[HIGH COURT OF AUSTRALIA.]

BAVCEVIC . . . . . APPLICANT;
APPELLANT,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
RESPONDENT,

H. C. OF A. 1957.

PERTH, *Sept.* 18, 19;

MELBOURNE, *Oct.* 30.

Dixon C.J., Webb and Kitto JJ.

Compensation—Commonwealth employees—Injury—Total incapacity for work—Medical board—Certificate—Conclusiveness as to matters certified—Residual capacity in employee—Whether incapacity nevertheless total—"Odd lot"—Burden of proof—Commonwealth Employees' Compensation Act 1930-1954, *ss.* 13 (1) (2), 19 (4), 20.

B., a labourer employed by the Commonwealth Department of Works and Housing, sustained in the year 1948 an injury in respect of which he received compensation in the form of weekly payments estimated on the basis of total incapacity pursuant to the provisions of the *Commonwealth Employees' Compensation Act* 1930-1954. In 1950 he applied for the redemption of such weekly payments by the award of a lump sum, but this application was refused by the Delegate of the Commissioner for Employees' Compensation upon the ground that the Act did not permit of redemption in the case of total and permanent incapacity. Thereafter the weekly payments continued until they approached the maximum limit of compensation provided by s. 13 (1) of the Act, namely £2,350. B. was then requested pursuant to s. 19 (1) of the Act to submit himself for medical examination by a medical board, which certified that B. at that time was incapacitated by injury to the extent of seventy per cent of total incapacity at his employment at the date of the injury and seventy per cent of total incapacity in the general labour market. The board further certified that B. was fit to undertake work not involving heavy lifting or much stooping. Section 19 (4) of the Act provides (*inter alia*) that the certificate given by a medical board is conclusive evidence as to the matters certified therein. The maximum limit of compensation having been reached, the commissioner stopped the weekly payments as from 26th July 1956 upon the basis that B. was by the certificate of the medical board shown to be not totally and permanently incapacitated. B. appealed against the stoppage of compensation payments to a local court in Western Australia, which dismissed the appeal upon the ground that he was not an "odd lot"

and was not totally incapacitated for work by reason of the injury. From this decision B. applied to the High Court for enlargement of time for making application for special leave to appeal and for special leave to appeal.

Held, by *Dixon* C.J. and *Kitto* J. that the certificate of the medical board concluded only so much of the issue as concerned the condition of B. at the time of the medical examination and his fitness for employment and whatever was " specified " as the kind of employment for which he was fitted, but did not necessarily conclude the issue as to whether B. was totally incapacitated for work, an issue which had to be decided upon a review of the concomitant circumstances in which B. might exercise his residual capacity.

Held further, by *Dixon* C.J. and *Kitto* J. (*Webb* J. dissenting), that B. having a residual capacity for work to the extent of thirty per cent, he must establish that he was totally incapacitated for work in the sense that he was an " odd lot " for whom no work was available and this he had failed to do.

APPLICATION for enlargement of time to apply for special leave to appeal and for special leave to appeal from an order of the Local Court of Western Australia at Fremantle.

This was an application by Marian Fedilio Bavcevic for enlargement of time for making application for special leave to appeal and for special leave to appeal from an order of the Local Court of Western Australia held at Fremantle dismissing an appeal by the applicant from the determination of the delegate of the commissioner under the *Commonwealth Employees' Compensation Act* 1930-1954.

The facts appear sufficiently in the judgments of the Court hereunder.

F. T. P. Burt (with him *L. Davies*), for the applicant. The applicant is out of time and this as a result of his having appealed in the first instance to the Supreme Court of Western Australia. That court held that no appeal lay, and, in so doing, followed its previous decision in *Dickie* v. *The Commonwealth* (1)—a decision which the applicant unsuccessfully submitted should in the light of *The Commonwealth* v. *Matheson* (2) be reconsidered. If he were wrong in this then it was an error of his professional advisers for which he should not suffer. The Commonwealth will not be prejudiced by the time being enlarged. The application raises important and difficult questions as to the conclusiveness of certificates of medical boards to whom questions are referred under s. 19 of the *Commonwealth Employees' Compensation Act* 1930-1954.

(1) (1938) 35 W.A.L.R. 79. (2) (1955) 93 C.L.R. 403.

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Section 19 (4) of such Act should be strictly construed: *Smith* v. *Mann* (1). Such a certificate is conclusive evidence only as to matters falling within the reference. In the present case it is conceded that it conclusively established that the applicant was incapacitated to the extent of seventy per cent of total incapacity for his former employment. This is not conclusive evidence and does not determine the question as to whether his incapacity for work is total or partial. The evidence established that the applicant was an "odd lot". [He referred to *Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (2); *Cardiff Corporation* v. *Hall* (3); *Birch Bros. Ltd.* v. *Brown* (4); *Hawkins* v. *Australasian United Steam Navigation Co. Ltd.* (5); *Hetton Bellbird Collieries Ltd.* v. *Aitken* (6); *Wemyss Coal Co.* v. *Walker* (7).] The onus was on the Commonwealth to show that work was in fact available for the applicant and this onus was not discharged. When the question of a lump settlement arose in October 1950, the Commonwealth refused settlement on the ground that the applicant's incapacity was both permanent and total. In the face of this attitude the applicant then abandoned his claim to a lump sum. This raises an estoppel against the Commonwealth or at least results in the establishment of a *prima facie* case, the onus thereafter being on the Commonwealth to show that the worker's condition has improved.

L. D. Seaton Q.C. (with him *A. L. Gleedman*), for the respondent. The case has no special features such as would justify the granting of special leave to appeal. The certificate of the medical board is conclusive evidence establishing that the applicant retains a very substantial capacity for work. He is not an "odd lot". [He referred to the cases cited by counsel for the applicant.] The onus was on the applicant to establish that his incapacity was total. The magistrate had ample evidence to find as he did, and his conclusion is not and has not been demonstrated to be wrong. Even if it had been held that the applicant was an "odd lot", the Commonwealth had shown that suitable work was available for him.

F. T. P. Burt, in reply.

Cur. adv. vult.

(1) (1932) 47 C.L.R. 426, at p. 451.
(2) (1933) 50 C.L.R. 328.
(3) (1911) 1 K.B. 1009.
(4) (1931) A.C. 605.
(5) (1938) W.C.R. 109.
(6) (1940) W.C.R. 77.
(7) (1929) S.C. (H.L.) 106; (1929) 22 B.W.C.C. 366.

DIXON C.J. AND KITTO J. The applicant was an employee within the meaning of the *Commonwealth Employees' Compensation Act* 1930-1954. His employment was with the Commonwealth Department of Works and Housing. He is described as a labourer. On 21st September 1948 he sustained an injury within the meaning of that Act and received compensation from the Commonwealth in pursuance of its provisions. The compensation paid to him was a weekly sum estimated on the basis of total incapacity. We are not informed of the precise nature of his injury but it is called a serious back injury and it resulted in a chronic lumbo-sacral strain. In the year 1950 while he remained in receipt of weekly payments of compensation it was suggested to him that he might be able to conduct a business of some sort and there was a proposal that he should buy a billiard saloon. That led him to apply for a lump sum settlement pursuant to cl. (11) of the first schedule of the Act. Clause (11) provides that in any case, other than one of total and permanent incapacity, where a weekly payment has been continued for not less than six months, the liability therefor may, at the option of the commissioner, and with the consent of the employee . . . be redeemed by the payment of a lump sum of such an amount as is determined by the commissioner having regard to the injury and the age and occupation of the employee at the date of the injury and the lump sum may be invested or otherwise applied by the commissioner for the benefit of the person entitled thereto. By letter dated 13th October 1950 the delegate of the commissioner declined to consider a lump sum settlement. The letter pointed out that in the case of an injury such as that suffered by the applicant the only section of the Act under which lump sum settlement might be effected is par. (11) of the first schedule. The letter continued—" However, this provision specifically prohibits the offer of a lump sum in a case of total and permanent incapacity." Then followed a statement that a doctor's certificate indicated that the applicant was then totally and permanently unfit for work as the result of the injury and confirmed the view which the writer said he had expressed in a letter eighteen months earlier that the degree of incapacity suffered would later increase. After stating that in those circumstances it was not legally possible under the Act to make a lump sum settlement, the letter concluded—" If subsequent developments in the applicant's condition result in his being only partially incapacitated for work, the question of a lump sum settlement of his claim will again receive consideration." After this the weekly payments continued until they approached the aggregate of £2,350 which is the limit of compensation provided by s. 13 (1)

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of the Act. Thereupon the applicant was requested to submit himself to medical examination and pursuant to the provisions of s. 19 (1) of the Act he so submitted himself for examination by a medical board on 11th July 1956. The board was composed of three. After the examination the board filled in a printed form of report provided under reg. 8 by form D in the *Commonwealth Employees' Compensation Regulations* (S.R. 1945 No. 23; 1946 No. 37; 1947 No. 27 and No. 132; 1948 No. 13; 1949 No. 90). The material part of the certificate, which was undated, states that on examination the board finds that the claimant is suffering from chronic lumbo-sacral strain, that the condition is the result of accident and is such that the claimant is thereby incapacitated at present to the extent of seventy per cent of total incapacity at his employment at the date of the injury and seventy per cent of total incapacity in the general labour market. In the foregoing the language is supplied by the form except for the words "chronic lumbo-sacral strain", "accident" and the figure "70". The form then proceeds—"Claimant is fit to undertake employment in such occupations as" to which the board has added—"work not involving heavy lifting or much stooping". Finally, under the words "General Remarks" the board says—"We feel that this claimant will improve following finalisation of his claim. No treatment is advised." Although the report is undated it is said to have been given on the day of the examination, viz. 11th July 1956.

The amount of £2,350 having been reached the commissioner stopped payment of the weekly compensation as from 26th July 1956. It is s. 13 (1) which imposes a limit of £2,350 upon the aggregate compensation payable. But by s. 13 (2) it is provided that where an injury results in the death or total and permanent incapacity of the employee for work, sub-s. (1) of the section cannot apply to limit the total amount of compensation payable under the Act. It follows that if at the time when the weekly payments were terminated the applicant remained, as the letter of 13th October 1950 had said, "totally and permanently incapacitated", the termination of his compensation was not authorised by the Act. The applicant took the course of appealing from the decision of the delegate for the commissioner under s. 20 of the *Commonwealth Employees' Compensation Act*. The courts to which under that section an appeal from the commissioner is given are called in the provision itself county courts. The expression "County Court" however is defined by s. 4 to mean a county court, district court, local court, or any court exercising a limited and civil jurisdiction and presided over by a judge or a police, stipendiary or special

magistrate of a State or Territory. The appeal came before a local court of Western Australia at Fremantle. That court heard the appeal on evidence and admissions but dismissed it. We are informed that the learned magistrate who presided gave oral reasons for his decision, but unfortunately they were not recorded. It is stated however that the learned magistrate found that the appellant was not an "odd lot" and that his injury had not resulted in a total incapacity for work within the meaning of s. 13 (2) of the Act.

Being under the impression that an appeal would lie from the local court exercising its federal jurisdiction under s. 20 to the Full Court of the Supreme Court of Western Australia under s. 107 of the *Local Courts Act* 1904-1954 (W.A.), the applicant gave notice of appeal to that court. He was met by the decision of the Supreme Court in *Dickie* v. *The Commonwealth* (1) by which the Full Court held that no such appeal lay, on the ground that the appeal under s. 20 of the Commonwealth Act was not an "action or matter" within the meaning of s. 107 of the *Local Courts Act* 1904-1954. That meant that the situation in Western Australia was the same as that which in *Martin* v. *Commissioner for Employees' Compensation* (2), *Mack* J. held to exist in Queensland. A consequence too of the decision would be that under s. 39 (2) (*b*) of the *Judiciary Act* 1903-1955 no appeal as of right would lie to this Court. In other words, in this case the position was exactly that which we held to obtain in *Goward* v. *The Commonwealth* (3). The applicant had no right of appeal to this Court but he might apply for special leave to appeal under s. 39 (2) (*c*) of the *Judiciary Act*. The position is explained as it relates to Queensland in *Goward's Case* (3) and the position in Western Australia appears to be the same, that is assuming the correctness of the decision of the Supreme Court in *Dickie's Case* (1). Accordingly an application was made to us on behalf of the applicant for special leave to appeal. The application is out of time, see O. 70, r. 2, but in the circumstances this would not be permitted to stand in the applicant's way. We therefore heard a full argument of the application upon the merits and took time to consider it. The question is whether on the facts as disclosed by the evidence the applicant was totally as well as permanently disabled. There is no question about his permanent disablement for at the hearing it was "agreed that should total disability be found by the court it is to be considered as permanent". Evidence

(1) (1933) 35 W.A.L.R. 79.
(2) (1953) S.R. (Q.) 85.
(3) (1957) 97 C.L.R. 355.

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was directed to the question whether his disability was total. The Commonwealth however claimed that the question was settled by the medical certificate. This contention was based on sub-s. (4) of s. 19 of the Act which provides that " the medical board to whom any matter is referred shall, as prescribed, give a certificate as to the condition of the employee and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and such other information as the Commissioner requires. Any such certificate given by a medical board shall be conclusive evidence as to the matters so certified." The applicant's answer to the contention was that the conclusiveness of the certificate is limited; it is conclusive only " as to the matters so certified ". The applicant says that in the present case the medical board was not requested to go beyond the matters mentioned in s. 19 (4), viz. the condition of the employee and his fitness for employment and it was to those matters that the conclusiveness of the certificate is restricted. If the certificate had specified the kind of employment for which he is fit that too might have been conclusive, but it was denied that the expression " work not involving heavy lifting or much stooping " was such a specification. In other words, the conclusiveness of the certificate should, so it was said, be confined to medical matters. It was not contested that the physical condition of the applicant did not itself completely incapacitate him from the activities of all employment but it was maintained that having regard to the fact that he was a labouring man and had no special capacities which would enable him to get employment in other vocations, he was totally incapacitated. It was said that he was in truth an " odd lot " within the meaning of that expression as settled by the authorities and that it therefore lay upon the Commonwealth to show that employment was available to him and that it had failed to do; on the contrary, his own evidence had shown an unavailing quest for work of the kind which he can do. It may be conceded that the applicant is right in the contention that the certificate concludes only so much of the issue as concerns the condition of the applicant at the time of the medical examination and his fitness for employment and whatever is " specified " as the kind of employment for which he is fit. For such a provision as s. 19 (4) is strictly construed. But, seeing that the purpose is to leave medical questions to the determination of medical men, what is fairly involved in such a determination must come within its conclusive effect: cf. *Smith* v. *Mann* (1). Here that does not

(1) (1932) 47 C.L.R. 426, at p. 451.

cover the ground upon which the applicant's claim rests that his incapacity is total. He must accept the description of his condition as chronic lumbo-sacral strain. He must accept too the conclusion that his physical incapacity does not go beyond seventy per cent of total incapacity for his former employment; for it may be taken that the nature of his former employment was ascertained by the board. There may be more doubt as to the board's statutory authority or competence to judge of "the general labour market", but probably the statement that the applicant was incapacitated to the extent of seventy per cent of total incapacity in the general labour market should be understood as meaning that his condition left him with a physical capacity of thirty per cent to do any ordinary unskilled work. It is explained by the statement that he is fit to undertake work not involving heavy lifting or much stooping. These conclusions, however much they must be accepted by the applicant as no longer disputable, do not necessarily mean that the applicant is only partially incapacitated. A phrase employed by Lord *Phillimore* briefly but aptly expresses the reason. In *Bevan* v. *Nixon's Navigation Co. Ltd.* (1) his Lordship was speaking of the expression "able to earn in some suitable employment or business", which is to be found in par. (1) (*c*) of the first schedule of the Commonwealth Act where it is used in connexion with partial incapacity. The source of the expression is par. (3) of the first schedule of the English *Workmen's Compensation Act* of 1906. Lord *Phillimore* said that if the matter were *res integra* he would have been prepared to hold that these words "pointed to some personal capacity of the workman, and not to the concomitant circumstances in which he might exercise that capacity" (2). Lord *Phillimore* goes on to say that the matter is not *res integra* (2). In other words, you are bound to look to the concomitant circumstances in which the injured employee might exercise his residual capacity.

It has long been settled that total incapacity may exist although the injured man retains enough physical capacity to enable him to do particular work of a special kind not forming one of the ordinary recognised avenues of employment. In this Court the position was summarised thus—"permanently and totally disabled, an expression which, in our opinion, means physically incapacitated from ever earning by work any part of his livelihood. This condition is satisfied when capacity for earning has gone except for the chance of obtaining special employment of an unusual kind": *Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (3). If that be the case the

(1) (1929) A.C. 44.
(2) (1929) A.C., at p. 61.
(3) (1933) 50 C.L.R. 328, at p. 338.

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disablement is regarded as total unless and until the employer can show that such special employment is available. The judgment of *Fletcher Moulton* L.J. in *Cardiff Corporation* v. *Hall* (1) contains the explanation which is regarded as the basis of the doctrine. It is there that his Lordship used, perhaps unfortunately and certainly apologetically, the expression "odd lot" with reference to the labour which the injured man is capable of offering. The passage in which it occurs is as follows: "If I might be allowed to use such an undignified phrase I should say that if the accident leaves the workman's labour in the position of an 'odd lot' in the labour market, the employer must shew that a customer can be found who will take it. For in such a case we are not in truth dealing with fluctuations of the labour market at all. We are dealing with the chance of some one being found who can and will avail himself of the special residue of powers which has been left in the workman, and, seeing that it is the result of the accident that the workman has been made dependent on the finding of such a special employer, it is right that those who are liable to pay to him compensation for his loss of earning power should only be allowed to take credit for his partial capacity for work if they can shew that it can actually be made productive of remuneration to him" (2).

The learned magistrate employed the expression "odd lot" in finding that the applicant's capacity for work was outside this doctrine. It is a doctrine that has been adopted by the House of Lords: *Bevan* v. *Nixon's Navigation Co. Ltd.* (3); *Wemyss Coal Co.* v. *Walker* (4). But because of a tendency to apply the principle too loosely or too widely it has been frequently discussed. It is enough however to refer to *Foster* v. *Wharncliffe Woodmoor Colliery Co. Ltd.* (5) and, as an illustration akin to the present case, to *Sage* v. *G. K. Stotherd Ltd.* (6). One difficulty in applying the doctrine is that of locality. The very phraseology of *Fletcher Moulton* L.J. suggests populous areas with recognised or settled "labour markets". In many places in Australia avenues of employment can hardly be dignified by such terms. Yet one can hardly expect the injured man to change his habitat in search of work. While the result may be that the kind of work available is more easily ascertained, at the same time it may be more difficult to say what

(1) (1911) 1 K.B. 1009, at pp. 1020, 1021.
(2) (1911) 1 K.B., at p. 1021.
(3) (1929) A.C., at p. 49.
(4) (1929) S.C. (H.L.) 106; (1929) 22 B.W.C.C. 366.
(5) (1922) 2 K.B. 701; (1922) 127 L.T. 771.
(6) (1923) 129 L.T. 602; (1923) 16 B.W.C.C. 74.

is special and exceptional when a class of work is within the capacity of the injured man but is not locally available. It must remain a question of fact in which the nature of the man's injury and of the consequent incapacity must be the primary consideration. In deciding it the tribunal must bear in mind that what the statute is speaking of is total or partial physical incapacity for earning a livelihood. The " concomitant conditions " in which the capacity is to be exercised must be judged reasonably in accordance with common conceptions of what is customary in travelling to work or in the movement of labour when suitable work is available elsewhere although not at hand. In the present case there is little more information about the condition of the applicant than has already been stated. There is a good deal of evidence about his attempts from time to time to do remunerative work or to obtain employment. No useful purpose is to be served by rehearsing the facts which this evidence discloses. It is enough to say that the difficulty in the way of the attack which is made for the applicant on the finding that his incapacity is not sufficient to make his labour an odd lot seems insuperable. The burden of proof lay upon him. The evidence is anything but conclusive, were it accepted in full, and it is by no means certain that the learned magistrate did so accept it. In other words, the evidence left the learned magistrate in a position to find as he did. The applicant cannot throw the burden of disproof over to the Commonwealth in the absence of a finding that his labour was an " odd lot ". No doubt the case for the applicant obtains some assistance from the letter of 15th October 1950 in which the delegate of the commissioner claimed that the applicant seemed at that time to be totally and permanently incapacitated. It must be remembered however that the letter itself speaks of the possibility of that condition changing. The letter cannot form the foundation of an estoppel. Clause (11) of the first schedule leaves the question of a lump sum settlement in the discretion of the commissioner where, because the incapacity is not permanent and total, such a settlement is allowable. It is not as if the commissioner had denied to the present applicant a definite right which would exist had he not been permanently and totally incapacitated and did so on the ground that he was so incapacitated. Even had that been the case it would have been difficult to apply the general rule " that no person may, after obtaining an advantage by the assertion of rights in relation to another and while retaining it, set up and rely upon other rights against the same person inconsistent with the existence of those

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already asserted": see *Richardson* v. *Federal Commissioner of Taxation* (1) citing *Cave* v. *Mills* (2), per *Wilde* B.; *Smith* v. *Baker* (3), per *Honyman* J.; and *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.* (4), per *Scrutton* L.J. The rule would not apply, not only because cl. (11) gives a discretion to the commissioner and does not confer a definite right on the employee, but also because the situation was not unchangeable, a fact to which the letter adverts, and what was true in 1950 has no necessary application many years later.

The evidentiary value or probative force of the claim in the letter is not great. For there stands the conclusive certificate of the medical board and the applicant's case must depend on the true nature and the practical effect of the residual capacity that document attributes to the applicant. When that is examined in the light of the evidence it appears with reasonable clearness that it was open to the learned magistrate to make the finding which he did. The fact is that the applicant has not discharged the burden of proving that his incapacity is total. The application must therefore be dismissed.

WEBB J. This is an application under O. 60, r. 6 (1) of the Rules of this Court for an enlargement of the time for making an application for special leave to appeal from an order of the local court at Fremantle, Western Australia, constituted by a stipendiary magistrate, dismissing an appeal from the determination of the delegate of the commissioner under the *Commonwealth Employees' Compensation Act* 1930-1954 that the applicant was not totally incapacitated for work. The delay in applying for special leave is attributed to the fact that the applicant appealed to the Supreme Court of Western Australia which held it had no jurisdiction to entertain the appeal, for reasons similar to those given by *Mack* J. in the Supreme Court of Queensland for holding there was no jurisdiction in that court to entertain such an appeal: see *Martin* v. *Commissioner for Employees' Compensation* (5).

Without deciding whether to grant the enlargement of time this Court heard full argument as if the applications for enlargement and special leave had been granted and the appeal instituted.

It is common ground that the applicant is permanently incapacitated for work. The only question is whether he is totally incapacitated for work.

(1) (1932) 48 C.L.R. 192, at p. 206.
(2) (1862) 7 H. & N. 913, at pp. 927, 928 [158 E.R. 740, at p. 747].
(3) (1873) L.R. 8 C.P. 350, at p. 357.
(4) (1921) 2 K.B. 608, at p. 612.
(5) (1953) S.R. (Q.) 85.

Incapacity for work includes inability to get work because of the injury but not because of the lack of demand for labour: *Cardiff Corporation* v. *Hall* (1); *Ball* v. *William Hunt & Sons Ltd.* (2); *Foster* v. *Wharncliffe Woodmoor Colliery Co. Ltd.* (3). In *Wicks* v. *Union Steamship Co. of New Zealand Ltd.* (4) this Court consisting of six justices unanimously held that permanently and totally disabled meant "physically incapacitated from ever earning by work any part of his livelihood. This condition is satisfied when incapacity for earning has gone except for the chance of obtaining special employment of an unusual kind" (5).

In September 1948 the applicant suffered an injury to his back and from that time until July 1956 he continuously received compensation at the full weekly rate for an adult male. In the meantime there had been only one medical examination of the applicant for the purposes of the Act. That was made in October 1950 and the medical certificate indicated that the applicant was then totally and permanently incapacitated for work. In the previous year, in May 1949, he had sought payment of a lump sum in lieu of the weekly payments, but, as the commissioner pointed out, cl. (11) of the first schedule to the Act did not permit of payment of a lump sum in the case of permanent and total incapacity for work. The result was that up to July 1956 the applicant was treated by the commissioner as being totally and permanently disabled and he received the full weekly payments. This appears from the fact that by that time the applicant had received a total amount exceeding £2,350, which by s. 13 (1) was the maximum amount payable in respect of injuries suffered in one accident, but which by s. 13 (2) was not the maximum in the case of total and permanent incapacity for work. I think the only reasonable conclusion from this is that the applicant's labour as at July 1956 was at best an "odd lot", that is to say, that only special, if any, employment was then open to him. That, I think, is also the most favourable view that can be taken for the Commonwealth. Then, as to this, in *Cardiff Corporation* v. *Hall* (1) *Fletcher Moulton* L.J. said that "if the accident leaves the workman's labour in the position of an 'odd lot' in the labour market, the employer must shew that a customer can be found who will take it. For in such a case we are not in truth dealing with fluctuations of the labour market at all. We are dealing with the chance of some one being found who can and will avail himself of the special residue of powers which has been left

(1) (1911) 1 K.B. 1009.
(2) (1912) A.C. 496.
(3) (1922) 2 K.B. 701.
(4) (1933) 50 C.L.R. 328.
(5) (1933) 50 C.L.R., at p. 338.

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Webb J.

in the workman, and, seeing that it is the result of the accident that the workman has been made dependent on the finding of such a special employer, it is right that those who are liable to pay him compensation for his loss of earning power should only be allowed to take credit for his partial capacity for work if they can shew that it can actually be made productive of remuneration to him " (1).

The Commonwealth, realising apparently that the onus was on it to prove that the applicant could get employment, did not cease payment of or reduce the weekly compensation, but under s. 19 of the Act required the applicant to submit himself for examination by a medical board consisting of three medical referees. Section 19 (1) provides *inter alia* that where any employee is receiving weekly payments he shall if so required by the commissioner submit himself for examination by a medical board ; and s. 19 (4) provides that the medical board to whom the matter is referred shall give a certificate " as to the condition of the employee, and his fitness for employment, specifying where necessary, the kind of employment for which he is fit, and such other information as the commissioner requires. And any such certificate given by a medical board shall be conclusive evidence as to the matters so certified."

The board's certificate stated *inter alia* that the applicant's condition was the result of accident and was such that the claimant was thereby incapacitated at that time to the extent of seventy per cent of total incapacity at his employment at the date of the injury, and seventy per cent of total incapacity in the general labour market ; and that he was fit to undertake employment in work not involving heavy lifting or much stooping.

It was on this certificate that the delegate made his determination that the applicant was not " totally and permanently incapacitated for work."

On appeal by the applicant to the local court against this determination by the delegate the Commonwealth relied on the certificate, but not wholly so. After all it was consistent with the applicant being still totally incapacitated if in fact he was suitable only for the particular class of work indicated by the certificate and no person could be found who would employ him. Accordingly the Commonwealth produced evidence tending to show that suitable work was available, but did not produce evidence to show that any particular employer was prepared to engage his services. The employee, on the other hand, gave evidence that though he had sought work he had been unable to obtain it.

(1) (1911) 1 K.B., at p. 1021.

In the circumstances I think the Commonwealth failed to discharge the onus that rested upon it to prove that the applicant was not totally incapacitated for work in the sense that there was work available that he could do and that he could have secured.

I would grant the applications for enlargement of time and for special leave and treating the appeal as duly instituted, waiving all rules otherwise applicable for that purpose, I would allow the appeal.

Application for special leave dismissed.
No order as to costs.

Solicitor for the applicant, *Lloyd Davies.*

Solicitor for the respondent, *H. E. Renfree,* Crown Solicitor for the Commonwealth.

F. T. P. B.