REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

TAYLOR . . . . . APPELLANT;

AND

STAPLEY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1954.

SYDNEY, *March* 26; *April* 13.

Dixon C.J., Webb and Taylor JJ.

Workers' Compensation—Youth—Temporarily employed—Lunch recess—Temporarily absent from place of employment—Nearby river—Swimming therein by youth—Not good swimmer—River—Volume and velocity of water increased by rain—Youth drowned—"Voluntarily subject himself to any abnormal risk of injury"—Workers' Compensation Acts 1926-1951 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 25 *of* 1951), *s.* 7 (1) (*e*). *

A youth, who on several occasions during lunch recesses had left his place of employment and had gone to a nearby river to bathe, similarly proceeded on the particular occasion accompanied by two other youths. By reason of recent rain the river had risen about eight inches and was flowing more swiftly. The youth, who was not a good swimmer, in making his way back from a sandbank to which he had waded, took a course, so far as appeared, by an error of judgment, which involved him in difficulties, and was carried beyond his depth and drowned.

Held, by *Dixon* C.J. and *Taylor* J. (*Webb* J. dissenting), that upon the evidence it was open to the Workers' Compensation Commission to find that the deceased had not voluntarily subjected himself to an abnormal risk of injury within the meaning of s. 7 (1) (e) (ii) of the *Workers' Compensation Acts* 1926-1951 (N.S.W.).

Held, further, by *Dixon* C.J. and *Taylor* J., that under s. 7 (1) (e) of the *Workers' Compensation Acts* 1926-1951 the burden rests upon an applicant to prove that the conditions of liability laid down by par. (e), except the absence of serious and wilful misconduct, were fulfilled.

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

* The provisions of s. 7 (1) (e) of the *Workers' Compensation Act* 1926-1951 are set out in the judgment of *Dixon* C.J. and *Taylor* J. at p. 7 (*post*).

H. C. OF A. 1954.

TAYLOR v. STAPLEY.

APPEAL from the Supreme Court of New South Wales.

In an application to the Workers' Compensation Commission for determination dated 4th June 1952, the applicant, Bertha Stapley, of 112 Smith Street, Penrith, claimed compensation under the *Workers' Compensation Acts* 1926-1951 (N.S.W.) from the respondent, George M. Taylor, of 62 Station Street, West Ryde, builder, for the death of her son, Thomas Stapley, aged sixteen years, upon whom she was partially dependent and who was employed by Taylor as a carpenter, the said death occurring on 11th January 1952 at Agnes Banks where, whilst swimming in the Nepean River during a recess, the deceased was drowned.

The respondent by his answer denied his liability to pay compensation on the grounds, *inter alia*, (i) that the injury to the deceased worker was not caused by injury in the course of his employment and that he voluntarily submitted himself during absence from his place of employment to an abnormal risk; and (ii) that the injury to the deceased worker was not caused by an injury in the course of his employment.

The following facts were proved or admitted in evidence: the deceased was a trainee-apprentice and during his annual holidays from his usual employment he had taken temporary employment with the respondent, a building contractor, who was carrying on building operations at a place known as Agnes Banks, Richmond. The employment of the deceased with the respondent commenced about 24th December 1951 and was still subsisting on 11th January 1952 when he met his death by drowning in the Nepean River. The property Agnes Banks was bounded by the Nepean River and the building operations were being carried on several hundred yards distant from the river bank. During the luncheon-hour recess at approximately 12.5 p.m. the deceased in company with two fellow workers, went to the river to swim. On previous occasions the deceased had gone swimming in the river during the luncheon recess. On 11th January 1952 the river was swollen by recent rains and was running more swiftly. The deceased, who was a poor swimmer, only a learner, with his companions waded across the river to a sandbank. The water at that point was only waist high. They swam for a quarter of an hour and then started to come out at a point lower down the river. As a result they got into a part where there was some nine feet of water, and not noticing that they were being swept down as they were getting out they got into this deep water. The deceased disappeared despite efforts to save him.

The Workers' Compensation Commission found that—(a) the death of the deceased resulted from drowning on 11th January 1952; (b) the applicant, Bertha Stapley, mother of the deceased, was partially dependent on his earnings at the time of his death; (c) (i) the deceased attended his place of employment on 11th January 1952; (ii) the deceased was temporarily absent from that place of employment during an ordinary recess—lunch break—and received injury during such recess; (iii) the deceased did not voluntarily subject himself to any abnormal risk of injury and received the injury without his serious and wilful misconduct.

An award was made in favour of the applicant in the sum of £700 as compensation for the financial injury arising to her as a result of the death of the deceased.

The judgment of the commission (Judge *Rainbow*) contained, *inter alia*, the following: "I think it more difficult to decide whether he (the deceased) was really such a bad swimmer that he could almost be classed as a non-swimmer, notwithstanding the alleged expert tuition of Mr. Kershaw. There are certainly points in the Nepean where in a fresh it is quite a job for a good strong swimmer to cross, there is no doubt that at other parts of the Nepean not very far removed from Penrith or Richmond, nobody could cross; and a non-swimmer in any event going into a stream he does not know would be said to take an abnormal risk. Against that you have some evidence that the deceased could keep his head above water and his efforts apparently allowed him to last thirty yards or so. He has been in this same river before, not at the precise point to be sure; he could just about swim. I think on those facts I would describe it as a risk, not in the sense that inadvertently anybody might become subject to cramp, even the best of swimmers drown, but it is getting very close to the point where it is an abnormal risk to himself. In view of the fact that he had done it on a number of occasions in the previous eight or ten days, he could support himself in the water and that the river at the point where they really intended to swim and play had not presented any difficulties to them I do not think you could say because he happened to cross lower down where there was deeper water that the whole risk of drowning was more than a mishap whilst swimming. I think it was a very definite risk but not abnormal. Therefore it follows that the applicant is entitled to recover."

At the request of the employer the commission stated a case under the provisions of s. 37 (4) of the *Workers' Compensation Acts* 1926-1951, the question of law argued before the Full Court of the

H. C. OF A. 1954. TAYLOR v. STAPLEY.

Supreme Court of New South Wales being: was the commission entitled to find that the deceased worker did not voluntarily subject himself to any abnormal risk of injury ?: see s. 7 (1) (e) (ii) of the *Workers' Compensation Acts* 1926-1951.

The Full Court of the Supreme Court (*Street* C.J. and *Herron* J., *Owen* J. dissenting), answered the question in the affirmative and dismissed the appeal against the award.

From that decision the employer appealed to the High Court.

The relevant statutory provisions are sufficiently stated in the judgments hereunder.

W. Collins, for the appellant. There is not any authority upon the point at issue. The facts do not fall within s. 7 (1) (e) of the *Workers' Compensation Acts* 1926-1951 (N.S.W.). That section must be construed as a section within the framework of the Act. The word "risk" in par. (ii) of s. 7 (1) (e) implies an element of danger. The nature of the thing is under consideration in this case. "Abnormal" as used means "not normal", that is, not a normal risk in the employment. The proper approach is shown in *Tompsett* v. *Southern Portland Cement Ltd.* (1). In the *Shorter Oxford English Dictionary*, 3rd ed. (1950), p. 5, "abnormal" is shown as meaning "deviating from type; contrary to rule or system; unusual." The worker voluntarily submitted himself to the risk. The risk was not an ordinary risk but was a risk outside the scope of, or course of, his employment: see *Flanagan* v. *Great Northern Wool Dumping & Stevedoring Co. Pty. Ltd.* (2). This provision was inserted in the Act to protect workers like the deceased during recesses but not in respect of abnormal risks voluntarily accepted by the worker. Normally, people do not take part in hazardous sports during a luncheon recess. The statutory provision was enacted subsequent to the decision in *Humphrey Earl Ltd.* v. *Speechley* (3). The matter of content cannot be ignored. There is a content of danger.

[DIXON C.J. referred to *Whittingham* v. *Commissioner of Railways (W.A.)* (4).]

That does not come within the section but must be determined in accordance with the general rules of workers' compensation. The word "abnormal" is used in s. 7 (1) (e) (ii) as a word of quality rather than of quantity; as a word of kind rather than of degree; and of nature rather than of control. The facts must be regarded

(1) (1941) 41 S.R. (N.S.W.) 126, at p. 132; 58 W.N. 137, at p. 139; 15 W.C.R. 137, at pp. 147-148.
(2) (1949) 49 S.R. (N.S.W.) 340, at p. 344; 66 W.N. 183.
(3) (1951) 84 C.L.R. 126.
(4) (1931) 46 C.L.R. 22.

as on that day ; as at the time the event occurred ; the river ; the then existing conditions ; flood ; faster flow ; the deceased ; poor swimmer ; voluntarily submitted to the risk. " Degree " is dealt with in an article by *Glanville Williams* in *Law Quarterly Review*, vol. 61, at pp. 181-184. The risk in this case was, in the circumstances, an abnormal risk, that is, an unusual risk involving hazard, danger and exposure to mischance or peril : see *Noble* v. *Southern Railway Co.* (1) and *Lancashire & Yorkshire Railway Co.* v. *Highley* (2). The deceased added an extra hazard to his life during that recess. It was found as a fact that he had undergone a very definite risk. The nature of the risk is the predominant question. This case does not come within the scope of the Act.

M. E. Pile Q.C. (with him *K. Coleman*), for the respondent. Section 37 (4) of the *Workers' Compensation Acts* 1926-1951 (N.S.W.) does not afford any appeal except upon a question of law. As to whether a question of law arises upon the construction of words in a given case : see *Tompsett* v. *Southern Portland Cement Co.* (3) per *Jordan* C.J. and *Herbert* v. *Samuel Fox & Co. Ltd.* (4). What is " abnormal risk " is a question of fact and degree. There is ample evidence to support the conclusion of fact of the Workers' Compensation Commission. There is nothing to show that the commissioner misdirected himself in law. The respondent, therefore, is entitled to rely upon the findings of fact. No question of law arises. If it were incumbent upon the Court to construe " abnormal risk ", a subjective test would be required, that is, did the worker by a voluntary act submit himself to a consciously perceived risk of injury knowing it to be " abnormal " ? Full awareness of the risk would be necessary to show that the worker had " voluntarily " subjected himself to it. Before the appellant could be successful it must be shown that the risk was voluntarily assumed by the worker, of his own volition, with full awareness of the nature of the risk he was accepting. It must be shown that he was acquainted with the abnormality of the risk and that he voluntarily subjected himself to it. Abnormal risk is judged by the incidence of the risk as well as by its magnitude, that is, it must affect a minority of the normal population and to an extraordinary extent. Risk must be judged by the comparison of the risks encountered by the normal public and not by the exigencies of the worker's employment at

(1) (1940) A.C. 583.
(2) (1917) A.C. 352.
(3) (1941) 41 S.R. (N.S.W.), at pp. 131, 132 ; 58 W.N., at p. 139 ; 15 W.C.R., at pp. 147, 148.
(4) (1916) 1 A.C. 405.

H. C. OF A. 1954. TAYLOR v. STAPLEY.

the time. The risk, whether abnormal or normal, to be considered, is the risk which was the precise cause of the injury which entitled the dependant to make a claim. The subject risk was not the going into the water. The casual risk was the fact that having got into the water he got into a hole which he had no reason to suspect was there. The worker's qualifications as a swimmer were a matter of fact for the tribunal to decide. "Abnormal" means either unusual in point of magnitude, or unusual in point of incident. The worker is entitled to "add a risk": cf. the test of "added peril" laid down in *Lancashire & Yorkshire Railway Co.* v. *Highley* (1); and see *Harris* v. *Associated Portland Cement Manufacturers Ltd.* (2) and *Noble* v. *Southern Railway Co.* (3). The commissioner held that the risk was not an abnormal risk and that it was not voluntarily accepted by the deceased, Even if the Court were of opinion that the risk was an "abnormal" one, the appeal ought not to be allowed unless there was not any evidence at all upon which the commissioner could find as he did. An injury suffered during a recess was considered in *Turrill* v. *Murch* (4) and "abnormal risks" was considered in *Radcliff* v. *Melbourne and Metropolitan Tramways Board* (5).

[DIXON C.J. referred to *Russell* v. *Conpress Printing Ltd.* (6).]

W. Collins, in reply. The whole case was decided by the tribunal on the basis that the worker voluntarily accepted the risk. It cannot be said that the risk was not abnormal merely because the deceased had taken the risk before. The test is: what would a reasonable person have done in all the relevant circumstances as then existing?

[DIXON C.J. referred to *Harris* v. *Associated Portland Cement Manufacturers Ltd.* (7); *Lancashire & Yorkshire Railway Co.* v. *Highley* (8) and *Noble* v. *Southern Railway Co.* (9).]

It is conceded that the deceased voluntarily subjected himself to the risk, therefore the only question is: was it an abnormal risk? In the circumstances then prevailing, it was. The onus is upon the applicant of proving that the matter comes within the Act.

Cur. adv. vult.

(1) (1917) A.C. 352.
(2) (1939) A.C. 71.
(3) (1940) A.C. 583.
(4) Workers' Compensation Board (Vict.) Decisions, vol. 2, 1946-1950, p. 51.
(5) Workers' Compensation Board (Vict.) Decisions, vol. 2, 1946-1950, p. 91.
(6) (1952) 26 W.C.R. 58.
(7) (1939) A.C. 71.
(8) (1917) A.C. 352.
(9) (1940) A.C. 583.

The following written judgments were delivered :—

DIXON C.J. AND TAYLOR J. The question upon which this appeal depends arises upon s. 7 (1) (e) of the *Workers' Compensation Act* 1926-1951 (N.S.W.). That provision, which was inserted in the Act by the *Workers' Compensation (Amendment) Act* 1951, is in the following terms : " (e) Where a worker on any day on which he has attended at his place of employment pursuant to his contract of service or apprenticeship—(i) is temporarily absent therefrom on that day during any ordinary recess ; and (ii) does not during such absence voluntarily subject himself to any abnormal risk of injury ; and (iii) during such absence receives an injury without his serious and wilful misconduct, 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." What is to be determined is whether upon the circumstances of this particular case it could be found that the worker did not voluntarily subject himself to any abnormal risk of injury.

The worker was a youth nearly seventeen years of age who was drowned in the Nepean River on 11th January 1952. During his annual holidays from his ordinary work he had taken temporary employment with the appellant, a building contractor, who was doing some work at Agnes Banks near Richmond. The building at which the deceased was at work was several hundred yards from the bank of the river. During the intervals for lunch the deceased and two other youths had several times gone to the river and bathed. He was anything but a good swimmer. He had learned to swim only during the Christmas holidays that had just passed. He was taught by a friend who said in evidence that he was learning very well, he was a fair swimmer, but able to swim at most thirty yards. One of his two companions described his capacity to swim as very slight and said that he was only a learner. His brother said that the deceased " could swim, just dog paddle." The evidence does not suggest that on the day when he was drowned the deceased meant to go into deep water. On previous occasions the youths had crossed the main stream in shallow water where the river broadens out forming a sand bank and a gravel island. The depth was described as up to the deceased's thighs. On the day of the drowning the three youths repeated this proceeding but on returning they recrossed lower down where the river was deeper. There had been some rain and the river had risen about eight inches and was flowing more swiftly. The deceased got into difficulties and was carried beyond his depth. His companions were unable to save him and he was drowned.

H. C. OF A. 1954. TAYLOR v. STAPLEY. Dixon C.J. Taylor J.

The Workers' Compensation Commission found that the deceased did not voluntarily subject himself to any abnormal risk of injury. There was no dispute about the other conditions of liability prescribed by par. (e). The deceased had attended at his place of employment pursuant to his contract of service; he was temporarily absent therefrom during an ordinary recess, viz., the recess for lunch, and during his absence he met his death without his serious and wilful misconduct. The commission made an award in favour of the deceased's mother as a partial dependant. An appeal by way of case stated was dismissed by the Supreme Court (*Street* C.J. and *Herron* J., *Owen* J. dissenting) on the ground that upon the evidence it was open to the commission to find that the deceased had not voluntarily subjected himself to an abnormal risk. It was correctly assumed that under par. (e) the burden rests upon an applicant to prove that the conditions of liability laid down by the paragraph, except the absence of serious and wilful misconduct, were fulfilled, notwithstanding the negative character of that required by sub-par. (ii). But it was held by the majority of the Court that whether sub-par. (ii) was fulfilled was a matter of fact for the commission and that upon the evidence the commission might find the fact as it had done.

To some extent the correctness of this conclusion depends on the effect given to the words "abnormal risk of injury". It was contended on this appeal that a risk should be regarded as abnormal within the meaning of the paragraph if it is a risk to which the worker has subjected himself in the course of some unusual or abnormal activity. But this proposition merely substitutes one difficulty for another since it is impossible to define those activities which may be said to constitute the normal activities of any particular worker during a recess and so to provide a standard of normality. The standard of normality cannot be discovered in the character of the employment for the whole paragraph relates, not to work but to a period of recess which is a period of freedom of action qualified only as to time and the necessity of returning to work. The word "abnormal" seems to mean no more than unusual and a risk may be said to be abnormal where the doing of an act is, in particular circumstances, attended with an unusual degree of risk. But to say this is not to deny that a risk should also be regarded as abnormal where it is a risk which is ordinarily incidental to the performance of some act which is itself inherently dangerous. Again the want of qualifications of a man for some activity may arise from his being unaccustomed to it and no doubt the risk might be rightly said to be abnormal or unusual in his case

through his inexperience, although usual or normal enough with many men. In truth all the circumstances of the particular case must be considered. The words "voluntarily subject himself" require that he shall have acted of his own free choice and intentionally done what involves the abnormal risk of injury. It is an element that in this case has a peculiar importance in the distinction between on the one hand bathing in the river, which the deceased intentionally did, and on the other hand recrossing the river by a route which took him into proximity to deep flowing water, a thing that there is no reason to suppose was anything but an error of judgment. The action of the deceased in crossing the river in a way that in fact exposed him to greater peril may for this reason be put on one side as not a voluntary subjection of himself to the risk. The ultimate question of fact would therefore be whether in going to bathe in the river though it had risen and though he was so poor a swimmer he subjected himself to an abnormal risk of injury.

The question of fact is not for the Supreme Court or for this Court to decide. The appeal by way of case stated which the Act gives is confined to questions of law. All that can be decided upon the case stated is whether there is any evidence on which it may reasonably be found by the commission as the tribunal of fact that the deceased did not voluntarily subject himself to any abnormal risk of injury.

The question whether a risk is abnormal must be very much one of degree and questions of degree are usually to be decided as matters of fact. For the reasons that have already been given the commission might properly consider that the only risk to which the deceased subjected himself voluntarily, was the risk attendant upon his bathing in a flowing stream the depth of which at the place where he proposed to bathe was up to his waist, knowing however that he was a poor swimmer and that there were places in the vicinity beyond his depth. Was this risk abnormal in the sense of unusual or excessive ? The answer to this question depends upon a number of factors including the capabilities of the deceased, the proficiency of those who were with him and the state of the river at the time. No doubt the evidence upon this point is meagre, but whatever we ourselves regard as the true answer to the question of fact involved, it seems to be going too far to deny that it was within the province of the commission to answer it as the commission considered proper. For a reasonable man might take the view that such a risk is not abnormal. In other words there was evidence

H. C. OF A. 1954. TAYLOR v. STAPLEY.

upon which a reasonable man might find that the deceased had not voluntarily subjected himself to an abnormal risk. It follows that the appeal should be dismissed.

WEBB J. This is an appeal from an order of the Full Court of New South Wales dismissing an appeal by way of case stated by the Workers' Compensation Commission. The appeal was by the appellant Taylor, the employer of the deceased, son of the respondent Mrs. Stapley. The deceased was a trainee-apprentice and whilst working for the appellant Taylor was drowned in the Nepean River at Agnes Banks on 11th January 1952, during his lunch hour.

Section 7 (1) (e) of the *Workers' Compensation Acts* 1926-1951 (N.S.W.) as amended by No. 20 of the Act of 1951 provides *inter alia* that where a worker on any day on which he has attended his place of employment is temporarily absent therefrom on that day during any ordinary recess and does not during such absence " voluntarily subject himself to any abnormal risk of injury " he or his dependants as the case may be shall receive compensation from the employer.

The onus of proof under this provision is on the claimant.

The only question that now arises is : was the commission entitled to find that the deceased worker did not voluntarily subject himself to any abnormal risk of injury ? The Full Court by a majority (*Owen* J. dissenting) answered the question in the affirmative.

The commission found *inter alia* : (1) that " the deceased was a poor swimmer, only a learner " ; and (2) that " the river was swollen by recent rains and was running more swiftly. The deceased with his companions waded across the river to a sandbank. The river at that point was *only waist high.* They swam for a quarter of an hour and then started to come out at a point lower down the river. As a result they got into a part where there was some nine feet of water and *not noticing that they were being swept down as they were getting out they got into this deep water.* The deceased disappeared despite efforts to save him ".

The italics are mine.

No question is raised as to the first of these two findings ; deceased's brother said he could just " dog paddle " ; but as to the second finding, reference must be made to the evidence, more particularly because of the words italicized in the commission's finding. The transcript of the evidence is attached to the case as part of it.

The companions of the deceased referred to in the commission's finding were his fellow workers, Weatherly and Harris. Harris did

not give evidence. Weatherly said in examination in chief that he could swim; and the deceased went swimming in the river on several occasions; they crossed the main stream where it was shallow—up to Weatherly's *thighs*—to a sandbank; between the time they first went swimming and the day the deceased was drowned there had been several inches of rain which had put more water into the river; as they waded across the stream to the sandbank on that day it was shallow and reasonably safe; it was safe where they swam on the sandbank; they were in for about a quarter of an hour; then they started to walk out; they were "diving and crossing together"; they started to cross lower down the river and the result was they got into a deeper part of the river that they had not been in and where there was about nine feet of water. Weatherly continued: "I did not notice we were getting swept down as we were getting out and we got into water out of our depth. Tom" (deceased) "started to struggle because he was a bit exhausted. He started to struggle and go under then".

In cross-examination Weatherly said that the river was different from what it had been previously because there had been rain; it was flowing much more swiftly; it was deeper and much swifter, but he could not say how many inches deeper. It follows that it might well have been more than "thigh" deep, which Weatherly says was its depth before the rain.

It was suggested to Weatherly in examination in chief that when he and the deceased were wading across the river on the way to the sandbank it was "only waist high". But Weatherly replied merely that it was shallow. Again Weatherly said that he—Weatherly—did not notice they were getting swept down as they were getting out. He thus spoke only for himself. It may be contended that it should be assumed that if Weatherly failed to notice he was being swept down by the stream, then that was evidence that the deceased also failed to notice it. But that does not follow. The deceased was a poor swimmer and would be expected to be more alert to a situation of danger in the river than if he could swim. He could just dog paddle and the river was fast flowing. This is an important consideration in the view I propose to take, because I am assuming in the respondent's favour, but without deciding, that the test to be applied in determining whether the particular worker voluntarily subjected himself to an abnormal risk is a subjective test, and that the respondent was entitled to recover if there was evidence that the deceased did not in fact appreciate the risk he took in diving or swimming instead of wading on his way out of the river, no matter how abnormal and obvious

H. C. OF A. 1954. TAYLOR v. STAPLEY. Webb J.

the risk was. If it could be found on this evidence that he as well as Weatherly was not noticing that he was being carried down stream, then I would not be prepared to find that he appreciated that he was taking an abnormal risk. But apart from that evidence of Weatherly's state of mind, I think it was impossible to find that, when the deceased began to dive and swim in this swollen and swiftly flowing stream, he did not realize that he was in grave danger of being carried into a deep part of the river where he could not wade and of being drowned, even in the company of a swimmer. Poor swimmers of normal intelligence, as the deceased must be assumed to have been, are not necessarily oblivious to grave risks of drowning because there is a swimmer about. There is no evidence that Weatherly undertook to keep a watch on the deceased in case he got into difficulties. Again, as appears from the evidence already quoted, Weatherly said that they started back from lower down the river; and there is nothing to indicate that this was at a part with which the deceased was familiar and knew to be shallow. Dog paddling in a fast flowing river at an unknown depth involved taking a risk out of the ordinary.

A man who said he had given swimming lessons to the deceased testified that deceased was a fair swimmer and could swim about thirty yards. But obviously this witness was not believed by the learned chairman of the commission who preferred the evidence of the deceased's brother that deceased could "just dog paddle".

In my opinion, taking the most favourable view for the respondent of s. 7 (1) (e) the commission was not entitled to find on the evidence that the deceased worker did not voluntarily subject himself to any abnormal risk of injury.

I would allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Hickson, Lakeman & Holcombe.*
Solicitors for the respondent, *Abram Landa & Co.*

J. B.