JUDGMENT OF THE COURT
OF 29 MAY 1979 [1]

Alberto Villano
v Nordwestliche Eisen- und Stahl-Berufsgenossenschaft;
Pasquale Barion
v Tiefbau-Berufsgenossenschaft
(preliminary ruling requested by the Bundessozialgericht)

"Successive accidents at work"

Joined Cases 173 and 174/78

Social security for migrant workers — Accidents at work and occupational diseases — Assessment of degree of incapacity — Taking into consideration of accidents or diseases occurring subsequently under the legislation of another Member State — Requirement — None

(Regulation No 3 of the Council, Art. 30 (1); Regulation No 1408/71 of the Council, Art. 61 (5))

Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 merely require the competent institution of a Member State to take into consideration accidents or diseases which have occurred previously under the legislation of another Member State, as if they had occurred under the legislation of the first Member State but do not require it to take into consideration also accidents or diseases which have occurred subsequently under the legislation of another Member State.

In Joined Cases 173/78 and 174/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht (Federal Social Court) for a preliminary ruling in the actions pending before that court between

ALBERTO VILLANO, Lumezzane Pieve (Brescia)

1 — Language of the Case: German.

and

NORDWESTLICHE EISEN- und STAHL-BERUFSGENOSSENSCHAFT (North-West Iron and Steel Employers Association for Social Insurance), Hanover (Case 173/78)

and

PASQUALE BARION, Matterello di Trento

and

TIEFBAU-BERUFSGENOSSENSCHAFT (Mine Engineering Employers Association for Social Insurance), Munich (Case 174/78),

on the interpretation of Article 30 (1) of Regulation No 3 of the Council of the European Economic Community of social security for migrant workers (Journal Officiel 1958, p. 561) and Article 61 (5) of Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

THE COURT

composed of: J. Mertens de Wilmars, President of the First Chamber, Acting as President, Lord Mackenzie Stuart (President of the Second Chamber), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Article 30 (1) of Regulation No 3 of the Council of the EEC on social security for migrant workers (Journal Officiel 1958, p. 561) and Article 61 (5) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416) both lay down the rule that where the legislation of a Member State expressly or by implication provides that accidents at work or occupational diseases which have occurred or have been confirmed previously shall be taken into consideration in order to assess the degree of incapacity, the competent institution of that State shall also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed previously under the legislation of another Member State, as if they had occurred or had been confirmed under the legislation which it administers.

2. In the Federal Republic of Germany Article 581 (3) of the Reichsversicherungsordnung (National Social Insurance Regulations) (hereinafter referred to as "the RVO") (as amended by the UVNG of 30 April 1963 (BGBl. I, p. 241)) provides for the granting of an invalidity pension of two-thirds of the annual salary ("Vollrente") if a worker is completely disabled as a result of sustaining an accident at work and, if his capacity for work is reduced by at least 20% as a result of such an accident, for the granting of a proportional pension or partial pension ("Teilrente") corresponding to the degree of incapacity. According to the first sentence of Article 581 (3) the injured person whose capacity for work has been reduced as a result of more than one accident at work shall receive an invalidity pension in respect of each such accident, including any which occurred previously, provided that the reduced capacity for work caused by the individual accidents at work amounts in the aggregate to not less than 20%. According to the second sentence of Article 581 (3) the effects of an accident at work are however only to be taken into consideration if they caused a reduction in capacity for work of at least 10%. Under Article 548 of the RVO only accidents insured against under the RVO may be treated as accidents at work within the meaning of Article 581 (3) of the RVO.

3. In Case 173/78 the plaintiff in the main action, Mr Villano, an Italian national resident in Italy, sustained an accident at work on 6 September 1969 in the Federal Republic of Germany. As a result of that accident the defendant in the main action paid the plaintiff as from 9 March 1970 a provisional pension equivalent to 20% of the pension at the full rate. That pension was discontinued at the end of November 1970 on the ground that his degree of incapacity was less than the minimum of 20% prescribed by German law in order to substantiate a claim to receive an invalidity pension.

On 11 December 1970 the plaintiff sustained another accident at work in Italy. The competent Italian social insurance institution, the Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (hereinafter referred to as "the INAIL"), granted him for that accident as from 13 February 1971 a pension calculated on the basis of a degree of incapacity for work of 17%.

On 22 June 1972 the plaintiff applied to the defendant for the regrant of a pension for the effects of the accident on 6 September 1969. The defendant by its decision of 28 August 1973 refused this application on the grounds that the incapacity had not worsened substantially and that the plaintiff's capacity for work had not appreciably diminished. In an expert opinion of 9 July the reduction in the plaintiff's capacity for work was estimated at 0%.

Since Mr Villano's action (before the Socialgericht [Social Court] Hannover) and appeal (to the Landessozialgericht [District Social Court] Niedersachsen) were unsuccessful he appealed upon a point of law to the Bundessozialgericht [Federal Social Court]. In support of his appeal his main submission was that there would be a breach of the principle of freedom of movement for workers enshrined in Article 51 of the Treaty if the competent German institutions could disregard accidents at work which occurred in the territory of the Community simply because they did not occur within the immediate field of application of the RVO.

4. In Case 174/78 the plaintiff in the main action, Mr Barion, an Italian national resident in Italy, sustained an accident at work in 1942 in territory which at the time was part of the German Reich and is now part of the Federal Republic of Germany. As a result of that accident the defendant in the main action granted him a pension equivalent to 25% of the full pension. In November 1955 that pension was discontinued on the ground that, since his condition had improved, the degree of incapacity was then only 15%.

On 5 April 1976 the plaintiff in the main action sustained another accident at work in Italy. The INAIL determined the degree of incapacity at 14% and granted him an invalidity pension calculated accordingly.

On 14 February 1973 the plaintiff in the main action applied to the defendant for the regrant of a pension for the effects of the accident of 14 September 1942. In the expert opinion of 31 July 1973, which was obtained at the request of the defendant in the main action, the reduced capacity for work caused by the accident on 14 September 1942 was estimated at 15%. By its decision of 17 May 1974 the defendant refused the application for a regrant of the pension by the plaintiff on the ground that the reduction in capacity for work due to the accidents at work sustained by the plaintiff under German legislation was less than the requisite minimum of 20% under Article 581 (3) of the RVO.

The Sozialgericht München before which the plaintiff had taken action against the defendant's decision held that the latter, by refusing to take into consideration the accident at work which occurred subsequently in Italy in order to determine whether the degree of the plaintiff's incapacity was in the aggregate at least equal to 20%, had failed to take account of the provisions contained in Article 61 (5) of Regulation (EEC) No 1408/71 of the Council and Article 72 of Regulation (EEC) No 574/72 of the Council. In fact the Sozialgericht considered that those provisions were to be interpreted as meaning that the chronology of the various accidents was irrelevant when providing compensation for those accidents. Therefore the Sozialgericht by its judgment of 10 March 1975 ordered the defendant to grant the plaintiff as from 1 February

1973 a pension calculated on the basis of a degree of invalidity of 15%.

On appeal by the defendant the Bayerisches Landessozialgericht by its judgment of 28 October 1975 annulled the judgment of the Sozialgericht München. The plaintiff appealed on a point of law to the Bundessozialgericht.

5. The Bundessozialgericht before which the two cases were brought referred, by separate orders, the following question to the Court for a preliminary ruling:

"Does the defendant German social insurance institution according to Article 30 (1) of Regulation No 3 of the Council of the European Economic Community concerning social security for migrant workers and according to Article 61 (5) of Regulation (EEC) No 1408/71 of the Council of the European Communities on the application of social security schemes to employed persons and their families moving within the Community have to take into consideration an accident at work sustained by the plaintiff which occurred subsequently in Italy as if it had occurred under German legislation, if the granting of a pension to the plaintiff arising out of a previous accident at work which occurred under German legislation depends upon the percentage of the reduction in capacity for work caused by both accidents at work amounting at least to the figure 20 (First sentence of Article 581 (3) of the Reichsversicherungsordnung (National Social Insurance Regulations))?"

The two orders making a reference were received at the Registry of the Court on 14 August 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted in Cases 173/78 and 174/78 by the Commission of the European Communities, represented by N. Koch, acting as Agent, and in Case 174/78 only by the plaintiff in the main action, represented by H. Niesel, of the Munich Bar, and by the Italian Government, represented by A. Maresca, acting as Agent, assisted by F. Favara, Avvocato dello Stato [State Advocate General].

By order of 14 February 1979 the Court decided to join the two cases for the purpose of the oral procedure and of the final judgment.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations

For the *plaintiff in the main action* in Case 174/78 the fundamental question is whether an accident sustained in another Member State may be considered to be an accident at work, within the meaning of German law. The answer to this question must be in the affirmative in the light of Articles 48 to 51 of the EEC Treaty and the general principles laid down in Article 3 (equality of treatment) and Article 10 (waiving of residence clauses) of Regulation No 1408/71.

Article 61 (5) of Regulation No 1408/71 does not provide the solution to the problem since that provision is only concerned with the assessment of the degree of incapacity for work, whereas the question which has arisen in the case in point is that of the entitlement to benefits to be provided under German insurance schemes for accidents at work. In this connexion there is a gap in the Community provisions. That gap must be filled having regard to the objectives

which the EEC rules and the EEC Treaty seek to attain. Application by analogy of Article 60 of Regulation No 1408/71 relating to aggravation of an occupational disease for which the benefit has been awarded is conceivable for this purpose since the legal situation in the instant case is comparable to that which is present in the case of aggravation of an occupational disease. An analogy can also be drawn between the present case and the taking into consideration of insurance periods provided for by Article 45 of Regulation No 1408/71.

If the accident at work sustained in Italy were not taken into consideration the plaintiff would suffer from having been a migrant worker. Taking the accident at work in Italy into consideration would not lead to unjustified overlapping of benefits since the plaintiff is only asking the defendant to compensate him for the degree of incapacity for work caused within the field of application of German law.

The *Italian Government* points out in the first place that it is apparent from the order making the reference that Mr Barion, the plaintiff in the main action in Case 174/78, has suffered a twofold reduction of his capacity for work, 15% as a result of the accident in 1942 which falls within German legislation and 14% by reason of the accident in 1966 which is governed by Italian legislation. It may therefore be considered that the effects of the first accident are greater than the 10% required under Article 581 of the RVO and it may also be assumed that Mr Barion has suffered in the aggregate a 29% reduction of his capacity for work. This fact means that the Barion case (Case 174/78) differs from the Villano case (Case 173/78) since in the Villano case the effects of the first accident have been estimated at nil.

The Italian Government states that Italian legislation, for the purpose of assessing the total degree of incapacity for work (Article 80 *et seq.* of Decree No 1124 of 30 June 1965 of the President of the Republic), expressly provides for accidents at work which were sustained previously to be taken into consideration. In the event, however, it does not look as if the plaintiff Mr Barion can prevail upon the competent Italian institution to include in its assessment the previous accident because that accident occurred at a date prior to 1 January 1959; the Community provisions (the above-mentioned Articles 30 (1) and 61 (5)) seem to have supplemented and amended the Italian national legislation but only within the limits as to time laid down by Article 53 (1) of Regulation (EEC) No 3 of 1958.

The rule laid down by Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 is addressed solely to the competent institution of the Member State the legislation whereof has to be applied after the last of several accidents. It follows that, since in the case in point the above-mentioned rule is not intended to apply to the German institution, the German court must apply its national legislation alone, by virtue of which the later accident is treated as an aggravation of the first accident.

The Italian Government, relying on the fact that the Community provision referred to above is "incomplete", submits that that provision is applicable at the request of a worker who has sustained an accident and who can opt either for an assessment of the degree of incapacity for work in the aggregate or

for separate compensation for each accident sustained in accordance with the legislation of the Member States under which the various accidents occurred. In any case Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 do not in fact automatically abolish or reduce the rights vested in employed persons as a result of accidents which have occurred or have been confirmed previously under the legislation of other Member States.

The Community provisions contained in the beforementioned Articles 30 (1) and 61 (5) also appear for another reason to be incomplete. They protect the interests of workers who have sustained accidents by guaranteeing them that the degree of incapacity shall be assessed in the aggregate. However, nothing has been laid down concerning reimbursements between the competent institutions and there is neither express waiver of any reimbursement nor a rule for lump sum compensation of all possible reimbursements.

It does not seem to be either fair or reasonable to impose upon the institution competent to deal with the last accident (in chronological order) the economic burden of pensions which also provide compensation for degrees of incapacity caused by previous accidents which occurred under the legislation of other Member States, that is to say during periods of "employment" completed in the above-mentioned Member States. Financial responsibility for each accident at work must be borne by the economic system within the confines of which the occupation producing resources and wealth has been carried on and in which the payment (and perhaps the retention) of contributions to social insurance funds has taken place. Moreover, several Community provisions relating to social insurance point this way (for example, Article 60 (1) (b) and (c) and (2) (b) of Regulation No 1408/71).

On the basis of the foregoing the Italian Government suggests that the question be answered in the following way:

"Articles 30 (1) of Regulation No 3 of 1958 and 61 (5) of Regulation No 1408/71 must be interpreted as meaning that the provisions contained in those two articles have in view solely the competent institution of the Member State under the legislation of which the last accident (in chronological order) occurred or was confirmed, that it applies at the request of the worker who has sustained the accident and who can decide that it be dealt with in the way indicated in Article 60 (1) (b) of Regulation No 1408/71, and that, in any case, it does not in fact automatically abolish or reduce the rights vested in employed persons as a result of accidents sustained previously which occurred or were confirmed under the legislation of other Member States and that it is valid only if it is supplemented by the principle of apportioning the cost of the benefits between the competent institutions of the several Member States under the legislation of which the various accidents occurred or were confirmed."

According to the *Commission*, which submits the same legal argument in both cases, it must be borne in mind that the aim of the Community legislature when it adopted Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 was to enact rules intended to make the institution competent to deal with the last case giving rise to social insurance take into consideration previous accidents and diseases. That

institution is best qualified to assess accurately the aggregate incapacity in the event of a succession of accidents at work or occupational diseases.

This interpretation is confirmed by a declaration of the Council concerning Article 61 (5) of Regulation No 1408/71 which was made when the said regulation was adopted and is repeated in the minutes of the Council of 14 June 1971. The text of that declaration, which the Commission produced in an additional written statement of its observations, reads as follows:

"The *Council* confirms that:

— Article 61 (5) does not fall within the rules against overlapping provided for in Article 12 (1) but is concerned with the assessment of incapacity;

— the object of that provision is to ensure that accidents at work and occupational diseases which have occurred previously under the legislation of a first Member State are taken into consideration as if they had occurred under the legislation of the second Member State, in which the institution must assess the degree of incapacity as a result of another accident or of another occupational disease. The institution of the second State cannot reassess the situation concerning the first accident but must accept the decision taken in the first State;

— moreover, this provision makes it obligatory for the institution of the second Member State to take into consideration accidents and occupational diseases which have occurred previously in order to determine the overall degree of incapactiy; it may not therefore determine that degree of incapacity by taking into consideration only the second accident at work or the second occupational disease."

In conclusion, the Commission suggests that the question referred be answered as follows:

"The social insurance institution of a Member State which is competent to deal with an accident at work is obliged, in order to assess the degree of incapacity in accordance with Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71, to take into consideration any accident at work which the insured person sustained previously in another Member State as if it had occurred under the legislation of the first Member State, where that legislation provides, expressly or by implication, that accidents at work which occurred or were confirmed previously must be taken into consideration."

III — Oral Procedure

At the hearing on 27 March 1979 the Commission, represented by N. Koch, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the hearing on 3 May 1979.

Decision

1 By separate orders of 28 June 1978, which were received at the Court Registry on 14 August 1978, the Bundessozialgericht submitted, pursuant to Article 177 of the EEC Treaty, the following preliminary question to the Court of Justice:

"Does the defendant German social insurance institution according to Article 30 (1) of Regulation No 3 of the Council of the European Economic Community concerning social security for migrant workers and according to Article 61 (5) of Regulation (EEC) No 1408/71 of the Council of the European Communities on the application of social security schemes to employed persons and their families moving within the Community have to take into consideration an accident at work sustained by the plaintiff which occurred subsequently in Italy as if it had occurred under German legislation, if the granting of a pension to the plaintiff arising out of a previous accident at work which occurred under German legislation depends upon the percentage of the reduction in capacity for work caused by both accidents at work amounting at least to the figure 20 (First sentence of Article 581 (3) of the Reichsversicherungsordnung (National Social Insurance Regulations))?"

2 This question was raised in the context of two actions between, first, the Nordwestliche Eisen- und Stahl-Berufsgenossenschaft (Case 173/78) and, secondly, the Tiefbau-Berufsgenossenschaft, of Munich (Case 174/78) and workers of Italian nationality, the plaintiffs in the main actions, who both suffered accidents at work on the territory of the Federal Republic of Germany. After suffering further accidents at work, this time in Italy, both workers requested the insurance institutions, the defendants in the main actions, to take the said accidents into consideration for the purposes of establishing whether the conditions prescribed by German legislation for the award of a pension in respect of accidents have been fulfilled.

3 Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 both provide that where the legislation of a Member State expressly or by implication provides that accidents at work or occupational diseases which have occurred or which have been confirmed previously shall be taken into consideration in order to assess the degree of incapacity, the competent institution of that State shall also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed pre-

viously under the legislation of another Member State, as if they had occurred or had been confirmed under the legislation which it administers. Accordingly, those two provisions merely require the competent institution to take into consideration accidents or diseases which have occurred previously under the legislation of another Member State and not those which have occurred subsequently.

4 The plaintiffs in the main actions nevertheless maintain that it is necessary to extend by analogy the rule laid down in the said provisions to accidents or diseases occurring subsequently under the legislation of another Member State, having regard to the objectives of Articles 48 to 51 of the EEC Treaty and to the general principles on which Regulations Nos 3 and 1408/71 are based. According to the plaintiffs in the main actions the competent institutions are obliged to take into consideration not only accidents or diseases which have occurred previously under the legislation of another Member State, as is laid down in the provisions in question, but also those which occur subsequently.

5 It is however impossible to accept that argument.

6 The provisions in question, when they require the institution which is competent in the most recent instance to take into consideration accidents or diseases which have occurred previously under the legislation of another Member State as if they had occurred or been confirmed under the legislation which the said institution administers, are concerned to ensure that an employed person who has suffered one or more accidents or diseases in another Member State obtains treatment equal to that provided for a worker who is in the same position and who has not left the Member State in question. Those provisions thus give sufficient effect to the basic principles set out in Articles 48 to 51 of the EEC Treaty.

7 The answer to the question submitted must therefore be that Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 do not require the competent institution of a Member State to take into consideration accidents or diseases which have occurred subsequently under the legislation of another Member State, as if they had occurred under the legislation of the first Member State.

Costs

8 The costs incurred by the Italian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

9 As these proceedings are, in so far as the parties to the main actions are concerned, in the nature of a step in the proceedings pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Bundessozialgericht, by separate orders of 28 June 1978, hereby rules:

Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 do not require the competent institution of a Member State to take into consideration accidents or diseases which have occurred subsequently under the legislation of another Member State, as if they had occurred under the legislation of the first Member State.

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 29 May 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber
Acting as President