[HIGH COURT OF AUSTRALIA.]

DAY . . . . . Appellant;
Applicant,

AND

STANDARD WAYGOOD LIMITED . . . Respondent.
Respondent,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1941.

Sydney, *Nov.* 19; *Dec.* 1.

Rich, Starke, McTiernan and Williams JJ.

Workers' Compensation—"Injury arising out of and in the course of the employment"—Pre-existing disease—Cancer—Aggravation of malignancy—Amputation of hand—Acceleration—Injury and amputation—Causal connection—Workers' Compensation Act 1926-1938 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1938), *secs.* 6 (1), 7, 9, 16.

A worker, in January 1938, slipped and fell on his employer's premises, and in falling injured the middle finger of his left hand. Two days later, owing to the painful and swollen condition of the finger, he was compelled to cease work, and the finger was then x-rayed. In March 1938 a further x-ray examination revealed that the finger was cancerous and was in such a state as to necessitate the immediate amputation of the hand. This was done. Upon a claim made under the *Workers' Compensation Act* 1926-1938 (N.S.W.) the Workers' Compensation Commission found on the evidence before it that prior to the fall there was a giant-cell sarcoma of the bone of the injured finger which was malignant; that some neoplastic cells had already escaped into the soft tissues, which indicated increased activity of the malignant cells; that the fall liberated further neoplastic cells into the soft tissues, increased the activity of the cells which were already malignant, and thus accelerated the need for the amputation of the hand; also, that if the worker had not had the fall the escape of the cells would have made the amputation of the hand necessary not later than the end of December 1938, but that the fall, which arose out of the work upon which the worker was engaged, did help in a material degree towards the loss of the hand in that the injury caused by the fall had accelerated that loss.

Held that as the fall did not originate a malignant condition or aggravate an existing malignant condition to a degree making amputation necessary but merely accelerated the amputation rendered necessary by the existing

malignant condition there was not sufficient causal connection or association between the injury from the fall and the loss of the hand to establish that the injury which arose out of and in the course of the worker's employment was "loss of hand" within the meaning of sec. 16 of the *Workers' Compensation Act* 1926-1938 (N.S.W.).

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

APPEAL from the Supreme Court of New South Wales.

A case was stated by the chairman of the Workers' Compensation Commission of New South Wales at the request of the applicant worker, David John Day, under the provisions of sec. 37 (4) of the *Workers' Compensation Act* 1926-1938 (N.S.W.), wherein were referred for the decision of the Supreme Court of New South Wales certain questions which arose in proceedings before the said chairman instituted by the applicant against the respondent, Standard Waygood Ltd., claiming weekly compensation payments under the provisions of the Act, on the ground that he was totally incapacitated for work due to an injury sustained by him arising out of and in the course of his employment with the respondent, the injury so sustained being described as "sarcoma of the left hand caused or aggravated by trauma."

According to the facts as found by the commission the applicant was an electrician, aged sixty-one years at the date of the accident, whose work was concerned with the repair and maintenance of electric lifts for the respondent. About 1900 practically the whole of the terminal phalanx of the applicant's left ring finger had been amputated.

On Saturday, 8th January 1938, when the applicant had finished his work with the respondent at the Dunlop Perdriau Works, Drummoyne, and was leaving the premises, he slipped on some french chalk which was on the floor, and in falling injured his left middle finger. The applicant stated that since 1900 he had not experienced any trouble whatever in the hand; that, so far as he could remember, in falling the left middle finger "went down flat" and took the force and pressure of the fall; he experienced pain on the dorsum of the proximal phalanx, but there was no break of the skin. During that week-end the finger was painful, but only very slightly swollen.

On Monday, 10th January 1938, the applicant resumed his work until noon, when the finger became too painful for him to continue. On the same day it was examined by means of x-rays. On 9th March there was a further x-ray examination. As the result of these examinations it was ascertained that the finger was cancerous, and was in such a state as to necessitate the immediate amputation

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of the lower part of the applicant's left arm between the wrist and the elbow.

This condition was brought under the notice of the applicant verbally and by letter. He was informed that the necessity for the amputation was "the result of the condition of sarcoma which was present when you sustained an injury in the employment of Standard Waygood Ltd. on 8th January 1938, and that the operation would have been equally necessary whether you sustained such injury or not." He was informed that the employer could not accept any responsibility for compensation and/or medical or hospital expenses in respect of the loss of the hand, but was prepared to have the operation performed by its doctor at its expense on the distinct understanding that its action in so doing was entirely *ex gratia* and must not be taken as an admission of any liability for any compensation or otherwise under the *Workers' Compensation Act*. He was advised that the operation should be performed with a minimum of delay.

The applicant replied accepting the offer to provide and pay the expenses of the operation, and stated that he understood that such payment was not to be taken as an admission of liability on the part of the respondent. He, however, reserved the right to claim compensation and other benefits under the Act in respect of the loss of his arm as a result of the operation. On 18th March 1938 the hand was amputated in a private hospital and he was discharged therefrom ten days later.

According to the stated case, when the applicant fell at his work on 8th January 1938 there was then present in his left middle finger a progressive but undisclosed pathological condition which the evidence established was a giant-cell sarcoma of the bone, which in the normal course of events would have led to a spontaneous fracture at the site of the pathological lesion, overcome any autogenous defensive reactions and permitted abnormal cells, i.e., neoplastic cells, to escape into the adjacent soft tissues, where their malignancy would probably be increased. To prevent metastasis from the neoplasm by way of the blood or lymph streams to other parts of the body, this dangerous pathological lesion would have resulted, and in fact did result, in the need for the amputation of the applicant's left hand.

In the case it was stated that the pathological condition was not caused by the fall, it having been present in the finger for at least some months before the fall. Skiagrams taken two days after the fall showed that the pathological process had progressed to the stage where there was a marked destruction of the cortex of practically the

whole of the proximal half of the phalanx. The fall caused a fracture, practically transverse, tending to be oblique, with but little displacement. The consensus of medical opinion was that the fracture of the phalanx sustained in the fall at work increased the malignancy and accelerated the progress of the neoplasm. The second skiagrams, taken on 9th March 1938, showed considerable change in the condition shown in the skiagrams taken on 10th January. If the applicant had not suffered the fall the dangerous pathological lesion which necessitated the amputation of the hand would have developed spontaneously towards the end of the year, whereas because of the fall it developed within two months of the fall.

The commission inferred that the fall and its results precluded the applicant from continuing in his employment from January to December 1938, and awarded him weekly compensation for incapacity up to the end of December 1938, on the ground that his incapacity during the period of acceleration had resulted from injury arising out of and in the course of his employment with the respondent on 8th January 1938.

Although the applicant's incapacity since December 1938 continued to be due to the loss of his left hand, the commission inferred that such incapacity was not a "result" of the injury of 8th January 1938, in that the amputation of the hand did not "result" from the injury he received when he fell. Prior to that day the neoplasm which "resulted" in the amputation, performed to prevent metastasis, was in existence but undiscovered. As the result of the fall—(*a*) discovery of the neoplasm was made; (*b*) the neoplasm was aggravated by the fall; and (*c*) the inherent need for amputation was accelerated by not more than nine months. If the neoplasm had been allowed to run its ordinary course without such acceleration it would have been necessary to amputate the hand not later than towards the end of December 1938.

The case stated was referred back to the commission by the Supreme Court in order that the commission might state the exact question or questions of law involved, and, also, what portions of the evidence it accepted and relied upon as being evidence which enabled the commission to arrive at its conclusions.

When the matter was reconsidered by the commission, the applicant submitted an alternative claim, asking that if his right to weekly payments were limited to the year 1938 he be awarded a sum of £600 as a lump-sum compensation under sec. 16 of the Act for the loss of his left hand.

The commission adhered to its decision that the applicant's right to weekly payments terminated at 31st December 1938, and, with

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reference to the new claim, held that the applicant was entitled to receive the lump sum claimed.

It then returned to the Supreme Court the original case stated with an addition wherein it stated that the conclusion in respect to weekly payments at which it had arrived was based on evidence which satisfied the commission that prior to the January fall—(1) the neoplasm existed; (2) was a giant-cell sarcoma of the bone; (3) was malignant; (4) some neoplastic cells, i.e., the abnormal cells previously referred to, had escaped into the soft tissues, which indicated increased activity of the malignant cells, and that the main grounds on which the applicant's case rested had been disproved, i.e., that the neoplasm was completely encapsulated, and consequently was either not malignant, or of very low-grade malignancy; and that no cells had escaped into the soft tissues.

The evidence of five medical witnesses satisfied the commission that some neoplastic cells had escaped into the soft tissues before the fall; and, following upon that, the evidence of two other such witnesses satisfied it that this escape of cells into the soft tissues rendered amputation of the hand necessary. The evidence of two of such witnesses satisfied it that the ultimate result would have been the same if there had not been any fall, that is, assuming the presence of the neoplasm had been discovered early, about January 1938.

The commission was satisfied that the part played by the fall was that it—(5) liberated further neoplastic cells into the soft tissues; (6) increased the activity of these cells, which were already malignant; and thus (7) accelerated the need for amputation of the hand.

The commission set out the portions of the evidence on which it relied.

In relation to the applicant's claim to a lump sum, the commission set out the following further findings:—(8) the injury caused by the January 1938 fall was one of the contributing causes without which the amputation—or loss—of the applicant's left hand on 18th March 1938 would not have taken place on that day; (9) but for the fall the loss of the hand would have taken place not later than towards the end of December 1938; (10) the disease would, ultimately, have resulted in the loss of the hand, but the fall, which arose out of the work which the applicant was doing, did help in a material degree towards the loss of the hand, in that the injury it caused accelerated the loss of the hand.

The commission submitted the following questions for determination by the court:—

(A) Whether there is any evidence enabling the commission to arrive at the conclusion that it did as to weekly payments.

(B) Whether there is any evidence on which the commission could hold that the loss of the worker's hand resulted from the injury within the meaning of the Act.

(C) Whether on the finding that some neoplastic cells had escaped into the soft tissues before the fall and that this escape of cells into the soft tissues rendered amputation necessary, the commission's findings Nos. 8, 9 and 10 were relevant or material in deciding whether the loss of the hand was due to injury arising out of the worker's employment within the meaning of sec. 16.

(D) Whether there was any relevant evidence entitling the commission to make its findings Nos. 8, 9 and 10.

(E) Whether there was any relevant evidence entitling the commission to make its findings Nos. 5, 6 and 7 and, if so, were such findings material?

(F) Whether on the relevant evidence the commission should have held that the loss of the hand did not result from injury arising out of and in the course of the employment.

(G) Whether on the relevant evidence the commission should have held that the loss of the hand was the result of pre-accident disease alone.

At the hearing before the Supreme Court it was not disputed by either party that there was evidence to support all the commission's findings numbered 1 to 10 inclusive, with the exception of No. 7, which was disputed by the respondent.

The Supreme Court held, on the commission's findings which were supported by evidence, that it had no material before it on which it could make an award of a lump sum to the applicant under sec. 16. The court answered question A: Yes, and question B: No, and, in the light of its reasons therefor, found it unnecessary to answer the other questions submitted.

From this decision the applicant appealed to the High Court.

Miller K.C. (with him *Kerr*), for the appellant. Appeals from the Workers' Compensation Commission to the Supreme Court are, by virtue of the provisions of sec. 37 of the *Workers' Compensation Act* 1926-1938, limited to questions of law. The Supreme Court is not empowered to substitute its own view of the facts for the view thereof taken by the commission, the tribunal of fact. Therefore the Supreme Court was not entitled to hold that there was not any evidence before the commission which justified the conclusions

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arrived at by the commission. If the findings of the commission be regarded as ambiguous they should be construed in a manner which would give them internal consistency. The possibility of the loss of the hand is irrelevant. The Act deals with actual losses. All that the Act requires is that the loss of the hand was materially contributed to by the injury sustained (*Clover, Clayton & Co. Ltd.* v. *Hughes* (1)). It is only necessary for the appellant to show that the amputation occurred at a particular time in consequence of the influence of the trauma upon the disease. The meaning of the words " results in " in sec. 16 of the Act was discussed in *Ward* v. *Corrimal-Balgownie Collieries Ltd.* (2). It is the consequence in fact which should be considered. The fall caused a marked and rapid development of the disease, and this in turn rendered imperative the immediate amputation of the hand. The fall brought about a greater, more urgent and different need than that which had existed prior to the fall. There is no qualification in sec. 16 of the Act which requires the court to investigate hypothetical causes or possible causes, or notional losses or notional recoveries, or any other notional ideas. Although the amputation was inevitable in any event, the fall caused acceleration (*Falmouth Docks and Engineering Co. Ltd.* v. *Treloar* (3) ; *Partridge Jones and John Paton Ltd.* v. *James* (4) ; *Dunnigan* v. *Cavan & Lind* (5) ; *Walkinshaw* v. *Lochgelly Iron & Coal Co. Ltd.* (6) ; *Ewers* v. *Curtis* (7) ; *Moore* v. *Tredegar Iron & Coal Co. Ltd.* (8) ; *Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (9)). The appellant is entitled to the lump-sum payment provided in sec. 16 of the Act ; alternatively, he is entitled to weekly payments of compensation.

Mitchell K.C. (with him *Ingham*), for the respondent. The necessity to amputate the diseased hand existed prior to the fall ; therefore it was not accelerated by that fall. The loss of the hand did not arise out of the employment. The fall enabled the medical practitioners to discover what previously had been unknown. The amputation was accelerated not by the fall but by the x-ray. The word " necessary " was not used by the commission in its findings in the sense of " inevitable," but as meaning that amputation was there and then necessary to save the appellant's life. For the purposes of this appeal the commission's findings of fact include the evidence upon which the commission relied therefor. Neither the

(1) (1910) A.C. 242, at p. 245.
(2) (1938) 61 C.L.R. 120.
(3) (1933) A.C. 481.
(4) (1933) A.C. 501, at pp. 504, 506.
(5) (1911) 4 B.W.C.C. 386.
(6) (1935) S.C. (H.L.) 36.
(7) (1933) 26 B.W.C.C. 553, at pp. 557, 558.
(8) (1938) 31 B.W.C.C. 359.
(9) (1939) 62 C.L.R. 317.

employment nor the fall contributed in any material degree to the necessity of amputating the hand (*Clover, Clayton & Co. Ltd.* v. *Hughes* (1)). Admittedly, the fall caused the fracture. The removal of the hand, however, was not for the purpose of treating the fracture, or the consequence brought about by the fracture, but was for the purpose of saving the appellant's life, which, independently of the fracture, was already in imminent jeopardy owing to the previous infiltration of malignant cells into the soft tissues. The commission's finding that the fall accelerated the need for amputation of the hand is not supported by the evidence. Even if it was so accelerated, that would be quite irrelevant to the question whether the amputation was brought about by the fall. The infiltration of further malignant cells into the soft tissues did not add to the already urgent need for amputating the hand, but merely amplified that urgent need. The decision in *Partridge Jones and John Paton Ltd.* v. *James* (2) is inapplicable to this particular class of case. The operation was performed as the voluntary act of the appellant to save his life from a danger not due to the fall but to pre-existing disease which had already placed his life in imminent jeopardy.

Miller K.C., in reply.

Cur. adv. vult.

Dec. 1.

The following written judgments were delivered :—

RICH J. In this matter the amended case stated by the learned chairman of the Workers' Compensation Commission of New South Wales under the provisions of sec. 37 (4) of the *Workers' Compensation Act* 1926-1938 submitted for decision a number of questions which arose in the course of an application by the appellant for compensation payments alleged to be payable under sec. 16 of the Act. Before the Supreme Court and this court one of these questions was argued, viz., whether there is any evidence on which the commission could hold that the loss of the worker's hand resulted from the injury within the meaning of the Act. The Supreme Court answered this question in the negative, and the worker appeals to this court from this decision.

Briefly stated, the facts as they appear in the case stated are that the worker on 8th January 1938 slipped and fell on the respondent's premises, and in falling injured the middle finger of his left hand. On 10th January 1938 he worked during the forenoon, but the finger became too painful for him to continue his work. On that day and

(1) (1910) A.C., at p. 247.

(2) (1933) A.C. 501.

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on 9th March the finger was x-rayed, when a condition of sarcoma was found in the finger, and the doctors who treated the appellant considered that his left arm should be amputated between the wrist and the elbow with a minimum of delay. This operation was performed on 18th March. The effect of the fall was the main question at issue before the commission. It found on the evidence before it that "prior to the January fall (1) the neoplasm existed; (2) was a giant-cell sarcoma of the bone; (3) was malignant; (4) some neoplastic cells (i.e., the abnormal cells referred to in the appeal book) had escaped into the soft tissues, which indicated increased activity of the malignant cells, and that the main grounds on which the applicant's case rested had been disproved, i.e., that the neoplasm was completely encapsulated, and consequently was not malignant, or of very low-grade malignancy; and that no cells had escaped into the soft tissues." This finding of disproof, in my opinion, disposes of the appellant's case. The evidence conclusively shows that the fall did not start or generate the cancer or cause the necessity for an amputation, which was already inevitable. "The pathological condition was not caused by the fall, it having been present in the finger for at least some months before the fall" (par. 10 of the case). There is not, in my opinion, any sufficient connecting link or causal connection between the injury from the fall and the loss of the hand to entitle the appellant to compensation under sec. 16 as for an "injury arising out of and in the course of" the appellant's employment. I agree with the conclusion arrived at by the Supreme Court.

The appeal should be dismissed.

STARKE J. Appeal from a decision of the Supreme Court of New South Wales upon a case stated by the Workers' Compensation Commission in proceedings instituted under the provisions of the *Workers' Compensation Act* 1926-1938.

About January 1938 the appellant, who was an electrician in the employ of the respondent, slipped on some chalk on the floor of the premises in which he was working, and in falling fractured and injured his left middle finger. In March 1938 the appellant's hand was amputated. The commission found that there was a sufficient causal connection or association between the injury from the fall and the loss of the hand to establish that the injury which arose out of and in the course of the appellant's employment was loss of hand within the meaning of sec. 16 of the Act, which entitled him to an award of £600.

According to the case stated, there was at the time of the fall present in the left middle finger a progressive but undisclosed pathological condition, namely a giant-cell sarcoma of the bone, which in the normal course of events would have led to a spontaneous fracture at the site of the pathological lesion, overcome any autogenous defensive reaction, and permitted abnormal cells to escape into the adjacent soft tissues, where their malignancy would probably be increased. The pathological condition was not caused by the fall—it was present in the finger some months before the fall. The commission inferred that the fall and its results precluded the appellant from continuing in his employment from January to December 1938; and that the appellant's incapacity since the end of December 1938 was not a result of the injury of January 1938, in that the amputation of the hand did not result from the injury which he received when he fell. The case also stated that as a result of the fall (*a*) discovery of the neoplasm was made, (*b*) the neoplasm was aggravated by the fall, and (*c*) the immediate need for amputation was accelerated by not more than nine months. If the neoplasm had been allowed to run its ordinary course without such acceleration it would have been necessary to amputate the hand not later than towards the end of December 1938. Further, the case stated that the commission was satisfied that prior to the January fall (1) the neoplasm existed, (2) was a giant-cell sarcoma of the bone, (3) was malignant, (4) some neoplastic cells had escaped into the soft tissue, which indicated increased activity of the malignant cells; and that the part played by the fall was that it (5) liberated further neoplastic cells into the soft tissues, (6) increased the activity of these cells, which were already malignant, and thus (7) accelerated the need for amputation of the hand. Further, (8) the injury caused by the fall in January 1938 was one of the contributing causes without which the amputation or loss of the appellant's left hand on 18th March would not have taken place on that day, (9) but for the fall, the loss of the hand would have taken place not later than towards the end of December 1938, (10) the disease would ultimately have resulted in the loss of the hand, but the fall, which arose out of the work which the appellant was doing, did help in a material degree towards the loss of the hand, in that the injury it caused accelerated the loss of the hand, as stated above.

The commission stated the following questions of law (among others) for the decision of the Supreme Court:—

(A) Whether there is any evidence enabling the commission to arrive at the conclusion that it did. It is desirable to state in connection with this question, so as to avoid misapprehension, that

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it relates, and was treated in the Supreme Court and on this appeal as relating, to a finding of the commission that the appellant's incapacity for work after 31st December 1938 did not result from the injury which arose out of and in the course of his employment with the respondent on 8th January 1938.

(B) Whether there is any evidence on which the commission could hold that the loss of the worker's hand resulted from the injury within the meaning of the Act.

The Supreme Court answered question A in the affirmative and question B in the negative. And it is from this decision that an appeal is brought to this court.

Under the Act, the commission has exclusive jurisdiction to examine, hear and determine all matters and questions arising under the Act, upon the real merits and justice of the case; it is not bound to follow strict legal precedent, and the validity of any proceeding or decision of the commission is not challengeable in any manner whatsoever. But when any question of law arises, the commission may of its own motion, and shall if any party so requests, state a case for the decision of the Supreme Court (Act, sec. 36).

It is in all cases a question of fact whether the injury sustained has arisen out of or in the course of the workman's employment (*Clover, Clayton & Co. Ltd.* v. *Hughes* (1); *Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (2)). It may involve the consideration of a wide area of facts, but the question is one of fact (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (3)). The commission may reach an erroneous conclusion of fact, but still the only question open to the Supreme Court is a question of law; in this case, whether there was any evidence from which the commission could reasonably conclude that the loss of the appellant's hand was due to or was contributed to by the fall sustained by him in the course of his employment or was due to the diseased condition of his finger or hand, independent of the injury sustained by the fall: Cf. *Woods* v. *Wilson, Sons & Co. Ltd.* (4); *Doolan* v. *Harry Hope & Sons Ltd.* (5). Or, to adapt the language of the ultimate finding and not the evidentiary and subsidiary findings of the commission (see *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1.] (6)), whether there was any evidence from which the commission could reasonably conclude that there was sufficient causal connection or association between the injury from the fall and the loss of the hand to establish that the injury which arose out

(1) (1910) A.C., at p. 247.
(2) (1939) 62 C.L.R., at p. 330.
(3) (1915) A.C. 433, at p. 466.
(4) (1915) 84 L.J. K.B. 1067 (H.L.).
(5) (1918) 87 L.J. K.B. 671.
(6) (1913) 16 C.L.R. 591, at pp. 622, 623.

of and in the course of the appellant's employment was "loss of hand" within the meaning of sec. 16.

All the evidence may be examined for this purpose, but I find it unnecessary to go any further than the explicit statements of the evidence and subsidiary facts set forth by the commission in its case, and already mentioned. The commission might, I think reasonably conclude from this evidence and these subsidiary findings that the appellant's fall or injury in January 1938 excited and in some degree increased the malignant condition of the appellant's finger or hand. But it was an active and not dormant condition at the time of the fall. Also, that the fall of January 1938 led to the discovery of this malignant condition, and the wisdom of an immediate amputation of the appellant's hand. But there is nothing in this evidence and the subsidiary findings which afford any reasonable basis for the inference that the loss of the appellant's hand was connected with or was contributed to by the fall: indeed, all that evidence and the findings make it clear that that was due to the diseased condition of his finger and hand, wholly independent of the injury sustained by the fall.

In my opinion, the decision of the Supreme Court was right and this appeal should be dismissed.

McTIERNAN J. The appellant makes alternative claims against the respondent for compensation under secs. 9 and 16 respectively of the *Workers' Compensation Act* 1926-1929. Sec. 9 provides that where total or partial incapacity results from the injury, the compensation payable is to include a weekly payment during the incapacity. Sec. 16 provides that notwithstanding certain antecedent sections, the compensation payable by the employer for the injuries mentioned in the first column of the table embodied in the section shall, if the worker so elects, when the injury results in total or partial incapacity be the amounts indicated in the second column of the table. The first column is entitled "nature of injury" and the second column "amount payable." The appellant sets up that he is entitled to claim for the injury described in the first column as the loss of either hand, for which the amount payable is £600.

It is a condition of the worker's right to recover compensation under either section that the injury is "a personal injury arising out of and in the course of the employment" and that it results in incapacity. The distinction between the rights conferred by each section is conveniently explained by *Ferguson* J. in *Horlock* v. *North Coast Steamship Navigation Co.* (1). Sec. 16 provides an alternative

(1) (1927) 27 S.R. (N.S.W.) 236, at pp. 240, 241; 44 W.N. 68, at p. 69.

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form of compensation at the option of the worker in the case of the injuries specified in the table. The amount payable is not a commutation of the weekly payment, but a substitution for it. If the worker elects under the section, he is entitled to be paid the whole amount, whatever the amount of the weekly payments to which he would otherwise have been entitled. *Ferguson* J. said :— "It is clearly intended as compensation for the physical injury, as distinguished from the mere loss of wages resulting from the injury. The amount bears no relation, as the weekly compensation does, to his average earnings before the accident, or to the diminution of his earnings or earning power, and it is not affected, as the weekly compensation is, by any consideration of payments made to him by the employer. It is a new statutory right to receive specific compensation for a specific injury" (1). The present statute does not require that the injury in respect of which compensation is payable shall be by accident. "The condition is that the injury, not 'an accident,' shall arise out of and in the course of the employment" (*Smith* v. *Australian Woollen Mills Ltd.* (2)) The words "arising out of and in the course of the employment" denote a causal relation between the employment and the injury : See *Clover, Clayton & Co. Ltd.* v. *Hughes* (3) ; *Partridge Jones and John Paton Ltd.* v. *James* (4) ; *Smith* v. *Australian Woollen Mills Ltd.* (5) ; *Hetherington* v. *Amalgamated Collieries of W.A. Ltd.* (6).

The questions to be decided are raised by a case stated by the Workers' Compensation Commission under sec. 37 (4) of the Act. The questions are, broadly, whether there was any evidence upon which the commission could properly find that the appellant received an injury arising out of and in the course of his employment in respect of which he was entitled to be paid compensation under sec. 9 or, alternatively, under sec. 16. The appellant, who was an electrician employed at that trade by the respondent, was compelled on 10th January 1938 by the painful and swollen condition of his left middle finger (the result of falling at his work on 8th January 1938) to lay down his tools and cease work. An examination of the finger revealed the presence in the bone of a malignant cancer which had invaded it before the fall. The hand was amputated on 18th March 1938. The commission made the following findings of fact about the condition of the finger and the consequence of the fall. The cancer existed prior to the fall ; it had become malignant and some

(1) (1927) 27 S.R. (N.S.W.), at p. 241 ; 44 W.N., at p. 69.
(2) (1933) 50 C.L.R. 504, at p. 511.
(3) (1910) A.C., at pp. 245, 247.
(4) (1933) A.C. 501.
(5) (1933) 50 C.L.R. 504.
(6) (1939) 62 C.L.R. 317.

abnormal cells had escaped into the soft tissues. The commission was satisfied upon the medical evidence that if the appellant had not fallen in January, the escape of the cells would have made the amputation of the left hand necessary "at least by 31st December 1938." It found that the fall liberated more cells into the soft tissues, increased the malignancy of the existing cancerous condition and "thus," the commission added, "accelerated the need for the amputation of the hand." An award was made entitling the appellant to weekly compensation until 31st December 1938. The principle in *Old* v. *Furness, Withy & Co. Ltd.* (1) was applied in making the award. "The commission considered" (to quote its own words) "that in his claim for weekly compensation payments, applicant had only established a case of accelerated incapacity for a period which would not have extended beyond the end of the year 1938. That claim was granted on the ground that the fall in question had caused certain and fast-approaching incapacity to happen at a time earlier than it would otherwise have happened, and when that period of acceleration had faded out the results of the malignant disease were left as the sole occupant of the whole field." The commission does not say precisely that the injury in respect of which the weekly compensation was awarded was the aggravation of the malignancy or the loss of the hand. There is ample evidence to warrant the conclusion that the fall did result in increased malignancy of the diseased finger. If the commission did determine in the claim for weekly compensation that the injury which resulted from the fall was the loss of the hand, it could not consistently with that determination have rejected the appellant's claim under sec. 16, provided that he had duly elected under the section. However, the commission did not reject that claim. It drew these further conclusions for the purpose of determining the claim under that section:—the injury was a contributing cause without which the amputation or loss of the hand on 18th March 1938 would not have taken place on that date; but for the fall the loss of the hand would have taken place not later than towards the end of December 1938; the cancer would ultimately have resulted in the loss of the hand, but the fall which arose out of the work which the appellant was doing did help in a material degree towards the loss of the hand in that the injury it caused accelerated the loss of the hand.

These statements, like the antecedent statement that the fall "thus accelerated the need for the amputation," are the commission's ultimate conclusions from the facts found by it. Such facts preclude the inference that the loss of the hand stood in such a relation of cause

(1) (1934) 27 B.W.C.C. 266, at p. 281.

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and effect to the fall as that determined by the commission. The ultimate fact found is that it was the cancerous condition itself which rendered the amputation necessary. The amputation was not done in consequence of the aggravation of the condition caused by the fall. The only consequence of that fall was that the amputation was done on a particular day. If the fall had not occurred the amputation would still have been necessary in consequence of the degree of malignancy reached by the cancer. That degree of malignancy developed independently of the fall. The fall did no more than to aggravate the dangerous degree of malignancy that had already developed. It did not bring an existing state of malignancy to such a degree as to make the amputation necessary. The facts found show a causal connection between the cancer and the amputation, but none between the fall and the amputation. In my opinion there was no evidence to justify the determination of the appellant's claim under sec. 16 in his favour.

In my opinion the appeal should be dismissed and the answers which the Supreme Court gave to the questions be affirmed.

WILLIAMS J. The facts are fully set out in the judgment of the learned Chief Justice of the Supreme Court, and it is unnecessary to repeat them.

On the appeal to this court the whole question turned upon whether the Supreme Court was right in deciding there was no evidence on which the commission could hold that the loss of the appellant's hand resulted from injury within the meaning of the *Workers' Compensation Act* 1926-1929, sec. 16. The section provides, so far as material, that notwithstanding the provisions of secs. 8, 9, 11, 12, 13 and 15 of the Act the compensation payable by the employer for the injuries mentioned in the first column of the table shall, if the worker so elects, when the injury results in total or partial incapacity, be the amounts indicated in the second column thereof. In the table compensation for the injury for the loss of the lower part of either arm or of either hand is assessed at £600. The commission had awarded this amount of £600 to the appellant, but the Supreme Court held upon an appeal by way of case stated that there was no evidence that the loss of the appellant's hand resulted from this injury within the meaning of the section. The appellant had slipped and fallen at his employer's premises on 8th January 1938 and injured his left middle finger. He resumed work on 10th January until noon, when the finger became too painful for him to continue. On the same day it was examined by means of x-rays. On 9th March there was a further x-ray examination. As

the result of this examination it was ascertained that the finger was cancerous and was in such a state as to necessitate the immediate amputation of the lower part of the left arm between the wrist and the elbow. The amputation was performed on 18th March. The commission found that prior to the fall there was a giant-cell sarcoma of the bone of the injured finger which was malignant, that some neoplastic cells had already escaped into the soft tissues, which indicated increased activity of the malignant cells, and that the part played by the fall was that it liberated further neoplastic cells into the soft tissues, increased the activity of the cells which were already malignant, and thus accelerated the need for amputation of the hand. It also found that, apart from the fall, the loss of the hand would have taken place not later than towards the end of December 1938, so that the disease would ultimately have resulted in the loss of the hand, but that the fall, which arose out of the work which the appellant was doing, did help in a material degree towards the loss of the hand in that the injury it caused accelerated this loss.

The judgment of the Supreme Court was based upon the view that the finding that the fall had accelerated the need for amputation of the hand, was inconsistent with the findings that not only had the bone of the finger been in a cancerous condition for some time before it was injured by the fall, but for some time before the fall the cancerous cells had spread into the soft tissues making an amputation of the hand necessary. The learned Chief Justice said :—" The fall did not create the need, nor did it accelerate its coming into existence. On the commission's findings, the conditions which had come into existence before the fall had already rendered amputation of the hand necessary. The only connection between the fall and the subsequent amputation of the plaintiff's arm was, that it was the happy accident of the fall that led to its being discovered that, independently of the fall, the applicant's finger was already in such a state that the amputation of his hand was necessary in order to save his life. In other words the fall did not cause or accelerate the need for the amputation, it only led to the discovery of the need."

It is clear that the commission found that at the moment of the fall amputation was inevitable, and, independently of the fall, must have taken place not later than towards the end of December ; so that, accepting this finding, the fall did not contribute to the loss of the hand but at most contributed to the acceleration of the date of the amputation. While agreeing that the view of the Supreme Court was justified, it seems to me that the appellant is not entitled to succeed, even accepting this finding.

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The phrase used in the Act is "personal injury arising out of and in the course of the employment." The injury to the appellant would have arisen out of the employment if the facts had established that the fall contributed in a material degree to the amputation, but this would only have occurred if the effect of the fall had been to originate the cancer in the bone of the finger or to aggravate the cancerous condition which already existed. The appellant's case at the hearing was that prior to the fall the neoplasm was encapsulated and consequently was either not malignant, or of a very low grade of malignancy, and that no cells had escaped into the soft tissues. If the commission had so found, the appellant would have been entitled to succeed, because the fall, by "wakening up" the cancer from a dormant into a malignant state, would have materially contributed to the loss of the hand (*Lewis* v. *Port of London Authority* (1)); but as the commission found that the cancer was already malignant, that some neoplastic cells had already escaped into the soft tissues, and that amputation was already inevitable, it appears to me that the injury, namely the loss of the hand, was solely attributable to the disease, and did not result in any way from the fall.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Aidan J. Devereux.*

Solicitors for the respondent, *Tietyens, McLachlan & Co.*

J. B.

(1) (1914) 111 L.T. 776.