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IN THE PRIVY COUNCIL No. 54 of 1960

ON APPEAL

FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

B E T W E E N:

SUNSHINE PORCELAIN POTTERIES PROPRIETARY LIMITED .. Appellant

- and -

IRIS LOREEN NASH .. Respondent

RECORD OF PROCEEDINGS

NICHOLAS WILLIAMS & CO.,
88/90, Chancery Lane,
London, W.C.2.
Solicitors for the Appellant.

MARKBY STEWART & WADESONS,
5, Bishopsgate,
London, E.C.2.
Solicitors for the Respondent.

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RECORD OF PROCEEDINGS

No. 1 - CASE STATED

In the Full Court of the Supreme Court of the State of Victoria

No. 1

Case Stated, 17th December 1957.

CASE STATED AT REQUEST OF RESPONDENT FOR THE DETERMINATION OF THE FULL COURT OF THE SUPREME COURT OF THE STATE OF VICTORIA PURSUANT TO SECTION 56(3) OF THE WORKERS COMPENSATION ACT 1951

1. By Application dated 9th February 1956 the Applicant worker claimed compensation in respect of the disease of silicosis from the Respondent employer. A copy of the said application is annexed hereto and marked "A".

2. The Respondent by its solicitors filed an Answer to the said application dated 30th October 1956. A copy hereof is annexed hereto and marked "B".

3. On the 7th day of February 1957 the application came on for hearing at the Workers Compensation Board constituted by His Honour Judge Dethridge as Chairman and Messrs. Wilkinson and Harry as members and, after hearing evidence and legal submissions, the Board reserved its decision. On the 21st day of February 1957 the Board made an award in favour of the Applicant, a copy of which is annexed hereto and marked "C" and delivered

In the Full Court of the Supreme Court of the State of Victoria

No. 1

Case Stated, 17th December 1957 - continued.

written reasons in support of its award, a copy of which is annexed hereto and marked "D".

4. The following facts were either admitted by consent of the parties or found on the evidence by the Board.

(a) Between the years 1931 and 1938 the Applicant worker was employed by the Respondent as an insulator cleaner. She was about 15 years of age when her employment began.

(b) The Applicant married in December 1937 and ceased to work for the Respondent in May 1938. Since that time she has been supported by her husband.

(c) At notime since she ceased to work for the Respondent has she worked for wages and at the time of hearing of this application she had no intention of again taking up any employment. At the date of the hearing she had two children under the age of 16 years and was fully engaged in the domestic duties involved in being a housewife.

(d) During her employment with the Respondent she was exposed to dust containing silica and as a result of this exposure she developed the disease of silicosis although it was not known to her nor manifested by any signs or symptoms until within the last few years. The first symptom noticed by her was breathlessness from about 1950 onwards.

(e) On the 20th day of December 1955 Dr. K.J. Grice certified that the Applicant was disabled from earning full wages by reason of silicosis. It was admitted by the Respondent that the Applicant had been physically totally disabled for work by reason of the disease for the last 24 months preceding the date of hearing. By reason of the disease the Applicant has incurred expenses for medical treatment since 1953, and she was in Fairfield Hospital for about a month in 1956.

(f) No notice of injury nor claim for compensation was given or made before the 5th January

1956 and the Respondent employer has not paid any sums by way of compensation.

5. The question of law submitted for the opinion of the Full Court is

Whether upon its findings of fact the Board was justified in law in making the said award or any and what part of it.

DATED the 17th day of December One thousand nine hundred and fifty-seven.

WORKERS COMPENSATION BOARD

G.L. Dethridge Chairman
H.R.C. Harry Member
James Wilkinson Member

In the Full Court of the Supreme Court of the State of Victoria

No. 1

Case Stated, 17th December 1957 - continued.

No. 2

Annexure "A"

(a) Application for Compensation, 9th February 1956.

No. 2 - ANNEXURE "A"

(a) APPLICATION FOR COMPENSATION

1. On the 9th day of December 1955 Dr. Kenneth J. Grice, medical practitioner, certified that IRIS DOREEN NASH of 33 Norfolk Street, Yarraville, in the State of Victoria, was suffering from silicosis, being a disease coming within the provisions of the Act which relate to Industrial Diseases, and was thereby disabled from earning full wages at the work at which she was employed.

2. The said Iris Doreen Nash alleges that the above-mentioned disease is due to the nature of her employment as an insulator cleaner and that she was last employed in such employment prior to the date of disablement by SUNSHINE PORCELAIN POTTERIES PTY. LTD.

3. During the years 1931 to 1938, personal injury by accident arising out of and in the course of her employment was caused to the Applicant, a worker employed during the above-mentioned period by the Respondent.

In the Full Court of the Supreme Court of the State of Victoria

No. 2

Annexure "A"

(a) Application for Compensation, 9th February 1956 - continued.

4. Questions have arisen as to -

(a) the liability of the Respondent to pay compensation to the Applicant under the above-mentioned Acts in respect of the aforesaid disablement, and

(b) the amount and duration of such payments.

5. A determination is hereby requested.

6. Particulars are hereto appended.

PARTICULARS

1. The name of the Applicant is Iris Doreen Nash and her address is 33 Norfolk Street, Yarraville, in the State of Victoria. She is 39 years of age.

2. The name of the Respondent is Sunshine Porcelain Potteries Pty. Ltd., carrying on business at 99 Derby Road Sunshine in the said State.

3. The Applicant was employed by the Respondent as an insulator cleaner.

4. The nature of the disease is silicosis.

5. The date of disablement was the 1st day of June 1950.

6. The circumstances of the Applicant's employment with the Respondent caused personal injury to the Respondent.

7. The injury was silicosis.

8. The Applicant was totally incapacitated for work from the 1st day of June 1950 and is still so incapacitated.

9. The Applicant is a married woman. She has two children under the age of 16 years.

10. The average weekly earnings of the Applicant were about £2.0.0.

11. From the 1st day of June 1950 the Applicant has been unable to earn any wages.

12. The Applicant has not received any payment, allowance or benefit from the Respondent in respect of her incapacity.

13. The Applicant claims weekly payments for total incapacity from the 1st day of June 1950.

14. Statutory notice of the disablement was given to the Respondent immediately on the 5th day of January 1956. The names and addresses of the Applicant and her Solicitors are as follows:

Of the Applicant: Iris Doreen Nash
33 Norfolk Street
Yarraville.

Of her Solicitors: Maurice Blackburn & Co.
17 Lygon Street
Carlton.

The name and address of the Respondent to be served with this application is:

Sunshine Porcelain Pottery P/L
99 Derby Road
Sunshine.

Maurice Blackburn & Co.

No. 2 - ANNEXURE "A"

WORKER'S COMPENSATION ACTS

(b) CERTIFICATE OF DISABLEMENT

(Section 12, Worker's Compensation Act 1951)

I hereby certify that having personally examined DOREEN IRIS NASH on the Ninth day of December 1955, I am satisfied that she is suffering from Silicosis being one of the diseases to which the Workers' Compensation Acts apply, and that she is thereby disabled from earning full wages at the work at which she has been employed, and I certify that the disablement commenced about 1950, according to the history given.

In the Full Court of the Supreme Court of the State of Victoria

No. 2

Annexure "A"

(b) Certificate of Disablement, 20th December 1955 - continued.

1. Full name and address of Worker:	Doreen Iris Nash 33 Norfolk Street Yarraville.
2. Process in which worker states she was employed at or immediately before the date of disablement:	Cleaning Insulators
3. Name and place of business of employer stated by worker to have last employed her in process abovementioned:	Sunshine Porcelain
4. Leading symptoms of disease:	Progressive shortness of breath, cough and wheezing.

DATED this Twentieth day of December, 1955.

(Signed) KENNETH J. GRICE M.D.

D A T E D this Ninth day of February, 1956.

MAURICE BLACKBURN & CO.

Solicitors for the Applicant.

No. 3

Annexure "B"

Answer to Application, 30th October 1956.

No. 3 - ANNEXURE "B"

ANSWER TO APPLICATION

TAKE NOTICE that the Respondent says that the Applicant's particulars filed herein are inaccurate or incomplete in the particulars set out hereunder and denies its liability to pay compensation by reason of the matters set out in the particulars hereunder.

PARTICULARS

1. It is not admitted that the Applicant is suffering from silicosis.

2. The date of disablement is not admitted.

In the Full Court of the Supreme Court of the State of Victoria

No. 3

Annexure "B"

Answer to Application, 30th October 1956 - continued.

3. Paragraph 7 is denied.

4. Paragraph 8 is denied.

5. Paragraph 11 is not admitted.

6. If the Applicant is suffering from the disease of silicosis (which is not admitted) this disease is not within the Schedule diseases of the relevant workers compensation legislation and she is not entitled to compensation for this disease.

7. The Respondent did not employ the applicant in any employment to the nature of which silicosis is due within 12 months of the date of disablement.

8. Silicosis is not a disease due to the nature of the applicant's employment with the Respondent.

9. The applicant is not entitled to any weekly payments inasmuch as she had no weekly earnings in the twelve months preceding the date of the alleged injury.

10. The applicant has not suffered any incapacity for work.

AND FURTHER TAKE NOTICE that the names and addresses of the Respondent and its solicitors are:

Of the Respondent: Sunshine Porcelain Potteries Pty. Ltd., 99 Derby Road Sunshine.

Of its Solicitors: Middleton McEacharn & Shaw, 60 Market Street, Melbourne.

DATED the 30th day of October, 1956.

No. 4

Annexure "C"

Award of Workers' Compensation Board, 21st February 1957.

No. 4 - ANNEXURE "C"

AWARD OF WORKERS' COMPENSATION BOARD

UPON READING the Application for a Determination filed by the Applicant herein and UPON HEARING

In the Full Court of the Supreme Court of the State of Victoria

No. 4

Annexure "C"

Award of Workers' Compensation Board,

21st February 1957 - continued.

Mr. Griffith of Counsel for the Applicant and Mr. C.W. Harris of Counsel for the Respondent and HAVING DULY CONSIDERED the matters raised in these proceedings the Board doth award as follows:

1. IT IS HEREBY DECLARED that the Applicant IRIS DOREEN NASH is suffering from silicosis an industrial disease contracted while the Applicant was in the employment of the Respondent, Sunshine Porcelain Potteries Pty. Ltd. and due to the nature of such employment.

2. IT IS ORDERED that the Respondent do pay to the Applicant weekly payments of compensation as for total incapacity for a period of 104 weeks at the rate of Two pounds two shillings per week in respect of silicosis contracted in the employment of the Respondent AND IT IS FURTHER ORDERED that weekly payments of compensation as for total incapacity do continue from the 21st day of February 1957 at the rate of Two pounds two shillings per week until the same shall be ended diminished increased or redeemed in accordance with the provisions of the abovenamed Act.

3. LEAVE is reserved to the Applicant to prove such matters as she is entitled to prove in respect of costs of medical, hospital, nursing or ambulance services.

4. AND IT IS FURTHER ORDERED that the Applicant's costs of and incidental to these proceedings be taxed by the Registrar according to Scale "D" of the County Court Scale of Costs together with appropriate items under Rule 60 of the Workers Compensation Rules together with a qualifying fee from Dr. Grice and when so taxed be paid by the Respondent to the Applicant.

DATED this twenty-first day of February 1957.

BY ORDER OF THE BOARD

George T. Smith

Registrar.

No. 5 - ANNEXURE "D"

In the Full Court of the Supreme Court of the State of Victoria

No. 5

Annexure "D"

Reasons for decision of The Workers' Compensation Board,

21st February 1957.

REASONS FOR DECISION OF THE WORKERS' COMPENSATION BOARD

The Applicant was employed as an insulator cleaner with the Respondent Company between the years 1931 and 1938 inclusive. As part of her duties she blew dust from porcelain ware with a hose of compressed air and was working in a dust laden atmosphere. In 1950 her health became affected and in 1955 Dr. Grice certified that she was suffering from Silicosis and had been disabled since 1950.

The Respondent admitted that this certificate complied with Section 12(1) of Act 5601 and that the Applicant's disease was due to the nature of her employment with Respondent. However it contended that the question of whether there was liability was to be decided by the law prevailing in 1938 because this was the date at which liability, if any, would arise in the Respondent under the decision of VICTORIA INSURANCE CO. v. JUNCTION NORTH BROKEN HILL 1925 A.C. 354.

Under the Workers' Compensation legislation in force at that date silicosis was not an industrial disease and therefore if the contention is sound the respondent is not liable.

The Privy Council case referred to was discussed by the Board under the Chairmanship of Gamble J. in MILLER v. J.W. HANDLEY PTY. LTD. Vol.2 Workers' Compensation Reports p.134, where Section 18 of the Workers' Compensation Act, reenacted in 1951 as Section 12 of Act 5601, was considered. The worker in Miller's case had in fact been employed by Respondent after the passage of the 1946 Legislation but the industrial disease had been contracted prior to that Legislation, just as in the instant case the disease was contracted prior to Act 5601. At page 140 of the reported case the reasons of the Board are expressed as follows:

"The Respondent further contended that the Act would be given an unwarranted retrospective operation if it were applied in a case where the actual date of the contraction of the disease was

In the Full Court of the Supreme Court of the State of Victoria

No. 5

Annexure "D"

Reasons for decision of The Workers' Compensation Board,

21st February 1957 - continued.

prior to September 1, 1946. In other words, that the section has no application where on the applicant's own evidence or where the respondent that is the last employer or some other respondent for the purpose of transferring his liability to some other respondent establishes that the disease was contracted prior to September 1, 1946.

In its original form Section 18 of the Act limited the period over which the Respondent or Respondents could go back in time to 12 months from the date of disablement. This is a matter of express statutory enactment in our opinion giving the section retrospective operation for that period and for that purpose. The amendment of the section by substituting "at any time" for the words "12 months" cannot affect the construction of the section. The words "at any time" are therefore still necessarily retrospective in the same sense. To construe the section otherwise would be to render the section nugatory, in most cases, for some years to come, and so destroy the obvious purpose of the legislature which was to remedy by statute forthwith and not at some future time, what it considered to be an existing social injustice."

This Board agrees with that statement and it follows that the Respondent's liability is to be determined under Act 5601. The Board holds that the effect of Dr. Grice's certificate and the admissions made is to create liability in the Respondent.

Mr. Harris for the Respondent further argued that there could be no liability in the Respondent as the failure of the Applicant to work for 12 months prior to the date of the certificate made the quantum provisions contained in the clauses appended to Section 9 inapplicable. This argument overlooks Section 18 which in a case of industrial disease provides that "the amount of compensation shall be calculated with reference to the earnings of the worker while at work under the employer from whom the compensation is recoverable" which employer in this case is the Respondent. Quite apart from Section 18 the Board in a case where Section 9 could not be applied would attempt to achieve the broad purposes of the Act in accordance with the Judgment of Halsbury L.C. in LYSONS v. ANDREW KNOWLES &

SONS LIMITED 1901 A.C. 79 at page 85 His Lordship states: "The first thing, I think, one has to do is to apply one's mind to what is the substantive intention and meaning of this statute. Does it mean that every workman, whoever is employed in one of the prescribed trades, shall be (subject to certain conditions not relevant to the matter now under debate) entitled to compensation? Or does it mean that only workmen shall be entitled to compensation in respect of whom it is possible to say that the periods of their employment and the mode in which they are paid will render it possible to establish an average weekly payment, so that anybody who comes outside that category is not entitled to any compensation at all? My lords, for my own part I cannot entertain a doubt that the Legislature did mean that every workman in the prescribed trades should be entitled to compensation, and I think that is the language which one would naturally expect to have been used by the Legislature if that was the meaning of the enactment" and at page 86 he further states: "Well, my Lords, for my own part, if I came to the conclusion that there hadbeen no mode by which the quantum should be fixed in the Schedule, I should still be of opinion that there was no repealing of the right which had been first granted, but that, by arbitration or some other means which I think would be quite within the powers of the Act, the compensation should be ascertained; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the quantum was to be."

The Respondent further submitted, and Mr. Harris stressed this argument, that until the Applicant formed an intention to work there was no incapacity which could be compensated. At the most, he contended, the Board should make a declaration of liability against the Respondent. This submission was made with reference to the evidence of the Applicant that she had left the employment of the Respondent to get married, which she had done, and she had no present intention of working. Mr. Griffiths for the Applicant argued

In the Full Court of the Supreme Court of the State of Victoria

No. 5

Annexure "D"

Reasons for decision of The Workers' Compensation Board,

21st February 1957 - continued.

that Section 12(1) applied independently for her present intention not to seek employment, an intention which could change overnight. It is true that the provisions of the Act are primarily intended for the compensation of persons who are in fact workers at the date of incapacity. However, in the VICTORIA INSURANCE COMPANY CASE Lord Wrenbury at page 358 of the report makes it clear that the certificate of disablement provisions apply to a person unemployed at the date of the certificate. The Scottish Case of KEARY v. RUSSELL LTD. (1915 S.C. p.672) is to the same effect. In the view of the Board the domestic cause of the Applicant's present unemployment does not disentitle her to an award and her case is clearly not one for a declaration of liability. The Board proposes to apply Section 18 in awarding compensation. Her wage with the Respondent was £2.2.- p.w. The Respondent admits that she has been totally incapacitated for two years prior to the application. On the evidence, the Board is unable to award any sum on the basis of partial incapacity. The Board therefore awards £218.8.-, being 104 weeks at £2.2.- and future weekly payments at the rate of £2.2.- per week. It awards the full amount of medical expenses, viz. £60.17.6.

Award costs on Scale "D". Certify for Dr. Grice appropriate items under Rule 60 and certifying fee for Dr. Grice.

21st February, 1957.

No. 6

(a) Reasons for Judgment of Herring, C.J. and Smith, J.,

21st March 1958.

No. 6 - REASONS FOR JUDGMENT

(a) Their Honours The Chief Justice (Sir Edmund Herring) and Mr. Justice Smith

Delivered 21st March 1958

This is a case stated for the determination of the Full Court by the Workers' Compensation Board under Section 56 (a) of the Workers' Compensation Act 1951 in proceedings brought by Iris Doreen Nash as Applicant against Sunshine Porcelain Potteries Pty. Ltd. as Respondent.

From the Case, the following facts appeared

as either admitted by consent of the parties or found on the evidence by the Board:-

(a) Between the years 1931 and 1938 the Applicant worker was employed by the Respondent as an insulator cleaner. She was about 15 years of age when her employment began.

(b) The Applicant married in December 1937 and ceased to work for the Respondent in May 1938. Since that time she had been supported by her husband.

(c) At no time since she ceased to work for the Respondent has she worked for wages and at the time of hearing of this application she had no intention of again taking up any employment. At the date of the hearing she had two children under the age of 16 years and was fully engaged in the domestic duties involved in being a housewife.

(d) During her employment with the Respondent she was exposed to dust containing silica and as a result of this exposure she developed the disease of silicosis although it was not known to her nor manifested by any signs of symptoms until within the last few years. The first symptom noticed by her was breathlessness from about 1950 onwards.

(e) On the 20th day of December 1955 Dr. K. J. Grice certified that the Applicant was disabled from earning full wages by reason of silicosis. It was admitted by the Respondent that the Applicant had been physically totally disabled for work by reason of the disease for the last 24 months preceding the date of hearing. By reason of the disease the Applicant has incurred expenses for medical treatment since 1953, and she was in Fairfield Hospital for about a month in 1956.

(f) No notice of injury nor claim for compensation was given or made before the 5th January 1956 and the Respondent employer has not paid any sums by way of compensation.

By application dated 9th February 1956 the Applicant claimed compensation in respect of the

In the Full Court of the Supreme Court of the State of Vicotria

No. 6

(a) Reasons for Judgment of Herring, C.J. and Smith, J., 21st March 1958 - continued.

disease of silicosis from the Respondent. On the 7th February 1957 the application came on for hearing before the Board and on the 21st February 1957 the Board made an award in favour of the Applicant.

The case stated submitted the following question of law for the opinion of the Full Court:-

> "Whether upon its findings of fact the Board was justified in law in making the said award or any and what part of it."

The main question argued before the Court was whether the Board was right in deciding that the applicant was entitled to compensation from the respondent in respect of the silicosis which she contracted whilst employed by and working for the respondent during the years 1931 to 1938 in an employment to the nature of which the silicosis is due.

Now before the Workers' Compensation Act 1946 (No.5128) came into force on the 1st September, 1946, silicosis was not a compensable disease, so far as Workers' compensation in Victoria was concerned. Up till this time compensation in respect of disease was only payable under the Acts in respect of certain diseases set out in a Schedule and silicosis was not one of those diseases.

Act No.5128 made at least two fundamental changes in the legislation. In the first place, Section 5 of the Principal Act of 1928 was amended, so that a worker's employer became liable to pay compensation if in any employment personal injury by accident arising out of or in the course of the employment is caused to the worker. Hitherto the word "and" had been used, so that a worker in order to succeed had to show that the injury complained of arose not only out of, but also in the course of, the employment. In cases to which Act No.5128 applies, it is sufficient for the worker to prove that the injury arose out of the employment, that is to say was caused by it, without showing that it arose in the course of it, and vice versa. This is a most far-reaching amendment, as was emphasised by Mr. Phillips, who appeared for the applicant before us.

The second fundamental change was that all industrial diseases became compensable. This result was achieved by the introduction of a new Section 18 into the Principal Act by Section 8(1).

The new Section 18 provided :-

"Where -

(a) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or

(b) the death of a worker is caused by any disease - and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of the disablement, then subject to the provisions hereinafter contained the worker or his dependants shall be entitled to compensation under this Act as if the disease were a personal injury arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident."

The new section not only departed from the old in removing the limitation of its operation to the scheduled industrial diseases, it also made another material alteration. Thus in the old section the applicant had to show that "the disease is due to the nature of any employment in which the worker was employed within the twelve months previous to the date of the disablement." This period the new section enlarged to "at any time prior to the date of the disablement." It was these words "at any time" that the Board relied upon to make an award in favour of the applicant in this case. They were also relied upon before us and it was said by Mr. Phillips that the language of the new Section 18 fitted exactly the case of his client and that she was consequently entitled to rely upon it.

For the employer, Mr. Menhennitt on the other hand contended that to treat the section as applying to the case of the applicant in all the circumstances would be to give to the section a retroactive operation. He relied upon the general rule of construction "that where a statute

In the Full Court of the Supreme Court of the State of Victoria

No. 6

(a) Reasons for Judgment of Herring, C.J. and Smith, J., 21st March 1958 - continued.

is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act." (per Cockburn, C.J. in R. v. Ipswich Union 2 Q.B.D. 269 at p.270). The language of the new Section 18, he maintained, said nothing "expressly to the contrary." The words "at any time" relied upon by Mr. Phillips were not in his submission directed to this point at all. With this submission, we agree. They were introduced so as to lighten the burden resting upon an applicant under the Section. Under the section as it stood an applicant might fail because he had not been employed, in what may be termed a relevant employment for the disease he had contracted, within twelve months previous to the date of the disablement. This limitation of time might well produce grave injustice and it was to obviate it that the words "at any time" were introduced. They cannot be said however to have been directed at the general rule enunciated by Cockburn C.J. nor "expressly" introduced to exclude its operation. This, however, leaves open the question whether the circumstances that the section requires that the disease should be one due to the nature of a past employment involves that working in that employment is part of the "state of facts" to which the rule relates.

The rule was applied by the High Court in British Broken Hill Proprietary Coy. Ltd. v. Simmons 30 C.L.R. 102, Kraljevich v. Lake View and Star Ltd. 70 CLR 647 and Maxwell v. Murphy 96 C.L.R. 261. The first of these cases had to do with an amendment of the Workmen's Compensation Act 1916 of New South Wales, which extended the meaning of the word "Workman" and increased the maximum of compensation. The Court held unanimously that one who is a "workman" within Section 5, which corresponds with Section 5 of the Victorian Act, only because of the extended meaning given to that word by the amending Act, can take no benefit under the Section, unless with respect to injury sustained after the passing of the amending Act. The majority held that the increased maximum was applicable only in case of an injury sustained after the passing of the amending Act.

The second of these cases had to do with an

amendment of the Workers' Compensation Act 1912 to 1941 of Western Australia. The amending Act altered the method of assessment of compensation so as to increase the lump sum to which a worker was entitled by way of redemption. It was held that the amendment did not apply to a case in which the accident in respect of which weekly payments were being made had occurred before the date of the amendment.

Now an applicant, who sought compensation on the basis of such an amending Act, had to prove, in addition to the injury which he had sustained after the passing of such amending Act, that he had had an employment that came under such amending Act. Section 5, both before and after the amendment of 1946, is explicit; it says "in any employment" and then goes on to provide that the worker's employer shall be liable to pay compensation in the circumstances set out. The applicant makes his claim as a "Worker", a person "who has entered into or works under a contract of service --- with an employer", and he makes it upon his employer. The words "has entered into" bring in a "Worker" whose contract was entered into before the commencement of the relevant legislation, but only if it is then a subsisting contract.

An applicant under the new Section 5 of 1946 therefore has to show an employment that that Section can properly recognize, that is to say, an employment that subsists after the amending Act came into force. The new section looks forward not only to an injury that will be sustained after the amending Act comes into force, but also to an employment that will be current thereafter; and that is so even if the connection relied on between the injury and the employment is merely causal and not temporal. To hold otherwise would be contrary to the general rule stated by Cockburn C.J. and referred to above.

When one passes to the new Section 18 introduced by the same Act of 1946 similar considerations apply in at least one important respect, despite the differences that necessarily arise between injuries by accident and disablements by disease, and despite difficulties that necessarily follow from the attempt the legislature has made to fit compensation in respect of industrial diseases into the scheme it adopted to deal with

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No. 6

(a) Reasons for Judgment of Herring, C.J., and Smith, J., 21st March 1958 - continued.

injuries by accident. These differences and difficulties have given rise to some difference of opinion in the Courts which are difficult to resolve. See for example Keary v. Russell 1915 S.C. 672; Victoria Insurance Coy. v. Junction North Broken Hill (1925) A.C. 354; Blatchford v. Stadden (1927) A.C. 461; Etterback v. Cornhill (1932) 1 K.B. 401; Bridges v. New Rock Collieries 101 L.J. K.B. 557; Richards v. Cosker (1937) A.C. 304; Eaton v. George Wimpey (1938) 1 K.B. 353, and Mayer and Sherratt v. Co-operative Insurance Society Ltd. (1939) 1 K.B. 621.

For the present purposes, however, it is sufficient to say that the legislative scheme is to confer a right to compensation in respect of industrial diseases upon "a worker" or "his dependants" by treating the disease as if it had been a personal injury by accident so as to come under Section 5. An applicant who seeks to come under the new Section 18 must show, therefore, just as one who seeks to come under Section 5, must do, that he was employed in an employment after the section he relies on came in force. If the only employment that he has engaged in is one that came to an end before that time, then he cannot bring himself within the section. To allow him to do so would be to give the section a retroactive operation in his favour in defiance of the rule of construction to which reference has been made.

True it is that a "worker" applying in respect of an industrial disease need not be in employment at the date of disablement but is able to refer back to past employments for the purpose of establishing a claim to recover compensation: see Keary v. Russell (supra); Victoria Insurance Coy. v. Junction North Broken Hill (supra); Williams v. Metropolitan Coal Co. 76 C.L.R. 431. But this was essential if a "worker" was to be given adequate protection in respect of a disease whose onset might take some considerable period. When it finally began to disable him, it might well be that the employment in which the disease was contracted had come to an end and that he was out of employment. To obviate this difficulty the legislature made it sufficient to show that at some time before his disablement or death he had been engaged in an employment, to the nature of which his disease was due. It is a

very different problem, however, to determine to what "workers" the old Section 18 should be held to apply, on the one hand, and to what the new on the other. This latter problem has to be solved, in our opinion, in accordance with the general rule of construction to which we have referred, by holding that the new section does not apply to any "worker" who cannot be shown to have had an employment subsisting at the time when the new section came into force or at some time thereafter.

Mr. Phillips placed great reliance upon the decision of the High Court in George Hudson Ltd. v. The Australian Timber Workers' Union 32 C.L.R. 413 and especially upon the judgment of Higgins J. That learned Judge, however, began what he had to say on the subject of "the well known presumption against treating a statute as retrospective" by saying on p.446:- "It is, of course, a mere presumption, which must yield to express words. But, in my opinion, it is an abuse of language to call the amending Act of 1921 retrospective if it merely imposes a future duty on existing persons as to existing agreements". It is clear from this statement that His Honour was not considering a case like the present, where it is sought to construe legislation as conferring future rights on existing persons who have not answered a description in the legislation at any time since it was passed, and merely because they used to answer that description during the existence of agreements of service that came to an end earlier.

The case of Williamson v. The Insurance Commissioner 33 Q.J.P. 106, though very shortly reported, appears to support the view put. The case of Bridges v. New Rock Collieries Co. (supra) may be thought to suggest a contrary view, but that decision may be distinguished by reason of the terms of the scheme and amendment which were there in question. What we have said is, in our view, sufficient to dispose of the present case; and in saying that we do not overlook the fact that by Section 20 of the Act of 1928, as amended by the 1946 Act, it was provided that the compensation should be recoverable from the employer who last employed the worker prior to the date of disablement in the employment to the nature of which the disease was due. We think it unnecessary for this Court to determine whether, by

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(a) Reasons for Judgment of Herring, C.J. and Smith, J., 21st March 1958 - continued.

reason of that provision, the applicant was bound to show, not only that she was a "worker" under some subsisting contract of employment after the commencement of the new Section 18, but also that after such commencement she was employed by the respondent in employment of the class to the nature of which the disease is due.

Since this case was argued we have found that the Full Court of New South Wales has held, by a majority decision, that under the corresponding legislation of that State the further burden to which we have just referred does rest upon an applicant; see Bellambi Coal Co. Ltd. v. Clark 53 S.R. N.S.W. 440. But as we have not had the advantage of hearing argument upon the reasons for judgment in that case, we think it preferable to refrain from expressing any concluded opinion upon the point. There is one aspect, however, of the reasons given in that case to which we think it necessary to refer.

All three members of the Full Court of New South Wales were, we think, in agreement upon one matter relating to the effect of the words in the legislation in that State corresponding with the words "the disablement shall be treated as the happening of the accident" at the end of our Section 18. They were agreed that the words in question, where they applied, had the effect of requiring, by implication, that an applicant should be deemed to have been, at the date of disablement, in the employ of the employer who last employed him in employment of the class to the nature of which the disease was due. The majority, however, took the view that this implication of a notional employment at the date of disablement did not arise as against an employer who had ceased to employ the applicant before the section in question came into force. Owen, J., who dissented, held that the implication was not limited in that way.

It might be argued that an implication of the kind described arises under Section 18 of our 1946 Act and creates a notional employment as at the date of disablement. And it might be urged that this overcomes the difficulty which, as we have said, we regard as fatal to the applicant in the present case, namely, that she cannot show that she was a "worker" under a subsisting

contract of employment at any time after that section came into force. We are not satisfied, however, that an implication such as we have referred to does in fact arise from the language of the Victorian legislation. The view that it does is not easy to reconcile with observations made in some of the cases in the United Kingdom already cited which suggest that the concluding words of Section 18 operate only in the working out of a liability the creation of which is to be established independently of, and cannot be negatived by, those words: compare Keary v. Russell (supra): Victoria Insurance Coy's case (supra), and Richards v. Gosker (supra). The New Zealand case of Durling & Alco Ltd. 1943 N.Z.L.R. 413 is distinguishable because of the explicit language of the statute in force there. In the circumstances, therefore, we think it preferable to express no concluded opinion as to whether the suggested implication does or does not arise under the Victorian Act. It is sufficient for us to say that if it does, then we think that the view of the majority in the Bellambi case (supra) should be followed as to the limit to be imposed upon the operation of the implication; compare the note in 27, A.L.J. at p.613. The suggested implication is, therefore, of no assistance to the applicant here to overcome the difficulty that the respondent has not been a "worker" at any time since the new Section 18 was introduced in 1946.

Many other points were raised. Mr. Menhennitt for example maintained that the amending Act only applied to diseases contracted after it came into force. We express no opinion upon this submission nor do we think any useful purpose would be served by discussing the many other intricate and difficult points that Counsel raised.

We answer the question raised by the case: No, the Board was not justified in law upon its findings of fact in making the said Award or any part of it.

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No. 6

(b) Reasons for Judgment of Gavan Duffy, J., 21st March 1958.

No.6 - JUDGMENT

(b) His Honour Mr. Justice Gavan Duffy.

The questions raised in this Appeal present very real difficulty owing to the nature of the provisions of Section 8 of the Workers' Compensation Act 1946 under which the award of compensation in favour of the Respondent to this Appeal against the appellant which is now the question was made. It or its predecessor Section 18 of the Workers' Compensation Act 1928, was introduced into an Act which was otherwise concerned with claims by workers for compensation for injuries by accident arising out of and in the course of the employment. Sections 18 of the 1928 Act and 8 of the Act of 1946 were directed to providing for the case of a worker who suffered from an industrial disease but might well find it impossible to give proof that it was contracted or aggravated in the course of or as a result of his employment by any particular employer who had employed him in the industry which was probably the cause of the disease from which he suffered.

The scheme adopted in Section 8 was to give a worker the right to compensation on his procuring a certificate from a medical practitioner certifying that he was suffering from a disease and was thereby disabled from earning full wages at the work at which he was employed and on proof that the disease was due to the nature of any employment in which he was employed at any time prior to the date of disablement. It was not required that his employment with any specific employer was in any way the cause of his disease (Blatchford v. Staddon & Founds, 1927 A.C. 461, Smith v. Mann, 47 C.L.R. 426).

Section 8(1) further provided however that the workers should be entitled to compensation "as if the disease were a personal injury by accident arising out of or in the course of that employment" and the disablement should be treated as the happening of the accident.

The basis of the claim for compensation therefore was that one employment or another in the industry in question was responsible for the workers' disease. As it was no doubt thought necessary

to the scheme that the worker's claim should be made against some specific individual a means was provided which Viscount Sumner speaks of as "perhaps rough and ready of enabling a suffering workman to get compensation from some one certain in respect of a disease contracted at a wholly uncertain time, (Blatchford v. Staddon & Founds (1927) A.C. at 469), by enacting (Section 20, Workers' Compensation Act 1928) and (Section 18 (2) of the Act of 1946) that the compensation should be recoverable from the employer who last employed the worker prior to the date of the disablement and giving such employer a right to shift the burden of compensation or share it with others who had employed the worker in the same industry.

The Respondent in the present appeal claimed and recovered compensation under Section 8 of the Workers' Compensation Act, 1946, from the Respondent who had been her last employer prior to the date of her disablement.

She was employed by the Appellant between 1931 and 1938 during which employment she was exposed to dust containing silica and as a result of an exposure of this kind she developed SILICOSIS although it was not known to her or manifested by any signs or symptoms till many years afterwards. In December 1937 she married and since then devoted herself to her home and family, and has not worked for wages in any employment and has had no intention of doing so.

On the 20th December 1955 Dr. G.K. Grice certified that the Respondent was disabled from earning full wages by reason of SILICOSIS and it was admitted by the Appellant that she had been physically totally disabled for work for the last twenty four months preceding the hearing by the Board on the 7th February 1957 by reason of SILICOSIS.

The Workers' Compensation Act 1946 did not come into operation till some date after the 27th May 1946, and the Award of Compensation made by the Board was attacked before us on the following grounds.

(1) The Respondent was not a "worker" for the purposes of Section 8 of the Workers' Compensation Act 1946.

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(b) Reasons for Judgment of Gavan Duffy, J., 21st March 1958 - continued.

(2) The Respondent evidently had not been disabled by her SILICOSIS from earning full wages at the work at which she was employed.

(3) Section 8 should not be read as having a retrospective operation and to do so was necessary to make the Appellant liable to compensate the Respondent.

(4) The only "worker" entitled to compensation under Section 8 was a person who was working under a Contract of service of apprenticeship or otherwise with an employer after the 1946 Act came into operation or had entered into such a contract after that date.

I may deal shortly with 1 and 2. As to 1, this I suppose means that she was not a worker because she had not been employed at all for several years.

Worker for the purpose of the 1946 Act is to be taken as defined in Section 1 at the Workers' Compensation Act 1928 as "any person who has entered into or works under a contract of service of apprenticeship or otherwise with an employer whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied in oral or in writing."

That a person who has left his employment may still recover compensation in the character of a "worker" appears to me clear enough. To hold otherwise would have the extraordinary result of depriving the worst cases of any relief. A man so seriously affected that he cannot continue his employment and leaves it would be entitled to no compensation. An applicant must be a "worker" but only in respect of the injury he has sustained. He is claiming in his character of "worker". It is not necessary that he should still be employed at the time he makes his claim. That this is so is certainly suggested by the fact that in the reported cases examples are to be found of successful claims by men who have ceased being employed. (e.g. Lord Atkinson's statement of facts at p.473 Blatchford v. Staddon and Founds (1927) A.C.).

There would seem more apparent justice in the contention (2) that the respondent was not disabled from earning full wages at the work in which she

was employed. It is clear certainly that her disease had nothing to do with her giving up her employment with the Appellant. However it must be remembered that she was to be compensated for being disabled about 1950, according to the doctor's certificate, (1946 Act, Section 8 (4)). It is true that it was found or admitted that at the time of the hearing on the 7th February 1957 she had no intention of again taking up any employment but that would not prevent her obtaining compensation.

The meaning of "disabled" is to my mind clear and is not to be confused with "prevented". A person is disabled from doing any particular work if he cannot do it.

For the third proposition there is this to be said; before the 1946 Act came into operation, under Section 18 of the 1928 Act, - a last employer was only liable to pay compensation in respect of certain diseases of which SILICOSIS was not one, and if the disease was due to the nature of any employment in which the worker was employed within twelve months previous to the date of disablement. These limitations have been removed by the 1946 Act, and the workers' rights accordingly increased.

It is a rule of construction that an Act of Parliament is to be read, prima facie, as not intended to be retrospective.

What may perhaps be called a sub-rule requires in certain cases a clear indication that an Act is to have a retrospective operation before it can be given one.

Dixon J. (as he then was) said in Kraljevich v. Lake View and Star Co. 70 C.L.R. at 652, "The presumptive rule of construction is against reading a statute in such a way as to change accrued rights, the title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words liabilities that are fixed or rights that have been obtained by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided, are not to be disturbed by a general law governing

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(b) Reasons for Judgment of Gavan Duffy, J., 21st March 1958 - continued.

future rights and liabilities unless the law intends appears with reasonable certainty."

Cockburn C.J. said in R v. Ipswich Union 2 Q.B.D. at 270, "It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act".

Wright J. in re Wilson (1898) 2 Q.B. said "Perhaps no rule is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only."

Buckley L.J. put the matter thus, "Retrospective operation is one matter, interference with existing rights is another. If an Act provides that as at a past state the law shall be taken to have been that which it is not that Act I understand to be retrospective."

On the other hand Higgins J. in George Hudson Ltd. v. The Australian Workers' Union, 32 C.L.R. said, "In my opinion it is an abuse of language to call the amending Act of 1921 retrospective if it merely imposes a future duty on existing persons as to existing agreements" and Lord Wrenbury in (1911) 2 K.B. 970, as quoted by Isaacs J. in the same case said, "The operation of a statute is correctly said to be retrospective when it enacts that something which was not the law of a date anterior to its passing shall be treated as having been the law at that date. An enactment which provides that in future the liability to repair certain existing pipes shall rest upon certain persons upon whom it did not rest before is not retrospective in that sense."

When it comes to applying these principles to the facts of the present case I feel considerable difficulty. There is a good deal to be said for treating the date of the occurrence of the disability as the date of the accident and

to do so is not without authority (see Scrutton L.J. in Ellerback Collieries Ltd. v. Campbell Insurance Co., Lord Sumner in Blatchford v. Staddon & Founds, 1927, A.C. at 482), where he said "the difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident". Lord Wrenbury in the same case at p.478 propounded the question whether the disease was the accident or the ascertainment in a defined way of the fact of the disease having been contracted was the accident and added that on the whole he thought it must mean the latter (and see Judgment of Scrutton L.J. in Ellerback Collieries Ltd. v. Campbell Insurance Co., (1932) 1 K.B. 401).

Such a construction of course bears an unreal appearance but the scheme for compensation in Section 8 is artificial however looked at. Its whole object is to allow compensation as if for an injury by accident arising out of or in the course of the employment against an employer out of or in the course of whose employment the disease may never have occurred.

If that construction were the correct one I should see no reason why the present Respondent should not succeed, since for the purpose of her claim the accident which caused her injury must be taken to have occurred in 1950, a considerable time after the 1946 Act came into force, and as a result the employment by the last employer must be taken as after the date of that Act.

It is difficult however to so regard the Section in view of the reasons given by Lord Wrenbury in delivering the judgment of the Judicial Committee in Victoria Insurance Co. v. Junction North Broken Hill M. 1925 A.C. 354, though the actual decision was not on that point.

However even if Section 8 is not to be read as introducing by implication a fictitious employment of the workman by the last employer there is a good deal to be said for regarding it as a new provision concerning industrial disease applying both to those workers who were in the last employer's service after the 1946 Act came into force and those who were so employed only before that. Section 8

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(b) Reasons for Judgment of Gavan Duffy, J., 21st March 1958 - continued.

of the 1946 Act did not amend Section 18 of the 1928 Act, it repealed it, substituting its own provisions. After its passing no worker employed only before the date of its coming into operation in an employment, to the nature of which his disease was due, could recover any compensation unless the possibility that then existed of doing so had hardened into an accrued right (Section 6, Acts Interpretation Act 1928). That such a worker should have no right to compensation under either the 1928 or 1946 Act would be an intention difficult to attribute to the legislature especially in an Act where there were words describing the necessary employment as being "at any time prior to the date of the disablement", and it is obvious that the worker in this case could not establish any "accrued right" within the meaning of those words in Section 6. What is necessary under Section 8 of the 1946 Act to recover compensation is the certificate and the proof of the necessary employment. The conditions imposed by Section 8 for obtaining compensation can only be effective if obtained after the 1946 Act comes into operation and the condition that employment must be proved is expressed in terms so wide as in their natural meaning to necessarily cover employment before 1946.

Again if there is a presumption here that Section 8 should not be read so as to gain the present claim for compensation I am of opinion that there is sufficient to be found in the Workers' Compensation Act 1946 to rebut such a presumption. The provision in Section 8 that what is to be proved is that the disease was due to the nature of any employment in which the worker was employed "at any time" prior to the date of the disablement is not consistent with the claim that where the employment was before 1946 the Section must be read as excluding the claim. The words are plain and I see no reason for not giving them their natural meaning. In addition looking at the Act as a whole it appears that the intention of Parliament was that the worker having obtained the necessary certificate and given the proof that Section 8 (1) requires should be entitled to compensation. Not only does the sub-section say so but the provisions of Section 8 (3) underline it. It seems highly improbable that the legislature's intention was that where the last employer had died, perhaps a

day before the 1946 Act came into operation he should be entitled to his compensation and if at a like time the worker was dismissed or through illness was compelled to leave his employer's service he should not.

In addition there is another rule of construction that should not be forgotten. As the Privy Council said in a case, cited by Isaacs J. in George Hudson Ltd. & The Australian Workers' Union, 32 C.L.R. at 436, the Pieve Superiors Giovanni Dupueto v. Wylie & Co. L.R. 5 P.C. 482 at 492, "the statute being remedial of a grievance .... ought according to the general rule applicable to such statutes to be construed as liable so as to afford the utmost relief which the fair meaning of the language will allow". Lord Loreburn L.C. (speaking at the Workmen's Compensation Act 1897) said "It is quite true that this Act is a remedial Act and like all such Acts should be construed beneficially." It appears to me sufficiently obvious that Section 8 substituted a new section for Section 18 of the 1928 Act for the purpose of removing what was considered a grievance to the workers arising from the inadequacy of the latter Section, and if the language of Section 8 permits, and it does more than permit, the Section should I think be read so as to achieve the obvious intention of Parliament.

We were referred to a decision of the Full Court of N.S.W. in Bellambi Coal Co. Ltd. v. Clark 53 S.R. N.S.W. 440 which laid it down that a worker claiming compensation in respect of an industrial disease under a N.S.W. Statute in some respects similar to Section 8 of our Workmen's Compensation Act 1946, could not succeed unless his employment with the employer against whom the claim was made had extended beyond the date at which the Act came into force, the Chief Justice saying "the rule that the last employer engaged in a hazardous industry must pay compensation resulting from that hazard entitles a worker to go back as far as 1st July 1926 but cannot in my view be taken to require the Court to go beyond that date and impose a liability upon an employee to which he was not by law subject when the relationship of employer and employee ceased to exist. That indeed would have the effect of providing that at a past date the law was to be taken to have been something which it was not and would clearly come within that

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(b) Reasons for Judgment of Gavan Duffy, J., 21st March 1958 - continued.

particular category of retrospectivity referred to by Buckley L.J. in West v. Gwynne (1911) 2 Ch. at p.12.

I need hardly say that I would treat any judgment of that Court with great respect. It is perhaps sufficient to say that some of the reasons that appear to have weighed with the majority are absent in the present case and the respective provisions to be considered were couched in language which differed the one from the other, and those differences to my mind are important.

In conclusion I may refer to what I have already said about the meaning of "worker" and I can see no reason in the Acts and more especially in Section 5 for limiting it to a person who is employed by somebody after Section 8 comes into operation, unless by the operation of the presumption against giving the Section retrospective operation, and as I have said I do not think such presumption should operate.

Apart from that the only limitation that the language of Section 5 could call for if it called for any is that no one is a "worker" except one who is a "worker" when he makes his claim and that does not appear to me to be a proper or reasonable limitation to place on the word.

As my brother Judges are of a contrary opinion to that which I have expressed it is unnecessary for me to consider the question whether the Board acted on a correct principle in computing the amount that was awarded by it.

No. 7

Order, 21st March 1958.

No.7 - ORDER

THIS CASE STATED by the Workers Compensation Board dated the seventeenth day of December 1957 at the request of the Respondent herein coming on for reading upon the eleventh and twelfth days of February 1958 UPON READING the said Case Stated AND UPON HEARING Mr. Phillips of Queen's Counsel and Mr. Griffith of Counsel for the above-named Applicant and Mr. Menhennitt of Queen's Counsel

and Mr. C.W. Harris of Counsel for the above-named Respondent THIS COURT DID ORDER that this Matter stand for Judgment and this Matter standing for Judgment this day accordingly THIS COURT DOTH ORDER the question submitted in the said Case be answered: The Board was not justified in making the said award or any part of it. AND THIS COURT DOTH FURTHER ORDER that the award be set aside. AND that the Applicant's costs of these proceedings be taxed and when taxed be paid by the Applicant to the Respondent's Solicitor.

In the Full Court of the Supreme Court of the State of Victoria

No. 7

Order, 21st March 1958 - continued.

No. 8 - ORDER GRANTING SPECIAL LEAVE TO APPEAL TO THE HIGH COURT OF AUSTRALIA

In the Full Court of the High Court of Australia

No. 8

Order granting special Leave to appeal to the High Court of Australia, 15th May 1958.

IN THE HIGH COURT OF AUSTRALIA
PRINCIPAL REGISTRY

No. 18 of 1958.

IN THE MATTER of the Workers Compensation Acts of the State of Victoria

and

IN THE MATTER of an Application dated the 9th day of February 1956 made to the Workers Compensation Board in which Iris Doreen Nash was Applicant and Sunshine Porcelain Potteries Limited was Respondent

and

IN THE MATTER of a Case Stated therein by the said Workers Compensation Board on the 17th day of December 1957 for the determination of the Full Court of the Supreme Court of the State of Victoria

and

IN THE MATTER of an order made by the said Full Court on the 21st day of March 1958

PENDING IN THE SUPREME COURT OF THE STATE OF VICTORIA

In the Full Court of the High Court of Australia

No. 8

Order granting special Leave to appeal to the High Court of Australia, 15th May 1958 - continued.

B e t w e e n :

IRIS DOREEN NASH Applicant

and

SUNSHINE PORCELAIN POTTERIES LIMITED Respondent

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON, MR. JUSTICE McTIERNAN, MR. JUSTICE FULLAGAR AND MR. JUSTICE TAYLOR.

THURSDAY THE 15th DAY OF MAY 1958

UPON APPLICATION made to the Court this day at Melbourne on behalf of the abovenamed Iris Doreen Nash (hereinafter called "the Applicant") AND UPON READING the Notice of Motion herein dated the 11th day of April 1958 and the two several affidavits of Mary Armytage Holdsworth sworn on the 11th day of April 1958 and the 8th day of May 1958 respectively and filed herein and the exhibits referred to in the last mentioned affidavit AND UPON HEARING Mr. Gowans of Queen's Counsel and Mr. Griffith of Counsel for the Applicant and Mr. Menhennitt of Queen's Counsel and Mr. C.W. Harris of Counsel for the abovenamed Respondent THIS COURT DOTH ORDER that special leave be and the same is hereby granted to the Applicant to appeal to this Court from the order of the Full Court of the Supreme Court of the State of Victoria made on the 21st day of March 1958 in the abovementioned proceedings.

BY THE COURT

M. Doherty

PRINCIPAL REGISTRAR

No.9 - NOTICE OF APPEAL

In the Full Court of the High Court of Australia

No. 9

Notice of Appeal, 29th May 1958.

NOTICE OF APPEAL TO THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

PURSUANT to an order of the Full Court of the High Court of Australia made on the 15th day of May 1958 granting Special Leave to Appeal to the Appellant herein TAKE NOTICE that the High Court of Australia in Full Court will be moved by way of appeal at the first sittings of the Full Court for hearing Appeals appointed to be heard at Melbourne after the expiration of six weeks from the institution of this appeal or so soon thereafter as Counsel may be heard by Counsel on behalf of the abovenamed Appellant against the whole of the Order made by the Full Court of the Supreme Court of Victoria constituted by His Honour the Chief Justice Mr. Justice Gavan Duffy and Mr. Justice Smith on the 21st day of March 1958 whereby the said Court answered the question submitted for its opinion in the case stated by the Workers Compensation Board as to whether upon its findings the Board was justified in law in making an award granting the Appellant weekly payments of compensation for incapacity due to a disease by saying that the Board was not justified in making the said Award or any part of it, for an Order that the said Order of the Full Court be set aside and reversed and that in lieu thereof the said question be answered in the affirmative as to the whole of the said Award and there be an order restoring the said Award and for the Appellant's costs in the said application and Case Stated and for such further Order as may be thought fit and that the Respondent be ordered to pay the costs of the Applicant of the application for Special Leave to appeal and of this Appeal and TAKE FURTHER NOTICE that the Appellant intends to appeal from the whole of the said judgment and that the grounds upon which the Appellant intends to rely are as follows:

(a) That the judgment was wrong in law.

(b) That the Court was wrong in holding that the fact that the Appellant was not employed after the coming into operation of the Workers' Compensation Act 1946 disentitled her from an Award.

In the Full Court of the High Court of Australia

No. 9

Notice of Appeal, 29th May 1958 - continued.

(c) That the Court should have held that, at all material times, the Appellant was a worker for the purposes of Section 18 of the Workers Compensation Act 1928 as enacted by Section 8 of the Workers Compensation Act 1946 or of Section 12 of the Workers Compensation Act 1951.

(d) That the Court should have held that the provisions of Section 18 of the Workers Compensation Act 1928 as enacted by Section 8 of the Workers Compensation Act 1946 or alternatively of Section 12 of the Workers Compensation Act 1951 applied to the Appellant as a person disabled by silicosis.

(e) That the Court should have held that the Appellant was entitled to be paid weekly payments of compensation on and after the date when she became disabled from earning full wages.

(f) That the Court should have answered the question submitted for its opinion in the affirmative as to the whole of the said Award.

DATED the 29th day of May, 1958.

MAURICE BLACKBURN & CO.

Solicitors for the Appellant

No.10

(a) Reasons for Judgment of Dixon, C.J., 2nd March 1959.

No.10 - REASONS FOR JUDGMENT

(a) HIS HONOUR THE CHIEF JUSTICE (SIR OWEN DIXON)

The question submitted for our decision by this appeal is whether a woman who twenty years ago married and on that account relinquished employment as an insulator cleaner can now recover worker's compensation in consequence of a disablement, that did not appear until twelve years later, arising from silicosis attributable to her employment. During the intervening twelve years she was not employed but pursued her domestic duties. In the year 1955 she obtained

from a medical practitioner a certificate that he had personally examined her and that he was satisfied that she was suffering from silicosis and was thereby disabled from earning full wages at the work at which she had been employed. He fixed the date of the commencement of the disablement as about 1950, a vagueness which though understandable may exceed the latitude allowed by law. However, for the purposes of our decision we may take it that the disablement commenced not later than the close of the year 1950. What the certificate meant by the statement that she was disabled from earning full wages at the work at which she had been employed is a question the answer to which is not self evident. For she had not been employed since 1938, when she gave up her work as an insulator cleaner. The words, however, are those of the legislation and doubtless mean in the certificate whatever they mean in the statute.

In 1938 when she gave up her employment silicosis was not in Victoria a disease in respect of which a worker could obtain compensation if he contracted it as a result of the nature of his employment and was thereby disabled. At that time compensation might be obtained in respect of a limited number only of diseases which were enumerated in a schedule to the Workers' Compensation Act 1928 as amended in 1935 (No. 3806 and No. 4360) or which had been added thereto by lawful authority: see secs. 18 to 25. Silicosis was not included among the so called "industrial diseases" that were scheduled. But in 1946 this policy was changed. The schedule went. Any disease sufficed so long as it was due to the nature of any employment in which the worker was employed at any time prior to the date of disablement. It had been necessary that the disablement should be caused by a scheduled disease which itself should be due to the nature of an employment in which the worker had been employed within the twelve months previous to the date of disablement. But the limitation of time went as well as the limitation of the description of disease. This was all accomplished by the Workers' Compensation Act 1946 (No. 5728) (Vic.). That Act also provided a definition of the word disease. It is to include any physical or mental ailment disorder defect or morbid condition whether of sudden or gradual development and it

In the Full Court of the High Court of Australia

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is to include also the aggravation acceleration or recurrence of any pre-existing disease as aforesaid. The law of workers' compensation in Victoria underwent a consolidation in 1951; in 1953 the consolidation in its turn underwent amendments. A not immaterial amendment took out the words "by accident" and the like, so that the basal idea was no longer "injury by accident arising out of or in the course of the employment" but "injury arising out of or in the course of the employment". The alternative "or" had been substituted for the conjunctive "and" in that momentous phrase in 1946. The word "injury" had already received a wide definition. In this legislation it means any physical or mental injury or disease and includes the aggravation acceleration or recurrence of any pre-existing injury or disease as aforesaid. In the case before us the medical certificate was given after the Act of 1951 had commenced and for that matter after the Act of 1953 had come into force; but the certificate fixed a date of disablement before the Act of 1951 came into operation and after the commencement of the Act of 1946. The Act of 1951 contains provision the object of which is plainly to prevent the consolidation prejudicing prospective rights which had not yet accrued. Its purpose is to carry over from the application, whether actual or inchoate or contingent, of the Acts repealed and consolidated into the operation of the consolidated Act all facts matters and things which might give rise to rights and liabilities under the legislation. The provision is to be found in sec. 2. In spite of the elusiveness of the somewhat indefinite and not entirely self consistent form the provision takes it makes it possible to adopt for the purpose of the present case the convenient course of treating the consolidated provisions of the Act of 1951 as applicable so far as the events of this case occurred after 1st September 1946 when the Act of 1946 (No. 5128) came into force. The material provisions do not differ except in the way the sections are numbered. Further, it will make for clearness and will not affect the consideration of the case if the text is read as amended by the Act of 1953 (No. 5676) which came into force on 1st June 1953, that is to say, before the medical certificate was given.

The most material provision is contained in sec. 12(1) of the Act of 1951. As it now reads it

provides that where (a) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or (b) the death of a worker is caused by any disease - and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement, then subject to the provisions thereinafter contained, the worker or his dependants shall be entitled to compensation under "this" Act (scil. the consolidated Act) as if the disease were a personal injury arising out of or in the course of that employment and the disablement shall be treated as the happening of the injury.

The provision states conditions on the fulfilment of which a right to compensation arises. The question in the present case appears to me to depend entirely on the meaning of the conditions and they, I think, are all stated in the earlier part of the subsection ending with the words "shall be entitled to compensation". Nothing which follows appears to me to state in terms or to imply any further condition or to state or imply any limitation of the meaning of what has preceded it. In seeking to determine the application to a case like this of such a provision it is desirable to begin by putting aside those features which are accidental to the case and cannot or ought not to weigh in adopting an interpretation of the material part of the enactment. Such a course makes it possible to see more clearly the problem of interpretation that is involved. For example, twelve years may seem a long time between the cessation of work to the incidents of which a disease may be traced and a disablement. But the problem of interpretation would be the same if the employment had ceased on 31st August 1946 and the date of disablement had been 2nd September 1946. Again, the fact should be put aside that it is marriage that counts for the applicant for compensation possessing no trade or employment and that it is twelve years since she had one. The interpretation of the provisions must be the same whatever may have been the reason of the applicant's ceasing to work for wages and however short or long the time.

Now it is as well to begin the discussion of the terms of sec. 12(1) by justifying the assertion that all depends on the conditions expressed down to the words declaring that when the conditions are

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fulfilled the worker or his dependants "shall be entitled to compensation" and that nothing can be found in the words that follow which can control or limit the conditions. The hypothesis expressed in the words beginning "as if" involves no reference to a matter of fact until you get to the words "that employment". Certainly "that employment" seems to refer to an employment susceptible of identification. But otherwise you are simply to suppose an injury and to suppose that it arose out of or perhaps in the course of the employment referred to and you are to do so in order to give effect to a right conferred upon the disabled worker or the dependants of the deceased worker to compensation under this Act. You are told that the disablement is to be treated as the happening of the injury. The date of the injury is that given by the medical certificate or, if the practitioner cannot certify a date, it is to be the date on which the certificate is given. If the death of the worker has occurred and he has obtained no certificate before dying, the date of his death is taken as the date of his disablement, (see sec. 20). The provisions (scil. secs. 41, 42 and 43) relating to notice of the injury apply (sec. 15) and that is one reason for treating the disablement as the happening of the injury. Of course the direction that the worker shall be entitled to compensation as if the disease by which he is disabled were a personal injury arising etc. refers to the basal provision for compensation. That is sec. 5 which says that if in any employment personal injury arising out of or in the course of the employment is caused to a worker his employer shall subject as thereinafter mentioned be liable to pay compensation in accordance with the provisions of the Act. It will be noticed that unlike sec. 12(1), which speaks of the worker's right to compensation ("shall be entitled to compensation"), sec. 5 is expressed in terms of the employer's liability to pay compensation. It may perhaps seem a point of little significance. But in a matter where rules of construction are invoked to limit the application of express words so that they will not apply to events, if any, that have already occurred it is not unimportant to notice that the legislature's concern is with conferring a right to compensation rather than with imposing a liability or duty. As will appear, the selection of a person to bear the burden which the creation of the right to

compensation necessarily creates is another, but a secondary, matter. By directing that the worker disabled by a disease "shall be entitled to compensation under this Act as if", etc., sec. 12(1) confers on that worker a title to compensation which is conclusive. It puts him conclusively in exactly the same position for that purpose as he would occupy if he acquired a right to compensation "under this Act" by suffering a personal injury arising out of or in the course of "that employment". If it be open to do so one would venture to think that for the same purpose it is to be considered that the injury happened at the date fixed for the disablement. Once you have fixed the employment to which the words "that employment" referred, all that remains is to work out the compensation. Cases of death could give no difficulty: the compensation would be calculated under cl. 1(1) (a) of the clauses appended to sec. 9. Many difficulties may be imagined in ascertaining the compensation for total or partial incapacity in a case of disablement by industrial disease where the worker has relinquished working for wages: to discuss them would not assist in reaching a solution of this case. But two things must be borne in mind. The first is that in ascertaining "average weekly earnings" cl. 4(b) provides a last resort unlikely to fail. Thus the missing factor for applying the second limb of para. (ii) of cl. 1(1) (b) will be supplied. The second is that it is well settled that a right to compensation conferred by the Act is not to be restricted or denied because of difficulties in fitting the clauses relating to the computation of compensation to the circumstances of his case: Lysons v. Andrew Knowles & Son 1901 A.C. 79; Ball v. Hunt 1912 A.C. 496 at p.500; King v. Port of London Authority 1920 A.C. 1 at pp. 11 and 28; McCann v. Scottish Co-operative Laundry 1936 1 All E.R. 475 at p. 478. There is, however, one not unimportant principle laid down by sec. 18 in relation to the computation, namely, that the amount of compensation shall be calculated with reference to the earnings of the worker while at work under the employer from whom the compensation is recoverable. That provision forms one of the sections which govern the ascertainment of the person who is to pay the compensation. They provide a plan or scheme for saddling a particular employer or particular employers with liability to meet the compensation to which, once the prescribed conditions are fulfilled, the worker becomes entitled.

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These provisions are of ccurse an essential part of the legislature's measures for conferring upon workers a right to recover compensation for industrial disease. But, as it appears to me, it would be a mistake to take these liability provisions as a guide for determining the scope and application of the right to compensation which the Act confers. A study of them seems to me to show that in truth legislative policy and principle were conceived from the opposite point of view. The primary thing was to prescribe the conditions the fulfilment or occurrence of which entitled the worker to compensation for injury arising from industrial disease. The question of allocating the burden came next. I say this because I do not think that considerations affecting liability can govern the question whether a worker whose disablement arises after 1st September 1946 from causes existing before that date falls within the operation of the provisions commencing on that date and the further question whether the employment must then subsist. This really becomes sufficiently clear when the character of the provisions for fixing liability upon employers is considered. In the first place the worker is to resort to the employer who last before the date of disablement employed him in the employment to the nature of which the disease was due: sec. 14. This does not mean that the disease must in fact be contracted in the employment of that employer. It is enough that the disease is incidental to that class of employment. "If the disease is incidental to that class of employment so that it can be attributed to service therein, then he is to be compensated, as if something could be proved, which ex hypothesi may not be proved - namely, as if an accident had arisen out of and in the course of that employment under a particular employer and at a particular time and had been proved to have so arisen. The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident. This is in favour of the workman. The employer, per contra, gets the provision that the proof of the disease is to be given by the certificate of the certifying surgeon, and if the surgeon cannot determine when the disease was contracted, the date of his certificate is to be taken as arbitrarily fixing the time of that event. If the suggested limitation of the relevancy of the last employer were adopted, the

anomalous result would be that the date of the accident would be fixed, but its connection with the employment, then or last previously subsisting, would be at large, and the workman's difficulties, arising in any case from the gradual appearance of the symptoms of his disease, would be aggravated by his being tied to a date for the accident, which might be long after the time when the disease was really contracted." per Lord Sumner, Blatchford v. Staddon 1927 A.C. 461 at p. 470. As Lord Sumner said: "The paternal benevolence of the Legislature towards workmen is well known, and if the price of that benevolence is paid by the last employer, who thus had to bear others' burdens, that is nothing new in this kind of legislation, nor is it done to an extent that need surprise any one who has fully digested the position in which the Act of 1897 had already placed employers." 1927 A.C. at p.469. But by a proviso the worker is required to furnish to the employer upon whom he claims information of what other people employed him in the same kind of employment. The last employer may join any previous employer as a party in any proceedings for the recovery of compensation and if it is proved that the disease was in fact contracted in his employment the compensation is to be recoverable from that employer. If the disease be of such a nature as to be contracted by a gradual process, employers who prior to the date of disablement employed the worker in the employment to the nature of which the disease was due are made liable for contribution to the employer from whom the compensation is recoverable. All this is effected by sec. 14 and its provisoes. As it seems to me it can be of no importance that the actual contraction of the disease may be shewn to have begun in an employment before 1st September 1946.

In Miller v. J.W. Handley Pty. Ltd. (1948) 2 Workers Compensation Decisions (Vict.) 134, compensation was awarded to a nursing sister who was shewn to have contracted pulmonary tuberculosis in January 1946. This was discovered in May 1948 when apparently she obtained a certificate of disablement. She was then still in the employment to the nature of which the disease was due. She recovered compensation from the last employer. The case differs, of course, from the present in the fact that when the Act commenced on 1st September 1946 the worker was still employed in the employment to the nature of which the disease was due. But in a judgment which I find convincing Judge Gamble,

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who was Chairman of the Board, shewed that the fact that the disease was contracted before the commencement of the Act of 1946 could not matter. "When it is borne in mind" said his Honour, "that under sec. 12 primary liability is placed upon the last employer in that particular kind of employment just because he is the last such employer, it is clear that the actual date of the contraction of the disease is as between the worker and the employer wholly irrelevant." 2 W.C.D. (Vic.) at p. 139. In a later passage the learned judge pointed out how absurd it would be having regard to the history of the provision to limit the operation of the words "at any time" in the phrase "in which the worker was employed at any time prior to the date of disablement." "In its original form section '12' of the Act limited the period over which the respondent or respondents could go back in time to 12 months from the date of disablement. This is a matter of express statutory enactment in our opinion giving the section retrospective operation for that period and for that purpose. The amendment of the section by substituting 'at any time' for the words '12 months' cannot affect the construction of the section. The words 'at any time' are therefore still necessarily retrospective in the same sense." It must of course be conceded that when as sec. 18 in the Workers Compensation Act 1914 (Vic.) the original provision including the words "employed within the twelve months previous to date of disablement" was enacted it might have been a question whether these words were to be limited by construction by applying a presumption against retrospective operation, limited for example to workers who were employed at the date when the Act commenced. I should not myself have thought that the words ought to have been so construed or that such a construction accorded with the real intention of the legislature: it is for that reason that I cite the foregoing passage. The learned judge proceeds: "Further as the liability of the last employer is determined independently of the date of the acquisition of the disease, the effect of the argument advanced by the respondents would be to deny to the last employer his essential right under the scheme to transfer or share the liability by establishing that the disease was in fact contracted in some other prior employment if that prior employment ceased before September 1, 1946 - even one day before. The amendment of the

period '12 months' to the unlimited 'at any time' was clearly intended to be an amendment enlarging the scope of the section not restricting it."

In the same judgment the meaning and effect of the judgment of the Privy Council in Victoria Insurance Co. v. Junction North Broken Hill 1925 A.C. 354 affirming the Supreme Court 24 S.R. N.S.W. 160, was explained and the contention that the decision bore on such a case as the present was disposed of. There is a paragraph (the third on p.138 of 2 W.C.D. Vic.) in which there is some confusion between Lord Wrenbury's position as only one Lord of Appeal of five in Blatchford v. Staddon 1927 A.C. 461 and his position of responsibility for the judgment of the judicial committee in the case of the Victoria Insurance Co. But otherwise I am content to accept the explanation of the passages (2 W.C.D. Vic. pp. 136-139) which the present respondent relied upon in that authority. But in any case I do not think that they affect the real question in this case.

The essential difficulty of the present case appears to me to arise not from the matters to which I have referred but from the somewhat elusive references under one form of expression or another to the fact of employment. Is it right to understand these references as meaning that the worker must have been employed since the commencement of the Act on 1st September 1946 in an employment to the nature of which the disease was due? For the purpose it is perhaps enough to begin with the citation of a provision not directly relevant. It is sec. 13 which provides that if it is proved that the worker has at the time of entering "the employment" wilfully and falsely represented himself in writing as not having previously suffered from the disease compensation shall not be payable. To what employment do the words "the employment" refer? The answer plainly must be the employment of the worker with the employer from whom the compensation would (but for sec. 13) be recoverable. When you turn again to sec. 14 you find that primarily he is the employer who employed the worker prior to the date of disablement in an employment of the required kind. Must he have employed the worker after 1st September 1946 when the amending Act commenced? The first thing to be noticed in sec. 12(1) is that the medical practitioner must certify that the worker is disabled from earning full wages at

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the work at which he was employed. Plainly the date of disablement fixed by or in consequence of the certificate must be after the commencement of the amending Act of 1946. For some time it appeared to me that perhaps in those words an implication was to be found that at the time when the disablement arose the worker either was employed at some work or would have been employed but for the disablement. In other words sec. 12(1) might perhaps be taken to contemplate a medical certificate of an existing disability for work or employment in or about which the worker had an existing concern at the time of the disablement certified. But so to read the provision would mean that even in the case of a disease contracted after the amending Act 1946 came into force which did not make itself manifest for some time it would be essential that the worker should be employed or that except for the disablement or some accidental circumstance he would be employed. On the whole the implication does not seem to be demanded by the words or sufficiently supported by the context. The argument that the word "worker" by definition imports some existing employment cannot be accepted. Throughout the Act this word is used no doubt to import that the required relationship shall exist at a time when it was material to the specific purpose of a given provision: but not otherwise or further. And in sec. 12(1) it is obvious that the status is material not to the certificate or to the actual time of disablement but to the employment to the nature of which the disease is due. As you proceed in the reading of sec. 12(1) you find that two references occur to employment which are linked together so that grammatically they must refer to the same thing. There is the phrase "any employment in which the worker was employed at any time prior to the date of disablement" and there is the phrase "arising out of or in the course of that employment".

It seems to me to be clear enough that the words "<u>that</u> employment" refer to the same employment as that described as "any employment in which the worker was employed at any time prior" etc. Now that employment cannot be restricted to the period after 1st September 1946, when the amending Act commenced, except by placing a limitation on the words "at any time". Yet it seems to me quite certain that these very words were inserted to

extend the time backwards. The definite retrospection of twelve months was deliberately replaced by the unrestricted "at any time". No rule of construction reflecting the presumption against imposing liabilities by reference to an event happening before the enactment of a statute could justify the limitation of these express words.

It was pointed out in the course of the argument that such a construction might leave without remedy a worker who but for the passing of the Act of 1946 would have been entitled to compensation. Suppose that prior to 1st September 1946 a worker had worked so long at a manufacturing process involving the use of lead or its compounds that his system was "poisoned" but no manifestations of the disease had appeared. Suppose, however, that he had left his employment before that date. Clearly enough upon the disease manifesting itself and his obtaining a certificate of disablement after that date he would have been entitled to compensation but for the passing of the Act of 1946 repealing the old provisions and the schedule. For lead poisoning was a scheduled disease. But he had acquired no title to compensation before 1st September 1946; no "right" had accrued. The incipient disease gave him no right or title whether present future or contingent: it amounted to nothing but a factor which if other events occurred might form one element in a title to a right. I cannot see how as at 1st September 1946 sec. 6(2) of the Acts Interpretation Act 1928 (Vic.) could apply to his case. It would be strange indeed if by an implied limitation of the words "at any time" his case were excluded from the Act containing amendments directed to the removal of all limitations upon the category of the diseases or upon the time at which the worker must have been employed in the employment to the nature of which they might be due.

In my opinion the applicant was entitled to recover compensation and her appeal should be allowed.

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(b) HIS HONOUR MR. JUSTICE McTIERNAN

In my opinion the appellant's claim for Workers Compensation should be upheld. She suffers from disability resulting from silicosis due to the nature of her employment with the respondent. In view of the fact that she caught the disease while in the respondent's employment it seems to me that it should occasion no surprise that the Workers Compensation Acts make the respondent liable even though her employment with the respondent terminated in 1938. I think that the decisive fact which makes the respondent liable is that the disability from the disease occurred after the Workers Compensation Act 1946 came into operation. The disability was an event on which s.8 of the Workers Compensation Act 1946 did operate. It was clearly a prospective operation. The broad saving provisions of s.2(2) of the Workers Compensation Act 1951 preserved the right which accrued to the appellant under s.8 to claim compensation in respect of her disability. Now s.8 limited no period between disability and the employment wherein the worker contracted the disease. Indeed, it expressly got rid of any such limitation which existed in old s.18 of the Workers Compensation Act 1928. Armed with the medical certificate for which s.8 provided, the worker had to prove that "the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement" and, compensation was by s.20 of the principal Act as amended by s.8 of the Act of 1946, "recoverable from the employer who last employed the worker prior to the date of disablement in the employment to the nature of which the disease was due". The relevant employment is identified by those criteria. After s.8 came into operation there was nothing about lapse of time. The authority which was given by the section to a medical practitioner is to certify as to a patient suffering from a disease and as to a personal disability for work. The section said the "work at which the worker was employed". I would not construe these words as referring only to a current employment for such a construction would leave unprotected any worker who gave up his employment or had retired from it because of disability resulting from a disease contracted in it. This would, in my opinion, be a

capricious and unsound construction where, as in this case, the worker was not employed at all after she left the employment in which she contracted her disease. The word "work" must include the work at which the worker was employed when he was last employed. In this case that work is the work at which the appellant was employed by the respondent, and at which she contracted the disease. It seems to me to be a proper construction of the section to include that work within the category for which the medical certificate might be given. Where the conditions precedent to the right to claim compensation in respect of disability resulting from disease are fulfilled, the provisions under which the worker proceeds allow the fiction to be adopted that the disease is an incapacitating injury, for the purpose of bringing into play the provisions of the Act relating to compensation for injury, so far as they are capable of application to the case. For these reasons the award in question was validly made under the Workers Compensation Act 1951 as amended. In my opinion the dissenting judgment of Gavan Duffy J. is right. I would allow the appeal and affirm the award made by the Workers Compensation Board in favour of the appellant.

REASONS FOR JUDGMENT

(c) HIS HONOUR MR. JUSTICE FULLAGAR

(c) Reasons for Judgment of Fullagar, J., 2nd March 1959.

This appeal, which is from a judgment of the Full Court of the Supreme Court of Victoria, raises a difficult question under those provisions of the Victorian Workers Compensation Acts which relate to "industrial diseases". The question is whether, having regard to the times at which the relevant events occurred, certain amendments of the legislation, which were made in 1946, apply to the case of the appellant. It is convenient to begin by stating the facts, which are simple enough.

Between the years 1931 and 1938 the appellant, Iris Doreen Nash, was employed by the respondent company as an insulator cleaner. In December 1937 she married, and in May 1938 she ceased to be employed by the respondent. Since that time she has not been employed by the respondent or by any

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other employer. During her employment with the respondent she was exposed to dust containing silica, and as a result of this exposure she developed the disease of silicosis, although it was not known to her nor manifested by any signs or symptoms until within the last few years. The first symptom noticed by her was breathlessness from about 1950 onwards. On 20th December 1955 Dr. K.J. Grice, a legally qualified medical practitioner, signed a certificate which, so far as material, was in the following terms:- "I hereby certify that having personally examined Doreen Iris Nash on the ninth day of December, 1955, I am satisfied that she is suffering from silicosis being one of the diseases to which the Workers' Compensation Acts apply, and that she is thereby disabled from earning full wages at the work at which she has been employed, and I certify that the disablement commenced about 1950, according to the history given." The appellant has been physically totally disabled for work by reason of the disease of silicosis since February 1955.

On 5th January 1956 she gave notice of her disablement to the respondent, and a little later, liability to pay compensation being denied, she made a claim for compensation, which came on for hearing before the Workers Compensation Board on 7th February 1957. The Board on 21st February 1957 made an award in her favour, but stated a case for the determination of the Full Court of the Supreme Court under s.56(3) of the Workers Compensation Act 1951. The question asked by the case is whether upon the facts above stated the Board was justified in law in making the award. The Supreme Court by a majority (Herring C.J. and Smith J., Gavan Duffy J. dissenting) held that this question should be answered:- No. From this decision the appellant appeals by special leave to this Court.

The first Victorian Workers Compensation Act was enacted in 1914. It followed fairly closely the English Act of 1906, which was the first English Act to make special provision for industrial diseases. The Victorian legislation was consolidated, without any amendment of importance, in 1915 and again in 1928. Between 1928 and 1946 a number of amendments of general importance were made, but none affecting industrial diseases, and from 1931 to 1938, the period during which the

appellant was in the employment of the respondent, an employer's liability in respect of industrial diseases was governed by the Act of 1928. Section 5(1) of that Act contained the general provision for payment of compensation, and was, so far as material, in these terms:- "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a worker his employer shall be liable to pay compensation in accordance with the Second Schedule." The Second Schedule provided for the amount or rate of compensation payable (a) "where death results from the injury", and (b) "where total or partial incapacity results from the injury". Sections 18-27 inclusive dealt with industrial diseases. It is necessary only to set out s.18. That section provided:- "Where - (i) the certifying medical practitioner for the district in which a worker was employed certifies that the worker is suffering from a disease mentioned in the Fifth Schedule and is thereby disabled from earning full wages at the work at which he was employed; or (ii) the death of a worker is caused by any such disease, and the disease is due to the nature of any employment in which the worker was employed within the twelve months previous to the date of the disablement whether under one or more employers, the worker or his dependants shall subject to the provisions hereinafter contained be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of and in the course of that employment and the disablement shall be treated as the happening of the accident." Sections 19-27 contained subsidiary and ancillary provisions. The only amendments which have ever been made in these provisions were consequential on the amendments of s.18 which were made in 1946 and will be mentioned in a moment.

It is seen that s.18 of the Act of 1928 was limited in two ways. In the first place, it applied only to diseases mentioned in the Fifth Schedule. In the second place, it did not apply if the disablement took place more than twelve months after the worker had ceased to be employed in an employment to the nature of which the disease was due. If s.18 had remained unaltered, it is obvious that the appellant in this case could have had no claim for compensation. For, in the first place, silicosis was not one of the diseases mentioned in the Fifth Schedule, and, in the second

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place, she had ceased to be employed in an employment to the nature of which her disease was due - or indeed in any employment - very much more than twelve months before her disablement.

The Workers Compensation Act 1946 (Act No. 5128) came into force, by virtue of a proclamation, on 1st September 1946. This Act effected an alteration of general importance in the law by substituting for the words "out of and in the course of the employment" in s.5 of the Act of 1928 the words "out of or in the course of the employment". What is material in the present case, however, is that by s.8 it greatly enlarged the scope of a worker's right to compensation in respect of industrial diseases. I will set out in a moment the amended section as it now appears in the consolidating Act of 1951. For the present it is enough to say that the enlargement was two-fold. Any disease which could be shown to be due to the nature of the employment of a worker became a compensable disease. And the time limit of twelve months disappeared, so that, in cases to which the new section applied, it ceased to matter how long before the disablement the worker had ceased to be employed in an employment to the nature of which the disease was due.

The Workers Compensation Act 1951 came into force by virtue of a proclamation on 19th December 1951. It was a consolidating Act. It repealed (subject to a saving clause) all prior legislation, including the Act of 1946. It then, so far as industrial diseases were concerned, re-enacted the pre-existing provisions, embodying without alteration the amendments effected in 1946. Section 5(1) contains the provision which gives the general right to compensation. It reads:- "If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of this Act." Section 9 provides for the amount or rate of compensation which is to be payable "where the worker's death results from the injury" and "where the worker's total or partial incapacity for work results from the injury". Section 12 reproduces the old s.18, as amended in 1946. It provides:- "(1) Where - (a) a medical practitioner certifies that a worker is suffering from a disease and is

thereby disabled from earning full wages at the work at which he was employed; or (b) the death of a worker is caused by any disease - and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement, then subject to the provisions hereinafter contained the worker or his dependants shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident." Section 14 provides:- "The compensation shall be recoverable from the employer who last employed the worker prior to the date of disablement in the employment to the nature of which the disease was due, and notice of the death or disablement shall be given to that employer and may be so given notwithstanding that the worker has voluntarily left his employment:" There are three provisoes. The first may be summarised by saying that it requires the worker or his dependants to supply to the last employer in what may be shortly called the hazardous employment information as to all other employers who have employed the worker in the hazardous employment, and provides that, if such information is not supplied, that last employer, if he can prove that the disease was not contracted in his employment, shall not be liable to pay compensation. The second provides that the last employer may join any other employer as a party to proceedings before the Board, and, if he proves that the disease was in fact contracted in the employment of that other employer, that other employer shall be the employer from whom compensation is recoverable. The third provides that, if the disease is of such a nature as to be contracted by a gradual process, any other employers who have employed the worker in the hazardous employment shall be liable to make to the employer from whom compensation is recoverable such contributions as the Board may determine. Section 16 provides for cases in which the employer who last employed the worker in a relevant employment is dead or cannot be found or (in the case of a company) has been wound up. Section 18 provides:- "The amount of the compensation shall be calculated with reference to the earnings of the worker while at work under the employer from whom the compensation is recoverable." Section 20 provides:- "The date of disablement shall be deemed to be such date as the medical practitioner

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certifies as the date on which the disablement commenced or if he is unable to certify such a date the date on which the certificate is given."

Before approaching the question at issue there are two things to be said about Dr. Grice's certificate. It certifies that the appellant is "disabled from earning full wages at the work at which she has been employed". The words of s.12 are "was employed", not "has been employed", but this is of no importance. The certificate must be taken to refer to the employment of the appellant by the respondent. Of possibly greater importance is that the certificate is defective in that it does not state any date as the date of the commencement of the disability. It merely states that the disablement commenced "about 1950", and even that statement is qualified by the words "according to the history given." It may be that in strictness s.20 of the Act ought to be held to apply, and the date of the commencement of the disability taken to be the date of the certificate. The case, however, has been conducted before the Board and in both courts on the footing that the certificate is formally correct and that the disability commenced not later than the end of 1950.

The appellant's argument has the attractiveness which commonly attends simplicity. She says that her case falls literally within the terms of s.12(1). A medical practitioner has ceritifed that she is suffering from a disease, and is thereby disabled from earning full wages at the work at which she was employed by the respondent from 1931 to 1938. The disease is admitted or proved to be due to the nature of her employment with the respondent. It follows, she says, that she is entitled to compensation under the Act, and the disease is to be treated, for the purposes of s.5 and s.9, as an injury which arose, when disablement supervened, out of or in the course of her employment with the respondent. The compensation is recoverable from the respondent by virtue of s.14, and the amount is to be calculated, under s.18, by reference to her earnings while at work under the respondent.

The appellant says that the view outlined above is inescapable on the clear language of the Act except by reading into s.12(1) some arbitrary qualification. She further says that that view does

not involve giving to s.12(1) any retrospective operation. The giving of the certificate, which is the primary foundation of her right, is an event which took place after the commencement of the Act of 1951. If we should test retrospectivity by reference to any other fact or event than the giving of the certificate, it can only be, she says, by reference to the occurrence of her disability. And, although that event occurred before the commencement of the Act of 1951, it occurred after the commencement of the Act of 1946, and gave her, she says, a right which is preserved by s.2(2) of the Act of 1951. That subsection provides (to put it shortly) that, notwithstanding the repeal of the Act of 1946, all circumstances existing under that Act shall continue to have the same operation and effect under the Act of 1951 as they would have had under the Act of 1946 if it had not been repealed. The construction of an amending Workers Compensation Act which makes it apply in respect of an "accident" or "injury" occurring after its commencement, but not in respect of an "accident" or "injury" occurring before its commencement, is, of course, familiar: see, e.g. Kraljevich v. Lake View & Star Ltd. (1945) 70 C.L.R. 647 and cases there cited, and cf. Mynott v Barnard (1939) 62 C.L.R. 68.

The respondent urges that to adopt the appellant's construction would be to give to the Act of 1946 or the Act of 1951 a retrospective effect and to make it operative in many cases in a manner most unjust to an employer. The liability which the Acts impose is imposed as an incident of the employment of workers by an employer. Surely there is a very strong presumption that the legislature did not intend - either in 1914, when the first Act was passed, or in 1946, when the relevant amendment was made - to impose a new liability as an incident of an employment which had ceased long before the relevant Act became law. The appellant was employed by the respondent in a hazardous employment from 1931 to 1938. During that period the potential liability of the employer which was an incident of that employment was, so far as industrial diseases are concerned, limited to a list of specific diseases which did not include silicosis, and it was further limited to cases in which the incapacity or death of a worker occurred within twelve months of the worker's ceasing to be employed by it. It is impossible, says the respondent, to

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suppose that the legislature, when eight years later it greatly extended the potential liability of an employer of workers in a hazardous employment, intended to attach that extended liability to an employment which had long since ceased. The presumption against such an intention is, it is said, strongly fortified when regard is had to the position in relation to insurance. An employer would normally, of course, wish to insure himself against his liability under the Acts, and in fact insurance has always been compulsory under the Acts. But how could an employer in 1938 insure himself against a liability which did not exist? The respondent could, and presumably did, insure itself against all potential liability in respect of industrial diseases under s.18 of the Act of 1928. But it could not be expected to insure itself in 1938 against what was not even a potential liability until the Act of 1946 became law. It might perhaps be suggested that he could, in each year after 1946, have insured himself against the new potential liability to workers employed by him in the past. But such a view seems altogether unrealistic. The insurance required by s.37 of the Act of 1928 was (as it still is) an insurance against liability to individual workers, and the penalty for non-compliance was (as it still is) a specified sum "in respect of each uninsured worker employed". A large employer of labour with a large "turnover" of labour would, in order to be safe, have to insure himself against the new potential liability in respect of every worker employed by him over a long period of years - he could not know how many years - in the past.

But, whatever may be thought of the position with regard to insurance, it is quite clear that the appellant's construction of the Acts of 1946 and 1951 does mean that a liability may be imposed on an employed in respect of something - viz. the actual or presumptive contraction of an industrial disease in his employment - which happened long before the Act of 1946 became law. It is also quite clear, as a matter of law, that such a construction, which gives to the Act an operation retrospective in the relevant sense, is to be avoided if a construction which will give it a merely prospective operation is reasonably open. I do not think that there is any serious difficulty in so construing the relevant section as to give it

a merely prospective operation.

One view which was said to avoid "retrospective" operation (though it was not pressed before us) was that the appellant was not a "worker" within the meaning of the Act for the very simple reason that she had not been employed by anybody since 1938. This view does not seem to me to be tenable. As Gavan Duffy J. said, "An applicant must be a 'worker', but only in respect of the injury he has sustained. He is claiming in his character of 'worker'." The view thus rejected is indeed inconsistent with Blatchford v. Staddon and Founds (1927) A.C. 461 and other cases of high authority.

The view of the majority of the Full Court was, as I understand it, that the amendment made in 1946 applied, on its true construction, only to cases where the worker had been employed after the commencement of the Act of 1946 in an employment to the nature of which the disease was due. It did not apply where the only relevant hazardous employment had ceased before the commencement of the Act. This view is, in my opinion, correct.

As Lord Sumner explained in Blatchford v. Staddon and Founds (1927) A.C. 461, the legislature, when it decided to make industrial diseases compensable, could not, because of the very nature of such diseases, simply provide that the contraction of such a disease should be treated as the equivalent of what may be called a traumatic accident or injury. On the other hand, it did not choose to enact a separate and self-contained "code" for such diseases, but took the course of giving the right to compensation in respect of such diseases by reference to the general provisions for cases of accidental injury, engrafting on them certain special provisions or modifications which the nature of the case seemed to require. The root of the difficulty with which the legislature had to deal lay in the fact that an industrial disease may be acquired in a particular employment, but may not produce incapacity, or manifest itself at all, until many years later. In the meantime the worker may have been employed by a number of employers in the hazardous employment, and it may be quite impossible to say in which of those employments the disease was in fact contracted. The solution of the difficulty was found in

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requiring the worker to prove no more than that the disease is "due to the nature of an employment in which he was employed at any time before disablement." If he can prove this, he is given a right to compensation, and the employer liable is "the employer who last employed him in the employment to the nature of which the disease is due." That employer may be able to shift the liability on to the shoulders of another employer, or he may be able to obtain contribution from another employer or other employers, but the only employer with whom the worker is primarily and directly concerned is the last employer in the hazardous employment.

It would seem to follow, as a matter of general principle, that the legislation on which the appellant founds her claim should be construed as limited in the application to cases where the relevant employment - the last employment to the nature of which the disease is due - is an employment subsisting after that legislation came into force. The general rule may for present purposes be stated by saying that an enactment is prima facie to be construed as not attaching new actual or potential legal consequences to facts which have ceased to exist before it came into force. The fact to which new potential legal consequences are attached here is the employment of a worker in an employment of a particular nature. That fact had ceased to exist, before the Act of 1946 came into force.

The view expressed above is, I think, strongly supported - if not indeed directly suggested - by the words "as if the disease were a personal injury by accident arising out of or in the course of the employment." In considering these assimilating words, it will make for clarity if we go back to the original Victorian Act of 1914. They have not been altered since, and, although s. 5, which gives the general right to compensation for accidental injury, has been altered in several respects, there has been no alteration which is material for present purposes.

Before the Act of 1914 there had been in Victoria no such thing as workers' compensation as we know it. Part III of the Employers and Employees Act 1886, following the English Employers' Liability Act, 1880, had modified the common law in certain not unimportant respects, but the Act of

1914 introduced an entirely novel idea into the law. Section 5 (1), which has been set out above, gave a general right to compensation to workers injured in their employment. Section 18, which also has been set out above, dealt with industrial diseases. It did not completely define the right of a worker to compensation in respect of an industrial disease. It gave him that right by reference to the general provisions of s. 5 (1).

Now, it may be taken as clear that s. 5 (1) is looking only to the future. It is impossible to construe it as imposing this entirely novel liability on an employer except in respect of accidents occurring after it came into force. And, because the accident must occur in an employment, s. 5(1) imposes that liability only in relation to an employment subsisting after it came into force. Such is the plain meaning of s. 5(1), and it is hardly necessary to invoke any rule of construction. Section 5 (1) cannot be read as applying to an accident occurring in an employment which had ceased before it came into force. Then, when s. 18 in effect equates an employment-disease to an employment-accident; it seems natural and right to infer that the same, or a corresponding, temporal limit of operation is intended. It seems natural and right to say that, just as s. 5 does not apply to an accident occurring in an employment which had ceased before it came into force, so s. 18 does not apply to a disease attributable actually or presumptively to an employment which had ceased before it came into force. The position in this respect is not, I think, affected by the provision in s. 18 that the disability shall be treated as the happening of the accident. The purpose of that provision is merely to fix the date of disablement as the date from which compensation is payable: see Keary v. Archibald Russell Ltd. (1915) S.C. 672, approved and applied in Victoria Insurance Co. Ltd. v. Junction North Broken Hill Mine (1925) A.C.354.

It has seemed to me to make for simplicity if we approach the matter by looking at the original Act of 1914. The relevant sections have been amended in several respects since 1914, but it is ovbious that precisely the same considerations apply when we are dealing with the amendment effected by the Act of 1946 or with the Act of 1951.

No surprising or untoward consequences appear

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to me to follow from the view which I have expressed. It was suggested that one result of adopting it would be (because the Act of 1946 repealed the old s. 18) to leave without any right to compensation a worker who before the Act of 1946 became law contracted a Fifth Schedule disease which did not disable him or manifest itself until after that Act became law. Such a worker, it was said, would have no claim under the repealed law, and would have no claim under the new law unless he had been employed after the Act of 1946 became law in an employment to the nature of which the disease was due. It is clear, in my opinion, that no such result follows. The position of such a worker would be governed by the law as it existed before the Act of 1946 came into force. His right arises from the actual or presumptive contraction of a disease in a particular employment, and that right would, notwithstanding the repeal of the old s. 18, be preserved to him by s. 8(2)(c) of the Acts Interpretation Act 1928.

It was also suggested that, on the construction which I have adopted, the new s. 18, introduced in 1946, could not, so far as it extended the rights of workers, have any effective operation for many years after its enactment. I am unable to accept this argument. If it were correct, it would mean that the old provision with the twelve months limit, which has never been altered in England, was in Victoria, and always has been in England, practically futile. That this is not so is shown by innumerable reported cases. The argument assumes that no industrial disease will manifest itself and create disability until - as in the case of the present appellant - many years have passed since it was actually contracted. There is no justification for any such assumption. The amendments of 1946 will apply to every case in which the disability of a worker is due to the nature of an employment in which he has been engaged since those amendments became law. Such a disability may, I should suppose, manifest itself soon or late - more or less immediately or many years later - and I can see no sound reason in any such consideration for inferring that the legislature, in enacting the Act of 1946, intended to make an employer liable by reference to something which occurred before its commencement.

A considerable number of authorities were cited in argument, but it is necessary, I think, to refer only to one or two of them. The judgment delivered by Lord Wrenbury for the Privy Council in Victoria Insurance Co. Ltd. v. Junction North Broken Hill Mine (1925) A.C. 354 has been the subject of a certain amount of controversy since the judgment of Scrutton L.J. in Ellerback Collieries Ltd. v. Cornhill Insurance Co. (1932) 1 K.B. 401, but it is sufficient to say that it is binding on this Court. It has, in my opinion, only a very indirect bearing on the present case. The view which I take is in accord with the decisions in Greenhill v. Daily Record, Glasgow Ltd. (1909) 2 B.W.C.C. 244 and Bellambi Coal Co. Ltd. v. Clark (1953) 53 S.R. (N.S.W.) 440, which are not, of course, binding on this Court, but which were, in my opinion, correctly decided.

The only other decision to which I think it necessary to refer is the decision of the Victorian Workers' Compensation Board in Miller v. J.W. Handley Pty. Ltd. (1948) 2 Workers Compensation Board Decisions 134. His Honour, Judge Dethridge, in giving the reasons of the Board for its award in favour of the appellant in the present case, referred to this decision, and really, I think regarded it as covering the present case. The decision in Miller's Case was, in my opinion, on the facts found, correct, and I would with respect agree with most of what was said by his Honour, Judge Gamble, in giving the reasons of the Board for that decision. But it seems to me to be perfectly consistent with the view which I take of the present case. In Minner's Case the worker was in the employment of the respondent employer on and after the date of commencement of the Act of 1946 and was indeed still in that employment when she obtained her certificate of disablement. It was, however, proved that she had actually contracted the disease (tuberculosis) before the date of commencement of the Act, and the argument for the respondent was that the Act should be construed, in order to avoid retrospective operation, as not applying to cases where the disease was shown to have been contracted before it came into force. The Board rejected this argument, but the reasons given indicate that it was fully conscious of what I would regard as the plain point of distinction between that case and the present case. His Honour said:- "When it is borne in mind that under S. 18 primary liability

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is placed upon the last employer in that particular kind of employment just because he is the last such employer, it is clear that the actual date of the contraction of the disease is as between the worker and the employer wholly irrelevant." I would entirely agree with this. He then listed the allegations which the claimant worker had to prove as these:- "(1) that the applicant is a worker, (2) that a medical certificate was given that she is suffering from a disease, (3) that she is disabled by such disease, (4) that the disease was due to the nature of her employment, (5) that the respondent was the last employer in an employment of the nature described." He proceeded:- "All these matters happened, or came into existence after 1st September 1946, and to apply the Act to them is in no sense to give the Act retrospective operation." In the present case the fifth of the stated alleganda et probanda is a fact which existed before, and only before, the amending Act came into force, and to apply the Act to this case would be to give it retrospective operation in the relevant sense.

There is one passage in the decision of the Board in Miller's Case with which I am quite unable to agree. That is the paragraph (at p.140) which begins:- "In its original form section 18 of the Act limited the period over which the respondent or respondents could go back in time to 12 months from the date of disablement. This is a matter of express statutory enactment in our opinion giving the section retrospective operation for that period and for that purpose." I would agree, of course, that the amendment of the section by substituting "at any time" for "within the twelve months" cannot affect the construction of the section for present purposes. But to say that the reference to the twelve months gave the section a retrospective operation to the extent of that period and that the amendment extended the period of retrospectivity, is, with respect, to beg the question. As Herring C.J. and Smith J. have pointed out, the references to time in the original section and in the amended section have no bearing on any question of retrospective operation. They are concerned with the period anterior to disablement within which the worker must have been engaged in the employment to the nature of which the disease is due. They cannot

affect in any way the entirely different question whether the section applies at all to a case where the worker has not been engaged in any such employment after the commencement of the Act.

For the reasons given I am of opinion that this appeal should be dismissed.

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(c) Reasons for Judgment of Fullagar, J., 2nd March 1959 - continued.

REASONS FOR JUDGMENT

(d) HIS HONOUR MR. JUSTICE TAYLOR.

(d) Reasons for Judgment of Taylor, J., 2nd March 1959.

The difficulty in this case is the inevitable result of the often noticed ineptness of making provision with respect to compensation for so-called occupational or industrial diseases by attempting to assimilate cases of this character to cases of "injury by accident" - or "injury" - in the course of employment. This, of course, is what section 12 of the Workers' Compensation Act 1951 attempts to do when it provides that, upon an appropriate certificate being given in respect of a worker suffering from a disease which is due to the nature of any employment in which he was employed at any time prior to the date of disablement, "the worker ... shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident". This section was amended in 1953 by the omission of the words "by accident" and by the substitution of the words "the injury" for the words "the accident". The "basal provision", or that which gives to workers the general right to compensation for injuries arising out of or in the course of their employment, is section 5 (1) and it is to this provision that a worker suffering from an occupational disease is relegated by the provisions of section 12. Accordingly, it seems to me, it is upon the provisions of section 5 (1) that his right to payments of compensation must ultimately depend. Substantially

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the question in the present case is whether the appellant, with the aid of section 12, is in a position successfully to assert that, in an employment to which section 5 (1) of the Act applies, she sustained personal injury arising out of or in the course of that employment. Whichever way this question is answered anomalies will result but I agree with my brother Fullagar in thinking that this contention cannot be made good.

Under section 5 (1) a worker may establish a right to compensation by showing that he has sustained an injury in the course of his employment and in undertaking this task he will of course have the benefit of the provisions contained in section 8 of the Act. Compensation under section 5 (1) may be recovered whether the injury is traumatic in origin or whether it is the result of a disease or the aggaravation acceleration or recurrence of any pre-existing injury or disease. But in each of these types of cases it is essential that the necessary connection between the so-called injury and a relevant employment be established. Section 12, however, does not in terms depend for its operation upon proof of any actual relationship between a worker's employment and the disease from which he is found to be suffering; it is sufficient if "the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement". Then when the prescribed conditions are found to exist he "shall be entitled to compensation under this Act as if the disease were a personal injury arising out of or in the course of that employment". But, in my view, section 12 is, in effect, no more than a "deeming" provision, which, in appropriate circumstances, will enable a worker to bring his case, not otherwise within the provisions of section 5 (1), within the provisions of that section. In effect he is put in the same position as if he had sustained personal injury arising in the course of his employment. But it would be a strange result if in the first two types of cases referred to compensation could be recovered under section 5 (1) only in respect of injuries arising out of an employment after the commencement of the Act whilst, in the case of a worker suffering from an industrial disease and whose right ultimately depends upon section 5, it is immaterial whether the relevant employment was

before or after that event. I am unable to accept the view that the right to compensation in such a case is solely dependent upon section 12 and for the reasons which I have briefly stated the appeal should, in my opinion, be dismissed.

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(d) Reasons for Judgment of Taylor, J., 2nd March 1959 - continued.

REASONS FOR JUDGMENT

(e) HIS HONOUR MR. JUSTICE WINDEYER

(e) Reasons for Judgment of Windeyer, J., 2nd March 1959.

The question in this case arises under the consolidating Workers Compensation Act 1951 (No. 5601), as amended in 1953 by Acts Nos. 5676 and 5715. But the problem really arises as a result of the Workers' Compensation Act 1946 (No. 5128). That Act substituted a new s. 18 for the previously existing s. 18 of the Workers' Compensation Act, 1928, the then principal Act. This s. 18 is now s. 12 (1) of the 1951 Act; but for the solution of this matter we must, I think, take our stand at 1946. Whatever rights the appellant got under the 1946 enactment were preserved for her by s. 2 of the 1951 Act; and that Act did not improve her position from what it was when the 1946 enactment came into operation on 1st September 1946. The difficulty in this case lies in deciding within what period of time the events and circumstances which under the Act artificially assimilate industrial diseases to traumatic injuries must have happened or existed. Immediately before the enactment of s.18 in 1946 only certain industrial diseases were compensable; and silicosis was not one of them. Moreover, a compensable disease could then produce entitlement to compensation only if the disablement resulting from the disease occurred while the worker was employed in the work of the kind which caused the disease, or had been so employed within twelve months of the date of disablement. In 1946 this was radically changed. By the new s. 18, firstly, all industrial diseases became compensable; and secondly, a worker was to be entitled to compensation if he became disabled

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(e) Reasons for Judgment of Windeyer, J., 2nd March 1959 - continued.

by an industrial disease at any time after being in the employment causing the disease, and not only when the disablement occurred within twelve months.

An applicant for compensation must after 1946 establish that "the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement". To avoid giving this provision any retrospective effect it might be construed as meaning "any employment in which (after the enactment came into operation) the worker was employed at any time". But the manner of the 1946 amendment was to substitute a new s. 18 for that in the existing Act. The actual or prospective rights it gave to workers were thus introduced into an existing system of compensation. I have found this a difficult case. Judgments given in other cases more or less comparable with this are not all easily reconcilable; but I have come to the conclusion that to determine who are entitled to the benefit of the rights given by the 1946 amendment the language of the statute should be applied quite literally, reading s. 18 in the context into which it was inserted. The words "at any time" then seem to me decisive. They no doubt were inserted to replace the former limitation of twelve months; but, in my view, these words when originally enacted gave a retroactive operation at the outset to the provisions concerning disability arising from industrial disease, the limit of retrospectivity being twelve months. The possible consequences of the extension made in 1946 may not have been in contemplation. To create a liability in an employer in cases where the employment had ceased years earlier, as here, might certainly cause considerable hardship for the employer; and this result was perhaps not intended by the Legislature. But I do not feel that, in all the circumstances, any general presumption against retrospectivity should displace or qualify what I consider to be the express meaning of the words.

I do not think it necessary under the section that an applicant be actually in employment at the time of the medical certificate or of the disablement. I may add, although the question does not arise here, that, as I read the section, it would always be open to an employer to contend that an applicant for compensation had not contracted a

disease at all. The worker must prove that "the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement"; and the employer could, I think, contend that the medical certificate was based on a mistaken diagnosis. Furthermore, in my view the effect of the section is to bring persons who become disabled by industrial disease within the purview of the Act. They become entitled to compensation "as if the disease were a personal injury by accident". It is, I think, necessary to measure the entitlement according to s. 9 as affected by s. 18 of the 1951 Act.

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(c) Reasons for Judgment of Windeyer, J., 2nd March 1959 - continued.

I would allow the appeal.

No.11 - ORDER

No.11

Order, 2nd March 1959.

ORDER OF THE FULL COURT OF THE HIGH COURT OF AUSTRALIA ALLOWING APPEAL 2nd March 1959.

IN THE HIGH COURT OF AUSTRALIA PRINCIPAL REGISTRY) No. 18 of 1958

B e t w e e n :

IRIS DOREEN NASH (Applicant) Appellant

- and -

SUNSHINE PORCELAIN POTTERIES PROPRIETARY LIMITED (Respondent) Respondent

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BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON, MR. JUSTICE McTIERNAN, MR. JUSTICE FULLAGAR, MR. JUSTICE TAYLOR and MR. JUSTICE WINDEYER.

MONDAY THE 2ND DAY OF MARCH 1959

THIS APPEAL from the order made on the 21st day of March 1958 by the Full Court of the Supreme Court of the State of Victoria upon the hearing of

In the Full Court of the High Court of Australia

No.11

Order, 2nd March 1959 - continued.

a Case Stated by the Workers Compensation Board dated the 17th day of December 1957 wherein Iris Doreen Nash was Applicant and Sunshine Porcelain Potteries Proprietary Limited was Respondent coming on for hearing before this Court at Melbourne on the 16th, 17th and 20th days of October 1958 pursuant to special leave to appeal granted by this Court on the 15th day of May 1958 UPON READING the transcript record of the proceedings herein AND UPON HEARING Mr. Gowans of Queen's Counsel and Mr. Griffith of Counsel for the Appellant and Mr. Menhennitt of Queen's Counsel and Mr. C.W. Harris of Counsel for the Respondent THIS COURT DID ORDER on the said 16th day of October 1958 that the proceedings in this appeal be amended by the insertion of the word "Proprietary" immediately before the word "Limited" in the title of the Respondent AND THIS COURT DID FURTHER ORDER on the said 20th day of October 1958 that this appeal should stand for judgment AND the same standing for judgment this day accordingly at Melbourne THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the said order of the Full Court of the Supreme Court of the State of Victoria be and the same is hereby set aside AND in lieu thereof THIS COURT DOTH ORDER that the question of law submitted for the opinion of the said Full Court be answered as follows, namely:-

QUESTION -

Whether upon its findings of fact the Board was justified in law in making the said award or any and what part of it

ANSWER -

Yes

AND THIS COURT DOTH FURTHER ORDER that the costs of the Appellant of the proceedings in the Supreme Court of the State of Victoria and of the appeal to this Court be taxed by the proper officers of the respective Courts and when so taxed and allowed be paid by the Respondent to the Appellant AND THIS COURT DOTH FURTHER ORDER that the sum of Fifty pounds (£50) lodged as security for the costs of this appeal be paid out of Court to the Appellant or to her solicitors Messrs. Maurice Blackburn & Co.

By the Court. M. DOHERTY.

PRINCIPAL REGISTRAR.

In the Privy Council

No.12

Order of Her Majesty in Council granting special leave to Appeal, 16th March 1960.

No.12 - ORDER OF HER MAJESTY IN COUNCIL GRANTING SPECIAL LEAVE TO APPEAL

AT THE COURT AT BUCKINGHAM PALACE

The 16th day of March, 1960.

P R E S E N T

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD CHANCELLOR
LORD PRESIDENT
SIR MICHAEL ADEANE
CHANCELLOR OF THE DUCHY OF LANCASTER
MR. SECRETARY BUTLER.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 7th day of March 1960 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Sunshine Porcelain Potteries Proprietary Limited in the matter of an Appeal from the High Court of Australia between the Petitioners Appellants and Iris Doreen Nash Respondent setting forth (amongst other matters) that the proceedings between the parties commenced before the Workers Compensation Board of Victoria with an application by the Respondent for compensation in respect of the disease of silicosis from which she suffered as a result she alleged of exposure to dust containing silica during her employment by the Petitioners: that the Board made an award of compensation in her favour in the form of weekly payments: that the Petitioners appealed by way of Case Stated on a question of law to the Full Court of the Supreme Court of Victoria seeking an answer to the question "Whether upon its findings of fact the Board was justified in law in making the said award or any and what part of it?" and that Court answered the question in favour of the Petitioners - "No": that the Respondent appealed to the High Court of Australia and that Court by its Judgment dated the 2nd May 1959 allowed the Appeal and reversed the decision of the said Supreme Court: that the issue is whether or not a change made in September 1946 in the provisions of the Victorian Workers Compensation

In the Privy Council

No.12

Order of Her Majesty in Council granting special leave to Appeal, 16th March 1960 - continued.

Acts is to be given a retrospective operation so as to impose upon employers in respect of events which occurred prior to September 1946 a liability which such employers did not have prior to that date: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the said Judgment of the High Court of Australia dated the 2nd day of May 1959 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His Late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar on behalf of the Respondent Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Australia dated the 2nd day of May 1959 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs and upon the condition that the Petitioners pay the Respondent's costs of the Appeal in any event:

"And Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. AGNEW.