[HIGH COURT OF AUSTRALIA.]

PYE . . . . . APPELLANT;
APPLICANT,

AND

THE METROPOLITAN COAL COMPANY LIMITED . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *April* 19, 20.

MELBOURNE. *May* 14.

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

Workers' Compensation—Injury—Disease—"Other than a disease caused by silica dust"—Onus of proof—Workers' Compensation Act 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *secs.* 6 (1), 7 (1).

The *Workers' Compensation Act* 1926-1929 (N.S.W.) provides, by sec. 7 (1), that a worker who has received an injury shall receive compensation from his employer in accordance with the Act, and, by sec. 6 (1): "'Injury' means personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process other than a disease caused by silica dust."

Held, by *Rich*, *Evatt* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), in a claim by a worker for compensation for injury in that he had contracted a disease which was of such a nature as to be contracted by gradual process, that the onus was not on the worker to establish that the disease was not caused by silica dust. The words "other than a disease caused by silica dust" in the definition of "injury" introduced an exception to the liability of the employer, and consequently the onus was upon the employer to prove that a disease in respect of which the worker would otherwise be entitled to compensation was in fact caused by silica dust.

Decision of the Supreme Court of New South Wales (Full Court): *Pye* v. *Metropolitan Coal Co. Ltd.*, (1933) 34 S.R. (N.S.W.) 206; 51 N.S.W.W.N. 44, reversed.

APPEAL from the Supreme Court of New South Wales.

Jacob Pye, a coalminer, aged sixty-six years, who had been in the employ of the Metropolitan Coal Co. Ltd. for thirty-eight years, proceeded against that company under the *Workers' Compensation Act* 1926-1929 (N.S.W.), for an award of compensation. He alleged that he had been working in dusty places in the company's coalmine at Helensburgh, and that on 27th April 1932 he became incapacitated for work by " breathlessness and/or other injury to the lungs caused or aggravated by the inhalation of dust in " the mine. The company denied the alleged injury and incapacity, and also that Pye had been working in dusty places. The grounds upon which the company denied liability included the following: (*a*) that the incapacity (if any) was due to a disease caused by silica dust; (*b*) that the injury (if any) complained of was not an injury within the meaning of the *Workers' Compensation Act*; and (*c*) that the injury (if any) sustained was not an injury in respect of which the Workers' Compensation Commission had jurisdiction. A medical board found that Pye had " a partially incapacitating pulmonary fibrosis which could be due to coal dust " and that he was fit for light work. This was supported by other medical evidence to the effect that Pye was suffering from pneumoconiosis in an advanced stage, which was a disease brought about by the inhalation of dust such as was found in coal mines, and that although the disease could be caused by silica dust, the cause could be attributable equally to other kinds of dust. There was not any evidence before the Commission as to the constituent elements of the dust in the mine where Pye worked.

The Commission found (*a*) that Pye was partially incapacitated for work; (*b*) that such partial incapacity was due to pulmonary fibrosis and resulted from the inhalation of dust in the company's mine; (*c*) that the disease was of such a nature as to be contracted by a gradual process, and Pye's employment with the company was employment to the nature of which the disease was due; and (*d*) that on the evidence before it it was not satisfied that Pye's partial incapacity for work resulted from a disease caused by silica dust. Upon these findings the Commission made an award of compensation in favour of Pye. The Commission did not find affirmatively that the disease to which Pye's incapacity for work was due was not

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caused by silica dust. At the request of the company, under sec. 37 (4) of the *Workers' Compensation Act* 1926-1929, the Commission submitted the following questions for the decision of the Supreme Court :—

(1) Did the Commission err in law in holding :—

(*a*) That, the company having in its filed answer raised the defence under the exception to the definition of " injury " in sec. 6 (1) of the *Workers' Compensation Act*, that Pye's incapacity (if any) was due to a " disease caused by silica dust," the onus of proving that allegation rests upon the company ?

(*b*) That it was unnecessary for Pye to allege in his filed application for determination that his disabling disease did not come within the exception to the definition of " injury," or to prove that such disease was not one which came within such exception as a " disease caused by silica dust " ?

(2) Is there any evidence to support the Commission's findings :—

(*a*) That Pye's partial incapacity for work was due to pulmonary fibrosis, and resulted from the inhalation of dust in the company's coal mine ?

(*b*) That the disease which partially incapacitated Pye for work was of such a nature as to be contracted by a gradual process, and his employment with the company was employment to the nature of which the disease was due ?

(3) Did the Commission err in law in holding :—

(*a*) On the evidence adduced, that it was entitled to find that Pye was partially incapacitated for work by " injury " as defined by sec. 6 (1) of the Act ?

(*b*) That Pye had discharged the onus of proof which rested upon him ?

(*c*) That the onus of proof had not been discharged by the company that Pye's partial incapacity for work resulted from a disease caused by silica dust ?

The Full Court of the Supreme Court answered questions 2 (*a*) and (*b*) in the affirmative and, by a majority, answered questions

1 (*a*) and (*b*), and 3 (*a*) and (*b*) in the affirmative, and 3 (*c*) that the onus of proof did not lie on the company : *Pye* v. *Metropolitan Coal Co. Ltd.* (1).

From that decision, so far as it related to questions 1 (*a*) and (*b*), and 3 (*a*), (*b*) and (*c*), Pye now, by special leave, appealed to the High Court.

Ingham (with him *Miller*), for the appellant. The question is whether the onus was upon the appellant, as applicant, to prove that the disease from which he was suffering was not caused by silica dust. It is a question of interpretation of the *Workers' Compensation Act* 1926-1929, particularly sec. 6 (1). An exception may be of two kinds, namely, one which excepts the particular thing out of the general category, and another which qualifies the particular thing (*Munro, Brice & Co.* v. *War Risks Association Ltd.* (2) ; *Welford and Otter-Barry's Fire Insurance*, 1st ed. (1911), pp. 124, 125). The concluding clause in sec. 6 (1) is an exception, not a qualification ; therefore the onus of proof is upon the respondent. Having regard to the objects of the Act it should, so far as is reasonably possible, be construed in favour of applicants for compensation (*Smith* v. *Mann* (3)). The Legislature, especially as regards a disease contracted by gradual process, did not intend that in order to establish a claim otherwise good, a worker should be required to pursue inquiries extending over many years, or that he should be required to produce evidence of a highly scientific or technical nature. The words " other than " as appearing in sec. 6 (1) create an exception (*Wrotesley* v. *Adams* (4) ; *Stroud's Judicial Dictionary*, 2nd ed. (1903), vol. II., p. 1369), and mean " does not include." It is sufficient for an applicant to prove an " injury " which, as defined by sec. 6 (1), is a more comprehensive term than " disease." Once it is established that the disease which resulted in the injury complained of arose out of the employment, the onus of proving that that disease was caused by silica dust is upon the respondent (*Motor Union Insurance Co.* v. *Boggan* (5) ; *Gorman* v. *Hand-in-Hand Insurance Co.* (6)), and it is immaterial that the exception

(1) (1933) 34 S.R. (N.S.W.) 206 ; 51 N.S.W.W.N. 44.
(2) (1918) 2 K.B. 78, at p. 89.
(3) (1932) 47 C.L.R. 426.
(4) (1559) 1 Plow. 187, at p. 195 ; 75 E.R. 287, at p. 300.
(5) (1923) 130 L.T. 588.
(6) (1877) I.R. 11 C.L. 224.

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appears in sec. 6 (1) only, and not in sec. 7 of the Act (*Munro, Brice & Co.* v. *War Risks Association Ltd.* (1)). In the interpretation of a statute which lays down a general principle exceptions should be construed against those who put them forward (*Wood* v. *Wood* (2)). In dealing with applications under the Act everything in the nature of a technicality should be avoided (*Powell* v. *Main Colliery Co.* (3)). Many of the rules of pleading under the *Common Law Procedure Act* are not applicable to matters under the *Workers' Compensation Act*. An applicant merely files particulars, and it is a question for the arbitrator or Commission to decide on the facts whether the matter is within the scope of the Act or not.

E. M. Mitchell K.C. (with him *Jaques*), for the respondent. Although technical forms of pleading under the ordinary rules do not apply to matters under the *Workers' Compensation Act*, the onus is, nevertheless, upon an applicant for compensation to prove that the injury complained of is within the scope of the Act. It is wholly fallacious to treat the definition clause in sec. 6 (1) as if it contained an exception from liability. The clause merely states what is an "injury" under the Act; it is not a declaration of liability, but is a description of the extent of the Act. This view is supported by the provisions of secs. 4 and 5. The real purpose and effect of sec. 6 (1), in this connection, is to show that "injury" does not include a "silica dust" disease, that is, that the Act does not apply to disease caused by silica dust. The operation of sec. 7, which is the operative section, is limited to those who receive an injury as described in the Act. The onus of proving that such an injury had been received and that the matter is within the jurisdiction of the Commission is upon the applicant (*Dothie* v. *Robert Macandrew & Co.* (4); *Skailes* v. *Blue Anchor Line Ltd.* (5)). It is for the applicant to show that he comes within the scope of the Act. To assist him to do so elaborate machinery has been set up by the Act, e.g., sec. 51; therefore the objection that an applicant would be required to overcome unreasonable preliminary technicalities, and be put to unreasonable expense and trouble in order to prove his

(1) (1918) 2 K.B., at p. 88.
(2) (1923) 130 L.T. 305; 16 B.W.C.C. 208.
(3) (1900) A.C. 366, at pp. 371, 372.
(4) (1908) 1 K.B. 803.
(5) (1911) 1 K.B. 360.

case, is without any real foundation. If an applicant leaves his case consistent either with liability or non-liability he cannot succeed (*Innes or Grant* v. *G. and G. Kynoch* (1); *Barnabas* v. *Bersham Colliery Co.* (2)). The Act and the rules thereunder place upon an applicant the onus of proving the cause of his injury (see *Workers' Compensation Rules*, 1926-1930, rr. 7, 8; Forms 1, 2, 4, 6, 7). The Workers' Compensation Commission is a Court of inferior jurisdiction; therefore a presumption in favour of its jurisdiction should not be made (*Amalgamated Society of Carpenters and Joiners, Australian District* v. *Haberfield Pty. Ltd.* (3); *R.* v. *Commissioners for Special Purposes of the Income Tax* (4)). If its jurisdiction is challenged, then an applicant, in order to succeed, must prove that the matter of his complaint is a matter within the jurisdiction (*Dothie* v. *Robert Macandrew & Co.* (5); *Innes or Grant* v. *G. and G. Kynoch* (6); *Mayor and Aldermen of the City of London* v. *Cox* (7); *Taylor* v. *Blair* (8)). The exception as to silica dust in sec. 6 (1) refers to "disease," not "injury"; therefore the decision in *Munro, Brice & Co.* v. *War Risks Association Ltd.* (9) does not apply. Where a matter is peculiarly within the knowledge of one party the onus of proof is upon that party. This applies particularly in the case of a disease contracted by gradual process. An applicant must prove such facts as bring him prima facie within the definition of "injury" contained in sec. 6 (1). The reason why it was held in *Wheeler* v. *Bavidge* (10) that the defendant, who relied upon an exception, had to plead it was because it was a matter peculiarly within his knowledge.

[STARKE J. referred to *Vavasour* v. *Ormrod* (11) and *Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), pp. 60, 61.]

Those are illustrations of the invariable rule in the old common law cases.

Ingham, in reply. This claim was brought under sec. 7 (4) of the Act, which confers rights and imposes liabilities; it is for the

(1) (1919) A.C. 765, at p. 771.
(2) (1910) 4 B.W.C.C. 119.
(3) (1907) 5 C.L.R. 33, at p. 46.
(4) (1888) 21 Q.B.D. 313, at p. 319.
(5) (1908) 1 K.B. 803.
(6) (1919) A.C. 765.
(7) (1867) L.R. 2 H.L. 239, at pp. 261-263.
(8) (1789) 3 T.R. 452; 100 E.R. 672.
(9) (1918) 2 K.B. 78.
(10) (1854) 9 Ex. 668; 156 E.R. 286.
(11) (1827) 6 B. & C. 430; 108 E.R. 509.

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respondent to show that an exception appears in another part of the Act. All that an applicant is required to prove under sec. 7 (4) is "a disease which is of such a nature as to be contracted by a gradual process." The purpose and effect of sec. 7 (4) is to relieve the worker of a certain amount of the onus of proof (*Munro, Brice & Co.* v. *War Risks Association Ltd.* (1)). The evidence shows that the appellant's condition could be due either to coal dust or to silica dust, and that he was exposed to coal dust for not less than thirty-eight years.

Cur. adv. vult.

May 14.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. A worker who has received an injury is entitled under the *Workers' Compensation Act* 1926-1929 of New South Wales to receive compensation from his employer in accordance with the Act. In the Act, "injury" means personal injury arising out of and in the course of the employment and includes a disease so arising, whether of sudden onset or of such a nature as to be contracted by gradual process, other than a disease caused by silica dust.

The facts as found in the present case by the Workers' Compensation Commission were that the worker was suffering from a disease known as pulmonary fibrosis, the result of inhaling dust in the respondent's coal mine, but the Commission also found that "on the evidence before it the Commission is not satisfied that the partial incapacity for work of the applicant results from a disease caused by silica dust." The majority of the learned Judges of the Supreme Court of New South Wales held that the onus of proving that his injury arose from a disease other than a disease caused by silica dust was upon a worker claiming compensation for injury. In our judgment that decision was right. The Act, by adopting a definition of the word "injury," limits the area or ambit of disease for which the employer shall be responsible, and the onus of proving that he is within this area or ambit lies upon the worker in just the same manner as it lies upon him to prove that the injury arose

(1) (1918) 2 K.B., at pp. 82, 85.

out of and in the course of his employment (*Pomfret* v. *Lancashire and Yorkshire Railway Co.* (1)). The condition of liability is qualified. The disease for which the employer is responsible is a disease other than a disease caused by silica dust, and the burden —the whole burden—of proving the condition essential to that liability "rests upon the worker and upon nobody else." The reasoning of *Bailhache* J. in *Munro, Brice & Co.* v. *War Risks Association Ltd.* (2), accords, in our opinion, with this view, especially the third proposition of the learned Judge.

The appeal should be dismissed.

RICH J. The *Workers' Compensation Act* 1926-1929 (N.S.W.) provides, by sec. 7 (1), that a worker who has received an injury shall receive compensation from his employer in accordance with the Act. It defines "injury" by sec. 6 (1) to mean "personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process other than a disease caused by silica dust." The last words of the definition, namely, "other than a disease caused by silica dust," have reference to the *Workmen's Compensation (Silicosis) Act* 1920. This Act provides a special scheme of compensation for incapacity resulting from diseases so caused. Probably the Legislature considered that the two Acts between them covered the whole ground—a view which may be mistaken.

The worker in the present case obtained from the Workers' Compensation Commission compensation under the *Workers' Compensation Act* 1926-1929 for personal injury consisting of a disease contracted by gradual process other than a disease caused by silica dust. On appeal by way of case stated, the Supreme Court by a majority, *Halse Rogers* J. and *James* J., *Harvey* A.C.J. dissenting, decided against the award upon the ground that the worker had not disproved that his disease was caused by silica dust. The Commission in its findings had stated that the worker's incapacity was due to pulmonary fibrosis due to the inhalation of dust in the employer's coal mine, and that it was not satisfied that the incapacity resulted

(1) (1903) 2 K.B. 718.

(2) (1918) 2 K.B., at pp. 88, 89.

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from a disease caused by silica dust. *Harvey* A.C.J. was of opinion that the legislation did not cast upon the worker the burden of negativing silica dust as the cause of his disease. I agree in this opinion. I have had the opportunity of reading the judgments prepared by my brothers *Evatt* and *McTiernan* and am in general agreement with their opinions. But as I find myself disagreeing with the majority of the Supreme Court I shall state shortly the grounds upon which my opinion is based. I do not think that the form in which the provisions are cast, i.e., the structure of the legislative enactment, determines whether a qualification is to be treated as a condition which must be negatived by the party relying upon the enactment, or as in the nature of a special or particular ground upon which the party resisting the application of the enactment may exclude himself from its operation. Of course, form must be regarded in ascertaining the intention of the statute, but the substantial nature of the provision and the principle upon which it proceeds cannot be disregarded. Although the decision in *Morgan* v. *Babcock & Wilcox Ltd.* (1) relates to the defeasance of a liability by matter subsequently arising, it illustrates the need for attending to the substance of the enactment. We have in the *Workers' Compensation Act* 1926-1929 a general law for compensating injury including disease arising out of and in the course of employment. In the *Workmen's Compensation* (*Silicosis*) *Act* 1920 we have a very special provision dealing with a special cause of disease occurring in special industries. The intention of the Legislature is clear, that a worker who comes within the purview of the special provision shall not also have the benefit of the general. The general provision includes disease with injury. It must arise out of and in the course of the employment, but, except in so far as the precise cause of the disease aids in deciding whether it did so arise, its exact cause is of no consequence. It is enough to prove that the disease was contracted in a manner which makes it an injury arising out of and in the course of employment. But, if a disease which answers this description in fact is caused by silica dust, the disease, because of its cause, which for all other purposes is beside the point, falls outside the general statute. In other words, the statute introduces

(1) (1929) 43 C.L.R. 163.

cause as a new fact important only as a ground of exclusion. In my opinion this means that cause consisting of silica dust is a ground for defeating a liability which would arise out of the other facts if they stood alone. The party, therefore, who relies upon the matter which defeats the liability arising from the other facts, in the absence of that matter must establish it by evidence.

The appeal should be allowed and the questions answered as follows :—1 (*a*) and 1 (*b*) : No. 2 (*a*) and 2 (*b*) : Yes. 3 (*a*), (*b*) and (*c*) : No.

EVATT J. Sec. 7 (1) of the New South Wales *Workers' Compensation Act* 1926-1929 entitles a worker who has received an " injury," whether at or away from his place of employment, to receive compensation from his employer in accordance with the Act. Sec. 7 (4) provides that, where the injury is a disease which is of such a nature as to be contracted by a gradual process, compensation is to be payable by the employer who last employed the worker.

" Injury " is defined in sec. 6 (1) as meaning " personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process *other than a disease caused by silica dust.*" I italicize the words which have led to the present dispute. The question in issue is whether, where the injury consists of a disease of such a nature as to be contracted by gradual process. a person who claims compensation under sec. 7 must himself affirmatively establish that the disease was *not* caused by silica dust. The answer to the question depends upon the meaning of sec. 7 as controlled by the definition section.

Reading the definition section into sec. 7 (1), the result is that the worker who receives an " injury " as defined is entitled to receive compensation. In order to establish his right, he must prove that he is suffering from a disease arising out of and in the course of the employment. But it is important to notice that, in the case of an industrial or " gradual process " disease mentioned in sec. 7 (4), it is not necessary to show any relationship between the disease and the particular employment the worker was in when last employed. " No doubt in the case of the ultimate as in that

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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 " (per *Rich* J. in *Smith* v. *Mann* (1)).

Every disease is included in the definition of " injury," the words " *whether* of sudden onset *or* of such a nature as to be contracted by gradual process " being words of extension indicative of the Legislature's desire to extend the field of compensable diseases to the utmost limit. The Legislature saw fit to impose one restriction, and one restriction only, upon this all-embracing category of diseases. A " disease caused by silica dust," but no other disease whatsoever, is excluded from the category.

It is argued for the respondent that as the " description " of " injury " is contained only in the definition section, the worker must show that each and every part of the description applies to his case, and therefore the onus must be upon him to show that in the case of " gradual process " diseases, and, even, as was boldly contended, in the case of every disease, the disease is something " other than a disease caused by silica dust." But the use of the word " description " does not, of itself, solve the present problem. In one sense, everything contained in every definition is necessarily a part of the " description " of the thing defined. But attention has to be paid to the relationship between the component parts which make up the definition, and to their relationship with the element which is alleged to be an exception or qualification.

The solution of the question is not advanced by the argument that the definition section marks out the jurisdiction of the New South Wales Workers' Compensation Commission, and, on that account alone, the onus is on the workman to exclude silica dust as a possible cause of his disease. The Commission has exclusive jurisdiction to " examine into, hear and determine all matters and questions arising under " the Act, (sec. 36 (1)), including the determining of the question whether a worker is entitled to compensation. The argument based on jurisdiction tends to confuse possible error of fact or law with possible absence of jurisdiction. The real

(1) (1932) 47 C.L.R. 426, at p. 440.

question is the meaning and application of the Act, the Commission being vested with ample jurisdiction to determine it. And the question should be determined by the Commission in precisely the same way as the Supreme Court should determine it if the latter were invested with the original jurisdiction of the Commission.

On the other hand, the workman contends that the definition is only a short way of writing " injury " where it occurs in sec. 7 (1), that the result of reading sec. 7 (1) and the definition together is that a worker who shows either that his disease arose out of and in the course of the employment or, in the case of a gradual disease, that it was due to the nature of the employment he was engaged in, is not required to go further and exclude the possibility that such employment involved any exposure to silica dust or that such exposure was the cause of his disease.

Reliance is then placed upon the principles suggested by *Bailhache* J. in *Munro, Brice & Co.* v. *War Risks Association Ltd.* (1), particularly rule 5 which is: " In construing a contract with exceptions it must be borne in mind that a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. The form in which the contract is expressed is therefore material." It is said (1) that the form of that part of the definition which commences with the words " other than " means " except in the case of," and so an exception *stricto sensu* is being introduced, and (2) that the exception in this case is one which " merely excludes from the operation of the promise particular classes of cases which, but for the exception, would fall within it, leaving some part of the general scope of the promise unqualified " (Rule 2).

This line of reasoning would appear to be more satisfactory. Where, therefore, *Halse Rogers* J. says: " If the diseases had been scheduled, and non-silica-dust diseases had been in schedule A and silica-dust diseases had been in schedule B, and the definition had set out that injury was to include any disease in schedule A, the onus would, in my opinion, have been clearly on the applicant," the statement cannot be questioned. But where his Honor adds: " And I think that the position is exactly the same with the definition as it stands," the accuracy of the latter conclusion depends upon

(1) (1918) 2 K.B., at pp. 88, 89.

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his Honor's opinion that " it is not all vocational diseases that are to be classed as injuries: it is only non-silica-dust diseases." But in thus stating the position his Honor seems to have done exactly what *Bailhache* J. (*Munro, Brice & Co.* v. *War Risks Association Ltd.* (1)) deprecates in rule 5. He has turned a promise with one exception " by an alteration of phraseology " into a qualified promise, and treated as of no significance the form of expression used in the document requiring construction.

It would therefore appear that the view adopted by *Harvey* A.C.J. is the better one, and that the words " other than a disease caused by silica dust " are used to introduce a true exception.

And the opinion of *Harvey* A.C.J. is greatly supported by reference to the history of the legislation which is as follows :—

(1) The *Workmen's Compensation Act* 1916 was replaced by the *Workers' Compensation Act* 1926, which greatly extended the scope of the benefits conferred by the former Act, including those in connection with industrial diseases. Under the former Act only certain diseases and employments were scheduled. Under the latter Act all " gradual process " diseases were covered. As *Dixon* J. says: " 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 " (*Smith* v. *Mann* (2)). His Honor added (at p. 449) :—" 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."

(2) Meanwhile, in the year 1920, the *Workmen's Compensation (Silicosis) Act* was passed. By that Act the Executive Government was empowered to provide a scheme for payment of compensation by the employers of workmen in any specified industry or process involving " exposure to silica or other dust." It should also be

(1) (1918) 2 K.B., at p. 89.

(2) (1932) 47 C.L.R., at p. 448.

noted that the *Workmen's Compensation (Silicosis) Act* 1920 has to be construed with the *Workmen's Compensation Act* 1916.

(3) By sec. 4 of the *Workers' Compensation Act* 1926, the words "or other" were omitted from the expression in the 1920 Act, so that thenceforward any statutory scheme was to be limited to those industries or processes which involved "exposure to silica dust." At the same time, in sec. 6 of the 1926 Act, "injury" was defined so as to include a disease contracted by a worker in the course of his employment, and to which the employment was a contributing factor, and the definition went on to conclude as follows: "But does not include a disease caused by silica dust."

(4) This definition of "injury" was amended by the Act of 1929, where it assumed the form which has already been set out.

This history of the relevant legislation shows quite clearly that the only reason for the Legislature's excepting from the category of gradual process those diseases caused by silica dust was that suitable provision for compensation had already been made. It was clearly contemplated that where exposure to silica dust was such a feature of an industry as to give rise to "silica dust" diseases, a workman sufficiently associated with such an industry should become entitled to compensation under a scheme upon his contracting such a disease. Thus any scheme the Minister provides under the Act of 1920 must proceed upon the basic conditions (*a*) that the industry involves exposure to silica dust, (*b*) that the workman is suffering from "silicosis" or from "silicosis accompanied by tuberculosis" or from any other disease of the pulmonary or respiratory organs caused by exposure to silica dust, and (*c*) that the workman has been employed in the specified industry for not less than five hundred days during the period of seven years preceding his death or incapacity.

The conclusion is that the words "other than a disease caused by silica dust" are intended mainly to exclude from the operation of the *Workers' Compensation Act* 1926-1929 diseases contracted by a gradual process where the gradual process is due to exposure to silica dust. In the event of the work involving a sufficient exposure of employees to silica dust to result in silicosis, &c., it is assumed by the Legislature that suitable provision will be made for a workman

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who works in that particular industry and contracts that particular disease. In other words, the Legislature was avoiding the possibility of duplicating benefits conferred and obligations imposed. The words " other than a disease caused by silica dust " used in relation to gradual-process diseases were inserted by the Legislature so as to enable an employer to show that, in any particular case of gradual disease, it was due to the workman's having been exposed to silica dust in the industry or employment where he was engaged. It is not sufficient for the employer to show that the applicant suffers from a disease which *may* have been caused by silica dust. He must show that it has been so caused. No doubt in the case of the specific disease of silicosis, the diagnosis of the disease will exclude every cause other than exposure to silica dust. But no such inference or deduction can be made in the case of pulmonary fibrosis, the disease which incapacitated the present appellant. The Legislature has undoubtedly assumed that a compensation scheme will be put into operation in every process or industry which involves such an exposure to silica dust as to cause silicosis, whether accompanied by tuberculosis or not. Schemes have been put into operation in New South Wales after elaborate inquiry into the conditions of a particular industry or process, but the coal mining industry has not been included in any such scheme.

The appellant worked as a coal miner in the respondent's colliery on the South Coast of New South Wales for a period of thirty-eight years. The Commission was satisfied that his pulmonary fibrosis was a disease contracted by the gradual process of inhaling dust in the respondent's mine. There was no evidence whatever that silicon dioxide was a constituent of the dust inhaled in the mine, still less that such a constituent was the cause of the pulmonary fibrosis. Even if the onus of proof were regarded as lying on the worker, there was sufficient material before the Commission to warrant the inference that silica had nothing to do with the appellant's disease, particularly in view of the fact that the coal mining industry had not been specified under the *Workmen's Compensation (Silicosis) Act* 1920.

The appeal should be allowed and the questions answered as follows:—1 (*a*): No. 1 (*b*): No. 2 (*a*): Yes. 2 (*b*): Yes. 3 (*a*): No. 3 (*b*): No. 3 (*c*): No.

McTIERNAN J. The appellant, who is a coal miner, proceeded against the respondent under the *Workers' Compensation Act* 1926-1929 of New South Wales for an award of compensation. He alleged that he had been working in dusty places and became incapacitated for work by breathlessness and/or other injury to the lungs caused or aggravated by the inhalation of dust in the respondent's mine. Sec. 7 of the Act entitles "a worker who has received injury" to obtain compensation from his employer in accordance with the Act. Sec. 6 says that "'Injury' means personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process other than a disease caused by silica dust."

The grounds upon which the respondent denied liability to pay compensation to the appellant included the following:—(*a*) The incapacity (if any) is due to a disease caused by silica dust. (*b*) The injury (if any) complained of is not an injury within the meaning of the *Workers' Compensation Act*. (*c*) The injury (if any) sustained is not an injury in respect of which the Commission has jurisdiction. The Commission made the following findings:—(*a*) The incapacity for work of the appellant since the 27th April 1932 has been, and still is, partial: (*b*) The appellant's partial incapacity for work is due to pulmonary fibrosis and results from the inhalation of dust in respondent's coal mine: (*c*) The disease which partially incapacitates the applicant for work is of such a nature as to be contracted by a gradual process, and his employment with the respondent was employment to the nature of which the disease is due: (*d*) On the evidence before it the Commission is not satisfied that the partial incapacity for work of the applicant results from a disease caused by silica dust.

Upon these findings the Commission made an award of compensation in favour of the appellant. The Commission did not find affirmatively that the disease to which the appellant's incapacity for work was due was not caused by silica dust.

The main question arising in this appeal is whether, upon the true construction of the Act, such a finding is essential to the validity of the award. It turns upon what the Legislature intended by adding the words "other than a disease caused by silica dust" to the

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definition of injury in sec. 6 (1). The principal object of the Act is to entitle a worker who is disabled from earning wages by a cause connected with the employment to receive compensation from the employer during the period of such disablement and to make provision for securing and enforcing that right. Where a worker receives an injury in the ordinary sense of the word the connection between the cause of disablement and the employment, necessary to found the disabled worker's right to compensation, is expressed by the words " arising out of and in the course of the employment." The definition of " injury " cannot be neatly written into sec. 7, which is the section whereby the worker's right to compensation is enacted. The words " arising out of and in the course of the employment " are in themselves a complete statement of what is a reasonable and necessary foundation of the worker's right to compensation. The words " other than a disease caused by silica dust " appended to the definition of injury would, if intended by the Legislature to be incorporated as part of the operative provisions creating the worker's right, introduce a different and strange criterion. These considerations suggest that these words are not part of the enactment creating the worker's right but a separate statement of an exceptional case in which the right granted by the Act will not be enforced. The word " disease " as part of the definition of " injury " is to be written into sec. 7 merely, as I read the Act, to assimilate the provisions relating to compensation for disablement due to disease with what is enacted with respect to the right of a worker who has sustained injury in the ordinary and natural sense of the word, and in that collocation means a disease arising out of and in the course of the employment whether of sudden onset or of such a nature as to be contracted by a gradual process. That is the criterion upon which the Act intended that the right of a worker disabled by disease should depend. It follows that the phrase " other than a disease caused by silica dust," which is appended to the definition of " injury," should not be construed as a limitation of what is intended to be within the purview of the enactment whereby the right to compensation is enacted. The effect of this phrase therefore, is that it states a ground of immunity from the resulting liability which, subject to other defences, is imposed upon the employer.

In *R.* v. *James and Johnson* (1), Lord *Alverstone* C.J. in delivering the judgment of the Court laid down a principle of construction which affords guidance in the solution of the present difficult question. The Chief Justice said : " We think the substance of the authorities is this : That it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception."

I agree with *Harvey* A.C.J. that the words " other than a disease caused by silica dust " are a proviso which the appellant was not bound to negative in order to establish his right. The onus, therefore, rests on the employer to prove that the disease which disables the worker was caused by silica dust, if the worker's right to compensation is to be questioned on that ground. But in the course of the proceedings the onus may shift to the worker to disprove the employer's case in relation to that issue.

The construction of the Act which I have adopted is, in my opinion, supported by the history of the legislation contained in the judgment of my brother *Evatt*.

The appeal should, in my opinion, be allowed and the questions answered as follows :—1 (*a*) and 1 (*b*) : No. 2 (*a*) and 2 (*b*) : Yes. 3 (*a*), 3 (*b*) and 3 (*c*) : No.

*Appeal allowed. Order of Supreme Court discharged. Case remitted to Workers' Compensation Commission with the intimation that the questions asked are answered as follows :—*1 (*a*) *and* 1 (*b*) *: No.* 2 (*a*) *and* 2 (*b*) *: Yes.* 3 (*a*), 3 (*b*) *and* 3 (*c*) *: No. Respondent to pay costs of the appeal and proceedings before the Supreme Court.*

Solicitor for the appellant, *Thomas A. Maguire*, Wollongong, by *Thomas B. McInerney*.

Solicitors for the respondent, *Sparke & Helmore*, Newcastle, by *Sparke & Broad*.

J. B.

(1) (1902) 1 K.B. 540, at p. 545.