[HIGH COURT OF AUSTRALIA.]

MAKSYMCZUK . . . . . APPELLANT;
APPLICANT,

AND

GILLESPIE BROTHERS PROPRIETARY LIMITED . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 13, 16.

Dixon C.J., Williams and Taylor JJ.

Workers' Compensation (N.S.W.)—Periodic journey—Interruption—Substantial—Risk—Material increase in—Award—Workers' Compensation Act 1926-1954 (*N.S.W.*), *s.* 7 (1) (*b*).*

Held, that the onus of proving that the conditions stated in the proviso to s. 7 (1) (b) of the *Workers' Compensation Act* 1926-1954 have been satisfied lies upon the applicant for compensation and not upon the respondent employer.

Decision of the Supreme Court of New South Wales (Full Court): *Gillespie Bros. Pty. Ltd.* v. *Maksymczuk* (1957) S.R. (N.S.W.) 610; 74 W.N. 365, affirmed.

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

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APPEAL from the Supreme Court of New South Wales.

On 28th October 1955 Parania Maksymczuk made application to the Workers' Compensation Commission of New South Wales at Sydney against Gillespie Bros. Pty. Limited for a determination of the liability of the respondent company and the amount of compensation payable by it in respect of the death of her husband Wasyl Maksymczuk on 26th August 1955, he being at the time of his death in the employ of the respondent company as a labourer. The application was brought by the said Parania Maksymczuk both on her own behalf and on behalf of the two children of her marriage with the deceased.

The applicant alleged that the deceased met his death on the date in question when he was run down by an electric train between St. Peters and Sydenham Railway Stations, whilst on a periodic journey between his place of employment and his place of abode. The respondent company contested this allegation and further charged that the deceased had received his injuries during or after a substantial interruption of or deviation from such journey made for a reason unconnected with his employment and during or after a break in such journey not reasonably incidental thereto.

On the hearing of the application the commission (Judge *Rainbow*) held that the onus of proving that there had been a substantial interruption in the deceased's journey from his place of employment to his place of abode on the date of his death lay upon the respondent and found that there had been such a substantial interruption for reasons unconnected with deceased's employment. He further held that if the respondent company was to escape liability it carried the onus of proving that the substantial interruption had materially increased the risk of injury, and found that this onus had not been discharged by it.

At the request of the respondent company Judge *Rainbow* stated a case pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1954 for a decision of the Supreme Court upon a number of questions, the only one material to this report being :—(1) did the commission err in law in holding that the onus was upon the respondent company to prove that in the circumstances of the particular case the risk of injury was materially increased by reason only of the interruption of the deceased's periodic journey ?

The Supreme Court (*Street* C.J., *Owen* J. and *Roper* C.J. in Eq.) answered the question in the affirmative : *Gillespie Bros. Pty. Ltd.* v. *Maksymczuk* (1), whereupon the applicant appealed to the High Court.

(1) (1957) S.R. (N.S.W.) 610 ; 74 W.N. 365.

The material facts appear fully in the judgment of the Court hereunder.

M. E. Pile Q.C. (with him *B. R. Thorley*), for the appellant. The onus of proof in relation to the matter contained in the proviso to s. 7 (1) (b) of the *Workers' Compensation Act* 1926-1954 lies upon the employer, the effect of the proviso being to introduce an exception to the entitlement of the worker to compensation. [He referred to *Darling Island Stevedoring & Lighterage Co. Pty. Ltd.* v. *Jacobsen* (1).]

In introducing the element of increased risk as a factor which would deprive the worker of the benefit referred to by the legislation, the legislature must have intended that proof of that element should lie upon those who would so deprive the worker of the benefit. It could not have intended to put the worker to proof of a negative. The history of all the amendments to the journeying section shows an intention by the legislature to increase the class entitled to benefit. This being so, any attempt to exclude workers from the benefits conferred by the introduction of the criterion of increased risk casts that burden upon those who seek to do so. The judgment of the Full Court should be set aside.

C. Langsworth Q.C. (with him *W. A. Mobbs*), for the respondent. The inference to be drawn from the form of s. 7 (1) (b) and the proviso independently of its substance leads to the conclusion that the onus lies on the worker when he seeks to establish entitlement under the provision. The considerations which the Court had in mind in *Jacobsen's Case* (2) are not here applicable, that case being distinguishable. Consideration of the substance of the proviso confirms the view here contended for: *K. D. Welding Co. Pty. Ltd.* v. *Tallar* (3). Looking at the substance of the proviso, once the employer shows that there has been a substantial interruption or deviation, then the worker is no longer within the course of his journey as defined. That being so, that portion of s. 7 (1) (b) which precedes the proviso gives him no rights in respect of the injury. But for the proviso he has no entitlement to compensation at all, and to give that entitlement he must prove that he falls within the terms of the proviso. In substance a worker is no longer in the course of his journey once a substantial deviation is established; he must show that the risk of injury was not materially

(1) (1945) 70 C.L.R. 635, at p. 643.
(2) (1945) 70 C.L.R., at p. 644.
(3) (1957) S.R. (N.S.W.) 614, at p. 617; 74 W.N. 367, at p. 369.

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increased. Where a right is conferred subject to a condition which qualifies it in general terms, the person asserting the right must establish compliance with the conditions.

B. R. Thorley, in reply.

The oral judgment of the COURT was delivered by :—

DIXON C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales. The order answers a question relating to the burden of proof raised by a special case from the Workers' Compensation Commission and allows the appeal brought by means of the special case with costs. The question relates to the burden of proof with respect to certain facts on which liability depends.

The case is one in which the applicant to the commission could only succeed by making out a case under the proviso to s. 7 (1) (b) of the *Workers' Compensation Act* 1926-1954.

The scantiness of the known facts of the case is the source of the difficulty. It is a claim in respect of the death of a worker. The worker himself was employed at Gillespie Brothers' mill at Pyrmont. He lived at a suburb called Revesby to and from which he went by train. He met his death on the railway line on 26th August 1955.

On that day he left his place of employment about 4.30 p.m. The railway journey, if he had gone directly, would have occupied about an hour, and his wife said in evidence that it was his custom to return home about 7 o'clock in the evening. Apparently, and there is evidence to support the inference, he used to go to an hotel in the neighbourhood of the mill after finishing his work and there he used to drink for a little while.

On the night of his death, assuming he left the mill towards half past four, he went to an hotel nearby with a friend, who was described as a non-drinking friend. The latter says that the deceased ordered some beer ; and after a second round of beer the friend left.

The next thing that is known about the deceased concerns the manner of his death.

The driver of an electric train travelling from Sydney to Hurstville on the extreme down line between St. Peters and Sydney, at a point a quarter of a mile from Sydenham, saw a man who must have been the deceased standing up on the extreme rail on the left-hand side on the edge of the sleepers on the outside of the track facing towards the train. The train ran down the man. The body, which was in fact identified as that of the deceased, was found on the line shockingly injured.

No other facts are known. On those facts the Workers' Compensation Commission was prepared to assume that his death occurred during the interruption of a journey. On a view which the learned judge took as to burden of proof he decided in favour of the applicant for compensation on the ultimate ground that it had not been shown by the employer that the interruption of the journey which must have taken place was one in which the risk of injury was materially increased by reason of the interruption. Section 7 on which the case depends provides that where a worker has received injury without his own default or wilful act on any of the daily or other periodic journeys referred to in par. (c), and the injury be not received during or after any substantial interruption of, or substantial deviation from, any such journey made, for a reason unconnected with the worker's employment or unconnected with his attendance at the trade technical or other school as the case may be, or during or after any other break in any such journey, which the commission, having regard to all the circumstances, deems not to have been reasonably incidental to such journey, the worker shall receive compensation.

The learned judge of the Workers' Compensation Commission was quite clear that the applicant could not bring the case within that paragraph as it stands because there had been a substantial deviation or interruption of the description which the section says negatives the right to compensation. But there is a proviso which follows, and it is under that proviso that the claim was sustained before the commission.

The proviso says that the worker (and in the case of the death of the worker his dependants) shall be entitled to receive compensation under the paragraph notwithstanding that the injury was received during or after substantial interruption of or substantial deviation from or other break in any journey if, in the circumstances of the particular case, the risk of injury was not materially increased by reason only of such substantial interruption, substantial deviation or other break.

The learned judge of the Workers' Compensation Commission decided that the employer, if the proviso was invoked, must prove that the risk of injury was materially increased by reason of the substantial interruption or deviation or other break. As his Honour found in the proofs no sufficient evidence that the risk was thus increased, he held in favour of the applicant for compensation.

The learned judges of the Supreme Court, on appeal by case stated, were unable to concur in that conclusion and took the view

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that the burden of proof to satisfy the conditions stated in the proviso lay on the applicant for compensation.

We think the view of their Honours of the Supreme Court is clearly right. The proviso is a provision which so to speak imposes ultimately a liability upon the employer notwithstanding that the conditions of the preceding part of the section under which he might otherwise be liable are negatived or are not established. It is a provision placing liability upon an employer occupying the position of a defendant and it places the liability on him by reason of a condition which though no doubt expressed as a particular condition lying outside the general rule contained in the preceding part of the sub-section yet is an affirmative imposition of liability. We think that upon ordinary principles the burden of proof must lie upon the person who seeks to avail himself of conditions from which liability results in that way. It is, in effect, an ordinary case of the burden of proof lying upon him who affirms.

For those reasons the appeal should be dismissed.

The appeal will be dismissed with costs. We will not interfere with the order as it stands.

Appeal dismissed with costs.

Solicitors for the appellant, *Abram Landa & Co.*

Solicitors for the respondent, *H. D. McLachlan, Chilton & Co.*

R. A. H.