Commissioner of Metropolitan v PMAB and WALTHER

In *Commissioner of Police of the Metropolis v Police Medical Appeal Board and David Walther* [2013] EWHC 1203 (Admin) the Court gave further guidance on the assessment of police injury awards where an underlying degenerative condition has been affected by an injury on duty. The Court concluded that an approach based on acceleration or aggravation is not appropriate. If, at the time when the question is referred to the Selected Medical Practitioner there is a disablement which is permanent, and if the duty injury caused or substantially contributed to that disablement at that time, the right to receive an injury award arises.

Background

The Interested Party, a former police officer, was suffering from a degree of lumbar disc degeneration when in 2006 he suffered an injury to his back in the course of his duty. The Selected Medical Practitioner ["SMP"] tasked with assessing the officer's entitlement to an injury award under the Police (Injury Benefit) Regulations 2006 considered that the injury on duty had resulted only in an acceleration of his pre-existing condition and that, had it not occurred, he would have become unable to perform his duties within around 18 months to 2 years in any event. The SMP decided that the injury had not substantially contributed to the officer's permanent disablement, and that an injury award should therefore not be made.

The Interested Party appealed to the Police Medical Appeals Board ["PMAB"], which considered that the concepts of acceleration and aggravation were not helpful and concluded that the injury on duty had substantially contributed to the permanent disablement: his function had become significantly compromised following the injury, his requirement for pain relief had increased and he had not been able to return to work in any capacity. The appeal was therefore upheld.

The Claimant sought judicial review of that decision, contending that the PMAB had failed to deal with the SMP's evidence as to the degree of acceleration and whether that amounted to a substantial contribution to the permanent disability.

The Court's Decision

The Judge agreed with the Defendant that an approach based on aggravation or acceleration and the extent of any acceleration was not appropriate, because the relevant time for assessing causation of disablement was the time the question was referred to the SMP. Collins J said at [28]:

"The true question is indeed whether at the relevant time the injury has substantially contributed to the permanent disability. Whether it has will be a question of fact which is likely to turn in most cases on the seriousness of the injury and its effects. Only if there will be no loss of earning capacity resulting from the injury when the officer is medically retired will it be likely to be the case that there was no substantial contribution."

Thus, even if a duty injury had caused only an acceleration of symptoms of 18 months to 2 years, if at the time the question was being considered by the SMP, the disablement was the result of the injury, then the officer would be entitled to an award. Importantly, though, and in contrast to views expressed by the Court of Appeal in an analogous case under the Fireman's Pension Scheme (*R (London Fire and Emergency Planning Authority) v Board of Medical Referees* [2008] EWCA Civ 1515),

Collins J did not consider that an award made on such a basis would necessarily continue even after the period of acceleration had passed. The basis for Collins J's view was that he considered that regulation 37, which provides for reassessment of injury pensions where there has been substantial alteration in the degree of disablement, enabled there to be a later assessment as to whether an underlying condition had overtaken any disablement resulting from the injury. The Judge said at [15]:

"… in my view regulation 37 does enable a review and a reduction in the pension awarded to the former officer if the progress of an underlying medical condition means that the duty injury is not still an operative cause of any reduction in the former officer's earning capacity."

By this means the Judge considered that the granting of injury award to an officer who would have become permanently disabled in due course in any event would not fall foul of what he stated the purpose of an injury award to be, observing at [10]:

"The purpose of an award is to give a minimum income guarantee depending on degree of disablement and length of service. This is an attempt to ensure that the person's reduced earning capacity caused by the disablement resulting from the qualifying injury is compensated for by the amount of the injury pension. … But, since it means that a sum based on the continuing effect of a qualifying injury is payable, it is necessary in the interest of ensuring that only the deserving continue to receive the injury pension at a particular level to be able to carry out checks. These may, of course, work both ways in that they may show that the effects of the injury have increased the degree of disability just as they may show the contrary."

Commentary

This is the latest in a series of somewhat conflicting decisions, mainly at first instance, on injury awards under the Police (Injury Benefit) Regulations 2006; in it, Collins J expressly disagreed an earlier decision in the same officer's case ([2010] EWHC 3009 (Admin)), when Irwin J had concluded that it was appropriate to consider aggravation, acceleration and the extent of any acceleration in determining entitlement to an award. It illustrates the practical difficulties for SMPs and others tasked with applying the 2006 Regulations on a daily basis: if the judiciary cannot agree, what confidence can others have that their decisions will not be overturned later?

Another area of particular difficulty arising from this decision may be the Judge's interpretation of regulation 37, central to his reasoning overall, that it permits a reduction in an injury award once a period of simple acceleration has passed. Collins J did not refer in his judgment to the decision of the Court of Appeal in *Metropolitan Police Authority v Laws and the PMAB* [2010] EWCA Civ 1099, in which it was held that the SMP was **not** entitled when conducting a review under regulation 37 to re-open clinical judgments as to causation or apportionment made in earlier decisions under the 2006 Regulations, and had merely to consider whether the degree of disablement had substantially altered. It remains to be seen whether an attempt to revise an injury award in an acceleration case in the way suggested by Collins J will withstand a challenge based on *Laws*.