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ADMINISTRATIVE TRIBUNAL

Judgement No. 502

Case No. 514: GISCOMBE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, Vice-President,
presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas at the request of Fitzgerald Giscombe, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January, 28 February, 30 April, 31 May and 30 June 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 16 June 1989, the Applicant filed an application, containing pleas that read in part as follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal:

Preliminary Measures

(1) To direct the Respondent, pursuant to Article 10 of its Rules, to furnish the Applicant with

requisite information and documents...

Substantive Measures

...

(7) To order the Respondent, pursuant to Article 9 of its Statute:

(a) To rescind his decision of 12 September 1988, denying the Applicant's claim for compensation under Article 11.2(d) of Appendix D to Staff Rules.

(b) To direct the Advisory Board on Compensation Claims to reconsider the Applicant's claim for compensation under Article 11.2(d) of Appendix D to Staff Rules, in the light of the assessment made by Dr. Fred Montas, as aforesaid, and of the requisite documents submitted by him to the Board, and to award him appropriate compensation under Article 11.2(d) of Appendix D to Staff Rules.

(c) To award the Applicant all appropriate compensations under any other provisions of Article 11 of Appendix D to Staff Rules.

(8) To award the Applicant a sum of \$3,000.00 to cover the Counsel's fees and other relevant expenses."

Whereas the Respondent filed his answer on 20 November 1989;

Whereas the Applicant filed written observations on 29 December 1989;

Whereas, on 20 September 1990, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 16 November 1990, the Tribunal decided to adjourn its consideration of the case until its next session to be held in 1991;

Whereas the facts in the case are as follows:

Fitzgerald Giscombe entered the service of the United Nations on 25 May 1965. He served in different capacities at the Office of General Services until 16 June 1976, when he was reassigned to the Paint Shop as a House Painter. On 24 April 1979, the Applicant was injured in an accident that resulted in disciplinary proceedings against another staff member. The Applicant subsequently filed a claim under Appendix D to the Staff Rules with the Advisory Board on Compensation Claims (ABCC). The ABCC recommended to the Secretary-General that "any injuries sustained by [the Applicant] in the incident of 24 April 1979 be attributed to the performance of official duties" and that "during such time as [the Applicant should be] incapacitated from the performance of official duties as a consequence thereof, his absence [should] be charged to sick leave and/or special leave in accordance with articles 11 and 18 of Appendix D to the Staff Rules". The Secretary-General accepted the ABCC's recommendation with the proviso that such compensation should be subject to the provisions of article 6 of Appendix D.

On 14 September 1981, the Secretary-General terminated the Applicant's permanent appointment for unsatisfactory service. The Applicant contested this decision, first, before the Joint Appeals Board (JAB) and then in the Administrative Tribunal which rendered Judgement No. 356 in his case on 5 November 1985. In paragraph VI of that judgement, the Tribunal rejected, under article 7 of its Statute, "as not receivable in the present procedure", further claims of the Applicant "for compensation for injuries sustained in connection with his employment with the United Nations" under Appendix D and for a disability pension. However, taking into account a statement by the Respondent at the oral proceedings "that in view of the unfortunate circumstances" of the case he would consider the Applicant's request for

empanelling a Medical Board to reconsider under article 17(a) of Appendix D the determination of the type and degree of the Applicant's disability, despite expiration of the time-limit, the Tribunal decided that the Applicant should be permitted to pursue his appeal under article 17 of Appendix D, should he so desire. (Judgement No. 356: Giscombe (1985), para. VI).

The Applicant filed a further claim with the ABCC. On 13 March 1986, the Secretary of the ABCC informed the Applicant that, in connection with his claim, the UN Medical Director requested that he undergo a "complete up-to-date orthopaedic examination" by Dr. Fred Hochberg, an orthopaedist whom the UN Medical Director had recommended. The cost of the examination would be borne by the United Nations. In a reply dated 15 April 1986, the Applicant objected to the physician recommended by the UN Medical Director, inquiring whether he cooperated regularly with the UN Medical Service and suggesting that his personal doctor and the UN Medical Director should "jointly nominate a specialist who would also be seen to be independent".

On 5 May 1986, the Secretary of the ABCC advised the Applicant that the selection of the physician had been made in accordance with article 14 of Appendix D to the Staff Rules, providing that: "The Secretary-General may require the medical examination of any person claiming or in receipt of a compensation for injury or illness under these rules". On 9 May 1986, the Applicant informed the Secretary of the ABCC that he was making arrangements to see Dr. Hochberg but would prefer if his "procedural suggestion" to appoint a different doctor were accepted.

On 31 July 1986, Dr. Ernesto Lee, the Applicant's orthopaedic surgeon, forwarded his medical opinion on the Applicant to the UN Medical Director.

On 18 September 1986, the UN Medical Director wrote to

the Secretary of the ABCC, indicating that, on the basis of Dr. Ernesto Lee's medical report, the Applicant's disability appeared "to be greater than what previous evidence has shown". He stated his belief that the UN had "insufficient information to arrive at an accurate determination" and proposed that a Medical Board, or an independent physician, be asked to provide new findings. In a reply dated 15 December 1986, the Secretary of the ABCC asked the UN Medical Director to establish a Medical Board under article 17 of Appendix D to determine the medical aspects of the claim for compensation for loss of function under article 11.3 of Appendix D.

On 22 April 1987, the then Deputy UN Medical Director, Dr. Gereade, informed the Acting Secretary of the ABCC that a Medical Board constituted by himself, representing the United Nations, Dr. Ernesto Lee, selected by the Applicant, and Dr. Fred Hochberg, who had been selected by the other two, would convene on 7 May 1987.

On 24 July 1987, the Applicant was examined by a Medical Board consisting of the then Deputy UN Medical Director, Dr. Ingrid Laux, representing the United Nations, Dr. Ernesto Lee, selected by the Applicant, and Dr. Fred Montas, selected by the other two. In its report on the Applicant, the Board stated that the purpose of the Board's meeting was "to determine the degree of Mr. Giscombe's impairment of the lower back using the Second Edition of the AMA [American Medical Association] Guides to the Evaluation of Permanent Impairment for this calculation."

After setting forth the conclusions of the medical examination, the Board added:

"Due to the fact that members of the Board noticed that Mr. Giscombe showed a noticeable difference between the (R [right]) and the (L [left]) calf, it was decided, that he should undergo CT [computer tomography] scan and possible thermography, in order to rule out any damage to the nerve roots. The results of these examinations will then be submitted to the Board."

In a letter dated 25 August 1987, to the UN Medical Director, Dr. Fred Montas set forth "additional comments concerning [the Applicant's] medical examination" and recommended that the Applicant be compensated according to a "20% functional ability, or 80% functional deficiency ...". He gave as a reference Dr. E.J. Norby's work entitled Disability Evaluation of the Neck and Back (1987).

On 8 October 1987, the UN Medical Director transmitted the Medical Board report to the Acting Secretary of the ABCC, together with his statement that, based upon the Medical Board report, he had "calculated that Mr. Giscombe has an impairment of the whole person equal to 25%" and that "this degree of impairment is permanent". The UN Medical Director further stated that although the Medical Board report, in its last paragraph suggested that Mr. Giscombe should "undergo CT scan and possible thermography", it was Dr. Ingrid Laux's understanding that no additional tests had been performed. He added: "This, of course, would not result in any reduction in the above calculation which is based upon movements of various joints and the spine. Previously on 2 September I had sent you the additional report which Dr. Montas had submitted. This report uses a different method of calculating impairment and therefore should only be 'noted for the record'".

On 22 October 1987, the ABCC again considered the Applicant's claim, together with the report of the Medical Board.

The ABCC recommended that the Applicant be compensated for a 25 per cent loss of function of the whole person under article 11.3 of Appendix D to the Staff Rules and be paid the amount of US\$21,162.50. This recommendation was approved on behalf of the Secretary-General on 2 November 1987. On 4 November 1987, the Acting Secretary of the ABCC informed the

Applicant of the decision by the Secretary-General.

In a letter dated 16 November 1987, the Applicant informed the Acting Secretary of the ABCC that he intended to request the ABCC to re-examine his claim and that he would use the money awarded to him, but with the understanding that he did not accept it as payment in full.

On 3 December 1987, the Applicant wrote to the Acting Secretary of the ABCC requesting a re-examination of his claim under article 11.2(d) of Appendix D to the Staff Rules instead of under article 11.3.

On 11 March 1988, the Acting Secretary of the ABCC informed the Applicant that his request for compensation for alleged loss of earning capacity had been discussed by the ABCC at its 316th meeting on 7 March 1987, and that the ABCC had decided to postpone a recommendation on his claim pending receipt of the Applicant's federal, state and city income tax returns from 1983 to 1987, and the results of a CT scan to be arranged by the UN Medical Service.

On 29 March 1988, a CT scan was performed on the Applicant, the results of which were sent to the UN Medical Service.

On 17 June 1988, Dr. Fred Montas wrote to the UN Deputy Medical Director commenting on the CT scan. He stated that: "The presence of a spinal stenosis can explain the patient's symptomatology but does not in itself prove a causal relationship with the low back injury. If the stenosis was pre-existing, it could be an aggravating factor to the patient's injury". He recommended that "in either case, consideration should be given to a laminectomy to open the spinal canal".

On 10 August 1988, Dr. Ernesto Lee wrote to the UN Deputy Medical Director commenting on the CT scan. He stated that: "It is my considered medical opinion that the osteoarthritis may be age related but the encroachment consistent with spinal stenosis may be traumatic".

On 13 September 1988, the Secretary of the ABCC informed the Applicant that the ABCC, at its 320th meeting held on 8 September 1988, upon re-examination of his claim for compensation under article 11.2(d) of Appendix D to the Staff Rules, had found that the Applicant was "not partially disabled as a result of the injury in a manner which adversely affected his earning capacity" and therefore recommended to the Secretary-General "that the claim for compensation under article 11.2(d) be denied".

On 16 June 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to furnish the Applicant with the requisite information and documents.
2. There were gross procedural irregularities in the actions of the ABCC.
3. The UN Medical Director failed to conduct appropriate examinations on the Applicant.

4. The Respondent deliberately attempted to distort the facts in order to cover up the failure of the UN Medical Director to conduct the said examinations.

Whereas the Respondent's principal contentions are:

1. The Respondent's refusal to furnish the documents requested by the Applicant is justified since all relevant material has been produced.

2. The decision by the Secretary-General, upon the recommendation of the ABCC, to award the Applicant US\$21,162.50 under article 11.3 of Appendix D to the Staff Rules was a valid exercise of discretion, taken in accordance with the prescribed procedures.

3. The decision by the Secretary-General, upon the recommendation of the ABCC, to deny the Applicant compensation under article 11.2(d) of Appendix D was a valid exercise of discretion, taken in accordance with the prescribed procedures.

The Tribunal, having deliberated from 19 October to 7 November 1990 and from 15 February to 22 February 1991, now pronounces the following judgement:

I. The Tribunal does not accept the request of the Applicant for an oral hearing as adequate material is available to come to a definite conclusion. As a preliminary measure, the Applicant asked for a number of documents, some of which should have been in his possession but were reported lost or mislaid. To the extent that the Applicant's requests have not been met already, the Tribunal considers the remaining documents sought irrelevant or unnecessary and therefore finds that they need not be produced. The Tribunal also notes that under "preliminary

measure", the Applicant asked on 24 February 1989, a large number of questions of the Respondent. As some of them are of a contentious nature and do not, in the view of the Tribunal, conform to the provisions of article 7(3)(a) of the Rules of the Tribunal regarding preliminary or provisional measures, while others have been answered directly or indirectly by the contents of the record in this case, the Tribunal does not consider that the Respondent is required to answer any further questions.

II. Under article 7 of the Statute of the Tribunal, the claim of the Applicant should first have been examined by the Joint Appeals Board (JAB), but it has been the practice of the Tribunal and of the Respondent to treat the Advisory Board on Compensation Claims (ABCC) as a joint appeals body provided for in the Staff Regulations.

III. The first four pleas of the Applicant relate to the ABCC recommendation to assess at 25 per cent the "injury or illness resulting in permanent disfigurement or permanent loss of a member or function" under article 11.3 of Appendix D to the Staff Rules. The other pleas relate to the Applicant's claim that he is entitled to benefits under article 11.2(d) of Appendix D rather than under article 11.3.

IV. This case is an outgrowth of paragraph VI of the Tribunal's Judgement No. 356, Giscombe (1985) which allowed the Applicant to pursue his request for empanelling a Medical Board under article 17(a) of Appendix D to determine the nature and extent of his injury and finally to assess the compensation to which he might be entitled.

V. The Respondent's agreement in the earlier case to waive

the prescribed time-limit to enable the Applicant to make a request under article 17(a) of Appendix D was based on the ground that "something went wrong - somebody advising him (the Applicant) did not quite advise him correctly". The statement made by the Respondent in this context during the oral hearing in the earlier case did not authorize the Applicant to submit a series of claims, including the present claim under article 11.2(d) "for enhanced disability and pension benefits" as indicated in point (2) of the present plea. However, the Respondent has not raised any objections on grounds of receivability of the present claim under article 11.2(d) or on grounds of untimeliness with respect to the appeal under article 11.3.

VI. There was some doubt at an early stage in connection with the claim under article 11.3, whether an independent medical opinion should be sought under article 14 of Appendix D or whether a medical board should be constituted under article 17 thereof. In the end, a medical board consisting of Dr. Laux, the then Deputy Director of the UN Medical Service, Dr. E. Lee, selected by the Applicant, and Dr. F. Montas, the third doctor selected by Dr. Laux and Dr. Lee, met "on 24 July [1987] after it had examined Mr. Giscombe on the same day". The purpose of the meeting, according to the three doctors, "was to determine the degree of Mr. Giscombe's impairment of the lower back, using the second edition of the AMA [American Medical Association] Guides to the Evaluation of Permanent Impairment for this calculation".

The report was signed by the different doctors on different dates, with the signatures being completed on 4 September 1987. The report concluded with the words that Mr. Giscombe "should undergo CT [computer tomography] scan and possible thermography, in order to rule out any damage to the nerve roots. The results of these examinations will then be submitted to the Board

[ABCC]".

VII. The Tribunal notes that neither at the time when the medical report was drawn up, nor when it was subsequently signed by the three doctors, was any indication given that the injuries sustained by the Applicant were going to be considered as "resulting in disability which is determined by the Secretary-General to be partial" to which article 11.2(d) of Appendix D applied, or as "resulting in permanent disfigurement or permanent loss of a member or function" to which article 11.3 of Appendix D was applicable. However, the ABCC recommended on 22 October 1987, to the Secretary-General "that in light of the report of the Medical Board, the claimant be compensated under article 11.3 for a twenty-five (25) per cent loss of function of the whole person in the amount of \$21,162.50".

VIII. The Applicant contests this recommendation of the ABCC on the ground that it was not supported by the report of the Medical Board. The Tribunal finds that the Board's determination was based on the unanimous assessment by the Medical Board of the injuries, even though the calculation was made by Dr. Irwin, the then Director of the UN Medical Service, who was not a member of the Medical Board; Dr. Irwin was guided by the AMA standard which governed, and which was accepted by the Medical Board unanimously, in calculating at 25 per cent the injury sustained by the Applicant. Dr. Montas, the third member of the Medical Board estimated the damage to be 80 per cent by adopting a different system of calculation apparently suggested by Dr. Nordby's publication entitled Disability Evaluation of the Neck and Back.

IX. The ABCC, which had been supplied by Dr. Irwin with a

copy of Dr. Montas' assessment, was thus faced with two sets of calculations, one by Dr. Irwin, based on the system accepted by all the three doctors of the Medical Board and another by Dr. Montas. Normally these developments should have been known to the Applicant through his own doctor (Dr. Lee). There is no evidence that either Dr. Lee or Dr. Montas raised any objection to the 25 per cent impairment arrived at by Dr. Irwin in applying the AMA standard to the medical observations detailed in the Medical Board report. The system applied by Dr. Irwin was on the basis of the work of the Medical Board; this has to be weighed against the individual suggestion made by Dr. Montas, on the basis of a system not adopted by the Medical Board. Dr. Lee, the claimant's own doctor, remained silent on this point.

X. Initially, the Medical Board was to consist of Dr. Lee, Dr. Laux and Dr. Hochberg. In a letter of 15 April 1986 to the Secretary of the ABCC, the Applicant suggested that instead of Dr. Hochberg, whom he thought might regularly "co-operate with the UN Medical Service", his "doctor could be in touch with the UN Medical Director, and they could jointly nominate a specialist who would also be seen to be independent". On 28 April 1987, the Acting Secretary of the ABCC wrote to the Applicant that "as requested, Dr. Gerede of the Medical Service has confirmed that your physician, Dr. Ernesto Lee, agreed to have Dr. F. Hochberg as the third physician on the Medical Board". It is unclear how Dr. Hochberg was replaced on the Medical Board by Dr. Montas on 24 July 1987, but it is obvious that the Applicant's physician must have agreed to the designation of Dr. Montas. The Applicant had emphasized the need for the third doctor on the Board being "independent", and the record shows that Dr. Montas was familiar with the Applicant and had examined him at least once on 11 June 1987, before the Medical Board met on 24 July 1987. Dr. Montas'

letter of 25 August 1987 to Dr. Irwin does not explain whether he made any further examination of the Applicant before he made his assessment by using Dr. Nordby's book. However, he signed the Medical Board report on the same date (25 August 1987) and did not mention in it his findings based on Dr. Nordby's book; nor did he refer to the Medical Board report in his letter of 25 August to Dr. Irwin. Dr. Irwin forwarded to the ABCC Dr. Montas' assessment "for the record".

XI. The Medical Board concluded its report with the words "it was decided, that he [the Applicant] should undergo CT scan and possible thermography, in order to rule out any damage to the nerve roots. The results of these examinations will then be submitted to the Board". In sending the Medical Board report to the ABCC, Dr. Irwin said, inter alia "it is Dr. Laux's understanding that no additional tests have been made". Dr. Irwin went on to explain that those tests would not have any effect on his calculation of 25 per cent impairment, which he stated had been "based upon the movements of various joints and the spine". No medical objections to Dr. Irwin's views were raised then or later. The ABCC apparently accepted Dr. Irwin's views and no further tests were made, except that the CT scan was subsequently undertaken in a different context. The thermography test was indicated as a possibility in the Medical Board Report and no one mentioned it again later.

XII. On receipt of the Secretary-General's decision of 22 October 1987, that the Applicant's impairment had been assessed at 25 per cent under article 11.3 of Appendix D to the Staff Rules and that he was awarded compensation in the amount of \$21,162.50, the Applicant wrote on 3 December 1987, to the Acting Secretary, ABCC, asking that his case be "reconsidered under the

provisions outlined in article 11.2(d) rather than under article 11.3". He also stated that his earning capacity "has been considerably minimized as a direct result of [his] partial disability due to service incurred accident". This was followed by a letter from Creative Construction concluding with the words: "While he [the Applicant] was willing to work, and has the ability, he could not cope with the lifting of the materials required for the job. Therefore, once again I had to lay him off".

XIII. The ABCC reopened the case and asked the Applicant to send the results of the CT scan to be arranged by the UN Medical Service and certified copies of his federal, state and city income tax returns for the years 1983-1987. The tax returns showed that the Applicant had filed no return with the US Federal authorities for the years 1983, 1984 and 1986, but earnings figures for 1985 were supplied; nothing was said about 1987. As for the New York State Department of Taxation and Finance, a document was forwarded stating that "no record of a return being filed" was available in respect of the tax years 1984, 1985 and 1986.

XIV. The CT scan was performed on 29 March 1988. It resulted in the conclusion that there were "osteoarthritic changes at the L4-L5 level", that "there does appear to be encroachment upon the contents of the neural canal" which "apparently represents a stenotic element" and that "a herniated nucleus pulposus is not discernible". On the CT scan report, Dr. Lee, the Applicant's own doctor, gave the opinion that "the conclusion is in my opinion self-explanatory. However, it is my considered medical opinion that the osteoarthritis may be age related but the encroachment consistent with spinal stenosis may be traumatic".

Dr. Montas remarked on the CT scan report: "The presence of a spinal stenosis can explain the patient's symptomatology but does not in itself prove a causal relationship with the low back injury. If the stenosis was pre-existing, it could be an aggravating factor to the patient's injury. In either case, consideration should be given to a laminectomy to open the spinal canal".

XV. About six months later, the ABCC took up the case on 8 September 1988, and reviewed the claim in the light of the latest developments. Having found "on the basis of the reports submitted that upon separation of the claimant from the United Nations service, he was not partially disabled as a result of the injury in a manner which adversely affected his earning capacity", the ABCC recommended that the Applicant's claim for compensation under article 11.2(d) be denied.

XVI. The recommendation of the Board was partly based on the medical reports before it and partly on what had transpired in the earlier years, i.e. from 1979, when the Applicant met with the accident, until he was separated; this period has been fully covered in the Tribunal's Judgement No. 356 of 5 November 1985. The Tribunal is not competent to pronounce on medical matters and accepts the present finding of the ABCC, that upon separation, the Applicant was not "partially disabled as a result of the injury in a manner which adversely affected his earning capacity". The Applicant's separation was due to his performance and he was accorded due process.

XVII. It remains only to comment on some connected matters of which a few appear to the Tribunal to be peripheral. The Applicant's accident happened over ten years ago. Given the

possibility that intervening events might have affected him, a causal relationship between the accident and the Applicant's present condition could not be established. Moreover, as is clear from some of the medical evidence, advancing age as well as the past medical history of the Applicant - difficult to sort out after this lapse of time - could have affected both his motivation and capacity to work. His lack of motivation has been referred to by Dr. Montas and his age-related condition has been mentioned by Dr. Lee.

XVIII. The Applicant has mentioned repeatedly that the laminectomy as recommended by Dr. Montas has not been performed.

Dr. Montas said that "consideration" should be given to this, but apparently there was no support for it from the other doctors. After reviewing the entire medical history of this case, which has been drawn out over a lengthy period of time, the Tribunal finds that the ABCC had not ignored any important medical advice or analysis and that its recommendation was not vitiated by any serious flaws. The letter dated 15 December 1986, from the Secretary of ABCC to Dr. Irwin indicates that, at that time, the ABCC considered the Applicant's claim as having been made under article 11.3. However, the subsequent consideration of the case by the ABCC on different dates shows that it was not limited to that article.

XIX. In conclusion, the Tribunal holds that, while the case is marked by occasional inefficient record-keeping and minor irregularities in procedure, these deficiencies have not affected the decision to a point where the Applicant's interests have been adversely affected or where the rules have been violated, far less "arbitrarily or capriciously" transgressed. In all the circumstances of this case, the compensation allowed to the

Applicant under Judgement No. 356, and subsequently by the ABCC under Appendix D, is fair and adequate.

XX. In view of the foregoing, the Applicant's pleas, including his request for costs, are rejected in their entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

New York, 22 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary