[HIGH COURT OF AUSTRALIA.]

KANDOS COOMBER COLLIERY COMPANY LIMITED . . . . . } APPELLANT;
RESPONDENT,

AND

BROMWICH . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 25, 26; *Dec.* 14.

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

Workers' Compensation—Injury—Partial incapacity due to employment disease—Pulmonary fibrosis—Total incapacity due to non-employment disease—Cardio-vascular degeneration—Worker simultaneously affected by both diseases at date of medical examination—Commission unable to find whether worker so totally incapacitated before contracting employment disease—Compensation—Onus—Workers' Compensation Act 1926-1947 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 9 *of* 1947), *ss.* 6, 7.

A worker claimed compensation under the *Workers' Compensation Act* 1926-1947 (N.S.W.), in respect of total incapacity alleged to be due, in April 1945, to (*a*) pulmonary fibrosis caused or aggravated by his work as a coal miner employed by a company, and (*b*) "cardio-vascular degeneration accelerated thereby." In May 1947, a medical board certified that the worker suffered from (i) a partially (33⅓%) incapacitating pulmonary fibrosis probably due to inhalation of mixed dusts, and (ii) a totally incapacitating cardio-vascular degeneration. The Workers' Compensation Commission found, *inter alia*, that in May 1947 the worker was affected simultaneously by both (i) pulmonary fibrosis, a disease contracted by a gradual process and in relation to which his 33⅓% incapacity could be due to his employment, and (ii) cardio-vascular degeneration, a progressive disease not associated with his employment. The Commission was unable to find that the worker was not so affected when he ceased work in February 1945. There was not any finding that the worker had become totally incapacitated by a non-employment injury before sustaining pulmonary fibrosis.

Held, by *Latham* C.J., *Starke* and *Dixon* JJ. (*Rich* and *Williams* JJ. dissenting), that the worker had not brought himself within the provisions of the

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Workers' Compensation Act 1926-1947 (N.S.W.), and was not entitled to compensation.

Decision of the Supreme Court of New South Wales (Full Court): *Bromwich* v. *Kandos Coomber Colliery Co. Ltd.*, (1948) 48 S.R. (N.S.W.) 532; 65 W.N. (N.S.W.) 243, reversed.

APPEAL from the Supreme Court of New South Wales.

On 25th August 1947, Henry Edward Charles Bromwich filed a claim under the *Workers' Compensation Act* 1926-1947 (N.S.W.) against Kandos Coomber Colliery Co. Ltd. for compensation under that Act. Bromwich alleged that on 13th April 1945 whilst working as a "groom shoeing horses underground and working in screen on surface" at the company's Kandos Coomber Mine he was totally incapacitated for work by "pulmonary fibrosis caused by and/or aggravated by coal-mining work also cardio-vascular degeneration accelerated thereby" and he claimed compensation at the rate of £3 10s. per week from the company as from that date.

The company denied its liability to pay compensation to Bromwich on the grounds, *inter alia*, that he did not suffer injury arising out of or in the course of his employment with the company; and that he was not incapacitated as a result of injury arising out of or in the course of his employment with the company.

Bromwich was examined by a medical board appointed at his request by the Workers' Compensation Commission under s. 51 (4) of the Act. By its certificate dated 7th May 1947, the medical board reported that "the finding of the Medical Board is that there is a partially (33⅓%) incapacitating pulmonary fibrosis probably due to inhalation of mixed dusts. There is a totally incapacitating cardio-vascular degeneration. His fitness for employment specifying where necessary the kind of employment for which he is fit: Unfit."

The following facts were proved or admitted at the hearing of the application. Bromwich was aged fifty-nine years, he had no dependants and had earned about £7 per week as a groom and screen hand employed by the company. He ceased work on 13th February 1945 because of shortness of breath and had not worked since that date. He started work at the age of fourteen years; he did bush work for three months, dairying for two and one-half years, farming for five years, worked in the cement industry for four years, he was employed at Broken Hill as a miner for three years, as a sanitary carter for fifteen years and at the company's mine for fifteen years. Bromwich had suffered from shortness of breath for at least twelve months prior to ceasing work in February

1945, and this condition had been getting worse. At the company's mine he worked as a groom, also at tipping skips of coal (from 1942 onwards for about one hour per day at the tunnel mouth) and at cleaning bathrooms, the manager's office, and the ambulance room. He went into the pit once per week to collect sanitary pans (occupied one to one and one-half hours) and about once per month to shoe a horse. Pulmonary fibrosis was a disease contracted by a gradual process. The cardio-vascular degeneration was not associated with Bromwich's employment with the company, and, further, it was a progressive disease which could progress irrespective of the nature of a patient's work. In May 1947, Bromwich was affected simultaneously by both pulmonary fibrosis and cardio-vascular degeneration and the Commission was unable to find that he was not also so affected in February 1945.

The Commission found that Bromwich's employment with the company was one to the nature of which "a $33\frac{1}{3}\%$ incapacitating pulmonary fibrosis probably due to the inhalation of mixed dusts" could be due and accordingly that he was entitled to compensation unless he were disentitled by reason of the finding that at the date of the medical board's certificate he suffered "a totally incapacitating cardio-vascular degeneration" which condition the Commission found to be not associated with his employment. There was not any evidence which established more than that Bromwich was affected by the two foregoing conditions simultaneously and in these circumstances the Commission found that Bromwich was entitled to be compensated for the incapacity which resulted from the employment disease. Compensation was assessed at the rate of £2 per week from 13th April 1945.

In a case stated pursuant to s. 37 (4) of the Act, at the request of the company, the following questions of law were referred for the decision of the Supreme Court of New South Wales:—

1. Having regard to the terms of the medical board's certificate, to the findings of the Commission, to the facts admitted or proved, to the decision of the High Court in *Dawkins* v. *Metropolitan Coal Co. Ltd.* (1), was the Commission bound to hold that either on 13th February 1945 or 7th May 1947 Bromwich had no capacity for work to lose by reason of the pulmonary fibrosis and was therefore not entitled to compensation?

2. Having regard to the terms of the medical board's certificate and to the findings of the Commission and to the facts admitted or proved did the Commission err in law in making an award in favour of Bromwich?

(1) (1947) 75 C.L.R. 169.

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3. Having regard to the date and terms of the medical board's certificate and to the findings of the Commission and to the facts admitted or proved did the Commission err in law in awarding compensation as from 13th April 1945 ?

The Full Court of the Supreme Court *Jordan* C.J., *Davidson* and *Street* JJ., answered the questions in the negative (*Bromwich* v. *Kandos Coomber Colliery Co. Ltd.* (1)).

From that decision the company appealed to the High Court.

Wallace K.C. (with him *Head*), for the appellant. The respondent has not discharged the onus of proving that his incapacity resulted from an " injury " within the meaning of the Act. At the time of the incapacity said to have resulted from his employment he was totally incapacitated by a disease in respect of which he was not entitled to compensation. Compensation was awarded as from the date the respondent ceased work, but there is no finding that he ceased work as the result of a disease contracted in the course of his employment and to which his work was a contributing factor. It is fallacious to suggest that as the lung trouble was a disease of gradual onslaught the respondent must have suffered from it prior to the date of the medical board's certificate, and, therefore, that the onus was upon the appellant to show that the disease for which compensation was not payable produced incapacity before the onset of the disease for which compensation was payable. An applicant for compensation under the Act must prove " injury " plus an incapacity resulting from the " injury." The words " results from " in s. 9 of the Act are of crucial importance (*Salisbury* v. *Australian Iron & Steel Ltd.* (2)). The only findings of fact arise out of the medical board's certificate. There was complete inability on the part of the respondent to show any incapacity due to lung trouble or at what period of time that incapacity commenced.

Sullivan, for the respondent. A specific finding that in 1947 the respondent was suffering from a totally incapacitating heart disease which was progressive did not mean that he was totally incapacitated on 13th February 1945, the date of the injury by pulmonary fibrosis, that date being the relevant date for the purpose of applying *Dawkins* v. *Metropolitan Coal Co. Ltd.* (3). The scope and intention of ss. 6 (1), 7 (1) (*a*), 7 (4) and 9 (1) of the Act are illustrated in *Metropolitan Coal Co. Ltd.* v. *Pye* (4), in which case also the question of onus of proof was dealt with (5). It is apparent that the legis-

(1) (1948) 48 S.R. (N.S.W.) 532 ; 65 W.N. (N.S.W.) 243.
(2) (1943) 44 S.R. (N.S.W.) 157, at p. 160 ; 61 W.N. (N.S.W.) 87, at p. 89.
(3) (1947) 75 C.L.R. 169.
(4) (1936) A.C. 343 ; 55 C.L.R. 138.
(5) (1936) A.C., at p. 349 ; 55 C.L.R., at p. 140.

lature intended that, subject to the requirement that incapacity results therefrom, all injuries such as the one now under consideration should entitle the worker to compensation under the Act if he prove : (*a*) an injury arising out of or in the course of his employment ; (*b*) that such injury is inconsistent with capacity for work ; and (*c*) that he is not exercising the capacity to work. An applicant is not required to prove that at the time of the injury he had capacity to lose. The onus is upon the employer to prove affirmatively that at that time the employee had no capacity to lose, and if the employer does so prove it is conclusive in his favour (*Dawkins* v. *Metropolitan Coal Co. Ltd.* (1)). If, on the other hand, the employee prove affirmatively that the injury entitling him to compensation preceded any other cause of incapacity it is conclusive in his favour (*Harwood* v. *Wyken Colliery Co.* (2) ; *Salisbury* v. *Australian Iron & Steel Ltd.* (3)). An employer does not discharge the onus by showing merely that at a given time the employee was suffering from two contemporaneous conditions either of which may have preceded the other.

Wallace K.C., in reply.

Cur. adv. vult.

Dec. 14.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court upon a case stated by the Workers' Compensation Commission of New South Wales under s. 37 of the *Workers' Compensation Act* 1926-1947 (N.S.W.). The Commission made an award for compensation in favour of the respondent Henry Edward Charles Bromwich under which his employer, the appellant company, was ordered to pay weekly compensation at the rate of £2 per week from 13th February 1945. The award recited that the Commission found that :—" (*a*) the applicant suffers incapacity for work from two causes—(i) pulmonary fibrosis due to the inhalation of dusts to which his coal mining employment with the respondent exposed him, and which causes him partial ($33\frac{1}{3}\%$) incapacity for work ; (ii) cardio-vascular degeneration which causes him total incapacity for work, and which has no causal connection with his employment ; (*b*) the applicant was affected by the conditions (*a*) (i) and (ii) simultaneously, and is entitled to compensation in respect of his capacity for work resulting from the condition (*a*) (i)." The case stated does not raise the question whether there was evidence

(1) (1947) 75 C.L.R. 169.
(2) (1913) 2 K.B. 158.
(3) (1943) 44 S.R. (N.S.W.) 157 ; 61 W.N. (N.S.W.) 87.

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to support the findings of the Commission. The questions asked in the case in substance inquire whether upon the basis of the findings of fact of the Commission the Commission was right in making an award in favour of the applicant. The applicant was examined by a medical board (see s. 51 of the Act) and the Board gave a certificate on 7th May 1947 in the following terms :—" The finding of the Medical Board is that there is a partially (33⅓%) incapacitating pulmonary fibrosis probably due to inhalation of mixed dusts. There is a totally incapacitating cardio-vascular degeneration."

The Commission found that the applicant ceased work on 13th February 1945 because of shortness of breath, that he had not worked since that date, that he had suffered from shortness of breath for at least twelve months prior to ceasing work, and that this condition had been getting worse. The Commission further found that pulmonary fibrosis is a disease contracted by a gradual process, that the cardio-vascular degeneration was not associated with the applicant's employment with the respondent and that it was a progressive disease which could progress irrespective of the nature of a patient's work. The conclusion of the Commission was expressed in the following words :—" The applicant was in May One thousand nine hundred and forty-seven affected simultaneously by both pulmonary fibrosis and cardio-vascular degeneration and the Commission was unable to find that he was not also so affected in February one thousand nine hundred and forty-five." In a reserved judgment his Honour Judge *Lamond* said : " There is no evidence which established more than that the applicant was affected by the two foregoing conditions simultaneously and in these circumstances the Commission finds that the applicant is entitled to be compensated for the incapacity which results from the employment disease."

The Full Court of the Supreme Court answered the questions in the case in favour of the worker, holding that " when a worker has established that he has received a personal injury arising out of or in the course of his employment, and that as a result he has sustained some incapacity for work, he is entitled to receive compensation provided for by the Act, unless the employer establishes (the onus being on him to do so) he is not so entitled " ; and a reference was made to the case of *Salisbury* v. *Australian Iron & Steel Ltd.* (1).

The present case is different from *Dawkins* v. *Metropolitan Coal Co. Ltd.* (2), where the worker was found to be totally incapacitated

(1) (1943) 44 S.R. (N.S.W.) 157 ; 61 W.N. (N.S.W.) 87.

(2) (1947) 75 C.L.R. 169.

before the injury upon which he relied to support his claim for compensation had produced any incapacity. In the present case it was not affirmatively found that the claimant was totally incapacitated by a heart disease before the fibrosis produced a degree of incapacity. An examination of the findings shows, in my opinion, that there is no finding on this point, one way or the other.

Under sub-s. (5) of s. 51 of the Act the medical certificate is conclusive evidence of the facts which a medical board is authorized to certify under that sub-section, namely the condition of the worker, his fitness for employment, and the kind of employment (if any) for which he is fit. The certificate, therefore, is conclusive evidence that in May 1947 the worker was suffering from two diseases, one a heart condition which, apart from other conditions affecting his health, produced total incapacity, and pulmonary fibrosis which, apart from other conditions, produced $33\frac{1}{3}\%$ incapacity. The Commission found that the heart condition was not associated with his employment in any way. There is no finding as to the date when either the fibrosis or the heart condition produced any incapacity. As already stated, the finding is simply in the negative form—that the Commission was unable to find that he was not in February 1945 affected in the manner in which he was affected in May 1947.

The award of the Commission can be supported only upon the basis that incapacity to work in February 1945 resulted from fibrosis. But the findings of the Commission are equally consistent with the hypothesis that the worker had the beginnings of fibrosis when he became unable to work in February 1945, but that at that time the fibrosis did not produce any incapacity; that the heart disease at that time resulted in total incapacity so as to stop him working; and that the fibrosis developed thereafter until in 1947 it resulted in a $33\frac{1}{3}\%$ incapacity. Thus there is no finding that the incapacity resulting from the fibrosis (which was the only disease associated with his employment) arose at a time when he had any capacity for work. *Salisbury* v. *Australian Iron & Steel Ltd.* (1) is not an authority for any such proposition as that if, upon the findings of fact, it is uncertain whether or not an incapacity had resulted from an injury, the worker is entitled to an award of compensation unless the employer establishes that the incapacity was not due to the alleged injury. What was decided in *Salisbury's Case* (1), so far as relevant to this case, was that "the burden of proof lies upon the worker to establish (1) that he has received a personal injury arising out of or in the course of his employment,

(1) (1943) 44 S.R. (N.S.W.) 157; 61 W.N. (N.S.W.) 87.

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and (2) that as a result he has sustained some incapacity for work. . . . If the worker establishes both these matters he is (in general) entitled to receive at least some workers' compensation from his employer" (1). In the present case the Commission was unable to find that, as a result of the fibrosis which was due to the worker's employment as a miner, he had sustained any incapacity, because it was unable to find either that the fibrosis produced any incapacity in February 1945 or that the heart condition, which in May 1947 produced one hundred per cent incapacity, did not exist to the same extent in February 1945. Thus the worker did not establish that, to use the words of *Salisbury's Case* (1), "as a result he had sustained some incapacity for work." If the heart condition had already made him totally incapable in February 1945, the onset then, or the development later, of fibrosis did not bring about a previously non-existing incapacity for work.

Accordingly, in my opinion, the worker has not brought himself within the provisions of the Act and is not entitled to compensation.

The first question in the case inquires whether, having regard to the medical certificate, the findings of the Commission, the facts admitted and proved, and the decision of the High Court in the case of *Dawkins* v. *Metropolitan Coal Co. Ltd.* (2), the Commission was bound to hold that either on 13th February 1945 or 7th May 1947 the applicant had no capacity for work to lose by reason of the pulmonary fibrosis and was therefore not entitled to compensation. In my opinion this question should not be answered because it wrongly assumes that it is necessary, in order to displace a claim, for the Commission to determine that the employer has shown that the worker was not entitled to compensation. On the contrary, it is for the worker to show that he is entitled to compensation. I would therefore not answer this question. The second question asks whether, having regard to the certificate and the findings of the Commission and to the facts admitted or proved, the Commission erred in law in making an award in favour of the applicant. This question should be answered in the affirmative. This answer makes it unnecessary to answer the third question.

The appeal should be allowed and the second question answered as stated.

RICH J. In this case not without hesitation I have come to the conclusion that the appeal should be dismissed on the ground that the circumstances proved entitled the Commission to find

(1) (1943) 44 S.R. (N.S.W.), at p. 160; 61 W.N. (N.S.W.), at p. 89.

(2) (1947) 75 C.L.R. 169.

that part of the worker's incapacity resulted from the injury. I do not deny that the onus lies upon the worker or in case of death upon his dependants to establish by sufficient evidence not only that he sustained injury and that he is incapacitated or dead but also that the incapacity or some part of it or death as the case may be resulted from the injury he sustained. In the present case we begin with the fact shown by the medical certificate that the worker was totally incapacitated at the time of the medical inspection, and that he suffered from pulmonary fibrosis which would account for one-third of his incapacity and from a heart condition which by itself would account for complete incapacity. Our decision in *Dawkins* v. *Metropolitan Coal Co. Ltd.* (1) shows that if the incapacity from his heart condition existed before the fibrosis produced its effect on the capacity none of his incapacity should be regarded as resulting from the fibrosis.

If the order in which his two diseases took effect were reversed that decision shows that the contrary conclusion would be correct. The whole question in the instant case is which disease produced incapacity before the other? In such a question the tribunal must proceed as best it can by reasoning on probabilities, medical indications and the small circumstances on which the balance of probabilities depend. Very little will suffice to raise a presumption of fact that is to turn the balance in the worker's favour. Here you have the worker's age, the long period to exposure of silicosis dust although it was not an intense exposure, his account of the breathlessness which led him to leave off work and the fact that two years elapsed before he is found to be totally incapacitated. These may be slight considerations but they are enough, I think, to call upon the employers for evidence making it more probable that the total incapacity from the heart condition preceded the incapacity from fibrosis. No such evidence is forthcoming.

In these circumstances I think the Commission was entitled to take the steps which it did in concluding the partial incapacity resulted from the injury. I do not understand how the Commission fixed the commencement of previous injury but that is a small matter and does not seem to be in contest.

For these reasons, I would dismiss the appeal.

STARKE J. Appeal from a decision of the Supreme Court of New South Wales upon a case stated by the Workers' Compensation Commission under the *Workers' Compensation Act* 1926-1947 (N.S.W.).

(1) (1947) 75 C.L.R. 169.

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Starke J.

The substantial question is whether the respondent, a worker, sustained personal injury by disease of a progressive nature contracted in the course of his employment whereby he was partially incapacitated for work caused by the injury.

A medical board found in May 1947 that the worker had a partially ($33\frac{1}{3}$ per centum) incapacitating pulmonary fibrosis probably due to the inhalation of mixed dusts and a totally incapacitating cardio-vascular degeneration.

The Commission found that the worker ceased to work in 1945 because of shortness of breath and has not worked since, that the fibrosis was a disease contracted by a gradual process, that the cardio-vascular degeneration was not associated with the worker's employment and was a progressive disease which could progress irrespective of the nature of the patient's work. Further that the worker was in May 1947 affected simultaneously by both pulmonary fibrosis and cardio-vascular degeneration and that the Commission was unable to find that the worker was not also affected in 1945.

It may be that the fibrosis was a contributing factor to the total incapacity of the worker. But the Commission has not so found.

If the cardio-vascular degeneration of the worker totally incapacitated him in 1945 when he ceased work and has progressively increased that incapacity then his incapacity for work cannot be attributed to the pulmonary fibrosis from which he suffered and his incapacity does not result from that injury (*Dawkins* v. *Metropolitan Coal Co. Ltd.* (1); cf. *Williams* v. *Metropolitan Coal Co. Ltd.* (2)).

This appeal should be allowed and question 2 of the case answered in the affirmative.

It is unnecessary to answer the other questions stated in the case.

DIXON J. In *Dawkins* v. *Metropolitan Coal Co. Ltd.* (1), this Court held that if a worker who is already totally incapacitated for work from some other cause afterwards suffers, while in that condition, injury arising out of or in the course of his employment which by itself would have resulted in total or partial incapacity, the worker's condition of incapacity cannot be attributed to such injury while the first cause continues to operate. In doing so we applied English authority.

In this appeal we have a case where the existing condition of the worker is one of total incapacity and there are two causes, each of which by itself would result in incapacity. One cause would result in total incapacity. The other, if it operated alone, would occasion

(1) (1947) 75 C.L.R. 169. (2) (1948) 76 C.L.R. 431.

the loss of one-third of the worker's full capacity for work. The former cause was cardio-vascular degeneration apparently unconnected with his work. The latter cause consists in a pulmonary fibrosis due to the inhalation of mixed dusts. As the worker was a miner before he relinquished work, his last employer would be liable to pay him worker's compensation for any incapacity resulting from that cause: s. 6 (definition of "injury"), s. 7 (4) and (5).

But it is has not been ascertained whether or not, before the worker's pulmonary fibrosis developed to a degree sufficient to cause partial incapacity, the worker had already become totally incapacitated from the first cause, his cardio-vascular degeneration.

The onus rests upon a worker or his dependants claiming compensation under the Act of proving that his incapacity or his death, as the case may be, resulted from the injury. Proof of circumstances or of medical opinion will of course suffice if it will support a reasonable inference that the injury is a cause of the incapacity or of some part of the incapacity. In a case such as the present it would be enough if the evidence supported a reasonable inference that, at the time when the worker's condition of fibrosis became sufficient to cause partial incapacity, he was not then already totally incapacitated by cardio-vascular degeneration or so incapacitated that the pulmonary fibrosis made no difference. It has not been treated as a case in which two causes of partial incapacity combined to cause total incapacity and no doubt the facts suggest that it is not a case of that description. If it were, then it would not matter in what order of time the two diseases first became bad enough to cause partial incapacity. But in a case such as the present, where one disease is by itself a sufficient cause of total incapacity, the order of time is important. For no part of the partial incapacity which the disease or injury due to the employment would suffice to cause can be said to result from that injury if total incapacity already existed.

Accordingly it seems to me that it was for the Commission to ascertain, if it could upon the evidence, whether the worker was or was not in a condition of total incapacity from cardio-vascular degeneration before the pulmonary fibrosis developed to such a degree as to suffice to occasion partial incapacity, and, if the Commission was unable on the evidence to reach a conclusion on this question, to dismiss the claim for want of proof. The Commission decided the claim in favour of the worker, but it did so on grounds which do not appear to me to be consistent in law with the view of the law I have expressed above. In the reasons of the Commission the following statement appears: "There is no evidence which

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establishes more than that the applicant was affected by the two foregoing conditions simultaneously and in these circumstances the Commission finds that the applicant is entitled to be compensated for the incapacity which results from the employment."

From this passage and from the particular findings set out in the case stated, I gather that the decision was based upon the view that it rested upon the employer to show that the condition of total incapacity due to cardio-vascular degeneration existed so as to exclude the possibility of the pulmonary fibrosis being a cause of partial incapacity. The law does not place any such onus on the employer. The initial and final burden of establishing the issue rests upon the claimant, the issue raised by the allegation that the incapacity resulted from the injury. Of course the burden may be discharged by proof of circumstances or medical opinions raising what is sometimes called a presumption of fact in favour of the claimant. That means that enough is shown to authorize an inference that the incapacity did result from the injury unless and until some further circumstances or considerations are shown which so weaken the inference that it ceases to be one that it would be reasonable to draw. But nothing of this sort occurred in the present case. All that appeared was that more than two years after the man left his employment he suffered from both conditions, the one enough to incapacitate him totally, the other partially. Both conditions must have been reached as a consequence of a process of development over a period of years. No reason appeared for supposing that total incapacity from cardio-vascular degeneration had not overtaken the worker before the fibrosis became serious enough of itself to cause a present partial incapacity.

In these circumstances the Commission did err in law, both in the legal reasoning by which it reached its result and in the result it reached.

I think that the appeal by the employer should be allowed. The order of the Supreme Court should be discharged and in lieu thereof the second question in the case stated should be answered: Yes. It is not my view of s. 37 that every question which at the instance of the parties the Commission appends to a case stated must be answered. It is enough to answer the questions which dispose of the matter, that is, if they are framed so as to admit of that course and to be susceptible of a legally satisfactory answer. I do not think questions (1) and (3) in the present case should be answered. If the third question had asked whether there was sufficient evidence to entitle the Commission to make an award of compensation I should have answered it: No.

WILLIAMS J. For fifteen years prior to 13th February 1945, the respondent was employed by the appellant at its coal mine where he worked as a groom, at tipping skips of coal (from 1942 onwards for about one hour a day at the tunnel mouth) and at cleaning bathrooms, the manager's office and the ambulance room. He went into the pit once per week to collect sanitary pans (occupied one to one and one-half hours) and occasionally (about once per month) into the pit to shoe a horse. He ceased work on 13th February 1945 because of shortness of breath and has not worked since that date. He had suffered from shortness of breath for at least twelve months prior to ceasing work. This condition had been getting worse. On 7th May 1947 a medical board certified that on that date the respondent suffered incapacity for work from two causes (*a*) a thirty-three and one-third per cent incapacity from pulmonary fibrosis probably due to the inhalation of mixed dusts and (*b*) a total incapacity from cardio-vascular degeneration. The Commission found that the respondent's employment with the appellant was one to the nature of which condition (*a*) could be due, and accordingly that he was entitled to compensation unless he was disentitled by reason of condition (*b*) which the Commission found to be not associated with his employment. The Commission went on to say that there was no evidence which established more than that the respondent was affected by the two foregoing conditions simultaneously and that in these circumstances the respondent was entitled to be compensated for the incapacity which resulted from the employment disease. The Commission assessed the compensation from 13th April 1945, which was apparently a clerical error for 13th February 1945.

At the request of the appellant, the Commission stated a case under the provisions of s. 37 (4) of the *Workers' Compensation Act* 1926-1947 (N.S.W.) for the decision of the Supreme Court of New South Wales. The questions asked in the case stated have been set out in previous judgments. *Jordan* C.J., in whose judgment *Davidson* J. and *Street* J. concurred, considered that these questions should be answered in the negative. In the course of his judgment *Jordan* C.J. said that " When a worker has established that he has received a personal injury arising out of or in the course of his employment, and that as a result he has sustained some incapacity for work, he is entitled to receive the compensation provided for by the Act, unless the employer establishes (the onus being on him to do so) that he is not so entitled " (1).

(1) (1948) 48 S.R. (N.S.W.) 532, at p. 534 ; 65 W.N. (N.S.W.) 243, at p. 245.

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Williams J.

Under the Act the respondent had to prove that he had received a personal injury (which includes a disease which is contracted by the worker in the course of his employment) arising out of or in the course of his employment, and that the injury resulted in total or partial incapacity for work. Section 7 (4) of the Act 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." Section 7 (5) provides that " for the purposes of subsection four of this section . . . the injury shall be deemed to have happened at the time of the worker's incapacity." The Commission found that pulmonary fibrosis is a disease contracted by a gradual process so that the appellant is the employer liable if the respondent is entitled to compensation under the Act. There is no finding whether the total incapacity due to cardio-vascular degeneration preceded or supervened upon the partial incapacity due to pulmonary fibrosis. There is only the finding that the two forms of incapacity existed independently but simultaneously on 7th May 1947. The pulmonary fibrosis was caused by mixed dusts and must therefore have been contracted by the respondent when in the employment of the appellant.

Compensation is awarded for the consequences of the injury as measured by diminished capacity to earn wages. A workman who has become totally incapable of work before he suffers an injury arising out of or in the course of his employment has no capacity to earn wages that can be diminished by the latter injury (*Dawkins* v. *Metropolitan Coal Co. Ltd.* (1)). But if a workman suffers some incapacity which results from an injury arising out of or in the course of his employment, the fact that he subsequently suffers some further incapacity or even total incapacity from some other cause does not affect his right to compensation in respect of the previous incapacity. In *Harwood* v. *Wyken Colliery Co.* (2) it was held that a workman who had brought himself within the provisions of the English *Workmen's Compensation Act* by proving that he had sustained personal injury by accident arising out of and in the course of his employment, and that incapacity had resulted from the injury, was not disentitled to compensation under the Act by reason of some supervening infirmity, not due to the accident, which had equally resulted in his incapacity. *Hamilton* L.J. (as Lord *Sumner* then was) said, " In my opinion the workman did bring himself within the Act, and he is not disentitled to be paid compensation by reason of the supervention of a disease of the heart.

(1) (1947) 75 C.L.R. 169.

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

It cannot be said of him that partial incapacity for work has not resulted and is not still resulting from the injury. All that can be said is that such partial incapacity is not still resulting 'solely' from the injury. To read the word 'solely' into the Act after the word 'injury' is not interpretation but is legislation, unless the context or the scheme of the Act (natural justice not being in question) demonstrates that the Legislature so intended" (1).

Stowell v. *Ellerman Lines Ltd.* (2) is a similar or stronger case for there the workman, after suffering an injury in the course of his employment, had returned to his ordinary work at his ordinary wages before he became totally incapacitated from doing further work by causes not associated with his employment. Both cases were cited with approval by the House of Lords in *McCann* v. *Scottish Co-operative Laundry Association Ltd.* (3). A later case is *Thompson* v. *London & North Eastern Railway Co.* (4), approved by the House of Lords in *Doudie* v. *Kinneil Cannel & Coking Coal Co. Ltd.* (5).

In *Dawkins' Case* (6) this Court followed the decision of the Court of Appeal in *Wheatley* v. *Lambton, Hetton and Joicey Collieries Ltd.* (7). That case has now been approved by the House of Lords in *Amalgamated Anthracite Collieries Ltd.* v. *Wilds* (8). In *Wheatley's Case* (9) Sir *Wilfred Greene* M.R. said "you cannot subtract from nothing. If you have an existing total incapacity, there is no element of capacity which can be taken away." But that is where it is proved that the total incapacity precedes the injury associated with the employment and it seems to me that the cases, particularly *Harwood* v. *Wyken Colliery Co.* (10), *Stowell* v. *Ellerman Lines Ltd.* (2) and *McCann* v. *Scottish Co-operative Laundry Association Ltd.* (11), establish that a workman who proves that he has suffered an injury arising out of or in the course of his employment which results in some loss of earning power brings himself within the Act, and that *Jordan* C.J. was right when he said (12) that the onus is then on the employer to show that there was no such loss because the workman has already been totally deprived of earning power by some other cause.

In my opinion the Supreme Court was right in answering the first and second questions asked in the case stated in the negative.

(1) (1913) 2 K.B., at p. 169.
(2) (1923) 16 B.W.C.C. 46; 128 L.T. 823.
(3) (1936) 1 All E.R. 475; 154 L.T. 503.
(4) (1935) 2 K.B. 90.
(5) (1947) A.C. 377.
(6) (1947) 75 C.L.R. 169.
(7) (1937) 2 K.B. 426.
(8) (1948) 2 All E.R. 252.
(9) (1937) 2 K.B., at p. 438.
(10) (1913) 2 K.B. 158.
(11) (1936) 1 All E.R. 475.
(12) (1948) 48 S.R. (N.S.W.), at p. 534; 65 W.N. (N.S.W.), at p. 245.

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The third question asks whether the Commission erred in law in awarding compensation from 13th April 1945. This date would appear to be a clerical error for 13th February 1945, the date on which the respondent ceased to be employed by the appellant. The compensation has been awarded for incapacity due to disease that is for a notional injury. This incapacity has not been proved to have existed before 7th May 1947, and the provisions of s. 7 (5) of the Act therefore require that the award should commence from this date. I would therefore vary the answer of the Supreme Court to question (3) accordingly.

Otherwise I would dismiss the appeal.

Appeal allowed with costs. Order of Supreme Court discharged. In lieu thereof second question in case stated answered Yes. Other questions not answered. Respondent to pay costs of appellant before the Commission and the Supreme Court.

Solicitors for the appellant, *J. W. Maund & Kelynack.*
Solicitors for the respondent, *J. B. Moffatt & Son.*

J. B.