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to the taxpayer's actual expenditure upon the purpose for which she receives the income, I shall do no more than remit the assessment to the Commissioner.

Appeal allowed with costs. Assessment set aside and remitted to the Commissioner of Taxation.

Solicitors for the appellant, *Blake & Riggall.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

Foll *Swiss Aluminium Aust Ltd* v FCT 73 ALR 584

Cons *Wellcome Australia Ltd* v *Aust Eagle Insurance Co Ltd* (1993) 34 NSWLR 269

Appl *CIC Workers' Compensation (NSW) Ltd* v *Alcan Aust Ltd* (1994) 35 NSWLR 169

[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT; APPLICANT,

AND

MANN AND OTHERS . . . . . RESPONDENTS. RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 6, 7; *Aug.* 4.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

Workers' Compensation—Injury—Disease—Contracted by gradual process—Whether brought about or contributed to by employment during twelve months preceding disablement—Necessity of proof—Disease incidental to employment in question—Cause—Condition of worker—Certificate of Medical Board—Conclusiveness—Case stated to Supreme Court subsequent to award—Appeal therefrom to High Court—Workers' Compensation Act 1926 (*N.S.W.*) (*No.* 15 *of* 1926), *secs.* 6*, 7 (1)*, (4)*, 37*, 51 (3)*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 73

Where a worker has contracted a disease which is of such a nature as to be contracted by a gradual process, it is not necessary for him, on an application for compensation in accordance with sec. 7 (4) of the *Workers' Compensation Act* 1926 (N.S.W.), to establish that the disease was actually brought about or

* The *Workers' Compensation Act* 1926 (N.S.W.), provided:—By sec. 6: "'Injury' means personal injury, and includes a disease which is contracted by the worker in the course of his employment, whether at or away from his place of employment, and to which the employment was a contributing factor, but does not include a disease caused by silica dust." By sec. 7:—"(1) A worker who receives personal injury . . . in the course of his

contributed to by the employment of the employer or employers during the twelve months preceding his disablement: it is enough if the disease is incidental to that class of employment so that it can be attributed to service therein.

Harmey v. *Board of Fire Commissioners of New South Wales*, (1927) 1 W.C.R. (N.S.W.) 247, disapproved.

The Workers' Compensation Commission, under sec. 51 of the *Workers' Compensation Act* 1926 (N.S.W.), referred to a medical board questions as to the condition of an applicant, and his fitness for employment. The Board, in its certificate, answered the questions and also expressed its opinion as to the cause of the applicant's condition. The Supreme Court held that the cause of the condition did not come within the scope of the questions referred to the Board and, therefore, the Commission was not bound by that part of the certificate. On appeal to the High Court,

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Gavan Duffy* C.J. dissenting), that the Board's certificate, stating the condition and the cause of that condition, was a certificate as to the condition of the applicant within the meaning of sec. 51 of the Act, and bound the Commission.

Upon a preliminary objection to the hearing of the appeal to the High Court, on the ground that the decision of the Supreme Court upon a case stated by the Workers' Compensation Commission under sec. 37 of the *Workers' Compensation Act* 1926 (N.S.W.) was merely an advisory or consultative opinion, and was not a "judgment, decree, order or sentence" within the meaning of sec. 73 of the Constitution from which an appeal would lie:

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., that a decision of the Supreme Court, given after the making of an award by the Commission, was not an advisory or consultative opinion but was a final determination of the rights of the parties in the matter in which it was given, and an appeal would lie therefrom.

Decision of the Supreme Court of New South Wales (Full Court): *Smith* v. *Mann*, (1931) 48 N.S.W.W.N. 171, reversed.

APPEAL from the Supreme Court of New South Wales.

In proceedings before the Workers' Compensation Commission of New South Wales, the applicant, Joseph Smith, claimed compensation in respect of disablement from a disease, that is, lead-poisoning, arising, as he alleged, out of and in the course of his employment as

employment, whether at or away from his place of employment . . . shall receive compensation from his employer in accordance with this Act." "(4) Where the injury is a disease which is of such a nature as to be contracted by a gradual process compensation shall be payable by the employer in whose employment the worker is or who last employed the worker. Any employers who, during the twelve months preceding a worker's incapacity, employed him in any employment to the nature of which the disease was due, shall be liable to make to the employer by whom compensation is payable such

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a painter, of such a nature as to be contracted by a gradual process. The respondents to the application were John Mann, who was the applicant's last employer, and Mossop & Cooper, W. R. J. Cox, H. T. Seymour Ltd. and A. A. Decros, who were joined as being employers who during the twelve months previous to the date of incapacity had employed the applicant in an employment to the nature of which the disease was alleged to be due.

In his application the applicant stated that he became incapacitated by lead-poisoning on 6th July 1929, and he claimed compensation as from that date until "certified fit." At the request of the respondents the applicant was referred to a Medical Board, in accordance with the provisions of sec. 51 of the *Workers' Compensation Act* 1926-1929 (N.S.W.), for a certificate as to his condition and fitness for employment. The respondents subsequently denied liability to pay compensation to the applicant, on the grounds that the alleged injury was not received by him in the course of his employment, and that the said employment was not a contributing factor in the contracting of the disease alleged in his particulars. On the matter coming on for hearing the Commission held that the Medical Board's certificate, the terms of which appear below, was not conclusive in favour of the applicant, but, after hearing evidence, on both sides, including independent medical evidence, it found that the applicant had not proved his case, and that he was not incapacitated by injury received in the course of his employment and to which the employment with any of the five respondents was a

contributions as, in default of agreement, may be determined by the Commission." By sec. 37 (1): "No award, order or proceeding of the Commission shall be . . . liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of judicature, on any account whatsoever." By sec. 37 (4) (as amended by sec. 8 of Act No. 36 of 1929):—"When any question of law arises in any proceeding before the Commission, the Commission may of its own motion, and shall, if in the manner and within the time prescribed by rules any party to the proceeding so requests, state a case for the decision of the Supreme Court thereon. A case may be stated under this section, notwithstanding that an award, order, direction or decision has been made or given by the Commission." By sec. 37 (7): "The decision of the Supreme Court upon the hearing of any such case shall be binding upon the Commission and upon all parties to such proceeding." By sec. 51 (3): "The . . . medical board to whom any matter is referred shall, in accordance with rules made by the Commission, . . . give a certificate as to the condition of the worker and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and such other information as the Commission may require. Any such certificate . . . shall be conclusive evidence as to the matters so certified."

contributing factor. The applicant claiming that a question of law had arisen, namely, whether the claim for compensation being for incapacity following on a disease which was of such a nature as to be contracted by a gradual process, it was material for the Commission to consider whether the applicant was incapacitated by a disease contracted in the course of his employment with the employers who last employed him, and to which the employment was a contributing factor, requested the Commission to state a case for the opinion of the Supreme Court under sec. 37 (4) of the Act. The Commission refused the request. The applicant then applied to the Supreme Court for a writ of mandamus requiring the Commission to state a case for the decision of the Court, which was granted: *Ex parte Smith*; *Re Workers' Compensation Commission* (1)).

The case which was accordingly stated by the Commission for the decision of the Supreme Court was substantially as follows :—

It was not disputed that the applicant was suffering from a disease of such a nature as to be contracted by a gradual process. The applicant gave evidence that his age was fifty-eight years, and that he had been engaged in the painting trade for forty-four years. His work as a painter included whitewashing, kalsomining, burning-off, sand-papering, and rubbing down old paintwork. In painting he had used dry colours, but his experience had been mostly with white lead. Applicant stated that he had worked a total of thirty-three weeks during the twelve months preceding his disablement: the details of such employment being, from 6th July to 8th November 1928, employed by the respondent Mossop & Cooper, burning-off and painting indoors and out of doors, using ordinary paint; from 16th November to 30th November 1928, employed by the respondent Decros, external painting with premixed paint, and sand-papering; 3rd December 1928 to 11th January 1929, employed by the respondent Cox, burning-off and used white lead, priming and mill white; 19th February to 4th April 1929, employed by the respondent H. T. Seymour Ltd., sand-papering, burning-off, and used paint containing white lead; from 29th June to 5th July 1929, employed by the

(1) (1930) 31 S.R. (N.S.W.) 152.

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respondent John Mann, mixing paint, painting and scraping down, but left work feeling ill.

About six weeks prior to the filing of the application for determination by the Commission, application was made on behalf of the respondent Mann for the examination of the applicant by a Medical Board. Following the usual practice, the applicant's medical and industrial histories were taken by an officer of the Commission and an order of reference was made referring the applicant to two doctors, who had been appointed "a Medical Board, to certify (*a*) as to the condition of the above named worker; and (*b*) as to his fitness for employment, specifying where necessary the kind of employment for which he is fit." No other question or matter was referred to the Medical Board. The certificate of the Medical Board, admitted in evidence, was as follows:—"Medical examination of Joseph Smith.—Employer: John Mann.—We hereby give you notice that having duly examined the said Joseph Smith . . . in accordance with the order of the Commission we certify as follows:—*Condition of the Worker.*—Complains of loss of power in right hand and arm and right leg. Presents signs of right sided hemiplegia. B.P. 200/110. Coast Hospital records 17/7/1929: Loss of power right side of face, right upper and right lower limb. No punctate basophilia. W.R.—ve. Urine, no albumin; lead in urine; ·08 mgm. per litre. B.P. 160/120. *His fitness for employment,* specifying where necessary the kind of employment for which he is fit: Unfit. And express an opinion as to whether or to what extent incapacity is due to the injury: See below. The facts as to the employment alleged by the worker, and on which this certificate is granted, are as follows:—We are of opinion that the worker has right sided hemiplegia resulting from cerebral thrombosis following arteriosclerosis and nephritis. We are of the opinion that his condition is one of degenerative disease. In a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work which has been in our opinion either the cause or aggravation of his disease.—Dated this 3rd day of December 1929.—Charles Badham, Leslie W. Dunlop, Medical Board." (The printed order of reference and certificate forms used were those prescribed in Div. IV. of the Rules made under the

Workers' Compensation Act 1926-1927.) The Commission considered the Medical Board's certificate to be conclusive evidence of (*a*) the condition of the worker, and (*b*) his fitness for employment.

The opinion expressed by the Medical Board that the applicant suffered from right sided hemiplegia resulting from cerebral thrombosis following arteriosclerosis and nephritis, and that his condition was one of degenerative disease was not disputed ; but allegations made on his behalf that he suffered from lead-poisoning, and that the arteriosclerosis and nephritis above mentioned were *sequelæ* of lead-poisoning were two of the matters in dispute before the Commission.

The Commission considered that questions for determination by it included the cause of the applicant's condition and whether his unfitness for employment was due to " injury " received in the course of his employment with any of the above mentioned respondents, and to which such employment was a contributing factor. In considering the opinion expressed by the Medical Board that " in a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work," the Commission interpreted " work " to mean applicant's work as a painter during the last forty-four years.

Three medical witnesses gave evidence to the effect that an examination of the applicant disclosed no signs specifically indicative of lead-poisoning, and that the examination of his gums with the aid of a lens did not reveal any sign of a blue line. Two of the medical witnesses agreed that it was possible that the applicant's work as a painter for forty-four years had been the cause of the aggravation of the condition which was now disabling him. The third medical witness stated that in his opinion the applicant was not susceptible to the action of lead, and his condition on examination was no different from that of a man with arteriosclerosis and nephritis who had not been exposed to lead ; in his opinion the applicant's association with lead was not in any way connected with his condition.

The Commission found that the applicant had not proved his case, and that he was not incapacitated by injury received in the course of his employment and to which his employment with any of the five respondents was a contributing factor.

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The principal considerations which guided the Commission in arriving at its finding were:—(*a*) There was no evidence of active lead-poisoning, such as (i.) punctate basophilia in applicant's blood film (see Medical Board's certificate); (ii.) attacks of lead colic during the period he was employed by any of the respondents; or (iii.) blue line on his gums: (*b*) on applicant's medical history given in evidence before the Commission it was of opinion that the probability that his incapacity was due to *sequelæ* of lead-poisoning at the most was no more than equal to the probability that his incapacity was due to a pathological condition unassociated with his work which could in any event disable him about the time that it did: (*c*) if the arteriosclerosis and nephritis from which the applicant suffered were *sequelæ* of lead-poisoning, as could be inferred by the opinion expressed by the Medical Board, then the disease of lead-poisoning must necessarily have been contracted many years before his employment with the respondents: and (*d*) the evidence did not establish that the applicant's employment with any of the respondents either aggravated or accelerated the existing diseases from which he suffered.

An award was prepared and settled in the following terms:—"Having duly considered the matters submitted, the Commission hereby orders and awards as follows:—(1) The Commission finds that the . . . applicant was not incapacitated for work by an injury received in the course of his employment as a worker employed by the . . . respondents, that is to say, by a disease contracted in the course of his employment and to which the employment was a contributing factor. (2) The Commission, therefore, makes its award in favour of the respondents."

The questions of law submitted by the Commission for the decision of the Supreme Court were as follows:—

(1) The Commission having referred the applicant worker to a Medical Board, which it had appointed under the provisions of sec. 51 of the *Workers' Compensation Act* 1926-1927 to certify as to (*a*) the condition of the worker; and (*b*) his fitness for employment, specifying where necessary the kind of employment for which he is fit, and the Medical Board having certified as to (*a*) and (*b*)

and having in addition expressed in that certificate the following opinion, "In a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work which has been in our opinion either the cause or aggravation of his disease"—were the Commission and the parties bound to regard that opinion as conclusive evidence as to the cause of the applicant's condition ?

(2) The applicant worker, being incapacitated by a disease which is of such a nature as to be contracted by a gradual process, and having claimed compensation from his last employer—did the Commission err in law in considering (*a*) the cause of the gradually contracted disease which resulted in the applicant worker's incapacity for work ; (*b*) whether he contracted such disease in the course of his employment and the employment was a contributing factor thereto ; (*c*) whether his employment with his last employer—or failing proof of that, with any of the other respondents—aggravated his pre-existing condition and accelerated his incapacity for work, in order to find whether applicant was "a worker who received personal injury" in terms of sub-sec. 1 of sec. 7 of the above mentioned Act ?

(3) Having regard to the facts that the Commission, after having duly considered the matters submitted, was satisfied that the applicant was incapacitated by a disease which is of such a nature as to be contracted by a gradual process, but although he had worked in an employment to the nature of which lead-poisoning may be due, there was no evidence of active lead-poisoning ; and further that it had not been established that the conditions which incapacitated him were the *sequelæ* of lead-poisoning, or that his work since the commencement of the *Workers' Compensation Act* 1926 had been either the cause or the aggravation of the disease which incapacitated him—was the applicant worker entitled in law to be paid compensation under the provisions of the *Workers' Compensation Act* ?

(4) Whether, the Commission having referred the applicant to be examined by a Medical Board under sec. 51 of the

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above mentioned Act and the said Medical Board having reported to the Commission as follows: "We are of the opinion that the worker has right sided hemiplegia resulting from cerebral thrombosis following arteriosclerosis and nephritis. We are of the opinion that his condition is one of degenerative disease. In a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work which has been in our opinion the cause or aggravation of his disease," and the said Medical Board having certified accordingly—such certificate of such Medical Board is conclusive evidence as to the matters so certified.

(5) Whether, such certificate having been given by a Medical Board under sec. 51 of the above mentioned Act, it is open to the Commission to make a finding as to the worker's condition or as to any other matter so certified contrary to the certificate of the Medical Board.

(6) Whether, the claim for compensation being for incapacity following on a disease which is of such a nature as to be contracted by a gradual process, it is material to consider whether the applicant is incapacitated by a disease contracted in the course of his employment with the employer who last employed him and to which the employment was a contributing factor in determining whether the applicant is entitled to be paid compensation under the provisions of the above mentioned Act.

The Supreme Court answered questions 1 and 3 in the negative, and did not see fit to make any answer to the other questions: *Smith* v. *Mann* (1).

From this decision the applicant now appealed to the High Court.

Ingham, for the respondents. There is a preliminary objection that in this matter no appeal lies to this Court. By secs. 36 and 37 of the *Workers' Compensation Act* exclusive jurisdiction is conferred upon the Commission to hear and determine all matters and questions arising under the Act, and the action or decision of the Commission is final, subject only to the stating of a

(1) (1931) 48 N.S.W.W.N. 171.

case on a question of law for the decision of the Supreme Court, in which event such decision is, by sub-sec. 7 of sec. 37, made binding on the Commission and upon all parties to the proceedings. The matter was dealt with by the Supreme Court in a consultative capacity only, and the decision of the Court, not being a " judgment, decree, order or sentence " within the meaning of sec. 73 of the Constitution, no appeal will lie therefrom (*Ex parte County Council of Kent and Councils of Dover and Sandwich* (1); *Commonwealth* v. *Brisbane Milling Co.* (2)).

[RICH J. referred to *In re Knight and Tabernacle Permanent Building Society* (3).]

That case must be read in the light of the decision in *C. T. Cogstad & Co.* v. *H. Newsum, Sons & Co.* (4).

[RICH J. If the Commission has the final duty of determining the application, is not the obtaining of the opinion of the Supreme Court an interlocutory matter in respect of which an appeal does not lie ?]

That aspect was dealt with by *Bowen* L.J. in *In re Knight* (3).

[STARKE J. The Supreme Court " ordered " that the questions submitted be answered in a certain way : Would not an appeal lie from such order ? (See *Corporation of Peterborough* v. *Overseers of the Parish of Wilsthorpe* (5).)]

There is no appeal, whether the proceedings are final or interlocutory, if the original tribunal has power to determine the matter (*Cogstad & Co.* v. *Newsum, Sons & Co.* (4)).

[DIXON J. referred to *Tata Iron and Steel Co.* v. *Bombay Chief Revenue Authority* (6).]

The case of *Overseers of the Poor of Walsal* v. *Directors of the London and North Western Railway Co.* (7) is distinguishable because the order there appealed against was made on a certiorari.

Miller, for the appellant. An appeal in this matter lies as of right. Under sec. 37 of the Act a case may be stated notwithstanding the making of an order or of a decision by the Commission. Here

(1) (1891) 1 Q.B. 725.
(2) (1916) 21 C.L.R. 559.
(3) (1892) 2 Q.B. 613.
(4) (1921) 2 A.C. 528.
(5) (1883) 12 Q.B.D. 1.
(6) (1923) 39 T.L.R. 288.
(7) (1878) 4 App. Cas. 30.

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the application for a case to be stated was made after the Commission had made an award and had thereby discharged its duty. The decision of the Commission is in exactly the same position as an order or determination under the *Justices Act* in respect of which appeal lies by way of case stated. The decision of the Supreme Court must be regarded as a final judgment because by it the appellant has been deprived of compensation. The *Workers' Compensation Act* provides that the decision of the Medical Board shall be final and conclusive, and, as the result of evidence contradictory to the Medical Board's report having been admitted by the Supreme Court, the appellant was refused compensation. In the circumstances the decision of the Supreme Court was corrective and not merely consultative. If the matter is interlocutory, special leave to appeal should be granted on the ground that the finding of the Medical Board was not accepted as final and conclusive. Leave should be granted for the purpose of determining also whether the appellant has to prove that his employment during the preceding twelve months caused the condition which incapacitated him.

GAVAN DUFFY C.J. The Court will reserve its decision on the preliminary objection. In the meantime the appeal will be heard on the merits.

Miller, for the appellant. The remarks of the Medical Board as appearing in its report must be regarded as forming part of the Board's certificate as to the condition of the appellant. It is immaterial whether employment with any of the respondents contributed to such condition. The Commission was bound to act on the report of the Medical Board and, having regard to the terms of such report, it was not open for the Commission to say that the appellant did not suffer from lead-poisoning. The Medical Board's certificate was wholly a certificate as to condition, and the fact that some of the Board's statements appear in a wrong part of the form is immaterial. Where a disease is contracted by gradual process, it is not necessary for the applicant for compensation to prove under sec. 7 (4) of the Act that the particular employment during the

preceding twelve months caused or contributed to the condition (*M'Gowan* v. *Merry & Cunninghame Ltd.* (1)).

[DIXON J. referred to *Blatchford* v. *Staddon & Founds* (2).]

That case shows that it is not material to consider whether the last employment did or did not contribute to the condition complained of, but the certificate of the Medical Board is conclusive, on the face of it, that the particular employment which the Board was considering could not be dissociated from the appellant's condition. It was not necessary for the Board to say that the appellant had lead-poisoning. The word " injury " in the Act has a specific meaning, and was intended by the Legislature to cover three cases, namely, an accident in the general sense, a disease contracted suddenly, and a disease contracted by gradual process. The liability of the last employer is established, irrespective of length of employment or whether the employment contributed to the condition, so long as the work done was of the same nature as that to which the condition is attributable (*Blatchford* v. *Staddon & Founds* (2)).

[MCTIERNAN J. referred to *Harmey* v. *Board of Fire Commissioners of New South Wales* (3).]

The certificate of the Medical Board on the questions submitted to it, namely, as to the condition and fitness of the appellant, is final and conclusive and cannot be reviewed by the Commission or the Court (*Short* v. *Parker* (4)). The certificate as given establishes the right of the appellant to compensation from the respondents. Alternatively, on the true interpretation of sec. 7 (4), the matter should be referred back to the Commission to determine whether the employment of the appellant during the forty-four years he was engaged in the industry caused or contributed to the condition which finally disabled him.

Ingham, for the respondents. In his claim for compensation the appellant alleged that the nature of the injury upon which he based his claim was lead-poisoning. The Medical Board certified only that he had arteriosclerosis, which is a condition common to any person above the age of fifty years. The appellant failed to show

(1) (1915) S.C. 34; 52 Sc.L.R. 30.
(2) (1927) A.C. 461.
(3) (1927) 1 W.C.R. (N.S.W.) 247.
(4) (1926) 95 L.J. K.B. 849; 135 L.T. 528.

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that such condition was attributable, in any way, to his occupation. All the medical men who gave evidence stated that there was no trace of lead-poisoning. The Commission was justified, in such circumstances, in finding that the appellant had not established that he had at any time suffered from lead-poisoning. The Medical Board's certificate should have been confined to answers to questions specifically put by the Commission to the Board, and to the extent that the certificate exceeds such answers it should be disregarded (*Walker* v. *Cadzow Coal Co.* (1)). The Board was not asked to express an opinion as to whether, and to what extent, the incapacity was due to the injury. The Board has, in addition to answering the specific questions submitted to it as to condition and fitness, and without being requested so to do, expressed opinions as to the cause of the injury. The certificate was as to a present condition, and not as to a past condition. As the certificate did not certify lead-poisoning the Commission was entitled to hear evidence as to whether the appellant had, or ever had suffered from, lead-poisoning (*Richard Evans & Co.* v. *Scahill* (2)). Upon the evidence before it the Commission found that the appellant was not suffering from lead-poisoning, and it was not satisfied that he had ever suffered from such poisoning, or that the condition of arteriosclerosis had been caused by lead-poisoning from which the appellant had suffered.

[STARKE J. referred to *Docherty* v. *Archibald Russell Ltd.* (3).]

That case is distinguishable because there there was definite medical evidence that the applicant concerned was suffering from the injury complained of; here there is no such evidence. Although the case of *Dean* v. *Rubian Art Pottery Ltd.* (4) was in part overruled by *Blatchford* v. *Staddon & Founds* (5), the former case was the authority followed up to the time of the passing of the *Workers' Compensation Act* 1926, and it must be taken that the Legislature intended that the applicant had to show that the injury complained of was in part contracted in the employment of the employer sued. Even assuming that the condition of arteriosclerosis was due to lead-poisoning, it would still be necessary to establish that it was contracted wholly or in part whilst in the employ of the employer

(1) (1925) S.C. 395.
(2) (1927) 137 L.T. 161.
(3) (1918) S.C. 115.
(4) (1914) 2 K.B. 213.
(5) (1927) A.C. 461.

against whom the claim is made (*Harmey* v. *Board of Fire Commissioners of New South Wales* (1)). *Blatchford* v. *Staddon & Founds* (2) is not applicable, because under the relevant Act there were two schemes, which is not the position here. Sec. 7 (4) of the Act does not create any new or additional responsibility. In brief the respondent contends (1) that the certificate does not certify lead-poisoning ; (2) that it is necessary to show that the disease was contracted or aggravated whilst in the employment of the employer sued, and (3) the connection between the disease and such employer must be found by the Court and not by the Medical Board.

Miller, in reply. *Walker* v. *Cadzow Coal Co.* (3) is distinguishable because the person there concerned was found not to be suffering from a disease referable to his occupation, which is different from the position here.

Cur. adv. vult.

Aug. 4.

The following written judgments were delivered :—

GAVAN DUFFY C.J. In my opinion the appeal should be dismissed. I agree with the statement of reasons contained in the judgment of *Ferguson* J.

RICH J. This case raises two questions of general importance as well as some matters which affect the rights and liabilities of the individual parties. The first of these matters is the correctness of the interpretation which in *Harmey* v. *Board of Fire Commissioners of New South Wales* (1) the Workers' Compensation Commission gave to sub-secs. 1 and 4 of sec. 7 of the *Workers' Compensation Act* 1926-1929. I find myself unable to agree with the interpretation adopted by this decision. It appears to me altogether too narrow. In my opinion the provision was not intended to restrict the right of the workers, but to enlarge them. Its object was to fix upon the ultimate employer of the worker a direct liability to him, leaving that employer to recover from previous employers subject to the

(1) (1927) 1 W.C.R. (N.S.W.) 247. (2) (1927) A.C. 461.
(3) (1925) S.C. 395.

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limitation of time expressed in the section. No doubt in the case of the ultimate as in that of the other employers the employment must be one to the nature of which the disease of the worker was due, but it is not necessary that the worker should establish that the disease from which he is suffering was actually brought about or contributed to by the employment of the last employer. The second question of general importance is how far the certificate of the Medical Board given under sec. 51 concludes the question of the causation of the disease. The material question submitted to the Medical Board in this case was that of his condition. Upon the construction of the certificate the Board gave, I do not doubt that they intended to certify that his condition was one of degenerative disease arising from lead-poisoning. Is it open to the Commission to disregard the finding of the Medical Board so certified in so far as it attributes the degenerative disease to lead-poisoning? The object of the section was to leave the condition or the bodily state physically and pathologically of the worker to a medical authority and to withdraw it from the lay tribunal. Condition is a wide word, but it is pointed rather at an existing state of affairs than at prior events by which it was caused. At the same time, in considering the nature and character of diseases, the distinction between cause and effect, as in other departments of life, is often unreal and cannot be strictly maintained. In the case of a broken skull there is no difficulty in distinguishing between the blow and the injury, but it would be impossible to predicate of a man that he was suffering from alcoholic poisoning and yet leave undecided the question whether he had imbibed alcohol. The question whether the finding of lead-poisoning goes to the condition of a man is largely one of fact. When lead-poisoning causes or contributes to such a state as that in which this worker was objectively found, is his diseased condition, when regarded from the point of view of his present and future capacity, which involves prognosis and remedy, the same as or different from that of a person presenting like objective symptoms arising from other causes? My perusal of the evidence leads me to give a negative answer to the question. Consequently the worker's condition includes "lead-poisoning" and the Commission was not at liberty to find that his incapacity arose or might

have arisen from other causes. I think that the preliminary objection should be overruled, and that the remaining contentions of the respondent fail.

The appeal should be allowed with costs, and the questions should be answered: (1) Yes; (2) In view of the Medical Board's certificate, Yes; (4) Yes; (5) No; (6) No. It is unnecessary to answer question 3.

STARKE J. This was a claim by a worker for compensation under the *Workers' Compensation Act* 1926-1927 of New South Wales. A worker who receives personal injury in the course of his employment is entitled to compensation from his employer in accordance with the Act, and "injury" includes a disease which is contracted by the worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor, but does not include a disease caused by silica dust (see Act, secs. 6, 7). And, by sec. 7 (4), where the injury is a disease which is of such a nature as to be contracted by a gradual process, compensation shall be payable by the employer in whose employment the worker is or who last employed the worker. Any employers who during twelve months preceding a worker's incapacity employed him in any employment to the nature of which the disease was due shall be liable to make to the employer by whom compensation is payable such contributions as in default of agreement may be determined by the Workers' Compensation Commission.

Under the *Workmen's Compensation Act* 1906 of England, it was formerly held that the disease must be contracted or accelerated during employment by the worker's last employer if he were to succeed against him, but the House of Lords dissented from this view and held that it was enough if his work with his last employer was of the same nature and character as the work to which the disease was due, and that it was not necessary to prove that it was the employment with his last employer that caused the "disablement" (*Dean* v. *Rubian Art Pottery Ltd.* (1); *Blatchford* v. *Staddon & Founds* (2); *Ellerbeck Collieries Ltd.* v. *Cornhill Insurance Co.* (3)). The *Workmen's Compensation Act* of 1916 of New South Wales

(1) (1914) 2 K.B. 213.
(2) (1927) A.C. 461.
(3) (1932) 1 K.B. 401, at pp. 409, 410.

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followed the actual terms of the English Act. And, while the Act of 1926-1927 of New South Wales has changed the language, its scheme and intention are the same, and the reasoning on which *Blatchford* v. *Staddon & Founds* (1) is founded applies as well to it as to the English Act. Both Acts should, therefore, receive the same interpretation. This brings me to the facts of the present case.

The worker was a man fifty-eight years of age who had been employed in the painting trade for forty-four years. Mann, his last employer, employed him in that trade for a week in 1929. He was engaged in mixing paint, painting, and scraping down, and he "left work feeling ill." Notice of the disablement seems to have been given. In November of 1929, the Commission, pursuant to the Act of 1926-1927 (secs. 50-52) made a reference to a Medical Board to certify: (*a*) as to the condition of the worker; (*b*) as to his fitness for employment, "specifying where necessary the kind of employment for which he is fit." The Act provides that any such certificate given by a Medical Board shall be conclusive evidence as to the matters so certified.

The Board, on 3rd December 1929, gave the following certificate: —"Medical examination of Joseph Smith.—Employer: John Mann. We hereby give you notice that having duly examined the said Joseph Smith of 24 Commodore Street, Newtown, in accordance with the order of the Commission we certify as follows:—*Condition of the Worker.*—Complains of loss of power in right hand and arm and right leg. Presents signs of right sided hemiplegia. B.P. 200/110. Coast Hospital records 17/7/1929: Loss of power right side of face, right upper and right lower limb. No punctate basophilia. W.R. — ve. Urine, no albumin; lead in urine; ·08 mgm per litre. B.P. 160/120. *His fitness for employment*, specifying where necessary the kind of employment for which he is fit: Unfit. And express an opinion as to whether or to what extent incapacity is due to the injury: See below. The facts as to the employment alleged by the worker, and on which this certificate is granted, are as follows: —We are of the opinion that the worker has right sided hemiplegia resulting from cerebral thrombosis following arteriosclerosis and nephritis. We are of the opinion that his condition is one of

(1) (1927) A.C. 461.

degenerative disease. In a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work which has been in our opinion either the cause or aggravation of his disease."

In January of 1930 the worker made application to the Workmen's Compensation Commission for compensation under the Act. He alleged that he was suffering from lead-poisoning, due to the nature of his employment, that of a painter; and that he was last so employed by John Mann. Other employers who during the twelve months preceding the worker's incapacity employed him as a painter were also added to the proceedings. The Commission on the hearing received medical evidence of the condition of the worker. The Commission found that the worker "was not incapacitated for work by an injury received in the course of his employment as a worker employed by the . . . respondents, that is to say by a disease contracted in the course of his employment and to which the employment was a contributing factor." By this it meant that the injury was not received in the course of the worker's employment with Mann and the other employers joined in the proceedings and to which the employment was a contributing factor, and further that the worker's disease, though of a nature contracted by a gradual process, was probably due to a pathological condition unassociated with the nature of his employment with Mann and the other employers who during the preceding twelve months had employed him. But the Act contains no limitation of time within which the disease must be contracted. It must arise, no doubt, from the nature of the employment. But it is not necessary that it should arise "out of the particular service of the particular employer sued": it is enough if the disease is "incidental to that class of employment so that it can be attributed to service therein" (*Blatchford* v. *Staddon & Founds* (1)). The compensation can be recovered only against the employer in whose employment the worker is or who last employed him. And the employer by whom such compensation is payable may obtain contribution from the employers who during the twelve months preceding a worker's incapacity employed him in any employment to the nature of which

(1) (1927) A.C., at p. 470.

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the disease is due. The Commission thus appears to have proceeded upon an erroneous interpretation of the Act.

Further, the Commission also considered that it must determine the cause of the workman's condition. The certificate of the Medical Board has already been stated :—" We are of the opinion that the worker has right sided hemiplegia resulting from cerebral thrombosis following arteriosclerosis and nephritis. We are of the opinion that his condition is one of degenerative disease. In a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work which has been in our opinion either the cause or aggravation of his disease." Nothing turns on the position in which this opinion is found in the certificate. The important question is whether it is part of the function of the Medical Board in giving a certificate as to the worker's condition to state the cause of that condition. If so, the certificate is conclusive, and the Commission was bound by it. Now it seems to me that " it is impossible," to use the language of *Farwell* L.J. in *Haylett* v. *Vigor & Co.* (1), " to have the consequence without the cause, which is the gist of the liability." The Medical Board is not certifying in the air, but with reference to injuries or diseases relevant to compensation under the Act. " It seems to me," as *Atkin* L.J. said in *Short* v. *Parker* (2), " that the words ' condition of the workman ' may very well mean to a doctor the same thing as if he were asked, ' Is his condition such that he is suffering from a disease which is in fact caused by long exposure to dust.' " See also *M'Avan* v. *Boase Spinning Co.* (3). The certificate of the Medical Board, stating the condition and the cause of that condition, was, in my opinion, a certificate as to the condition of the worker within the meaning of the Act, and bound the Commission.

A case was stated for the decision of the Supreme Court upon various questions of law, but the Supreme Court only dealt with the medical certificate, and said that in expressing an opinion as to the cause of the condition the Medical Board was exceeding its function. But with this view, for the reasons already given, I cannot agree.

(1) (1908) 2 K.B. 837, at p. 841.
(2) (1926) 95 L.J. K.B., at p. 861 ; 135 L.T., at p. 537.
(3) (1901) 3 F. (S.C.) 1048.

Lastly, it was argued that the decision of the Supreme Court was not an appealable, but merely a consultative or advisory, order. There is nothing advisory about the decision : it was given in favour of the employer after the award of the Commission, and it is binding upon the Commission and all parties to the proceedings.

The appeal should be allowed, and the questions stated in the case answered as follows : (1) Yes ; (2) Yes, in so far as it disregarded the certificate of the Medical Board ; (3) The question is not answered ; (4) Yes ; (5) No ; (6) No.

The proceedings should be remitted to the Workers' Compensation Commission of New South Wales, with a direction to do therein as shall be just, and consistent with the judgment of this Court, and if necessary to deal with any claim against the employers added to the proceedings that may be substantiated.

DIXON J. This is an appeal from an order of the Supreme Court of New South Wales determining questions raised by a special case which the Workers' Compensation Commission stated under sec. 37 (4) of the *Workers' Compensation Act* 1926 as amended to 1929.

A preliminary objection was made by the respondent to the competence of the appeal on the ground that the order of the Supreme Court is advisory in its character or, at any rate, is not final but interlocutory. The objection depends upon the provisions under which the case is stated. The case may be stated by the Commission before it makes its award, or after it has made its award, and the Commission is bound to state a case if required to do so by one of the parties. The case, which is confined to questions of law, is stated " for the decision of the Supreme Court thereon," and the decision of the Supreme Court is binding upon the Commission and upon all the parties to the proceeding. As the provision originally stood it was construed by the Supreme Court to mean that the Commission might state a case during the course of a proceeding, but not after the proceeding had been determined by an award (*Roberts* v. *Jones* (1)). As it now stands amended, it is apparent that the provision authorizes two kinds of proceeding by way of case stated. A special case that is stated by the Commission

(1) (1928) 28 S.R. (N.S.W.) 543.

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before making any order or award can do no more than obtain from the Supreme Court rulings upon questions of law by which the Commission must be governed in determining the proceedings pending before it. A case stated after an award or order has been made by the Commission has a very different operation. The Commission has then determined the proceedings pending before it, and its award or order concludes the matter, except in so far as the award or order may be affected by the decision of the Supreme Court upon the case stated. Accordingly, the statement of a case after award becomes a means of invoking the jurisdiction of the Supreme Court so that it may revise or reconsider, within the limits of the questions of law raised, the determination of the Commission. If the decision of the Supreme Court upon any of those questions means that the order or award of the Commission was erroneously made, that order or award can no longer remain in operation as a determination of the proceedings before the Commission. But a decision of the Supreme Court to the contrary results in the continuance of the order or award in full force and effect as the expression of the legal rights of the parties.

In the present case the Supreme Court so decided questions of law in the case stated as to support the order of the Commission. Thus the order of the Supreme Court finally concluded the rights of the appellant. It was final and not advisory. It follows that the preliminary objection should be overruled.

The appeal itself raises some difficult questions. The appellant claimed compensation under sec. 7 (4) for total incapacity resulting from injury consisting of a disease which is of such a nature as to be contracted by a gradual process. The appellant was a painter by trade, and the disease he relied upon was that of lead-poisoning. The respondent Mann was the employer in whose employment the worker was, or who last employed him (sec. 7 (4)); and therefore the claim was made against that respondent in the first instance. But he had employed the appellant for a very short time and accordingly he caused the remaining respondents, four in number, to be joined as the employers who, during the twelve months preceding the worker's incapacity, employed him in the employment to the nature of which the disease was said to be due. The appellant's

incapacity arose from right sided hemiplegia, itself the result of cerebral thrombosis caused by arteriosclerosis and nephritis. He was fifty-eight years of age and had been a painter for forty-four years. Evidence was given before the Commission to the effect that the absorption of lead causes or aggravates arteriosclerosis and nephritis, and that although these conditions are common among all classes of whatever occupation, yet there is a greater incidence among those working in trades in which lead is used, such as painting. The appellant showed some traces of lead absorption but, on the other hand, blood changes common in chronic lead-poisoning and changes in the nervous system were not found. Conflicting medical opinions were expressed upon the question whether the appellant's condition was caused by the absorption of lead or arose independently. The Commission considered that, upon the medical history of the appellant as it appeared from the evidence, the probability that his incapacity was due to the *sequelæ* of lead-poisoning was, at most, no more than equal to the probability that his incapacity was due to a pathological condition unassociated with his work which could in any event disable him about the time that it did; and that if the arteriosclerosis and nephritis from which he suffered were *sequelæ* of lead-poisoning then the disease of lead-poisoning must necessarily have been contracted many years before his employment with the present respondents. The ultimate conclusion of the Commission was that the appellant had not established his claim and was not incapacitated by injury which he received in the course of his employment with any of the five respondents and to which this employment was a contributing factor. It could not be maintained that the Commission, upon the materials before it, was not at liberty to reach this conclusion which is limited to a denial that the employment by any of the five respondents contributed to the "injury," that is, the disease, and that it was received in the course of that employment. The Commission considered that a finding thus limited was enough to negative the appellant's claim because of the interpretation which the Commission had in previous cases placed upon sub-secs. 1 and 4 of sec. 7 construed with the aid of the definition of "injury" in

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sec. 6 (1). In *Harmey* v. *Board of Fire Commissioners of New South Wales* (1) the Commission ruled that the combined effect of these enactments is to place the onus on the worker claiming compensation for disablement by disease of proving that in the course of his employment with the last employer he contracted a disease to which the employment was a contributing factor. This interpretation gives too narrow an operation to sub-sec. 4 of sec. 7, the effect of which is to enable a worker, if in the course of his occupation he receives injury by contracting a disease by a gradual process through the nature of his occupation, to obtain compensation from the employer in whose employment in that occupation the worker is at the time of his incapacity, or, who last before his incapacity so employed him, leaving that employer to recover contribution from any other employers who in the twelve months prior to his incapacity employed the worker in that occupation.

If the definition of injury were written into the material part of sub-sec. 1 of sec. 7 of the Act of 1926-1927, it would run as follows: "A worker who receives personal injury including a disease which is contracted by the worker in the course of his employment and to which the employment was a contributing factor shall receive compensation from his employer in accordance with this Act." Sub-sec. 4 provides :—"Where the injury is a disease which is of such a nature as to be contracted by a gradual process compensation shall be payable by the employer in whose employment the worker is or who last employed the worker. Any employers who, during the twelve months preceding a worker's incapacity, employed him in any employment to the nature of which the disease was due, shall be liable to make to the employer by whom compensation is payable such contribution as, in default of agreement, may be determined by the Commission."

Up to 1st July 1926 provisions modelled on those contained in sec. 43 of the British *Workmen's Compensation Act* 1925 were in force in New South Wales (sec. 12 of Act No. 71 of 1916), but those now in operation appear to be an attempt to provide for industrial or occupational diseases in a more compendious and general manner. It is difficult to suppose that the new provisions were meant to

(1) (1927) 1 W.C.R. (N.S.W.), at p. 260.

confine the worker's right to compensation within narrower limits than the old. No doubt in the expression " shall receive compensation from his employer " in sub-sec. 1 of sec. 7, the words " his employer " refer to the employer in the course of whose employment personal injury was received. Thus, when the definition of injury is applied so that disease is included, the words must refer to the employment in the course of which the disease is contracted and which is a contributing factor in the contracting of the disease. But sec. 6 contains many provisions which must operate as extensions imposing the liability created by sec. 7 on persons who are not employers. Sub-sec. 4 of sec. 7 deals with the special cases of diseases contracted by a gradual process, and this also operates by way of extension. The nature of a disease contracted by a gradual process is such as to make it difficult, and sometimes impossible, to say how far a particular period of employment contributed. The purpose of the sub-section is to pitch upon the latest employer for the purpose of immediate liability to the worker, leaving him to recover over from others by way of contribution. The description of the disease implied in the expression in the second paragraph " employment to the nature of which the disease was due " may properly be carried back into the first paragraph for the purpose of understanding its meaning. In other words, the diseases dealt with are those which are contracted by a gradual process and are due to the nature of an employment. The expression in the first paragraph " in whose employment the worker is or who last employed the worker " implies a reference to a point of time or event, and it is apparent that the occurrence of incapacity is the event or time intended. The employer at the time of, or last before, the incapacity is made primarily liable. It seems proper to understand the provision in the first paragraph as confined to employers who do employ or have employed the worker in an employment to the nature of which the disease is due, but any further restriction upon the class of employment or any further requirement as to causation seems unwarranted.

From this construction of sub-sec. 4 of sec. 7 it follows that the ultimate finding made by the Commission stated by it in the special case is not enough to negative the liability of the respondents. But,

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although the ultimate finding of the Commission does not negative the respondents' liability to the appellant, the Commission states the principal considerations which guided it in arriving at this finding, and among them is the opinion that the probability that the incapacity was due to the *sequelæ* of lead-poisoning was at most no more than equal to the probability that it was due to an independent pathological condition. This amounts to a finding, based upon the onus of proof, to the effect that exposure to lead dust and to lead, in his trade of painter, was not a cause contributing to the appellant's incapacity. The Commission found that he was incapacitated by a disease which is of such a nature as to be contracted by a gradual process, and that he had worked in an employment, namely, a painter's trade, to the nature of which lead-poisoning may be due, and that, if the incapacity was due to the *sequelæ* of lead-poisoning, lead-poisoning was contracted before his employment with the respondents, but that it had not been established that the conditions by which he was incapacitated were the *sequelæ* of lead-poisoning. Although these subsidiary findings are expressed in a way which emphasizes "active lead-poisoning," "lead-poisoning" and "lead-intoxication," it seems reasonably clear that the Commission intended to cover all lead absorption and to hold that the appellant had failed to prove to the satisfaction of the Commission that the lead which he absorbed had any appreciable causal connection with his pathological condition. The Full Court of New South Wales proceeded upon this view of the Commission's finding which, it held, was fatal to the appellant's claim, unless it was outside the authority of the Commission to make the finding.

The appellant contends that the question whether his condition is occasioned by lead-poisoning or absorption was not for the Commission to decide, because it was concluded in his favour by a certificate of a Medical Board given under sec. 51. The Supreme Court entertained some doubt whether by its certificate the Medical Board did certify that the appellant's condition was due to lead-poisoning, but considered that, if this was the effect of the certificate, the Board had certified upon a matter not referred to it. Sub-sec. 3 of sec. 51 requires the Medical Board, in accordance with

the rules made by the Commission, to give a certificate as to the condition of the worker and his fitness for employment, specifying where necessary the kind of employment for which he is fit and such other information as the Commission may require. It provides that any such certificate given by a Medical Board shall be conclusive evidence of the matters so certified. In this case, the Board was, by the terms of the reference, confined to the condition of the appellant and his fitness for employment. From the evidence given by the medical witnesses it inferentially appears that the pathological condition of a patient with arteriosclerosis and nephritis when it has been brought on or hastened by lead absorption may differ from that of such a patient who has not been exposed to lead-poisoning, and it certainly nowhere appears affirmatively that, in the diagnosis, prognosis and treatment of such a degenerative disease as that from which the appellant was suffering, it is immaterial whether it originated in or was aggravated or accelerated by a condition of lead absorption or of lead-intoxication. In many cases of traumatic injury and some cases of disease the state of the patient and the cause of that state are two independent matters. But a present stage in a continuous developing pathological condition can seldom be considered apart from previous stages, and, when it arises out of or has been influenced by some organic effect produced in the human body the consequences of which are not exhausted, the so-called " causes " of the man's present state may form an inseverable part of the description of his " condition." No doubt sec. 51 (3) should be strictly construed but, after all, it was intended to leave medical questions to the determination of medical men. The " condition " of a patient cannot be described except by reference to the character of his disease, and the character of his disease may be, and perhaps more often than not is, determined or conditioned by its origin. In the state of degeneration by disease which existed in the case of the appellant, the conclusion that it began with or was affected by lead absorption or intoxication enters into and forms part of the complete description of his condition. It follows that it was within the province of the Medical Board to certify that his state arose from lead absorption or intoxication, and that a certificate to that effect would be conclusive.

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The remaining question is whether the Board did so certify. In a medical certificate under sec. 51 (3) definiteness and precision of expression are desirable, but the formality of a judgment or other legal instrument cannot be expected. It should be read in relation to the question which has arisen and the circumstances of the case together with such evidence as may be needed in explanation of technical expressions. If, when so read, it appears with reasonable clearness that the Board intended to state any conclusion or opinion, that conclusion should be treated as a matter certified whether the certificate records the opinion or conclusion under one heading or another. In this case the certificate under the heading "Condition of the worker" sets out various symptoms ascertained from examination and from inquiry. Then after the unfitness of the worker for employment is stated, a note, "see below," is placed under a printed request to "express an opinion as to whether or to what extent incapacity is due to the injury." Below, the following statement appears upon the certificate:—"We are of the opinion that the worker has right sided hemiplegia resulting from cerebral thrombosis following arterioscelerosis and nephritis. We are of the opinion that his condition is one of degenerative disease. In a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work which has been in our opinion either the cause or aggravation of his disease."

This appears plainly to mean that, in the opinion of the Board, exposure to lead dust has been the cause or aggravation of arteriosclerosis and nephritis followed by thrombosis causing hemiplegia. The position on the form in which this statement of opinion is written does not prevent it being a certificate as to the condition if otherwise it is so. It necessarily involves the proposition that the absorption of lead induced or increased the arteriosclerosis and nephritis.

For the reasons given this is a matter falling within the description of the worker's condition and accordingly the certificate is conclusive of it. It follows that the grounds upon which the Commission made its award cannot be supported.

The questions should be answered as follows:—(1) Yes; (2) Having regard to the certificate of the Medical Board, Yes; (3)

This should not be answered, as the answer would involve some inferences of fact; (4) Yes; (5) No; (6) No.

The appeal should be allowed with costs.

McTiernan J.

McTIERNAN J. A preliminary objection was taken by counsel for the respondents to this appeal, on the ground that the decision of the Supreme Court against which the appeal was brought is not a judgment, decree, order or sentence within the meaning of sec. 73 of the Constitution of the Commonwealth. In support of this submission it was contended that upon the true construction of sec. 37 of the *Workers' Compensation Act* 1926-1929 of New South Wales, under which the Supreme Court was invoked, the Court merely gave a consultative or advisory opinion for the guidance of the Workers' Compensation Commission. The award of the Commission, as settled by the Registrar of the Commission pursuant to rule 27 of the Rules made under the *Workers' Compensation Act* 1926-1929, was as follows: "Having duly considered the matters submitted, the Commission hereby orders and awards as follows:— (1) The Commission finds that the above named applicant was not incapacitated for work by an injury received in the course of his employment as a worker employed by the above named respondent, that is to say, by a disease contracted in the course of his employment and to which the employment was a contributing factor. (2) The Commission, therefore, makes its award in favour of the respondent."

Sub-sec. 7 of sec. 37 of the *Workers' Compensation Act* 1926-1929 is in these terms: "The decision of the Supreme Court upon the hearing of any such case shall be binding upon the Commission and upon all the parties to such proceeding." In view of the provisions of this sub-section, it is clear that if the Commission had made an award in favour of the present appellant, and the Supreme Court, by its decision under sec. 37 of a question that arose in the proceedings, denied the liability of the respondents to pay compensation to the appellant, the decision would have overruled the award and the respondent would not have been bound by the award to pay any compensation to the appellant. A decision of the Supreme Court under sec. 37, given as it was in this case, after an award had been made by the Commission, is, in my opinion, not an advisory

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or consultative opinion, but a final determination of the rights of the parties in the matter in which it was given. The preliminary objection should be dismissed.

The facts of the case have already been fully reviewed, and it is not necessary that they should be stated again. A number of questions were propounded in the stated case for the purpose of testing the validity of the reasons by which the Workers' Compensation Commission said it was guided in arriving at its decision to make an award in favour of the respondents. These questions may be reduced to the two questions which were argued at the hearing of this appeal, namely, (1) whether, upon its true construction, the certificate of the Medical Board was conclusive that the condition of the appellant was that he had lead-poisoning, and (2) whether the Commission was in error in confining its inquiry to the appellant's employment with the five respondents for the purpose of determining whether this appellant received "personal injury in the course of his employment," within the meaning of the Act.

Sec. 51 (1) of the *Workers' Compensation Act* 1926 provides that where notice has been given of an injury to a worker, any such worker shall, if so required by the Commission, submit himself for examination by a medical referee or a medical board. By sec. 6 "Injury" means personal injury, and includes a disease which is contracted by the worker in the course of his employment, whether at or away from his place of employment, and to which the employment was a contributing factor. Sec. 51 (3) provides that the medical authority, to whom any matter is referred, shall in accordance with rules made by the Commission give a certificate as to the condition of the worker and his fitness for employment, specifying where necessary the kind of employment for which he is fit and such other information as the Commission may require.

An application was made on behalf of the respondent John Mann, apparently after the receipt of the notice of "injury," and about six weeks prior to the application for an award, for the examination of the appellant by a Medical Board. The medical and industrial histories of the appellant were taken by an officer of the Commission and an order was made referring the appellant to a Medical Board to certify "(*a*) as to the condition of the above named worker:

and (*b*) as to his fitness for employment, specifying where necessary the kind of employment for which he is fit." The Commission did not require any other information. The terms of the certificate which was given by the Medical Board need not be repeated. The certificate is headed " Medical examination of Joseph Smith." It will be noted that the medical officers who gave the certificate exhausted the space under the heading " Condition of the worker " by writing particulars of the complaint which the worker made to them, the signs which they observed and the result of their examination. The first sentence of the final part of the certificate is as follows : " We are of opinion that the worker has right sided hemiplegia resulting from cerebral thrombosis following arteriosclerosis and nephritis." This sentence immediately follows the direction on the printed form handed to the Board to " express an opinion as to whether or to what extent incapacity is due to the injury." The Medical Board was not expressly asked by the Commission to certify as to this matter. The respondents did not dispute that the appellant was afflicted, as the Board certified, with right sided hemiplegia resulting from cerebral thrombosis following arteriosclerosis and nephritis. The certificate continues : " We are of opinion that his condition is one of degenerative disease." Though this sentence is not under the heading " Condition of the worker," it is an opinion as to his condition. The question remains, what is the significance of the following statement " In a worker whose exposure to lead dust has been marked one cannot dissociate his disease from his work which has been in our opinion either the cause or aggravation of his disease " ? It was contended on behalf of the respondents that this sentence states the cause of the appellant's condition rather than the condition itself, and it should therefore be rejected as beyond the terms of the Commission's reference to the Board. This statement is not written under the heading " Condition of the worker," but I do not think that it is impossible on that ground to regard it as a statement as to his condition. Upon a fair reading of the certificate does that statement mean that the appellant was suffering from lead-poisoning ? I think it does. It is true that arteriosclerosis and nephritis are pathological conditions which may be found in persons who have not been poisoned by the

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absorption of lead. But these conditions are *sequelæ* of lead-poisoning. I think that the statement of the Medical Board, cognizant as it was of the medical and industrial history of a worker, and discovering in him those *sequelæ* and other symptoms of lead-poisoning, that his disease cannot be dissociated from the fact that he was in his employment exposed in a marked degree to lead dust, and that his work has been either the cause or the aggravation of his disease, is a certificate under sec. 51 as to the condition of the worker. In my opinion it certifies that he is suffering from lead-poisoning, which is an industrial disease. In this view the certificate was conclusive evidence that the appellant was suffering from lead-poisoning, and any finding of the Commission at variance with that conclusion cannot be supported.

The answer to the other question, namely, whether the Commission was in error in confining its inquiry to the appellant's employment with the five respondents for the purpose of determining whether he received " personal injury " in the course of his employment, turns upon the definition of " injury " in sec. 6, and upon sub-secs. 1 and 4 of sec. 7 of the *Workers' Compensation Act* 1926-1929. The definition of " injury " has already been quoted. Sub-sec. 1 says that a worker who receives such an injury whether at or away from his place of employment (and in the case of the death of a worker, his dependants) shall receive compensation from his employer in accordance with the Act; and sub-sec. 4 says that where the injury is a disease which is of such a nature as to be contracted by a gradual process, compensation shall be payable by the employer in whose employment the worker is or who last employed the worker, and that any employers who, during the twelve months preceding a worker's incapacity, employed him in any employment to the nature of which the disease was due, shall be liable to make to the employer by whom compensation is payable such contributions as, in default of agreement, may be determined by the Commission.

These provisions supplant secs. 5 and 12 of the *Workmen's Compensation Act* 1916. Sec. 5 (1) of that Act provided that if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer

should be liable to pay compensation in accordance with the First Schedule in the Act. Sec. 12 provided for the payment of compensation in the case where a workman died from or was disabled by any industrial disease contained in the Third Schedule to the Act. Questions arose under sec. 5 as to liability when a mishap, arising out of and in the course of the employment, set up a disease, the question being whether the disease or the mishap caused the personal injury. In *Eke* v. *Hart-Dyke* (1) *Cozens-Hardy* M.R. said:— "Neither this Court nor the House of Lords has ever attempted to say that a mere disease without accident, not attributed to something which may properly be called an accident, entitles a workman to compensation under the Act. No doubt there have been some cases which were very near the line." (See also *Pyper* v. *Manchester Liners Ltd.* (2).)

Reading sec. 7 (1), sec. 6 and sec. 7 (4) together, it will be seen that the Legislature has provided that compensation shall be payable, subject to the provisions of the Act, where a worker (*a*) receives personal injury, or (*b*) contracts a disease in the course of his employment and to which the employment was a contributing factor, or (*c*) contracts a disease in the course of his employment and to which his employment is a contributing factor and the disease is of such a nature as to be contracted by a gradual process. The Legislature, having defined injury to include disease, replaced the elaborate provisions contained in sec. 12 of the earlier Act by the more compendious provisions relating to the payment of compensation to a worker incapacitated by an industrial disease contained in sec. 7 (4). The category of industrial diseases is not limited as it was under the earlier Act. The class of diseases to which sec. 7 (4) relates are diseases of such a nature as to be contracted by a gradual process. In the case of personal injury, in the primary sense of the word, the disablement would occur in the course of the employment in which the injury was received. But the gradual process by which the disease was contracted which ultimately disabled a workman may have extended over the course of his employment with a number of employers. The difficulties of a worker, disabled

(1) (1910) 2 K.B. 677, at p. 681. (2) (1916) 2 K.B. 691.

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by such a disease, in making a claim, are diminished by the provisions of sub-sec. 4, which enable him to claim compensation from the employer in whose employment he is or who last employed him.

The statement of *Scrutton* L.J. in *Ellerbeck Collieries Ltd.* v. *Cornhill Insurance Co.* (1) is in point notwithstanding the differences between sec. 7 of the present Act and sec. 43 of the *Workmen's Compensation Act* 1925 (15 & 16 Geo. V. c. 84) in relation to which it was made. *Scrutton* L.J. said (2) :—" But it seems to me that the policy was intended to cover the liability of the employers for the results of industrial diseases caused by the employment. When one tries to fit in these results to a scheme for compensation for accidents arising out of and in the course of the employment, this difficulty arises at once. An " accident " happens on a fixed and easily ascertainable date. But it is very difficult to say when an industrial disease, such as miners' nystagmus or lead-poisoning, begins. It is a gradual deterioration due to the employment which may be going on during service by the workman under several employers in the same industry until it results in disablement which may appear when the workman has only just begun to work under a particular employer. Under these circumstances it would be very difficult for the workman to pick the proper employer to sue. The Legislature saw the difficulty, and provided a conventional and artificial means for enabling the workman to get compensation, leaving the various employers to fight out their proportion of the liability between themselves."

It is admitted in the present case that the appellant was suffering from a disease of such a nature as to be contracted by a gradual process. The case stated says: " The Commission found that the applicant had not proved his case and that he ' was not incapacitated by injury received in the course of his employment and to which the employment was a contributing factor '—meaning his employment with any of the five above named respondents who were represented before the Commission." That finding was not sufficient, in my opinion, to dispose of the appellant's claim for compensation in respect of the disease from which he was suffering. It was a disease of such a nature as to be contracted by a gradual

(1) (1932) 1 K.B. 401. (2) (1932) 1 K.B., at p. 409.

process and the appellant had been employed as a painter prior to the period to which the Commission limited the inquiry. The decision of the Workers' Compensation Commission in *Harmey* v. *Board of Fire Commissioners of New South Wales* (1), which was applied by it in this case, does not, in my opinion, correctly interpret the intention of the Legislature in enacting sec. 7 (4). That decision was in these terms :—" The combined effect of these enactments is to place the onus on the worker claiming compensation for disablement by disease of proving that he received an injury (i.e., contracted a disease to which the employment was a contributing factor) in the course of his employment with the last employer. The further effect of sub-sec. 4, to my mind, is to deem a disease of gradual acquirement as having been contracted on each day of the twelve months preceding disablement that the worker was working in an employment to the *nature* of which his disease was due. The terms of the statute indicate in the case of diseases contracted gradually that the contraction of any such complaint could continue after the time when the disease first manifested itself. The words 'contracted by a gradual process' indicate that the contraction need not be limited to a specific point of time in one employment but might extend over employments covering a period of twelve months at least" (2). Sub-sec. 4 confines the liability of making contribution to the employers who, during the twelve months preceding the worker's incapacity, employed him in any employment to the nature of which the disease was due, but the Commission is not limited to the course of the worker's employment during that period for the purpose of determining whether he has contracted a disease in the course of his employment and to which his employment is a contributing factor and which is of such a nature as to be contracted by a gradual process. In the present case the question does not arise whether the Legislature intended that "the employer in whose employment the worker is" or "who last employed the worker" should be an employer who employed him in any employment to the nature of which the disease was due. The respondent Mann, as well as all the other respondents employed the appellant as a painter.

(1) (1927) 1 W.C.R. (N.S.W.) 247. (2) (1927) 1 W.C.R. (N.S.W.), at p. 260.

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The appeal should be allowed and the questions answered as follows: (1) Yes, that the cause of his condition was lead-poisoning; (2) Yes, as the certificate was conclusive as to his condition, and the inquiry should not have been limited to his employment as a painter with the respondents; (3) See answer to (2); (4) Yes; (5) No; (6) No.

Appeal allowed. Judgment of the Supreme Court discharged. In lieu thereof questions in the case stated answered as follows: (1) *Yes*; (2) *Having regard to the certificate of the Medical Board, Yes*; (3) *Not answered*; (4) *Yes*; (5) *No*; (6) *No. The respondents to pay the costs of this appeal and of the special case.*

Solicitor for the appellant, *Abram Landa*.

Solicitors for the respondents, *Stephen, Jaques & Stephen*.

J. B.