[HIGH COURT OF AUSTRALIA.]

KING . . . . . APPELLANT;
RESPONDENT,

AND

HAYWARD . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1943.

SYDNEY, *Aug.* 3.

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

Workers' Compensation—Lump sum payment—Loss of sight of eye—Eye previously injured and compensation received therefor—Compensation for second injury—Amount payable—Deduction of amount previously received—Workers' Compensation Act 1926-1942 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 13 *of* 1942), *s.* 16.

During the course of his employment a worker received an injury by which he was deprived of ninety-five per cent of the sight of his left eye and he received compensation therefor in accordance with s. 16 of the *Workers' Compensation Act* 1926 (N.S.W.). Two years later whilst employed by another employer the worker received another injury to his left eye and it was, as a consequence, enucleated.

Held that notwithstanding the payment of compensation received in respect of the first injury the worker was entitled to the full amount specified in s. 16 of the *Workers' Compensation Act* 1926-1942, for the loss of the sight of one eye.

Rodios v. *Trefle*, (1937) 54 W.N. (N.S.W.) 197, and *Bennett* v. *General Motors Holdens Ltd.*, (1940) 40 S.R. (N.S.W.) 117; 57 W.N. 88, approved.

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

CASE STATED.

A claim was made under the *Workers' Compensation Act* 1926-1941 (N.S.W.) by Harry Hayward against William Robert Fawcett King, trading as King & Mann, for £375 lump sum compensation under s. 16 in respect of the total loss of the sight which Hayward had in his left eye, suffered as a result of the enucleation of the eye. The enucleation was necessitated by injury which arose out of and in the course of Hayward's employment with King on 24th December 1941.

Liability to pay the claim was denied by King on the grounds :— (*a*) that Hayward admittedly suffered an injury to the same eye on 2nd June 1939, when in another employment ; that a medical board had assessed the " permanent loss of the efficient use of the left eye at 95% of the total loss thereof " on 20th December 1939 ; and that Hayward had received £356 5s. lump sum compensation in respect of such loss from the employer in whose employment he received the injury ; and (*b*) that Hayward had no industrial sight in the left eye prior to its enucleation.

During the hearing before the Workers' Compensation Commission the medical board's certificate of 20th December 1939 was tendered in evidence. In it the medical board also certified that Hayward's vision in his left eye was " counting fingers at one metre and with correction = almost 6/60." Liability for five per cent loss of vision in Hayward's left eye was admitted on behalf of King.

The evidence showed that on 24th December 1941 Hayward was employed by King as a painter, and in the course of that employment on the premises of Amalgamated Wireless (Australasia) Ltd. at Ashfield Hayward was storing painting material in an open box when he accidentally struck and injured his left eye against a hasp on the box. On 29th December, Hayward's injured eye was examined by an eye specialist, who found a large wound across the cornea of the eye, intense inflammation, pus, and swelling ; in the doctor's opinion the only thing possible to do was to enucleate the eye, which he did.

Hayward's evidence was that he in fact had industrial sight in his left eye after the first injury and prior to the second injury. He could distinguish colour, and used the industrial sight in the eye quite a lot in his painting work, particularly when on a swinging stage, scaffold, or high ladder. He said he was ambidexterous and when on a swinging stage would hold on to a window frame with one hand and paint with the other, and that this necessitated some sight in the left eye. When working with a mate on his left on a scaffold sight in the left eye was necessary, otherwise he would bump into his mate. He said that after the eye was enucleated he found a big difference when doing any work on his left, and now he has to turn his head to see on the left.

The eye specialist gave evidence that in his opinion if a man had only five per cent vision in one eye, and full vision in the other, there would be no possibility of stereoscope vision ; and that with only five per cent vision in an eye there would be no useful acuity in the eye from the point of view of working capacity, because with only five per cent vision the eye is usually regarded as being practically blind.

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The Commission found that Hayward had some sight in his left eye prior to the second injury which, in fact, was useful to him in his trade as a painter; he had industrial sight in the left eye, and as a result of the second injury he lost that industrial sight.

The Commission held that it was bound by the decision in *Rodios* v. *Trefle* (1), and as Hayward had lost the industrial sight he had in his left eye as the result of the second injury, he was entitled to £375 lump sum compensation from King in respect of such total loss of sight irrespective of the fact that he had already had £356 5s. lump sum compensation under s. 16 from another employer in respect of the earlier partial loss of vision in that eye due to a prior injury.

In a case stated at the request of King under s. 37 (4) of the *Workers' Compensation Act* 1926-1942 the question for the decision of the Court was: Whether the Commission erred in law in awarding Hayward £375 lump sum compensation under s. 16 against King in respect of Hayward's total loss of the sight he had in his left eye prior to the second injury to that eye.

The Full Court of the Supreme Court of New South Wales followed the decisions in *Rodios* v. *Trefle* (1) and *Bennett* v. *General Motors Holdens Ltd.* (2) and answered the question in the negative.

From that decision King appealed to the High Court.

Sir *Henry Manning* K.C. (with him *Ashburner*), for the appellant. In the circumstances the respondent suffered only a partial loss of sight of one eye and, therefore, is entitled only to a proportionate sum by way of compensation based upon the proportion of effective sight so lost (*Keenan* v. *Doherty* (3)). It is submitted that, contrary to the decision in *Rodios* v. *Trefle* (1), the statute does make a distinction between eyes of full normal vision and eyes of impaired efficiency. Unless that distinction is recognized the whole value of the table to s. 16 completely disappears. Even if the court came to the conclusion that it was bound on a literal construction to bring about the result that there could be successive payments the court would shrink from doing so because it would be contrary to the intendment of the legislature to be gathered from the whole of the Act (*Asian Temperance and General Mutual Life Assurance Society Ltd.* v. *Howe* (4); *Mattison* v. *Hart* (5); *Ex parte Walton*; *In re Levy* (6); *De Vesci* (*Evelyn Viscountess*) v. *O'Connell* (7)). The phrase "loss of sight" as used in the table means loss of total

(1) (1937) 54 W.N. (N.S.W.) 197.
(2) (1940) 40 S.R. (N.S.W.) 117; 57 W.N. 88.
(3) (1934) 8 W.C.R. (N.S.W.) 193.
(4) (1922) 31 C.L.R. 290, at p. 294.
(5) (1854) 14 C.B. 357, at p. 385 [139 E.R. 147, at p. 159].
(6) (1881) 17 Ch. D. 746, at p. 750.
(7) (1908) A.C. 298, at p. 307.

or normal sight. It does not cover the loss of defective sight. In any event payment of compensation to the respondent should be limited to the loss of five per cent sight of one eye. *Bennett* v. *General Motors Holdens Ltd.* (1) was incorrectly decided.

Barwick K.C. (with him *Isaacs* for *M. D. Healy* on active service), for the respondent. Section 16 of the Act provides, in a regulation of rights *inter partes*, that a given individual shall, if an injury arises out of or in the course of his employment, be given a stipulated sum as shown in the table referred to in that section. By its emendation of sub-s. 2 of s. 16 in 1942, that is after the decision in *Bennett* v. *General Motors Holdens Ltd.* (1), the legislature dealt with what may be deducted under that sub-section and re-stated its intention. The expression " permanent loss of the use of " in sub-s. 4 and the expression " permanent loss of the efficient use of " in sub-s. 5 are inapt in the case of the table, where the injury referred to is loss of sight. This accounts for the footnote to the table. The table is not confined to normal parts. The fact that the respondent had recovered compensation under the Act for a prior injury to the eye is an irrelevant fact. In the contest between the appellant and the respondent, as employer and employee, the respondent was found to have lost the sight of an eye; therefore he was entitled to the award made in his favour.

Sir *Henry Manning* K.C., in reply.

The following judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales upon a case stated under the *Workers' Compensation Act* 1926-1941. The worker, Harry Hayward, admittedly suffered an injury arising out of and in the course of his employment by the appellant. As a result of that injury he lost one eye and obviously lost completely the sight of that eye, but he had admittedly suffered an earlier injury to the same eye on 2nd June 1939 when in other employment. The medical board at that time assessed the permanent loss of the efficient use of his left eye at ninety-five per cent of the total sight thereof. In respect of this prior injury he received £356 5s. lump sum compensation, being a proportion, namely ninety-five per cent, of £375 provided in the table which is part of s. 16 of the *Workers' Compensation Act*, the relevant provision in the table being " loss of sight of one eye £375."

(1) (1940) 40 S.R. (N.S.W.) 117; 57 W.N. 88.

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It was found as a fact that the worker still had five per cent vision in his left eye after the first accident and that such vision was industrially useful to him. Upon these proceedings the worker claimed for the loss of the sight of one eye, namely, the loss of all the sight he had in that eye, claiming the full amount of £375. On the one hand, on behalf of the employer, it was contended that the worker had already received £356 5s. in respect of loss of sight of that eye and that the further injury which was in question in these proceedings only added five per cent loss to the loss already suffered, and that compensation should be assessed upon the basis that £375 in respect of all the injuries concerned was the limit of the amount recoverable.

The Full Court, following two previous decisions—one a case of *Rodios* v. *Trefle* (1) and the other the case of *Bennett* v. *General Motors Holdens Ltd.* (2)—answered the question asked in the special case by declaring that the Commission had not erred in law in awarding the respondent £375 lump sum compensation in these circumstances. This Court upon this appeal is now asked in effect to review the decisions to which I have referred.

Section 16 of the Act provides in sub-s. 1 : " Notwithstanding the provisions of sections eight, nine, eleven, twelve, thirteen and fifteen of this Act the compensation payable by the employer for the injuries mentioned in the first column of the table hereunder set forth shall, if the worker so elects, when the injury results in total or partial incapacity, be the amounts indicated in the second column of that table." The table then contains provisions such as these : " Loss of a leg—£600, loss of a foot—£525, loss of sight of one eye, with serious diminution of the sight of the other—£675," and the provision which is immediately relevant in the present case, " loss of sight of one eye—£375." Other provisions of s. 16 are these :—" (4) For the purpose of the said table the expression ' loss of ' includes ' permanent loss of the use of '." " (5) For the purpose of the said table the expression ' loss of ' also includes the ' permanent loss of the efficient use of ' but in such case a percentage of the prescribed amount payable, equal to the percentage of the diminution of the full efficient use, may be awarded in lieu of the full amount." There is a footnote attached to the words " loss of sight of one eye " which is in the following terms :—" For the partial loss of the sight of one eye there shall be payable such percentage of the amount that would be payable for the total loss of the sight thereof as is equal to the percentage of the diminution of sight."

(1) (1937) 54 W.N. (N.S.W.) 197.

(2) (1940) 40 S.R. (N.S.W.) 117 ; 57 W.N. 88.

For the appellant it is argued that the object of these provisions is to fix a maximum amount of compensation in the case of incapacity, total or partial, resulting from the injuries mentioned and that the Act is not properly applied if, in any case where the total result of a number of injuries is the final effect described in the table, the amount or amounts allowed to be recovered exceed the amount prescribed in the table in respect of that total result—e.g., loss of the sight of an eye.

On the other hand it is argued for the respondent to the appeal that the decisions of the Supreme Court in this and prior cases mentioned are correct, and that in this case the essential point is that the worker has in fact suffered, as a result of the later injury, the loss of the sight of one eye, although it was admittedly a deficient eye. It is argued that the table draws no distinction between fully efficient and less efficient eyes.

Section 16 (1) is positive in terms, providing that notwithstanding certain provisions which impose a limit upon recoveries by way of weekly payments the compensation payable by the employer for the injuries mentioned shall, if the worker so elects, be certain amounts. This section relates to claims made upon specific occasions by a particular employee against a particular employer; it is directed to determining the compensation payable upon each of these occasions.

In my opinion each injury must be considered in each case of a claim for compensation in relation to the effect which that injury has produced. The injury in respect of which compensation is claimed must arise out of and in the course of the employment by the particular employer sought to be made liable. If it arose out of and in the course of such employment, what is the injury? The injury in the present case is an injury which has resulted in the removal of an eye and therefore the loss of the sight of one eye by a worker. That eye may have been a good eye or a bad eye. In this case there was some useful vision in the eye. The loss is a total loss of sight in the eye and prima facie the worker is entitled to recover £375.

In my opinion, such a loss of sight should not be described as a partial loss of sight within the meaning of the words used in the footnote to the table. It is a total loss of all the sight which the worker had before the injury, and the injury should therefore be regarded as bringing about a loss of sight of one eye in terms of the table. If however the footnote were applied and this final result of complete removal of the eye were to be regarded as further partial

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loss, then the extent of the diminution of the worker's sight in that case would be one hundred per cent and not five per cent and would still bring about the result that £375 is recoverable.

It has been pointed out that the provisions in the table and footnote relate to diminution of sight and not to deduction of amounts previously received by the worker. There are provisions in sub-s. 2 of the section for the deduction of certain amounts. Those amounts are, as this section has been amended by Act No. 13 of 1942, the amounts of weekly payments made. That amendment was made in 1942, after the cases in the Supreme Court had been decided, and no other provision for deductions from the amounts set forth in the table was then made. There is no provision which would justify the deduction of an amount recovered at common law in respect of a prior injury from a lump sum recoverable under s. 16 and I can find nothing in the words of the section which would justify the deduction of the amount of compensation paid by some other employer—or even by the same employer—in the case of a prior injury. I agree with what was said by Mr. Justice *Davidson* in *Rodios* v. *Trefle* (1) when he said that " the table does not make any distinction between eyes of full normal vision and eyes of impaired efficiency ". I would add even where that impaired efficiency is due to a prior injury. I think also his Honour the Chief Justice expressed the principle rightly, if I may say so, in relation to another illustration, namely loss of a finger, in the case of *Bennett* v. *General Motors Holdens Ltd.* (2): " In my opinion, it makes no difference if the finger was lost as the result of a compensatable injury in respect of which full compensation was received under s. 16. If the defective hand is subsequently lost, the worker is clearly entitled to the full table amount for the loss of a hand."

In my opinion the decision of the Full Court was right and the appeal should be dismissed.

RICH J. I agree.

STARKE J. I agree with the decision of the Supreme Court of New South Wales in *Bennett's Case* (3). I can find no answer to the construction which the learned Chief Justice put upon the provisions of the *Workers' Compensation Act*. They require the attention of the legislature.

(1) (1937) 54 W.N. (N.S.W.), at p. 198.
(2) (1940) 40 S.R. (N.S.W.), at p. 124; 57 W.N., at p. 90.
(3) (1940) 40 S.R. (N.S.W.) 117; 57 W.N. 88.

McTIERNAN J. I agree. The judgment of the Supreme Court is right. The correct criterion to apply is whether the respondent worker suffered the loss of such sight as he had in the eye in consequence of the injury in respect of which he made the claim in these proceedings. In a practical sense he had sight in that eye at the time he suffered that injury. To the question whether, in consequence of the injury, he lost that sight, the only possible answer is that he did lose it.

Appeal dismissed with costs.

Solicitors for the appellant, *A. O. Ellison & Co.*
Solicitor for the respondent, *W. I. Short.*

J. B.