[HIGH COURT OF AUSTRALIA.]

WARD . . . . . APPELLANT;
APPLICANT,

AND

CORRIMAL-BALGOWNIE COLLIERIES LIMITED . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 10, 11; *Dec.* 23.

Latham C.J., Rich, Dixon and McTiernan JJ.

Workers' Compensation—Injury—"Total and permanent disablement"—Contributing factors—Relation to employment or injury—Workers' Compensation Act 1926-1927 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 32 *of* 1927), *sec.* 9 (3).

Sec. 9 (3) of the *Workers' Compensation Act* 1926-1927 (N.S.W.) provided that "the total liability of an employer in respect of compensation under this section shall not, except in the case of a worker whose injury results in total and permanent disablement, exceed one thousand pounds in any one case."

Held, by *Latham* C.J., *Rich* and *Dixon* JJ., that where a worker receives an injury within the meaning of the Act which results in partial incapacity, and other causes not associated with the injury later bring about total disablement, the worker is not entitled to the benefit of the exception contained in the sub-section.

Held, further, on the facts of the case, by *Latham* C.J., *Rich* and *Dixon* JJ. (*McTiernan* J. dissenting), that, in view of the findings, the conclusion was justified that the injury, within the meaning of the Act, suffered by the claimant worker had not resulted in his total and permanent disablement but had only partially contributed thereto.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

A case stated by the Workers' Compensation Commission of New South Wales, at the request of the applicant, Thomas Ward, for the determination by the Supreme Court of New South Wales of certain questions, was, as amended, substantially as follows :—

1. This case is stated at the request of the respondent under the provisions of sec. 37 (4) of the *Workers' Compensation Act* 1926-1929 (N.S.W.), and refers for the decision of the Supreme Court certain questions of law which arose in proceedings before the Workers' Compensation Commission of New South Wales.

2. The applicant, Thomas Ward, was employed as a coal-miner at the respondent colliery, and claimed that the inhalation of dust at such work had resulted in his becoming incapacitated for work on 17th April 1929, by pneumoconiosis or other injury to his lungs.

3. On 22nd December 1930, the commission made an award in his favour, which, omitting formal parts, is as follows :—" Having duly considered the matters submitted, the commission, on the facts, finds :—(i) That the above-named applicant received injury in the course of his employment as a coal-miner through contracting pneumoconiosis to which his employment with the above-named respondent was a contributing factor. (ii) That the fibrosis of the applicant was a result of exposure to dust in his employment. Thereupon the commission orders and awards as follows :—(*a*) That the respondent do pay to the applicant the weekly sum of £4 17s. as compensation for personal injury by disease received by the applicant on 17th April 1929, in the course of his employment as a worker employed by the respondent, and to which the employment was a contributing factor, such weekly payment to commence as from 17th April 1929, and continue to 11th June 1930, both dates inclusive, and on and after 12th June 1930 at the rate of £4 8s. 6d. a week, such last-mentioned payment to continue during the total or partial incapacity for work of the applicant or until the same shall be ended, increased, diminished or redeemed in accordance with the provisions of the above-mentioned Act.

4. The applicant was examined from time to time by medical boards.

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5. Compensation was paid under that award by the respondent until 18th July 1933, when, in all, the applicant had received as compensation the sum of £1,000.

6. On 18th March 1936 the applicant commenced proceedings before the Workers' Compensation Commission, claiming a continuance of the weekly payments under the Act from 19th July 1933, on the ground that he was totally and permanently incapacitated by pulmonary fibrosis caused or aggravated by work as a coal-miner, and cardiac disability aggravated by pulmonary fibrosis. The respondent denied liability on the ground that the applicant was not so disabled.

7. On 30th October 1936 the following judgment in favour of the applicant was delivered by the deputy chairman, *Lamond* J.:— "The applicant, who is now aged 64 years, had been employed for some thirty years by the respondent company, when he became incapacitated for work and was paid compensation at the rate of £4 17s. per week as from 17th April 1929, and at the rate of £4 8s. 6d. per week from 12th June 1930, under an award made by the commission on 22nd December 1930. Prior to the making of the beforementioned award there were a number of references to medical boards . . . The medical board of 10th October 1930, which was the last medical board prior to the commission making its award of 22nd December 1930, expressed the view that applicant's then incapacity was reasonably attributable to his occupation as a coal-miner. The commission's findings were:—1. That the applicant received injury in the course of his employment as a coal-miner through contracting pneumoconiosis to which his employment with respondent was a contributing factor. 2. That the applicant's fibrosis was a result of exposure to dust in his employment. Compensation was paid in accordance with such award until 18th July 1933, by which date the sum of £1,000 had been paid. Within the period from December 1930 to July 1933, three medical boards have certified as to applicant's condition, and since then three additional medical boards have also furnished certificates. . . . Examination of the certificates of the various medical boards between 1929 and 1935 shows that the worker was found by some or other of such boards to suffer from chronic bronchitis, bilateral pulmonary fibrosis, signs

of arteriosclerosis and myocardial degeneration. In addition the first board, presumably, mainly on the basis of an X-ray of applicant's chest, found him to be suffering from long-standing tuberculosis, though the activity of such tuberculosis lesion is not supported by later boards and in the last four boards no mention is made of a tubercular lesion of the lung. All the foregoing medical boards have been uniformly of the opinion that the worker was unfit for work. The applicant's case is governed by sec. 9 (3) of the *Worker's Compensation Act* 1926-1927, and no compensation will be payable in excess of £1,000 unless the case is one in which the worker has suffered total and permanent disablement. The commission, notwithstanding the award of 22nd December 1930, may treat applicant's present claim as a new cause of action (See judgment of *Halse Rogers* J. in *Wicks* v. *Union Steamship Co. of New Zealand* (1)) and may relieve the respondent company of further liability if it is established that the worker's condition either is not one of total and permanent disablement or that if such condition does exist, it is not the result of injury received by the applicant in the course of his employment and to which his employment was a contributing factor. On the evidence the commission finds that the worker is totally and permanently disabled. The question whether such condition results from applicant's occupation as a coal-miner is one to be decided partly on the medical board certificates and partly on the other medical evidence tendered in the course of the hearing. After considering this evidence the commission finds that applicant has pulmonary fibrosis due to his exposure to dust in the course of his employment as a coal-miner with the respondent company. The commission also finds that applicant suffers from myocardial degeneration, the diagnosis of which is based on (*a*) applicant's extreme breathlessness on exertion ; (*b*) applicant's blood pressure, which is definitely raised even for a man of sixty-four years of age, and (*c*) the presence of arteriosclerosis. Dr. Tansey, a medical witness for the applicant, thought that the pulmonary fibrosis could not but have a bad effect on the efficiency of the heart, though he agreed that some of applicant's heart trouble might be unassociated with his work as a coal-miner. Dr. Collins, who also gave evidence for

(1) (1933) 33 S.R. (N.S.W.) 267, at p. 272.

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the applicant, agreed that if the medical boards were right in thinking that applicant's fibrosis was non-incapacitating, its effect on applicant's cardiovascular condition would be minor. He himself, however, thought that the fibrosis was largely responsible for applicant's shortness of breath on exertion. Dr. C. G. McDonald, another medical witness, gave it as his opinion that the main cause of applicant's disability was his cardiovascular condition, which was not associated with his work. In considering the last medical board's certificate, viz., that of 3rd July 1935, it is possible to interpret the finding to mean that the pulmonary fibrosis from which applicant then suffered was of such a degree as to be non-incapacitating to a man suffering from that condition and no other. The remaining portion of the medical certificate is inconclusive on the question whether applicant's disability is or is not due in part to his pneumoconiotic condition. On the medical evidence tendered at the hearing as to applicant's condition the commission finds that applicant's disability for work is attributable partly to arteriosclerosis and myocardial degeneration and partly to pulmonary fibrosis. Where total incapacity results from two causes, partial compensation may be awarded (*Lewis* v. *Wrexham and Acton Collieries Ltd.* (1); *Chilby* v. *Bulli Colliery & Coke Works Ltd.* (2)). The extent to which the condition of pulmonary fibrosis has contributed to applicant's total incapacity is assessed by the commission at 20 per cent of such incapacity, in respect of which the commission makes an award for 17s. 9d. per week as from 19th July 1933 to 19th October 1935, and for 16s. per week as from 20th October 1935."

8. The commission then made the following award :—" Having duly considered the matters submitted, the commission :—(i.) Noted the commission's award of 22nd December 1930, in which the commission found that the applicant received injury in the course of his employment as a coal-miner through contracting pneumoconiosis, as the result of exposure to dust in his employment, and that his employment with the respondent was a contributing factor thereto; that the applicant was awarded a weekly payment of £4 17s. as compensation in respect of such injury, to continue ' during the total

(1) (1916) 115 L.T. 367; 9 B.W.C.C. 518. (2) (1927) 1 W.C.R. (N.S.W.) 267.

or partial incapacity for work of the applicant or until the same shall be ended, increased, diminished or redeemed in accordance with the provisions of the above-mentioned Act'; and that as at 19th July 1933 the applicant had received weekly payments totalling £1,000 under that award; (ii) for the reasons set out in its judgment found that:—1. The applicant worker has been totally and permanently disabled as from 19th July 1933. . . . 2. Such total and permanent disablement is due to two causes operating concurrently:—(*a*) Pulmonary fibrosis due to the nature of the applicant's employment causing him 20 per cent incapacity for work. (*b*) Arteriosclerosis and myocardial degeneration causing him 80 per cent incapacity for work. 3. The injury which the applicant worker received in the course of his employment on 17th April 1929 was a contributing factor to the total and permanent disablement for work which he has suffered since 19th July 1933.

Thereupon the commission hereby orders and awards as follows: —(*a*) That the respondent do pay the applicant the weekly sum of 17s. 9d. from 19th July 1933 to 19th October 1935 (both dates inclusive), and the weekly sum of 16s. as from 20th October 1935, as compensation for personal injury received by the applicant on 17th April 1929 arising out of and in the course of his employment as a worker employed by the respondent, such last-mentioned payment to continue during the total or partial incapacity of the applicant for work, or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Act."

9. The questions of law referred for the decision of the Supreme Court were as follows:—

(*a*) Did the commission err in law in awarding the above-mentioned applicant compensation at the rate of 17s. 9d. per week from 19th July 1933 to 19th October 1935, and 16s. per week from 20th October 1935?

(*b*) Whether the injury to the applicant resulted in his total and permanent disablement.

In compliance with a reference back by the Supreme Court on the case stated, the matter came before the commission, constituted as before, on 9th February 1938. No further evidence was tendered.

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As the result of its reconsideration the commission found :— "1. The applicant worker is, and has been since 19th July 1933, totally and permanently disabled. 2. Such total and permanent disablement is due to two causes : (*a*) pulmonary fibrosis due to the nature of applicant's employment causing him partial incapacity for work to the extent of 20 per cent ; (*b*) arteriosclerosis and myocardial degeneration not due to the nature of his employment causing him partial incapacity for work to the extent of 80 per cent. The conditions referred to in (*a*) and (*b*) herein are not causally associated. 3. By reason of facts referred to in par. 2 hereof the applicant worker's injury did not result in his total and permanent disablement."

The Full Court of the Supreme Court answered the questions submitted :—(*a*) Yes. (*b*) No.

From that decision Ward appealed to the High Court.

Miller (with him *Dwyer*), for the appellant. The appellant is within the exception contained in sec. 9 (3) of the *Workers' Compensation Act* 1926 (N.S.W.), and is thus entitled to a continuance of full compensation. The exception contained in sec. 9 (3) is satisfied when, as here, the total and permanent disablement of the worker is materially contributed to by incapacity arising from an injury sustained by him to which the Act applies. The sub-section does not require that a worker shall prove that his injury accounts for his total and permanent disablement, it only requires that it should result from his injury. Here, in the absence of the incapacity resulting from his injury, the appellant would not be totally and permanently disabled. The award made by the commission in 1930 shows that the appellant's total disability arose from the injury received by him in the course of his employment. The court below erroneously interpreted the word " results " in sec. 9 (3) as meaning " wholly and solely causes " (*Harwood* v. *Wyken Colliery Co.* (1) ; *McNally* v. *Furness, Withy & Co. Ltd.* (2) ; *Lewis* v. *Guest, Keen and Nettlefold Ltd.* (3) ; *Dunham* v. *Clare* (4) ; *Stroud's Judicial Dictionary, Supplement* (1931), p. 290, *sub tit.* " Direct cause " ; *Willis* on *Workmen's Compensation Acts*, 31st ed. (1938), p. 218, and cases

(1) (1913) 2 K.B. 158, at p. 169.
(2) (1913) 3 K.B. 605, at p. 614.
(3) (1928) 1 K.B. 20, at p. 40.
(4) (1902) 2 K.B. 292.

there cited). The certificates given by the last three medical boards are contradictory and, therefore, should have been disregarded. Those certificates were not taken as conclusive on the matter. The whole matter should have been regarded as open and not to be determined by any certificate. Also, the certificates given by the first four medical boards were before the commission when it made its award in 1930, therefore they could not have been regarded as conclusive as at that time. The fact that the appellant was then suffering from a heart condition makes irrelevant the fact that he is now suffering from that condition (*Clover, Clayton & Co. Ltd.* v. *Hughes* (1)). On the last occasion the commission approached the matter from the wrong angle. Throughout, the appellant was totally incapacitated by pneumoconiosis.

[DIXON J. referred to *Wicks* v. *Union Steamship Co. of New Zealand* (2).]

Sec. 9 (3) of the 1926 Act was dealt with in *Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (3). The right to the benefit of the exception was acquired at the time the appellant received the injury. That right was not affected by the amendment to sec. 9 (3) made by the 1929 Act. " Injury " and exceptions thereto was dealt with in *Pye* v. *Metropolitan Coal Co. Ltd.* (4). Alternatively, in the circumstances of the case, the appellant is entitled to a continuance of compensation on a proportionate basis (*Lewis* v. *Guest, Keen and Nettlefold Ltd.* (5)).

Weston K.C. (with him *Rainbow*), for the respondent. The only matters for determination by this court are the questions of law propounded upon the case stated. The parties are bound by the case stated and are not at liberty to draw inferences. Were it not for the heart condition, which is not associated with his employment, the appellant would not be totally and permanently disabled. The degree of totality of permanent disablement is a matter for the legislature ; it is not a matter for decision by the court. The court is not in a position to act upon the footing that the initial incapacity

(1) (1910) A.C. 242.
(2) (1933) 33 S.R. (N.S.W.) 267, at p. 272.
(3) (1933) 50 C.L.R. 328.
(4) (1934) 50 C.L.R. 614 ; (1936) 55 C.L.R. 138.
(5) (1928) 1 K.B. 20.

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from a lung condition was total. Even if the initial finding was on the footing of total incapacity, it was not on the footing of permanent incapacity. The evidence shows that the incapacity progressively decreased as time passed by, and that a finding by the commission in 1936 that there was not any permanent or any incapacity from a lung condition would have been justified. A similar question arose in *Lewis* v. *Wrexham and Acton Collieries Ltd.* (1). There is a wide difference between an injury which " results in total and permanent disablement " and an injury which contributes in a material degree, with other factors, to total and permanent disablement. The latter position does not come within the scope of the exception in sec. 9 (3) (*Birch Brothers Ltd.* v. *Brown* (2)). The cases referred to on behalf of the appellant as supporting the submission that the expression " injury arising from accident " was not to be construed as meaning " injury arising merely from accident," relate only to the time when the injury occurred. The test of what is, for the purpose of sec. 9 (3), an injury resulting in total and permanent disablement is whether the injury which results is only partial within the meaning of sec. 11, or more than partial.

Miller, in reply.

Cur. adv. vult.

Dec. 23.

The following written judgments were delivered :—

LATHAM C.J. This appeal provides an illustration of the difficulties which arise in applying the idea of causation in the determination of legal problems.

Every effect is the result of a totality of concurring facts no one of which can with accuracy be regarded as in itself the cause of the effect. Strictly, when the totality of relevant circumstances comes into existence, the effect thereupon and at that very moment appears. If any other element were needed in order to produce the effect, the cause would not have been fully constituted. But such a view of cause and effect cannot be applied when it becomes necessary to attach liability to a person for some injury suffered by another

(1) (1916) 115 L.T. at p. 368; 9 B.W.C.C., at p. 521.

(2) (1931) A.C. 605, at pp. 615, 622, 630.

person. Thus, in a negligence case, it is common to speak of the negligent act or omission of the defendant as being the cause of an injury to the plaintiff, though it would not be disputed that other surrounding circumstances are as necessary to account for the resulting injury (in the place and at the time at which it actually occurred) as the act or omission of the defendant.

In the case of workers' compensation the cause of an injury (as distinct from the cause of an incapacity) is not the important matter. Most Workers' Compensation Acts require that the injury should arise out of and in the course of the worker's employment, whatever the cause may have been. In the case of the New South Wales *Workers' Compensation Act* 1926 (under which the present case arises) it is sufficient if the injury is received in the course of the worker's employment or, without his own default or wilful act, on the daily or other periodical journey between his place of abode and his place of employment (sec. 7). Compensation under the Act is not paid in respect of the injury. In this judgment I use the word "injury" in the sense in which that word is defined in sec. 6 of the Act: "'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."

Compensation is paid under the Act in respect of death or total or partial incapacity resulting from an injury (secs. 8 and 9) not in respect of the injury itself (See *Harwood* v. *Wyken Colliery Co.* (1); *King* v. *Port of London Authority* (2)). Incapacity under sec. 9 is measured by loss of earning power (*Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (3); *Ball* v. *William Hunt & Sons Ltd.* (4)).

In determining whether incapacity results from an injury the law necessarily adopts an idea of causation which, in a sense, isolates the injury as a causative element from other elements which are taken for granted or ignored. If the addition of the injury to other concurrently existing facts brings about the incapacity, then the

(1) (1913) 2 K.B., at pp. 162, 163, 169, 170.
(2) (1920) A.C. 1.
(3) (1933) 50 C.L.R. 328.
(4) (1912) A.C. 496, at p. 500.

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incapacity is regarded as resulting from the injury, although in fact it results from the injury taken together with the other circumstances.

The legal doctrine may be illustrated by considering the case of a worker who has a condition of heart disease which is not an injury within the meaning of the Act and which has not produced any incapacity. Although the worker has heart disease, he is able to earn full wages, and, as his earning capacity is not diminished, he is suffering from no incapacity within the meaning of the Act (*Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (1)). If such a worker then receives an injury within the meaning of the Act and suffers incapacity as the consequence of the injury added to his heart disease, then the incapacity (total or partial as the case may be) in those circumstances results from the injury. The injury is an element which only completes the tale of circumstances which constitutes the cause of the incapacity in the non-legal sense: but in the legal sense it is itself the cause of the incapacity which therefore is said to " result " from it (See *Clover, Clayton & Co. Ltd.* v. *Hughes* (2); *Partridge Jones and John Paton Ltd.* v. *James* (3)—cases on " arising out of the employment "). If an employer employs a man who suffers from some defect, though the defect produces no incapacity, the employer runs the risk that incapacity may more readily result from an injury to such a man than from an injury to a man who does not suffer from any such defect.

A partial incapacity which, in the sense stated, results from an injury may itself, without the intervention of any new cause, result in total incapacity; for example, a man whose eye is injured may be only partially incapacitated for a time, but the injury may, without any new cause operating, so develop as to produce complete blindness in both eyes. In such a case first the partial incapacity, and next the total incapacity, would have resulted from the injury. The position is the same if the injury aggravates an already existing disease so as to bring about incapacity, partial or total.

In other cases there may already be partial incapacity resulting from an injury, and other causes, quite independent of and not associated with the injury in any way, may afterwards bring about

(1) (1933) 50 C.L.R. 328.
(2) (1910) A.C. 242.
(3) (1933) A.C. 501.

further or total incapacity. In such a case the worker is still entitled to compensation, but it is only the incapacity which is the result of the injury (and not the added incapacity which is the result of other causes) for which there is any liability under the Act. Thus if a man was suffering from an injury consisting in lung disease which produced partial incapacity he would be entitled to compensation in respect of that incapacity. If he subsequently became subject to a form of heart disease which was quite unconnected with his lung disease and by reason thereof became totally incapacitated, he would still be entitled under the Act to payment in respect of the partial incapacity which resulted from the injury, but only to payment for partial incapacity (*Harwood* v. *Wyken Colliery Co.* (1); *Stowell* v. *Ellerman Lines Ltd.* (2)). What are called "natural causes" bring about total incapacity with advancing age. The employer is not liable under the Act for any incapacity resulting from such natural causes. I refer to what *Pickford* L.J. said in *Lewis* v. *Wrexham and Acton Collieries Ltd.* (3):—"It has been contended, as I understand, that if there be a total incapacity of the workman arising from a partial incapacity as a result of the accident and a partial incapacity arising from something else, the employers must pay for the total incapacity. I certainly do not accept that argument."

If total incapacity results from an injury (for example, loss of both eyes) it is immaterial that total incapacity may subsequently be brought about by a new cause (for example, heart disease). The worker is entitled to continue to receive compensation as for total incapacity resulting from an injury (*Harwood* v. *Wyken Colliery Co.* (1)—total incapacity due to knee injury, subsequent heart disease (not an injury) in itself producing total incapacity; worker held entitled to full compensation).

In considering the questions which arise in this field it must be remembered that, although incapacity can never be more than total, that is, 100 per cent, it does not follow that the incapacity resulting from different causes can be separated into portions in such a way that their total adds up to 100 per cent. A man may suffer an

(1) (1913) 2 K.B. 158.
(2) (1923) 16 B.W.C.C. 46.
(3) (1916) 115 L.T. at p. 368; 9 B.W.C.C., at p. 521.

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injury which produces 60 per cent incapacity. He may then suffer another injury which, separately considered, would also produce 60 per cent incapacity. He has 100 per cent incapacity, not 120 per cent. His earning capacity, before the second injury, was 40 per cent. As a result of the second injury, it became nil. If he was employed by A when he suffered the first injury he would be entitled to an award of 60 per cent of the maximum compensation provided for in sec. 9 (1) (*a*) (and see sec. 11). If, when employed by B, he suffered a further injury which produced total incapacity, this misfortune would not relieve A from the payment for which he had already become liable. The worker, however, would be able to establish as against B that the injury which he suffered while in B's employment had reduced him from 40 per cent capacity to total incapacity. He can, therefore, recover compensation from B on that footing. He would receive 60 per cent compensation from A and 40 per cent compensation from B, thus being paid for total incapacity (*Harwood* v. *Wyken Colliery Co.* (1)).

In the present case the question which arises depends upon sec. 9 (3) of the *Workers' Compensation Act* 1926 (N.S.W.). The question arises under the terms of sec. 9 (3) as it appeared in that Act before an amendment made by Act No. 36 of 1929 omitted the exception which the court is called upon to interpret in this case.

Sec. 9 (3) is as follows: "The total liability of an employer in respect of compensation under this section shall not, except in the case of a worker whose injury results in total and permanent disablement, exceed one thousand pounds in any one case."

In the present case the employer had already, between December 1930 and July 1933, paid £1,000 in compensation to the worker. The worker now claims that his injury has resulted in total and permanent disablement and accordingly claims payment as for total incapacity.

The section does not provide that, wherever a worker has received an injury and he subsequently becomes and remains totally and permanently disabled, he shall be entitled to continue to receive compensation notwithstanding the fact that he has already received £1,000. As I have already stated, there are cases in which a worker

(1) (1913) 2 K.B. 158.

who has received an injury and who is therefore entitled to payment under the Act for a partial incapacity becomes totally and permanently disabled by reason of some quite new cause. The section does not apply to such a case. The total and permanent disablement to which the section refers must result from the injury. In accordance with the principles which I have stated a worker who had lung disease, which was an injury, and who subsequently became subject to heart disease, which was not an injury and which was not the result of the lung disease, and who, as a result of the concurrent action of both diseases, became totally and permanently disabled, would not be entitled to the benefit of the exception in sec. 9 (3).

The facts of the present case are not clear in all respects. Many differing opinions have been expressed from time to time by the doctors who, under sec. 51 of the Act, have acted as medical boards. Sec. 51 (5) of the Act provides that the medical referee or board by whom a worker is examined shall give a certificate as to the condition of the worker and as to his fitness for employment, specifying, where necessary, the kind of employment for which he is fit. The section also provides that " the certificate of a medical board shall be conclusive evidence as to the matter so certified."

Before referring to the medical certificates it should be stated that it is not disputed that the worker has in fact been totally incapacitated for work ever since May 1929.

The appellant in the present case is suffering from pneumoconiosis resulting in fibrosis of the lungs, and also from myocardial degeneration—a heart condition. Eleven certificates have been given by medical boards. The doctors differed in opinion from time to time. On 13th May 1929 the report was that there was an old fibrosis but no pneumoconiosis, but some evidence of long-standing tuberculosis which might have been aggravated by his work. On 12th November 1929 the doctors were of opinion that there was myocardial degeneration and chronic bronchitis neither of which could be strictly associated with his work. A somewhat similar certificate was given on 26th June 1930. But on 10th October 1930 another medical board found that he was suffering from fibrosis of the lung and myocardial degeneration and that his then incapacity was reasonably attributable to his occupation as a coal-miner. Upon this certificate

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the Workers' Compensation Commission found that he had received injury in the course of his employment as a coal-miner through contracting pneumoconiosis to which his employment was a contributing factor, and that the fibrosis was a result of exposure to dust in his employment. An award was made on 22nd December 1930 under which he received payment as for total incapacity. By 18th July 1933 a sum of £1,000 had been paid to him by way of compensation. On 18th March 1936 he took proceedings before the commission claiming a continuance of the weekly payments under the Act from 19th July 1933. The ground of his claim was that he was totally and permanently incapacitated by pulmonary fibrosis caused or aggravated by work as a coal-miner and cardiac disability aggravated by pulmonary fibrosis. Since December 1930 there have been six certificates of medical referees. I do not set them out in detail. They vary in the opinions expressed. Each of them should be regarded under the terms of sec. 51 as conclusive with respect to the worker's condition at the respective times when they were given. The latest certificate is dated 3rd July 1935. It is substantially identical with the last preceding certificate dated 1st December 1933. It is in the following terms :—" The finding of the medical board is that there is a non-incapacitating pulmonary fibrosis probably due to the dust inhaled in coal mines. There is also a cardiac disability present which we are not prepared to associate with his work or pneumonoconiotic condition." Thus the basis upon which the commission had to consider the worker's application for a continuance of payments after the receipt of £1,000 was that, although he was totally disabled and although he was suffering from lung disease probably due to his work, that lung disease was non-incapacitating. He was also suffering from a heart disease which the doctors were not prepared to associate with either his work or the lung disease. If the commission had acted upon this certificate it would not have been possible to hold that the total and permanent disablement of the worker had resulted from any injury as injury is defined in sec. 6 of the Act. But, in view of the conflict of medical opinion, the commission, with the consent of the parties, received further evidence of medical opinion as to the condition of the worker. The evidence was again conflicting. The result was that the commission found that the appellant was

totally and permanently incapacitated ; that he was suffering from lung disease which was due to his exposure to dust in the course of his employment as a coal-miner and that therefore he was suffering from an injury within the meaning of the Act. The commission also found that the applicant was suffering from myocardial degeneration. After considering the medical certificates and the evidence at the hearing, the commission found that the total incapacity of the worker was due partly to the heart condition and partly to the lung condition. Where part only of total incapacity is the result of an injury, partial compensation may be awarded (*Lewis* v. *Wrexham and Acton Collieries Ltd.* (1)). The commission estimated at 20 per cent the extent to which the lung condition had contributed to total incapacity, and made an award as for 20 per cent incapacity, namely, 17s. 9d. per week till October 1935, and 16s. a week thereafter, the reduction being made on account of a child attaining the age of fourteen years on 19th October 1935 (see sec. 9 (1) (*b*) (ii)). Such an award cannot, in my opinion, be supported. Sec. 9 (3) makes it possible for the amount of £1,000 to be exceeded only in the case of a worker whose injury results in total and permanent disablement. The finding of the commission is a finding that the injury did not result in total and permanent disablement, though the concurrence of the injury and heart disease did result in such disablement. Upon the basis of such a finding no award can properly be made under sec. 9 (3). Where an award is made by reason of the exception in sec. 9 (3) it must be an award as for total and permanent disablement or an award for nothing at all. It is, in my opinion, not possible to justify an award under this section for anything less than the full amount payable for total incapacity.

The matter came to the Full Court of the Supreme Court of New South Wales upon a case stated which asked for the opinion of the court upon the following question of law : Did the commission err in law in awarding the above-mentioned applicant compensation at the rate of 17s. 9d. per week from 19th July 1933 to 19th October 1935, and 16s. per week from 20th October 1935 ? At the suggestion of the Full Court a second question was asked, namely, whether the

(1) (1916) 115 L.T. 367 ; 9 B.W.C.C. 518.

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injury to the applicant resulted in his total and permanent disablement. Difficulties arose in interpreting the findings of the commission, and the matter was referred back to the commission for report. The report was as follows :—" 1. The applicant worker is, and has been since 19th July 1933, totally and permanently disabled; 2. Such total and permanent disablement is due to two causes: (*a*) pulmonary fibrosis due to the nature of applicant's employment causing him partial incapacity for work to the extent of 20 per cent; (*b*) arteriosclerosis and myocardial degeneration not due to the nature of his employment causing him partial incapacity for work to the extent of 80 per cent. The conditions referred to in (*a*) and (*b*) herein are not causally associated. 3. By reason of facts referred to in par. 2 hereof the applicant worker's injury did not result in his total and permanent disablement."

The Supreme Court answered the first question in the affirmative and the second question in the negative, with the result that it was held that the commission had erred in law in making its award and that the injury to the applicant did not result in his total and permanent disablement.

Upon the hearing of the appeal to this court the report of the commission has been criticized on the ground that it may have been based upon the view that if 80 per cent disability was brought about by the heart condition there was only 20 per cent left to be accounted for by the lung condition; whereas, if the lung condition had been assessed first, a larger percentage might have been attributed to it, leaving only the balance (possibly much less than 80 per cent) to be attributed to the heart condition. If the commission acted upon such a view, then, I should think, for reasons which I have already stated, that the commission was wrong. But, even if the commission did act upon such a view, and if such a view is wrong, it is still clear that the commission was of opinion that the lung condition, which alone was an injury within the meaning of the Act, was not responsible for the whole of the incapacity of the appellant. The commission found that the " applicant's disability for work is attributable partly to arteriosclerosis and myocardial degeneration and partly to pulmonary fibrosis."

The extent to which the condition of pulmonary fibrosis had contributed to applicant's total incapacity was assessed by the commission at 20 per cent of such incapacity. It was after making these findings that the commission attributed 80 per cent of incapacity to the heart condition. In my opinion, it is sufficiently clear that the commission, to use its own language, found that the total and permanent disablement from which the worker admittedly suffers was due to two causes operating concurrently, one only of which was an injury within the meaning of the Act. Upon the basis of this finding the total and permanent disablement of the applicant cannot be described as a disablement which resulted from the injury. It resulted from the combination of heart disease with the injury. That is the only proposition which the commission regarded as established. If the evidence had established that the injury supervened upon a pre-existing condition of heart disease so as to produce a total incapacity, then it would follow that that incapacity resulted from the injury. But the evidence does not lead to this proposition as a conclusion which can properly be drawn by a court of appeal as from facts definitely established, and there is no finding to this effect by the commission. The onus is, I think it must be conceded, upon the applicant to establish his case, and that he has not succeeded in doing.

I am therefore of opinion that the appeal must be dismissed.

Rich J. At the relevant date, 17th April 1929, sec. 9 (3) of the *Workers' Compensation Act* 1926 (N.S.W.) read as follows :—" The total liability of an employer in respect of compensation under this section shall not, except in the case of a worker whose injury results in total and permanent disablement, exceed one thousand pounds in any one case." In *Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (1) this court held that the expression " permanently and totally disabled " means, in the case of an injured workman, " physically incapacitated from ever earning by work any part of his livelihood. This condition is satisfied when capacity for earning has gone except for the chance of obtaining special employment of an unusual kind." The question for our consideration is whether the appellant's case

(1) (1933) 50 C.L.R., at p. 338.

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falls within the exception which before its repeal formed part of sub-sec. 3 of sec. 9. The findings of the commission based upon the facts proved are:—"(1) The applicant worker is, and has been since 19th July 1933, totally and permanently disabled. (2) Such total and permanent disablement is due to two causes: (*a*) pulmonary fibrosis due to the nature of applicant's employment causing him partial incapacity for work to the extent of 20 per cent; (*b*) arterio-sclerosis and myocardial degeneration not due to the nature of his employment causing him partial incapacity for work to the extent of 80 per cent. The conditions referred to in (*a*) and (*b*) herein are not causally associated. 3. By reason of facts referred to in par. 2 hereof the applicant worker's injury did not result in his total and permanent disablement."

Some difficulty has been found in interpreting par. 2 of the findings in so far as it apportions the incapacity in percentages. Even if the apportionment is to be interpreted as relating to physical condition and not to the consequences in earning power, I do not think that on the facts of the case the result is affected. For, accepting the statement that the conditions are not causally associated, it is, I think, impossible on the facts of the case to find that pulmonary fibrosis is the cause of the total disablement. *Owen* J. stated the problem thus: "The difficulty arises by reason of the fact that it has been found that the worker's disability arises from two independent and unconnected complaints, the combined effect of which is to render him totally and permanently unfit for work." Where, as in this case, the total incapacity is due to injuries which are unconnected and independent and between which there is no "causal link of connections," I find myself precluded by authority —I refer particularly to the decisions in *Hargreave* v. *Haughhead Coal Co. Ltd.* (1) and *Birch Brothers Ltd.* v. *Brown* (2)—from holding that the total incapacity results from "the injury."

The appeal should be dismissed.

DIXON J. On 22nd December 1930 the Workers' Compensation Commission of New South Wales made an award in favour of the appellant, who was a coal-miner, then aged 58, employed in the

(1) (1912) A.C. 319. (2) (1931) A.C. 605.

respondent's colliery. The award expressed findings that the appellant had on 17th April 1929 received injury in the course of such employment by contracting pneumoconiosis to which his employment contributed. It awarded a weekly payment at certain rates, beginning as from 17th April 1929, and continuing during the appellant's total or partial incapacity for work or until the weekly payment should be ended, increased, diminished, or redeemed in accordance with the provisions of the *Workers' Compensation Act* 1926-1927, the Act which governed the case. Compensation was paid to the appellant in pursuance of the award until 18th July 1933, when, without recourse to the commission, the respondent terminated the weekly payments on the ground that the amount received by the appellant had reached £1,000, the sum which sec. 9 (3) says the total liability of an employer for total or partial incapacity is not to exceed. At the date to which the appellant's injury is attributed, viz., 17th April 1929, sec. 9 (3) contained an exception, which afterwards was repealed by sec. 4 (*c*) of Act No. 36 of 1929. By the exception the case was excluded of a worker whose injury results in total and permanent disablement. The applicant claimed the benefit of the exception. He went several times before medical boards and eventually on 18th March 1936 instituted proceedings before the commission for an order for the continuance of the weekly payments. His right to any further payment depended upon the question whether the pneumoconiosis he was found to have contracted on 17th April 1929 had resulted in total and permanent disablement. Having investigated his condition of health as on 19th July 1933, the commission found that it was one of total and permanent disablement. But the commission did not ascribe this condition to pneumoconiosis alone. That body found that the appellant's total and permanent disablement was due to two causes operating concurrently. One was pulmonary fibrosis, representing pneumoconiosis. The other was arteriosclerosis and myocardial degeneration. There was ground for inferring that the cardiovascular degeneration had set in before the date assigned to the pneumoconiosis, but the commission did not state whether, in its opinion, the inference should be made. The commission did, however, make two things clear by its findings.

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First, the absence of any causal connection between the fibrosis and the arteriosclerotic and myocardial degenerative condition was definitely found. Secondly, no doubt was left upon the point that in the absence of the latter condition there would not be total incapacity or disablement. This was expressed by saying that the pulmonary fibrosis caused the appellant twenty per cent incapacity for work, and that the arteriosclerosis and myocardial degeneration caused him eighty per cent incapacity for work. I understand the statement to mean that, in the opinion of the commission, the appellant's physical disabilities which deprive him of the capacity to earn his living are composed of two distinct factors, one of which, the fibrosis, would by itself reduce his earning capacity by twenty per cent, and the other, the cardiovascular degeneration, by eighty per cent. Whatever may be thought of the validity or cogency of such an attempt at a numerical apportionment or distribution of the consequences of two pathological conditions, it at least makes it plain that the case is not one where two independent conditions co-exist, each in itself enough to deprive the worker of all capacity to earn his living. In such a case, if the cause which first produces total and permanent disablement is an injury for which the worker is entitled to receive compensation, his right is not destroyed or impaired by the fact that afterwards from independent causes another condition arises which by itself would amount to total and permanent disablement, or would prevent his earning his living (*Jamieson* v. *Fife Coal Co. Ltd.* (1); *Harwood* v. *Wyken Colliery Co.* (2); *McNally* v. *Furness, Withy & Co. Ltd.* (3); *Lewis* v. *Wrexham and Acton Collieries Ltd.* (4); *North's Navigation Co.* (1889) *Ltd.* v. *Batten* (5); *McCann* v. *Scottish Co-operative Laundry Association Ltd.* (6); and cf. *Wheatley* v. *Lambton, Hetton & Joicey Collieries Ltd.* (7)).

In the present case the state of facts is that an injury for which the appellant is entitled to compensation produces a bodily condition which by itself would not amount to or result in total disablement,

(1) (1903) 5 Fraser 958.
(2) (1913) 2 K.B. 158.
(3) (1913) 3 K.B. 605.
(4) (1916) 115 L.T. 367; 9 B.W.C.C. 518.
(5) (1933) 150 L.T. 186.
(6) (1936) 1 All E.R. 475; (1935) S.C. 65.
(7) (1937) 2 All E.R. 756.

but which is combined with another bodily condition arising independently so that together they result in total disablement, a total disablement that is permanent.

The question is whether this state of facts satisfies the description "the case of a worker whose injury results in total and permanent disablement," and brings the appellant within the exception formerly standing in sub-sec. 3 of sec. 9.

In my opinion we are precluded by authority from giving an affirmative answer to the question. The word "results" as it occurs in the exception must receive the same meaning and effect as in the well-known expression in sub-sec. 1 of sec. 9: "where total or partial incapacity for work results from the injury," an expression transcribed from Schedule I. (1) (*b*) of the British *Workmen's Compensation Act* 1906. It is true that the word has been held satisfied where the accident or the injury is one cause, although not the sole cause, of the incapacity. The cases cited above adopt, sometimes expressly, sometimes tacitly, this construction of the word "results." But the statement that the incapacity need not be solely caused by the accident or injury is directed to cases where, after the workman suffers incapacity by accident, he encounters some further cause preventing his earning a full livelihood, such as a second accident or disease enough in itself to incapacitate him, or even imprisonment. *Scrutton* L.J. described these as "cases where loss of wages would follow from either of two independent causes, of which damage from the accident would be one" (*Lewis* v. *Guest, Keen & Nettlefold Ltd.* (1)). The statement may contemplate also a chain of causation consisting of links representing different factors or events all terminating in a single conclusion, that is to say, in one condition amounting, as the case may be, to total or to partial incapacity. But it is not concerned with independent causes producing independent consequences, distinct bodily conditions which amount to total incapacity only because they must be added together. Cases of the latter description appear to me to be governed by the decisions relating to the loss or impairment of the sight of both eyes. The loss of the sight of one eye may or may not mean lasting

(1) (1928) 1 K.B., at p. 40.

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incapacity, but usually it will mean no more than partial incapacity. If it is caused by an accident arising out of and in the course of the employment, the employer will, of course, be responsible to the full extent of the resulting incapacity. But if, from causes independent of the accident, the vision of the second eye is lost or impaired so that the worker becomes totally incapacitated, or his incapacity is greatly increased, then the employer is not responsible for this additional consequence. The total incapacity or increased incapacity is not considered to "result" from the accident (*Hart* v. *Cory Brothers Ltd.* (1); *Lomax* v. *Sutton Heath and Lea Green Collieries Ltd.* (2)). The view that the accident, whether causing loss of an eye or some other bodily impairment or infirmity, produces a condition by reason of which the later accident, illness or other misfortune completes the incapacity, appears definitely to have been rejected. It is a view that received the support of *Scrutton* L.J. both in *Lomax' Case* (3) and in *Birch Brothers Ltd.* v. *Brown* (4). In the latter case he said :—"If there were no authorities, I think the court could see its way clearly. A man with two eyes has each eye as a stand-by to the other ; if he loses either, his condition is materially impaired, for he is deprived of a stand-by eye. It does not seem to me to make much difference whether he first loses an eye by disease, and then loses the other eye by accident within the Act, in which case I understand it is agreed he would recover compensation for total incapacity ; or whether he first loses an eye by accident and then loses the other by unconnected disease. In the second case, I should have thought, the effect of the accident is that he becomes totally blind, whereas if there had been no accident but only disease, he would be able to see. In other words, the resultant blindness is caused by two combined causes, neither of which would produce it alone, the disease in one eye and the accident to the other." *Greer* L.J., in the same case, attempted a distinction which, if it had been sustainable, might have been of importance in the present case. He said : "These decisions do not oblige this court to hold that where injury by accident caused to a workman suffering from a progressive disease

(1) (1916) 1 K.B. 172.
(2) (1926) 135 L.T. 564.
(3) (1926) 135 L.T., at p. 567.
(4) (1930) 2 K.B. 255, at p. 260.

is followed after an interval of time by inability to earn, which would not have occurred if the accident had not happened, such inability to earn is not the result of the accident" (1). But the House of Lords have pronounced against the protest of *Scrutton* L.J. and the distinction of *Greer* L.J. (*Birch Bros. Ltd.* v. *Brown* (2)). Speaking of the previous decision of the House in *Hargreave* v. *Haughhead Coal Co. Ltd.* (3) Lord *Atkin* said :—"I think the case, however, is an authority for the proposition that in an ordinary case if a man loses one eye by accident in the course of his employment and afterwards loses his second eye by a cause unconnected with his employment the arising total blindness is not caused by the accident. Many people have thought this is a hard saying, and that the accident would be in such a case at least half the cause of the blindness. But if this decision fails to give to the workman the full relief which the Act intended him to have, the legislature alone can correct it; and it must be admitted that in spite of several opportunities there has been no apparent disposition to alter the law as there enunciated. *Greer* L.J. adopts the attractive view that a distinction should be drawn between a supervenient and an antevenient disability in the uninjured eye: and suggests that an injury to a sound eye when the other eye has incipient cataract should be treated as analogous to an accident to a man suffering from heart disease the full consequences of which must be attributed to the accident. However much one might be disposed to accept this view unfettered by authority, I think that the decision in *Hargreave's Case* (3) too definitely dissociates from the results of the accident any infirmity in the uninjured eye to enable one to reconcile the decision with the distinction proposed" (4).

The reasoning upon which these decisions are based already had been applied to a case where total incapacity arose from pathological and degenerative conditions supervening upon and combining with traumatic injuries by accident which alone would not have produced total incapacity (*Lewis* v. *Wrexham and Acton Collieries Ltd.* (5)).

(1) (1930) 2 K.B., at p. 269.
(2) (1931) A.C. 605.
(3) (1912) A.C. 319.
(4) (1931) A.C., at pp. 622, 623.
(5) (1916) 115 L.T. 367; 9 B.W.C.C. 518.

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When the total disablement of the worker is made up of a partial incapacity due to the injury for which the employer is liable and of a later disability or disabilities due to independent causes, it is, in my opinion, impossible, consistently with these decisions, to hold that the total disablement results from the injury. And this remains true notwithstanding that at the time of the injury there existed the pathological causes of the subsequent disability or even that disability itself in an incipient form not yet amounting to incapacity.

The evidence supports the findings of fact which appear from the case stated by the commission.

These findings made it necessary to dismiss the appellant's application for a continuance of the weekly payments, a course which the commission should have taken.

In my opinion the appeal should be dismissed.

McTiernan J. The appellant had been employed by the respondent as a coal-miner. On 22nd December 1930 the Workers' Compensation Commission made an award in his favour which was based on the finding that he received injury in the course of his employment through contracting pneumoconiosis, to which his employment with the respondent was a contributing factor, and that the pulmonary fibrosis from which the appellant suffered was the result of exposure to dust in his employment. The appellant was awarded the weekly sum of £4 17s. per week as compensation for this injury. That was the maximum weekly payment to which he was entitled under the Act. Compensation was paid under the award by the respondent until 18th July, 1933. By this time the appellant had received from the respondent the aggregate sum of £1,000. The appellant began proceedings against the respondent to determine the question whether he was entitled to be paid compensation by the respondent beyond the above-mentioned sum. The proceedings were taken under sec. 9 (3) of the *Workers' Compensation Act* 1926 (N.S.W.) as it stood before it was amended by sec. 4 of Act No. 36 of 1929 (N.S.W.).

Before amendment the sub-section said that the total liability of an employer in respect of compensation under sec. 9 of the Act shall

not, except in the case of a worker whose injury results in total and permanent disablement, exceed one thousand pounds. The amendment abolished the exception. This case falls to be decided under the sub-section as it stood before the amendment was made.

The sub-section as it then stood was construed in the case of *Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (1). In that case the court said that the expression " total and permanent disablement " meant that the worker was " physically incapacitated from ever earning by work any part of his livelihood." The court added that " this condition is satisfied when capacity for earning has gone except for the chance of obtaining special employment of an unusual kind." In the proceedings which the appellant took under sec. 9 (3) the commission found that the appellant had been totally and permanently disabled as from 19th July 1933, and that such disablement was due to two causes operating concurrently: pulmonary fibrosis, due to the nature of the appellant's employment; and arteriosclerosis and myocardial degeneration. It found that the former disease caused him 20 per cent incapacity for work and the latter 80 per cent incapacity for work. The commission also concluded that the pulmonary fibrosis found in the original proceedings for the award was a contributing factor to the total and permanent disablement for work which the appellant suffered since 19th July 1933. The commission made an award requiring the respondent to make a weekly payment equal to a one-twentieth part of the weekly payment to which the appellant was entitled under the original award. The commission referred for the opinion of the Supreme Court the question whether it erred in law in awarding the appellant this proportionate payment by way of compensation and whether the pulmonary fibrosis " resulted in his total and permanent disablement." The Supreme Court referred the matter back to the commission for reasons stated by *Davidson* J. in his judgment. He said: —" As the section of the Act requires that, in order that the respondent should succeed in his application for continued payments, it must appear that his injury had resulted in total and permanent disablement, there could not be an award on the basis of partial

(1) (1933) 50 C.L.R. at p. 338.

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disablement and necessarily the question originally asked in the case stated would have to be answered in the affirmative. The parties thereupon agreed that, in order, if possible, to obtain finality, the case should be amended by adding a further question whether the commission had erred in law in finding that the respondent's injury did not result in his total and permanent disablement, in other words, whether there was any evidence upon which in law such a finding could be made."

Upon reconsideration the commission found as follows :—" 1. The applicant worker is, and has been since 19th July 1933, totally and permanently disabled. 2. Such total and permanent disablement is due to two causes : (*a*) pulmonary fibrosis due to the nature of the applicant's employment causing him partial incapacity for work to the extent of 20 per cent ; (*b*) arteriosclerosis and myocardial degeneration not due to the nature of his employment causing him partial incapacity for work to the extent of 80 per cent. The conditions referred to in (*a*) and (*b*) herein are not causally associated. 3. By reason of the facts referred to in par. 2 hereof the applicant worker's injury did not result in his total and permanent disablement."

In order to make the finding that the appellant was 20 per cent incapacitated for work due to fibrosis and 80 per cent incapacitated for work due to the other diseases, the commission must have presupposed some standard of what constitutes total and permanent disablement within the meaning of the Act. What standard was adopted is not expressly stated. The commission apportioned his physical unfitness to two causes, without saying what amount of physical unfitness would constitute total and permanent disablement within the meaning of the sub-section. It appears to me that the commission estimated the appellant's incapacity for work and apportioned it between fibrosis and the other diseases by reference exclusively to his physical fitness. The clear question for the commission under the sub-section was whether " the injury," that is, the pulmonary fibrosis, " resulted in " the appellant's " total and permanent disablement." In other words, did that injury incapacitate the appellant from ever earning by work any part of his livelihood. This was the standard laid in *Wicks' Case* (1).

(1) (1933) 50 C.L.R. 328.

Now it seems to me that this question is not to be solved by endeavouring to assess what is the percentage of the man's health and strength of which the injury has taken toll. The criterion of whether an injury has resulted in total and permanent disablement of a worker is not whether it has wholly taken away the worker's health and strength. *Wicks' Case* (1) denies any such criterion. If that were the right criterion, then moribund workers only would be within the scope of the exception in the sub-section. It is clear that there are degrees of unfitness short of moribundity which totally and permanently incapacitate a man from earning his livelihood, and a worker whose physical fitness has only been partially impaired by fibrosis may still be physically incapacitated by the disease from ever earning by work any part of his livelihood. Indeed, in the present case the medical evidence called for the respondent said that the fibrosis, from which the appellant suffered, would render him fit for light work only. The appellant contracted the fibrosis when he was about 57 years of age. The condition upon which he is entitled to receive further compensation under the sub-section is satisfied if his capacity for earning has been taken away except for the chance of obtaining special employment of an unusual kind. Evidence was called on behalf of the appellant to prove that he tried to get work different from that of coal-mining and failed. No evidence was called on behalf of the respondent showing that he was able to get any work, although it appeared from medical evidence adduced for the respondent that, if he had fibrosis and nothing else, he would be fit for light work only.

There is not on the record any indication which I can see that the appellant's case was considered at all by the commission in the light of *Wicks' Case* (1). Indeed, the commission made an award on the basis that the pulmonary fibrosis resulted in the partial incapacity of the appellant. Such an award does not seem to me to be one made under sec. 9 (3) at all.

The second question of the stated case cannot, in my opinion, be answered without special findings of fact based on the principle laid down in *Wicks' Case* (1). I think that the whole matter should be

(1) (1933) 50 C.L.R. 328.

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referred back to the commission for such findings. In such an inquiry the appellant could not rely on the diseases incapacitating him other than the fibrosis. The question for determination is whether the fibrosis, apart from the other diseases, affected his health to such a degree as to render him totally and permanently disabled in accordance with the criterion in *Wicks' Case* (1).

Appeal dismissed with costs.

Solicitors for the appellant, *Abram Landa & Co.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1933) 50 C.L.R. 328.