[HIGH COURT OF AUSTRALIA.]

DAWKINS . . . . . APPELLANT;
APPLICANT,

AND

METROPOLITAN COAL COMPANY LIMITED . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 28; *Dec.* 1, 15.

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

Workers' Compensation—Injury—Disease—Total incapacity—Not due to employment—Later application for compensation—Continuance of former injury and incapacity—Additional injury due to employment—No right to compensation—Certificate by medical board—Conclusiveness—Workers' Compensation Act 1926-1946 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 41 *of* 1946), *ss.* 7 (4), (5), 51 (4), (5), (6) —*Workers' Compensation Rules, Div. IV., r.* 10, *forms* 3, 6.

If a worker who is already totally incapacitated or disabled suffers injury by accident or disease which in itself would totally incapacitate or disable him from work his incapacity cannot be attributed to the second cause. His incapacity does not "result" from that injury.

In October 1946, D. made a claim for compensation under the *Workers' Compensation Act* 1926-1946 (N.S.W.) against M., a coal-mining company by which D. was last employed as a coal miner, as for total incapacity from 27th July 1945, the result of pulmonary fibrosis caused by the inhalation of dust. The evidence before the Workers' Compensation Commission consisted of: (*a*) a certificate dated 27th July 1945 by a medical board, appointed under the Act, certifying that there was a totally incapacitating pulmonary fibrosis probably due to D.'s work in coal mines, that there was also a chronic tuberculosis probably active and that he was unfit for employment; (*b*) a certificate dated 19th April 1938 by a medical board, similarly appointed, certifying that D. suffered from a non-incapacitating pulmonary fibrosis probably due to inhalation of dust in coal mines and that there was probably a condition of pulmonary tuberculosis and signs of a cardio-renal degeneration, and that D. was unfit for employment; (*c*) an award made in September 1940 by the Commission which found that D.'s work at M.'s colliery did not materially

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aggravate his heart or lung conditions so as to be a contributing factor to his incapacity for work, and that D.'s incapacity was not the result of any injury arising out of and in the course of his employment with M.; and (*d*) oral evidence by D. that he had been unable to work, except for a period of six weeks, since 1934.

Held that there was evidence upon which the Commission could find, as it did, that before, on and after 27th July 1945 D. was totally incapacitated for work by chronic tuberculosis in no way due to, or aggravated or contributed by, D.'s work as a miner with M., therefore D. was not entitled to compensation as from that date on the basis of total incapacity from an injury within the meaning of the *Workers' Compensation Act* 1926-1946 (N.S.W.).

Wheatley v. *Lambton, Hetton and Joicey Collieries Ltd.* (1937) 2 K.B. 426, applied.

The conclusiveness of certificates by medical boards granted under the *Workers' Compensation Act* 1926-1946, discussed.

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

APPEAL from the Supreme Court of New South Wales.

On 22nd May 1940, Fred Dawkins, then aged sixty years, filed a claim under the *Workers' Compensation Act* 1926 (N.S.W.), as amended, against the Metropolitan Coal Co. Ltd. for compensation under the Act, the nature of the injury alleged being pulmonary fibrosis associated with pulmonary tuberculosis and cardio-renal degeneration caused or aggravated by his work. As to the date and place of the injury, the nature of the work on which he was then engaged, and cause of injury, he stated that on or before 28th September 1934 he had been for a long time employed as a miner, and that he had been totally incapacitated since 16th December 1937. He further stated in his application that his earnings were about £5 per week; that he was a single man and claimed as compensation the sum of £3 per week from 16th December 1937; and that a written notice of the injury had been given to the respondent on 15th December 1937. He did not appear to have made a claim prior to the date of the application.

The respondent denied that the applicant was incapacitated as a result of injury arising out of and in the course of his employment with the respondent, and also raised the issues of notice of injury and claim not having been given or made within the time as required by the Act.

The application was heard by the Workers' Compensation Commission and an award, made on 13th September 1940 in favour of the respondent, set forth (*a*) that the applicant's work at the respondent's colliery did not materially aggravate his heart or lung

conditions so as to be a contributing factor to his incapacity for work, in respect of which compensation was claimed ; and (*b*) that the applicant's said incapacity was not the result of any injury arising out of and in the course of his employment with the respondent.

On 12th October 1946, the applicant made another claim for compensation and filed an application in which the particulars shown were not dissimilar from those shown in the application made by him in May 1940. His age was shown as sixty-seven years ; the date and place of injury were shown as " 28th September 1934, Metropolitan Colliery, applicant had been working for a long time as a miner " ; the nature of the injury was stated to be pulmonary fibrosis caused by the inhalation of dust, and it was alleged that the applicant had been totally incapacitated since 27th July 1945. He claimed compensation at the rate of £3 10s. per week as from 27th July 1945, and stated that he had given notice of the injury on 15th December 1937, and notice of claim on 11th August 1945.

Liability under the Act was denied by the respondent on the grounds :—(*a*) that the applicant was not incapacitated as a result of an injury arising out of or in the course of his employment with the respondent, and (*b*) that the claim of the applicant had already been adjudicated upon by the Commission and an award had been made in favour of the respondent.

At the hearing of this application the following facts were proved or admitted :—

(i) The applicant commenced work at the age of 14 years ;
(ii) He worked outside the coal-mining industry for five years ;
(iii) He then became a coal miner in England for three years ;
(iv) He came to New South Wales in 1901 and worked as a coal miner for an employer other than the respondent for a period of five years ;
(v) In 1906 he joined the employment of the respondent employer as a coal miner for a period of six years ;
(vi) He then left the coal-mining industry and worked as a general labourer for five years until approximately 1917 ;
(vii) On the termination of this employment he returned to the respondent employer as a coal miner and worked with it in this capacity until 1926. In 1926 he changed the nature of his employment and became a shift worker with the respondent employer. This is an underground employment associated with coal mining ;

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(viii) In 1934 the mine closed down for repairs and the applicant worker left the coal-mining industry ;

(ix) Thereafter until the present time he was employed six weeks as a relief worker ;

(x) The respondent employer was the last employer to employ the applicant in coal mines ;

(xi) That between the dates of the examinations by the medical board on 19th April 1938 and 27th July 1945 respectively, the condition of pulmonary fibrosis had progressed ; and

(xii) That the disease of pulmonary fibrosis is contracted by a gradual process.

The following facts were found by the Commission :—

(*a*) The respondent employed the appellant as a coal miner and shiftman from 1906 up to 28th September 1934, and his average weekly earnings were £5 ;

(*b*) In such employment the appellant was exposed to the inhalation of coal dust ;

(*c*) The appellant's condition of pulmonary fibrosis was the result of such inhalation of coal dust, and was a disease contracted by a gradual process within the meaning of s. 7 (4) of the *Workers' Compensation Act* 1926-1946 ;

(*d*) The respondent was the last employer who employed the appellant in an employment where he was exposed to the inhalation of such coal dust ;

(*e*) The appellant's condition of pulmonary fibrosis arose out of his employment with the respondent ;

(*f*) Pulmonary fibrosis due to the inhalation of coal dust, or pneumoconiosis is a progressive disease, and once established may progress for the worse after exposure to the inhalation of dust has ceased ;

(*g*) The appellant ceased work with the respondent on 28th September 1934, when the mine closed down and substantially has not worked since on account of the bad state of his health ;

(*h*) On 19th April 1938, the appellant submitted himself for examination by a medical board constituted under s. 51 (4) and (5) of the *Workers' Compensation Act* 1926-1929 and such medical board certified that he was unfit for employment, and, *inter alia*, reported as follows : The finding of the medical board is that there is a non-incapacitating pulmonary fibrosis present probably due to the inhalation of dust in coal mines. There is probably a condition of

pulmonary tuberculosis. There are signs also of a cardio-renal degeneration.

(*i*) On 22nd May 1940, the appellant filed a claim against the respondent claiming £3 per week from 16th December 1937. He alleged in his particulars that he had sustained injury on 28th September 1934, arising out of and in the course of his employment, namely, pulmonary fibrosis associated with pulmonary tuberculosis and cardio-renal degeneration;

(*j*) The matter was heard on 12th and 13th September 1940, and an award was made in favour of the respondent. Such award set out that the Commission found that: "(*a*) Applicant's work at the respondent's colliery did not materially aggravate his heart or lung conditions so as to be a contributing factor to his incapacity for work, in respect of which compensation is claimed; (*b*) Applicant's then incapacity was not a result of any injury arising out of and in the course of his employment with the respondent. . . ."

(*k*) In April 1938, the appellant was suffering from a non-incapacitating pneumoconiosis the result of his employment with the respondent;

(*l*) In April 1938, the appellant was totally unfit for work by reason of pulmonary tuberculosis and cardio-renal degeneration;

(*m*) Neither the combined heart-kidney trouble nor the tuberculosis was due to appellant's work with the respondent nor in any way aggravated or contributed to by such work;

(*n*) On 27th July 1945, the appellant was totally incapacitated for work by pneumoconiosis and such incapacity continues;

(*o*) The appellant on 27th July 1945, was also totally incapacitated by chronic tuberculosis and such incapacity still continues;

(*p*) Since April 1938, down to 27th July 1945, and continuing, the appellant was totally incapacitated for work by pulmonary tuberculosis; and

(*q*) The appellant received an injury, namely suffered from a totally incapacitating pneumoconiosis on and from 27th July 1945, and such injury was received in the course of his employment.

The evidence in the case consisted of a medical board certificate dated 19th April 1938; a medical board certificate dated 27th July 1945; the award of the Commission dated 13th September 1940; the application for determination dated 22nd May 1940, and the

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answer dated 11th September 1940; and the evidence of the appellant.

On 27th July 1945 a medical board constituted under the Act issued a certificate stating that the appellant was suffering from a totally incapacitating pulmonary fibrosis probably due to his work in coal mines. It was further certified that there was also a chronic tuberculosis, probably active. Reference was made to the examination of films taken on 19th April 1938, and to two stereoscopic films taken 27th July 1945, the latter indicating that the nodular fibrosis shown in the earlier one had considerably increased and could be classified as advanced. It was added that there was also chronic tuberculosis, probably active.

Upon those findings the Commission held :—

(i) Since 1938 and onwards, the appellant was totally incapacitated for work by a non-compensable condition, namely, pulmonary tuberculosis.

(ii) Since July 1945, he has also been totally incapacitated by a compensable condition, namely, pneumoconiosis, contracted in the course of his employment with the respondent.

(iii) Since 27th July 1945, he was totally incapacitated by each of these separate independent diseases.

(iv) The appellant received injury within the meaning of the *Workers' Compensation Act* 1926-1945 on 27th July 1945, when he was certified as being incapacitated by pulmonary fibrosis.

(v) On or before 27th July 1945, as the result of a non-compensable condition he had no capacity for work left, and therefore could not earn wages.

(vi) The pneumoconiosis could not be taken into account as causing any total or partial incapacity unless and until the pre-existing total incapacity due to the non-compensable cause entirely or partially disappeared.

An award was made in favour of the respondent.

In a case stated, pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1946, at the request of the applicant the following questions of law were referred for the decision of the Supreme Court of New South Wales :—

(1) Was there any evidence on which the Commission could find that the applicant was totally incapacitated for work on 27th July 1945 by a non-compensable condition namely chronic tuberculosis and that such incapacity continued after that date ?

(2) In a claim for compensation for incapacity due to a disease contracted by gradual process where the disease may be progressive and where contraction of disease and onset of incapacity do not coincide, and such claim is brought against the applicant's last employer in the employment to the nature of which the disease is due, is it correct :—

(*a*) To have regard to the period of the last twelve months' employment with such last employer (or any shorter sufficient period) for the purpose of calculating the applicant's pre-injury average weekly earnings ; if not, what is the proper method of arriving at such earnings having regard to s. 14 ?

(*b*) To decline to award an applicant who is incapacitated by an industrial disease compensation from the date of the onset of incapacity if at and prior to that date the applicant is already totally incapacitated for work from non-compensable causes ?

(3) Did the Commission err in law in holding that the applicant was not entitled to compensation on the basis of total incapacity from a compensable injury within the meaning of the Act as from 27th July 1945 ?

The Full Court of the Supreme Court, by majority (*Street* and *Owen* JJ., *Davidson* J. dissenting) answered the questions as follows :—1, Yes ; 3, No ; and, by the whole Court, 2 (*a*) and (*b*), Yes.

From that decision the applicant appealed to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Miller K.C. (with him *Sullivan*), for the appellant. Whatever may be the view, as a matter of construction, of the certificate given by the medical board in 1938 there can be no doubt as to the meaning of the certificate given by the medical board in 1945. The appellant was certified as unfit for employment, the pulmonary fibrosis by which he was totally incapacitated being probably due to his work in coal mines, this being the injury stated by the appellant in his application. It is not necessary to ignore the finding made by the Commission in 1940. That award determined the issue as to the incapacity then asserted. It merely found that at that time there was no right on the part of the appellant to compensation because there was no injury within the meaning of the Act caused by the dust at that time, but the fact is that, notwithstanding the removal of the exposure, the results of dust had continued. It is perfectly consistent that although the appellant had

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not been exposed to dust since 1934 the pulmonary fibrosis caused by the dust could have advanced to bring about a condition referred to by the medical board in 1945. It is consistent with the facts that the appellant may have recovered some of his incapacity and subsequently lost it owing to a disease connected with his employment. The claim now before the Court is for compensation only as from the date of the 1945 certificate and the only evidence relevant to that claim is that certificate. That certificate is conclusively binding that the appellant is totally incapacitated by a dust disease and that that injury occurred to him by virtue of the provisions of s. 7 (5) of the *Workers' Compensation Act* 1926-1946 (N.S.W.) as at the date of the 1945 certificate (*Savage* v. *Nightingale* (1)). The claim now before the Court is not a reopening of the matter in the strict sense. It is a new claim. The basis of it is that the jurisdiction to consider at any time whether there is a right to compensation continues notwithstanding a decision by the Commission. Although, generally speaking, an award by the Commission in an ordinary case concludes the matter, there is specific power in the Act to reopen it at any time. Although it was decided in *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (2) that if a worker has no capacity he cannot get compensation under the Act even though he sustains an injury which in itself would be sufficient to produce total incapacity if he were not already so incapacitated, the question was left open by the Judicial Committee in *Doudie* v. *Kinneil, Cannell and Coking Coal Co. Ltd.* (3). Some of the findings by the Commission in respect of this claim are not supported by evidence and therefore are not binding on this Court. There is no evidence to support the finding of facts (*o*) and (*p*), or the holding by the Commission that the appellant, since 27th July 1945, was totally incapacitated by each of the separate independent diseases referred to in par. 8 (iii) of the stated case. There was evidence upon which the Commission could and did find that the appellant was totally incapacitated by the compensable condition. There was no admissible evidence upon which finding of fact (*o*) could be based. The Commission has substituted its own view for the view of the medical board ; this it is not entitled to do (*Smith* v. *Mann* (4) ; *Savage* v. *Nightingale* (5)). The Commission did not give full effect to the provisions of s. 51 (4), (5), (6) of the *Workers' Compensation Act*. There can be no condition in the worker other than the condition in respect of which this claim was made ; regard

(1) (1937) 30 B.W.C.C. 299.
(2) (1937) 2 K.B. 426.
(3) (1947) 1 All E.R. 6.
(4) (1932) 47 C.L.R. 426, at pp. 440, 444, 450, 451, 455.
(5) (1937) 30 B.W.C.C., at pp. 301, 302.

cannot be had to anything else. The appellant's claim comes within s. 7 (4) of the Act. *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1) upon which the Commission relied, was a special type of case and does not at all control the meaning of the relevant provisions of the *Workers' Compensation Act* 1926-1946. That case is unsatisfactory because it fails to give effect to the language of the statute. There is no doctrine of continuance that the Court will impose upon the finding made by the Commission in 1940. The doctrine of *res judicata* cannot be applied (*O'Donel* v. *Commissioner for Road Transport and Tramways* (2)). Upon the Commission holding that since 27th July 1945 the appellant had been totally incapacitated by a compensable condition, that is pneumoconiosis, contracted in the course of his employment with the respondent, the statutory requirements were satisfied (*Evans* v. *Oakdale Navigation Collieries Ltd.* (3)). In that case the court gave effect to the double claim for compensation. The Commission should have had regard only to the 1945 certificate. That was the only relevant certificate with respect to the matter which was the subject of the claim. It was a certificate as to the appellant's whole condition. There was not any mention in that certificate of anything at all disabling apart from the condition of pulmonary fibrosis due to coal dust. It was entirely overriding that certificate for the Commission to assume that there was a condition upon which the medical board had not reported at all, or that there was an incapacity upon which the medical board had not reported. The appellant is only required to prove that there was some incapacity from the fibrosis. Similar problems of burden of proof were dealt with in *Metropolitan Coal Co. Ltd.* v. *Pye* (4) and *Darling Island Stevedoring & Lighterage Co. Ltd.* v. *Jacobsen* (5). In *Evans* v. *Oakdale Navigation Collieries Ltd.* (6) the matter between the parties was decided strictly upon the words of the statute. The court in that case was concerned only with the fact that the worker had an industrial disease and was not concerned with another injury suffered by the worker or the consequences of that other injury. *Ward* v. *Corrimal-Balgownie Collieries Ltd.* (7) was in respect of a different type of problem and has no bearing on this case.

Wallace K.C. (with him *Head*), for the respondent. The irresistible inference from the facts is that, having regard to his state of health from 1934 onwards and his inability to work, the appellant was by and in 1938 totally unfit by reason of a non-compensable

(1) (1937) 2 K.B. 426.
(2) (1938) W.C.R. 10.
(3) (1940) 1 K.B. 702.
(4) (1936) A.C. 343; 55 C.L.R. 138.
(5) (1945) 70 C.L.R. 635.
(6) (1940) 1 K.B. 702; (1939) 32 B.W.C.C. 51.
(7) (1938) 61 C.L.R. 120.

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disease, and although there were within him germs of a compensable disease they were non-incapacitating. The Commission was entitled to use its knowledge and common sense and to hold that, that being the position in 1938, and so found in 1940, and it having been established that in 1945 that totally incapacitating non-compensable disease was still present and probably active, that tuberculosis which rendered the appellant totally unfit in 1938, as so found in 1940, was still of a totally incapacitating nature in 1945. The medical board which considered the matter in 1945 had before it some at least of the evidence which was before the medical board in 1938. There was some evidence upon which the Commission was entitled to make its finding. There was no evidence which showed that the appellant either wholly or partly recovered from his first incapacity, and then suffered from the onset of a new incapacity. The principle is clear from the *Workers' Compensation Act* that a worker does not get compensation for an injury but for an incapacity, and if a worker is already totally incapacitated he cannot be further incapacitated and thus is not entitled to further or additional compensation (*Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1)). *Evans* v. *Oakdale Navigation Collieries Ltd.* (2) and *Doudie* v. *Kinneil, Cannell and Coking Coal Co. Ltd.* (3) are cases where there was only a partial incapacity at the time of the totally incapacitating industrial disease, and thus are not in point in this case. The question for this Court is: Whether there was sufficient evidence to establish the findings made by the Commission. It is submitted that there was ample evidence to justify the findings so made by the Commission. The Commission was, and this Court is, entitled to construe the 1945 certificate. It should be construed in the light of the previous certificate and award and the evidence before the medical board in 1938, and the Commission in 1940.

Miller K.C., in reply. The certificate by the medical board is conclusive evidence as to the worker's condition as at the date of the certificate (*Simpson* v. *James Nimmo & Co. Ltd.* (4); *Wicks* v. *Union Steamship Co. of New Zealand* (5); *Tulloch's Phoenix Iron Works Pty Ltd.* v. *Roxburgh* (6)). Evidence as to the worker's condition subsequent to the date of the certificate is admissible. The " condition " of the worker was discussed in *Smith* v. *Mann* (7).

Cur. adv. vult.

(1) (1937) 2 K.B. 426.
(2) (1940) 1 K.B. 702.
(3) (1947) 1 All E.R. 6.
(4) (1929) 22 B.W.C.C. 750.
(5) (1933) 33 S.R. (N.S.W.) 267.
(6) (1941) W.C.R. 69.
(7) (1932) 47 C.L.R., at pp. 440, 444, 451, 456.

The following written 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 by his Honour Judge *Rainbow*, a member of the Workers' Compensation Commission of New South Wales.

The appellant, Fred Dawkins, on 12th October 1946 made a claim for compensation under the *Workers' Compensation Act* 1926-1946 as for total incapacity, the result of pulmonary fibrosis caused by the inhalation of dust. He had been a coal miner and was last employed (except for a period of six weeks' relief work) by the respondent coal-mining company. The claim was made for payment of compensation as from 27th July 1945. The *Workers' Compensation Act*, s. 7 provides as follows :—"(4) Where the injury is a disease which is of such a nature as to be contracted by a gradual process compensation shall be payable by the employer in whose employment the worker is or who last employed the worker. . . . (5) For the purposes of sub-section four of this section . . . the injury shall be deemed to have happened at the time of the worker's incapacity." The claim for compensation was made under s. 9 which provides that, subject to certain provisions of the Act, where total or partial incapacity for work results from the injury the compensation payable by the employer shall be as prescribed by the section.

It was admitted that pulmonary fibrosis or pneumoconiosis was a disease of such a nature as to be contracted by a gradual process. The applicant supported his case by producing a medical certificate dated 27th July 1945 which stated that he was unfit for employment and that he had a "totally incapacitating pulmonary fibrosis probably due to his work in coal mines."

Under s. 51 (5) of the Act, it is provided that the medical referee or board to whom a matter is referred in accordance with the section, shall, in accordance with rules made by the Commission, give a certificate as to the condition of the worker and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that the certificate of a medical board shall be conclusive evidence as to the matters so certified.

The case of the applicant is that he produced conclusive evidence that he was suffering from total incapacity resulting from pulmonary fibrosis probably due to his work in coal mines. He therefore under s. 7 (4) of the Act makes a claim against his last employer, the respondent upon this appeal.

The respondent relies upon other evidence which, it is claimed, should be considered together with the certificate mentioned. This

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evidence included oral evidence upon the application, a certificate of the medical board given under the Act on 19th April 1938 and an award under the Act made on 13th September 1940.

The contention of the respondent is that this other evidence shows that the applicant had suffered from total incapacity ever since 1938 (probably since 1934) by reason of a disease, viz., tuberculosis, which was not connected in any way with his employment, and that the incapacity due to pulmonary fibrosis which had developed by 1945 did not create a new total incapacity in respect of which compensation was payable.

The first question which is submitted in the case stated is : " Was there any evidence on which the Commission could find that the applicant was totally incapacitated for work on 27th July 1945 by a non-compensable condition namely chronic tuberculosis and that such incapacity continued after that date ? "

The Commission made an award in favour of the respondent. Upon appeal to the Supreme Court it was held by *Street* and *Owen* JJ. (*Davidson* J. dissenting) that the question should be answered " Yes."

The oral evidence of the applicant was to the effect that he had been unable to work except for a period of six weeks since 1934. In 1938 he was examined by a medical board appointed under the Act. The medical board gave a certificate in which the condition of the worker was described, and reference was made to previous X-ray examinations which demonstrated some fibrosis. The certificate proceeded : " The condition appears to be one of chronic tuberculosis involving most of the left lung and the upper third of the right lung. The finding of the medical board is that there is a non-incapacitating pulmonary fibrosis present probably due to inhalation of dust in coal mines. There is probably a condition of pulmonary tuberculosis. There are signs also of a cardio-renal degeneration." Under the heading of : " His fitness for employment, specifying where necessary the kind of employment for which he is fit " the medical board certified : " Unfit." This certificate states that the applicant is unfit for any work, i.e., that he was totally incapacitated. There is an express statement that this incapacity was not the result of pulmonary fibrosis. In my opinion this is the fair interpretation of the statement that the pulmonary fibrosis was " non-incapacitating." The worker was totally incapacitated, but the total incapacity is certified to be due to causes other than fibrosis. Other causes mentioned are tuberculosis, and cardio-renal degeneration as a possibility.

In 1940 the appellant applied for an award. The Commission made an award in favour of the respondent and formally stated its findings as follows :—" (*a*) applicant's work at the respondent's colliery did not materially aggravate his heart or lung conditions so as to be a contributing factor to his incapacity for work, in respect of which compensation is claimed ; (*b*) applicant's said incapacity is not a result of any injury arising out of and in the course of his employment with the respondent." These are findings, *binding upon the applicant, that on the date when the findings* were made (13th September 1940) the incapacity was not a result of any injury arising out of and in the course of his employment at the respondent's colliery, and that his work was not a factor contributory to his incapacity.

In 1945 the appellant made the claim which is now under consideration. The medical board gave a certificate stating that the nodular fibrosis had considerably increased and could be classified as advanced. The certificate stated : " There is also a chronic tuberculosis, probably active. The finding of the medical board is that there is a totally incapacitating pulmonary fibrosis probably due to his work in coal mines. There is also a chronic tuberculosis, probably active." Under the heading of " fitness for employment " the board reported : " Unfit."

This certificate is conclusive evidence (s. 51 (5)) that the appellant was on 27th July 1945 totally incapacitated for work, that he was suffering from chronic tuberculosis and from pulmonary fibrosis, and that the latter disease was totally incapacitating.

Upon this evidence the Commission found, *inter alia*, the following facts :—

In April 1938 the appellant was totally unfit for work by reason of pulmonary tuberculosis and cardio-renal degeneration ;

Neither the combined heart-kidney trouble nor the tuberculosis was due to appellant's work with the respondent nor in any way aggravated or contributed to by such work ;

On 27th July 1945 the appellant was totally incapacitated for work by pneumoconiosis and such incapacity continues ;

The appellant on 27th July 1945 was also totally incapacitated by chronic tuberculosis and such incapacity still continues ;

Since April 1938 down to 27th July 1945 and continuing, the appellant was totally incapacitated for work by pulmonary tuberculosis.

Upon these findings the Commission held :—" (i) Since 1938 and onwards, appellant was totally incapacitated for work by a non-compensable condition i.e. pulmonary tuberculosis. (ii) Since July

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1945 he has also been totally incapacitated by a compensable condition i.e. pneumoconiosis, contracted in the course of his employment with the respondent. (iii) Since 27th July 1945, he was totally incapacitated by each of these separate independent diseases."

The case stated contains a question whether upon the findings of fact the Commission was right in holding that the applicant was totally incapacitated for work on 27th July 1945 by a condition in respect of which compensation was not payable. The answer to this question depends in the first place upon the answer to the first question, namely—Was there evidence to justify the findings ?

Section 51 (5) of the Act provides that medical certificates shall be conclusive as to certain matters. The appeal was argued upon the basis that the medical certificates were given in accordance with the provisions of the Act and rules and that the only question which arose with respect to them was one of interpretation. The certificates were given under s. 51 (4) and (5) of the Act. So far as the 1945 certificate states that incapacity resulted from fibrosis, it may be that the certificate could be given only under s. 51 (6) and therefore only upon a joint application of employer and worker and in the form prescribed : see Rules under the Act, Div. IV., Rule 10 and Form 6. But no such point was taken in argument and I assume in favour of the applicant that the 1945 certificate upon which he relies was a certificate to which the Act gives conclusive effect.

If medical certificates are inconsistent, difficulties in applying the provision as to their conclusive character will arise. In the present case, however, there is no inconsistency between the medical certificates. The certificate of 1938 refers to the condition at that date. Total incapacity had then been produced by tuberculosis and possibly other causes. The worker then suffered from fibrosis but that disease did not make any contribution to his incapacity. The medical certificate given in 1945 showed that the fibrosis had developed to such an extent that it had by that date itself produced total incapacity quite independently of the tuberculosis.

Upon this evidence the Commission was entitled to find that the incapacity caused by the tuberculosis had continued throughout. The presumption of continuance is in itself sufficient to justify this conclusion (see *Phipson* on *Evidence*, 8th ed. (1942), p. 98), but there is in this case also the additional evidence of the appellant himself that he has been unable to work since 1934. That evidence excludes the possibility that he recovered from the tuberculosis at

some time so that for a time he had no incapacity, or only partial incapacity, arising from that cause and subsequently became incapacitated by reason of the fibrosis.

Upon this state of facts, could the Commission properly make an award in favour of the applicant?

The total incapacity from which the worker suffered in 1945 was incapacity which had been created before 1938 and which had continued ever since. In respect of that incapacity no increase was possible. The incapacity due to the fibrosis which had become complete by 1945 did not add to previously existing incapacity. The previous existing incapacity still continued and that incapacity did not result from an injury in respect of which compensation was payable. Under the New South Wales Act an applicant can succeed in his claim only if he can show that he has suffered an injury arising out of or in the course of his employment (s. 6, definition of "injury"; and s. 7) which results in incapacity (s. 9).

In *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1) the Court of Appeal considered a case of total incapacity arising from an accident, followed by total incapacity arising from miner's nystagmus. It was held that the workman was not entitled to any compensation in respect of nystagmus while the total incapacity from the previous accident continued, as the disease did not result in any loss or diminution of earning capacity. In that case a second medical certificate had been given certifying that the miner's nystagmus had created total incapacity. Sir *W. Greene* M.R. said: "At the date of the certificate, as he was already incapacitated for work, he had no element of capacity left in him which this new supervening accident" (i.e., disease) "could take away" (2). The effect of this decision is stated by *Luxmoore* L.J. in *Evans* v. *Oakdale Navigation Collieries Ltd.* (3) in the following words: "Of course, if, as the result of the first accident, the workman suffers total disability, it matters not whether he is subsequently certified to be suffering from an industrial disease which also has rendered him totally incapacitated, for in such a case there is no capacity for work on which the notional accident can operate; *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1). As *Greene* M.R. pointed out in the earlier appeal—*Evans* v. *Oakdale Navigation Collieries Ltd.* (4)—so long as the total incapacity lasted from the first accident, no compensation could be recovered in respect of the second accident, although in respect of the second accident a declaration of liability might properly be obtained."

(1) (1937) 2 K.B. 426.
(2) (1937) 2 K.B., at p. 435.
(3) (1940) 1 K.B., at p. 714.
(4) (1939) 32 B.W.C.C., at p. 56.

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In the present case the total incapacity of the worker which existed in 1945 had existed for some years prior to that date as a result of tuberculosis. It could not therefore be said to be the result of fibrosis because one hundred per cent incapacity cannot be increased beyond one hundred per cent by any supervening cause.

In my opinion the Full Court rightly answered in the affirmative the question whether there was evidence on which the Commission could make the findings which were actually made and the other question whether the Commission was right in declining to make an award in favour of the applicant and in holding that the applicant was not entitled to compensation on the basis of total incapacity as from 27th July 1945.

In my opinion the appeal should be dismissed.

RICH J. I am in substantial agreement with the reasons of my brother *Dixon* and cannot usefully add to them.

I would dismiss the appeal with costs.

STARKE J. Appeal from a decision of the Supreme Court of New South Wales in Full Court upon a case stated by the Workers' Compensation Commission of New South Wales pursuant to the provisions of the *Workers' Compensation Act* 1926-1946.

The appellant made an application under the Act against the respondent for the determination of the liability and the amount of compensation payable by the respondent. The appellant had been last employed by the respondent as a miner and alleged that he had sustained an injury within the meaning of the Act, namely, pulmonary fibrosis due to the inhalation of coal dust. He proved a certificate dated July 1945 from a medical board appointed under the Act certifying that there was a totally incapacitating pulmonary fibrosis probably due to his work in coal mines, that there was also a chronic tuberculosis probably active and that he was unfit for employment. The Act makes the certificate conclusive evidence as to the matters certified (Act, s. 51 (5)).

So far the case was clear. But the Workers' Compensation Commission found that since April 1938 down to and on 27th July 1945 and onwards the appellant was totally incapacitated by chronic tuberculosis in no way due to the appellant's work as a miner nor in any way aggravated or contributed to by such work. But it also found that the appellant was in April 1938 suffering from a non-incapacitating pneumoconiosis or pulmonary fibrosis due to the inhalation of coal dust which had progressed and in July 1945 totally incapacitated him from work.

The question stated is whether there was any evidence on which the Commission could find that the applicant was totally incapacitated for work on 27th July 1945 by chronic tuberculosis and that such incapacity continued after that date.

In May 1940 the appellant made an application under the *Workers' Compensation Act* 1926-1938 for the determination of the liability of the respondent to pay compensation to the appellant in respect of an injury arising out of and in the course of his employment with the respondent. The nature of the injury was described as pulmonary fibrosis associated with pulmonary tuberculosis and cardio-renal degeneration caused or aggravated by the appellant's work. He produced a certificate of a medical board dated April 1938 which certified that the appellant suffered from a non-incapacitating pulmonary fibrosis probably due to inhalation of dust in coal mines and that there was probably a condition of pulmonary tuberculosis and signs of a cardio-renal degeneration and that the appellant was unfit for employment.

In September 1940 the Workers' Compensation Commission found that the appellant's work at the respondent's colliery did not materially aggravate his heart or lung conditions so as to be a contributing factor to his incapacity for work in respect of which compensation was claimed and that the appellant's incapacity was not the result of any injury arising out of and in the course of his employment with the respondent. And the Commission awarded in favour of the respondent.

But this certificate and award are evidence only of the condition of the appellant at the time when the same were given and made but they are not conclusive in the present proceedings.

However, the appellant was sixty years of age at the time of the application in 1940.

About 1934 he left the coal-mining industry and has never worked since except for a period of about six weeks on relief work.

And the medical certificate of 1945, though it stated that nodular fibrosis had considerably increased and could at that date be classified as advanced, also stated that there was a chronic tuberculosis probably active.

In my opinion these facts are evidence upon which the Commission could find that the applicant was totally incapacitated for work on 27th July 1945 by a condition, namely, chronic tuberculosis and continued to be so incapacitated after that date.

And as the Commission did so find the cases of *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1) and *Ward* v. *Corrimal-Balgownie Collieries Ltd.* (2) support the Commission's conclusion

(1) (1937) 2 K.B. 426. (2) (1938) 61 C.L.R. 120.

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that the appellant was not entitled to compensation as from 27th July 1945 on the basis of total incapacity from an injury within the meaning of the *Workers' Compensation Act*.

The appeal should be dismissed.

DIXON J. The Workers' Compensation Commission in its case stated included a finding that in April 1938 the appellant was totally unfit for work by reason of pulmonary tuberculosis and cardio-renal degeneration, a finding that since April 1938, down to 27th July 1945 and continuing, the appellant was totally incapacitated for work by pulmonary tuberculosis and a further finding that the appellant on 27th July 1945 was totally incapacitated by chronic tuberculosis. In respect of the incapacity so caused the employer, the respondent, is, of course, not liable, there being nothing to associate the condition with the employment. But the Commission also found that on 27th July 1945 the appellant was totally incapacitated for work by pneumoconiosis and that such incapacity continues. If these findings are to stand it is plain that, while the appellant was under a total incapacity arising from a cause in respect of which the employer was not liable, he became subject to pneumoconiosis in a degree sufficient to incapacitate him. For incapacity attributable to pneumoconiosis the respondent as employer, in the circumstances, is liable. The finding, however, that the appellant was totally incapacitated from pulmonary tuberculosis on 27th July 1945 is challenged.

The Workers' Compensation Commission is established as a tribunal from which no appeal lies on questions of fact. Under s. 37 of the *Workers' Compensation Act* 1926, as amended, there is a proceeding by way of case stated which amounts in substance to an appeal upon questions of law. The finding could, therefore, be impugned only on the ground that there was no sufficient evidence to support it. The question of the sufficiency of evidence was argued before us.

The evidence consists of a medical certificate given in 1938, of a decision of the Commission given in 1940 and of a medical certificate of 1945; there are to be added some few circumstances. I have considered these matters and, not without some misgiving, I have arrived at the conclusion that they do afford material from which the Commission might properly draw the inferences expressed in its findings.

The question then is whether, on these findings, the respondent as employer is liable for compensation in respect of the incapacity as it existed on 27th July 1945 and afterwards.

The more material provisions of the Act consist in the definition of "injury" in s. 6, which includes a disease which is contracted by the workman in the course of his employment; of s. 7 (4), which provides that where the injury is a disease which is of such a nature as to be contracted by a gradual process, compensation shall be payable by the employer in whose employment the worker is, or who last employed the worker; and of s. 7 (5), which provides that, for the purpose of sub-s. (4), the injury shall be deemed to have happened at the time of the worker's incapacity. These provisions will, if the conditions which they describe are fulfilled, operate to bring s. 9 into play. The material part of s. 9 provides that where total incapacity for work *results* from the injury compensation payable by the employer under this Act shall be as therein set out. By reason of the medical certificate of 1945 the appellant must be taken under s. 7 (4) and (5) to have suffered injury on 27th July 1945 by a disease of a kind for which compensation would be payable by the employer. He must be taken to be in a totally incapacitated condition on that date, and it must be assumed that the disease is the injury. The question remains, however, whether under s. 9 the total incapacity for work results from the injury, that is, the disease with respect to which the employer is liable. The requirement or condition expressed in these words must be fulfilled before liability is imposed upon the employer.

It appears to be established by *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1) that if a man who is already totally incapacitated or disabled suffers injury by accident or disease which in itself would totally incapacitate or disable him from work his incapacity cannot be attributed to the second cause. As he was totally incapacitated before and at the time when he encountered the full effects of the second accident or disease which would in itself have sufficed totally to disable him, the latter cannot be said to have incapacitated him. The incapacity, therefore, does not "result" from the injury. This conclusion appears to be equally applicable when the first and second causes of incapacity are disease or are traumatic injury; when the first is traumatic injury, and the second is disease; and when the first is disease and the second traumatic injury. In *Evans* v. *Oakdale Navigation Collieries Ltd.* (2) a man who had been incapacitated by a rib injury was certified to be totally disabled by silicosis. The question was whether he was partially or totally incapacitated by the rib injury. Sir *Wilfred Greene* M.R. said that the result of a finding that he was totally incapacitated "would have been, according to the

(1) (1937) 2 K.B. 426. (2) (1939) 32 B.W.C.C. 51.

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decision of this Court in the case of *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1) that so long as the total incapacity from the first accident lasted, no compensation could be recovered in respect of the second " (notional) " accident, although in respect of that second " (notional) " accident a declaration of liability might properly have been made " (2).

The *Workers' Compensation Act* 1926 of New South Wales is somewhat differently drawn from the English Act, but I think the result of the provisions is in this respect the same. A point, however, was made upon the relation of sub-s. (5) of s. 7 to sub-s. (4). Reliance was placed upon the fact that under sub-s. (5) the injury must be deemed to have happened at the time of the worker's incapacity. It was said that the medical certificate established conclusively the incapacity ; that sub-s. (5) established conclusively that the injury happened at the time of the incapacity and that, therefore, an inconsistency was involved in deciding that for the purposes of s. 9 incapacity for work did not result from the injury. This appears to me to be merely a verbal point which disregards the real meaning of the provisions. Sub-section (5) of s. 7 is directed to fixing the time or date and not to establishing a conclusive presumption that incapacity and injury are all one. A medical certificate is conclusive evidence perhaps of two facts, namely, that the man is incapacitated and that he suffers from a disease which is inconsistent with a capacity for work. Neither the medical certificate nor the provisions of sub-ss. (4) and (5) of s. 7 conclude the question whether total incapacity already existed as a result of another cause, also inconsistent with his incapacity for work.

In cases of this description a question will naturally present itself whether a continuing incapacity may not at one time be attributable to one disease as the dominant cause and at another time to another disease as a dominant cause. The effects of the first disease may gradually modify or disappear, so that, if it were not for the second disease, the man would not be totally incapacitated. Where the employer is liable in respect of one of the two diseases and not in respect of the other his liability may perhaps ensue from the replacement of one cause by another, but that question does not arise in the present case. The findings of fact make the case one in which a total incapacity attributable to a disease for which the employer was not liable continued unaffected by the progress of another disease for which he might have been liable, developing to a severity sufficient of itself to cause incapacity.

In my opinion the appeal should be dismissed.

(1) (1937) 2 K.B. 426. (2) (1939) 32 B.W.C.C., at p. 56.

McTiernan J. I am of opinion that the appeal should be dismissed.

The appellant relies upon the certificate of 27th July 1945 to prove his case. If by force of s. 51 of the Act the certificate is conclusive evidence that on and from that date the appellant had a total incapacity due to pulmonary fibrosis his case is established. But if the certificate is not conclusive evidence of that fact the evidence which the Commission considered upon that issue was relevant and admissible evidence and I think that the evidence is sufficient to support the finding of the Commission against the appellant on that issue. The evidence has been set out and I do not repeat the statement of it. It is therefore necessary to consider whether the certificate is conclusive evidence that on 27th July 1945 the appellant had a total incapacity which was due to pulmonary fibrosis. The first question is whether this is a matter as to which the medical board certified. The certificate says "that there is a totally incapacitating pulmonary fibrosis due to his (the appellant's) work in coal mines." Section 51 makes a certificate given under s. 51 (4) and (5) conclusive evidence as to the condition of a worker and his fitness for work. Section 51 also makes a certificate given in accordance with the prescriptions in s. 51 (6) conclusive evidence as to the question whether or to what extent the incapacity of the worker is due to injury "as if the question were one as to the condition of the worker." For the purposes of s. 51 therefore, the condition of the worker is not a term which covers the question as to whether or to what extent his incapacity is due to the injury in respect of which he claims compensation. The definition of injury in the Act includes disease. It is necessary for the appellant's case that the certificate means *inter alia* that the total incapacity of the appellant is due to pulmonary fibrosis. But in so far as the certificate has that meaning, it is not a certificate as to his condition under s. 51 (4) and (5), but a certificate "as to whether and to what extent his incapacity is due to the injury" (that is, the disease) under s. 51 (6). The certificate would not be conclusive evidence that the total incapacity of the appellant was due to pulmonary fibrosis unless it was in accordance with the provisions of s. 51 (6) and the rules referred to in the sub-section.

The certificate says on its face that it was given under s. 51 (4) and (5). It follows Form 3, which is in Div. IV. of the Workers' Compensation Rules. This is the form prescribed by the rules for a certificate given under these sub-sections, not under s. 51 (6). It could not be claimed that the certificate is conclusive evidence that the total incapacity of the appellant is due to the pulmonary

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fibrosis unless it was given in accordance with the requirements prescribed by s. 51 (6). A certificate which satisfies those requirements must be in Form 6 in Div. IV. of the above-mentioned rule. This certificate is not in that form. Indeed, it is entituled as follows: "In the matter of a medical examination under the provisions of s. 51 (4) and (5) of the *Workers' Compensation Act* 1926-1945." It follows that, in so far as the certificate means that as from 27th July 1945 the appellant had a total incapacity resulting from pulmonary fibrosis, it is not a certificate about a matter as to which it is possible to hold that s. 51 makes it conclusive evidence. The certificate therefore leaves open the question whether on 27th July 1945 the appellant already had a total incapacity resulting from any other disease which is not an injury in respect of which the respondent is liable to pay statutory compensation. The Commission found that he did. In these circumstances the appellant has no statutory right under the Act to recover compensation from the respondent: *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (1); *Evans* v. *Oakdale Navigation Collieries Ltd.* (2).

I am of the opinion that the first question should be answered "Yes."

Appeal dismissed with costs.

Solicitors for the appellant, *Maguire & McInerney*, Wollongong, by *Maddocks Cohen & Maguire.*

Solicitors for the respondent, *A. O. Ellison & Co.*

J. B.

(1) (1937) 2 K.B. 426.

(2) (1940) 1 K.B. 702.