[HIGH COURT OF AUSTRALIA.]

COMMISSIONER FOR RAILWAYS (N.S.W.) . APPELLANT ; RESPONDENT,

AND

AGALIANOS . . . . . RESPONDENT. APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 30, 31; *June* 9.

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

Workers' Compensation—Adult worker—Partial incapacity—Average weekly earnings—Pre-injury earnings—Post-injury earnings—Comparison—Rising wage structure—Weekly payments—Attempt to maintain values—Basic wage formula—Workers' Compensation Act 1926-1951 (*N.S.W.*), *s.* 11 (1) (*a*), (*b*).

Section 11 (1) of the *Workers' Compensation Act* 1926-1951 provides:—"(a) 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. (b) The amount of the average weekly earnings of a worker as aforesaid shall, in the case of an adult worker in receipt of compensation at the commencement of the *Workers' Compensation (Amendment) Act*, 1951, or who after such commencement receives compensation in respect of an injury which occurred before such commencement, be deemed to be increased as from such commencement by the difference between the living wage the needs basic wage or the basic wage, as the case may be, applicable at the time of the injury and the basic wage applicable at such commencement, and shall after such commencement be deemed to be increased or reduced from time to time, as the case may be, by the amounts by which and from the dates from which the basic wage applicable at such commencement is subsequently increased or reduced, as the case may be."

Held, (1) that the words "who . . . receives compensation" in s. 11 (1) (b) refer not to an adult worker actually receiving compensation but to one who is to be the recipient of compensation; (2) that the second limb of s. 11 (1) (b)

should be interpreted as covering the case where in respect of an injury suffered before the *Workers' Compensation (Amendment) Act* 1951 the partially incapacitated adult worker would be deprived of compensation because of the limitation imposed by s. 11 (1) (a) if it were not for the notional increase which, for the purpose of calculating the amount limited by s. 11 (1) (a), s. 11 (1) (b) requires to be made in the amount of the average weekly earnings received before injury.

Decision of the Supreme Court of New South Wales (Full Court): *Commissioner for Railways* v. *Agalianos* (1954) 55 S.R. (N.S.W.) 342; 72 W.N. 303, affirmed.

APPEAL from the Supreme Court of New South Wales.

George Agalianos of Junee, New South Wales, was for some time prior to 29th January 1953 in the employ of the Commissioner for Railways and in the course of his employment he sustained injuries to his right leg, the dates of such injuries being 18th January 1948 and 21st July 1949 respectively. On 12th December 1952 by reason of age Agalianos retired from the service of the commissioner and was paid by the latter all wages due to him up to 29th January 1953. On 5th January 1953 he made application to the Workers' Compensation Commission of New South Wales for compensation for partial incapacity resulting from the injuries sustained by him as aforesaid. The commission (Judge *Rainbow*) heard the application on 28th April 1953 and found that the applicant had since 29th January 1953 suffered partial incapacity for work, that his average weekly earnings for the twelve months prior to 21st July 1949, the date of the second injury, were £7 15s. 6d., that on his return to work after his injuries his wages exceeded his pre-injury average weekly earnings and that at the date of the application he was able to earn eight pounds per week. The commission held s. 11 (1) (b) of the *Workers' Compensation Act* 1926-1951 to be applicable and found that the difference between the basic wage at the date of injury and at the date of the application was £5 9s. 0d., giving a notional average weekly earnings of £13 4s. 6d. for the twelve months preceding the second of his injuries. There was thus a maximum award available to Agalianos of £5 4s. 6d. per week and the commission in its discretion made an award of £4 10s. 0d. per week.

At the request of the commissioner Judge *Rainbow* stated a case pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1951 for the decision of the Supreme Court upon, *inter alia*, the questions (1) whether the commission should have held that Agalianos was debarred by s. 11 (1) of the *Workers' Compensation Act* 1926-1951 from receiving weekly payments; (2) whether the commission

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should have held that the amendment of s. 11 (1) of the *Workers' Compensation Act* 1926-1948 effected by Act No. 20 of 1951 did not apply to Agalianos.

The Supreme Court (*Maxwell* J., *Roper* C.J. in Eq. and *Herron* J.) answered both questions in the negative, whereupon the commissioner appealed to the High Court.

The *Workers' Compensation (Amendment) Act* 1951 (No. 20 of 1951) came into operation on 27th June 1951, and the relevant portions thereof appear in the judgments of *Dixon* C.J. and *Kitto* J. hereunder.

G. Wallace Q.C. (with him *H. Jenkins*), for the appellant. The scheme of the amending Act shows that the legislature intended to deal with and did deal with certain types of cases retrospectively, but not the type of case to which the applicant belongs. In respect both of entitlement and *quantum* the critical date is the date of injury and the law in force at such date is that which is applicable. [He referred to s. 3 (2) of the amending Act amending s. 9 of the *Workers' Compensation Act* 1926-1948 and continued :] This subsection illustrates the scheme of the Act and gives a retroactive operation in two types of case, (a) persons in actual receipt of weekly payments under the principal Act, i.e. the 1926-1948 Act, and (b) persons becoming entitled to weekly payments under the principal Act. Then s. 4 (c) (i) of the amending Act, which introduces pars. (b) and (c) to s. 11 of the principal Act, continues the legislative scheme and the benefits under par. (b) are conferred retroactively in the same limited manner. Section 11 (1) (b) operates for the benefit of those either receiving or entitled to receive compensation under the principal Act unaffected by the amending Act, the right to compensation is not to be derived from the provisions of the amending Act alone, which is directed to the *quantum* of compensation. In framing the legislation Parliament was forced to draw the line at some point, it not being intended to re-open all previous cases, and the line was drawn by limiting the benefit to those in fact receiving compensation under the principal Act and those who having received an injury before the amending Act were subsequently held entitled under the principal Act. The basis of the argument is that s. 11 (1) (b) is not an entitling section, but serves merely to increase the amount of compensation payable where an adult worker has otherwise established his right to compensation. Unless compensation is payable under s. 11 before the introduction of the amendments s. 11 (1) (b) will not cure the position.

M. E. Pile Q.C. (with him *F. McAlary*), for the respondent. An applicant is not obliged to show entitlement under the principal Act prior to the amendment as distinct from the principal Act read with the amendment: see No. 20 of 1951, s. 2. Section 11 deals merely with the manner of ascertaining average weekly earnings and the function of s. 11 (1) (b) is definitive and must be read with s. 11 (1) (a). The amendment does not grant entitlement to a new class of persons but re-defines "average weekly earnings" for the benefit of persons otherwise entitled. If the effect of the injury persists the amendment enlarges the formula of s. 11 to enable an award to be made.

G. Wallace Q.C., in reply.

Cur. adv. vult.

June 9.

The following written judgments were delivered:—

DIXON C.J. In this appeal we are called upon to decide a question depending upon the meaning and operation of par. (b) of sub-s. (1) of s. 11 of the *Workers' Compensation Act* 1926-1951 of New South Wales. That paragraph, together with pars. (c) and (d), was inserted in sub-s. (1) by the *Workers' Compensation (Amendment) Act* 1951 (No. 20 of 1951). Shortly afterwards it was amended by the *Workers' Compensation (Further Amendment) Act* 1951 (No. 25 of 1951). One of the purposes of the two Acts of 1951 was to deal with the consequences upon the compensation of injury by accident arising out of or in the course of employment which were seen to ensue from the very considerable change in the purchasing power of money and the rise in the monetary expression of wages that had occurred in the years preceding the enactments. Section 9 of the *Workers' Compensation Act* limited the weekly payments of the compensation to a percentage of the worker's average weekly earnings for the twelve months before the injury, if the worker has been so long employed by the same employer and it is obvious that in any case where weekly payments were, when the Act was passed, still continuing in respect of an injury sustained some time before, the limitation would result in a figure disproportionately lower than if the same percentage were applied to rates of wages since current. Section 11 provided that in the case of partial incapacity, the weekly payment should 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 must bear

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such relation to the amount of that difference as under the circumstances of the case may appear proper. The assumption made by this provision is, of course, that where there is partial incapacity for work the earnings before the injury will always be greater than wages obtainable by the employee after the injury. Accordingly it was thought sufficient to speak simply of the " difference between " the two rates of earning without defining it as the excess of the average weekly earnings before the injury over the weekly earnings since the injury. But its meaning is the same as if it had so defined the difference. It was entirely logical to make the assumption; for " incapacity for work " means the loss or reduction of the capacity to earn. The often quoted statement of Lord *Loreburn* is that there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch: *Ball* v. *William Hunt & Sons Ltd.* (1). But as the purchasing power of money fell the amounts in which wages were expressed increased sufficiently and with sufficient rapidity to make it possible for a man whose injury placed a lasting limitation on his real earning power to obtain a weekly wage expressed in a greater amount than that which he earned before his injury. Yet in comparison with his fellows he might still be under a partial incapacity for work. As s. 11 stood it would of course operate to prevent such a man from receiving any compensation. But there might well be cases in which, although the new wages were not actually higher than the old and in fact were lower, yet because of the change in money value the difference would not justly reflect the actual diminution in earning power due to the injury. In such a case the weekly payments which the man under partial incapacity would receive would be much reduced in amount. Further, it was reasonable to suppose that in the future there would be alterations in wage levels which would operate to affect the result of the comparison between the average weekly earning before the injury and the average weekly amount of the present earnings of the partially incapacitated man. A purpose of the Act No. 20 of 1951 was to deal with these situations. It failed, however, to deal with the operation of s. 9 and dealt only with the operation of s. 11, an omission that was remedied by Act No. 25 of 1951.

In dealing with s. 11, the Act No. 20 of 1951 divided the subject into two parts. It introduced into s. 11 one paragraph applying to cases where the injury had taken place before the passing of the

(1) (1912) A.C. 496, at pp. 499, 500.

amending Act, and another paragraph applying to cases where the injury should take place after the passing of the Act. The first, which became par. (b) of sub-s. (1) of s. 11, provides that the average weekly earnings "as aforesaid", that is to say as mentioned in the substantive provision of s. 11 already set out which becomes sub-s. (1), should be deemed to be increased as from the commencement of Act No. 20 of 1951 by the difference between what may be called the base wage applicable at the time of the injury and that applicable at such commencement. A means is provided of identifying or ascertaining the appropriate base wage in the case of the different industrial regulations but to refer to this introduces an unnecessary complication that is not material. The paragraph goes on to say in effect that after such commencement the difference shall be deemed to be increased or reduced from time to time, as the case may be, in accordance with variations in the basic wage, and par. (c) makes a corresponding provision applicable in the case of adult workers injured after the commencement of the Act.

It is the earlier part of par. (b) that governs the present case. The provision is so expressed as to restrict its application to the case of an adult worker who is described or defined in words which must be quoted literally, because it is upon their meaning or effect that the question for decision turns. The words are—" in the case of an adult worker in receipt of compensation at the commencement of the *Workers' Compensation (Amendment) Act* 1951 or who after such commencement receives compensation in respect of an injury before such commencement."

Now the respondent in the present case suffered an injury by accident arising out of or in the course of his employment with the appellant commissioner which resulted in partial incapacity for work. Indeed he suffered two such injuries. But he was continued in his employment and paid his full wages, whether as a result of s. 100B of the *Government Railways Act* 1912-1952 or for other reasons does not appear and does not matter. He was in the employment of the appellant commissioner at the date of the commencement of Act No. 20 of 1951, viz. 27th June 1951, and he remained in that employment for another eighteen months when he retired on the ground of age, having attained sixty. Thus at the time of the commencement of the amending Act he was in receipt of wages, not compensation. The question is whether in these circumstances he can bring himself within the foregoing language quoted from par. (b). He was not " in receipt of compensation at the commencement of the Act ". Is he " an adult worker who after

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such commencement receives compensation in respect of an injury which occurred before such commencement" ?

The question turns on the meaning conveyed by the words "receives compensation". For he is an adult worker. His injury occurred before the commencement of the Act. He is partially incapacitated for work by his injuries, as it has been found, for now that he no longer is employed by the commissioner, we must take it that the diminished earning capacity attributable to his injuries has taken effect and has resulted in his being disabled from earning less than, in spite of his age, he otherwise would have been able to do. That he does not actually "receive" compensation is of course a fact. His claim to do so was rejected by the commissioner and is the matter now in issue. But the provision can scarcely mean that actually receiving compensation should be the test of its operation upon a given case. The expression is explained by the appellant as referring to cases in which compensation is paid or becomes payable under s. 11 in its unamended form in respect of an injury which has occurred before the commencement of Act No. 20 of 1951 and has resulted, whether before or after that date, in partial incapacity for work. This part of par. (b), according to the appellant, is concerned with workers who independently of the amendment become or should become recipients of compensation and its purpose is to put up the amount to be received ; the appellant denies that it has any purpose of enabling an injured worker to receive compensation who otherwise would be excluded by the operation of s. 11 with reference to his pre-injury wages. In point of policy such a distinction can be justified only on grounds of expediency, not of justice. If it is fair and proper to alter one limb of the statutory comparison because the amount of compensation otherwise payable in respect of an injury is too low, still more must it be fair and proper to do so when the disproportion with present-day rates is so extreme as to produce nothing for the incapacitated man. The words "who after such commencement receives compensation in respect of an injury which occurred before such commencement" are directed at the points of time of the two events ; the injury must be before and the compensation must be after the Act. The draftsman does not appear to have been concerned with the relationship to the compensation which the word "receives" might connote. The appellant contends that the draftsman contemplated two steps, the establishment under the old law of something equivalent to receipt or receivability of an amount and then the increase of the amount received or receivable

by enhancing the average weekly earnings as at the time of the injury. But it is obvious from the mere reading of the provision that two steps were never in contemplation. The paragraph is simply a direction with respect to the mode of calculating a sum which when computed is to be received. It must be remembered that what is now s. 11 (1) (a) has two aspects. It sets a limit to the weekly payments on account of partial incapacity and it sets a standard in relation to which the weekly payments are to be fixed or assessed. Paragraph (b) is concerned only with a factor in the calculation of the amount which forms both the limit and the standard. It is the product of the calculation that is received, not the factor. The very indefinite present tense of the word " receives " is used, somewhat vaguely perhaps, on the footing that the adult worker is to be the recipient of compensation and the draftsman finds it convenient so to describe him when it becomes necessary to speak of him in order to make the point that the injury must be before and the compensation after the amending Act. It may be illogical to speak of a man as a recipient of a sum of money in prescribing the calculation on the result of which his receiving the money is contingent, but the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.

Notwithstanding the difficulties to which the phrase gives rise, it is sufficiently clear that par. (b) should be interpreted as covering the case where in respect of an injury suffered before the Act, the partially incapacitated man would be deprived of compensation because of the limitation imposed by s. 11 (1) (a) if it were not for the notional increase which, for the purpose of calculating the amount limited by s. 11 (1) (a), par. (b) requires to be made in the amount of the average weekly earnings received before the injury.

On that interpretation the findings in the special case entitle the respondent to the compensation awarded. Accordingly the appeal should be dismissed.

WILLIAMS J. I agree with the reasons for judgment of his Honour the Chief Justice. In my opinion the appeal should be dismissed with costs.

WEBB J. I would dismiss the appeal for the reasons given by the Chief Justice and by *Kitto* J. whose reasons for judgment I have had the advantage of perusing.

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KITTO J. This is an appeal against a rule by which the Full Court of the Supreme Court of New South Wales answered a number of questions submitted for its decision by the Workers' Compensation Commission of New South Wales. The case was stated pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1951 (N.S.W.). The proceeding in which it was stated was an application by the present respondent, a worker, against the present appellant, his employer, for a determination of the appellant's liability to pay the respondent compensation under the Act and of the amount of such compensation.

The respondent received an injury affecting his right leg on 15th January 1948, and a second injury, again to his right leg, on 21st July 1949. Both injuries arose out of and in the course of his employment with the appellant, and they fell within the definition of " injury " in s. 6 of the Act. The receipt of the injuries entitled the respondent to receive compensation from the appellant in accordance with the Act: s. 7. The respondent was retired from the appellant's service by reason of age on 12th December 1952. In the interval and until 29th January 1953 he admittedly had a partial incapacity for work, resulting from his injuries. The appellant paid him all the wages to which he was entitled up to the last-mentioned date, but denied liability to pay any compensation thereafter. The respondent then made his application to the Workers' Compensation Commission.

The commission made a finding that partial incapacity for work still existed as a result of the injuries, and this finding qualified the appellant for a weekly payment of compensation: s. 9. The compensation to be awarded, however, was limited by the operation of several provisions. In the first place, insofar as it was a payment in respect of himself, as distinguished from his dependants, s. 9 (1) (a) provided that it should not exceed seventy-five per centum of his average weekly earnings for the twelve months before the injury, and that it should not exceed £5 15s. 0d. per week. Section 9 (2) provided that the total weekly payment should not exceed a sum equal to the average weekly earnings above-mentioned or the sum of nine pounds whichever should be the smaller amount. And s. 11 provided, subject to the effect of qualifying provisions added by the *Workers' Compensation (Amendment) Act* 1951 (No. 20 of 1951) (N.S.W.) as amended by the *Workers' Compensation (Further Amendment) Act* 1951 (N.S.W.), that the weekly payment should not exceed the difference between the amount of his average weekly earnings before the injury and the average weekly amount he was

earning or was able to earn in some suitable employment or business, after the injury.

The respondent's average weekly earnings for the twelve months preceding his first injury were £6 17s. 0d. and for the twelve months preceding his second injury were £7 15s. 6d. As at 29th January 1953, however, he was able, despite his partial incapacity, to earn eight pounds a week in some suitable employment, wage rates in the community generally having increased substantially in the meantime. In this situation, s. 11, if it had not been qualified by the amending Acts of 1951, would have precluded the respondent from being awarded any weekly payment in respect of the period which commenced on the last-mentioned date. The appellant's claim depends upon the effect of the amendments.

The material provisions of the 1951 Acts added two new paragraphs to s. 11 (1). Their enactment is to be explained by the notorious fact that the inflation which had affected the economy of the country since the end of the war had destroyed the assumption underlying s. 11 (1) (a), or s. 11 (1) as it was before the amendments. That assumption was that the economic loss for which compensation was to be payable could fairly be measured by comparing the amount of the injured worker's average earnings immediately before the date of the injury with the amount of his earnings or potential earnings at the date of the award. The swift rise in wage rates which occurred between the end of the second world war and the passing of the 1951 Acts, and the probability which could then be foreseen that further rises would occur, meant that except where the two dates were very close together the comparison must substantially fail of its purpose. If there were any substantial interval, the earning capacity which, but for his injury, the worker would have enjoyed at the date of the award could not fairly be assessed as equal in amount to his pre-injury earning capacity. In order that a fair comparison should be made, the amount of the pre-injury earnings would have to be notionally increased so as to allow for the difference in the general level of wage rates at the respective dates of injury and award.

It is the apparent object of the two new paragraphs to provide for such a notional increase in the case of an adult worker. Paragraph (b) deals with the case of an injury which occurred before the commencement of the *Workers' Compensation (Amendment) Act* 1951 (N.S.W.), while par. (c) deals with the case of an injury which occurred after the commencement of that Act. The date of the commencement of the Act was 27th June 1951. The provision made by par. (c) for cases of future injury is that the average

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weekly earnings of an adult worker who receives such an injury shall be deemed to be increased or reduced from time to time by the amounts by which and from the dates from which the basic wage applicable at the time of the injury is subsequently increased or reduced, as the case may be. Thus all cases of adult workers partially incapacitated by injuries subsequently received are covered; a notional increase or decrease, corresponding with the rise or fall in the basic wage, is to be made in each such case.

But par. (b), dealing with cases of injuries received before the first amending Act of 1951, contained a difference of expression which gives rise to the problem in the present case. The provision it makes for a case which falls within its terms is that the amount of the average weekly earnings of the worker before the injury shall be deemed to be increased as from the commencement of the amending Act No. 20 of 1951 by the difference between the living wage, the needs basic wage or the basic wage, as the case may be, applicable at the time of the injury and the basic wage applicable at such commencement; and it adds that after such commencement the average weekly earnings shall be deemed to be increased or reduced from time to time by the amounts by which and from the dates from which the basic wage applicable at such commencement is subsequently increased or reduced as the case may be. (The expressions the living wage, the needs basic wage and the basic wage, it may be mentioned, are defined; broadly, they refer to amounts so denominated at different periods for the purposes of industrial awards). The problem in the present case arises from the fact that the paragraph is expressed as applying "in the case of an adult worker in receipt of compensation at the commencement of the *Workers' Compensation (Amendment) Act*, 1951, or who after such commencement receives compensation in respect of an injury which occurred before such commencement". The argument addressed to us on behalf of the appellant is that the two cases described in the words quoted do not include the case of a worker such as the respondent. True, he was injured before the commencement of the amending Act, and at that date he was still partially incapacitated for work as a result of the injury. But, it is said, he is not within the first class described in the paragraph, for he was not at that date "in receipt of compensation", even though this expression should be construed as meaning actually receiving or entitled to receive weekly payments under a current award. Nor (the argument proceeds) is he within the second class, even on a corresponding interpretation of the expression "receives compensation", for he cannot bring himself within that class

unless he can show a right to some amount of compensation without relying upon par. (b) itself, and it is evident from the figures which have been mentioned that he has no such right.

The argument means that par. (b) of s. 11 (1) should be read as excluding from the relief which it affords to workers injured before the first Act of 1951 every case in which a worker so injured is prevented by the operation of par. (a), considered by itself, from receiving compensation payments. It is no less clear in such a case than it is in any other that a comparison of pre-injury wages with earnings or potential earnings ascertained as at the date of the award is, in such economic circumstances as those which evoked the 1951 legislation, a fallacious method of measuring the extent of an injured worker's reduced earning capacity. No reason has been suggested for discriminating against such a case, except that to include it would have led to the re-opening of many cases in which the right to receive weekly payments had come to an end before the first Act of 1951 was passed. But why the legislature should have thought it inexpedient to allow the re-opening of cases in which the subtraction of post-injury earnings (actual or potential) from pre-injury earnings left nought or a minus quantity, while allowing the re-opening of cases in which such a subtraction left a positive remainder, is a question to which no answer is readily perceivable. The considerations of policy which apply in the latter cases apply with no less force in the former.

In support of the appellant's argument, reference was made to s. 3 (2) of the Act No. 20 of 1951. Section 3 (1) of that Act contained a par. (b), which made a number of amendments to s. 9 of the principal Act, most of them clearly referable to the reduction which had occurred in the value of money. Then s. 3 (2) provided that these amendments should be deemed to extend to, and from the commencement of the Act apply in respect of all persons "in receipt of weekly payments under the provisions of section nine of the Principal Act . . . as well as to all persons becoming entitled to weekly payments under any of such provisions after such commencement". This provision was said to exhibit a policy with which the new par. (b) inserted in s. 11 (1) of the principal Act should be construed as conforming, a policy, that is to say, of confining the benefit of the amendments which were being made for the purpose of allowing for the effects of inflation to workers injured after the Act and such workers injured before the Act as either were in enjoyment of current awards at the commencement of the Act or should thereafter be entitled to awards according to

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the provisions of the principal Act as it stood before the 1951 amendments. The words " under any of such provisions ", referring as they do to " the provisions of section nine of the Principal Act ", were seized upon as supporting this contention. It was said that the reference to the principal Act was shown by sub-ss. (1) and (2) of s. 3 to be a reference to the 1926 Act with all amendments made prior to 1951, but not to include the 1951 amendments; and that therefore s. 3 (2) excludes from the benefits given by s. 3 (1) every person who must depend upon the 1951 amendments in order to show a right to an award.

The fair construction of s. 3 (2), however, is that the two classes of persons to which it refers are those who had current awards for weekly payments (or were receiving payments without awards) under the principal Act at the commencement of the Act No. 20 of 1951 and those who should become entitled, after the commencement of that Act and by reason of injuries either already received or thereafter to be received, to obtain awards of weekly payments under the principal Act as it may apply to them, with all relevant amendments, after such commencement. So construed, the subsection not only lends no support to the appellant's theory as to the policy of the 1951 legislation but tends strongly against the whole of the appellant's argument, for it does not restrict the persons who are to get the benefit of s. 3 (1) in future awards to those who would be entitled to awards if the 1951 Acts had not been passed.

It is convenient to mention here that it seems to have been by an oversight that the Act No. 20 of 1951 made no provision for the adjustment of a worker's average weekly earnings for the purposes of s. 9 (1) (a). At all events the Act No. 25 of 1951, which inserted such a provision as sub-s. (1A) of s. 9, was passed soon afterwards. Here there was no need to deal with the case where a worker's injury was received after the commencement of the Act No. 20; unlike s. 11 (1) (a), which restricts the amount of the weekly payments by prescribing a maximum which may vary from time to time, s. 9 (1) (a) imposes a limit of fixed amount, to be ascertained once for all as at the time of the injury from which incapacity results, namely seventy-five per centum of the worker's average weekly earnings for the previous twelve months. Accordingly what was done in relation to s. 9 (1) (a) was to enact only that for the purposes of determining the compensation payable under s. 9 to an adult worker in receipt of compensation at the commencement of the Act No. 20 of 1951, or who after such commencement receives compensation in respect of an injury which occurred before

such commencement, the average weekly earnings referred to in s. 9 (1) (a) should be deemed to be increased as from such commencement by the difference between the living wage, the needs basic wage or the basic wage, as the case may be, applicable at the time of the injury and the basic wage applicable at such commencement. This provision does not raise a question similar to that which arises in the present case, because its operation is only to increase a fixed maximum figure, and it cannot on any view admit to compensation a class of persons formerly excluded.

Paragraph (b) of s. 11 (1), on the other hand, has the effect of qualifying a provision which otherwise might operate, and in the present case would operate, to preclude a partially incapacitated worker from receiving any compensation at all; and in the end the question is whether a worker who, by reason of par. (a), will receive nothing unless par. (b) applies to his case, fills the description which that paragraph itself contains of a worker "who after (the commencement of the Act No. 20 of 1951) receives compensation".

It is important to recognize at the outset that the operation of pars. (b) and (c) of s. 11 (1), like the operation of sub-s. (1A) of s. 9, is to affect the determination of the amount which is to be made payable to a worker who possesses the physical qualification for compensation. The amount payable under an award in force at the commencement of the first 1951 Act was not automatically altered by the passing of that Act, and the amount payable after the commencement of that Act (under an award whenever made) does not alter by force of the Act alone upon every occurrence of an increase or decrease in the basic wage. In every case, action by the commission is necessary in order that the application of the appropriate paragraph of s. 11 (1) to the facts of the case shall be reflected in a determination of an actual liability on the part of the employer to pay a weekly sum to the worker. The operation of the paragraphs themselves is only to effect a notional alteration in one of the figures to be used by the commission in working out the limit imposed by par. (a) on the amount of the weekly payment which may be awarded.

Consider what this means in the case of a worker who, even on the appellant's construction of par. (b), falls within the second of the classes to which the paragraph applies, that is to say one who was injured before the commencement of the Act No. 20 of 1951 and, not being entitled to compensation under an award current at such commencement, applies thereafter for an award and would be entitled to have one made in his favour if par. (a) stood without

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qualification. Such a worker, as the appellant would agree, must be given the benefit of par. (b) as one " who after such commencement receives compensation ". What meaning, then, must be attributed to " receives compensation ", in order that it may be said of such a worker, while there is yet no award in his favour, that he " receives compensation " ? The expression must necessarily refer only to the fact that he has established before the commission, first, that he has received an " injury " and so has become entitled (in the words of s. 7) to receive compensation from his employer in accordance with the Act, and, secondly, that partial incapacity for work has resulted from that injury so that the condition is fulfilled to which his right to be paid compensation is subject by virtue of s. 9. That stage in his application having been reached, it must be conceded, if the second limb of par. (b) is to have any operation at all, that when the commission turns to consider the amount of the weekly payments to be awarded it must hold him to be a worker who " receives compensation " after the commencement of the amending Act. If this is so, then in every case in which an injury resulting in partial incapacity has been established and the *quantum* of compensation payable is in course of being determined, the worker must be considered one who " receives compensation ", and it is therefore irrelevant that the application of the provisions of the Act governing amount would yield him no payments of compensation for the time being if the paragraph itself did not operate to assist him.

This construction of the crucial words is fatal to the appellant's argument. It means that the two cases mentioned in par. (b) together cover every case in which partial incapacity for work is found by the commission, after the commencement of the Act No. 20 of 1951, to be subsisting as a result of an injury received before such commencement. The purpose of mentioning the two cases separately appears to be, not to leave a residue of cases outside the application of the paragraph, but simply to make it clear that the paragraph applies in the review of existing awards, so as to enable the compensation payable under them to be increased, and not only in the making of future original awards.

The amount of the respondent's average weekly earnings in the twelve months preceding the second of his injuries, if notionally increased in accordance with par. (b), was £13 4s. 6d. On this basis, par. (a) of s. 11 (1) set a maximum of £5 4s. 6d. (£13 4s. 6d. less eight pounds) to the weekly amount for which an award might be made in the respondent's favour. The commission

awarded him £4 10s. 0d. a week. The award was challenged by the appellant on a number of grounds by means of the stated case out of which this appeal arises, but the answers given by the Supreme Court to the questions submitted to it were favourable to the respondent. Against the correctness of those answers no other argument has been pressed on this appeal than that which has been dealt with.

The appeal should be dismissed.

TAYLOR J. I agree entirely with the reasons expressed by *Dixon* C.J. and *Kitto* J. and have nothing to add.

Appeal dismissed with costs.

Solicitor for the appellant, *Sydney Burke*, Solicitor for Railways.
Solicitor for the respondent, *C. O'Dea*.

R. A. H.