a standard equivalent to that of his regular occupation. See also CI 351/50, R(I) 40/51 and R(I) 2/86.

R(I) 29/52  
(T)

iii A meter collector was incapable of following his regular occupation as the result of an industrial accident but obtained employment as a stock-record clerk at approximately the same wage, but claimed that that was not employment of an equivalent standard to his regular occupation because no uniform was provided and no travelling expenses were paid. It was held that the post-accident employment was of an equivalent standard to that of the claimant's regular occupation. See also CWI 17/49.

R(I) 33/52

- R(I) 61/52      iv      As the result of an industrial accident a man could no longer perform his regular occupation, but was able to do less arduous work at which, by reason of his absenteeism in his regular occupation he could earn as much as he had earned as a colliery packer.
- R(I) 48/53      v      A fireman who was permanently incapable of following his regular occupation following an industrial accident obtained 4 months' employment as a gateman in which he earned more than he would have earned as a fireman. It was held that he was not incapable of following employment of an equivalent standard to that of his regular occupation. Compare R(I) 42/52, 11.3.4 iii *above*.
- R(I) 23/54      vi      A part-time canteen assistant injured her left hand in an industrial accident and was unable to follow that occupation, but although there was medical evidence that she was capable of work of a limited nature she had not registered for any employment. It was held that she did not prove that as the result of the relevant loss of faculty she was incapable of following suitable equivalent standard employment.
- R(I) 10/55      vii      After an industrial accident a man continued to work in his regular occupation of slaughterman until he had to have an operation, whereafter he obtained employment as a farm hand at a higher wage than he had obtained in his regular occupation. The claimant's pre-accident employers had not been parties to a trade agreement in pursuance of which the rate of pay of a slaughterman was higher than that actually earned by the claimant in either his pre- or post-accident occupations and it was held that his employment as a farm hand was employment of an equivalent standard to that of his regular occupation since he derived at least as much from farm work as he had done as a slaughterman.
- R(I) 42/61      viii      'Equivalent standard' does not mean that employment must of equal permanence to that of a regular occupation, and accordingly, when a man was unable to continue to work as a coal-miner by reason of the injuries he received in an industrial accident, but obtained other employment at a higher wage for a period of 3 months until he was made redundant, it was held that, although the employment was of a temporary and not of a permanent nature, it could not be said that it was not of an equivalent standard to that of the claimant's regular occupation. The employment was of a recognised kind and was not exceptional and could not be disregarded. See R(I) 48/53.
- R(I) 2/76      ix      A coal-miner whose regular occupation was that of a face worker (cableman) developed pneumoconiosis and was moved from his work on the coalface to other underground work as a category B miner. A medical board advised that he was capable of following his regular occupation provided he worked in dust-approved conditions and the employers confirmed that dust-approved working conditions currently existed in the 2 seams in which the claimant had worked. It was accepted that he was incapable, as the result of pneumoconiosis, of following his regular occupation of face worker (cableman) without any qualification relating to dust-approved conditions, but it was held that he was not incapable of following the occupation of face worker (cableman) in dust-approved conditions and that such employment was of an equivalent standard to that of his regular occupation. See also R(I) 11/75 and R(I) 4/76.

**6 Has at all times since the end of the injury benefit period been incapable of following his regular occupation and of following suitable employment of an equivalent standard thereto**

i A man who was employed as a labourer with a heavy machinery gang injured his wrist in an industrial accident, but it was not at first known how serious the injury was and he was advised to return to his employment. He did so for 9 months but had to be helped by his mates and was then given lighter work. When the true nature of his wrist injury was discovered he made a claim for a special hardship allowance and it was held that his incapacity had in fact been continuous at all times since the end of the injury benefit period. See also R(I) 35/58. R(I) 72/53

ii A driver-loader employed by a local authority resumed his regular occupation after recovering from the effects of an industrial accident, but although he was paid his full wages he acted as a driver only and paid a weekly amount to each of his two mates to do his share of carrying and loading. It was held that he had at all times since the end of the injury benefit period been incapable of following his regular occupation. Compare R(I) 29/52, *supra* 11.3.5 ii. R(I) 5/58

iii The existence of a 'gap' in the periods of assessment of a person's disablement is not an insuperable obstacle in satisfying the continuous condition of (what is now) section 60(1) of the Act, because the decision of the medical authorities as to the degree and estimated duration of disablement, being merely for the purposes of basic disablement benefit, it is open to the statutory authorities to decide in respect of any period whether, as a matter of fact, having regard to the realities of the situation, the claimant has been incapacitated by the relevant loss of faculty. See paragraphs 7 *et seq* and compare R(I) 29/58 and R(I) 33/59. R(I) 9/66

**7 Has not at all times since the end of the injury benefit period been incapable of following his regular occupation or equivalent standard employment**

i A coal face worker was incapable of work for various periods as the result of an industrial accident and after the end of the injury benefit period returned to work on the coal face for some 6 years. He lost a number of shifts by reason of the relevant injury but it was held that, notwithstanding his frequent absences, his employers did not continue to employ him out of charity and that he had not at all times since the end of the injury benefit period been incapable of following his regular occupation. See paragraphs 11-15. R(I) 50/56

ii Some 2 months after a man had met with an industrial accident an initial medical board decided that he had no loss of faculty. It was held by a Tribunal of Commissioners that that finding by the medical board did not enable the claimant to prove that he had been incapable of following his regular occupation at all times since the end of the injury benefit period. See paragraphs 11-14 and see R(I) 29/58 and R(I) 33/59, but compare R(I) 9/66, *supra* 11.3.6 iii. R(I) 25/57

- R(I) 35/57      iii      An underground worker in a colliery was incapable of work by reason of an injury to his hand as the result of a fall during the course of his employment. After the end of the injury benefit period he continued to follow his regular occupation for some 4½ years until he had an operation at a time when he was incapable of work as the result of a further industrial accident. It was held that he could not show that he had been incapable of following his regular occupation at all times since the end of the injury benefit period. See paragraphs 11 and 13 and see also R(I) 81/53, *infra* 11.5.1 ii.

## 8      What is 'suitable employment'?

- R(I) 24/57  
(T)      i      The question whether a particular employment is suitable for a claimant for a special hardship allowance has to be judged with reference to him as a worker in industry and matters affecting him otherwise are irrelevant. A married woman who lived on a farm with her husband (who was employed as a cowman) and her children was employed as a dairy maid, but contracted prescribed disease no. 24(b) .now no. 42), with the result that she became incapable of following that occupation. It was not accepted that she could not have followed some light factory employment but by reason of lack of travelling facilities and the difficulties of getting from the farm where she lived to the nearest town meant that either her husband would have had to give up his then situation or that she would have had to live apart from him and her children. A Tribunal of Commissioners found that, treating the claimant simply as an industrial worker, the locality of her home and the distance and means of travel between her home and the place where employment existed which she was capable of following were factors to be considered in deciding whether such employment was suitable in her case (see paragraph 28); and it was added (see paragraph 29) that if employment which a claimant was capable of following did not exist in his locality, but did exist elsewhere, then after a lapse of a reasonable interval from the date when a claimant became incapable of work a particular employment would not be unsuitable for him by reason only that it was employment in an area different from that in which he lived. Applying those considerations to the claimant, the Tribunal held that an occupation could not be regarded as unsuitable in her case merely because it would involve either her living apart from her family or her husband changing his situation, but that reasonable time should be allowed for the necessary arrangements to be made. In the circumstances it was held that 3 months should suffice for that purpose.
- R(I) 22/61      ii      It is necessary to distinguish the capacity of a claimant to follow an employment and the suitability of the employment for him. The incapacity of a claimant to follow the employment is not relevant unless it is the result of the relevant loss of faculty; whereas suitability refers to such matters as education, experience or training and has to be judged by reference to the claimant's past industrial history. But a claimant may be able to show that, as the result of an inherent physical or mental defect or a permanent disability from which he was already suffering before the relevant accident, certain employments would be unsuitable in his case, although if he seeks to rely on incapacity which has supervened since the relevant accident he must show

that such incapacity is the result of the relevant accident and cannot rely on that supervening incapacity as a basis for saying that the employment in question is not suitable in his case. Thus a builder's labourer who injured his thumb and wrist in an industrial accident and, as a result, became permanently incapable of following his regular occupation was held not to be entitled to a special hardship allowance when he had to give up his alternative employment as a night-watchman by reason of osteoarthritis which had supervened since the relevant accident. See also R(I) 1/74, *supra* 11.3.4 xii and R(I) 6/77, *infra* 11.4.1 iii.

iii It was held in the case of a coal-miner who developed pneumoconiosis that employment as a faceworker (cableman) in dust-approved conditions was suitable employment in his case. See also *supra* 11.3.5 ix. R(I) 2/76

## Part 4: Period and rate of award

*Section 60(6) of the Act.*

### 1 Meaning of ‘standard of remuneration’ and of ‘equivalent standard’

- C.W.I. 17/49 i The expressions ‘standard rate of pay’ and ‘standard of remuneration’ do not necessarily have the same meaning, for in the case of a piece-worker ‘rate’ may refer to the amount per ton or per yard which he is paid, but that of itself is no indication of the amount of remuneration. ‘Remuneration’ is the amount of money (or its equivalent) which a person receives in return for his services, and the meaning of the expression ‘standard of remuneration’ may be found by comparison with the common expression ‘standard of living’, which is frequently used to denote a certain scale of expenditure, so that ‘standard of remuneration’ is intended to denote a certain scale of pay in the sense of the actual amount received, or expected to be received, in respect of a given period. See also R(I) 78/51, R(I) 60/52 and R(I) 33/55.
- R(I) 1/72 ii The purpose of (what is now) section 60 of the Act is the compensating of the insured person, not for the loss of earnings, but for loss of earnings capacity, and accordingly subsections (1) and (6) perform different functions in that subsection (1) determines whether the person concerned qualifies for an award of special hardship allowance to be awarded; whereas subsection (6) qualifies the allowance to be awarded. Thus the phrase ‘employment of equivalent standard’ in the context of subsection (1) means ‘employment of a standard of remuneration’ equivalent to that of the regular occupation. The phrase ‘standard of remuneration’ means the normal level of remuneration and is not the same as average earnings. See also R(I) 6/68, *infra* 11.4.8 vi and the Appendix to R(I) 7/69, *infra* 11.4.8 viii.
- R(I) 6/77 iii A claimant whose regular occupation was that of a biscuit factory worker met with an industrial accident, as a result of which she injured her back, and it was accepted that she was likely to be permanently incapable of following her regular occupation. It was suggested that should would be capable of alternative employment as a machinist in a Remploy factory, but it was held that such alternative employment represented sheltered employment of an exceptional character and that probable earnings of a person so employed should not be taken as indicative of her probable earnings capacity in the open market, so that that employment should not be used for the purposes of the statutory comparison for the purposes of section 60(6) of the Act. Under that subsection the suggested employment as a machinist for Remploy was excluded for comparison purposes on the basis that it was merely hypothetical and that a special hardship allowance was payable to the claimant at a rate based on a comparison between the probable earnings in her regular occupation and those of a chocolate factory worker, which was accepted as suitable in the claimant’s case.
- R(I) 9/80 iv A chicken eviscerator worked a normal 35 hours week in her regular employment at the time she contracted prescribed disease no. 34 (tenosynovitis). She subsequently worked a normal 40 hour week in an alternative employment as nursery woman. Where the hours worked in an alternative employment are equal to or greater than those for the regular employment, in respect of past periods the actual hours worked in each employment will determine the ‘probable’ standard of remuneration for the purposes of section 60(6). The normal hours of work in the alternative employment will also be taken into account for any other period for which an award is made. R(I) 6/68 and R(I) 6/78 (part-time employment) referred to, *infra* 11.4.8 vi and 11.4.8 vii.

**2 Appropriate periods for determination of probable standards of remuneration**

i The dominant principle is to compare the employment which the claimant is capable of following, taken as a whole, with his regular occupation, also taken as a whole, and to consider whether, looking at the matter fairly, the claimant is worse off in the financial sense as a result of his loss of faculty, and for that purpose a long view must be taken. Thus a railway shunter who was rendered permanently incapable of following that occupation as the result of an industrial accident worked as a passenger porter and suffered a small loss of earnings over 12 months, but was paid more overtime as a port during the summer than he would have earned in his regular occupation. It was held that the earnings of two occupations should be compared over the whole year. See also R(I) 5/53. R(I) 76/52

ii Where, during a temporary trade recession in a claimant's occupation, his probable earnings in that occupation are lower than his earnings in his existing employment it does not necessarily follow that his existing employment is of an equivalent standard to that of his regular occupation so as to disqualify him for a special hardship allowance under subsection (1) of (what is now) section 60 of the Act, though it may justify a temporary recession of payments under subsection (6) of the section. Thus when trade in the steel industry began to fall off and the bonus of work were reduced by stages to a point where the foundry at which the claimant had formally been employed was working only 4 days a week, it was held that the amount payable to him by way of a special hardship allowance held to be reduced. Compare R(I) 8/53, *infra* 11.4.4 i. R(I) 31/59

**3 Effect of absenteeism**

i A quarryman who, before being injured in an industrial accident, was to a very large extent a piece-worker, habitually earned less than he might have done because of frequent days of absence from work. After recovering from the effects of the accident he resumed work in a different occupation and it was held that the actual earnings in his regular occupation must be compared with what he would have earned in the post-accident employment but for absenteeism. See paragraphs 4-5. R(I) 23/51

ii A former bus conductor earned less in his post-accident employment than bus conductors earning full overtime, but before his accident he was acting as honorary secretary of a football club, in which capacity he availed himself of his usual idle day to attend matches as being unable to work overtime. His secretary was, however, temporary only and if he had returned to his regular occupation there was no reason to suppose that he would not have worked overtime. It was held that the standard of remuneration of his regular occupation fell to be determined by the standard enjoyed by other bus conductors. R(I) 14/57

**4 Effect of short-time working**

- R(I) 8/53 i A labourer at a steel mill who had been injured in an industrial accident was thereafter employed at a lower wage, but, owing to shortage of materials, short-time working became general in his former occupation, with the result that his earnings in his fresh employment were at least as good as they would have been in his regular occupation. It was held that a special hardship allowance was no longer payable to him, although the facts did not establish that he was capable of equivalent standard employment. See now section 60(4) of the Act.
- R(I) 5/62 ii Owing to a trade recession the earnings from a claimant's regular occupation were reduced for an indefinite period, with the result that they were lower than his current earnings in his post-accident employment. It was held that the question whether a claimant satisfied the requirements of section 14(4) of the National Insurance (Industrial Injuries) Act 1946 (now section 60(6) of the Act) could only be decided on the facts as they existed at the date of the insurance officer's decision and that it was not enough for a claimant to show at some later date a total loss of earnings over a period of 12 months.

**5 Effect of regular occupation ceasing to exist**

- R(I) 10/54 i A man was employed by a company of motor manufacturers for many years in a variety of different jobs, and finally as what was known as a 'dinger' (i.e. an unskilled tinsmith). While so employed he developed prescribed disease no. 24(b) (now no. 42) and subsequently resumed work with the same firm as a progress clerk, but later, because of a reorganisation, the occupation of dinger disappeared and those so employed were transferred to other manual jobs in the factory. It was found that the claimant's regular occupation should be held to be that a manual worker using tools and that the fact that the job of dinger ceased to exist did not mean that his regular occupation had ceased to exist, with the result that he was entitled to a special hardship allowance of an amount based on a comparison of his earnings as a progress clerk with those of the other former dingers in their new jobs.
- R(I) 16/54 ii A man whose regular occupation was that of a foreman teamer and horse keeper fractured his wrist in an industrial accident and became incapable of his regular occupation, but returned to work with his pre-accident employers as a light labourer and later as a temporary storekeeper. His employers no longer kept horses and his post-accident earnings as a storekeeper were more than those of a teamer, but it was shown that the occupation of team/horsekeeper still existed with other employers and that the claimant was entitled to a special hardship allowance at a rate representing the difference between the rate of pay for a combined occupation of teamer/horsekeeper and that for the occupation of a storekeeper.
- R(I) 11/65 iii When a man met with an industrial accident he was employed partly as a storeman, partly as a boiler attendant and partly as an assistant to a fitter. Later, after some reorganisation at the claimant's place of employment, the storeman's duties

became full time and he was not required to perform any other duties. It was held that of the purposes of determining the amount of an award of a special hardship allowance the probable earnings in the regular occupation should be assessed, where no-one follows that occupation in the period in question, by having recourse to comparisons with the increases of other comparable employed persons or to a percentage increase, or by some other means. See paragraphs 9-11.

## **6 What should be included when earnings are being assessed**

- i A man had worked overtime on 3 days a week for more than 3 years and it was held that overtime in his regular occupation as a machinist should be included in the comparison of the standards of remuneration before and after an industrial accident. See also R(I) 7/51. C.I. 81/49
- ii A riding instructress and professional horsewoman received from her employers, in addition to her salary and board and accommodation, extra payments in respect of any prizes she won or horses she sold. It was held that the extra payments should be included when the standard of remuneration in her regular occupation was being assessed. R(I) 47/54
- iii A foreman blacksmith obtained employment as a colliery blacksmith and, in addition to his weekly earnings, was entitled each month to one ton of coal. It was held that the value of that concessionary coal was a return for his services rendered and should be included in the assessment of his probable remuneration. R(I) 3/58
- iv Before meeting with an industrial accident a man who was employed as a overhead linesman had been paid a subsistence allowance by his employers for some 8 years. It was held that the allowance was a perquisite annexed to his wages and formed part of his remuneration. R(I) 24/59
- v It was accepted that overtime was a normal feature of a coal-miner's employment during a period under review and must be taken into account when the standard of his remuneration in his regular occupation was being assessed. See paragraph 19. R(I) 1/72



**7 What should be excluded when earnings are being assessed**

- i Remuneration is the amount of money (or its equivalent) which a person receives in return for his services. A slot-meter collector who became incapable of work as a result of an industrial accident was provided by his employers with a uniform, but it was held that he did not receive the uniform for his services but simple because his employers wished him to wear a uniform. R(I) 33/52
- ii A workman received a net weekly wage after deduction had been made for the cost of the materials he used, and it was held that it was his net weekly wage that had to be taken into account. R(I) 79/52
- iii A cinema operator who became incapable of following his regular occupation as the result of an industrial accident contented that his post-accident employment was not of an equivalent standard to that of his regular occupation because he received no subsistence allowance. It was held that the subsistence allowance was not to be taken into account in the assessment of the claimant's standard of remuneration in his regular occupation. See and compare R(I) 24/59. R(I) 1/54
- iv Both before and after he met with an industrial accident a man was employed in the evenings as a stoker and cleaner, and it was held that his earnings from that subsidiary occupation should be excluded from an assessment of his post-accident standard of remuneration because his full-time earnings capacity. See also *infra* 11.4.8 ix. R(I) 2/70

**8 General considerations for comparison of earnings**

- i When the rate of special hardship allowance is being calculated the amount of basic disablement pension should be disregarded for the purposes of comparing standards of remuneration. See paragraph 5. And see R(I) 78/51 (in comparing standards of remuneration what has to be considered as earnings). C.I. 330/50
- ii If a man obtains employment in a recognised occupation and stays in for some months the reasonable inference is that his earnings in that occupation are a proper measure of his earning capacity, but there may be exceptional cases where the rate of wages is quite different from that which he would reasonably expect to receive from such employment. Thus when an iron-moulder was unable to follow his regular occupation as the result of an industrial accident he obtained employment as a shift foreman, when he paid more than he would have been in his regular occupation of iron-moulder; it was held, nevertheless, that, when that employment came to an end, he was unable to follow employment of an equivalent standard to that of his regular occupation. See paragraph 4. R(I) 42/52
- iii If it is known that a person never does any remunerative work during a definite period of the year, and that is the period to which comparison must be made, there is then no standard of remuneration to which a comparison can be made for the R(I) 56/53

purposes of entitlement to a special hardship allowance. Accordingly an agricultural worker who normally did no work between the end of November and the beginning of March each year was held not to be entitled to a payment under (what was then) section 14 of the National Insurance (Industrial Injuries) Act 1946 during that period. (See now section 60 of the Act).

- R(I) 45/61 iv A claimant who was permanently incapable of following his regular occupation ought not to be regarded as capable of following employment of an equivalent standard merely because for a limited period or in exceptional circumstances he has enjoyed earnings as high as those in his regular occupation. A man was held to be entitled to an increase of disablement benefit on account of special hardship notwithstanding that for 8 months he was employed at a wage (including much overtime) which exceeded that of his regular occupation. See paragraph 8 and the decisions referred to therein.
- R(I) 14/62 (T) v The words in section 14(4) of the National Insurance (Industrial Injuries) Act 1946 (see now section 60(6) of the Act) requiring comparison to be made between a claimant's probable standard of remuneration in alternative employment and 'that in his regular occupation' were held to mean 'if he had continued to follow it'. A Tribunal of Commissioners held that a special hardship allowance continues to be payable to a coal-miner notwithstanding he had retired from that occupation and that in assessing his probable standard of remuneration it had to be assumed that he was following his regular occupation. It was said to be irrelevant to the calculation that since the accident the claimant had retired or become too old to work to incapable of work due to some supervening unconnected cause. See paragraphs 6-20 and see also R(I) 1/63.
- R(I) 6/68 (T) vi As the result of an industrial accident a man whose regular occupation was that of a collier (market man) was unable to follow that occupation and became employed as a steel checker, but both before and after the accident he engaged in various public duties, with the consequence that his earnings in both employments were consistently reduced because of absences necessitated by such duties. A Tribunal of Commissioners said, with reference to the case of *R. v. Deputy Industrial Injuries Commissioner, Ex parte Humphreys*, that, since like must be compared with like, if a claimant works only part-time in his regular occupation the standard of remuneration in other employment must also be assessed on the same basis. See paragraphs 15-21. In the course of his judgement in the Humphreys case Lord Denning M.R. said of the claimant (whose regular occupation was that of a ripper in a coal-mine but who, after meeting with an industrial accident, was able to work as a welder burner) that '.... you must compare his probable wages as a welder burner with his probable wages as a ripper. If the scale of wages is higher in one part of the country than the other, you must take the comparison at the place where he is living. You must compare like with like.' And see *infra* 18.1.2 ii. See also R(F) 9/80 *supra* 11.4.1 iv and R(I) 3/89.
- R(I) 7/68 (T) vii A married woman whose regular occupation consisted of employment as a home help and private domestic work for a private employer was unable to follow this occupation as result of contracting prescribed disease no. 42, but was considered to be capable of factory work. Before contracting the disease she worked 28 hours a week, but full-time factory work for 40 hours a week would have yielded more wages than she had earned previously. It was held by a Tribunal of Commissioners that when comparing the probable standards of the claimant's remuneration the comparison was to be made between the earnings in her regular occupation for a 28-hour week with probable earnings in the factory employment for a 28-hour week. See also R(I) 1/80 *supra* 11.4.1 iv and R(I) 3/83.
- R(I) 7/69 (T) viii The test required by (what is now) section 60(6) of the Act is not to be made by a comparison between 2 remunerations or 2 average remunerations, but the true test is a comparison between 2 normal levels of remuneration which may be discovered by striking an average of the relevant remuneration over a reasonable period provided that exceptional remuneration due to such factors as unusual periods of overtime or short-time excluded. A coal-miner who was unable to continue in his regular occupation as the result of an industrial accident became a driver with the same employer, but in that occupation, unlike his regular occupation, he worked a

considerable amount of overtime. A tribunal of Commissioners rejected the contention that awards of special hardship allowance should be made on the basis of a comparison between the hourly earnings of the regular occupation and that of the suitable alternative employment. And the decision was upheld by the Divisional Court of High Court on an application for an order of certiorari and on appeal via the CA. See *R. v. National Insurance Commissioner, Ex parte Mellors* printed as an App. to R(I) 7/69 and see 18.1.1 viii *below*. See also R(I) 4/77.

ix In the case of a man who, as a result of an industrial accident, was unable to continue to follow his regular occupation of a full-time lorry driver, but was employed as a full-time machine operator, it was held that his subsidiary occupation of a stoker and cleaner did not fall to be treated as part of his regular occupation and that, for the purposes of (what was then) s. 14(6) of the NI (Industrial Injuries) Act 1965, when a claimant's probable post-accident standard of remuneration in suitable insurance employments is being considered, it was not always appropriate to equate that standard with his actual earnings in the employment or employments which he happened to be following in the relevant period since such standard is based upon his reasonable post-accident earning capacity in one or more suitable employments. See paras. 8-10. R(I) 2/70

x The claimant, a part-time home help (average 24 hours per week), was accepted as incapable of her regular occupation as a result of the relevant loss of faculty. The balance of medical evidence indicated that she was capable of the full-time alternative employment of folder - dusters and dishcloths and of the alternative employment of light assembly of purses, handbags etc for 20 hours a week. Part-time workers were not employed in the occupation of folder and workers in light assembly were not employed for longer than 20 hours, 24 hours **not** being available to them. The Commissioner held that: R(I) 3/83

1. in the case of a person whose regular occupation is part-time, it is wholly inappropriate to take as the basis of comparison for the purpose of s. 60(6) an alternative occupation which is full-time; like should be compared with like (para. 10);
2. it is also inappropriate to take as the 'probable' standard of remuneration a standard based on the assumption that an alternative occupation can be worked for (in this case) a 24 hour week when the evidence is that it can **only** be worked for (in this case) a 20 hours week;
3. the proper basis for an award is between the probable standard of remuneration for a 20 hour week in the alternative occupation and a 24 hour week in the regular occupation (paras. 11 and 12).

The Commissioner referred to and applied the principles of Decisions R(I) 6/68 and R(I) 7/68 by tribunals of Commissioners.

## 9 Maximum amount payable

i The claimant made claims to benefit in respect of two industrial accidents. The Commissioner held *inter alia* that a person was entitled to only one award of REA in respect of all accidents and that that award must be subject to the statutory maximum. The S of S appealed to the CA who set aside the Commissioner's decision. The Court held that there can be multiple claims for and awards of REA but the maximum amount payable on each claim is 40% of the maximum rate of disablement pension and the maximum amount payable overall is 140% of that rate. [For a summary of the Court's judgment see 18.6.2 xxvi]. R(I) 2/02

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## Part 5: Periods to be disregarded when capacity is being determined for employment after the end of the injury benefit period

*Reg. 9 of the SS (Industrial Injuries) (Benefit) Regs. 1975 (hereinafter in Part 5 of Chapter 11 referred to as 'the Regs.').*

### 1 Return to regular occupation on medical advice

i The purpose of (what is now) reg. 9 of the Regs. is to protect a man who needs to rely on providing that he is, and at all times since the end of the injury benefit period has been, incapable of following his regular occupation and of following equivalent standard employment from being prejudiced by working for a temporary period for the purposes named in the reg.

ii The condition that a person is waiting to undergo surgical treatment requires that he should have been given a definite opinion by a medical practitioner that such treatment ought to be carried out. After an industrial accident a miner was advised by his doctor to return to his normal work by to avoid working in low seams, and was told that he would probably have to have an operation. Twenty one months later, when he was put back on low seams, he stopped worked and an operation was subsequently decided to be necessary. It was held that that period during which he did his normal work did not fall to be disregarded under (what was then) reg. 4A of the NI (Industrial Injuries) (Benefit) Regs. 1948. See also C.I. 254/50, R(I) 93/53 and R(I) 35/57; and compare R(I) 45/61

iii A painter who had contracted PD No. 24(b) (now No. 42) was advised by his doctor to return to his regular occupation. He did so, but performed specialist direct work only for a total period of 15 weeks, after which he resumed general work, but suffered a recurrence of a bleeding rash and eventually returned to work in a different occupation. It was held that the period during which he worked at his regular occupation might probably be regarded as one during which he worked for the purpose of ascertaining whether he had recovered from the effects of the disease. See also R(I) 14/62 (T) 97/53.

iv A miner met with an industrial accident but the full extent of the injuries he suffered was not a first diagnosed. His doctor told him that there was nothing broken and that it would benefit him to take exercise, and accordingly, on his doctor's advice, he returned to work as soon as possible. He continued to suffer considerable pain, however, and had to give up work some six months later. In the meantime he had asked that he should be X-rayed and it was then discovered that he had a fracture which had been unknown to the doctor when he advised a return to work. It was said that the circumstances were 'a fair illustration of a case where a man returns to work on the advice of his doctor for the purpose of rehabilitation and continues to work at his regular occupation for that purpose'. R(I) 6/68 (T)

v A colliery worker injured his back in an industrial accident but continued to work in his regular occupation for the next 15 months, although he did not do any heavy lifting or overtime work. He received treatment from his doctor but the condition did not improve and he was referred to a specialist, who prescribed treatment but advised the claimant that he could continue in his regular occupation provided he took care and avoided heavy lifting. His condition still did not improve and eventually he had to give up work, and medical boards found a loss of faculty of varying degree at all times since the end of the injury benefit period. It was held that the period during which the claimant worked in his regular occupation could be disregarded under (what was then) reg. 4A of the NI (Industrial Injuries) (Benefit) Regs. 1948. At para. 12 it was said that it

it was in which that regulation came to a claimant's rescue for the reasons given in the para.

vi A coal-hewer injured his left knee in an industrial accident and as a result a small loose piece of bone was broken off the upper end of the tibia. A consultant surgeon advised an operation, but the claimant refused to accept that advice. It was conceded that he was incapable of following his regular occupation while his knee remained in that condition, but it was held that his incapacity for his regular occupation did not result from an unreasonable refusal to undergo the operation since an opinion in favour of an operation should be given by more than one expert before benefit is stopped and an improvement must be not merely possible, but probable, before an operation can be reasonably required.

R(I) 7/68  
(T)

vii A miner met with an industrial accident which resulted in a right inguinal hernia, but was advised by his doctor to continue to work without a truss so that it might be seen whether the hernia would get bigger. The doctor promised that if it did he would arrange surgical treatment, and the claimant accepted that advice. The hernia grew worse and the doctor arranged for an examination at a hospital. While waiting the operation the claimant returned to lighter work with a consequent drop in his weekly earnings. It was held that the period during which he worked in his regular occupation prior to going to hospital was a period which fell to be disregarded as one during which he was working on the advice of a medical practitioner for the purpose of ascertaining whether he had recovered from the effects of the relevant injury. See paragraph 11 in which it was said that the purpose of the regulation providing that a return to employment should be disregarded if it was for the purpose of ascertaining whether a person had recovered from the effects of the relevant injury was to encourage injured workers to get back to work as soon as possible and to protect the workman who is prepared to attempt to do his work by providing that, should such attempt fail, he would not be prejudiced by being refused a special hardship allowance. See also R(I) 13/56. And see the references to R(I) 81/53 at paragraph 12.

R(I) 7/69  
(T)

R(I) 2/70

R(I) 3/83

## 2 Return to regular occupation for ascertaining of recovery

R(I) 1/51

i A ripper in a coal-mine injured his knee in an industrial accident but returned to his regular occupation and, apart from a few short absences, followed it for nearly 18 months. Later he became incapable of that occupation and made a claim for a special hardship allowance, which was disallowed. Fifteen months later he made a further claim and it was held that, although at the outset the claimant's return to his regular occupation may have been for the purpose of ascertaining whether he had recovered from the effects of the relevant injury, the period during which he worked in his regular occupation could only be disregarded if the purpose continued throughout that period, which in that case it did not. See also R(P) 3/84, 17.6.1 iv *below*.

R(I) 81/53

ii The words 'ascertaining whether he had recovered from the effect of the relevant



injury' must be treated as meaning 'ascertaining whether he had recovered sufficiently to enable him to work'. On the facts it was held that the claimant's return to his regular occupation was for that purpose. See paragraphs 8-13.

## Part 6: Effect of prescribed diseases regulations

*The Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1975 (hereinafter in Part 6 of Chapter 11 refer to as 'the Regulations').*

### 1 A sequela of a prescribed disease may be treated as the prescribed disease

*See regulation 3 of the Regulations*

i An iron moulder contracted prescribed disease no. 42 as a result of a fault in the sand hopper he was required to use. The fault caused a fine shower of sand to fall on the moulder's neck and frequent wiping with hot sandy hand resulted in dermatitis owing to friction caused by sand. On two occasions he tried to return to his employment, but each time he had a relapse of his skin condition, and it was held that the sequela of the prescribed disease (i.e. the tendency of the skin to break down if subject to comparable conditions) prevented the claimant from following his regular occupation.

R(I) 93/53

R(I) 35/55

R(I) 35/58

### 2 When a person has abandoned an occupation as a result of the relevant loss of faculty it may be treated as having been his regular occupation

R(I) 23/59

*See regulation 19 of the Regulations*

i After working 18 years in a coal-mine as an overman the claimant's health broke down, and after a complete rest, which he took on the advice of his doctor, he resumed work as a surface datal worker. But he became so employed, not because he was incapable of working as an overman, but because there was then no vacancy for that occupation. He then developed pneumoconiosis and it was held that his regular occupation was that of an overman.

R(I) 13/61

ii A machineman left his regular occupation in 1953 because of an industrial accident, but some 3 years later he found to be suffering from pneumoconiosis from which it was reasonable to support he had probably been suffering for the past 3 years. It was found that at the date of the development of the disease he had no regular occupation and that it could not, therefore, be said that he had abandoned his regular occupation as a result of pneumoconiosis. See paragraphs 8-9.

iii A man worked in the coal-mining industry until, for health reasons, he left it and became

a roadman for the local authority. Some 5 years later he was examined by a pneumoconiosis medical board, who found that he was suffering from pneumoconiosis, and he then claimed a special hardship allowance on the ground that he had abandoned his occupation in the coal-mine and that it should be treated as having been his regular occupation by force of regulation 16A of the National Insurance (Industrial Injuries) (Prescribed Disease) Amendment Regulations 1957 (see now regulation 19 of the Regulations). It was held for the reasons given in paragraphs 10-11 that the claimant could be treated as having abandoned his regular occupation of a brusher in a coal-mine because of pneumoconiosis.

iv A storeman was held to have developed prescribed disease no. 42 and after receiving injury benefit resumed work as a clerical worker (porter) at a greatly reduced wage. Subsequently the symptoms recurred and the medical appeal tribunal found that he was suffering from a fresh outbreak of the prescribed disease, and a local tribunal upheld the insurance officer's decision that the claimant's regular occupation was the occupation he had been following at the date of the second development of the prescribed disease, namely clerical worker (porter). It was held that regulation 19 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations 1959, as amended (see now regulation 38 of the Regulations) required the words 'relevant disease' to be construed in the ordinary sense as meaning the disease relevant to the case under consideration and that, accordingly, the regulation enabled the claimant's regular occupation to be treated as that of storeman. See paragraph 14.

R(I) 5/66

### **3 Deemed incapacity in cases of pneumoconiosis**

R(I) 1/69

*See regulation 38 of the Regulations*

R(I) 28/60

i A miner was unable to follow his regular occupation of a screener because he suffered from pneumoconiosis and, after receiving a 'letter of advice' from the medical authorities, was employed as a light surface labourer. It was accepted that he was incapable of following his regular occupation, but it was held that he could not be deemed under (what is now) regulation 38 of the Regulations to be incapable of following equivalent standard employment since 'the contrary had not been proved'.

ii A colliery worker was found to be suffering from pneumoconiosis and was given a letter of advice by a medical board that he should not follow his regular occupation unless he observed certain safeguards. He continued to work in his regular occupation, but later had to take lighter work because of his disability. It was held that his regular occupation was that of a collier and that a special hardship allowance was payable to him.

iii A colliery repairer was found to be suffering from pneumoconiosis and was advised that he could go on working under dust-approved conditions. Five years later he retired from regular employment and it was held that his retirement fell to be treated under (what was then) regulation 34A of National Insurance (Industrial Injuries)

(Prescribed Diseases) Amendment Regulations 1948 (see now regulation 38 of the Regulations) as if his retirement had taken place immediately after he received the medical board's advice. See paragraphs 12-13.

iv An underground worker in a coal-mine was found to be suffering from pneumoconiosis and a little under 2 years after the date determined as the date of the development of the disease he voluntarily left his employment although, since he was over 71 years of age, he would in any case have been retired. He was given a letter of advice saying he could continue to work in the coal-mine in dust-approved conditions and it was held that the presumption raised by regulation 34A of the 1948 Regulations had not been rebutted. (See now regulation 38 of the Regulations). See paragraphs 8, 10 and 11 and compare R(I) 37/51.

v A supervisor in a coal-mine developed pneumoconiosis and was given a letter advising him that he could continue to work in the coal-mine under dust-approved conditions. He already worked in dust-approved conditions and continued to follow his employment until his post was abolished. He then changed to less remunerative work and it was held that, even though he had been working in dust-approved conditions when he received the letter of advice from the medical board, the presumption in his favour applied, but that it was rebutted by the fact that he was only prevented from following his regular occupation by the abolition of it and not by pneumoconiosis.

R(I) 34/51

vi A coal-hewer who suffered from pneumoconiosis followed his occupation for 10 years until the colliery at which he was employed closed down and he was then transferred to a lower-grade work. He had been given a letter of advice by a medical board and was accordingly deemed under (what was then) regulation 37 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations 1959 (see now regulation 38 of the Regulations) to be incapable of his regular occupation unless the contrary was proved. It was held that the contrary had not been proved and that the claimant was entitled to a special hardship allowance.

R(I) 8/58

vii Regulation 37 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulation 1959 (see now regulation 38 of the Regulations) fulfilled a two-fold purpose. First, if a claimant gave up his regular occupation on receiving a letter of advice, or at any time, it might be difficult for him in the ordinary way to prove his incapacity unless he was deemed by the regulation to be incapable unless the insurance officer could prove the contrary. Secondly, if he decided to continue in his regular occupation, but eventually gave it up, he was to be in no worse a position if he had given it up immediately on receiving the advice since the intervening period of employment fell to be disregarded although it was still open to the insurance officer to prove by evidence of the claimant's physical condition that (in spite of pneumoconiosis) he would be capable of following his regular occupation. On the facts of the case it was held that the claimant was not incapable, as the result of pneumoconiosis, of following his regular occupation of a coal-hewer. See also R(I) 42/60.

R(I) 13/58

R(I) 4/69

viii At paragraph 8 it was pointed out that 'dust-approved' is not the same as 'dust-free'. There can seldom if ever be entire freedom from dust in places where coal mining is going on and a certificate of dust approval means that on routine dust sampling taken at coal-faces and at other places during normal working shifts in accordance with a prescribed technique the dust count is found to be within approved limits. A former coal-miner was awarded disablement benefit in respect of pneumoconiosis and letter of advice were issued by successive medical boards that he could continue in the coal-mining industry without danger to his health provided he worked in approved dust conditions. He continued to work in a coal-mine as a repairer for some 10 years until he became employed as a watchman, and shortly thereafter was certified to be incapable of work by reason of pneumoconiosis. His claim for a special hardship allowance was disallowed following an opinion by 2 members of the pneumoconiosis medical panel that he could follow his regular occupation provided he did so in dust-approved conditions, and it was held that the presumption raised by (what was then) regulation 37 of the National Insurance (Industrial Injuries) (Prescribed Diseases)

Regulations 1959 was effectively rebutted and that the claimant had not been shown to be incapable of following his regular occupation as the result of pneumoconiosis in dust-approved conditions.

ix A coal-miner (stoneworker) developed pneumoconiosis and after being given 'letters of advice' by various medical boards changed to lighter work, with a consequent reduction in his earnings. A later pneumoconiosis medical panel advised that the claimant's incapacity for following his regular occupation in dust-approved conditions was not as a result of the disease but was due to advancing years. It was held that the claimant had established an incapacity for following his regular occupation; that in rebutting the presumption in (what is now) regulation 38 of the Regulations the insurance officer does not have to prove affirmatively that some other condition gives rise to the incapacity but need only show that pneumoconiosis is not a material contributing cause of incapacity; that the statutory presumption had been rebutted; and that it had been established that the claimant's incapacity for following his regular occupation in dust-approved conditions was not as a result of the relevant loss of faculty. (On application for an order of certiorari the decision was quashed: see *R. v. Industrial Injuries Commissioner, Ex parte Langley*, *infra* 18.1.2 iv, but see R(I) 2/76, *supra* 11.3.5 ix and R(I) 4/76.

x A coal-miner (face worker) developed pneumoconiosis and was given the usual 'letter of advice' by the various medical boards by whom he was examined. Some 15 years after developing the disease he changed to a lighter occupation and made a claim for special hardship allowance. A medical board advised that he was probably not capable of working as a face worker, but not because of pneumoconiosis. It was held by a Tribunal of Commissioners that, applying *Langley's* case *supra*, the claimant was incapable of following his regular occupation; that the medical evidence showed that since starting to do light work the claimant had been, and was likely to remain, permanently incapable of the occupation of face worker in dust-approved conditions, but that pneumoconiosis did not cause or contribute to his incapacity; that employment in the activities involved in a man's regular occupation which is subject to restriction or limitation can properly be treated as alternative employment of equivalent standard; and that employment as a face worker in approved dust conditions was of equivalent standard to the claimant's regular occupation and was suitable in his case. See paragraphs 18 *et seq.*

## Part 7: Set-Off

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*See s. 86(2) of the Act, as amended by s. 7 of the SS Act 1979*

### **1 Award for later accident against award for earlier one**

i A claimant for special hardship allowance, a paviour, had suffered two industrial accidents (one in 1977 and the other in 1978) each resulting in strain to the right groin. In June 1980 he claimed the allowance in respect of the second accident and was awarded the allowance on the grounds that by reason of the relevant loss of faculty he was and was likely to remain permanently incapable of his regular occupation as a paviour. He later claimed the allowance in respect of the first accident for similar reasons. It was not disputed that he was entitled to the award, but the question in issue was how to treat the benefit paid in respect of the second accident. The Commissioner held that, where the regular occupation at the date of the first accident was one which the claimant had become permanently incapable of following by reason of the relevant loss of faculty sustained in that accident, he could not be said to be incapable of following the same occupation as a result of the relevant loss of faculty due to the second accident (para. 4). The award in respect of the second accident would not have been made if the favourable decision in respect of the earlier accident had been given in the first place (para. 4). By virtue of s. 86(2) of the Act, as amended by the SS Act 1979, the sums paid under the award in respect of the second accident were to be treated as paid on account of the benefit awarded in respect of the first accident (paras. 5 and 6).

C.I. 321/50

## **Part 8: Retirement allowance**

11.8.1-2

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**1 Meaning of “gives up regular employment”**

- i The phrase “gives up regular employment” has a readily understandable, natural and ordinary meaning and denotes some conscious act and intention on the part of the person concerned to give up regular employment. Consequently a man who was dismissed from his job at a newsagents through no fault of his own did not give up regular employment. The award of REA could not therefore be converted to retirement allowance.
- R(I) 41/52
- ii The claimants were over pensionable age and in receipt of awards of REA. Both had been unable to work for many years because of industrial accidents. Para. 13 of Sch. 7 to the Social Security Contributions and Benefits Act 1992 provided that a person in receipt of REA who had attained pensionable age and had given up regular employment on or after 10 April 1989 should cease to be entitled to REA and instead become entitled to retirement allowance, payable at a lower rate for life, from the day that they gave up regular employment. It could not be said in the case of either claimant that they had given up regular employment on or after 10 April 1989. Under the existing legislation there was therefore no power to cease payment of REA. However, from 24 March 1996, by virtue of the powers of para. 13(8) of the Social Security and Benefits Act 1992, amending regs. provided that a person was to be regarded as having given up regular employment at the start of the first week after 24 March 1996 when they were over pensionable age and no longer in such employment. The Commissioner decided that the regs. had the effect that both claimants had to be regarded as having given up regular employment from week commencing 31 March 1996. Retirement allowance was therefore payable instead of REA. In so deciding the Commissioner rejected the argument that people who had given up regular employment before 10 April 1989 on 24 March 1996 had an indefinite right to REA at unfrozen rates. Nor did he accept that the 1996 amending regs. did not bite on people who had already given up regular employment because those people had nothing to give up. He further rejected the argument that such people had an accrued right to REA which prevented it from being removed. The claimants appealed to the Court of Appeal who upheld the decision of the Commissioner. For a summary of the Court of Appeal judgment see 18.6.2 xix.
- R(I) 33/54
- R(I) 44/54
- R(I) 69/54
- iii The claimants in five cases were all in receipt of REA but had that benefit either frozen or replaced by retirement allowance because they had reached pension age. The cases were chosen as representative of very many appeals to the Commissioner by the claimants or the AO. They raised questions whether the different treatment linked to unequal pension ages for men and women amounted to unlawful discrimination on the grounds of sex contrary to Council Directive 79/7/EEC. This reported decision includes the three questions referred by the Commissioner to the ECJ and the judgment of the Court. Following the judgment the Commissioner decided against all the claimants by a short decision (not reproduced). The Court held that REA is a benefit which falls within the scope of Directive 79/7/EEC. It is not excluded as an old age pension under Article 7(1)(a) but can be classified under that Article as a benefit for which the determination of retirement age has repercussions. The requirement in Article 8 to bring into force such laws to comply with the Directive within six years does not prohibit a Member State which has set different retirement ages from adopting new measures linked to that age difference after the expiry of that period. The derogation in Article 7(1)(a) must be interpreted as applying to a benefit such as REA introduced after the expiry of the prescribed period and subject to age conditions which differ according to sex.
- R(I) 2/00
- R(I) 34/60
- R(I) 35/60

**2 Meaning of “day of interruption of employment”**

- i The phrase “day of interruption of employment” has the same meaning as in the provisions relating to UB, sickness benefit and invalidity benefit. A day of interruption of employment is therefore a day of unemployment or a day of incapacity for work which a person can reasonably be expected to do.
- R(I) 3/93

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