CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 61113/00
by Kari Tapio MARKKO
against Finland

The European Court of Human Rights (Fourth Section), sitting on 13 December 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 14 July 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Kari Tapio Markko, is a Finnish national, who was born in 1966 and lives in Vaajakoski. He is represented before the Court by Minna Tyviö, a lawyer practising in Jyväskylä. The respondent Government are represented by their Agent, Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant was involved in an accident on 9 June 1997 while driving an ice cream van. He sustained injuries to his neck and upper back. A fracture in the applicant's spine was diagnosed on 9 June 1997. An insurance company paid the applicant a daily allowance pursuant to the Act on Accident Insurance (*tapaturmavakuutuslaki, lag om olycksfallsförsäkring*; 608/1948) from 10 June 1997 to 20 August 1997, and reimbursed medical expenses. The insurance company decided on 28 November 1997 to cancel the daily allowance as from 20 August 1997 as it considered that the applicant's working capacity was reduced by less than 10 % from that moment.

In 1998 the applicant sought medical treatment for pain in his left shoulder, right leg and back as well as for pain and tactile disturbances in his right arm. Medical certificates regarded him as unfit to work from 19 January to 25 January 1998 and from 29 January to 10 June 1998 due to pain in his left shoulder and left knee, sciatic symptoms in his right side, compression of nerve roots in his right arm and whiplash injury.

The applicant applied for a daily allowance and reimbursement of expenses as from 19 January 1998 from the insurance company. On 24 April 1998 the insurance company rejected the applicant's claims. It maintained that the distension of a spinal disc was not caused by the car accident. The company apparently considered that sciatic symptoms, which affected the applicant's lower limbs, were the principal reason for his incapacity to work as from 19 January 1998. It informed the applicant that it had transferred a medical doctor's opinion of 1 April 1998 regarding some symptoms of sciatica to the Insurance Court (*vakuutusoikeus, försäkringsdomstolen*) which was examining a prior accident insurance claim regarding another accident on 17 January 1997.

The applicant appealed to the Accident Board (*tapaturmalautakunta, olycksfallsnämnden*). He also claimed continued payment of the daily allowance from 20 August 1997, maintaining that the principal reason for his medical examination in January 1998 was the problem with his neck and right arm and not sciatica as the insurance company had held. The applicant

appended two medical opinions dated 30 January 1998 and 29 April 1998 respectively.

The Accident Board rejected the application on 15 September 1998. It held that the accident on 9 June 1997 had caused whiplash injury and a spinal fracture, for which the applicant had received compensation until 20 August 1997, after which time the injuries no longer entitled him to a daily allowance. It further held that the applicant's incapacity to work after 20 August 1997 was caused by muscular tension in the neck, nerve root problems in the right arm, pain in the left shoulder and left knee as well as sciatic symptoms in the right side of the body, none of which were caused by the accident on 9 June 1997. It finally maintained that the accident in question had not worsened the applicant's pre-existing back illness.

The applicant appealed to the Insurance Court repeating his claims. He argued that muscular tension in the neck, the nerve root problems in the right arm and pain in left shoulder were caused by the accident on 9 June 1997. He submitted a medical opinion dated 28 August 1998. The insurance company submitted its observations on the appeal and the applicant was invited to give a further response. On 2 February 1999 the insurance company submitted an additional medical statement of 14 December 1998 and a medical case history concerning the period from 7 to 10 December 1999. On 2 March 1999 the applicant submitted an additional decision of 23 February 1999 of the insurance company concerning his pension.

On 8 June 1999 the Insurance Court issued its decision accepting the reasons given by the Accident Board and held that the new evidence presented to the Insurance Court did not give rise to any changes in the assessment of the case.

The applicant sought leave to appeal to the Supreme Court. The leave to appeal was refused on 28 January 2000.

B. Relevant domestic law

Section 33 of the Administrative Judicial Procedure Act (*hallintolainkäyttölaki, förvaltningsprocesslag*, 586/1996) provides that an appellate body must ensure that the case is examined properly. Subsection 2 provides that an appellate body must invite the production of any necessary further material of its own motion when the interests of justice, equality of arms or the nature of the case so require.

Section 34, subsection 1 of the said Act provides that a party must be afforded a possibility to give his/her opinions on submissions made by parties or received from other sources and on other material which may influence the outcome of the matter.

Section 5 subsection 1 of the Insurance Court Act (*laki vakuutusoikeudesta, lag om försäkringsdomstolen,* 14/1958), as in force at the relevant time, provided that a case before the Insurance Court was dealt

with in a section that consisted of an insurance judge as a chairperson and two legally trained persons as members, or when the case concerned medical issues, one legally trained member and one medical member. In addition, when needed, two lay members participated in the panel making the decision. Since 1 January 2004, the proceedings before the Insurance Court have been governed by the new Insurance Court Act (v*akuutusoikeuslaki, lag om försäkringsdomstolen*, 132/2003).

COMPLAINTS

The applicant complained under Articles 6 and 13 of the Convention that the Insurance Court had failed to respect the principle of equality of arms as he had no possibility to participate in the proceedings by acquainting himself with the opinion of its medical member. He further complained that he was not properly heard before the Insurance Court. In his submissions of 21 July 2004 he complained that the written procedure of the Insurance Court violated his right to submit evidence to the court.

THE LAW

The applicant complained that the adversarial principle was violated in the proceedings before the Insurance Court as the conclusions of its medical member were not revealed to him, nor was he properly heard. Furthermore he complained that had not been able to submit enough evidence. He invoked Article 6, which reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

He also invoked Article 13, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Non-disclosure of the medical member's opinion

As to the applicant's complaint that he was not given information on the deliberations of the Insurance Court, the Government observed that when medical expertise is required for deciding a case before the Insurance Court, a medical member of the court examines the medical evidence and prepares a preliminary commentary for further consideration by the court. That person is a member of the Insurance Court, like a judge, in the sense that his

or her said commentary is part of that court's internal deliberations, and therefore it is not a document which is made public even to the complainant.

The applicant maintained that the fact that he was not given the possibility to comment on the opinions of the doctor who sat in the composition restricted him in providing the Insurance Court with further evidence supporting his claims.

The Court finds it unnecessary to examine whether the applicant has exhausted the domestic remedies available to him by raising this complaint in his application to the Supreme Court, as there is no indication that the refusal to disclose to the applicant an opinion of the medical member of the Insurance Court, whose opinions form part of the internal deliberations of that court, deprived the applicant of a fair and effective opportunity to put forward his own case or to answer the arguments of the other party. There is in the circumstances no appearance of a violation of Article 6 § 1 of the Convention. It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

Adversarial proceedings

The Government observed that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention as he did not complain in his request for leave to appeal to the Supreme Court about the non-communication of any documents by the Insurance Court.

In any case, the Government observed that the applicant, represented by counsel, was not placed at a disadvantage *vis-à-vis* the insurance company in question as the relevant documents were originally submitted directly to him by the authors of those documents. The Government noted that all the documents were sent to the applicant, either directly by the authors of those documents, or by the insurance company or the Insurance Court. The Government argued that in the proceedings before the Insurance Court the applicant was afforded ample opportunities to state his case and comment on the submissions of the adversary party. The Government further noted that the applicant was given the opportunity to provide additional documents, which he also used.

The applicant maintained that he was not properly heard before the Insurance Court even though he was given the opportunity to submit written observations on the insurance company's observations.

The Court recalls at the outset that, according to the principles set out in its judgment in the case of *Akdivar and Others v. Turkey* (judgment of 16 September 1996, Reports of Judgments and Decisions No. 15, 1996-IV, pp. 1210-1222, §§ 65-69), the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitration organ to use first

the remedies provided by the national legal system. Moreover, the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law.

As to the present case, the Court finds that the applicant did not raise in his application for leave to appeal to the Supreme Court any allegation of a violation of his right to adversarial proceedings. Therefore, the Court rejects this part of the application for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

Submission of evidence

In so far as the applicant has complained that the written procedure before the Insurance Court hampered the submission of evidence, the Court notes that this grievance was lodged with the Court for the first time in the applicant's observations of 21 July 2004. Under Article 35 § 1 of the Convention the Court may only deal with the matter within a period of six months from the date on which the final decision was taken. As the final decision in the present case dates back to 2000 this compliant is out of time.

It follows that this part of the application must be rejected as being out of time pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President