[HIGH COURT OF AUSTRALIA.]

SELBY SHOES (AUSTRALIA) PROPRIETARY LIMITED . . . . . APPELLANT;

AND

ERICKSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 18;

MELBOURNE, *Oct.* 1.

Dixon C.J., Webb, Fullagar, Kitto, and Taylor JJ.

Workers' Compensation—Periodic journey—Interruption—Substantial—Not reasonably incidental to journey—Injury—Risk—Material increase—Award—Workers' Compensation Act 1926-1951 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 25 *of* 1951), *s.* 7 (1) (*b*).*

If a break in a journey of the description covered by the provisions of s. 7 (1) (b) and (c) of the *Workers' Compensation Act* 1926-1951 (N.S.W.) is deemed by the Workers' Compensation Commission not to have been reasonably incidental to such journey the worker is not entitled under those provisions to compensation notwithstanding that "in the circumstances of the particular case the nature, extent, degree and content of the risk of injury were not materially changed or increased by reason only of such interruption" and that the interruption for that reason is not to be deemed a substantial interruption within sub-par. (i) of par. (b) of s. 7 (1).

A worker interrupted a daily or periodic journey to his place of abode from his place of employment by a visit of an hour's duration to a hotel. He then resumed his journey part of which he made by train. In alighting from the train he suffered injury. The Commission found that the interruption of the journey occasioned by the call at the hotel was a substantial interruption in fact but that it was not an interruption by reason whereof (within the meaning of the second of the two paragraphs of s. 7 (1) (b)) the nature, extent, degree and content of the risk were materially increased. It was therefore not to be deemed a substantial interruption within sub-par. (i) of s. 7 (1) (b).

Held that, by consequence of its exclusion from sub-par. (i), the interruption fell within the words "any other break in any such journey" of sub-par. (ii)

* The provisions of par. (b) of s. 7 (1) are set out in the judgment of the Court—p. 31 *post*.

of s. 7 (1) (b), and the worker therefore was not entitled under that provision to recover compensation.

Decision of the Supreme Court of New South Wales (Full Court): *Selby Shoes (Aust.) Pty. Ltd.* v. *Erickson* (1953) 53 S.R. (N.S.W.) 142; 70 W.N. 86, reversed.

APPEAL from the Supreme Court of New South Wales.

In an application for determination filed by him under the *Workers' Compensation Act* 1926-1951 (N.S.W.), the worker, William Charles Erickson, claimed that he had, on 10th December 1951, met with an injury on his daily journey between his place of employment and his place of abode, which resulted in an injury to his left leg which totally incapacitated him from his employment from that day onward. The employer, Selby Shoes (Australia) Pty. Ltd., in its amended answer, denied liability on the grounds—(a) that the applicant's injury was received after a break in his said journey which had not been reasonably incidental to the said journey, and (b) that the applicant did not suffer an injury without his serious and wilful misconduct whilst on a periodic journey.

The following facts were proved or admitted in evidence: on 12th (*sic*) December 1951, the applicant, aged sixty-three, left his place of employment with the employer in Renwick Street, Redfern, at 4.15 o'clock p.m. and proceeded to the London Tavern Hotel, Regent Street, Redfern, which is located near Redfern railway station. He entered that hotel in accordance with his daily practice at about 4.20 o'clock p.m., bought a schooner of beer and proceeded to read a newspaper and drink the beer. He had an additional purpose in visiting the hotel on that evening inasmuch as he wanted to secure a ticket which would entitle him, at Christmas time, to purchase from the licensee of that hotel some bottled beer. After waiting for half an hour he was told that the tickets would not be issued that evening. That information did not make any difference to his stay at the hotel. He drank the remainder of the beer and then leaving the hotel at approximately 5.10 o'clock p.m., he proceeded to Redfern railway station to catch a train to Wiley Park railway station, that railway station being the nearest to his place of abode at No. 50 Shadforth Street, Punchbowl. As the trains were then crowded he waited until a number of trains had proceeded through the railway station and finally boarded a train at about 5.20 o'clock p.m. which arrived at Punchbowl railway station at about 5.49 o'clock p.m. Before the train stopped at Punchbowl railway station the applicant jumped from the train on to the platform and suffered the injury alleged in the particulars.

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The Workers' Compensation Commission found (a) that the applicant was injured after a substantial interruption of his journey which did not materially increase the risk of injury; (b) that the break in the journey was not reasonably incidental to the journey; and (c) that the applicant met with the injury without his own serious and wilful misconduct.

An award was made in favour of the applicant for £5 15s. 0d. per week from 11th December 1951 and continuing with medical and hospital expenses and costs.

At the request of the employer the Commission stated a case under the provisions of s. 37 (4) of the *Workers' Compensation Act* 1926-1951, the questions of law referred to the Full Court of the Supreme Court for decision being:

(i) Whether, having found that the worker was injured after a substantial interruption of his daily journey and that that interruption did not materially increase the risk of injury, the Commission should have made an award for the respondent employer because of its further finding that the said interruption was not reasonably incidental to the journey;

(ii) Whether the Commission erred in law in considering whether the break in the journey amounted also to a substantial interruption in the journey; and

(iii) Was there any evidence on which the Commission could hold that the said interruption did not materially increase the risk of injury.

The Full Court of the Supreme Court of New South Wales (*Owen* and *Herron* JJ., *Street* C.J. dissenting), answered the questions in favour of the applicant and dismissed the appeal against the award (*Selby Shoes (Aust.) Pty. Ltd.* v. *Erickson* (1)).

From that decision the employer appealed to the High Court.

G. Wallace Q.C. (with him *W. Collins*), for the appellant. It was incorrectly said in the court below that it was difficult to envisage cases where such a substantial deviation could be said to be reasonably incidental to such a journey. Sub-paragraph (i) of s. 7 (1) (b) of the *Workers' Compensation Acts* 1926-1951 (N.S.W.) means that a substantial interruption made for reasons unconnected with the employment shall not disentitle the worker to compensation provided the nature and extent of the risk of injury were not materially changed thereby. Any deviation which is not saved by sub-par. (i) must be scrutinized in the light of sub-par. (ii). The interruption by the respondent was not, in the circumstances,

(1) (1953) 53 S.R. (N.S.W.) 142; 70 W.N. 86.

reasonably incidental to his journey. The period of interruption was found to be a substantial break. If the view of the court below be correct it would have the anomalous result of leaving a worker who substantially deviates for private reasons, in a better position than one who makes a lesser break which is not incidental to his journey. Once a break is in fact substantial, but does not increase the risk, it is still to be regarded as substantial for purposes of sub-par. (ii). A non-employment break can be incidental to the journey. The same break cannot be substantial in fact for one purpose and deemed not to be substantial for another purpose. The Commissioner found as a fact that the break in the journey was not reasonably incidental to the journey. In view of the evidence that the respondent " jumped off a moving train " the Commissioner wrongly found as a fact that the respondent met with the injury without his own serious and wilful misconduct.

E. S. Miller Q.C. (with him *J. H. Wootten*), for the respondent. A " break ", as used in s. 7 (1) (b) of the *Workers' Compensation Act* 1926-1951 (N.S.W.) is either substantial or is not substantial. If it is substantial it falls within s. 7 (1) (b) (i), and it cannot, therefore, be " any other break " within sub-par. (ii) because " other " in that sub-paragraph must refer to a break other than those mentioned in sub-par. (i). Either the subject break, the only break, was substantial in fact or it was not substantial in fact. The subject break was properly found to be substantial, and, being the only break, could never fall within sub-par. (ii). The provision at the end of par. (b) that although in fact substantial the break shall not be deemed to be substantial prevents the worker from being disentitled to compensation. The Act does not make a substantial break unsubstantial—it merely eliminates the consequences otherwise attaching to substantial breaks; the consequence would have been loss of compensation and that consequence was removed. Nevertheless the break was still substantial (although not attended by that consequence) and cannot be a break which is other than a substantial break within sub-par. (ii); considering the purposes for which the statutory fiction was introduced, and to which it should be limited, it is clear that the purpose for which the fiction operates is to prevent the loss of the right to compensation in certain circumstances. It was not introduced for the academic purpose of altering or distributing " breaks " between sub-pars. (i) and (ii), and should not be employed for that purpose: *Reg.* v. *Norfolk County Council* (1); *Green* v. *Marsh* (2); *Ex parte Walton*;

(1) (1891) 60 L.J. (Q.B.D.) 379, at p. 380.

(2) (1892) 2 Q.B. 330, at p. 335.

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In re Levy (1); *Stroud's Judicial Dictionary*, 3rd ed. (1952), vol. 1, p. 755. The word "other" in sub-par. (ii) indicates any break other than a substantial interruption or deviation. If an interruption to, or deviation from, a journey is substantial it must necessarily be "not incidental to the journey" because "substantial" denies that which is merely incidental. Therefore both sub-par. (i) and sub-par. (ii) deal with non-incidental breaks. Sub-paragraph (i) deals with breaks which are not incidental because they are substantial, and sub-par. (ii) deals with other breaks which, having regard to all the circumstances, are deemed not to have been reasonably incidental. The new paragraph inserted at the end of par. (b) was intended by the legislature to preserve the rights of workers in certain cases where formerly they would have been lost. If substantial breaks are taken out of sub-par. (i) by the new paragraph only to be thrown into sub-par. (ii) the new paragraph will not have any effect because a substantial break is in its nature not incidental to the journey. As to what is incidental was discussed by the Commission. For the new paragraph to have any effect it must be construed as saving the right to compensation in the case of substantial breaks which do not affect the risk. The purposes of the Act must be considered so as not to deprive the worker of his compensation. The draftsman has left a *casus omissus*. It is clear that when he prepared the amendments the draftsman paid particular regard to the judgment in *Moore* v. *Commissioner for Railways* (*N.S.W.*) (2). Although, perhaps, the gaps in the legislation were only partly closed that does not render the provision nugatory.

Cur. adv. vult.

Oct. 1.

THE COURT delivered the following written judgment:—

This is an appeal from an order of the Supreme Court of New South Wales made on an appeal by way of case stated against an award of the Workers' Compensation Commission. The order of the Supreme Court dismissed the appeal against the award and answered the questions in the case stated in favour of the worker.

The worker, who is the respondent in this court, suffered injury as he alighted from a moving train on his journey home from work. The accident occurred on 12th December 1951. He was then sixty-three years of age. On that afternoon he left his place of employment at a quarter past four. To travel home it was his custom to take a train from Redfern railway station near which his place of employment was situated. On the afternoon of the

(1) (1881) 17 Ch. D. 746, at p. 757.

(2) (1947) 21 W.C.R. 182.

accident he did not go directly to the station but proceeded to the London Tavern Hotel, which is not far from the station. From about twenty minutes past four until ten minutes past five he remained in the hotel, where he drank beer and spent some time attempting to obtain a ticket entitling him to buy bottled beer at the approaching Christmas season. He got on a train at twenty minutes past five at Redfern station for the purpose of journeying to Punchbowl, where he lived. The train reached that station twenty minutes later, but before it came to a stop he jumped from the train to the platform and fell down, suffering the injury of which he complains.

The Workers' Compensation Commission made an award in his favour on the ground that the injury had been received in circumstances entitling him, under s. 7 (1) (b) and (c) of the *Workers' Compensation Act* 1926-1951 (N.S.W.) to compensation. This decision was affirmed by the Full Court (*Owen* J. and *Herron* J., *Street* C.J. dissenting). It is desirable to set out textually s. 7 (1) (b) and (c) as they now stand.

"7. (1) (b) Where a worker has received injury without his serious and wilful misconduct on any of the daily or other periodic journeys referred to in paragraph (c) of this subsection, or on any of the other journeys referred to in paragraph (d) of this subsection, and the injury be not received—(i) during or after any substantial interruption of, or substantial deviation from, any such journey, made for a reason unconnected with the worker's employment or unconnected with his attendance at the trade, technical or other school, place of pick-up, or place referred to in subparagraph (i) of paragraph (d) of this subsection, as the case may be; or (ii) during or after any other break in any such journey, which the Commission, having regard to all the circumstances, deems not to have been reasonably incidental to any such journey; the worker (and in the case of the death of the worker, his dependants), shall receive compensation from the employer in accordance with this Act. An interruption of or deviation from any journey shall not be deemed to be substantial if, in the circumstances of the particular case, the nature, extent, degree and content of the risk of injury were not materially changed or increased by reason only of any such interruption or deviation.

(c) The daily or other periodic journeys referred to in paragraph (b) of this subsection shall be (i) between the worker's place of abode and place of employment; and (ii) between the worker's place of abode, or place of employment, and any trade, technical or other

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training school, which he is required by the terms of his employment or is expected by his employer, to attend ".

The learned judge constituting the Workers' Compensation Commission found that the interruption of the journey occasioned by the call at the hotel was a substantial interruption in fact but was not an interruption by reason whereof in the circumstances of the particular case, the nature, extent, degree and content of the risk were materially changed or increased. The result of this conclusion was to bring into operation the second of the two paragraphs of which s. 7 (1) (b) is composed, namely, the paragraph providing that an interruption or deviation shall not be deemed substantial if the nature, extent, degree and content of the risk were not thereby materially changed or increased. It accordingly made it necessary to treat the interruption as not a substantial interruption of or deviation from the journey within the meaning of the first of what it is convenient to refer to as the conditions of which the first paragraph of s. 7 (1) (b) is composed. Inasmuch as the interruption was not one to which the first condition of s. 7 (1) (b) applied, it was contended by the employer, with at least a prima-facie appearance of logic, that it must come within the words " any other break in any such journey " which occur in the second condition of s. 7 (1) (b).

The argument for the employer was simple enough. The injury was received during or after a break in the journey. The break *ex hypothesi* was not a substantial interruption within the first condition; it must, therefore, be an " other break " within the second condition. All that remained was for the Commission to decide whether, having regard to all the circumstances, it was to be deemed not to have been reasonably incidental to the journey. The Commission made a finding on this question. It found that in truth the interruption was not reasonably incidental to any such journey. On that finding the employer maintained that his case was complete, that the interruption constituted a break, that it was not reasonably incidental, and since it was not a substantial interruption or deviation within the first, it fell within the second of the two conditions in s. 7 (1) (b) negativing a claimant's title to compensation. In substance this is the view which *Street* C.J. adopted.

The second paragraph of s. 7 (1) (b), namely, that beginning " An interruption of or deviation from any journey shall not be deemed," &c., was added by Act No. 20 of 1951, s. 2 (b) (iv). Before it was so added there were only two grounds upon which an interruption or deviation that had taken place in fact could be

excluded from the operation of the first of the two conditions stated in s. 7 (1) (b) with the consequence that the worker's title to compensation under s. 7 (1) (b) would not be lost. One ground was that the interruption or deviation was not in fact substantial. The other ground was that, though substantial it was in fact connected with the worker's employment or his attendance at the trade, school or pick-up place, &c. Logically speaking, it was only upon one or other of these grounds, unsubstantiality or some connection with the worker's employment, &c., that a break could come within the words "any other break" in the second of the two conditions stated in s. 7 (1) (b).

In the present case substantiality in fact, as opposed to substantiality for the purpose of the second paragraph, exists. The view taken by the majority of the Supreme Court is in effect that the second paragraph could not be intended to operate to put into the second condition what hitherto must have fallen only within the first condition. The paragraph was obviously inserted in order to benefit the workman by taking the interruption out of the first condition and it ought not to be construed as at the same time operating to his detriment by consequently placing the interruption within the second condition. *Owen* J. said :—"There is no doubt that, as a piece of draftsmanship, the sub-section with its double negatives, and even without the amendment, is not an artistic piece of work, and in this respect the amendment does not improve it. But, if the construction for which the employer contends be placed upon the sub-section, the amending paragraph seems to produce no benefit to the worker although it was obviously intended to do so. If a break, substantial in point of time or space but deemed not to be substantial, is excluded from sub-par. (i), the worker's case must stand or fall by sub-par. (ii), and the amendment does not pretend to mitigate the effect of that paragraph. On the whole I think that the section should be construed as the learned Commissioner construed it. Sub-paragraph (i) must be read as dealing with all breaks which are substantial in fact, while sub-par. (ii) covers all breaks which are not substantial in fact. If, as here, a break is found to be substantial in fact but one which has not increased the risk it is still to be regarded as a substantial break but not one which would debar the worker from relief by throwing his case into sub-par. (ii). It is obvious that this construction may produce the result, mentioned by the learned Commissioner, that a worker who has made a substantial break in his journey for a purpose unconnected with his work may be in a better position than one who momentarily turns aside from his journey for a reason

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not incidental to it. But to construe the sub-section so as to take what I may call a 'non-risk-increasing substantial break' out of sub-par. (i) and put it into sub-par. (ii) would defeat what seems to me to be the underlying purpose of the amendment" (1).

It must be conceded that the probability is high that the legislature was actuated by some such purpose as his Honour attributes to them, but it is another question whether the language used in the provision enacted is capable of effectuating such a purpose. The provision, as *Owen* J. points out, seems to have originated in the following passage in a judgment delivered by his Honour Judge *Rainbow* in the Workers' Compensation Commission in *Moore* v. *Commissioner for Railways* (2):—"For my own part, I should have thought the law could easily have provided that if one came to the conclusion, even after a substantial interruption, that the nature, extent, degree and content of any risk run on a journey home was in no wise changed or increased and no added burden thrown on the employer by any additional risks that the man had undergone by reason of his delay, it might have been left in the discretion of the Commission to award compensation. However, the plain words of the section are that it must not be received during or after a substantial interruption and, as in my opinion injury was received during or after a substantial interruption, there must be an award for the respondent" (3). It will be seen that the legislation which the learned judge commended to the legislature would have covered not only the first condition in s. 7 (1) (b) but also the second; for his Honour said it might have been left in the discretion of the Commission to award compensation in the case which he described substantially in the language adopted by the second paragraph inserted by Act No. 20 of 1951. But it would not be logical to deduce from this that the legislative intention coincided with that of the learned judge. For it may be said that the deliberate departure of the legislature from the terms employed by his Honour in stating the conclusion that should ensue from a finding that the risk was not changed or increased tells in the oppposite direction. It tends to confirm the view that the draftsman in truth intended to deal only with the first of the two conditions and not with the second.

We have formed the opinion that the language in which the legislature has expressed its intention is not susceptible of the interpretation which the majority of the members of the Full Court have adopted, however plausible may be the conjecture

(1) (1953) 53 S.R. (N.S.W.), at p. 146; 70 W.N., at p. 88.
(2) (1947) 21 W.C.R. 182.
(3) (1947) 21 W.C.R., at p. 183.

that the legislature intended to bring about the result which that interpretation effects. The interpretation of the first of the two conditions in s. 7 (1) (b) is controlled by the second paragraph which Act No. 20 of 1951 inserted and, accordingly, an interruption cannot be substantial if it is an interruption which in the circumstances of the particular case did not change or increase the nature, extent, degree and content of the risk of injury. It is true that the words " shall not be deemed to be substantial " are used and it is true that the word " deemed " is often employed where the legislature requires an assumption to be made contrary to fact. But once, in obedience to the command expressed in the paragraph, the interruption is not deemed to be substantial, it ceases for any of the purposes of s. 7 (1) (b) to be substantial, and accordingly it cannot be an interruption within the meaning of the first condition in s. 7 (1) (b). The interruption must be a break in the journey. An interruption could be nothing else, however unsubstantial it might be in fact. We cannot regard the word " break " as requiring a more prolonged suspension of the journey than the word " interruption " does, and, *ex hypothesi*, before the second paragraph applies there must be an interruption.

There may be something to be said for the view that " other break " in the second condition of s. 7 (1) (b) means other than a susbstantial interruption or deviation and does not mean simply other than a deviation which comes within the first condition of s. 7 (1) (b). A substantial interruption might not come within that condition because it was connected with the worker's employment, &c., and it is possible that an interruption connected with the worker's employment was not intended to come within the second condition of s. 7 (1) (b). But, assuming that " any other break " means " any break other than a substantial interruption or substantial deviation " and has not the more logical meaning of " any break other than a break falling within the description in the previous condition ", it still remains true that the break cannot be considered a substantial interruption because of the application to it of the second paragraph added by Act No. 20 of 1951. To avoid this result it is necessary to find an implication in the provision. But even if there be room for the conjecture that the legislature did not intend to produce the result which its language requires, there appears to us to be no material in the provision from which an implication could be made.

In our opinion the reasons of *Street* C.J. are correct. We think the appeal should be allowed and the order of the Full Court discharged. In lieu of that order an order should be made discharging

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the award for the applicant and answering the questions in the case stated as follows :—

Question (i)—The Commissioner should have so made an award for the respondent.

" (ii)—This question does not arise.

" (iii)—It is unnecessary to answer this question.

Appeal allowed with costs. Order of the Supreme Court discharged. In lieu thereof order that the questions in the case stated be answered as follows :—

Question (i) The Commissioner should have made an award for the respondent to the application, Selby Shoes (Australia) Pty. Ltd. Question (ii) This question does not arise. Question (iii) It is unnecessary to answer this question.

The respondent to this appeal to pay the costs in the Supreme Court of the case stated.

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

J. B.