

[HIGH COURT OF AUSTRALIA.]

MICHAELIS, HALLENSTEIN & COMPANY } APPELLANT;
PROPRIETARY LIMITED }
RESPONDENT,
AND
LEWIS RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Workers' Compensation—Worker injured by accident—Temporary total incapacity—Permanent partial incapacity—Inability, under normal conditions, to obtain employment—Re-employment, due to war conditions, at higher wage than before injury—Weekly payments during total incapacity—Suspension of payments on re-employment—Claim for lump sum by way of redemption—Jurisdiction of Board—Workers' Compensation Acts 1928-1937 (Vict.) (No. 3806—No. 4524), s. 5, Second Schedule.

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MELBOURNE,
Feb. 24;
Mar. 10.
Latham C.J.,
Rich and
Starke JJ.

A worker who suffered injury entitling him to compensation under the *Workers Compensation Acts* 1928-1937 (Vict.) was totally incapacitated for a period of more than six months and received weekly payments in accordance with the Acts from his employer during that period. Thereafter he was partially incapacitated, the nature of the incapacity being such that, apart from abnormal conditions created by the war, he could not have obtained employment either at his former work or as a labourer. Owing to war-time conditions, however, he was re-employed by the employer at his former work at a higher wage than he received before the injury.

Held that under par. 16 of the Second Schedule to the *Workers' Compensation Acts* the Workers Compensation Board had jurisdiction to hear and determine an application by the worker for payment of a lump sum in redemption of his right to weekly payments under the Acts.

Decision of the Supreme Court of Victoria (Full Court): *Lewis v. Michaelis Hallenstein Pty. Ltd.*, (1943) V.L.R. 202, affirmed.

APPEAL from the Supreme Court of Victoria.

On an application by Richard John Lewis to the Workers Compensation Board appointed under the *Workers' Compensation Acts* 1928-1937 (Vict.) the Board stated for the opinion of the Supreme Court a case which was substantially as follows :—

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1. The applicant was employed by the respondent as a stuff-cutter.

2. On 20th June 1940 the applicant suffered personal injury by accident arising out of and in the course of his employment with the respondent.

3. The injury in its now stable condition resulted from the poisoning of the applicant's left thumb. The forearm and hand generally were affected, the present stable condition being constituted by the ankylosis of all the carpal bones and of the radii of these and, except in the case of the thumb, of the carpal bones and phalanges. In the thumb there is serious limitation of the metacarpo-phalangeal hinge, and of the inter-phalangeal hinge. There is also inability to flex the wrist. The thumb cannot be opposed to the ring or little fingers and barely to the middle and index fingers.

4. The applicant is aged 52 years and has been all his working life a stuff-cutter in the boot trade. The occupation of stuff-cutting involves manual activity and dexterity. The applicant is now and always hereafter will be unable to perform certain of the actions necessary for a worker to perform in stuff-cutting and can perform certain other of such actions only with difficulty and slowly.

5. The physical disability of the applicant prevents and hereafter will prevent his engaging normally in any occupation which involves the active use of both forearms or hands or of the left forearm or left hand.

6. Before the happening of the accident the applicant was a stuff-cutter of average ability. His ability is now and will hereafter be reduced to about fifty per cent of what it formerly was. The efficiency of his left forearm, wrist and hand has been permanently reduced by about fifty per cent of what it formerly was.

7. Because of war-time conditions which at present obtain in the boot trade employers are unable to get sufficient workers who are qualified to perform their work efficiently and it is impossible to replace such workers who leave their employment.

8. Because of the war-time conditions aforesaid many inefficient workers are employed in the boot-trade. Such workers were not so employed before the said conditions caused a scarcity of efficient workers.

9. The applicant has resumed his employment with the respondent. But for the existence of such conditions the applicant would have been dismissed from his employment and would in such event have been unable to obtain employment as a stuff-cutter with another employer. Prior to the happening of the accident his wage was £5 1s. per week. His wage now is £6 1s. 6d. per week pursuant to

the provisions of an award made by the Commonwealth Court of Conciliation and Arbitration on 19th June 1941.

10. If and when conditions in industry become similar to those which obtained therein before the said war-time conditions arose the applicant will, because of his incapacity to perform the work of a stuff-cutter, be unable to find employment as a stuff-cutter, and he will then, because of disability, be unable to work as a labourer or to find employment as a labourer.

11. During the period when the applicant was totally incapacitated as a result of the said accident he received from the respondent weekly payments of compensation as for total disability.

12. On 23rd July 1942 the employer by his agent presented for acceptance by the Workers Compensation Board an agreement made between the applicant and the respondent whereby the sum of £125 was expressed to be payable to the applicant in full satisfaction of all compensation payable to him by respondent.

13. On 13th August 1942 the Workers Compensation Board, having examined the applicant in the presence of his solicitor and a representative of the respondent's insurance company and having considered the matter, refused to accept the agreement, such refusal being made on the ground that the amount expressed to be payable thereunder was inadequate.

14. On 13th August an application for determination by the Workers Compensation Board was issued at the request of the applicant wherein he claimed such lump sum as was just and reasonable in all the circumstances of the case.

15. It was contended for the applicant that he is permanently partially disabled, that he is entitled to compensation, and that such compensation ought to be awarded in a lump sum.

16. It was contended for the respondent that the applicant is not suffering any disability, that his claim is barred by the said agreement, and that he is not entitled to any compensation; alternatively, that if he is suffering partial disability he is not entitled to present payment of compensation but may be entitled to a declaratory award.

The questions for determination by the Supreme Court were:—

Upon the facts above stated and upon the true construction of the relevant provisions of the *Workers' Compensation Acts*—

- (a) Is the applicant presently entitled to have an award of the Workers Compensation Board made in his favour?
- (b) Can the Workers Compensation Board properly make in favour of applicant an award of a lump sum?

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(c) Can the Workers Compensation Board properly make in favour of applicant a declaratory award ?

The Full Court of the Supreme Court answered the questions as follows :—(a) Yes. (b) and (c) The Board has power to make either of those awards and should make the award which it thinks proper on the facts : *Lewis v. Michaelis Hallenstein & Co. Pty. Ltd.* (1).

From this decision the respondent to the application appealed, by special leave, to the High Court.

Fullagar K.C. (with him *Stafford*), for the appellant. The right to redemption under par. 16 of the Second Schedule to the *Workers' Compensation Acts* 1928-1937 exists only where there is a present liability to pay compensation. In *Irons v. Davis & Timmins Ltd.* (2) an order was made for 1d. per week in order to preserve future rights of the worker ; sometimes a declaratory order has been made. The latter practice was approved and the former disapproved by the House of Lords in *King v. Port of London Authority* (3). An order adapted from that case would be appropriate here, but the applicant is entitled to nothing more. In England, where only the employer can redeem, the right to redeem is absolute (*Kendall & Gent Ltd. v. Pennington* (4) ; *Elliott Ltd. v. Hobbs* (5)). In Victoria, since par. 16 was amended in 1936, the employee also has the right to require redemption. This affords no ground for changing the nature of the right ; either party now has the right, the only functions of the Board being to ascertain whether the conditions of par. 16 have been fulfilled and, if so, to fix the sum. The compensation the right to which is given by s. 5 of the 1928 Act is defined in par. 1 (b) (i.) and (ii.) of the Second Schedule to that Act. In par. 1 (b) (ii.) the phrase "during the incapacity" refers to incapacity to work. This paragraph shows that there is no right to compensation while the incapacity is not operating. That incapacity means incapacity to work—to earn full wages—is shown in *Marshall, Sons & Co. Ltd. v. Prince* (6) ; *Birch Bros. Ltd. v. Brown* (7). Par. 15 of the Second Schedule provides for the suspension of payments when incapacity ceases. When incapacity ceases liability ceases, although it may arise again in the future, and the employer need not apply to the Board for leave to cease weekly payments (*George Gibson & Co. v. Wishart* (8))—See also *Ocean Coal Co. Ltd.*

(1) (1943) V.L.R. 202.

(2) (1899) 2 Q.B. 330.

(3) (1920) A.C. 1, at pp. 12, 13, 37-39.

(4) (1912) 106 L.T. 817 ; 5 B.W.C.C. 335.

(5) (1929) 22 B.W.C.C. 509.

(6) (1914) 3 K.B. 1047, at p. 1054.

(7) (1931) A.C. 605, at pp. 626-628.

(8) (1915) A.C. 18, at pp. 22-24, 26, 27.

v. *Davies* (1). Redemption is based on average earnings, which must be stabilized over six months before redemption can be made. [He also referred to *Calico Printers' Association Ltd. v. Higham* (2); *Carlton Main Colliery Co. Ltd. v. Clawley* (3); *Davis v. Cambrian Wagon Works Ltd.* (4); *Edward Curran & Co. Ltd. v. Kays* (5); *Pick v. Paling* (6).]

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P. D. Phillips (with him *Mulvany*), for the respondent. Section 13 of the English Act of 1925 contains two mutually incompatible principles of redemption: (1) in the case of temporary incapacity the redemption is of weekly payments; (2) in the case of permanent incapacity it is *the compensation* that is redeemed. The Victorian Act adopts the second of these principles in relation to both temporary and partial incapacity; accordingly English decisions in relation to the first principle are not applicable here. There is no difficulty in fact in determining the lump sum in this case. The right of the applicant does not come to an end because a mathematical formula of quantification produces at the moment a zero result: See *McCann v. Scottish Co-operative Laundry Association Ltd.* (7).

[*RICH J.* referred to *British Broken Hill Pty. Co. Ltd. v. Simmons* (8).]

In par. 16 the expression "the liability therefor" refers to the right created by the statute—not by the Schedule, which does not affect the "life," the continuance, of the right. The liability must refer to the whole of the future. Under par. 15 of the Second Schedule weekly payments may be reviewed. The terms of this paragraph help in the construction of par. 16 and generally as to the nature of the right. A review of weekly payments may be made even when there is no weekly payment currently being made (*Wilson v. William Baird & Co. Ltd.* (9); *Wolseley Motors Ltd. v. Sharp* (10); *Vickers-Armstrongs Ltd. v. Regan* (11)). The Board has a duty to make an order for redemption if there is sufficient evidence before it to enable an order to be made; it has no discretion to refuse to make the order because it thinks it unwise.

Fullagar K.C., in reply.

Cur. adv. vult.

(1) (1927) A.C. 271, at pp. 282, 283, 286-288, 294, 295.

(2) (1912) 1 K.B. 93.

(3) (1917) 2 K.B. 691, at pp. 699, 701; (1918) A.C. 744, at pp. 749-751, 755.

(4) (1941) 1 K.B. 444.

(5) (1928) 2 K.B. 469, at p. 481.

(6) (1936) 2 All E.R. 1291.

(7) (1936) 1 All E.R. 475, at p. 478.

(8) (1921) 30 C.L.R. 102, at p. 108.

(9) (1922) 16 B.W.C.C. 284.

(10) (1925) 18 B.W.C.C. 15.

(11) (1933) 1 K.B. 232.

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The following written judgments were delivered :—

LATHAM C.J. Appeal from the Full Court of the Supreme Court of Victoria from an order made upon a case stated by the Workers Compensation Board under the *Workers' Compensation Act* 1937 (Vict.), s. 9. The Court answered the questions submitted in the case in favour of Richard John Lewis, the respondent to this appeal, by stating that he was entitled to have an award of the Workers Compensation Board made in his favour, and that the Board had power to make either an award of a lump sum, or a declaratory award, as it should think proper on the facts. The employer of the worker appeals to this Court.

It is stated in the case that Lewis was employed by the appellant company at a wage of £5 1s. a week. He suffered personal injury by an accident arising out of and in the course of his employment and the company became liable to pay him compensation under the *Workers' Compensation Acts* (Vict.), s. 5. By reason of the accident he was totally incapacitated for 52 weeks and 3 days, and during that period he received weekly payments from the appellant company in performance of their obligations under the Act. He then returned to work. Owing to scarcity of labour due to war conditions, and to an increase made in rates of payment, he thereafter received a wage of £6 1s. 6d. per week—that is, a higher wage than he received before the happening of the accident. As long as he received such a wage, the employers were under no liability to make any payment to him, although it was found by the Board that he had suffered a permanent incapacity, about fifty per cent, and that, when the special conditions which at present enabled him to earn high wages ceased, he would be unable to find employment in his ordinary vocation, and also would be unable to work as a labourer, or to find employment as a labourer.

In these circumstances the employer made an agreement with the worker under which the worker agreed to accept £125 in full satisfaction of all compensation payable to him by the company. The Workers Compensation Board refused to accept the agreement (*Workers' Compensation Act* 1937, s. 10).

The worker then made an application to the Board wherein he claimed such lump sum as was just and reasonable in all the circumstances of the case. This application has been treated by all concerned as an application made under the Second Schedule, par. 16, of the *Workers' Compensation Act* 1928. That paragraph is in the following terms :—

“(16) *Lump sum in redemption of weekly payment*—Where any weekly payment has been continued for not less than six months,

the liability therefor may, on application by or on behalf of the employer or the worker, be redeemed by the payment of a lump sum of such an amount as may in default of agreement accepted by the Board be settled by the Board, and such lump sum may be ordered by the Board to be invested or otherwise applied for the benefit of the person entitled thereto."

The employer contended before the Board that the applicant was not subject to any incapacity, as he could earn full wages; that the employer was accordingly under no liability to make and was not making any weekly payments at the time when the application was made; and that, therefore, there was no liability for weekly payments which could be redeemed under par. 16. The employer conceded that the worker was entitled to a declaratory award which would protect the worker's rights if circumstances should so change that the employer again became bound to make weekly payments (*King v. Port of London Authority* (1)). A further argument that the agreement which the Board had refused to accept barred the worker's claim was not relied upon in this Court.

In its original form par. 16 referred only to redemption by or on behalf of the employer, but the *Workers' Compensation Act* 1936, s. 13 (*h*), enabled the worker also to apply for "redemption." In England it has been held that under a substantially identical provision (so far as the employer is concerned) the employer has a right to redeem (*Elliott Ltd. v. Hobbs* (2)). Similar reasoning leads to the conclusion that under the Victorian legislation the worker has also a right to redeem when the conditions of the clause are satisfied.

The clause becomes applicable when "any weekly payment has been continued for not less than six months." The weekly payment referred to is a payment in discharge of a liability under the Act. The words used are "any weekly payment has been continued." They are not "where weekly payments have been made." It is settled that the clause can apply only where a weekly payment at a constant rate has been continued for not less than six months (*Davis v. Cambrian Wagon Works Ltd.* (3)). The conception underlying the provision is that when regular payments have continued for as long as six months the worker shall be entitled, on his side, to obtain full compensation under the Act by the payment of a lump sum, and the employer, on his side, to be fully discharged from liability under the Act. This consequence is involved in the meaning of the word "redeem."

It was argued for the appellant that par. 16 applied only where a weekly payment had been continued for six months immediately

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(1) (1920) A.C. 1.

(2) (1929) 22 B.W.C.C. 509.

(3) (1941) 1 K.B. 444.

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before and up to the time of the application for redemption. The words of the paragraph do not support this contention. If a constant weekly payment has been made for any period of six months the condition prescribed by the initial words of the paragraph is satisfied.

The liability of the employer to make weekly payments under the Act is a liability which depends upon the continued incapacity for work of the worker. The provisions in the Second Schedule of the Act, clause 1 (b), show that weekly payments are required to be made only "during the incapacity," and incapacity means incapacity to earn full wages (*Ball v. William Hunt & Sons Ltd.* (1); *George Gibson & Co. v. Wishart* (2); *Ocean Coal Co. Ltd. v. Davies* (3)).

It is argued for the appellant that there is no liability under the Act which is capable of redemption if, as in the present case, there is no incapacity of the worker, so that the employer is not, at the time when the application for redemption is made, making any weekly payments. It is urged that the clause applies only where there is what is called a present liability, and that what could be called the risk of a liability arising in the future owing to change of circumstances is not a liability which can be redeemed under par. 16.

That which may be redeemed is described as "the liability therefor." The word "therefor" refers back to the words "where any weekly payment has been continued for not less than six months." A further argument for the appellant is that that which can be redeemed is a liability which is measured and ascertained by a weekly payment which has been made for six months.

The liability to be redeemed cannot be a liability in respect of weekly payments which have already been made. Those payments have discharged past liability. The words must refer to liability to make weekly payments *in futuro*. In all cases where a lump sum has not already been awarded under the Act the liability under the Act which can be redeemed is necessarily a liability to make payments in the future. It is true that actual payment is obligatory only during incapacity, but there is liability under the Act even though, for the time being, no weekly sums are payable to the worker: *Edward Curran & Co. Ltd. v. Kays* (4), where Lord *Hanworth* M.R. said: "In *Wolseley Motors Ltd. v. Sharp* (5) I said that the redemption could proceed if there was a liability for compensation,

(1) (1912) A.C. 496.

(2) (1915) A.C. 18.

(3) (1927) A.C. 271.

(4) (1928) 2 K.B., at p. 479.

(5) (1925) 18 B.W.C.C. 15.

although that liability was cloaked by the payment of wages." The Master of the Rolls, after referring to another case, continued :
 " The effect . . . is that there can be an application for redemption, even though at the moment a 'weekly payment' in the true sense of the words is not being made but there is only a subsisting liability to make them ".

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Par. 15 of the Second Schedule provides that any weekly payment may be reviewed at the request of the employer or of the worker. It has been argued that where no weekly payment was actually being made at the time when an application for review was set on foot, there could be no review, but this contention was rejected in *Vickers-Armstrongs Ltd. v. Regan* (1). In that case a declaration of liability of the employer had been made in the form settled in *King v. Port of London Authority* (2). No weekly payment was being made, but it was nevertheless held that there could be a review of a weekly payment under par. 15, and that the amount of a weekly payment could be settled by the Board under that provision. If a strictly non-existent weekly payment can be "reviewed" under par. 15, it is not difficult to reach the conclusion that what is conceded to be at least a potential liability for weekly payments can be redeemed under par. 16.

In my opinion the right to redeem created by par. 16 of the Second Schedule does not depend upon the circumstance that a weekly payment is being made at the time when the application is made. It arises whenever a constant weekly payment has been made for not less than six months. There can then be an application by either party for a redemption of future liability. In the English *Workmen's Compensation Act* 1925, s. 13, liability for weekly payments in the case of permanent incapacity may be redeemed by the payment of a lump sum which is sufficient to purchase an annuity for the workman equal to seventy-five per cent of the annual value of the weekly payment. Where this provision applies, that which is redeemed must be a weekly sum which is being paid as representing full compensation and seventy-five per cent of the annual value of that sum is automatically taken for the purposes of redemption (*Clawley v. Carlton Main Colliery Co. Ltd.* (3)). There is no such special provision in the Victorian Act, and the line of cases in which it has been held in England that there cannot be redemption by the employer under this provision unless there is a weekly payment which he seeks to redeem which represents his full liability under the Act have no application in the case of the Victorian Act. In other cases than those of permanent incapacity s. 13 of the English

(1) (1933) 1 K.B. 232.

(2) (1920) A.C. 1.

(3) (1918) A.C. 744.

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Act provides that the amount of any lump sum to be paid by way of redemption of weekly payments may be settled by arbitration under the Act. In determining such a lump sum the tribunal will, in cases other than those of permanent incapacity in England, and in all cases in Victoria, take into account all the matters which affect the liability of the employer, and correspondingly the rights of the worker, under the Act. In reaching its determination the Board will be merely "putting in another form the compensation which the Act has already given him" (the worker). The Board will therefore consider "the amount of the weekly payments, their probable duration, the probability of their being diminished or raised in the future, and the probable extent of such variation, if any" (*Calico Printers' Association Ltd. v. Higham* (1)).

At the present time in the present case no weekly payments are being made because, owing to special circumstances, the worker is earning more than he earned before the accident happened. But if those circumstances should change, so that, by reason of the incapacity resulting from the accident, the employer again becomes bound to make payments, the liability under the Act again results in the obligation to make weekly payments. It is this liability, with all its chances of change, which may be redeemed under par. 16.

It is settled by *King v. Port of London Authority* (2) that, even where an employer is under no present liability to make payments, a declaration of liability may be made in order to establish the rights of the worker, so that if, by reason of change of circumstances, he should become entitled to weekly payments, an award for such payments can be made against the employer.

In my opinion, therefore, the decision of the Supreme Court was right and should be affirmed. The form of the questions asked, however, has caused some difficulty, because they are not limited to questions of law. The Board has jurisdiction to deal with the application for redemption: it may, as it thinks proper, make an order for redemption or it may make a declaration of liability. In my opinion the questions should be answered accordingly.

RICH J. The question of law which arises for our consideration from the facts stated in the special case is, in effect, whether the Workers Compensation Board is entitled to hear and determine the application for compensation made by the respondent. This application is based upon clause 16 of the Second Schedule to the *Workers' Compensation Act 1928* (Vict.). During the period when the respondent was totally incapacitated as a result of the accident

(1) (1912) 1 K.B., at p. 103.

(2) (1920) A.C. 1.

suffered by him weekly payments were made to him by the appellant company by way of compensation for total disability (par. 11 of the special case). These payments continued for over twelve months. At the end of this period the respondent was taken back into service with the appellant on the same job, but with higher wages, as before the accident. An attempt was made by means of an agreement between the parties for a lump sum to determine once and for all the appellant's liability for compensation. This agreement was submitted to the Board for approval, but was rejected as inadequate. Thereupon the respondent made the application now in question. In par. 10 of the special case it is stated that: "If and when conditions in industry become similar to those which obtained therein before the said war-time conditions arose the applicant will, because of his incapacity to perform the work of a stuff-cutter be unable to find employment as a stuff-cutter, and he will then, because of disability, be unable to work as a labourer or find employment as a labourer."

The right to compensation is given by the Act, the object of which is to compensate for the loss of the workman's earning capacity. The right to redemption or commutation conferred by the Victorian Act in clause 16 of the Second Schedule on both employer and worker is based on the condition precedent that "where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer or the worker, be redeemed." Counsel for the appellant contended that as, in the circumstances of the case, there was no present liability on the part of the appellant to make any weekly payment, no present right to redeem existed. The difficulty in the construction of this clause arises upon the words "liability therefor"—grammatically it may be said that they refer to the redemption of that particular weekly payment, but I would adopt the construction placed upon the phrase by *Sankey* L.J., as he then was, that it means that the liability under the Act may be redeemed (*Edward Curran & Co. Ltd. v. Kays* (1)).

Accordingly I think that the respondent is entitled to ask for a redemption on the basis of the full compensation under the Act to which he would be entitled (*Pick v. Paling* (2)). The form of order is a matter for the discretion of the Board and may be either an order for redemption or a declaratory or suspensory award (*King v. Port of London Authority* (3); *Chandler v. Smith* (4)).

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(1) (1928) 2 K.B., at p. 481.

(2) (1936) 2 All E.R., at p. 1294.

(3) (1920) A.C. 1.

(4) (1899) 2 Q.B. 506.

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STARKE J. Appeal from the judgment of the Supreme Court of Victoria upon a case stated by the Workers Compensation Board pursuant to the provisions of the *Workers' Compensation Act* 1937 (Vict.), s. 9 (3).

The respondent was employed by the appellant and had suffered personal injury by accident arising out of and in the course of his employment. The appellant was, subject to the provisions of the Act, liable to pay compensation to the respondent in accordance with the Second Schedule to the Act (*Workers' Compensation Act* 1928 (Vict.), s. 5).

By that schedule the amount of compensation payable in case of total and partial incapacity is prescribed. And s. 7 in its amended form provides that subject to the Act where a worker's total or partial incapacity for work results from the injury the compensation payable shall in default of agreement be in the discretion of the Board either a weekly payment during the period of incapacity or such lump sum as is just and reasonable in all the circumstances of the case but not exceeding £800.

The appellant recognized its liability under the Act and paid to the respondent, who accepted the same, weekly payments of compensation as for total incapacity. The respondent would have lost his employment with the appellant owing to his incapacity, but because of war-time conditions the appellant re-employed him at a greater wage than he had received before the accident. An agreement was subsequently made between the appellant and the respondent whereby he agreed to accept a lump sum of £125 in addition to the sum of £131 15s. already paid to him from the date of the accident on 20th June 1940 to 27th June 1941 in full satisfaction of all claims and demands of whatsoever kind against the appellant whether under the *Workers' Compensation Act* 1928 or otherwise. But the Workers Compensation Board refused to accept this agreement on the ground that it was inadequate (*Workers' Compensation Act* 1937, s. 4 ; Rules under *Workers' Compensation Act*, rule 32). The respondent then made an application to the Workers Compensation Board wherein he claimed such lump sum as was just and reasonable in all the circumstances of the case. But this application, though it seems to follow the words of s. 7 above mentioned, was based, or has been treated by the parties on the argument before this Court as being based, upon the provisions of clause 16 of the Second Schedule to the *Workers' Compensation Act* 1928 as amended, which is as follows :—

“Lump sum in redemption of weekly payment.” “Where any weekly payment has been continued for not less than six months,

the liability therefor may, on application by or on behalf of the employer or the worker, be redeemed by the payment of a lump sum of such an amount as may in default of agreement accepted by the Board be settled by the Board, and such . . . sum may be ordered by the Board to be invested or otherwise applied for the benefit of the person entitled thereto."

The authorities establish that this provision confers upon the employer and worker a right to redeem subject to certain conditions as to time and otherwise, and not a mere discretionary authority upon the Board (*Kendall & Gent Ltd. v. Pennington* (1); *Elliott Ltd. v. Hobbs* (2); *Calico Printers' Association Ltd. v. Higham* (3); *Moreland & Sons v. Eley* (4)). But the party seeking redemption must in the ordinary course of legal procedure lead evidence to establish his right. It was suggested during argument that the right to redeem depends upon the full weekly payment having been continued up to the date of the application for redemption. But the words of the rule do not, I think, preclude an application for redemption "even though at the moment a 'weekly payment,' in the true sense of the words, is not being made, but there is only a subsisting liability to make them," or even though the full weekly payment prescribed by the Act has not been continued for six months. There is a right to redeem if a weekly payment has been continued for not less than six months. And it is to be observed that the redemption is not of a weekly payment of known amount but of the liability for payment under the Act (*Edward Curran & Co. Ltd. v. Kays* (5)). *Davis v. Cambrian Wagon Works Ltd.* (6) is not in conflict with this view, because under the English Act there in question the employer was only entitled to redeem a weekly payment of a known amount payment of which had continued for not less than six months.

Now that which is to be redeemed under clause 16 is the liability for the weekly payment (the full equivalent of the compensation) payable under the Act (*Clawley v. Carlton Main Colliery Co. Ltd.* (7)). And to ascertain that compensation various provisions of the Act must be regarded, e.g., Second Schedule, clause 1 (b) (i.), (ii.) and (iv.), clause 3, and clause 15. Some doubt was expressed during argument whether the total liability of the employer in this case was £700 (Second Schedule, clause 1 (b) (iv.)) or £800 (Act, s. 7). But s. 7 appears to operate only in default of agreement.

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(1) (1912) 106 L.T. 817; 5 B.W.C.C. 335.

(2) (1929) 22 B.W.C.C. 509.

(3) (1912) 1 K.B. 93.

(4) (1916) 1 K.B. 85.

(5) (1928) 2 K.B. 469, at pp. 471, 479, 482.

(6) (1941) 1 K.B. 444.

(7) (1918) A.C. 744.

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The facts stated in the case disclose that the respondent suffered personal injury by accident arising out of and in the course of his employment with the appellant: that a weekly payment has been made to him pursuant to the provisions of the Act for not less than six months: that by reason of the accident his ability as a workman is reduced about fifty per cent. Prima facie, therefore, I should think that the respondent had established a case for consideration under clause 16 of the Second Schedule.

The case, however, states that prior to the accident the respondent's wage was £5 1s. per week, whereas owing to war-time conditions he can command, and was at the date of his application for redemption, and still is, being paid by the appellant, the sum of £6 1s. 6d. per week pursuant to the provisions of an award of the Commonwealth Court of Conciliation and Arbitration. And the argument for the appellant is that the respondent is only entitled to a weekly payment during incapacity and that incapacity for this purpose is incapacity to work or the loss or diminution of wage-earning capacity (*Ball v. William Hunt & Sons Ltd.* (1)).

It was conceded that a declaration of liability under clause 16 might be made, modelled on the form of order in *King v. Port of London Authority* (2). But it is contended that a lump sum cannot be ordered by way of redemption under clause 16 unless there exists some present liability to make weekly payments or at all events some subsisting and not some suspended obligation to make such payments. The fallacy of the argument resides in the assumption that the redemption is of some existing weekly payments, whereas the redemption is of the full measure of compensation payable under the Act.

The result is that the Board has jurisdiction and authority to hear and determine the respondent's application for a lump sum in redemption of his right to weekly payments during incapacity under the Act. And I would so answer the case stated, for the questions stated have not been carefully drawn and involve questions of fact which are not for the determination of the courts but of the Board.

Perhaps I may add in this case that the facts require careful consideration on the part of the Board before the payment of a lump sum is ordered. Apparently from the date of the accident to 27th June 1941 a sum of £131 15s. was paid by the appellant. Since that date other sums have been paid to the respondent and will apparently continue during the war, which is of uncertain duration.

A couple of years at six pounds per week would, with the payments already made, approach, if not exceed, the limits of compensation

(1) (1912) A.C. 496.

(2) (1920) A.C. 1.

payable to the respondent. The ascertainment of the lump sum demands on the part of the Board serious consideration of many variable factors and it should not be assessed by the exercise of a kindly and generous discretion at the expense of the employer or its insurer.

The order of the Supreme Court should be varied in the manner already suggested, but in substance the appeal fails.

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Appeal dismissed with costs. Order of Supreme Court varied by substituting the following for the answers to the questions—"The Board has jurisdiction to hear and determine the application for payment of a lump sum in redemption of the respondent's right to weekly payments under the Workers' Compensation Acts."

Solicitors for the appellant, *D. Bruce Tunnock & Clarke.*
Solicitors for the respondent, *Maurice Blackburn & Co.*

E. F. H.