Privy Council Appeal No. 25 of 1986

Co-operative Bulk Handling Limited *Appellants*

v.

Albert Stuart Jones *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MARCH 1987

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
LORD MACKAY OF CLASHFERN
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Keith of Kinkel**]*

This appeal from the Full Court of the Supreme Court of Western Australia is concerned with the proper interpretation of clause 17(1) of the First Schedule to the Workers' Compensation and Assistance Act 1981 of Western Australia ("the Act of 1981"), as it stood before being amended by the Workers' Compensation and Assistance Amendment Act (No. 2) 1986.

Section 18 of the Act of 1981 provides that if a disability of a worker occurs, the employer shall, subject to the Act, be liable to pay compensation in accordance with Schedule 1 to the Act, which is headed "Compensation Entitlements".

The provisions of the unamended Schedule 1 relevant for present purposes are as follows:-

"7.(1) Subject to section 56 and sub-clause (3) when total incapacity for work results from the disability a weekly payment during the incapacity equal to the weekly earnings of the worker calculated and varied in accordance with this Schedule.

(2) ...

(3) An entitlement of a worker to weekly payments for a disability under this Act ceases if and when the total weekly payments for that disability reaches the prescribed amount, unless the Board has made or makes an order to the contrary under section 122, and there shall be no revival of, or increase in, that entitlement upon any subsequent increase in the prescribed amount.

(4) Nothing in sub-clause (3) affects the liability of an employer for, and the entitlement of a worker to, expenses as are provided for in clauses 9, 17, 18, and 19 but subject to the limitations on those expenses as provided in clause 17(1).

(5) ...

(6) ...

17. In addition to weekly payments of compensation payable, a sum is payable equal to the reasonable expenses incurred in respect of -

(1) first aid and ambulance or other service to carry the worker to hospital or other place for medical treatment; medicines and medical requisites; medical or surgical attendance and treatment, including where necessary, medical or surgical attendance and treatment by specialists; dental attendance and treatment; physiotherapy or chiropractic attendance and treatment; other attendance and treatment by way of rehabilitation; charges for hospital treatment and maintenance, in accordance with clause 18 but not including charges for a nursing home unless a medical practitioner certifies that the worker is totally and permanently incapacitated and requires continuing medical treatment and maintenance which cannot be administered in the worker's domestic environment; the provision of hearing aids, artificial teeth, artificial eyes, and where the disability renders their use necessary, spectacles or contact lenses, but not exceeding, in the aggregate, a sum equal to 10% of the prescribed amount, unless the Board finds, that in the particular circumstances of the case, the amount for such expenses is inadequate, and there shall be no revival of, or increase in, the entitlement to such expenses upon any subsequent increase in the prescribed amount; ..."

The respondent, who was born on 19th June 1919, sustained in the course of his employment with the appellants, on 26th August 1982, an accident which left him with a disability in the shape of complete paraplegia below the level of the 7th thoracic vertebra. He became totally and permanently incapacitated for work. Following the accident the respondent received from the appellants, under clause 7(1) of Schedule 1 to the Act, weekly payments totalling between $22,000 and $30,000. By virtue of section 56 of the Act of 1981, the payments ceased on 19th June 1984, when the respondent attained the age of 65 years. The respondent then became entitled to a repatriation pension comparable in amount to an invalid pension.

The respondent's condition naturally necessitated very heavy expenses by way of hospital charges and medical treatment. He has been for a considerable time an inmate of the Royal Perth Hospital Quadriplegic Centre at Shenton Park, Western Australia, and is likely to remain so for the rest of his life. The appellants have paid the respondent the sum of $35,884 towards these expenses. That sum in itself greatly exceeds the limit of "10% of the prescribed amount" mentioned in clause 17(1) of Schedule 1. At the material time the prescribed amount was $70,236, so that 10% of it was $7,023.60.

On 21st June 1983 the respondent commenced proceedings before the Workers' Compensation Board (which is "the Board" referred to in Schedule 1 of the Act of 1981), claiming an increase pursuant to clause 17(1) of the Schedule over the limit of reasonable expenses for medical treatment and hospital charges payable to him by the appellants, on the ground that the amount for such expenses was inadequate in the particular circumstances of the case. He sought payment of expenses for such treatment and charges amounting in total to $55,470, additional to the sum of $35,884 already paid to him by the appellants.

On 7th November 1984 the Board dismissed the respondent's application, holding that there were no particular circumstances of the case such as would warrant the making of the order sought. In reaching its decision the Board took into account the circumstance that the respondent possessed savings of about $30,000 and also the circumstance that, in the view of the Board, (the correctness of which it is unnecessary to consider), a very substantial part of the charges for the respondent's hospital accommodation and treatment were recoverable by him from the Commonwealth Department of Health under Commonwealth legislation.

The respondent appealed to the Full Court which on 16th August 1985 by a majority (Wallace and Olney JJ., Kennedy J. dissenting) allowed the appeal and remitted the application to the Board to be dealt with according to law. The view of the majority was that under clause 17(1) the function of the Board was limited to ascertaining whether the expenses claimed were reasonable and whether they exceeded the limit laid down, namely 10% of the prescribed amount, and that the Board was not entitled to take into account, in considering the adequacy of the amount arrived at by application of the limit, the personal resources of the disabled worker or the availability of funds from other sources. The opposite view was taken by Kennedy J., who considered that the provisions of the latter part of clause 17(1) would otherwise have no sensible content. The employers now appeal, with leave of the Full Court, to Her Majesty in Council.

The issue which arises as to the proper construction of clause 17(1) is reflected in the division of opinion among the members of the Full Court. Their Lordships are satisfied that the view taken by the majority is correct. The words "the amount for such expenses" in clause 17(1) must refer to "a sum equal to 10% of the prescribed amount". No more than that sum is payable for reasonable expenses in respect of hospital charges and medical treatment unless the Board finds that that sum is inadequate. The question arises: inadequate for what? The answer can only be: inadequate to meet the expenses in question. It is a notable feature of the sub-clause that the Board is given no discretion to decide what particular sum over and above the limit is adequate to meet reasonable expenses and to award that sum. Upon the view that the Board is entitled, in considering adequacy, to take into account the applicant's own resources, it would have to follow that, if 10% of the prescribed amount taken together with those resources falls short by only a little of what is adequate to meet the expenses, nevertheless the whole amount of the expenses would, however large, be payable by the employer. If, on the other hand, the 10% plus the worker's own resources slightly exceeded the amount of the reasonable expenses, the employer would have to pay only 10%. In the former situation the worker's own resources would play no part in reducing the amount payable, while in the latter it might reduce it dramatically. The legislature cannot reasonably be taken to have intended such an anomalous state of affairs. The matter may be illustrated thus: Case A reasonable expenses \$117,023; 10% of prescribed amount \$7,023 + worker's own resources \$109,990 = \$117,013: all expenses payable by employer. Case B reasonable expenses \$117,023; 10% of prescribed amount \$7,023 + worker's own resources \$110,010 = \$117,033; only \$7,023 payable by employer. The absence of any

discretion given to the Board must have the result that the only function which the Board is required to perform is to make a finding of fact, namely as to whether or not 10% of the prescribed amount is adequate to meet the reasonable medical expenses of the worker. It is true that this conclusion does not give any important content to the words "in the particular circumstances of the case", but on no view of the matter can these words in themselves have the effect of enabling the Board to decide upon the amount exceeding 10% of the prescribed amount which is payable as being the sum adequate to meet the reasonable expenses. The words do have some content in respect that the circumstances of each case are different from the point of view of determining whether or not 10% of the prescribed amount is in itself adequate to meet the reasonable medical expenses.

The majority of the Full Court found support for their interpretation of clause 17(1) in *Denn v. Midland Brick Co. Pty. Ltd.* (1985) 58 A.L.R. 225. That was a decision of the High Court of Australia upon the construction of section 122 of the Act of 1981 (which has also now been amended by the Act of 1986), which provided that in the case of a disability resulting in total incapacity for work the Board may make such order as to the total liability of the employer for the incapacity "as the Board thinks proper in the circumstances", but not exceeding certain limits. This section has the effect that the employer may by order of the Board be made liable to continue to make weekly payments, notwithstanding that the total of payments so far made has reached the prescribed amount: (clause 7(3) of Schedule 1). The High Court held by a majority that it would be wrong to exercise the discretion conferred by section 122 as though the incapacitated worker was entitled to no more than what might be thought, taking into account other resources available to him, to be sufficient for his needs. Section 122 in terms confers a discretion on the Board. Clause 17(1) of Schedule 1 does not. The present case is therefore *a fortiori* of *Denn*.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs.