[HIGH COURT OF AUSTRALIA.]

WILLIAMS . . . . . APPELLANT;
APPLICANT,

AND

METROPOLITAN COAL COMPANY LIMITED RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 22; *Aug.* 12.

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

Workers' Compensation—Injury—Disease—Coal miner—Earning capacity not affected—Statutory retirement—Four years later—Certificate by medical board—Pneumoconiosis—Partial incapacity—Entitlement to compensation—Fitness for light work—Barred by statute from accepting light work available with last employer—No earnings during twelve months preceding injury—"Average weekly earnings"—Workers' Compensation Act 1926-1946 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 41 *of* 1946), *ss.* 6, 7 (1), (3), (4), 9, 11 (1)—*Coal and Oil Shale Mine Workers (Pensions) Act* 1941-1942 (*N.S.W.*) (*No.* 45 *of* 1941—*No.* 12 *of* 1942), *s.* 5.

A worker who, having attained the age of sixty years, is compulsorily retired from his employment as a mine worker, upon pension, pursuant to the provisions of the *Coal and Oil Shale Mine Workers (Pensions) Act* 1941-1942 (N.S.W.) is not thereby disentitled to compensation under the *Workers' Compensation Act* 1926-1946 (N.S.W.) in respect of incapacity subsequently arising from an industrial disease contracted prior to his retirement.

So *held* by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting).

In the case of "injury" by disease contracted by gradual process the "average weekly earnings" of the worker should, for the purposes of ss. 9 and 11 of the *Workers' Compensation Act* 1926-1946 (N.S.W.), be computed in relation to the period of twelve months immediately previous to his ceasing work for the employer who last employed him in employment which contributed to the disease.

So *held* by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. not deciding).

Decision of the Supreme Court of New South Wales (Full Court): *Metropolitan Coal Co. Ltd.* v. *Williams*, (1947) 48 S.R. (N.S.W.) 66; 65 W.N. (N.S.W.) 36; 21 W.C.R. 146, reversed.

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APPEAL from the Supreme Court of New South Wales.

On 5th February 1947, Morris Williams, then aged sixty-five years, filed a claim under the *Workers' Compensation Act* 1926-1946 (N.S.W.) against Metropolitan Coal Co. Ltd. for compensation under that Act. Williams claimed that he had been totally incapacitated since 17th October 1946 by pneumoconiosis caused by the inhalation of dust; that the date of injury was 18th February 1942; that his average weekly earnings during the twelve months previous to the injury had been about £8 10s.; and that he was not able to earn any amount in some suitable employment or business after the injury.

The company denied its liability to pay compensation on the grounds, *inter alia*, that the particulars furnished by Williams, as mentioned above, were inaccurate and incomplete; that he did not receive any personal injury arising out of or in the course of his employment; that the incapacity, if any, was not due to injury arising out of or in the course of his employment; that he was not totally incapacitated for work; and that if he were partially incapacitated he was able to earn in a suitable employment in the company's coal mines an amount equal to his average weekly earnings before his injury.

The following is a summary of the relevant facts found by the Workers' Compensation Commission on the evidence adduced at the hearing of the application. On 18th February 1942, Williams, who had for some years been employed as a coal miner in the company's colliery at Helensburgh, ceased work because he had reached the retiring age of sixty years prescribed by the *Coal and Oil Shale Mine Workers (Pensions) Act* 1941 (N.S.W.) and was awarded the statutory pension under that Act. He had been working on the face up to the date of his retirement and although he had suffered from some breathlessness this had not affected his earning capacity as a coal miner. Prior to Williams' retirement his earnings as a coal miner averaged £8 10s. per week. Because of increasing breathlessness he consulted a doctor in September or October 1946 and was examined by a medical board on 19th November 1946. The medical board, in certifying on 19th November 1946 as to his condition, stated "The finding of the medical board is that there is a partially incapacitating (75%) pneumoconiosis due to work in coal mines," and, in certifying as to his fitness for employment, stated: "Fit for light sedentary work." Apart from taking an odd job lasting about one week in 1943, Williams had not exercised his ability to earn but had lived on his pension. Consequently his earnings during the twelve months preceding 19th November 1946

were nil. He was physically capable of doing the work of a time-keeper at the company's colliery, which was light sedentary work. Were it not for Williams' age and the provisions of s. 5 of the *Coal and Oil Shale Mine Workers (Pensions) Act* 1941-1942, such a job as time-keeper would be made available to him at the company's colliery. The wage payable to a time-keeper was £7 11s. per week. No such job was, in fact, available to Williams at the company's colliery or elsewhere.

In regard to the commencing date of compensable incapacity, Williams' evidence was to the effect that his breathlessness commenced to become marked about 1943-1944. In the absence of other definite evidence the Commission accepted the date of the medical board's certificate, 19th November 1946, as the date on which his earning capacity was first materially affected by the progress of the industrial disease.

The Commission held that Williams' average weekly earnings for the purposes of s. 9 (1) (a) of the *Workers' Compensation Act* 1926-1946, were £8 10s., and that because of his age and the provisions of s. 5 of the *Coal and Oil Shale Mine Workers (Pensions) Act* 1941-1942, which prohibited the employment of Williams as a time-keeper at the company's colliery, such employment was not "suitable employment" within the meaning of those words in s. 11 of the *Workers' Compensation Act* 1926-1946.

The Commission ordered the company to pay Williams weekly compensation at the rate of £4 15s. from 19th November 1946.

In a case stated pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1946, 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. Did the Commission err in law in awarding the applicant compensation although his average weekly earnings were nil during the twelve months prior to 19th November 1946?

2. Did the Commission err in law in awarding the applicant compensation in excess of nineteen shillings per week, it being the difference between his average weekly earnings as a coal miner and the weekly earnings of a time-keeper in a coal mine?

The appeal by the company to the Full Court of the Supreme Court was, by majority, (*Davidson* and *Street* JJ., *Jordan* C.J. dissenting), upheld, Question 1 being answered: "Yes, subject to the explanation given in the reasons of the majority of the Court," and Question 2: "This question does not arise." The majority of the court said that the questions submitted did not raise the

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real issue which was whether the Commission erred in law in awarding any amount of compensation, a question which should be answered in the affirmative (*Metropolitan Coal Co. Ltd.* v. *Williams* (1)).

From that decision Williams appealed, by special leave, to the High Court.

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

Barwick K.C. (with him *Sullivan*), for the appellant. The point at issue on the first question as asked is not whether the appellant should get an award for compensation at all but is whether he should get an award based upon a comparison between twelve months' actual incapacity or twelve months with his last employer. The only disagreement between the parties was as to *quantum* but the majority in the court below decided a question of liability which was not raised.

[DIXON J. referred to *Smith* v. *Mann* (2)].

The Court should confine a decision to the stated questions. The first question should not be construed literally but according to its true intent. The *quantum* should be measured by using the period of twelve months in the last employment as being a figure with which to compare the present position. The employing of the appellant as a time-keeper in the coal-mining industry was rightly found to be unsuitable employment for him within the meaning of the *Workers' Compensation Act*. The court below was confused between two ideas, namely physical incapacity to work and legal restraint on the exercise of capacity to work (see *Dawkins* v. *Metropolitan Coal Co. Ltd.* (3) and *Jones* v. *Amalgamated Anthracite Collieries Ltd.* (4)) . Under the Act there are three steps : (i) a right to compensation, (ii) the imposition of liability on some person, and (iii) quantification. The judgments of the majority members of the court below confused what was imagined to be the policy of the Act with the quantifying provisions of the Act. Those provisions are exclusive. The only point then remaining is: To which period of twelve months is reference made ? The disease from which the appellant suffers is within the meaning of the word " injury " as defined in s. 6 (1) of the Act and the use in that definition of the word " contracted " is equivalent in point of time to the injury. The appellant having contracted such disease acquired

(1) (1947) 48 S.R. (N.S.W.) 66; 65 W.N. (N.S.W.) 36; 21 W.C.R. 146.

(2) (1932) 47 C.L.R. 426, at pp. 445, 446.

(3) (1947) 75 C.L.R. 169.

(4) (1944) A.C. 14.

under s. 7 (1) (a) a right to compensation. Sub-section (4) of s. 7 presupposes the right of the worker to compensation under s. 7 (1) (a) and then proceeds to fasten the liability on the employer in whose employment the worker was when last employed, that is, as decided in *Smith* v. *Mann* (1), the last of the employers in the type of employment which contributed to the disease. Sub-section (4) of s. 7 assumes that incapacity has supervened on the injury. Section 9 (1) performs a double task. It is not exclusively directed towards quantifying the amount of compensation, it introduces also a condition of liability, namely, resultant incapacity for work. The expression " compensation shall be payable " in s. 7 (4) presupposes resultant incapacity and, notionally, that the incapacity took place in the last employment. If it were otherwise an effective meaning could not be given to the word " incapacity " as used in the second paragraph in s. 7 (4). The words " during the twelve months preceding a worker's incapacity " in that paragraph, should be read as meaning during the twelve months preceding the last employment to the nature of which the disease which resulted in the incapacity was due. Section 7 (4) creates a notional situation, the notional situation being that both the injury and the incapacity for the purpose of selecting the person who is liable had taken place in the last employment. The notional concurrence of the injury and the incapacity is not, however, for general purposes. Causation is determined under s. 9 and *quantum* is determined under that section in conjunction with ss. 11 and 14. The expression " incapacity for work " as used in s. 9 means incapacity to do work, and is not restricted to the sort of work the worker was doing before the incapacity. It does not mean incapacity to do the particular work in a particular industry. The period of twelve months referred to in s. 9 (1) (a) of the Act, in the case of a disease of gradual process, is the period of twelve months with the last employer in the occupation which contributed to the disease (*Collins* v. *Australian Iron and Steel Ltd.* (2); *Bacon* v. *A. W. Wills & Sons Ltd.* (3); *Cole* v. *Amalgamated Anthracite Collieries Ltd.* (4); *Evans* v. *Oakdale Navigation Collieries Ltd.* (5)). If s. 9 (1) (a) be read as relating to the twelve months preceding the injury, then s. 7 (4) presupposes the injury to take place in the last employment and presumably on the last day of such employment. Thus s. 9 (1) (a) would operate in support of the appellant on that assumption. But even if, contrary to that submission, s. 9 (1) (a) be read as meaning previous

(1) (1932) 47 C.L.R. 426.
(2) (1947) 48 S.R. (N.S.W.) 55, at p. 61; 64 W.N. (N.S.W.) 189, at p. 192.
(3) (1933) 2 K.B. 493, at p. 501.
(4) (1933) 26 B.W.C.C. 560.
(5) (1940) 1 K.B. 702.

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to incapacity then s. 7 (4) for that purpose treats incapacity as having taken place also in the last employment and on that view s. 9 (1) (a) would operate. Section 7 (3) (a) is not a controlling provision. It is only directed to showing that temporary injuries shall not come within the scheme. It is wholly inapplicable to a case of incapacity from disease of gradual onset and is superseded in relation to this particular case by the express provision in s. 7 (4), that is that the employer shall be liable unqualified by the waiting period in s. 7 (3) (a). The words " full wages at the work at which he was employed " in s. 7 (3) (a) appear to have been inserted to ensure that a disability that precluded a worker from earning his full wages in the particular employment was at least included in the type of injury for which he was to be compensated. The Act is concerned only with final incapacity to work and is not concerned with legal restraint. Both questions should be answered in the negative.

A. R. Taylor K.C. (with him *W. Collins*), for the respondent. The appellant became incapable of working in February 1942 when he attained the age of sixty years. " Injury " as used in s. 7 (1) includes a disease contracted by gradual process. The word " incapacity " should be construed as meaning only actual physical incapacity. An employer is not liable to contribute unless he was an employer of the worker at some time within twelve months of the actual physical incapacity. Section 7 (5) shows that in the case of a disease of gradual process the incapacity and the injury are contemporaneous. The plain meaning of the words in s. 9 (1) (a) is that the worker shall not exceed sixty-six and two-thirds per cent of his average weekly earnings for twelve months prior to his incapacity. The average weekly earnings of the appellant during the previous twelve months were nil. *Collins* v. *Australian Iron and Steel Ltd.* (1) was wrongly decided. It would be contrary to the spirit of the legislation to compute compensation except on the basis of the worker's present economic loss. The English legislation is quite different from the *Workers' Compensation Act* 1926-1946 (N.S.W.) therefore *Bacon* v. *A. W. Wills & Sons Ltd.* (2); *Cole* v. *Amalgamated Anthracite Collieries Ltd.* (3) and *Evans* v. *Oakdale Navigation Collieries Ltd.* (4) are not applicable to this case. A consideration of ss. 43 and 47 of the *Workmen's Compensation Act* 1925 (Imp.), s. 9 of the *Metal Grinding Industries*

(1) (1947) 48 S.R. (N.S.W.) 55; 64 W.N. (N.S.W.) 189.
(2) (1933) 2 K.B. 493.
(3) (1933) 26 B.W.C.C. 560.
(4) (1940) 1 K.B. 702.

Scheme 1927, and the reasons contained in the judgments therein show that *Evans* v. *Oakdale Navigation Collieries Ltd.* (1) is not an authority for the observations appearing in *Collins* v. *Australian Iron and Steel Ltd.* (2) and in *Metropolitan Coal Co. Ltd.* v. *Williams* (3). Section 9 of the Act must be construed according to its plain words. The reference in that section to twelve months means the period of twelve months prior to the incapacity. In the circumstances the appellant did not qualify for any compensation, and therefore, having regard to s. 7 (1), an order should not be made in his favour. Although the first question in this case may not be appropriately phrased it does raise the plain issue of liability. When the liability occurs the compensation is to be measured by the worker's earnings within the last twelve months but the liability is to be borne by the last employer who employed him in the prior twelve months. Section 7 (3) (a) creates a condition precedent to the right of compensation. The appellant was incapacitated from performing the work of a coal miner antecedent to the injury, therefore the injury could not be said to have disabled him for any period (*Jones* v. *Amalgamated Anthracite Collieries Ltd.* (4)). At the time of the injury he was already disabled by the *Coal and Oil Shale Mine Workers* (*Pensions*) *Act* 1941-1942. The first question should be answered in the affirmative.

Barwick K.C., in reply. The reasoning in *Jones* v. *Amalgamated Anthracite Collieries Ltd.* (4) entirely supports the submissions made on behalf of the appellant. The Court should ignore the legal restraint on the exercise of the appellant's capacity and have regard only to such results as flow from his physical incapacity. The whole basis of the Act is to relate the compensation, both in liability and in *quantum*, to the employment in which the injury takes place. Section 7 (4) notionally puts the construction of the disease as the injury into the period of the last employment.

Cur. adv. vult.

Aug. 12.

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 (5) upon a case stated by his Honour Judge *Perdriau*, Chairman of the Workers' Compensation Commission, under the *Workers' Compensation Act* 1926-1946, s. 37 (4) (6).

(1) (1940) 1 K.B. 702.
(2) (1947) 48 S.R. (N.S.W.), at p. 61 ; 64 W.N. (N.S.W.), at p. 192.
(3) (1947) 48 S.R. (N.S.W.), at p. 77.
(4) (1944) A.C. 14.
(5) (1947) 48 S.R. (N.S.W.) 66 ; 65 W.N. 36 ; 21 W.C.R. 146.
(6) (1947) 21 W.C.R. 141.

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The appellant Morris Williams was employed as a miner by the respondent company, the Metropolitan Coal Co. Ltd., for a number of years prior to February 1942. On 18th February 1942 the appellant ceased work as a coal miner because he had reached the age of sixty years. Under s. 5 of the *Coal and Oil Shale Mine Workers (Pensions) Act* 1941 (N.S.W.) he could no longer be employed as a mine worker. Under that Act he became entitled to a pension of £2 a week and his wife to a pension of £1 5s. a week—£3 5s. a week in all. In the succeeding years the appellant did not work, and accordingly earned no wages. On 19th November 1946 he was examined by a medical board and the certificate of the board stated that he suffered from a " partially incapacitating (75%) pneumoconiosis due to work in coal mines," and it was certified that he was fit for light sedentary work. Pneumoconiosis is a disease of such a nature as to be contracted by a gradual process. Where the injury resulting in incapacity (*Workers' Compensation Act*, s. 9) is such a disease, compensation is payable " by the employer in whose employment the worker is or who last employed the worker " (s. 7 (4)).

The last mining wage which the applicant had earned was £8 10s. a week in 1942. He was physically capable of acting as a time-keeper on a mine, and the respondent company was prepared to employ him in that capacity at a wage of £7 11s. a week—but such employment was prevented by the *Coal and Oil Shale Mine Workers (Pensions) Act*. He would have been able to earn at light (non-mining) work an average of £3 15s. a week.

The Commission awarded the applicant compensation of £4 15s. a week ; that is, the difference between his prior mining wage of £8 10s. and the wage which he was able to earn in 1946 of £3 15s. a week.

It was contended for the respondent company that the company was not liable to pay any compensation, because the worker's incapacity in relation to mining employment was due, not to pneumoconiosis, but to disqualification under the *Pensions Act*. It was further contended in the alternative that the maximum amount of compensation payable required the Commission to compare what the applicant could earn when suffering from the incapacity with " his average weekly earnings for the previous twelve months " —*Workers' Compensation Act*, s. 9. The average weekly earnings of the worker for the twelve months previous to the certification of incapacity were nil. Accordingly, it was argued, no compensation was payable. As a further alternative it was contended for the employer that if physical incapacity independently of any legal

disqualification was the relevant matter, the comparison should be made between the former wage of £8 10s. a week and the amount of £7 11s. a week which the worker was physically capable of earning, so that the award, if any, should be for 19s. a week.

The Commission submitted the following two questions for the decision of the Supreme Court :—" (1) Did the Commission err in law in awarding the applicant compensation although his average weekly earnings were nil during the twelve months prior to 19th November, 1946 ? (2) Did the Commission err in law in awarding the applicant compensation in excess of nineteen shillings per week, it being the difference between his average weekly earnings as a coal miner and the weekly earnings of a time keeper in a coal mine ? " (1).

The questions were answered by the Supreme Court by a majority, *Davidson* and *Street* JJ., *Jordan* C.J. dissenting, as follows :—" (1) Yes, subject to the explanations given in the reasons of the majority of the Court. (2) This question does not arise " (2). The form of the answer to the first question is explained by the fact that the learned Justices who constituted the majority were of opinion that the facts stated showed that the worker was not entitled to any compensation, and that accordingly the particular point to which the first question invited attention did not arise. The affirmative answer to the first question meant that the Commission erred in awarding any compensation ; therefore the second question, relating to amount of compensation, did not arise. *Jordan* C.J. was of opinion that both questions should be answered in the negative (3).

The appellant's claim for compensation is based upon personal injury arising out of or in the course of his employment, the injury being a disease which was contracted by the worker in the course of his employment (definition of " injury," s. 6) as certified by the medical board (s. 51 (5)), the injury being such as to be contracted by a gradual process (s. 7 (4)). In such a case compensation, if any, is payable by the employer " in whose employment the workman is or who last employed the worker " (s. 7 (4)). The respondent company was the last employer of the worker.

In the present case the medical board has certified that the partially incapacitating pneumoconiosis was due to work in coal mines. Section 7 (4) further provides that : " Any employers who, during the twelve months preceding a worker's incapacity, employed him in any employment to the nature of which the disease

(1) (1947) 21 W.C.R. at p. 145.
(2) (1947) 48 S.R. (N.S.W.), at p. 86.
(3) (1947) 48 S.R. (N.S.W.), at p. 73.

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was due, shall be liable to make to the employer by whom compensation is payable such contributions as, in default of agreement, may be determined by the Commission." In the present case there were no employers who employed him in any employment at all during the twelve months preceding his incapacity as certified as arising on 19th November 1946—the facts are different from those in *Smith* v. *Mann* (1), but also there were no employers other than the respondent company who employed him for several years prior to February 1942. In the present case, therefore, no question of contribution by other employers arises, and it is unnecessary to determine the true construction of the provision mentioned.

Section 7 (5) provides that, for the purposes of sub-s. (4) of s. 7 and of ss. 44 and 53 of the Act, the injury shall be deemed to have happened at the time of the worker's incapacity. The Commission accepted the date of the medical board's certificate, 19th November 1946, as the date on which the applicant's earning capacity was first materially affected by the progress of the industrial disease (par. 6 of case stated). Accordingly, the injury, for the purposes stated in s. 7 (5), must be deemed to have happened on 19th November 1946. This provision, however, only applies for the purposes of the sections mentioned—s. 7 (4) (determination of twelve months preceding injury in order to identify " other employers "), s. 44 (notification of injury) and s. 53 (time for taking proceedings). These particular sections do not affect the worker's claim in the present case, and it is therefore not necessary to consider the operation of s. 7 (5). The Commission has found that the incapacity commenced on 19th November 1946.

In order to establish a claim for compensation, the worker must show incapacity resulting from an " injury " ; that is, in this case, resulting from the disease. " Incapacity " means incapacity to earn wages (*Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (2)). It means " loss or diminution of the capacity to earn wages in the employment in which the injured workman was employed " (*Ball* v. *William Hunt & Sons Ltd.* (3)). Partial incapacity resulting from injury may continue to be ground for compensation though a subsequent infirmity not resulting from an employment " injury " may have produced further or total incapacity (*Harwood* v. *Wyken Colliery Co.* (4) ; *Ward* v. *Corrimal-Balgownie Collieries Ltd.* (5)).

An award of compensation in respect of incapacity is based upon comparison of a worker's diminished earning capacity as a result

(1) (1932) 47 C.L.R. 426.
(2) (1933) 50 C.L.R. 328, at p. 338.
(3) (1912) A.C. 496, at pp. 500, 501.
(4) (1913) 2 K.B. 158.
(5) (1938) 61 C.L.R. 120.

of the injury on the one hand, with, on the other hand, what the worker could have earned in a relevant employment if he had not been affected by the injury which has brought about his incapacity. I agree with the opinion of the majority in the Full Court that the facts stated show that the incapacity of the worker to earn wages in the coal industry—whether £8 10s. or £7 11s. per week—existed, as a consequence of the attainment of the age of sixty years by the worker and of the provisions of the *Pensions Act*, from February 1942, i.e., before 19th November 1946. That incapacity (and it is the relevant incapacity) was therefore not the result of the pneumoconiosis. The *Pensions Act* had already made the worker 100 per cent incapable of earning any wages in the coal mining industry, and accordingly the pneumoconiosis did not, in the circumstances, produce any incapacity in relation to that industry. I agree with the following statement of *Street* J. :—" I think that with the statutory destruction of his right to work in that industry, there was also destroyed his right to claim compensation for a subsequent injury which would have diminished or destroyed his wage-earning capacity had he been permitted to remain in the industry " (1). Accordingly, I am of opinion that the worker was not entitled to recover any compensation from the respondent company. Upon this view it is unnecessary to consider whether, for the purposes of ss. 9 and 11 of the Act, the " average weekly earnings " of the worker in the present case should be estimated in relation to a twelve months' period preceding 19th November 1946, in which case they would be nil, or whether they should be estimated in relation to a period of twelve months ending in February 1942.

The result is that, in my opinion, the particular questions submitted by the Commission, first, as to the determination of his average weekly earnings during the twelve months prior to 19th November 1946, and secondly, as to the relevance of the rate of pay for a time-keeper in a coal mine, do not arise. The questions which invite decisions upon these points, however, take the form of asking whether the Commission erred in law in awarding the applicant compensation.

In my opinion both questions should be answered in the affirmative and the appeal should be dismissed.

The judgments in the Supreme Court refer to the great difficulties of interpretation of the Act arising from the insertion of provisions relating to slowly developing diseases in a statute which has not been designed to deal with such cases. The subject requires the attention of the legislature.

(1) (1947) 48 S.R. (N.S.W.), at p. 85.

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STARKE J. Appeal by special leave from the judgment of the Supreme Court of New South Wales (1) upon a case stated by the Workers' Compensation Commission of New South Wales (2).

The questions stated were :—(1) Did the Commission err in law in awarding the applicant (the appellant here) compensation although his average weekly earnings were nil during the twelve months prior to 19th November 1946 ? (2) Did the Commission err in law in awarding the applicant compensation in excess of 19s. per week, it being the difference between his average weekly earnings as a coal miner and the weekly earnings of a time keeper in a coal mine ?

The facts are, I should think, unusual but those relevant to the determination of the questions can be shortly summarized.

The appellant had been a coal miner for many years. The Metropolitan Coal Co. Ltd., the respondent here, was his last employer.

In February 1942 he attained the age of sixty years and was compulsorily retired from his employment as a mine worker, upon pension, pursuant to the provisions of the *Coal and Oil Shale Mine Workers (Pensions) Act* 1941 of New South Wales.

Except on odd occasions the appellant has not worked since his retirement but has lived upon his pension.

In November 1946 the appellant was examined by a medical board appointed pursuant to the *Workers' Compensation Act* 1926-1946 of New South Wales. And the board certified the condition of the appellant as follows :—" The finding of the Medical Board is that there is a partially incapacitating (75%) pneumoconiosis " (the contracted form of pneumonoconiosis) " due to work in coal mines " and that the appellant was fit for light sedentary work.

The certificate of the medical board is conclusive evidence as to the matters certified (see Act s. 51 (5)).

In these circumstances the appellant claimed compensation from the respondent pursuant to the provisions of the *Workers' Compensation Act* 1926-1946. And the Workers' Compensation Commission found that the appellant had been partially incapacitated for work by pneumoconiosis since the date of certification by the medical board in November 1946 and that pneumoconiosis was a disease contracted by the worker in the course of his employment in coal mines in which he was employed by the respondent and to which such employment was a contributing factor. And it awarded the appellant weekly compensation at the rate of £4 15s. from 19th

(1) (1948) 48 S.R. (N.S.W.) 66; 65 W.N. 36; 21 W.C.R. 146.

(2) (1947) 21 W.C.R. 141.

November 1946 in respect of his partial incapacity for work, due to pneumoconiosis, such weekly payments to continue during the said partial incapacity of the applicant for work or until the same be ended, diminished, increased or redeemed in accordance with the provisions of the Act.

The effect of this award upon the pension payable to the appellant is dealt with by s. 12 of the *Coal and Oil Shale Mine Workers (Pensions) Act*.

The majority of the learned judges of the Supreme Court held that the *Workers' Compensation Act* conferred no right upon the appellant to compensation and therefore answered the first question stated in the affirmative.

Now, the *Workers' Compensation Act* 1926-1946 provides :—Section 7 (1). A worker who has received an injury whether at or away from his place of employment . . . shall receive compensation from his employer in accordance with this Act.

Section 6. " Injury " means personal injury arising out of or in the course of employment and includes a disease which is contracted by the worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor . . .

Section 7 (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.

Section 7 (5). For the purposes of sub-section four of this section and of sections forty-four and fifty-three of this Act the injury shall be deemed to have happened at the time of the worker's incapacity.

The right to compensation is given by the Act, which has been called the workmen's charter (*Lysons* v. *Andrew Knowles & Sons Ltd.* (1); *Ball* v. *William Hunt & Sons Ltd.* (2)). The Act prescribes some limits to the amount of compensation (see ss. 9-11) but they are what *Atkin* L.J. in *Ling* v. *De Dion Bouton* (3) described as arithmetical boundary posts which do not guide to the amount of compensation that has to be fixed within those limits. The appellant in the course of his employment as a mine worker contracted in the course of his employment a disease of gradual onset to which his employment was a contributing factor. And though the appellant was not incapacitated as a mine worker before his retirement pursuant to the *Coal and Oil Shale Mine*

(1) (1901) A.C. 79.
(2) (1912) A.C. 496, at p. 500.
(3) (1920) 1 K.B. 88, at p. 96.

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Workers (Pensions) Act still he had contracted the disease whilst so working. That was his injury which is deemed to have happened at the time of his incapacity. And, in the absence of other definite evidence, the Board accepted the date of the medical board's certificate, 19th November 1946, as the date on which the appellant's earning capacity was first materially affected by the progress of the disease. But, as *Davidson* J. said in *Collins* v. *Australian Iron and Steel Ltd.* (1), the fixation of the time of the injury from a practical point of view must be only notional.

Prima facie, therefore, the right of the appellant to compensation is established against the respondent as his last employer.

And he is entitled to compensation in accordance with the Act. It has been held that these words are not restrictive of the right of the workman but prescribe a mode of ascertaining the *quantum* of such compensation (*Lysons* v. *Andrew Knowles & Sons Ltd.* (2); *King* v. *Port of London Authority* (3)).

It is true, however, that the compensation has to be fixed within the limits prescribed by the Act.

Compensation is not payable for the injury but for the loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity in the future is less than it was before the injury (*Birmingham Cabinet Manufacturing Co.* v. *Dudley* (4); *Jackson* v. *Hunslet Engine Co.* (5)). It is erroneous to say that the whole object of the Act is to compensate a worker for injury whether by disease or otherwise only to the extent to which he is thereby incapacitated from earning his full wages in the employment in which the injury arose or that the clear intention of the Act is to limit its operation to the matter of restoring the financial position of the worker in relation to the industry in which he had been working at the time of the injury.

The provisions of the Act relating to compensation relevant to this case are as follows: "9 (1) Subject to the provisions of this section and of sections ten and eleven, where total or partial incapacity for work results from the injury the compensation payable by the employer under this Act shall include:—(a) a weekly payment in respect of the worker during the incapacity which shall not exceed sixty six and two-thirds per centum of his average weekly earnings for the previous twelve months if he has been so

(1) (1947) 48 S.R. (N.S.W.), at p. 59; 64 W.N., at p. 191.
(2) (1901) A.C. 79.
(3) (1920) A.C. 1, at pp. 11, 28.
(4) (1910) 102 L.T. 619.
(5) (1915) 84 L.J. K.B. 1361.

long employed by the employer, but if not, then for any less period during which he has been in the employment of the same employer. . . . "

There are additional provisions in respect of wife, children and other dependants (see s. 9 (1) (b), (c)).

And there are limitations upon the amount of compensation that can be awarded (see s. 9 (1) (a), 9 (2), (3)).

There is also a provision in s. 7 (3) that the employer shall not be liable under the Act in respect of any injury which does not disable a worker for a period of at least three days from earning full wages at the work at which he was employed. But if he is disabled for that period, the compensation shall date from his receiving the injury. And s. 11 (1) provides :—

" In the case of partial incapacity, the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the worker before the injury, and the average weekly amount he is earning, or is able to earn, in some suitable employment or business, after the injury, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." And s. 14 provides :—

" For the purposes of the provisions of this Act relating to ' earnings ' and ' average weekly earnings ' of a worker. . . . (a) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the worker was being remunerated :

Provided that where by reason of the shortness of the time during which the worker has been in the employment of his employer, or the terms of employment, it is impracticable at the date of the injury to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade, employed at the same work, by the same employer ; or, if there is no person so employed, by a person in the same grade employed in the same class of employment, and in the same district."

Taking the words of these sections in their common and ordinary signification the respondent contends that compensation is calculated upon the average weekly earnings of the worker for the twelve months previous to the worker's incapacity if he has been so long employed by the employer but if not then for any less period during which he has been in the employment of the same employer. And the respondent, in support of this contention, relies upon the provisions in s. 7 (4) providing for contributions to compensation :

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" Any employers who, during twelve months preceding a worker's incapacity, employed him in any employment to the nature of which the disease was due, shall be liable to make to the employer by whom compensation is payable such contribution as, in default of agreement, may be determined by the Commission. The worker . . . shall furnish to the employer from whom compensation is claimed such information as to the names and addresses of all the other employers who employed the worker during the twelve months preceding the injury as he or they may possess."

This contention of the respondent destroys, in this case, the right of compensation given to the worker by the Act.

And yet the Act provides that compensation shall be payable by the employer in whose employment the worker was or who last employed the worker. The Act itself recognizes that the mode of calculating the amount of compensation must be modified to meet the circumstances of particular cases but none of these provisions it is said, e.g., ss. 11 and 14, are applicable in terms to this case.

Still, *Halsbury* L.C. said in *Lysons' Case* (1): " Well, my Lords, for my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the quantum was to be." Cited with approval in *King* v. *Port of London Authority* (2).

The respondent last employed the appellant and is, therefore, the party liable to pay the compensation to the appellant. And the *quantum* can be ascertained because either the method prescribed by s. 9 involves, as *Jordan* C.J. said in the Supreme Court (3), in the first place taking as a maximum sixty-six and two-thirds per cent of his average weekly earnings from that employer during the twelve months previous to his ceasing work for that employer (cf. *Bacon* v. *A. W. Wills & Sons Ltd.* (4)) or else the average can be computed in the manner " best calculated to give the rate per week at which the worker was being remunerated " which introduces

(1) (1901) A.C., at p. 86.
(2) (1920) A.C., at pp. 28, 29.
(3) (1947) 48 S.R. (N.S.W.), at p. 69.
(4) (1933) 2 K.B. 493.

a question of fact for the Commission (see Act, s. 14 and cf. *Twidale* v. *London and North Eastern Railway Co.* (1)).

It may be that the terms of s. 7 (4) will not enable the respondent in this case to recover contributions from other employers. But, if so, that does not deprive the appellant of his right to compensation. All that can be said is that the Act has not provided for contribution in the present case. There is nothing in s. 53, as *Jordan* C.J. said, which puts any obstacle in the way of the appellant receiving compensation (2).

The other question stated by the Commission can be disposed of more shortly.

The Commission found that the appellant's pre-injury average weekly earnings were £8 10s. and it also found that the appellant, notwithstanding his injury, was physically capable and could have performed the work of time-keeper in a colliery. The wage payable to a time-keeper was £7 11s. per week. And were it not for the appellant's age and the *Coal and Oil Shale Mine Workers (Pensions) Act* the job of time-keeper would have been available to the appellant in the respondent's colliery.

The respondent contended in these circumstances that the appellant's compensation should not, in any case, exceed 19s. per week.

But the appellant was debarred by the Act from accepting any employment in a coal mine and, therefore, the Commission was right in rejecting the contention of the respondent.

In my judgment, this appeal should be allowed and the questions stated in the case each answered in the negative.

DIXON J. The facts which are legally material to the principal question in the appeal may be reduced to a very brief statement. A coal miner upon reaching sixty retires from coal mining. Over four years afterwards he is found to be partially disabled from work that he might otherwise have done by pneumoconiosis, caused by his work as a miner. During the interval he had chosen to do little or no work. He had been in receipt of a pension under the *Coal and Oil Shale Mine Workers (Pensions) Act* 1941 (N.S.W.), by the provisions of which he had been compelled to retire. The question is, can he obtain compensation from his last employer ?

An interpretation has been placed by this Court, in *Smith* v. *Mann* (3), upon s. 7 (4) of the *Workers' Compensation Act* 1926-1946 (N.S.W.) in its application to s. 7 (1) and the definition of " injury "

(1) (1925) 2 K.B. 455.
(2) (1947) 48 S.R. (N.S.W.), at p. 70.
(3) (1932) 47 C.L.R. 426.

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in s. 6 (1). The effect is that, if a disease amounting to personal injury is contracted by a gradual process in an occupation, a worker so contracting it is entitled to receive from the employer in whose employ he is pursuing the occupation at the time of his incapacity, or from the last employer who before his incapacity employed him in such an occupation, compensation in accordance with the Act. For the purposes of sub-s. (4) the injury is to be deemed to have happened at the time of the worker's incapacity (s. 7 (5)). One paragraph of sub-s. (4) prescribes a period of time calculated from that injury for a notice by the employer to earlier employers if he wishes them to contribute. It may be for this reason that the time of the incapacity was made the time of the injury, but the direction in s. 7 (5) is quite general and must operate for all the purposes of sub-s. (4).

Pneumoconiosis is a disease contracted by a gradual process in the occupation of a coal miner. The extent of his physical disablement for work is fixed by a medical certificate, which also operates to fix the date of the incapacity and so of the injury. It may seem unsatisfactory that a pensioner, who for some years before his physical incapacity arose had preferred not to follow any gainful employment, should recover workers' compensation in respect of his incapacity from his last employer in the industry from which he was retired compulsorily and pensioned. But what answer is to be found to his claim in the circumstances I have stated when the foregoing tests of liability are applied to them ? The answers upon which the employer relies are discovered in the criterion of incapacity and in the provisions prescribing the conditions governing compensation and the mode of ascertaining compensation.

" Incapacity," so it is said, means incapacity for the man's former work. But, (proceeds the argument), the worker was retired from coal mining and forbidden to pursue that occupation. His incapacity for his former work therefore arose from statute. His subsequent partial incapacity for the work has, therefore, no point.

Then s. 7 (3) (a), s. 9 (1) (a), s. 11 (1) and s. 14 are constructed, as it is contended, on the basis that the worker is at work and in receipt of earnings at the time the worker is injured or incapacitated. Thus it is made a condition of recovery of compensation that he has been prevented for three days at least from earning full wages.

Again, the compensation is limited to two-thirds of his average weekly earnings for the previous twelve months and to the difference between the amount of his average weekly earnings before the injury and what he is able to earn in some suitable employment

or business. The average weekly wages are to be computed in such a manner as is best calculated to give the rate per week at which the worker was being remunerated, which, it is said, means at the time of the injury or incapacity.

In my opinion the grounds which are given for denying the worker's title to compensation are not sound. They are not sound because, in the first place, it is not true that incapacity is a conception covering nothing but incapacity for the man's former work or for work in his former industry and, in the second place, the difficulties of fitting cases of disease due to a gradual process into a scheme designed to compensate for physical injuries sustained at work does not operate to modify or exclude the application of s. 7 (4) as construed in *Smith* v. *Mann* (1). It will be seen that two separate matters are involved. There is first the possibility of a limitation on the conception of incapacity for work and secondly the difficulty of applying the provisions requiring in effect a loss of earnings for three days and limiting compensation by reference to earnings.

As to the first of these, it is no doubt easy to find judicial statements defining incapacity as if it was concerned only with the worker's ability to resume his former job. For instance, in *Ball* v. *William Hunt & Sons Ltd.* (2), Lord *Macnaghten* says that incapacity is inability to earn wages or full wages at the work in which the injured workman was employed at the time of the accident. But that only means "at least at the work in which he was employed," for if he can resume his former work, he could hardly be incapacitated. The phrase in the Act is simply "where total or partial incapacity for work results from the injury": s. 9 (1). It is a commonplace that incapacity is not total if some other employment is reasonably open to the injured man. If he is disabled from his former employment, that in itself implies some incapacity. But s. 11 (1) says that in case of partial incapacity, the weekly payment shall in no case exceed the difference between the amount of his average weekly earnings before the injury and the average weekly amount he is earning or able to earn in some suitable employment or business after the injury. That means that his capacity for other work is taken into account and in such a way that it may reduce the compensation to nothing. The question could only arise, I imagine, in a case where there have been two causes of incapacity, whatever the nature of the incapacity, and the first to take effect has been limited to work in the man's former

(1) (1932) 47 C.L.R. 426.

(2) (1912) A.C., at p. 500.

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job or industry, while the second covers the whole area, or a larger sector, of possible employment and arose from an injury.

Further, it is difficult to see how such a case could arise except where the second to take effect was a slowly acquired disease. In the case of traumatic injury the man would, *ex hypothesi*, be at work. But be that as it may, there seems to be no justification for the view that there can be no incapacity beyond the former work of the worker or the industry in which he was employed.

I agree that much difficulty exists in applying the compensation provisions to s. 7 (4) combined with s. 7 (1) and the definition of "injury" in s. 6. But it was settled very early in the history of workers' compensation legislation that the liability provisions were to be treated as paramount to the compensation provisions where any conflict is found between them: *Lysons* v. *Andrew Knowles & Sons Ltd.* (1); *King* v. *Port of London Authority* (2); *McCann* v. *Scottish Co-operative Laundry Association Ltd.* (3). Here the difficulty arises from the inappropriateness of the conceptions involved in s. 7 (4) to compensation provisions based on the supposition that a man would sustain injury while at work, injury doubtless thought of instinctively as traumatic. In *Collins* v. *Australian Iron & Steel Ltd.* (4), *Owen* J. began his judgment by saying: "The problems to which the case gives rise are due to the fact that the legislature has sought to incorporate into a code of law, designed to provide compensation for reduced earning capacity occasioned by 'industrial accident,' provision for compensation for reduced earning capacity caused by 'industrial disease,' an 'injury' which in most, if not all, cases is of slow growth, progressive in its incapacitating effect and of which it is seldom, if ever, possible—except by the use of a fiction—to point with certainty to the date of the 'accident' or the commencement of the incapacity resulting therefrom."

This is completely true of the present case.

Section 7 (4) speaks of the liability of "the employer in whose employment the worker is or who last employed the worker"; and this plainly supposes that where the injury is by disease contracted by gradual process the worker may have relinquished his employment before the incapacity. Yet s. 7 (3), in making a general requirement of three days' disablement from earning full wages, speaks of "full wages at the work at which he was employed," doubtless on the footing that the injury would occur during employment. In the same way s. 9 (1) (a) presupposes that a period of

(1) (1901) A.C. 79.
(2) (1920) A.C., at p. 11.
(3) (1936) 1 All E.R. 475, at p. 478.
(4) (1947) 48 S.R. (N.S.W.), at p. 62.

employment by the employer going back from the date of the incapacity will exist that may be used to calculate the two-thirds of the average weekly earnings which limits the amount of the compensation. Not unnaturally the employer reads s. 9 (1) (a) literally and says that it produces a result of nil when applied to this case. So again with s. 11 (1), the assumption is that there are "average weekly earnings before the injury." And s. 14 (a) speaks of "the rate per week at which he was being remunerated."

The argument based on these provisions may take either of two forms. One form is that they show that only those employed at the time of the injury or incapacity are to receive compensation. The answer to that is that *Smith* v. *Mann* (1) has construed s. 7 (4) as imposing a liability on an employer however long the interval may be between the last time he employed the incapacitated worker and development of his incapacity. Section 7 (4) controls the provisions for ascertaining compensation, they do not control s. 7 (4). The other form of the argument is that adopted by *Street* J. It is that they show that the worker is to receive compensation with respect to his loss of earnings in the industry in connection with which he sustained his injury. Thus if, as in this case, he had been already excluded from that industry, there would be no room for compensation. I think that this inference cannot be made. The provisions are drawn simply on the assumption, a natural assumption, that an injury arising out of or in the course of employment would occur while the employment existed. It happens that the assumption is untrue of injury by disease contracted by a gradual process. But they imply no limitation upon the industry which may be taken into account as the basis of the loss of earnings. In fact, on the contrary, the result of the provisions is that only loss of earning capacity in all fields of employment amounts to total incapacity and that loss in the field only of former employment is compensated as partial incapacity. Of course they never contemplated the case of legal exclusion from the field of former employment. Though *Stevens* v. *Birmingham Corporation* (2) is a case of compelled superannuation and retirement from the service of one undertaking and not the whole industry and the physical incapacity preceded the legal incapacity, the view of Lord *Hanworth* (3) seems in principle to be inconsistent with this particular contention.

A subsidiary question arose as to the measure of compensation because the work of a time-keeper at the mine would, but for the

(1) (1932) 47 C.L.R. 426.
(2) (1929) 22 B.W.C.C. 311.
(3) (1929) 22 B.W.C.C., at p. 319.

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legislation, have been available to the worker. His physical condition is equal to the duties of such a position. But I agree that in view of the legislation that is irrelevant.

I would answer both questions in the case stated—No.

I think the appeal should be allowed with costs.

McTIERNAN J. I am of opinion that the appeal should be allowed.

I agree with the reasons of my brother *Dixon*.

Questions answered No. Appeal allowed with costs.

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

Solicitors for the respondent: *Norton, Smith & Co.*

J. B.