31 OF 1979

8/80

IN THE PRIVY COUNCIL

C.A. No. 148 of 1977

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

BETWEEN: T.H. BUSHBY

First Appellant

AND: GLENMORE PTY. LIMITED

Second Appellant

AND: SYDNEY BLAIR MORRIS, R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE and THE REGISTRAR OF THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES

Respondents

# RECORD OF PROCEEDINGS

---

SOLICITORS FOR THE FIRST AND SECOND APPELLANTS

Malcolm Johns & Company,
Level 38,
MLC Centre,
19-29 Martin Place,
SYDNEY.

By their Agents:

Charles Russell & Co.,
Hale Court,
Lincolns Inn,
LONDON. WC2A. 3UL

SOLICITORS FOR THE RESPONDENT,
SYDNEY BLAIR MORRIS

W.C. Taylor & Scott,
181 Elizabeth Street,
SYDNEY.

By their Agents:

Baker & McKenzie,
Crompton House,
95 Aldwych Street,
LONDON. WC 2B - 4SP

SOLICITORS FOR THE RESPONDENT,
THE REGISTRAR OF THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES

G.J. Curran,
Solicitor to the Commission,
131 Macquarie Street,
SYDNEY.

By his Agent:

Light & Fulton,
24 John Street,
LONDON. WC1N. 2DA.

Prepared by Young & Cooke, 70-70a Castlereagh St., Sydney

IN THE PRIVY COUNCIL                    C.A. No. 148 of 1977

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IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

| | | | | |
|---|---|---|---|---|
| C.A. | No. | 148 | of | 1977 |
| W.C.C. | No. | 8102 | of | 1974 |
| W.C.C. | No. | 3600 | of | 1975 |
| W.C.C. | No. | 9101 | of | 1975 |

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission

IN THE MATTER of determinations between -

Matter No: 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Respondents

Matter No: 3600 of 1975

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties

TAKE NOTICE that I MALCOLM NELSON JOHNS of Level 38, MLC Centre, 19-29 Martin Place, Sydney have been appointed the Solicitor for Glenmore Pty. Limited in the place of Alan William Blanch.

Documents may be served upon Glenmore Pty. Limited at Messrs. Malcolm Johns & Company, Level 38, MLC Centre, 19-29 Martin Place, Sydney.

FILED the 28th day of June, 1979.

for Malcolm N Johns

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SOLICITOR FOR GLENMORE PTY. LIMITED

Matter No: 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant

T.H. BUSHBY

Respondent

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of N.S.W. as an added party pursuant to Order of the Court of Appeal dated 2nd day of August, 1977.

NOTICE OF CHANGE OF SOLICITOR

MALCOLM JOHNS & COMPANY,
Solicitors,
Level 38,
MLC Centre,
19-29 Martin Place,
SYDNEY. N.S.W. 2000

Telephone: 231 4688

D.X. - 840 MNJ:MB:8

IN THE PRIVY COUNCIL C.A. No. 148 of 1977

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

BETWEEN: T.H. BUSHBY

First Appellant

AND: GLENMORE PTY. LIMITED

Second Appellant

AND: SYDNEY BLAIR MORRIS, R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE and THE REGISTRAR OF THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES

Respondents

RECORD OF PROCEEDINGS

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| SYDNEY BLAIR MORRIS | | |
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| DR. J.G. ALLMAN | | |
| Examined<br>Cross-Examined | | |
| DR. W.E. GIBLIN | | |
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| SYDNEY BLAIR MORRIS | | |
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| 2. Appearance by Glenmore Pty. Limited to the Summons of the Registrar of the Workers' Compensation Commission of New South Wales | | |
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| 6. Affidavit of James Michael Redman of Service of Notice of Motion for Conditional Leave to Appeal to Her Majesty in Council and two (2) Affidavits in Support thereof of Malcolm Nelson Johns on behalf of T.H. Bushby on R.D. George and F.W. McKern | 12 December, | 1977 |
| 7. Notice of Motion for Conditional Leave to Appeal to Her Majesty in Council by the Registrar of the Workers' Compensation Commission of New South Wales | 9 December, | 1977 |

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IN THE SUPREME COURT )
OF NEW SOUTH WALES ) C.A. No. 148 of 1977
COURT OF APPEAL )

IN THE MATTER of s. 37(4)(b) of The Workers' Compensation Act, 1926

IN THE MATTER of determinations between

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

and R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE 10

Respondents

Matter No. 3600 of 1975

SYDNEY BLAIR MORRIS

Applicant

and GLENMORE PTY. LTD.

Respondent

and R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties 20

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant

and T.H. BUSHBY

Respondent

## SUMMONS

In the matter of a case stated by The Workers' Compensation Commission of New South Wales, constituted by Williams J., of its own motion, claiming the decision or determination of the questions and matters stated for decision or determination in 30 the said stated case. The stated case is dated 3rd May, 1977.

1. Summons by Registrar

To the Parties - W.C. Taylor & Scott,
181 Elizabeth Street,
SYDNEY. N.S.W. 2000

J.P. Grogan & Co.,
14 Hunter Street,
HORNSBY. N.S.W. 2077

Hickson, Lakeman & Holcombe,
170 Phillip Street,
SYDNEY. N.S.W. 2000 10

Boyd, Johns & Curwood,
86 Pitt Street,
SYDNEY. N.S.W. 2000

You are liable to suffer judgment or an order against you unless the prescribed form of notice of your appearance is received in the Registry within 14 days after service of this Summons upon you.

By order made on the 25th October, 1976 by his Honour Judge Williams all proceedings upon application Nos. 3600 of 1975 and 9101 of 1975 in The Workers' Compensation Commission of New South Wales were stayed until after the hearing of these proceedings. 20

And by further order made on the 6th December 1976 by his Honour Judge Williams all proceedings made upon application No. 8102 of 1974 in The Workers' Compensation Commission of New South Wales were suspended until after the hearing of these proceedings.

Call over Date - 15th June, 1977
Court 7G at 9.15 a.m.

Address of the Registrar, The Workers' Compensation Commission of New South Wales — 131 Macquarie Street, SYDNEY. N.S.W. 2000 30

Address of Court of Appeal Registry — Level 5, Law Courts Building, Queen's Square, SYDNEY. N.S.W. 2000

DATED THIS 31ST DAY OF MAY 1977

Registrar
The Workers' Compensation
Commission of New South Wales 40

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

Term No. of 1977

IN THE MATTER of the Workers' Compensation Act, 1926.

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales, constituted by Williams J., of its own Motion, in pursuance of Section 37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission. 10

IN THE MATTER of determinations between -

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

and R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Respondents

Matter No. 3600 of 1975

SYDNEY BLAIR MORRIS

Applicant 20

and GLENMORE PTY. LIMITED

Respondent

and R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant

and T.H. BUSHBY

Respondent 30

Solicitors for the Applicant - W.C. Taylor & Scott,
181 Elizabeth Street,
SYDNEY. N.S.W. 2000

| | |
|---|---|
| Solicitors for the Respondents - and Third Parties, R.D. George, F.W. McKern (and C.F. Whitehouse) | J.P. Grogan & Co.,<br>14 Hunter Street,<br>HORNSBY. N.S.W. 2077 |
| Solicitors for the Respondent - Glenmore Pty. Limited | Hickson, Lakeman & Holcombe,<br>170 Phillip Street,<br>SYDNEY. N.S.W. 2000 |
| Solicitors for the Respondent - T.H. Bushby | Boyd, Johns & Curwood,<br>86 Pitt Street,<br>SYDNEY. N.S.W. 2000 |

10

IN THE WORKERS' COMPENSATION ) Matter No. 8102 of 1974
) Matter No. 3600 of 1975
COMMISSION OF NEW SOUTH WALES ) Matter No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a determination between

SYDNEY BLAIR MORRIS

Applicant

and R.D. GEORGE, F.W. McKERN
and C.F. WHITEHOUSE

Respondents 10

AND IN THE MATTER of a determination between

SYDNEY BLAIR MORRIS

Applicant

and GLENMORE PTY. LIMITED

Respondent

and R.D. GEORGE, F.W. McKERN,
and C.F. WHITEHOUSE

Third Parties

AND IN THE MATTER of a determination between

SYDNEY BLAIR MORRIS 20

Applicant

and T.H. BUSHBY

Respondent

CASE STATED

1. The Workers' Compensation Commission of New South Wales, constituted by Williams J., states this case of its own Motion pursuant to subsection 37(4)(b) of the Workers' Compensation Act, 1926, as amended, and refers to the Court of Appeal the questions of law set forth hereunder arising from proceedings before the Commission and the respective Awards and Orders 30 made by it in the abovementioned matters.

2. The three instant matters (and a claim made by the Applicant under section 18C of the Uninsured Liability Scheme, for the payment to him from the Fund of compensation that might be awarded against the abovenamed Respondents R.D. George, F.W. McKern and a further Respondent not joined as a respondent in this case, C.F. Whitehouse, and two further matters in which the Applicant claimed to be entitled to compensation under the Act from two Respondents, his former employers, namely Hull and Lowrey and D. O'Brian & Co. Pty. Limited) were all heard together on 11th and 19th March and 1st April 1976, when judgment was reserved. On 7th July 1976 judgment was given in the three above-mentioned matters the subject of this stated case, by the making of an Award in favour of the Applicant against each of the three above-mentioned Respondents, and certain Orders were also then made in connection with these Awards. As a matter of narrative only, the Commission in the exercise of its discretion declined to make any Order for the payment to the Applicant of any compensation from the Fund with respect to compensation the subject of the Award made by it against the abovenamed Respondents R.D. George and F.W. McKern, although it was found that they were uninsured against their liability to the Applicant under the Act at the time of the relevant injury.

3. As to the two further matters to which Hull and Lowrey and D. O'Brian & Co. Pty. Limited were Respondents, the Commission made in each case an incomplete Award consisting of findings only, the parties being given liberty to apply as to

further findings on some subsidiary, but undetermined, issues of fact.

4. C.F. Whitehouse, named as a Respondent in Matter 8102 of 1974, and in the Third Party Notice given by the Respondent Glenmore Pty. Limited in Matter 3600 of 1975, was stated by Counsel appearing for the Respondents R.D. George and F.W. McKern to be deceased. There was no evidence of the service upon him of the Applicant's Application for Determination, and of the Third Party Notice given by the Respondent Glenmore Pty. Limited, and no Award was entered against him. Accordingly, he is not joined as a respondent to this stated case. 10

5. At the time the several Awards and Orders were made on 7th July, 1976, the Commission stated to the parties in attendance that reasons for judgment would be published shortly after the then current Vacation. A long and unforeseen absence of the undersigned from his judicial duties from late in April 1976 delayed the making of the Awards and the publishing of reasons for judgment at the time the Awards were made. Shortly after the Awards were made, a further long and unforeseen absence from his judicial duties further delayed the publishing of the reasons for judgment until 30th November 1976. 20
Annexed hereto and marked with the letters 'A', 'B' and 'C' respectively are copies of the respective Awards and Orders made by the Commission in the matters the subject of this stated case. Also annexed and marked with the letter 'D' are the reasons for judgment published on 30th November 1976.

6. Copies of the respective Applications for Determination as filed by the Applicant, and the Answers to such Applications filed by certain of the abovenamed Respondents, are annexed hereto in the order in which the matters are set forth in the title hereto and marked with the letters 'E', 'F', 'G', 'H' and 'I' respectively. No Answer was filed by the abovenamed Respondents R.D. George and F.W. McKern at any time. A copy of the Third Party Notice given by the Respondent Glenmore Pty. Limited is annexed hereto and marked with the letter 'J'. 10

7. The respective Awards made on 7th July 1976 against each of the abovenamed Respondents were made in the order in which those matters appear in the title to this stated case, as is observed in page 7 of the reasons for judgment (annexure 'D'). In the result, the Award made against the Respondents R.D. George and F.W. McKern was pronounced prior to the Award made against the Respondent Glenmore Pty. Limited.

8. On 26th July 1976 the abovenamed Respondent Glenmore Pty. Limited appealed to the Court of Appeal from the Award made against it on 7th July 1976. On 23rd November 1976 the Applicant appealed to the Court of Appeal against the Award made on 4th November 1976 against D. O'Brian & Co. Pty. Limited. Requests for a stated case were made to the Commission after the publishing of the reasons for judgment by both the abovementioned Respondent Glenmore Pty. Limited and the Respondent T.H. Bushby, but not by the Respondents R.D. George and F.W. McKern. 20

9. These two requests for stated cases were lodged with the Commission long after the expiry date prescribed for the making of such requests under the Rules made under the Act. Such requests came on for hearing on 17th March 1977 and were adjourned upon the Commission intimating that it would give favourable consideration to stating a case of its own Motion upon questions of law arising from the proceedings. The two requests were subsequently withdrawn.

10. In his respective Applications against the first and third abovementioned Respondents, the Applicant alleged that on 16th November 1964 he had received an injury to his low back arising out of and in the course of his employment as a bricklayer with the first-mentioned Respondents, R.D. George, F.W. McKern (and C.F. Whitehouse), and that on 17th June 1966 he had received a further injury to his low back, arising out of and in the course of his employment as a bricklayer with the third-mentioned Respondent, T.H. Bushby. 10

11. The Respondents R.D. George and F.W. McKern failed to file with the Commission any Answer to the Applicant's Application. In the course of the hearing their case was conducted upon the basis that there was no dispute that the Applicant received the 1964 injury in the course of his employment with them. 20

12. The Answer filed by the Respondent T.H. Bushby did not deny that the Applicant had received the injury of 1966 in the course of his employment with that Respondent, and accordingly no issue upon that matter was raised in the proceedings.

13. The Application as filed against the Respondent

Glenmore Pty. Limited alleged that the Applicant was a worker employed by the Respondent company, and that the injury on 16th November 1964 was received by him in the course of his employment with it. The Answer filed by the Respondent Glenmore Pty. Limited (inter alia) denied that he was a worker employed by it and that the injury of July 1964 was received by him in the course of his employment by it. The Third Party Notice, however, given by the Respondent Glenmore Pty. Limited to the third parties, namely the abovementioned Respondents R.D. George, 10 F.W. McKern (and C.F. Whitehouse) stated as the grounds for its claim to be indemnified by the third parties that at the time of the injury in respect of which compensation was claimed by the Applicant he was not immediately employed by it but was employed by the Respondents R.D. George, F.W. McKern (and C.F. Whitehouse) in the execution of the work undertaken by the Respondent company in respect of which work it had contracted with the third parties for the execution thereof by or under them.

14. The proceedings between the Applicant and the Respondent 20 company were not conducted in conformity with the Application and Answer abovementioned. It was common ground in this case that the Applicant was not directly employed by the Respondent company at the time of the injury of the 16th November 1964, and accordingly the issue presented for determination was not whether the Applicant had received the abovementioned injury in the course of his employment with the Respondent company. The issue, in fact, presented for determination by the parties

in the course of the hearing was whether pursuant to section 6(3)(a) of the Act the Respondent company, as a principal within the meaning of the section, was liable to pay to the Applicant the compensation claimed by him for the alleged effects of the abovementioned injury. For the purposes of raising this issue, the Applicant's case was treated as being grounded (inter alia) upon the same allegations as the Respondent company had made in the Third Party Notice given by it to the Respondents R.D. George, F.W. McKern (and C.F. Whitehouse). 10

15. In the matters not the subject of this stated case, concurrently heard with the instant matters, the Applicant alleged that he had received a further injury to his back on and prior to 21st December 1972 arising out of and in the course of his employment as a bricklayer with the Respondents Hull and Lowrey, and that, in July 1974, he had received a further injury to his back arising out of and in the course of his employment as a bricklayer with D. O'Brian & Co. Pty. Limited.

16. As a result of each of the abovementioned injuries of 1964, 1966 and 1972, the Applicant claimed that he was either 20 totally or partially incapacitated for work as a result of each of these injuries during various closed periods between 22nd December 1972 and 16th July 1974, and totally incapacitated for work thereby from 17th July 1974 onwards. He also claimed that his total incapacity from 17th July 1974 resulted from the abovementioned injury received by him in the course of his employment with D. O'Brian & Co. Pty. Limited in July 1974.

17. In addition to weekly payments of compensation for the

abovementioned period of incapacity for work, the Applicant, claimed under section 10 of the Act, compensation for expenses incurred by him for medical, hospital and rehabilitation treatment from 1972 onwards, which he alleged had been reasonably necessary as a result of the effects of the respective injuries.

18. In issue in all cases, was whether such incapacity for work as the Applicant should be found to have had during the various periods, the subject of the particular claims, resulted from any of the alleged injuries, and whether the medical and other treatment he had received between December 1972 and the time of the hearing was reasonably necessary as a result of any of the alleged injuries. These issues involved a subsidiary question of fact whether the laminectomy operation performed upon the Applicant's spine in April 1968 had been reasonably necessary as a result of the first two injuries of 1964 and 1966, and whether the further operation performed upon the Applicant's spine on 23rd April 1975 was reasonably necessary as a result of the physical effects of the first two injuries, including the effects of the laminectomy operation in 1968, or of either of the alleged injuries of 1972 and 1974.

19. During the course of the instant proceedings the Applicant did not elect to pursue one only of the two respective claims brought by him against the Respondents R.D. George and F.W. McKern and, under section 6(3)(a) against the Respondent company.

20. Prior to the institution by the Applicant of his instant claims for compensation against the abovementioned Respondents,

Glenmore Pty. Limited and T.H. Bushby, the Applicant instituted, in 1964, proceedings in this Commission against the Respondent company claiming compensation from it in pursuance of the provisions of section 6(3)(a), with respect to incapacity for work and treatment alleged to have resulted from the abovementioned injury of 1964 received in the course of his employment with the abovenamed Respondents R.D. George, F.W. McKern (and C.F. Whitehouse, who was not then deceased). In the earlier proceedings, the Respondent Glenmore Pty. Limited joined in the proceedings under a Third Party Notice served by it, the employers R.D. George, F.W. McKern and C.F. Whitehouse, claiming an indemnity for any compensation awarded against it in such proceedings. The Applicant did not then, or at any time prior to the instant proceedings, make any claim for compensation against his employers R.D. George, F.W. McKern and C.F. Whitehouse with respect to the 1964 injury. Later, in 1967, the Applicant also instituted proceedings for compensation against the Respondent T.H. Bushby with respect to the abovementioned injury of 17th June 1966. Part of the period for which the Applicant claimed compensation for incapacity for work in each of the earlier proceedings included a period in which he was incapacitated for work as a result of the laminectomy operation on his spine performed in April 1968 for removal of a disc protrusion at the L4-5 level of his spine.

21. Both earlier claims were heard together by the Commission in 1968, and Awards were made in favour of the Applicant against both Respondents. The award of weekly payments of

compensation in each case included compensation for a closed period of total incapacity during a period commencing prior to the laminectomy operation and following it, and for partial incapacity for work for the period between 24th April 1968 and 2nd August 1968, but no award of weekly compensation after 2nd August 1968. Compensation was also awarded in each matter under section 10 of the Act.

22. A copy of the transcript of evidence in the instant proceedings, and exhibits 'A', 'B', 'C', 'D' and 'E' therein, are annexed hereto and marked respectively with the letters 'K', 'L', 'M', 'N', 'O' and 'P'. 10

23. There was no evidence in the instant proceedings that the earlier Awards had been the subject of any review or rescission, or the subject of any appeal.

24. The Commission held in the instant proceedings that the findings contained in Awards made in the earlier proceedings against the Respondent Glenmore Pty. Limited, and the Respondent T.H. Bushby, gave rise to issue estoppel in the instant proceedings between the same parties, so far as matters the subject of the findings were raised afresh for determination under the instant issues between them. Save as abovementioned, the oral and documentary evidence in the earlier proceedings was admitted as evidence, so far as relevant, in all instant matters then before the Commission. 20

25. The specific findings of the Commission in each of the three instant matters are to be found in the Awards annexed hereto (annexures 'A', 'B' and 'C'). In giving reasons for

the judgment, it should be noted that the Commission amended the findings in the Awards made against each of the three Respondents abovementioned that the Applicant was totally incapacitated for work as a result of the respective injuries between 18th August 1974 and 2nd February 1976, and partially incapacitated thereby from 3rd February 1976 and continuing, by substituting 30th November 1975 for 2nd February 1976 and 1st December 1975 for 3rd February 1976.

26. Broadly stated in combination, the findings of the Commission were: 10

THAT the Applicant had received injury arising out of and in the course of his employment firstly with the abovenamed Respondents R.D. George and F.W. McKern, on 16th November 1964, namely a lumbar disc strain: secondly, with the abovenamed Respondent T.H. Bushby, on 17th June 1966, namely an aggravation and exacerbation of a pre-existing condition of the lumbar spine: thirdly, with Hull and Lowrey, on and prior to 21st December 1972, namely an aggravation of a pre-existing lumbar spine disability; fourthly, with D. O'Brian & Co. Pty. Limited, in July 1974, namely an aggravation of a pre-existing disability of his lumbar spine. 20

THAT on and prior to 21st December 1972 and continuing, and from 5th January 1973 to the date of the Award and continuing, the Applicant was partially incapacitated for work (excepting during periods of total incapacity for work falling within that period as hereinafter mentioned)

and that such partial incapacity resulted respectively from the injuries of 16th November 1964 and 17th June 1966.

THAT the Applicant was totally incapacitated for work as a result of the injury of 21st December 1972 from 22nd December 1972 for fourteen days, and totally incapacitated for work as a result of the injury of July 1974 for a period not precisely ascertained but for at least one month.

THAT the Applicant was totally incapacitated for work 10 from 16th January 1973 to 21st February 1973 and from about 18th August 1974 to 30th November 1975, as a result of the effects of, and necessary treatment for the effects of, each of the injuries of 16th November 1964 and 17th June 1966.

THAT the laminectomy operation performed upon the Applicant in April 1968, and medical treatment in the years 1970, 1971 and 1973, and the medical and hospital treatment between 21st April 1974 and 7th May 1975, including the spinal fusion operation carried out in that period, 20 and post-operative medical treatment and rehabilitation treatment at Mt. Wilga Centre, was reasonably necessary as a result of each of the abovementioned injuries of 1964 and 1966.

THAT the medical and hospital treatment mentioned did not result from the injury received in December 1972, or the injury received in July 1974.

THAT the Respondent Glenmore Pty. Limited in the course

of and for the purposes of its trade or business had contracted with the abovementioned Respondents R.D. George and F.W. McKern (and C.F. Whitehouse) for the execution by them of part of the work undertaken by the Respondent company as principal, and the Applicant was at the time of the injury received by him in the course of his employment by the Respondents R.D. George, F.W. McKern (and C.F. Whitehouse) employed in the execution of the work undertaken by the principal, and thus the Respondent company was liable to pay compensation to the Applicant pursuant to section 6(3)(a) of the Act as if he had been directly employed by it. 10

27. Under the Awards made against the three Respondents abovementioned, the compensation awarded the Applicant under the provisions of sections 7, 9, 11(1) and 10 was identical. The compensation awarded the Applicant against Hull and Lowrey and D. O'Brian & Co. Pty. Limited was limited to the short period of total incapacity found to have resulted from his respective injuries received in the course of his employment by them. 20

28. In the Awards made against each of the abovementioned Respondents, the Commission ordered that compensation paid to the Applicant under each of the said Awards should, pro tanto, discharge the liability of the other Respondents abovementioned, under the respective Awards made against each of them. In the matter of the Third Party proceedings brought by the Respondent Glenmore Pty. Limited against the Respondents R.D. George, F.W. McKern (and C.F. Whitehouse) the Commission ordered that

the Third Parties R.D. George and F.W. McKern should indemnify the Respondent company against the compensation paid by it to the Applicant under the Award made against the Respondent company, and should pay the Respondent company's costs of the Third Party proceedings.

29. The questions of law referred for the decision of the Court of Appeal are:

(1) Whether upon the true construction of the provisions of section 6(3) of the Act, the Award made in favour of the Applicant against the respondents R.D. George and F.W. McKern is invalid by virtue of the fact that, at the time the Award was made, the Commission had made, on 15th November 1968, an award of compensation in favour of the Applicant against the Respondent Glenmore Pty. Limited under the provisions of section 6(3)(a) of the Act with respect to the injury received by the Applicant on 16th November 1964 in the course of the Applicant's employment with the Respondents R.D. George and F.W. McKern? 10 20

(2) If the answer to question (1) be in the negative, whether upon the true construction of the provisions of section 6(3) of the Act, the Award made in the instant proceedings in favour of the Applicant against the Respondent Glenmore Pty. Limited was invalid by virtue of the fact that the Award made in favour of the Applicant against the Respondents R.D. George

and F.W. McKern had been made before the first-mentioned Award was made?

(3) Whether there was any evidence to support the findings set forth in the Award made in favour of the Applicant against the Respondents R.D. George and F.W. McKern?

(4) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent Glenmore Pty. Limited? 10

(5) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent T.H. Bushby?

(6) Whether the Applicant was disentitled to the award of compensation specified in the Award in his favour against the Respondent T.H. Bushby once the Commission had made validly any one of the two instant Awards against the Respondents R.D. George and F.W. McKern and the Respondent Glenmore Pty. Limited for 20 the payment of the same compensation as he was awarded under the Award made against the Respondent T.H. Bushby?

(7) Whether the order made by the Commission in each of the three abovementioned matters, that the compensation paid by the respective Respondents under the relevant Awards should be pro tanto a discharge of the liability of each of the other two Respondents

under the respective Awards made against them, it or him, as the case may be, was unlawful and without force and effect?

DATED this Third day of May, 1977.

Signed: I.M. Williams

Member of the Workers' Compensation
Commission of New South Wales

ANNEXURE "A"

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 8102
OF NEW SOUTH WALES ) of 1974

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris — Applicant

and

R.D. George, F.W. McKern and
C.F. Whitehouse — Respondents 10

Having duly considered the matters submitted, THE COMMISSION -

1. FINDS, against the respondents R.D. George and F.W. McKern:

(a) The Applicant's average weekly earnings sufficient to support an award at the maximum rate.

(b) On 16th November 1964 the applicant received injury arising out of and in the course of his employment, namely, lumbar disc strain. The effects of the injury and necessary treatment therefor resulted in chronic low back instability and recurrent pain of increasing severity. 20

(c) Treatment reasonably necessary for the effects of the injury included laminectomy surgery at the L-5 level of the spine in April 1968 and follow-up medical treatment, medical treatment in 1970, in 1971, in 1973 and in 1974, medical and hospital treatment from about 21st April 1974 to 7th May 1975 including a double spinal fusion at the L4-5 and S/1 levels of the spine and follow-up treatment and rehabilitation treatment at Mt. Wilga Centre from about October 1975 to 11th March 1976. 30

(d) The applicant was partially incapacitated for work as a result of his injury on and prior to December 1972. Except during periods of total incapacity for work between 21st December 1972 and 4th January 1973 and between 17th July 1974 and 16th August 1974 (resulting from further injuries in other employment) and the periods of total incapacity mentioned in paragraph 1 (e) of this award the applicant was partially incapacitated for work as a result of the instant injury from December 1972 to date and continuing thereafter and unfit for work involving heavy 40

lifting, repeated bending and back strain and also unfit for the ordinary duties of a bricklayer.

(e) The applicant was totally incapacitated for work as a result of the effects of his injury and necessary treatment from 16th January 1973 to 21st February 1973 and totally incapacitated for work thereby from about 18th August 1974 to 2nd February 1976.

(f) The applicant's two student children were totally dependent for support upon him at all material times. 10

(g) During his partial incapacity for work prior to 2nd February 1976 the evidence does not, in the Commission's opinion, establish that the applicant was not earning in some employment or business.

(h) During the applicant's partial incapacity for work from 3rd February 1976 to date the applicant was not earning in employment but was able to earn in some suitable employment or business approximately 20 $100 per week and from 3rd Feburary 1976 to date he probably would have earned in the same employment but for his injury at least $170 per week.

~~DATED day of 19~~

~~For the Commission~~ (L.S.)

~~Registrar of the Commission~~

~~For Applicant~~

~~For Respondent~~

~~Appearances on Settlement~~ )
)
) 8 U.L.S. 6/8 30

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 8102
OF NEW SOUTH WALES ) of 1974

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney

In the matter of a Determination between

Sydney Blair Morris — Applicant

and

R.D. George, F.W. McKern and C.F. Whitehouse — Respondents 10

~~Having duly considered the matter submitted THE COMMISSION~~

2. HEREBY ORDERS AND AWARDS, against the respondents R.D. George and F.W. McKern

(a) That the respondents do pay the applicant weekly compensation at the rate of -

(i) $80 from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 2nd February 1976 on the basis of total incapacity.

(ii) $70 from 3rd February 1976 on the basis of partial incapacity, such weekly payment to continue until the same be ended, diminished, increased or redeemed in accordance with the provisions of the Act. 20

(b) That the respondents do pay the applicant's section 10 expenses.

(c) That the respondents do pay the applicant his costs of this application forthwith after they have been agreed or taxed.

3. NOTES that compensation paid to the applicant under this award shall pro tanto discharge the liability of the respondent Glenmore Pty. Ltd. in Matter No. 3600 of 1975 and the respondent T.H. Bushby in Matter No. 9101 of 1975. 30

4. GRANTS liberty to apply generally.

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DATED 7th day of July 1976

For the Commission,

A.L. Goss (L.S.)

Registrar of the Commission.
AS.

For Applicant

NONE

For Respondent

Appearances on Settlement)
21.7.76 )
)

10

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 8102
OF NEW SOUTH WALES ) of 1974

In the matter of the Workers' Compensation Act, 1926.

CORAM: Langsworth J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris Applicant

and

R.D. George, F.W. McKern
and C.F. Whitehouse Respondent

Having duly considered the matters submitted, THE COMMISSION, by and with the consent of the parties hereto -

HEREBY ORDERS that the award herein dated 7th July 1976 be varied by deleting paragraph 2 (a)(I) and substituting in lieu thereof the following paragraph 2(a)(i) -

2(a)(i) $53 from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 30th April 1975 and $80 from 1st May 1975 to 2nd February 1976.

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DATED 4th day of August 1976

For the Commission,

A.L. Goss
Registrar of the Commission. (L.S.)

A.S.

For Applicant

NONE

For Respondent

Appearances on Settlement)
)
5.8.76 )

IN THE WORKERS' COMPENSATION COMMISSION) Matter No. 8102 of
OF NEW SOUTH WALES ) 1974

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney

In the matter of a determination between

Sydney Blair Morris Applicant,

and

R.D. George, F.W. McKern, 10
C.F. Whitehouse Respondents.

Having duly considered the matters submitted, THE COMMISSION -

HEREBY ORDERS:

1. That the weekly compensation payable under the award herein dated 7th July 1976 as varied be suspended pending the determination of the appeals lodged by Glenmore Pty. Ltd. the respondent in matter No. 3600 of 1975 and T.H. Bushby the respondent in matter No. 9101 of 1975.

2. That the question of costs be reserved.

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DATED 6th day of December, 1976 20

A.L. Goss
Registrar of the Commission (L.S.)

A.S.

For Applicant.

NONE

For Respondents.

Appearances on Settlement)
)
29.12.76 )

In accordance with rule 24 copy forwarded to each of the parties and the Insurer. 30

ANNEXURE "B"

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 3600
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris — Applicant

and

Glenmore Pty. Limited — Respondent

and

R.D. George, F.W. McKern and C.F. Whitehouse — Third Parties ~~Respondent~~

Having duly considered the matters submitted, THE COMMISSION -

1. FINDS:

(a) The applicant's average weekly earnings sufficient to warrant an award at the maximum rate.

(b) On 16th November 1964 the applicant received an injury arising out of and in the course of his employment with the third parties, namely, lumbar disc strain. The effects of the injury and necessary treatment therefor resulted in chronic low back instability and recurrent pain of increasing severity.

(c) Treatment reasonably necessary for the effects of the injury included laminectomy surgery at the L-5 level of the spine in April 1968 and follow-up medical treatment, medical treatment in 1970, in 1971, in 1973 and in 1974, medical and hospital treatment from about 21st April 1974 to 7th May 1975 including a double spinal fusion at the L4-5 level and S/1 level of the spine and follow-up treatment and rehabilitation treatment at Mt. Wilga Centre from about October 1975 to 11th March 1976.

(d) The applicant was partially incapacitated for work as a result of his injury on and prior to December 1972. Except during periods of total incapacity for work between 21st December 1972 and 4th January 1973 and between 17th July 1974 and 16th August 1974 (resulting from further injuries in other employment) and the periods of total incapacity mentioned in paragraph 1 (e) of this award the applicant was partially incapacitated for work as a result of the instant injury from December 1972 to date and continuing thereafter and unfit for work involving heavy

lifting, repeated bending and back strain and also unfit for the ordinary duties of a bricklayer.

(e) The applicant was totally incapacitated for work as a result of the effects of his injury and necessary treatment from 16th January 1973 to 21st February 1973 and totally incapacitated for work thereby from about 18th August 1974 to 2nd February 1976.

(f) The applicant's two student children were totally dependent for support upon him at all material times. 10

(g) During his partial incapacity for work prior to 2nd February 1976 the evidence does not, in the Commission's opinion, establish that the applicant was not earning in some employment or business.

(h) During the applicant's partial incapacity for work from 3rd February 1976 to date he was not earning in employment but was able to earn in some suitable employment or business approximately $100 per week and from 3rd February 1976 to date he probably would have earned in 20 the same employment but for his injury at least $170 per week.

~~DATED~~ ~~day of~~ ~~19~~

~~For the Commission~~

(L.S.)

~~Registrar of the Commission~~

~~For Applicant~~

~~For Respondent~~

~~Appearances on Settlement~~ )
)
)

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 3600
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris Applicant

and

Glenmore Pty. Limited Respondent 10

and

R.D. George, F.W. McKern and
C.F. Whitehouse Third Parties
~~Respondent~~

~~Having duly considered the matter submitted THE COMMISSION~~

(i) The respondent in the course of and for the purposes of its trade or business contracted with the said third parties for the execution by such contractor of part of the work undertaken by the respondent as principal and the present applicant was employed in the execution of the 20 said work by the said third parties at the time of his injury and thus the respondent is liable (in pursuance of section 6(3)(a)) to pay compensation to the applicant as if he had been directly employed by it.

2. HEREBY ORDERS AND AWARDS:

(a) That the respondent do pay the applicant weekly compensation at the rate of -

(i) $80 from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 2nd February 1976 on the basis of total incapacity. 30

(ii) $70 from 3rd February 1976 on the basis of partial incapacity, such weekly payment to continue until the same be ended, diminished, increased or redeemed in accordance with the provisions of the Act.

(b) That the respondent do pay the applicant's section 10 expenses.

(c) That the respondent do pay the applicant his costs of this application forthwith after they have been agreed or taxed.

(d) That the third parties, R.D. George and F.W. McKern (the third party notice herein not having been served upon the third party C.F. Whitehouse) indemnify the respondent for all compensation paid by the respondent to the applicant under this award, the respondent to have the costs of the third party proceedings in accordance with the costs rules. 10

3. NOTES that compensation paid to the applicant under this award shall pro tanto discharge the liability of the respondents R.D. George and F.W. McKern in Matter No. 8102 of 1974 and the respondent T.H. Bushby in Matter No. 9101 of 1975.

4. GRANTS liberty to apply generally.

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DATED 7th day of July 1976

For the Commission,

A.L. Goss (L.S.) 20
Registrar of the Commission.
A.S.

For Applicant

NONE

For Respondent

Appearances on Settlement )
21.7.76 )
)

Annexure "B" to
Case Stated

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 3600
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Langsworth J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris Applicant

and

Glenmore Pty. Limited Respondent 10

and

R.D. George, F.W. McKern and
C.F. Whitehouse Third Parties
Respondent

Having duly considered the matters submitted, THE COMMISSION, by and with the consent of the parties hereto -

HEREBY ORDERS that the award herein dated 7th July 1976 be varied by deleting paragraph 2 (a) (i) and substituting in lieu thereof the following paragraph 2 (a)(i) -

2(a)(i) $53 from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 30th April 1975 and $80 from 1st May 1975 to 2nd February 1976. 20

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DATED 4th day of August 1976

For the Commission

A.L. Goss (L.S.)
Registrar of the Commission.
A.S.

For Applicant

NONE

For Respondent 30

Appearances on Settlement )
5.8.76 )
)


Annexure "B" to
Case Stated

IN THE WORKERS' COMPENSATION COMMISSION) Matter No. 3600
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney.

In the matter of a determination between

Sydney Blair Morris — Applicant

and

Glenmore Pty. Ltd. — Respondent 10

and

R.D. George, F.W. McKern and C.F. Whitehouse — Third Parties ~~Respondent~~

Having duly considered the matters submitted, THE COMMISSION -

HEREBY ORDERS that the proceedings herein be stayed until further order.

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DATED 25th day of October 1976

A.L. Goss (L.S.)
Registrar of the Commission 20
A.S.

For Applicant.

NONE

For Respondent.
Third Parties

Appearances on settlement )
16.5.77 )
)

In accordance with rule 24 copy forwarded to each of the parties and the insurer.

IN THE WORKERS' COMPENSATION COMMISSION) Matter No. 3600
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney

In the matter of a determination between

Sydney Blair Morris — Applicant,

and

Glenmore Pty. Ltd. — Respondent 10

and

R.D. George, F.W. McKern
and C.F. Whitehouse — Third Parties
~~Respondent~~

Having duly considered the matters submitted, THE COMMISSION -

HEREBY ORDERS:

1. That the weekly compensation payable under the award herein dated 7th July 1976 as varied be suspended pending the determination of the appeals lodged by the respondent herein Glenmore Pty. Ltd. and T.H. Bushby the respondent in matter No. 9101 of 1975. 20

2. That the question of costs be reserved.

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DATED 6th day of December, 1976

A.L. Goss (L.S.)
Registrar of the Commission
A.S.

For Applicant,

NONE

Appearances on settlement) For Respondent.
29.12.76 ) 30
)

In accordance with rule 24 copy forwarded to each of the parties and the insurer.

ANNEXURE "C"

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 9101
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris — Applicant

and

T.H. Bushby — Respondent

Having duly considered the matters submitted, THE COMMISSION - 10

1. FINDS:

(a) The applicant's average weekly earnings sufficient to support an award at the maximum rate.
(b) On 17th June 1966 the applicant received injury arising out of and in the course of his employment, namely, aggravation and exacerbation of a pre-existing condition of his lumbar spine. The effects of the injury and necessary treatment therefor resulted in chronic low back instability and recurrent pain of increasing severity.
(c) Treatment reasonably necessary for the effects of the injury included laminectomy surgery at the L-5 level of the spine in April 1968 and follow-up medical treatment, medical treatment in 1970, in 1971, in 1973 and in 1974, medical and hospital treatment from about 21st April 1974 to 7th May 1975 including a double spinal fusion at the L4-5 and S/1 levels of the spine and follow-up treatment and rehabilitation treatment at Mt. Wilga Centre from about October 1975 to 11th March 1976. 20
(d) The applicant was partially incapacitated for work as a result of his injury on and prior to December 1972. Except during periods of total incapacity for work between 21st December 1972 and 4th January 1973 and between 17th July 1974 and 16th August 1974 (resulting from further injuries in other employment) and the periods of total incapacity mentioned in paragraph 1 (e) of this award the applicant was partially incapacitated for work as a result of the instant injury from December 1972 to date and continuing thereafter and unfit for work involving heavy lifting, repeated bending and back strain and also unfit for the ordinary duties of a bricklayer. 30 40
(e) The applicant was totally incapacitated for work as a result of the effects of his injury and necessary treatment from 16th January 1973 to 21st February 1973 and

totally incapacitated for work thereby from about 18th August 1974 to 2nd February 1976.

(f) The applicant's two student children were totally dependent for support upon him at all material times.

(g) During his partial incapacity for work prior to 2nd February 1976 the evidence does not, in the Commission's opinion, establish that the applicant was not earning in some employment or business. 10

(h) During the applicant's partial incapacity for work from 3rd February 1976 to date the applicant was not earning in employment but was able to earn in some suitable employment or business approximately $100 per week and from 3rd February 1976 to date he probably would have earned in the same employment but for his injury at least $170 per week.

~~DATED day of 19~~

~~For the Commission~~

(L.S.) 20

~~Registrar of the Commission~~

~~For Applicant~~

~~For Respondent~~

~~Appearances on Settlement~~ )
)
)

IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 9101
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris Applicant

and

T.H. Bushby Respondent 10

~~Having duly considered the matters submitted THE COMMISSION~~

2. HEREBY ORDERS AND AWARDS:

(a) That the respondent do pay the applicant weekly compensation at the rate of -

(i) $80 from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 2nd February 1976 on the basis of total incapacity.

(ii) $70 from 3rd February 1976 on the basis of partial incapacity, such weekly payment to continue until the same be ended, diminished, 20 increased or redeemed in accordance with the provisions of the Act.

(b) That the respondent do pay the applicant's section 10 expenses.

(c) That the respondent do pay the applicant his costs of this application forthwith after they have been agreed or taxed.

3. NOTES that compensation paid to the applicant under this award shall pro tanto discharge the liability of the respondent Glenmore Pty. Ltd. in Matter No. 3600 of 1975 and the respon- 30 dents R.D. George and F.W. McKern in Matter No. 8102 of 1974.

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DATED 7th day of July 1976

For the Commission,
A.L. Goss (L.S.)
Registrar of the Commission.
A.S.

For Applicant

NONE

Appearances on Settlement)
21.7.76 )

For Respondent

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IN THE WORKERS' COMPENSATION COMMISSION) No. of Matter 9101
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Langsworth J. at Sydney.

In the matter of a Determination between

Sydney Blair Morris Applicant

and

T.H. Bushby Respondent 10

Having duly considered the matters submitted, THE COMMISSION, by and with the consent of the parties hereto -

HEREBY ORDERS that the award herein dated 7th July 1976 be varied by deleting paragraph 2 (a)(i) and substituting in lieu thereof the following paragraph 2(a)(i) -

2(a)(i) $53 from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 30th April 1975 and $80 from 1st May 1975 to 2nd February 1976.

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DATED 4th day of August 1976

For the Commission, 20

A.L. Goss (L.S.)
Registrar of the Commission.
A.S.

For Applicant
NONE
For Respondent

Appearances on Settlement)
)
5.8.76 )

IN THE WORKERS' COMPENSATION COMMISSION) Matter No. 9101 of
OF NEW SOUTH WALES ) 1975

In the matter of the Workers' Compensation Act, 1926.

CORAM: Williams J. at Sydney.

In the matter of a determination between

Sydney Blair Morris Applicant,

and

T.H. Bushby Respondent. 10

Having duly considered the matters submitted, THE COMMISSION -

HEREBY ORDERS:

1. That the application to set aside the award herein dated 7th July 1976 as varied be refused.

2. That a stay of proceedings herein be granted until further order.

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DATED 25th day of October, 1976.

A.L. Goss
Registrar of the Commission
(L.S.) 20
A.S.

For Applicant.

NONE

For Respondent.

Appearances on settlement )
16.5.77 )

In accordance with rule 24 copy forwarded to each of the parties and the insurer.

ANNEXURE "D"

7933/73 SYDNEY BLAIR MORRIS and HULL AND LOWREY
8102/74 SYDNEY BLAIR MORRIS and R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE
8103/74 SYDNEY BLAIR MORRIS and R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE (Application under the Uninsured Liability Scheme)
8110/74 SYDNEY BLAIR MORRIS and D. O'BRIAN & CO. PTY. LIMITED
3600/75 SYDNEY BLAIR MORRIS AND GLENMORE PTY. LIMITED - R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE (Third Parties) 10
9101/75 SYDNEY BLAIR MORRIS and T.H. BUSHBY

JUDGMENT

1976 )
Novr. 30 ) WILLIAMS, J.: Under the abovementioned Applications, Sydney Blair Morris (hereinafter called "the applicant") claims weekly payments of compensation for various periods of total and partial incapacity for work, commencing on 22nd December, 1972, and for expenses for medical and hospital treatment resulting from a distinct injury which he claims he re- 20 ceived to his lower back arising out of or in the course of his employment with each of four of the abovenamed respondents between the years 1964 and 1975.

The first of these injuries, that of the 16th November, 1964, he claims to have received in the course of his employment with the second and third abovenamed respondents, R.D. George, F.W. McKern and C.F. Whitehouse, and that injury is relied upon for the purposes of the third claim abovementioned for payment of compensation from the Uninsured Liability Fund pursuant to section 18C of the Act. This injury is also relied 30 upon in the claim brought against the abovenamed respondent Glenmore Pty. Limited, a claim founded upon the provisions of section 6(3)(a) of the Act. The applicant's claim in this case

is that the respondent company as principal, in the course of and for the purposes of its trade or business, contracted with the abovementioned partnership, R.D. George, F.W. McKern and C.F. Whitehouse, as contractors, for the execution by or under them of the whole or part of the work undertaken by the respondent company, and that the applicant at the time of his injury was a worker employed in the execution of such work. Thus, he claims, the respondent company is liable under the sub-section 10
to pay him the compensation which it would have been

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liable to pay if the applicant had been immediately employed by it.

The respondent company joined as a third party, under Third Party Notice filed by it, the abovementioned members of the partnership, claiming to be indemnified by them against its liability to pay compensation.

Counsel for the respondents R.D. George and F.W. McKern appeared, by leave, to defend on their behalf the claim brought 20
by the applicant against these two respondents, and appeared for the same respondents to defend the claim brought under the Third Party Notice throughout.

There was no evidence of the service upon C.F. Whitehouse of either the applicant's claim or the Third Party Notice filed by the respondent company. Whitehouse was unrepresented at the hearing and Counsel for the remaining members of the partnership

stated, without challenge from the Bar table, that Whitehouse was deceased.

The second injury (in point of time) that of 17th June, 1966, he claims to have received arising out of or in the course of his employment with the respondent T.H. Bushby; the third injury, that of 21st December, 1972, he claims to have received arising out of or in the course of his employment with the respondents Hull and Lowrey, and the fourth injury, that of July, 1974, arising out of or in the course of his employment with the respondent D. O'Brian & Co. Pty. Limited. 10

The periods during which weekly compensation was claimed under the respective applications for either total or partial incapacity resulting from each of the said first and third injuries were identical. The claim against the respondent company D. O'Brian & Co. Pty. Limited is for continuing total incapacity for work from 17th July, 1974.

Although no particulars of the compensation claimed by the applicant were given in the application filed against the respondent T.H. Bushby, in the hearing that case was con- 20

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ducted on the footing that the compensation claimed was the same as that claimed from all the other respondents, with the exception, of course, of the respondent D. O'Brian & Co. Pty. Limited.

The order in which the respective applications were filed by the applicant, indicated in the heading of this judgment,

does not correspond with the order in which he claimed he received the four injuries. Under Answers filed respectively by each of the respondents Hull and Lowrey, D. O'Brian & Co. Pty. Limited and Glenmore Pty. Limited, injury and incapacity for work, and that incapacity resulted from the relevant injury were put in issue.

In addition, the respondents mentioned each raised the statutory defences under section 53 of the Act that notice of injury had not been given, and the claim for compensation had not been made, as or within the time required by that section. 10

No written Answer was filed on behalf of any of the respondents R.D. George, F.W. McKern and C.F. Whitehouse, an oversight that was not cured during the hearing. The case, however, for the respondents R.D. George and F.W. McKern was conducted by their Counsel implicitly, if not expressly, upon the footing that the incapacity for work claimed did not result from the injury of November 1964.

The grounds for denial of liability given in the Answer filed by the respondent Bushby were limited to denial that incapacity suffered by the applicant was the result of the injury of 17th June, 1966. In that case, the receipt of injury by the applicant on 17th June, 1966 was not in issue. 20

All the abovementioned applications were heard together over a number of days commencing on 11th March, 1976. On 1st April, 1976 judgment was reserved.

Throughout the hearing, and addresses by Counsel, no

attention was given to the statutory defences, and it seems clear that this was by oversight, if not by a tacit intention not



to rely upon section 53.

It should also be mentioned that the transcripts of the instant proceedings do not show, nor have I any recollection that the applicant elected at any time to pursue one only of his respective applications against the respondents R.D. George, F.W. McKern and C.F. Whitehouse, and Glenmore Pty. Limited. 10

Prior to the commencement of the present proceedings, the applicant instituted proceedings, in 1964, against Glenmore Pty. Limited claiming compensation pursuant to section 6(3)(a) of the Act for incapacity for work and medical and hospital treatment resulting from injury received on 16th November, 1964 in the course of his employment with R.D. George, F.W. McKern and C.F. Whitehouse. Some years later (in 1967) he also instituted proceedings against the present respondent T.H. Bushby with respect to the 1966 injury, upon which, as has been mentioned, he relies in the present proceedings against that respondent. 20

Both earlier claims were heard together, and awards were made by me in favour of the applicant on 15th November, 1968 in both applications.

At the time of the earlier proceedings, the applicant had not brought a claim against R.D. George, F.W. McKern and C.F. Whitehouse. They were, however, joined in the proceedings under a Third Party Notice given to them by the respondent

company under which it claimed to be indemnified by the partnership for compensation paid by it pursuant to the subsection.

The awards, judgment, transcript of the evidence, and exhibits were tendered in the present proceedings without objection by any of Counsel for the respondents. The respective findings and awards in the earlier proceedings were in these terms:-

In the claim of Glenmore Pty. Limited - (Matter No. 3517/1964) 10

... "the Commission -

1. finds -

(a) .....;

(b) that on the Sixteenth day of November, 1964, the applicant received injury arising out of and in the course of his employment with the third parties, R.D. George, C.F. Whitehouse and F.W. McKern, namely, a lumbar disc strain;

(Continued) 20

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(c) that the applicant was totally incapacitated from the Seventeenth day of November, 1964, to the Sixth day of December, 1964, and from the Fourth day of March, 1968, to the Twenty-third day of April, 1968, and partially incapacitated thereby from the Twenty-fourth day of April, 1968, to date and continuing, and unfit for work requiring heavy lifting and bending;

(d) the applicant's incapacity in 1968 the result of the effects of the present injury and of the injury received on the Seventeenth day of June, 1966, in the employment of T.H. Bushby, the respondent in Matter No. 3481 of 1967; 30

(e) that the respondent in the course of and for the purposes of its trade or business contracted with the said third parties for the execution by such contractor of part of the work undertaken by the respondent as principal and the present

applicant was employed in the execution of the said work by the said third parties at the time of his injury and the respondent is liable to pay compensation to the applicant as if he had been directly employed by it (in pursuance of section 6(3)(a);

(f) that from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, the applicant during his partial incapacity was earning, or able to earn, in suitable employment Forty-two dollars per week approximately and probably would have earned in his pre-injury employment, but for his injury, approximately Seventy-four dollars per week." 10

"2. HEREBY ORDERS AND AWARDS:

(a) That the respondent DO PAY the applicant weekly compensation at the rate of -

(i) TWENTY-eight dollars fifty cents from the Seventeenth day of November, 1964, to the Sixth day of December, 1964, on the basis of total incapacity; 20

(ii) THIRTY-five dollars from the Fourth day of March, 1968, to the Twenty-third day of April, 1968, on the basis of total incapacity;

(iii) THIRTY dollars from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, on the basis of partial incapacity. 30

(b) That the respondent DO PAY the applicant medical and hospital expenses reasonably incurred as a result of the said injury, the payment of such expenses to be in accordance with the provisions of section 10."

In the claim of T.H. Bushby - (Matter No. 3481/1967)

... "the Commission -

1. finds -

(a) .....;

(b) that on the Seventeenth day of June, 1966, the applicant received injury arising out of and in the course of his employment, namely, aggravation and exacerbation of a pre-existing condition of his lumbar spine; 40

(continued)

(c) that the applicant was totally incapacitated thereby from the Seventeenth day of June, 1966, to the Twenty-second day of June, 1966, and totally incapacitated thereby by necessary treatment for the back condition resulting from the present injury and the injury received in the employment of the firm, Whitehouse, George and McKern; 10

(d) that from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, the applicant during his partial incapacity was earning, or able to earn, in suitable employment Forty-two dollars per week approximately and would probably have earned in his pre-injury employment, but for his injury, approximately Seventy-four dollars per week."

"2. HEREBY ORDERS AND AWARDS: 20

(a) that the respondent DO PAY the applicant weekly compensation at the rate of -

(i) THIRTY-one dollars from the Seventeenth day of June, 1966, to the Twenty-second day of June, 1966, on the basis of total incapacity;

(ii) THIRTY-five dollars from the Fourth day of March, 1968, to the Twenty-third day of April, 1968, on the basis of total incapacity; 30

(iii) THIRTY dollars from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, on the basis of partial incapacity.

(b) That the respondent DO PAY the applicant medical and hospital expenses reasonably incurred as a result of the said injury, the payment of such expenses to be in accordance with the provisions of section 10."

The award then went on to make certain other orders including an order that the Third Parties indemnify the respondent company for all compensation paid by the respondent company under the award, and that the compensation received by the 40

applicant under the award made against T.H. Bushby should be pro tanto in satisfaction of the compensation payable under the award for the incapacity of the applicant in 1968.

The terms of the lastmentioned award, in paragraph 2(ii), indicate that the period of total incapacity mentioned in the award must have been inadvertently omitted from paragraph 1(c) of the findings.

The transcript in the earlier proceedings clearly establishes that on 1st April, 1968 Dr. Allman, orthopaedic surgeon, removed a disc protrusion of the intervertebral disc between the 4th and 5th lumbar vertebrae, and that the applicant was totally incapacitated for work for the period mentioned in 10

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paragraph 2(ii) of each of the awards.

At the time of the present proceedings, there was no evidence that any application had been made at any time by either of the parties to the earlier claims, to review or rescind either of the two awards, nor was there evidence that the awards 20 had ever been the subject of any appeal.

On 7th July, 1976, when all the present matters were relisted for judgment, I indicated to the legal representatives of the parties present that I had reached a decision in certain of the applications as to the findings, awards and orders that should be made, and that in other matters, having regard to the manner in which the cases had been conducted with respect to

the defences under section 53 of the Act, I had also reached a decision as to the findings that should be made on the more important substantive issues, but was not in a position to make a final award until the statutory defences had been further considered. I also stated that to avoid further delay I proposed to make immediately the findings, and awards where appropriate, that I had determined, that the parties concerned in the outstanding questions under section 53 of the Act would be granted 10 liberty to apply as to such defences within six weeks from 3rd August, 1976 (that being the first sitting day after the Vacation) and I would publish my reasons for judgment as soon as practicable after the end of the then current Vacation.

The findings and awards in the respective matters, in the order in which they were then made, were in the following terms:-

7933/73 SYDNEY BLAIR MORRIS v. HULL AND LOWREY

1. The average weekly earnings of the applicant sufficient to warrant an award at the maximum rate.
2. On and prior to 21st December 1972 the applicant received 20 injury arising out of and in the course

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of employment, namely:- aggravation of pre-existing lumbar spine disability.
3. The applicant was totally incapacitated for work thereby from 22nd December 1972 for fourteen days.
4. The applicant's wife and two children were wholly dependent for support upon applicant at all material times.

5. Liberty to apply is granted to both parties within six weeks from 3rd August, 1976 with respect to defence raised under paragraph 2(e) of answer.

Further findings and award reserved until expiry of time limited for liberty to apply, or application thereunder.

<u>8102/74</u> <u>SYDNEY BLAIR MORRIS and R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE</u>

1. Average weekly earnings of the applicant sufficient to support an award at the maximum rate. 10

2. (a) On 16th November 1964 the applicant received injury arising out of and in the course of his employment, namely, lumbar disc strain. The effects of the injury, and necessary treatment therefor, resulted in chronic low back instability and recurrent pain of increasing severity.

(b) Treatment reasonably necessary for the effects of the injury included laminectomy surgery at the L4-5 level of the spine in April 1968, and follow-up medical 20 treatment; medical treatment in 1970, 1971, 1973 and 1974; medical and hospital treatment from about 21st April 1974 to 7th May 1975, including a double spinal fusion at the L4-5 and L5/S/1 levels of the spine, and follow-up treatment, and rehabilitation treatment at Mt. Wilga Centre from about October 1975 to 11th March 1976.

3. The applicant was partially incapacitated for work as a result of his injury on and prior to December 1972. Except during periods of total incapacity for work between 21st December 1972 and 4th January 1973, and between 17th July 1974 and 16th August 1974 (resulting from his further injuries in other employment) and the periods of total incapacity mentioned in par. 4, the applicant was partially incapacitated for work as a result of the instant injury from December 1972 to date and continuing, and unfit for work involving heavy lifting, repeated bending and back strain, and also unfit for the ordinary duties of a bricklayer. 10

4. The applicant was totally incapacitated for work as a result of the effects of his injury and necessary treatment from 16th January 1973 to 21st February 1973, and totally incapacitated for work thereby from about 18th August 1974 to 2nd February 1976. 20

5. The applicant's two student children were wholly dependent for support upon the applicant at all material times.

6. During his partial incapacity for work prior to 2nd February 1976, the evidence does not, in the Commission's opinion, establish that he was not earning in some employment or business.

7. During the applicant's partial incapacity for work from 3rd February 1976 to date and continuing, the applicant

was not earning in employment but was able to earn in some suitable employment or business approximately $100 per week, and from 3rd February 1976 to date and continuing he probably would have earned in the same employment, but for his injury, at least $170 per week.

The award is for the applicant at the rate of $80 per week from 16th January 1973 to 21st February 1973 and from 18th August

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1974 to 2nd February 1976 (total incapacity, sections 7 and 9); $70 per week from 3rd February 1976 to date and continuing (section 11 (1)); medical and hospital expenses (section 10). The respondents shall pay the applicant's costs of this application. In default of agreement costs to be in accordance with Costs R.46.

The third parties, namely, R.D. George and F.W. McKern (the third party notice herein not having been served upon the third party C.F. Whitehouse) shall indemnify the respondents for all compensation paid by the respondents to the applicant under 20 this award, the respondents to have the costs of the third party proceedings in accordance with Costs R.46.

Compensation paid to the Applicant under the instant Award shall pro tanto discharge the liability of the Respondent Glenmore Pty. Limited in Matter No. 3600 of 1975 and the Respondent T.H. Bushby in Matter No. 9101 of 1975.

Having regard to the fact that Mr. Ireland appeared for the

first two of three abovenamed Respondents but announced during the hearing that the Respondent Whitehouse is now deceased, liberty is granted to both parties to apply generally.

8103/74 SYDNEY BLAIR MORRIS and R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

(Application under the Uninsured Liability Scheme)

I find that at the time of the happening of the applicant's injury, the respondents R.D. George, F.W. McKern and C.F. Whitehouse were not maintaining in force a policy of insurance or indemnity under this Act for the full amount of their liability to the injured worker, but in the exercise of its discretion having regard to the awards made in these proceedings against the respondents Glenmore Pty. Limited and T.H. Bushby, the Commission makes no order for the payment of any amount in or towards the satisfaction of the present claim made under the Uninsured Liability Scheme and reserves for argument the question of costs of this application. 10

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8110/74 - SYDNEY BLAIR MORRIS and D. O'BRIAN & CO. PTY. LIMITED 20

1. Average weekly earnings of applicant sufficient to warrant an award at the maximum rate.

2. In July 1974 the applicant received injury arising out of and in the course of employment, namely:- aggravation of pre-existing disability of lumbar spine.

3. The applicant was totally incapacitated for work thereby

from 17th July 1974 for a period not precisely established but for at least one month.

4. The applicant's two student children were wholly dependent for support upon the applicant at all material times.

5. Liberty to apply is granted to both parties within six weeks from 3rd August, 1976 with respect to defences raised under paragraphs 4 and 5 of answer.

Further findings and award reserved pending exercise of liberty to apply or the expiry of the time limited without application being made. 10

3600/75 SYDNEY BLAIR MORRIS and GLENMORE PTY. LIMITED R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE (Third Parties)

1. Average weekly earnings of the applicant sufficient to warrant an award at the maximum rate.

2. (a) On 16th November 1964 the applicant received an injury arising out of and in the course of his employment with the third parties R.D. George, F.W. McKern and C.F. Whitehouse, namely lumbar disc strain. The effects of the injury, and necessary treatment therefor, resulted in chronic low back instability and recurrent pain of increasing severity. 20

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(b) Treatment reasonably necessary for the effects of the injury included laminectomy surgery at the L4-5 level of his spine in April 1968, and follow-up medical treatment; medical treatment in 1970, 1971, 1973 and

1974; medical and hospital treatment from about 21st April 1974 to 7th May 1975, including a double spinal fusion at the L4-5 and L5/S/1 levels of the spine, and follow-up treatment, and rehabilitation treatment at Mt. Wilga Centre from about October 1975 to 11th March 1976.

3. The applicant was partially incapacitated for work as a result of his injury on and prior to December 1972. Except during periods of total incapacity for work between 21st December 1972 and 4th January 1973, and between 17th July 1974 and 16th August 1974 (resulting from his further injuries in other employment) and the periods of total incapacity mentioned in par. 4, the applicant was partially incapacitated for work as a result of the instant injury from December 1972 to date and continuing, and unfit for work involving heavy lifting, repeated bending and back strain, and also unfit for the ordinary duties of a bricklayer.

4. The applicant was totally incapacitated for work as a result of the effects of his injury and the necessary treatment from 16th January 1973 to 21st February 1973, and totally incapacitated for work thereby from about 18th August 1974 to 2nd February 1976.

5. The applicant's two student children were wholly dependent for support upon the Applicant at all material times.

6. During his partial incapacity for work prior to

2nd February 1976, the evidence does not, in the Commission's opinion, establish that he was not earning in some employment or business.



7. During the applicant's partial incapacity for work from 3rd February 1976 to date and continuing, the applicant was not earning in employment but was able to earn in some suitable employment or business approximately $100 per week, 10 and from 3rd February 1976 to date and continuing he probably would have earned in the same employment, but for his injury, at least $170 per week.

8. The respondent in the course of and for the purposes of its trade or business contracted with the said third parties for the execution by such contractor of part of the work undertaken by the Respondent as principal and the present Applicant was employed in the execution of the said work by the said third parties at the time of his injury and thus the Respondent is found liable (in pursuance of sec- 20 tion 6(3)(a)) to pay compensation to the Applicant as if he had been directly employed by it.

The Award is for the Applicant at the rate of $80 per week from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 2nd February 1976 (total incapacity, sections 7 and 9); $70 per week from 3rd February 1976 to date and continuing (partial incapacity section 11(1)); medical and hospital expenses (section 10). The Respondent shall pay the

applicant's costs of this application. In default of agreement costs in accordance with Costs R.46.

The third parties, namely R.D. George and F.W. McKern (the third party notice herein not having been served upon the third party C.F. Whitehouse) shall indemnify the Respondent for all compensation paid by the Respondent to the Applicant under this Award, the Respondent to have the costs of the third party proceedings in accordance with Costs R.46. 10

Compensation paid to the Applicant under the respective Awards made this day in this matter (No. 3600/75) shall pro tanto discharge the liability of the Respondent to pay such compensation under the Awards made this day against the

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Respondents R.D. George and F.W. McKern (No. 8102/74) and T.H. Bushby (No. 9101/75).

Liberty to apply to both parties.

<u>9101/75</u> <u>SYDNEY BLAIR MORRIS and T.H. BUSHBY</u>

1. Average weekly earnings of the applicant sufficient to support an award at the maximum rate. 20

2. (a) On 17th June 1966 the applicant received injury arising out of and in the course of his employment, namely, aggravation and exacerbation of a pre-existing condition of his lumbar spine. The effects of the injury, and necessary treatment therefor, resulted in chronic low back instability and recurrent pain of increasing severity.

(b) Treatment reasonably necessary for the effects of the injury included laminectomy surgery at the L4-5 level of the spine in April 1968, and follow-up medical treatment; medical treatment in 1970, 1971, 1973 and 1974; medical and hospital treatment from about 21st April 1974 to 7th May 1975, including a double spine fusion at the L4-5 and L5/S/1 levels of the spine, and follow-up treatment, and rehabilitation treatment at Mt. Wilga Centre from about October 1975 to 11th March 1976. 10

3. The applicant was partially incapacitated for work as a result of his injury on and prior to December 1972. Except during periods of total incapacity for work between 21st December 1972 and 4th January 1973, and between 17th July 1974 and 16th August 1974 (resulting from his further injuries in other employment) and the periods of total incapacity mentioned in par. 4, the applicant was partially incapacitated for work as a result of the instant injury 20 from December 1972 to date

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and continuing, and unfit for work involving heavy lifting, repeated bending and back strain, and also unfit for the ordinary duties of a bricklayer.

4. The applicant was totally incapacitated for work as a result of the effects of his injury and necessary treatment from 16th January 1973 to 21st February 1973, and totally

incapacitated for work thereby from about 18th August 1974 to 2nd February 1976.

5. The applicant's two student children were wholly dependent for support upon the applicant at all material times.

6. During his partial incapacity for work prior to 2nd February 1976, the evidence does not, in the Commission's opinion, establish that he was not earning in some employment or business. 10

7. During the applicant's partial incapacity for work from 3rd February 1976 to date and continuing, the applicant was not earning in employment but was able to earn in some suitable employment or business approximately $100 per week, and from 3rd February 1976 to date and continuing he probably would have earned in the same employment, but for his injury, at least $170 per week.

The Award is for the Applicant at the rate of $80 per week from 16th January 1973 to 21st February 1973 and from 18th August 1974 to 2nd February 1976 (total incapacity, sections 7 and 9); 20 $70 per week from 3rd February 1976 to date and continuing (partial incapacity section 11(1)); medical and hospital expenses (section 10). The Respondent shall pay the Applicant's costs of this application. In default of agreement costs in accordance with Costs R. 46.

Compensation paid to the Applicant under this Award shall be pro tanto a discharge of liability of the Respondent Glenmore Pty. Limited in matter No. 3600 of 1975 and the

Respondents R.D. George and F.W. McKern in matter No. 8102 of 1974.



For several months after the making of these awards and findings, I was absent from judicial duties, and was unable to complete the making of awards in those matters where findings only have been made, and to publish reasons for judgment.

In the meantime, the solicitors for the respondent Glenmore Pty. Limited filed a Notice of Motion appealing against the award made against it, and the solicitor for the respondent T.H. Bushby moved for an order seeking a declaration that the award made against that respondent be declared not an award of the Commission, and for an order extending the time for stating a case to the Court of Appeal against the award. All such matters having been re-listed for mention after my return to judicial duties, the period of liberty to apply granted to the respondents Hull and Lowrey and D. O'Brian & Co. Pty. Limited was extended for a further period, the application made by the respondent T.H. Bushby to set aside the award was refused, and a stay of proceedings on the award was granted until further order. At the same time, an order was made staying proceedings on the award made against the respondent Glenmore Pty. Limited.

Pursuant to the liberty to apply granted to the respondent D. O'Brian & Co. Pty. Limited, on 4th November, 1976, the solicitor for that respondent withdrew the statutory defences

under section 53 contained in paragraphs 4 and 5 of the Answer filed by it, and thereupon, in view of the findings already made, the Commission made an award for the applicant of $64 per week from 17th July, 1974 to 16th August, 1974, together with medical and hospital expenses under section 10 and ordered that the respondent should pay the applicant's costs.

On 8th November, 1976, the solicitor for the respondents Hull and Lowrey stated that the respondents withdrew their statutory defences under section 53 of the Act contained in paragraph 2(e) of the Answer, and thereupon the Commission made an award of compensation for the applicant at the rate of $64 per week during his total incapacity of 14 days from 22nd December, 1972, under sections 7 and 9, together with medical

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expenses pursuant to section 10.

In the present proceedings, the Commission's findings in the award made against Glenmore Pty. Limited in 1968 gave rise to an issue estoppel so far as the same issues were raised afresh in the claim brought by the applicant against the respondent company. Thus, the findings made in the earlier award as to the elements necessary for the operation of section 6(3)(a) of the Act with respect to the injury of November 1964 were conclusive as between the applicant and respondent company in the present proceedings, and the issue left for determination in that claim was whether the applicant was entitled to the compensation claimed for the incapacity and the effects of the

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injury of November 1964, from December 1972 to date.

Similarly, the present respondent T.H. Bushby is bound by the findings found on the face of the award made against it in the earlier proceedings, so far as relevant to the present claim against that respondent. However, in the lastmentioned case, as has already been noted, the injury of 17th June, 1966 is not in issue.

The respondents R.D. George and F.W. McKern, in the conduct of their case, did not raise any clear issue as to whether the injury of 16th November, 1964 had been received by the applicant in the course of his employment with them, but these respondents were clearly not bound by the findings expressed in the earlier award made against Glenmore Pty. Limited. 10

However, the evidence given in earlier proceedings became an exhibit in the present proceedings for the purposes of all claims brought by the applicant. As that evidence provides a background to the additional evidence given in the instant proceedings, some features of it will now be mentioned. 20

At the time of the first injury in November 1964, the applicant was a man aged about 36 years and had been engaged in bricklaying work for about 20 years. Prior to that injury, he had not suffered any injury to his back nor had he suffered any disability to his back. Upon 16th November, 1964, in the course of his employment as a bricklayer with R.D. George, F.W. McKern and

C.F. Whitehouse, he tripped and fell onto his buttocks. Shortly afterwards, he experienced pain and difficulty in straightening his back after bending. The pain became more severe and later that day he was seen at home by Dr. Giblin who found him in a state of acute distress from back pain. He remained off work totally incapacitated from the date of the injury until 7th December, 1964. Upon reference from Dr. Giblin, 10 Dr. Allman, a specialist orthopaedic surgeon, examined him on 3rd November, 1974. He found, upon X-ray, that the applicant had a narrowing of the L5-S1 disc space, with possibly some slight retrospondylolisthesis of L5 and S1. His clinical and X-ray findings he considered to be compatible with a disc strain at this level.

Thereafter, the applicant continued to see Dr. Allman at intervals, and Dr. Allman treated him from that time until 25th October, 1968, that is shortly prior to the hearing in the earlier proceedings. In December 1964, the applicant returned 20 to his usual bricklaying work, finding employment with different employers from time to time. He continued to have pain and disability in his back periodically, but lost no time from work as a result of his condition. On 17th June, 1966, in the course of performing bricklaying work for his employer T.H. Bushby, one of the present respondents, he was obliged to carry out bricklaying work for a long period of time in a stooped position. His back became painful in the course of this work in the same

place as he had previously suffered pain following the 1964 injury, and this became more severe as the work progressed. As the result of his back pain he rested in bed from the weekend following, and saw Dr. Giblin on 20th June who issued him with a certificate to be off work for five days. He stayed off work for the period of his certificate and then went back to the work of bricklaying. Between May 1965 and February 1967 the applicant did not consult Dr. Allman. In February 1967 he gave a history to Dr. Allman that he had had a recurrence of symptoms in February 1966, after a difficult job at Hornsby, and had continued to have symptoms on and off, which were quite severe, in October 1966. 10

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In referring to February 1966 as the time the symptoms were received, the history recorded seems to have been incorrect. The month of June 1966 seems to have been the correct time of their recurrence. But, from a diagnostic point of view, whether they recurred in February 1966 or June 1966, does not appear to have been of any consequence. Upon a clinical examination on that occasion, the applicant had a slight list of the spine to the right, but his findings were otherwise normal. Dr. Allman then reported that the applicant's "subsequent history suggests that he has a lumbar disc instability. This is probably in the nature of a degenerative change and may have been aggravated by the accident he described in 1964. The presence of slight retrospondylolisthesis of 20

the 5th lumbar vertebrae on the 1st sacral supports this view". He later went on to say: "If he had no symptoms at all prior to the accident, then it must be considered that the accident caused an aggravation, resulting in the subsequent clinical course of events". The "accident" he refers to is the work incident of 1964.

Following this consultation, the applicant's back condition deteriorated. He developed sciatic pain and footdrop. He consulted Dr. Allman on 4th March, 1968, and the signs and symptoms on that occasion were, in Dr. Allman's opinion, classically those of L4-5 intervertebral disc protrusion. Dr. Allman stated in his written report of 7th March, 1968: "It is extremely difficult to relate these to his original symptoms, which suggested that his lesion was at the L5-S1 disc space. However, it may well be that the radiological findings, as is often the case, are misleading and, in fact, the narrowed disc was not the cause of his symptoms all the time. There is no doubt about the diagnosis now, because of the typical history and findings of sciatica from the 5th lumbar nerve root irritation".

Following this examination, the applicant was admitted to hospital and, as previously mentioned, the protruding disc material at L4-5 was surgically excised. On 28th April, 1968,

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after discharge from hospital, Dr. Allman found him to be fit

to resume light work that did not involve heavy lifting or bending strain.

In his report of 29th April, 1968, Dr. Allman stated: "However, if he had had no symptoms at all prior to the accident in which he sat down heavily at work and this was followed by immediate low back pain which he had never experienced before, I would regard it as a very reasonable claim that this accident did in fact damage the disc, causing the chain of events that led to its eventual protrusion which required its surgical removal". 10

The applicant found a fortnight's light work about the middle of 1968 and thereafter he was unable to obtain work until he returned to the work of a bricklayer on 2nd August, 1968.

He was examined by Dr. Watts for the respondent T.H. Bushby on 17th July, 1968, when he was still off work following the fortnight of light work previously mentioned. The applicant complained that back pain and pain in both buttocks was still present "only if I do anything". Dr. Watts found the applicant to have slight posterior right and left knee pain on full flexion, and no pain on other movements. Straight leg raising tests were then negative through to 80°; there was a 3/4" wasting of the left thigh and faint weakness of the extensor muscles of the left foot. Otherwise no abnormality was detected. 20

Dr. Watts considered him fit to resume work in 3 or 4 weeks time, but added that if he went back to work as a bricklayer with a back that he possessed he was most likely to have

further episodes of back and lower limb pain in the future. He added: "the lighter work he does the less likely are such episodes to occur".

Earlier, in June, Dr. Harvey had examined the applicant. He then complained of pain in the buttocks when he tried to lift or bend, aggravated by coughing. Straight leg raising was to $70^{\circ}$ on each side but this caused a complaint of pain behind the knees. He considered that the applicant could 10

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probably manage lighter bricklaying work but that he would have difficulty doing the full work of a bricklayer. He expected some gradual improvement in the next 4-5 months, but thought it possible that he might have difficulty getting back to the full work of a bricklayer.

Dr. Allman saw the applicant again for review on 16th July, 1968, but in the earlier proceedings there was no evidence of the history and findings on that occasion. However, he did see the applicant again on 25th October, 1968, just prior to the 20 hearing of the earlier proceedings, and found that his condition was then quite good. The applicant, he stated, had reported having returned to bricklaying work, but stated that this was not without some discomfort, causing him to walk more slowly and to be cautious about bending to lift bricks. Upon examination, movement of his spine was fair, but no abnormal neurological findings were found by him. He considered the applicant still unfit for full active duties as a bricklayer.

A report of Dr. Allman of 3rd July, 1973, tendered in the present proceedings, reviews, in summary form, certain features of his reports and recommendations from 1964 through his last examination of 6th March, 1973. This report states that the applicant had returned for review by him on 16th July, 1968 complaining of pain in both buttocks. Clinical examination on that occasion revealed weakness of the left extensor hallucis longus muscle, the result of the old protrusion, but otherwise no abnormality. He further stated that he regarded his symptoms at that time as being due to instability at the site of the disc injury and referred him for physiotherapy treatment. 10

In the earlier proceedings, in his sworn evidence, Dr. Allman had put to him, in examination in chief, the history deposed to by the applicant with the onset of back pain on 17th June, 1966, whilst working for the respondent T.H. Bushby, and the applicant's subsequent complaints of pain, as deposed to by him, from a time shortly following that injury. Upon the assumptions made in the history, he was asked whether the work 20

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of 17th June, 1966 had any significance in the return of his symptoms at the time Dr. Allman had seen him in March 1968. He said in his answer that it was definitely an aggravating feature. He was then asked to express an opinion whether either or both of the work incidents of November 1964 and June 1966 had contributed to the necessity for the operation in March 1964. In answer, he said that he "could only say that they both contributed".

In the earlier award made against T.H. Bushby, the finding that total incapacity for work resulted from the injury of June 1966 between 4th March and 23rd April, 1968, and would appear to have been based upon a subsidiary finding that the surgical and other treatment carried out within this period was necessary as a result of the injury.

At this point, it is convenient to turn to the applicant's evidence in the present proceedings, a summary of which will now be given. He stated that from the time he resumed bricklaying work in 1968, and apparently up to the time he had last worked in 1974, he had to be wary about the type of work he 10

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selected, and he had to be careful, because of his back condition, as to how he performed it and, in this respect, it would seem, he was referring to bending and lifting. He said that he was entirely free of painful symptoms from the time of the operation until he had a gradual onset of pain in his left buttock, and from that time he was never free from pain in his legs which mostly came on when he was working. 20

Between the time he commenced bricklaying work after the operation and the time the pain first came on in 1970, he has worked for many different employers as a bricklayer, and had continued working in that capacity between 1970 and December 1972, when he commenced working for the respondents Hull and Lowrey.

In the course of his work with the respondents Hull and

Lowrey, he was obliged to carry heavy scaffolding, and in the course of his work, he said, his back became stiff, and he felt pain in his lower back at about the site of his earlier operation. His symptoms became worse as the work proceeded, but nevertheless he continued working up to the commencement of the holiday period at Christmas on 22nd December, 1974 and, it would seem, continued to be incapacitated for work during the ensuing fortnight. At the expiry of this holiday period the pain in his back was not the best and he went back to his old job site with a view to resuming work with the respondents. Before commencing work he spoke to the foreman of the respondents, informing him that he had back pain and inquired: "What are we going to do?", intending to convey by that question that he wanted to know what work he was to be given. The foreman then said to him: "You are finished up". He collected his outstanding pay, did not recommence work, and never worked for the respondents again.

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Before returning to work, he said that he had consulted Dr. Allman, but as will shortly be mentioned, Dr. Allman does not recall having seen him between 15th December 1972 and 16th January 1973. He could not remember how long his back pain had persisted after he left Hull and Lowrey, nor could he remember how long he

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was off work after ceasing to work for them, but he agreed (in cross-examination) that the pain in his back would not have

persisted for very long, perhaps a couple of weeks, and he had then gone back to bricklaying work.

He further said (in cross-examination) that his symptoms, referring to the symptoms in his legs, were much worse from the time he ceased working for Hull and Lowrey, and never returned to the state that existed before he commenced working for that firm.

About the middle of 1974 he commenced working for the respondent D. O'Brian & Co. Pty. Limited. His work with the respondent company consisted entirely of the laying of heavy concrete blocks from ground level upwards. Whilst performing this work his back became stiff and painful. He reported his difficulties to Mr. O'Brian, apparently an executive of the company, and he told him to carry on. After working for a short time further, he felt unable to work any longer, and Mr. O'Brian then gave him two days off. After this period he recommenced work upon the same duties. Symptoms in his back became worse, and after working for half a day he felt that he could work no longer. He then ceased work of his own accord, and from that time to the time of the hearing had not done any work at all. He returned to Dr. Allman for consultation and treatment, and said that Dr. Allman informed him that he was finished "as far as bricklaying is concerned". He was unable to remember for how long the back pain, that developed whilst working for the company, had continued after he left his employment with the company, but he said that that pain (as distinct from other pain) did not last for months.

In November 1974 he was admitted to Mt. Wilga Rehabilitation Centre at Hornsby, and came under the care of Dr. Seaton, who from that time took over his treatment. After his spinal fusion operation in April 1975, previously mentioned, he returned to the Rehabilitation Centre and, at the time of the

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hearing, was being re-trained at the Centre as a carpenter.

The applicant gave no evidence of the onset of any specific symptoms whilst performing bricklaying work for a specific employer, apart from what has been mentioned above. 10

The applicant impressed me as being an honest witness with a defective recollection as to what kind of symptoms he had, from time to time, from 1968 onwards. It will have been observed that there is a conflict between his evidence as to the time of the first onset of symptoms after the laminectomy operation and the history given in the medical reports that have been mentioned.

Accepting the symptoms elicited in the clinical examinations mentioned in the medical reports furnished after the operation, part of the history recorded in some of those reports (those of Dr. Watts and Dr. Harvey) does not purport to be a history of contemporaneous symptoms but rather of past symptoms. However, the report of Dr. Allman of 16th July, 1968 appears to give a history of contemporaneous symptoms in both buttocks. In the result, the history set forth in the reports of Dr. Watts, and Dr. Harvey about the middle of 1968, has not 20

been established, but the history found in Dr. Allman's report of 16th July, 1968 as to contemporaneous symptoms, is evidence of the fact reported, and is to be preferred to the present evidence given by the applicant. (Ramsay v. Watson, 108 C.L.R. 642). It is, however, to be observed that the findings made on clinical examination by the three doctors, mentioned in their reports, are also inconsistent with the applicant's evidence as to the time of first onset of symptoms, and they are to be preferred, in my opinion, to the present evidence of the applicant. He was, in my opinion, as a result of his injuries, and the effects of his laminectomy operation, partially incapacitated for work, and unfit for work involving heavy lifting and bending, and this incapacity probably continued from the time he first went back to work after the operation. 10

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Returning now to the medical evidence as to his condition after the earlier hearing, Dr. Allman remained as treating specialist from 8th January, 1970 until November, 1975. His written reports, tendered in the present proceedings, afford the only contemporaneous accounts from a qualified medical practitioner in the present proceedings as to the history given, and the clinical findings on examination, from 8th January, 1970 to late 1975. His report of 3rd July, 1973, previously referred to, conveniently summarises the main features of consultations up to 6th March, 1973. It should be noted that he did not see the applicant between the consultation of October 20

1968, previously mentioned, and January 1970, a period during which the applicant was certainly working as a bricklayer. The remainder of his report of July 1973 should be quoted:

> "He consulted me again on 8.1.70 complaining of stiffness in his back after work and clinical examination showed restrictive movement in his lumbar spine but neurological examination showed no abnormality. On 28.6.71 he complained of pain in the buttocks but on examination straight leg raising was 90 degrees, no spasm was present and I did not consider any special treatment was indicated. 10
>
> On 15.9.71 he consulted me again complaining of sudden onset of pain in the left buttock and numbness in the left leg and the front of the left shin. On clinical examination there was a little weakness of dorsi-flexion of the left foot but the reflexes were normal, movement of the spine satisfactory and straight leg raising was 90 degrees. I advised mobilising exercises.
>
> On 16.9.71 he complained of some return of sciatica and I advised him to continue with his mobilising exercises. 20
>
> On 22.9.71 he stated that his symptoms had improved but there was still some numbness in the left shin. He had not been able to work the preceding few weeks but he felt improved enough to try a return to work.
>
> On 15.12.71 his symptoms had improved and apart from an odd twinge of pain in the left hip he was doing his usual work as a bricklayer.
>
> Mr. Morris consulted me again in 1973 and I remarked on 16.1.73 30

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> he had pain in the right first sacral dermatome distribution, but on clinical examination no abnormality was detected. Review of the x-rays showed some narrowing of both lower lumbar discs and once more I prescribed some physiotherapy treatment.
>
> On 21.2.73 he still complained of pain in the right leg and first sacral dermatome, but no abnormality was detected on neurological examination. At this stage he felt 40 unable to work as a bricklayer because of pain in the buttock and leg which was constant and he felt and I agreed

with him, that the only alternative was to try a lighter job.

On final review on 5.3.73 he had made no progress. Pain was still present down the right leg and there was hypoaesthesia in the left 4th lumbar dermatome. Clinical examination showed slight restriction of straight leg raising on the right side but his back was fairly mobile and he stated that he would attempt to resume bricklaying again as he had had no luck with a lighter occupation. 10

In my opinion progress of Mr. Morris' symptoms has been unfavourable and he continues to have low back pain associated with his abnormal lower two intervertebral discs. As I mentioned to you in my report of 29.4.68, prognosis was good but he was still left with an abnormal disc at the level of operation as well as the previously degenerated one below. Unfortunately my hope of a good result has not been fulfilled and his prognosis has so far proved to be only fair. Though not totally disabled, he has continued to have symptoms which have interferred with his normal work as a bricklayer and in my opinion will continue to do so, it being a strong probability that he will be unable to continue with this type of work permanently. 20

The question of liability of the original accident causing his present situation probably depends on the fact that he does not admit to any symptoms prior to accident. Though his accident was not severe, it was the type of strain that commonly does cause injury to disc. The fact that his lower disc, the one between the 5th lumbar and 1st sacral vertebra was already narrow at that time does indicate that he was beginning to suffer disc degeneration which of course is not uncommon in the general population and more common in those that do heavy work. The process need not necessarily cause significant discomfort at all and it may well be that the fall of the type that he suffered, in the presence of a degenerating disc at the L4/5 level, was sufficient to initiate the train of events that has followed. There is no indication for further surgical treatment as I am not in favour of fusion operations where more than one disc is involved in the degenerating process." 30 40

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Upon 16th January, 1973 Dr. Allman had seen the applicant, as he stated in another report of 3rd July, 1973, when he complained of pain in the right sacral distribution, and x-ray

investigation then disclosed disc narrowing at the L4-5 and L5/S1 levels.

After March 1973, Dr. Allman next saw the applicant on 17th July, 1974. His report of 23rd July, 1974, dealing with that consultation, states:

> "... As I have mentioned before, there is no alternative but for him to seek other employment which does not involve such heavy bending and lifting work. 10
>
> Clinical examination revealed some restriction of movement in his lumbar spine compatible with his previous injury and there is no indication for further treatment and in my opinion his condition is permanent."

On 25th July, 1974 he wrote to the Commonwealth Employment Services, referring to the applicant's occupation as that of a bricklayer, and stating that "he remains unable to carry out this work without frequent interruptions from low back pain". He went on to say that he had strongly advised him over the last six months to obtain employment which did not place such a 20 great strain on his lumbar spine, and that he was a very suitable person for re-training. He next saw the applicant on 1st December, 1975, after the spinal fusion operation had been carried out, and when he was attending Mt. Wilga Rehabilitation Centre for re-training. Clinical examination then disclosed that there was very marked restriction of his lumbar spine, but no other abnormalities were reported. In his opinion, the applicant remained unfit for heavy bending or lifting. At the end of his report of 2nd February, 1976 appears the following passage: 30

"... It is difficult to state positively the exact degree of physical disability that Mr. Morris suffers, as assessment depends largely on subjective evidence. It is also difficult to be certain of the degree to

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which his initial injuries contributed to his original disability as it could be fairly said that the basis of the pathology is degenerative in nature. However, though it is not uncommon for people of sedentary occupation to suffer disc lesions, the prognosis is usually good and a spontaneous recovery takes place. In the presence of heavy manual work disc degeneration is certainly not tolerated as it is undeniably aggravated by the strains imposed on the spine and a degree of disability may be reached which would not otherwise be expected if the patient was not engaged in this type of work."

Before outlining the oral evidence of Dr. Allman and Dr. Seaton, both of whom were called by the applicant to give sworn evidence, it is convenient to refer now to the written report of Dr. Seaton of 29th May, 1975. After setting out the previous medical history of the applicant (but with some inaccuracy, it should be noted) he reported as follows:-

"... He was assessed at the Centre and found to be an honest working man who was very keen to get back to bricklaying, which had been his life, but because of his age and because of the fact that he had a laminectomy, it was not possible for him to do this. He had on assessment good clerical ability, he was reasonably educated, and he had good practical ability with use of his hands. It was decided that an attempt would be made to cure his back so that he could return to some form of work in the building trade where he could earn a reasonable living. He said he would be prepared to do process work, but this of course would have meant a great drop in income.

For this reason he was admitted to hospital on 21/4/1975 and a myelogram was carried out. This

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> showed that he had disc lesions at the L4/5 and 5/1 levels. He underwent operation on 23/4/1975 and a laminectomy was carried out with decompression of the discs at 4/5 and S1. A double spinal fusion was performed and he was discharged two weeks later from hospital wearing a polythene jacket. His recovery has been uneventful, he has no longer any pain nor is he suffering with sciatica. However, it will take six months before the spinal fusion is effective, he will then be reassessed and I will let you know his progress." 10

The words underlined above are my own emphasis.

In his sworn evidence Dr. Allman said that he was unable to nominate the precise periods in which the applicant had been totally incapacitated for work during the long period in which he had been under his care, but that at times during the period in which he had seen him, he had certainly been unfit for work. In cross-examination, he said he thought that the 20 fact that he was engaged in heavy work between 1968 and 1974 would have rendered his chances of suffering pain that was disabling greater than if he had been in a sedentary occupation during that time. He would not agree that his work as a bricklayer, over a period of years, would have led to a change in the underlying pathology because pathology had been the same throughout. His symptoms were associated with degenerative changes and instability in the two lower discs which were known from the past to be degenerating. He agreed that a way of putting the position could be that the trauma of heavy work was 30 superimposed upon such degeneration. He would not, he said, exclude an association between work that the applicant had been

performing in late 1972 and the symptoms reported to him in early 1973, but he regarded this as a natural thing that happened in his case because he had lost his shock-absorbing disability, and that, with his spine, any stresses would be likely to cause this sort of symptom - not

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necessarily, but it was reasonable that it should have happened. His painful symptoms in late 1972 were caused at that time by his underlying pathological condition, and similarly, in 1974, the performance of the heavy work of laying concrete blocks would have produced the painful symptomatology. He would not agree that these episodes added to the incapacity that he had been suffering, but they would be episodes of pain and temporary disability. If the applicant had had no symptoms between August 1968 and January 1970, the later work he had carried out, and the work during the two episodes, he would regard, he said, as an aggravation of his condition, causing painful symptoms. If he had remained completely free of heavy work between 1964 and 1974, it would certainly be probable that he would have recovered and had no more trouble, "but that would not be 100% so". The injury of 1964, coupled with the degeneration (in his lumbar spine) could have resulted in him being, sooner or later, disabled, accepting the medical and work history outlined above. The two work episodes of December 1972 and July 1974, he agreed, were only "a demonstration of the fact that the shock-absorbers in his spine had packed up".

Dr. Seaton, in his sworn evidence, said that when he had seen the applicant "about a month ago" (that is, in February, 1976), the applicant was very fit indeed and eager to get work. As he had had two spinal operations, including a fusion at two levels at the base of his spine, and was getting close to fifty, restrictions had to be placed on his future employment, and they were no heavy lifting and no repeated bending. He undoubtedly now had complete fusion at the levels mentioned in 10
his written report. The medical and work history of the applicant, substantially as already outlined, was put to him, including the history of the 1966 injury, and he was asked to express an opinion whether the respective injuries and the episodes of symptomatology in 1972 and 1974, which came on during his work for Hull and Lowrey and D. O'Brian & Co. Pty. Limited, played any part in the

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need for the operation performed in 1975. His answer to this question was as follows: 20

> "Well, in answer to that I can only give an opinion, naturally. It is not a factual thing. But I am sure the Commission is aware of the fact that a spinal injury that is significant enough to invoke a laminectomy very rarely allows a man to return to an arduous job such as bricklaying; and, indeed, it is incredible that in this case, without an accompanying fusion, that the man was able to continue as a bricklayer; it is very unusual. The reason I say that is that with the removal of a disc and its substance you do get further problems, sometimes 30
> called the post-laminectomy syndrome; and part of that problem is instability.
>
> And I am sure that the treating surgeon, who is well-known, Dr. Allman - I think that was the name mentioned - would

have agreed that there would be some instability following such. And, therefore, putting it simply, the train of thought in my mind was that the man had a disc injury followed by laminectomy, this led to instability, and it was my job to stabilise it; this I did."

In cross-examination, he said, by way of explanation, that a man who has had a disc removed, not followed by a fusion, and goes to lifting and bending work was always at risk, in his opinion. He agreed that if he had not performed the heavy lifting and bending work after the laminectomy operation, the need to operate would not have been likely. He further agreed that there was, probably as far back as 1964, a degenerative process at work which was particularly common in the case of bricklayers, and that such persons, with a degenerative disc, could come to a stage where they could no longer do the work without having painful symptoms anatomically. 10

As to the history of the onset of symptoms when lifting scaffolding in 1972, he agreed that it would be fair to say that the pain arose by reason of the imposition of heavy work upon the applicant's unstable back, and further agreed with Dr. Allman that the two episodes of symptomatology in late 1972 and the middle of July 1974 were demonstrations of the fact "that the shock-absorbers had packed up". The episode in 1964, he said, was a definite milestone, in his opinion, and the other episodes seemed to him to be part and parcel of his everyday job. 20

Upon this evidence, there can be little doubt that both

before and after December 1972 the applicant had been partially incapacitated for work during certain periods of time and, at other periods, totally incapacitated for work.

The question that has been much canvassed in argument by Counsel for the respective respondents was not so much concerned with the question whether the applicant received each injury, as he claims, within the definition of "injury" contained in section 6(1) of the Act, but, rather, whether his incapacity for work for the period claimed should be held to be the result of one or more of the injuries upon which he relied, or was the result of the frequent performance of heavy work as a bricklayer in various employments over a period of years, or was the result of a gradual degenerative process unaffected by the injury, or was the result of some combination of one or more of these events or circumstances. The problem that the evidence presents is far from novel. It has been the subject of attention in the decided cases repeatedly, but ultimately it must remain a question of fact, upon the evidence, whether an injury or injuries resulted in incapacity for work or, if such be the case, in some other event which is compensable. (Adelaide Stevedoring Company v. Forst, 64 C.L.R. 538; Butler v. The Commonwealth, 102 C.L.R. 465; La Macchia v. Cockatoo Docks & Engineering Co. Pty. Ltd. 1972, N.S.W. L.R. 644; Pyrmont Publishing Co. Pty. Ltd. v. Peters (C.A.) 1972, W.C.R. 27; Federal Broom Company Pty. Ltd. v. Semlitch, 110 C.L.R. 626).

It is convenient to consider at the outset whether the evidence established that the applicant received the respective injuries in the course of his employment with the four respondents R.D. George, F.W. McKern and C.F. Whitehouse, T.H. Bushby, Hull and Lowrey and Glenmore Pty. Limited. In the Commission's opinion, the injury in November 1964 was received arising out of and in the course of his employment with the respondents George, McKern and Whitehouse; the injury of June 1966 was received arising out of and in the course of his employment with the respondent

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T.H. Bushby; in December 1972 arising out of and in the course of his employment with the respondents Hull and Lowrey and, in July 1974 arising out of and in the course of his employment with the respondent Glenmore Pty. Limited. The Commission accepts the evidence of the applicant as to the circumstances under which he was working at the time of the respective injuries and as to the nature and time of onset of the symptoms and disabilities that he experienced following the performance of the work duties upon which he had been engaged at the respective times.

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Having regard to the state of the evidence, the determination of the precise periods in which he was partially or totally incapacitated for work was not free from difficulty.

The onus was certainly upon the applicant to establish the nature and duration of any incapacity for work in the period

claimed and that incapacity resulted from one or more of the various injuries. The Commission has found, as already mentioned, that the injury received in the course of his employment with the respondents Hull and Lowrey resulted in total incapacity for work for a fortnight. It was at the expiration of this time that the applicant reported for work with Hull and Lowrey. The applicant's account of his symptoms after the expiry of this period, when considered in the light of the written reports of Dr. Allman upon his consultations of 16th January, 1973 and 21st February, 1973, did not, in the Commission's opinion, justify the inference that he was totally incapacitated for work for any period after the expiry of the fortnight. In the Commission's opinion, he was probably partially incapacitated for work between 5th January and 15th January, 1973. But, in this period, his partial incapacity for work was probably not the result of the effects of the injury he received with the respondents Hull and Lowrey. The effects of this work injury, as Dr. Allman explained in relation to this and similar episodes, gave rise to temporary disability,

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and probably did not change the underlying pathology in his spine.

The symptoms with which he presented on 16th January, 1973 and 21st February, 1973 were much the same as those that he had experienced in his buttocks or one or other of his legs over many years previously. As a result of his symptoms, and

necessary treatment by Dr. Allman during this period, he was probably, as the Commission has found in the awards made against the respondents Glenmore Pty. Limited and Bushby, totally incapacitated for work. On 22nd February, 1973, until he received the further injury with the respondent D. O'Brian & Co. Pty. Limited, the applicant returned to a state of partial incapacity for work. However, no evidence was presented as to what he would have been able to earn in the same or some comparable em- 10 ployment in this period but for his injury. Accordingly, it was not established, pursuant to section 11(1) of the Act, that the applicant was entitled to compensation with respect to this period of partial incapacity.

The injury mentioned in the award made against the respondent D. O'Brian & Co. Pty. Limited precipitated incapacitating symptoms for a short period, and probably did not give rise to any changes in the underlying pathology existing at the time of the injury. The applicant's evidence as to the duration of these symptoms was far from precise. It seems clear that he 20 must have been incapacitated for work, probably totally, by reason of his symptoms for one month at least, but upon the evidence, the Commission was not satisfied that he was totally or partially incapacitated for work thereafter, as a result of that injury.

However, the Commission has found, in the awards made against the respondents Glenmore Pty. Limited and Bushby, that he was totally incapacitated for work from 18th August, 1974 to

2nd February, 1976. The lastmentioned date was taken to be the date of his last consultation with Dr. Allman, the subject of his report of 2nd February, 1976, but I have observed that that



report gives the date of the last consultation with him as 1st December, 1975, and it is therefore clear that the award to this extent was based upon a misapprehension and should be vari- 10 ed to close the period of total incapacity on the day preceding this consultation, namely the 30th November, 1975. From the date of the consultation mentioned, the applicant, as the Commission has found, was partially incapacitated for work and unfit for work involving heavy lifting, repeated bending and back strain, and unfit for the ordinary duties of a bricklayer. The finding of total incapacity in the period 18th August, 1974 to the end of November 1975 was based upon the applicant's account of his symptoms during this period, the necessity for rehabilitation treatment, and subsequent hospital and surgical treatment 20 in April, 1975. The surgical findings, upon operation, confirmed that he was, in all probability, totally incapacitated for work for a long period before admission to hospital, and the surgical treatment itself probably caused him to be totally incapacitated for work during subsequent convalescence up to the time of the applicant's last consultation with Dr. Allman. There was evidence of what the applicant would have earned as a bricklayer employed at award rates during his partial

incapacity from late 1975 onwards, and by reference to these rates and the Commission's estimate of the amount he was able to earn in some suitable employment or business, the Commission determined the amount of his weekly entitlement to compensation under section 11(1), as found in the awards made against the respondents Glenmore Pty. Limited and Bushby.

It is necessary now to outline the facts that the Commission found to be established in reaching its findings that total and partial incapacity of the applicant during the period from early January 1974 to date, excepting the month of total incapacity resulting from the injury of July 1974, resulted from the injuries of 1964 and 1966. 10

The laminectomy operation performed in April 1968, as previously mentioned, resulted from the effects of the first

-37-

two injuries. That operation succeeded, for the time being at least, in curing his sciatic pain, but it produced a chronic back instability at the site of the operation, that is at the L4-5 level, and this instability was, as Dr. Seaton said in evidence, part of what is frequently described as a post-laminectomy syndrome. Symptoms of this back disability had already appeared by July 1968 before the applicant returned to bricklaying work. As a result of his back instability, the applicant was partially incapacitated for work, and unfit for work involving heavy lifting and repeated bending. These 20

restrictions upon his work capability rendered him unfit for the ordinary work performed by a bricklayer and, indeed, for many other kinds of work commonly available in the building industry. His incapacity for the types of work mentioned would have, in the Commission's opinion, continued indefinitely unless his spine could be stabilised successfully by spinal fusion. At the time of the 1964 injury, the applicant already had a degenerative condition in the discs at the L4-5 and L5/S1 levels 10 but, up to the time of that injury the applicant had no symptoms.

As a result of the instability in his back at the L4-5 level, the applicant was likely to experience painful symptoms when he performed the work that he in fact performed from about August 1968 onwards, but such smmptoms, whenever they occurred, were probably temporary and, as already mentioned, unlikely to have changed the underlying character of the pathology present in the two intervertebral discs. There was no clear evidence as to what symptoms he experienced in his lower back or legs 20 between July 1968 and early 1970, but there can be no doubt, upon the evidence, in the Commission's opinion, that he had recurrent back symptoms from 1970 onwards, and that these symptoms were much the same as those with which he had presented to Dr. Allman in July 1968. The Commission is satisfied that these symptoms were probably a result of his low back instability at the L4-5 level, and were consequential upon the laminectomy

operation.

To use the expression adopted by Dr. Allman, the applicant had lost his shock-absorbers in the lower part of his spine, and this would appear to be a reference to the spinal abnormalities at the L4-5 and L5/S1 levels. Whatever was the association between the original injury and the condition of the disc space at the L5/S1 level, the instability left by the laminectomy operation alone rendered it likely that any activities that imposed stress on the lower part of the spine would cause disabling symptoms from time to time, and such symptoms were already in evidence, apparently without any back stress, as early as July 1968. As already mentioned, the injuries of 1972 and July 1974 were temporary only in their effects. There was no evidence that any specific injury from 1968 onwards, apart from these two, had in fact altered the underlying pathology, and thereby resulted in some enhanced incapacity for work. The recurring symptoms in his back and legs from July onwards were probably manifestations of a well-established back instability resulting from the effects of the earlier injuries of 1964 and 1966, including the post-operative effects of the laminectomy.

The evidence justified the inference, in the Commission's opinion, that the instability in his back at the L4-5 level, by a gradual process over a period of years, led to a progressive deterioration in the condition of his spine at that level. It is probable that, concurrently, deterioration was taking

place in the disc space at the L5/S1 level. Whatever contribution was made by the deterioration of the lastmentioned disc space to his incapacity for work, his total incapacity for work between 16th January, 1975 and 21st February, 1975, and from 18th August, 1974 to 30th November, 1975, was probably a result of the effects of the laminectomy operation.

The Commission accepted the grounds given by Dr. Seaton

-39- 10

in his written report, and in the passage cited from his oral evidence, for his decision to perform the spinal fusion operation. The Commission was satisfied, in the light of this evidence, that that operation was reasonably necessary to cure the back instability resulting from the laminectomy operation. The fact that a spinal fusion was carried out at the L5/S1 level in the course of the operation does not have any real bearing upon the question whether the operation was necessary as a result of the condition at the L4-5 level.

The Commission did not accept medical evidence to the effect that the need for the operation would have been unlikely if the applicant had not engaged in unsuitable work as a bricklayer over the years following the laminectomy operation. No doubt if he had obtained regular and remunerative employment in suitable light work, from a practical point of view, there might have been no point in undertaking surgical treatment to correct the instability in his back, but once it was fully demonstrated, as it was, that as a result of the instability in

his lumbar spine he was seriously handicapped in obtaining and holding employment as a bricklayer, and probably as well in the building industry generally, it was, in the Commission's opinion, entirely reasonable to attempt to cure, by surgical operation, the chronic instability in his back, with a view to increasing his work capacity and thereby improving his chances of obtaining employment in the building industry in which he had always been employed. 10

Once the injuries of 1964 and 1966 are accepted as having had these results, it would seem of slight practical importance whether the pathology of his L5/S1 disc, however caused, had the same results.

The present evidence, however, involved, among other matters, an inquiry into what part (if any) the four specific injuries played, and prolonged performance of heavy work, in bringing about his disabilities and treatment at the L5/S1

-40-

level, as well as the L4-5 level of his spine, from the time of 20 his first injury onwards.

In the recent awards there are specific findings that surgical fusion at the L5/S1 level was necessary as a result of each of the 1964 and 1966 injuries. Upon its factual findings in the earlier proceedings upon the effects of these two injuries, and its overall view of medical evidence given in these proceedings, the Commission was persuaded that the applicant's incapacity for work and medical treatment were not merely

related causally to the progress of an autogenous degeneration of the L4-5 and L5/S1 discs, and the prolonged performance of heavy work by the applicant, although such a hypothesis was not unreasonable. Upon the part played by the two injuries, and particularly the first - a milestone, it was said - the opinions expressed by Dr. Allman from time to time, and by Dr. Seaton, gave rise to difficulties of interpretation in part by reason of language they used and the other varied matters that fell under their immediate attention. But substantially, their opinions depended upon the history that was accepted as proven. Whatever else may have caused, initially or ultimately, the pathology in the L5/S1 disc found at operation, and the necessity for the fusion surgery performed upon it, the Commission was satisfied that the operation resulted from the injuries of 1964 and 1966.

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Having published these reasons for the recent awards, attention should now be drawn to the decision of the Court of Appeal in Edwards v. Mainline Constructions Pty. Limited, 1 N.S.W. L.R. 90. That case decided that where claims are brought in proceedings before the Commission under section 6(3) of the Act against a "principal", and under section 7 of the Act against an "employer" who is, for the purposes of the section, the "contractor" to the principal, the provisions of the section require that

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one award only should be made, and that once an award is made in favour of an applicant worker against one of two such respondents, the worker loses any right he may have had up to the time the award is made, to an award against the other.

Edwards' case was quite overlooked by the Commission at the time that the recent awards were made against the respondents George and McKern and Glenmore Pty. Limited. There may have been in the course of the final addresses some discussion upon the construction of section 6(3)(a) with respect to the necessity for making one award only against either the respondents George and McKern or the respondent Glenmore Pty. Limited, but I have no note of it and no recall of it. 10

As previously mentioned, in the present proceedings the award against George and McKern was made before the award against Glenmore Pty. Limited. If this were the only matter for attention in applying Edwards' case, the award made against the respondent Glenmore Pty. Limited would appear to have been invalidly made and, as I see it, it would now be open to the Commission to rescind or suspend it. 20

However, at the time of the making of these two awards, the Commission, in November 1968, had made an award against the respondent company in which, it will have been seen, the respondent was found liable to pay compensation to the applicant for the effects of the same injury as is the subject of the two recent awards "as if he had been directly employed by it" in

pursuance of section 6(3)(a). Although the compensation then awarded was different from that which was the subject of the recent award made against the company, the decision in Edwards' case would appear to have required that the award made in the previous proceedings against the respondent company should be treated as having terminated any right that the applicant had up to that time against his employers George, McKern and Whitehouse, and to have thus required, upon the findings presently made, that in the present proceedings an award be made solely against the 10

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respondent company.

As previously mentioned, the respondent company has already appealed, by Notice of Motion to the Court of Appeal, against the present award made against it, and proceedings on that award have been stayed, but the award made against the respondents George and McKern remains unrescinded and unsuspended. In these circumstances, I propose to re-list these two matters 20 six days after the date of publishing these reasons, with a view to receiving any submissions the parties may desire to make. As at present advised, an order suspending the order against the respondents George and McKern, pending a decision of the Court of Appeal, upon the motion of the respondent company, appears to me to be appropriate.

It should also be observed, in connection with the application brought under section 18C for an order that the

compensation awarded against the respondents George and McKern (who were undoubtedly uninsured) should be paid from the Uninsured Fund, that the Commission declined in the exercise of its discretion under the section, to make this order because the applicant was entitled, under concurrent awards, to the same compensation made against Glenmore Pty. Limited and Hull and Lowrey, both respondents being presumed to be insured. If the award against George and McKern was a nullity, no basis existed for the claim against the Uninsured Fund. However, the Court of Appeal in K.B. Hutcherson Pty. Limited v. Employers' Mutual Indemnity Association Limited 1976, N.S.W. L.R., 103, has since held that the statutory Workers' Compensation policy does not give an indemnity to the principal of a contractor against his liability to pay compensation to a worker under the provisions of section 6(3)(a).  10

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MR. D. FREEMAN (instructed by Messrs. W.C. Taylor & Scott) appeared for the applicant.  20

MR. TOOMEY (instructed by C.A. Vandervord, Esquire) appeared for the respondents Hull and Lowrey.

MR. IRELAND (instructed by Messrs. J.P. Brogan & Co.) appeared for the respondents R.D. George and F.W. McKern.

MR. DAVIDSON (instructed by Messrs. P.V. McCulloch & Buggy) appeared for the respondent D. O'Brian & Co. Pty. Limited.

MR. POULOS (instructed by Messrs. Hickson, Lakeman & Holcombe) appeared for the respondent Glenmore Pty. Limited.

MR. R. de CHANCE for the respondent T.H. Bushby.  30

MR. BROWN appeared for the Registrar.

ANNEXURE "E"

APPLICATION FOR DETERMINATION

IN THE WORKERS' COMPENSATION COMMISSION ) No. of Matter 8102
OF NEW SOUTH WALES ) of 1974

In the matter of the Workers' Compensation Act, 1926, as amended.

In the matter of a Determination between

SYDNEY BLAIR MORRIS Applicant,

and

R.D. GEORGE, F.W. McKERN, C.F. WHITEHOUSE Respondent, 10

An application under the above-mentioned Act is hereby made by the applicant against the respondent for the determination of the liability and amount of compensation payable by the respondent.

Particulars are hereto appended.

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| 1. Name, age and address of applicant: | Sydney Blair Morris Age 46<br>18 Low Street,<br>Mt. Kuring-Gai 2080 |
| 2. Name, place of business, and nature of business of respondent: | R.D. George, 46 Belmont Pde, Mount Colah<br>F.W. McKern, 18 Denison Street, Hornsby<br>C.F. Whitehouse, 5 Lockville St. Wahroonga<br>Bricklaying Subcontractors. |
| 2(A). Name and address of insurer of respondent: | Uninsured |
| 3. Nature of employment of applicant at time of injury, and whether employed under respondent or under a contractor with him*: | Employed by the Respondents as a bricklayer |
| 4. Date and place of injury, nature of work on which worker was then engaged, and cause of injury: | 16th November, 1964 at the Respondents job at the Cnr. of Duff Street and Pacific Highway, Turramurra. The Applicant stepped backwards and fell. |
| 5. Nature of injury: | Injuries to the back caused and/or materially aggravated by the work described. |

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*If employed under a contractor or by another employer who is not a respondent, name and place of business of contractor or other employer to be stated.

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| 6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity: | Total incapacity for intermittant periods after the injury, until the 21st December, 1972. Total incapacity from 22nd December, 1972 to 16th March, 1973, partial incapacity thereafter. |
| 7. Average weekly earnings during the twelve months previous to the injury, if the applicant had been so long employed under the employer by whom he was immediately employed, or if not, during any less period during which he has been so employed: | $76.00 a week. |
| 8. Average weekly amount which the applicant is earning or is able to earn in some suitable employment or business after the injury: | Nil during total incapacity. |
| 9. Payment, allowance, or benefit received from employer during the period of incapacity: | The Applicant has received compensation under Award No. 3517 of 1964. |
| 10. Amount claimed as compensation: | $64.00 a week from the 22nd December, 1972 to 16th March, 1973 under Section 9. $64.00 a week under Section 11(1), from the 17th March, 1973 to date and continuing. Medical and hospital expenses under Section 10. |
| 11. Particulars of persons dependent upon applicant's earnings: | Wife and two children totally dependent. |
| 12. (a) Date of service of statutory notice of injury on respondent, and whether given before worker voluntarily left the employment in which he was injured.⁄ (b) Where necessary, date of notice of incapacity. (c) Date when claim for compensation made. | (a) Approximately 16th November, 1964 (b) (c) Approximately 16th November, 1964 |

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⁄A copy of the notice to be annexed.

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| 13. If notice not served, reason for omission to serve name. | -- |
| (Where injury is a disease contracted by a gradual process.)<br>14. Names and addresses of all other employers by whom applicant was employed during the twelve months previous to date of incapacity in any employment to the nature of which the disease was due. | -- |

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The name and address of the applicant's solicitor are:
Francis Joseph Liddy of W.C. Taylor & Scott, 181 Elizabeth Street, Sydney (DJC:RH)

DATED this 9th day of November, 1974

SYDNEY BLAIR MORRIS

per: F.J. Liddy
Solicitor for the Applicant.

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Appointed Days - Rules Div. 1, H12
Hearing Thurs 20.3.75
Answer 14.1.75
Service 10.12.74
4 & 10

ANNEXURE "F"

APPLICATION FOR DETERMINATION

IN THE WORKERS' COMPENSATION COMMISSION ) No. of Matter 3600
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

In the matter of a Determination between

SYDNEY BLAIR MORRIS Applicant,

and

GLENMORE PTY. LIMITED Respondent

An application under the abovementioned Act is hereby made by the applicant against the respondent for the determination of the liability and amount of compensation payable by the respondent. Particulars are hereto appended. 10

PARTICULARS

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|---|---|
| 1. (a) Name and address of applicant:<br><br>(b) Date and year of birth: | (a) Sydney Blair Morris<br>18 Low Street,<br>Mt. Kuring-Gai 2080<br>(b) Aged: 47 |
| 2. Name, place of business, and nature of business of respondent: | Glenmore Pty. Ltd., 28 Water Street, Wahroonga. 2076 |
| 2(A). Name and address of insurer of respondent: | Eagle Star Insurance Co. Ltd.,<br>118 Alfred Street,<br>Milsons Point. 2061 |
| 3. Nature of employment of applicant at time of injury, and whether employed under respondent or under a contractor with him*: | Employed by the Respondent as a Bricklayer. |
| 4. Date and place of injury, nature of work on which worker was then engaged, and cause of injury: | 16th November, 1964 at the Respondent's job at the Cnr. of Duff Street and Pacific Highway, Turramurra. The Applicant stepped backwards and fell. |
| 5. Nature of injury: | Injuries to the back caused and/or materially aggravated by the work described. |

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*If employed under a contractor or by another employer who is not a respondent, name and place of business of contractor or other employer to be stated.

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| 6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity: | Total incapacity for intermittant periods after the injury, until the 21st December, 1972. Total incapacity from 22nd December, 1972 to 16th March 1973, partial incapacity thereafter. |
| 7. Average weekly earnings during the twelve months previous to the injury, if the applicant had been so long employed under the employer by whom he was immediately employed, or if not, during any less period during which he has been so employed: | $76.00 a week. |
| 8. Average weekly amount which the applicant is earning or is able to earn in some suitable employment or business after the injury: | Nil during total incapacity. |
| 9. Payment, allowance, or benefit received from employer during the period of incapacity: | The Applicant has received compensation under Award No. 3517 of 1964. |
| 10. Details of compensation claimed: (Vary or add to as necessary; delete what inapplicable.) | (a) $64.00 p.w. from 22.12.72 to 16.3.73 under S.9. $64.00 a week under S.11(1), from the 17.3.73 to date and continuing.<br>(b) s.16 lump sum $ in respect of<br>(c) s.10 expenses Medical and hospital expenses under S.10.<br>(d) |
| 11. Particulars of persons dependent upon applicant's earnings: | Wife and two children totally dependent. |

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|---|---|
| 12. (a) Date of notice of injury: | (a) Approximately 16th November, 1964. |
| (b) Date of notice of incapacity if given: | (b) --- |
| (c) Date of claim for compensation: | (c) Approximately 16th November, 1964. |
| (d) Reason for omission of any notice: | (d) --- |
| 13. Where injury is a disease contracted by a gradual process, names and addresses of all other employers by whom applicant was employed during the twelve months previous to date of incapacity in any employment to the nature of which the disease was due: | --- |

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The name and address of the applicant's solicitor are: FRANCIS JOSEPH LIDDY of W.C. Taylor & Scott, Solicitors, 181 Elizabeth Street, Sydney. 2000 61.7591 Ref: DJC.

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DATED this 13th day of May, 1975.

SYDNEY BLAIR MORRIS

Per: F.J. Liddy
Solicitor for the Applicant.

Appointed Days -
Hearing Thurs. 26.6.75
Answer 25.6.75
Service 23.6.74
9B & 10B (notes illegible)

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ANNEXURE "G"

IN THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES

No. 3600 of ~~192~~ ~~1964~~ 1975

IN THE MATTER of the Workers' Compensation Act 1926 as amended

IN THE MATTER of a determination between

SYDNEY BLAIR MORRIS

Applicant 10

and

GLENMORE PTY. LIMITED

Respondent

ANSWER BY RESPONDENT

WORKERS COMPENSATION COMMISSION
OF NEW SOUTH WALES
14 AUG 1975
*DISTINGUISHING LETTER*
M

Dc. 14/8 20

HICKSON, LAKEMAN & HOLCOMBE
SOLICITORS
170 PHILLIP STREET,
SYDNEY. 233-5311

IN THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES ) No. 3600 of ~~1964~~ ~~197~~ 1975

IN THE MATTER of the Workers' Compensation Act 1926 as amended

IN THE MATTER of a determination between

SYDNEY BLAIR MORRIS Applicant

and 10

GLENMORE PTY. LIMITED Respondent

TAKE NOTICE that the Respondent states that the Applicant's particulars filed in this matter are inaccurate or incomplete in the particulars annexed hereto.

That the Respondent denies its liability to pay compensation under the abovementioned Act in respect of the alleged injury to the Applicant.

That the Respondent intends at the hearing of the application to give evidence and to rely on the facts in the particulars annexed hereto. 20

PARTICULARS

1. The particulars filed by the Applicant are inaccurate or incomplete as to the facts contained in paragraphs 3, 4, 5, 6, 7, 10 and 12.

2. The grounds on which the Respondent denies its liability are:

(a) That the Applicant was not a worker to whom the Act applies.

(b) That the Applicant did not receive an injury within the meaning of the Act as alleged in particular Number 4. 30

(c) That the Applicant's incapacity for work (if any) was not a result of injury arising out of or in the course of his employment with the Respondent.

(d) That notice of the alleged injury was not given to the Respondent as required by Section 53 of the Act.

(e) That the Applicant left the employment in which he was at the time of the injury before he became incapacitated as alleged, and did not, as soon as practicable after the happening of incapacity resulting from the injury, as alleged, give notice of such incapacity to the Respondent. 10

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

Of the Respondent: GLENMORE PTY. LIMITED
28 Water Street,
Wahroonga

Of its Solicitor: HICKSON, LAKEMAN & HOLCOMBE
Solicitors,
170 Phillip Street, 20
SYDNEY.

DATED this 14th day of August 1975

J.B. Bagnall
Solicitor for the Respondent.

To the Registrar
and
To the Applicant

ANNEXURE "H"

APPLICATION FOR DETERMINATION

IN THE WORKERS' COMPENSATION COMMISSION ) No. of Matter 9101
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

In the matter of a Determination between

SYDNEY BLAIR MORRIS Applicant,

and

T.H. BUSHBY Respondent

An application under the abovementioned Act is hereby made by the applicant against the respondent for the determination of the liability and amount of compensation payable by the respondent. Particulars are hereto appended. 10

PARTICULARS

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|---|---|
| 1. (a) Name and address of applicant:<br><br>(b) Date and year of birth: | (a) Sydney Blair Morris, 18 Low Street, Mt Ku-ring-gai. 2080.<br>(b) 45 years |
| 2. Name, place of business, and nature of business of respondent: | T.H. Bushby, 256 Canterbury Road, Canterbury. 2193 Bricklaying Contractor. |
| 2(A). Name and address of insurer of respondent: | Southern Pacific Insurance Company Limited, 80 Alfred Street, Milsons Point. 2061. |
| 3. Nature of employment of applicant at time of injury, and whether employed under respondent or under a contractor with him*: | Employed by the Respondent as a Bricklayer. |
| 4. Date and place of injury, nature of work on which worker was then engaged, and cause of injury: | 17th June, 1966, at the Respondent's job Waitara. The Applicant was required to perform work whilst in a stooped position. The work caused and/or aggravated the Applicant's back condition. |
| 5. Nature of injury: | Injuries to the back. |

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*If employed under a contractor or by another employer who is not a respondent, name and place of business of contractor or other employer to be stated.

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| 6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity: | See annexure "A". |
| 7. Average weekly earnings during the twelve months previous to the injury, if the applicant had been so long employed under the employer by whom he was immediately employed, or if not, during any less period during which he has been so employed: | Approximately $74.00 per week. |
| 8. Average weekly amount which the applicant is earning or is able to earn in some suitable employment or business after the injury: | Nil during total incapacity. |
| 9. Payment, allowance, or benefit received from employer during the period of incapacity: | The Applicant has been paid compensation pursuant to Award in Matter No. 3481 of 1967. |
| 10. Details of compensation claimed: (Vary or add to as necessary; delete what inapplicable.) | (a) $ p.w. from to<br>(b) s.16 lump sum $ in respect of<br>(c) s.10 expenses<br>(d) See annexure "A". |
| 11. Particulars of persons dependent upon applicant's earnings: | Wife and two children totally dependent. |

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| 12. (a) Date of notice of injury: | (a) 17th June, 1966. |
| (b) Date of notice of incapacity if given: | (b) |
| (c) Date of claim for compensation: | (c) 17th June, 1966. |
| (d) Reason for omission of any notice: | (d) |
| 13. Where injury is a disease contracted by a gradual process, names and addresses of all other employers by whom applicant was employed during the twelve months previous to date of incapacity in any employment to the nature of which the disease was due: | |

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The name and address of the applicant's solicitor are: Francis Joseph Liddy of W.C. Taylor & Scott, 181 Elizabeth St, Sydney.
Tel: 61-7591 DJC.

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DATED this 17th day of November, 1975

J.F. Liddy
Solicitor for the Applicant.

"A"

6. Total incapacity from the 17th June, 1966, to the 22nd June, 1966, and from the 4th March, 1968, to the 23rd April, 1968, partial incapacity from the 24th April, 1968, to the 2nd August, 1968, total incapacity from the 22nd December, 1972, to the 16th March, 1973, partial incapacity thereafter until the 17th July, 1974, total incapacity from the 17th July, 1974, to date and continuing. 10

10. $64.00 per week from the 22nd December, 1972, to the 16th March, 1973, under Section 9, $64.00 per week from the 17th March, 1973, to the 17th July, 1974, under Section 11(1), $64.00 per week from the 17th July, 1974, to the 20th April, 1975, under Section 9 or in the alternative, Section 11(1), $64.00 per week from the 20th April, 1975 to the 30th April, 1975, under Section 9 and $96.00 per week from the 1st May, 1975, to date and continuing under Section 9, together with medical and hospital expenses under Section 10. 20

ANNEXURE "I"

IN THE WORKERS' COMPENSATION
COMMISSION OF NEW SOUTH WALES

NO. OF MATTER 9101 of 1975

IN THE MATTER OF THE WORKERS'
COMPENSATION ACT 1926-1970

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IN THE MATTER OF A DETERMINATION

BETWEEN

Sydney Blair Morris

Applicant 10

AND

T.H. Bushby

Respondent

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RESPONDENT'S ANSWER

(L.S.)

R. de P. CHANCE,
Solicitor
P.O. Box 1
Milsons Point 2061

Phone: 929 8100

IN THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES ) No. of Matter 9101 of 1975

IN THE MATTER OF THE WORKERS' COMPENSATION ACT 1926-1971

IN THE MATTER OF A DETERMINATION

BETWEEN Sydney Blair Morris

Applicant

AND T.H. BUSHBY

Respondent 10

TAKE NOTICE that the Respondent states that the Applicant's Particulars filed in this matter are inaccurate or incomplete in the Particulars annexed.

AND TAKE NOTICE that the Respondent denies liability to pay compensation under the Act in respect of the injury to the applicant mentioned in the Applicant's Particulars, on the grounds stated in the particulars hereto annexed.

PARTICULARS

1. Particulars in which the Application filed by the Applicant is inaccurate or incomplete: 20

   Paragraphs 4, 5, 6, 7, 10, and 11

2. Grounds on which the Respondent denies liability to pay compensation:

   1. That any incapacity suffered by the applicant is not the result of an injury arising out of or in the course of his employment with the respondent.

   2. That if the applicant does have any incapacity it is not the result of an injury received on 17.6.66 when employed by the respondent. 30

AND FURTHER TAKE NOTICE that the name and address of the said Respondent is:

T.H. Bushby
256 Canterbury Road, CANTERBURY

AND of its Solicitor:

R. de P. CHANCE
P.O. Box 1
Milsons Point 2061

DATED this 5th day of February 1976.

R. de P. Chance
Respondent's Solicitor

TO: The Registrar
and to the Applicant. 10

ANNEXURE "J"

IN THE WORKERS' COMPENSATION )
)
COMMISSION OF NEW SOUTH WALES )

No. 3600 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926 as amended

IN THE MATTER of a Determination

BETWEEN: SYDNEY BLAIR MORRIS

Applicant

AND GLENMORE PTY. LIMITED 10

Respondent

---

NOTICE BY RESPONDENT TO THIRD PARTY

---

WORKERS' COMPENSATION COMMISSION
OF NEW SOUTH WALES
14 AUG 1975
DISTINGUISHING LETTER
U.

HICKSON, LAKEMAN & HOLCOMBE
Solicitors,
170 Phillip Street, 20
SYDNEY, N.S.W. 2000
Ph: 233 5311

Annexure "J" to
Case Stated

IN THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES ) No. of Matter 3600 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926, as amended.

IN THE MATTER of a Determination

BETWEEN SYDNEY BLAIR MORRIS

Applicant 10

AND GLENMORE PTY. LIMITED

Respondent

NOTICE BY RESPONDENT TO THIRD PARTY

TO: R.D. GEORGE (a male) of 46 Belmont Parade, Mount Colah

C.F. WHITEHOUSE (a male) of 5 Lockville Street, Wahroonga

F.W. McKERN (a male) of 18 Denison Street, Hornsby

TAKE NOTICE that SYDNEY BLAIR MORRIS of 18 Low Street, Mount Ku-ring-gai has filed a request for a determination (the copy whereof is hereunto annexed) as to the amount of compensation alleged to be payable by the Respondent, GLENMORE PTY. LIMITED 20 of 28 Water Street, Wahroonga, to the said SYDNEY BLAIR MORRIS in respect of personal injury alleged to have been received by the said SYDNEY BLAIR MORRIS arising out of or in the course of his employment.

The Respondent, Glenmore Pty. Limited, claims to be indemnified by you against its liability to pay such compensation on the ground that at the time of the injury in respect of which compensation is claimed, the said Sydney Blair Morris was not immediately employed by the said Glenmore Pty. Limited but was

employed by you and each of you in the execution of the work undertaken by the said Glenmore Pty. Limited in respect of which the said Glenmore Pty. Limited had contracted with you for the

-2-

execution thereof by or under you AND TAKE NOTICE that if you wish to dispute the Applicant's claim as against the Respondent, Glenmore Pty. Limited, or your liability to the said Respondent, you must do so before the Commission at the time and place mentioned in the Notice, copy of which is hereunto annexed. 10

In default of you so appearing you will be deemed to admit the validity of any Award made in the said determination as to any matter in which the Commission has jurisdiction to decide in such determination as between the Applicant and the Respondent, Glenmore Pty. Limited whether such award is made by consent or otherwise and your liability to indemnify the said Respondent, Glenmore Pty. Limited.

DATED this 13th day of August 1975.

J.B. Bagnall 20

Solicitor for the Respondent,
Glenmore Pty. Limited

APPLICATION FOR DETERMINATION

IN THE WORKERS' COMPENSATION COMMISSION ) No. of Matter 3600
OF NEW SOUTH WALES ) of 1975

In the matter of the Workers' Compensation Act, 1926.

In the matter of a Determination between

SYDNEY BLAIR MORRIS Applicant,

and

GLENMORE PTY. LIMITED Respondent

An application under the abovementioned Act is hereby made by the applicant against the respondent for the determination of the liability and amount of compensation payable by the respondent. Particulars are hereto appended. 10

PARTICULARS

| | |
|---|---|
| 1. (a) Name and address of applicant:<br><br>(b) Date and year of birth: | (a) Sydney Blair Morris<br>18 Low Street,<br>Mt. Kuring-Gai 2080<br>(b) Aged: 47 |
| 2. Name, place of business, and nature of business of respondent: | Glenmore Pty. Ltd., 28 Water Street, Wahroonga. 2076 |
| 2(A). Name and address of insurer of respondent: | Eagle Star Insurance Co. Ltd.,<br>118 Alfred Street,<br>Milsons Point. 2061 |
| 3. Nature of employment of applicant at time of injury, and whether employed under respondent or under a contractor with him*: | Employed by the Respondent as a Bricklayer. |
| 4. Date and place of injury, nature of work on which worker was then engaged, and cause of injury: | 16th November, 1964 at the Respondent's job at the Cnr. of Duff Street and Pacific Highway, Turramurra. The Applicant stepped backwards and fell. |
| 5. Nature of injury: | Injuries to the back caused and/or materially aggravated by the work described. |

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*If employed under a contractor or by another employer who is not a respondent, name and place of business of contractor or other employer to be stated.

Annexure "J" to Case Stated

| | |
|---|---|
| 6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity: | Total incapacity for intermittant periods after the injury, until the 21st December, 1972. Total incapacity from 22nd December, 1972 to 16th March, 1973, partial incapacity thereafter. |
| 7. Average weekly earnings during the twelve months previous to the injury, if the applicant had been so long employed under the employer by whom he was immediately employed, or if not, during any less period during which he has been so employed: | $76.00 a week. |
| 8. Average weekly amount which the applicant is earning or is able to earn in some suitable employment or business after the injury: | Nil during total incapacity. |
| 9. Payment, allowance, or benefit received from employer during the period of incapacity: | The Applicant has received compensation under Award No. 3517 of 1964. |
| 10. Details of compensation claimed: (Vary or add to as necessary; delete what inapplicable.) | (a) $64.00 p.w. from 22.12.72 to 16.3.73 under S.9. $64.00 a week under S.11(1), from the 17.3.73 to date and continuing.<br>(b) s.16 lump sum $ in respect of<br>(c) s.10 expenses Medical and hospital expenses under S.10.<br>(d) |
| 11. Particulars of persons dependent upon applicant's earnings: | Wife and two children totally dependent. |

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|---|---|
| 12. (a) Date of notice of injury: | (a) Approximately 16th November, 1964. |
| (b) Date of notice of incapacity if given: | (b) - - - |
| (c) Date of claim for compensation: | (c) Approximately 16th November, 1964. |
| (d) Reason for omission of any notice: | (d) - - - |
| 13. Where injury is a disease contracted by a gradual process, names and addresses of all other employers by whom applicant was employed during the twelve months previous to date of incapacity in any employment to the nature of which the disease was due: | - - - |

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The name and address of the applicant's solicitor are:
FRANCIS JOSEPH LIDDY of W.C. Taylor & Scott, Solicitors,
181 Elizabeth Street, Sydney. 2000 61.7591 Ref: DJC.

20

DATED this 13th day of May, 1975.

SYDNEY BLAIR MORRIS

Per: F.J. Liddy
Solicitor for the Applicant.

Appointed
Hearing Thurs. 26.6.75
Answer 25.6.75
Service 23.6.74

30

9B & 10B

ANNEXURE "N"

Copies notices sent to
Applicant's Solor./Agent
Respondent's Solor./Agent
6/11/68 MB

Copies notices sent to
Applicant's Solor./Agent
Respondent's Solor./Agent
13/11/68 MB

IN THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES

NO. OF MATTER 3517 of 1964.

IN THE MATTER OF THE WORKERS' COMPENSATION ACT, 1926, AS AMENDED

IN THE MATTER OF A DETERMINATION

BETWEEN

Sydney Blair Morris 10
Applicant

and

Glenmore Pty. Limited
Respondent

and

R.D. George, C.F. Whitehouse and F.W. McKern Third Parties

AWARD

WORKERS' COMPENSATION COMMISSION
OF NEW SOUTH WALES
5 NOV 1968
DISTINGUISHING LETTER
R

to be settled by the Registrar on Tuesday, the 12th day of November, 20
1968, at 10.15 a.m.

Award settled: 12.11.68.

Appearances

for Applicant

Respondent.

Third Parties.

(Initials) Registrar.

IN THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES ( No. of Matter 3517 of 1964.

IN THE MATTER of the Workers' Compensation Act, 1926, as amended

IN THE MATTER of a determination between

CORAM: Williams J. at Sydney.

Sydney Blair Morris Applicant
and
Glenmore Pty. Limited Respondent 10
and
R.D. George, C.F. Whitehouse and F.W. McKern Third Parties

Having duly considered the matters submitted, the Commission -

1. finds -

(a) the applicant's average weekly earnings Sixty-eight dollars Twelve cents, as agreed;
(b) that on the Sixteenth day of November, 1964, the applicant received injury arising out of and in the course of his employment with the third parties, R.D. George, C.F. Whitehouse and F.W. McKern, namely, a lumbar disc strain; 20
(c) that the applicant was totally incapacitated from the Seventeenth day of November, 1964, to the Sixth day of December, 1964, and from the Fourth day of March, 1968, to the Twenty-third day of April, 1968, and partially incapacitated thereby from the Twenty-fourth day of April, 1968, to date and continuing, and unfit for work requiring heavy lifting and bending;
(d) the applicant's incapacity in 1968 the result of the effects of the present injury and of the injury received 30 on the Seventeenth day of June, 1966, in the employment of T.H. Bushby, the respondent in Matter No. 3481 of 1967;
(e) that the respondent in the course of and for the purposes of its trade or business contracted with the said third parties for the execution by such contractor of part of the work undertaken by the respondent as principal and the present applicant was employed in the execution of the said work by the said third parties at the time of his injury and the respondent is liable to pay compensation to the applicant as if he had been directly employed by it 40 (in pursuance of section 6 (3)(a));
(f) that from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, the applicant during his partial incapacity was earning, or able to earn, in suitable employment Forty-two dollars per week approximately and probably would have earned in his pre-injury employment but for his injury, approximately Seventy-four dollars per week.

2. HEREBY ORDERS AND AWARDS:

(a) That the respondent DO PAY the applicant weekly compensation at the rate of -
 (i) TWENTY-EIGHT DOLLARS FIFTY CENTS from the Seventeenth day of November, 1964, to the Sixth day of December, 1964, on the basis of total incapacity;
 (ii) THIRTY-FIVE DOLLARS from the Fourth day of March, 1968, to the Twenty-third day of April, 1968, on the basis of total incapacity; 10
 (iii) THIRTY DOLLARS from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, on the basis of partial incapacity.

(b) That the respondent DO PAY the applicant medical and hospital expenses reasonably incurred as a result of the said injury, the payment of such expenses to be in accordance with the provisions of section 10.

(c) That the respondent DO PAY the applicant his costs of and incident to this determination, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the Registrar under the appropriate scale of the scales of costs prescribed by the Commission, and to be paid by the respondent forthwith after the date of such taxation. 20

(d) That the said third parties respectively DO INDEMNIFY the respondent for all compensation paid by the respondent to the applicant under this award, the respondent to have costs in accordance with Rule 46.

(e) That liberty be reserved to apply re costs of the applicant's application. 30

(f) That the compensation received by the applicant under the award in Matter No. 3481 of 1967 shall be pro tanto satisfaction of the compensation payable under this award for the incapacity of the applicant in 1968.

DATED the Fifth day of November, 1968,
For the Commission

F. Higgins
Registrar of the Commission.

IN THE WORKERS' COMPENSATION
COMMISSION OF NEW SOUTH WALES

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No. OF MATTER 3481 of 1967.

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Copies notices sent to
Applicant's Solor./Agent
Respondent's Solor./Agent
6/11/68 MB

WORKERS' COMPENSATION COMMISSION
OF NEW SOUTH WALES
6 NOV 1968
DISTINGUISHING LETTER G

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Copies notices sent to
Applicant's Solor./Agent
Respondent's Solor./Agent
13/11/68 MB

IN THE MATTER OF THE WORKERS' COMPENSATION ACT, 1926, AS AMENDED

IN THE MATTER OF A DETERMINATION BETWEEN

Sydney Blair Morris Applicant.

and

T.H. Bushby Respondent.

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AWARD

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CORAM: WILLIAMS, J.
THE WORKERS
COMPENSATION COMMISSION
OF NEW SOUTH WALES
Sydney 19 MAR 1976 (Two Awards)
....... Exhibit C .....
Sydney Blair Morris
Hull & Lowrey

to be settled by the Registrar on Tuesday, the 12th day of November, 1968, at 10.15 a.m.

Award Settled: 12.11.68.
Appearances

for Applicant.

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Respondent.

(Signed) (INITIALS)
Registrar.

C (Part)

IN THE WORKERS' COMPENSATION COMMISSION OF NEW SOUTH WALES ( No. of Matter 3481 of 1967

IN THE MATTER of the Workers' Compensation Act, 1926, as amended

IN THE MATTER of a determination between (L.S.)

CORAM: Williams J. at Sydney.

Sydney Blair Morris — Applicant,
and
T.H. Bushby — Respondent.

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Having duly considered the matters submitted, the Commission -

1. finds -

(a) the applicant's average weekly earnings Seventy-four dollars;

(b) that on the Seventeenth day of June, 1966, the applicant received injury arising out of and in the course of his employment, namely, aggravation and exacerbation of a pre-existing condition of his lumbar spine;

(c) that the applicant was totally incapacitated thereby from the Seventeenth day of June, 1966, to the Twenty-second day of June, 1966, and totally incapacitated thereby by necessary treatment for the back condition resulting from the present injury and the injury received in the employment of the firm, Whitehouse, George and McKern; 20

(d) that from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, the applicant during his partial incapacity was earning, or able to earn, in suitable employment Forty-two dollars per week approximately and would probably have earned in his pre-injury employment but for his injury, approximately Seventy-four dollars per week. 30

2. <u>HEREBY ORDERS AND AWARDS</u>:

(a) That the respondent <u>DO PAY</u> the applicant weekly compensation at the rate of -

(i) <u>THIRTY-ONE DOLLARS</u> from the Seventeenth day of June, 1966, to the Twenty-Second day of June, 1966, on the basis of total incapacity;

(ii) <u>THIRTY-FIVE DOLLARS</u> from the Fourth day of March, 1968, to the Twenty-third day of April, 1968, on the basis of total incapacity; 40

(iii) <u>THIRTY DOLLARS</u> from the Twenty-fourth day of April, 1968, to the Second day of August, 1968, on the basis of partial incapacity.

(b) That the respondent <u>DO PAY</u> the applicant medical and

hospital expenses reasonably incurred as a result of the said injury, the payment of such expenses to be in accordance with the provisions of section 10.

(c) That the respondent DO PAY the applicant his costs of and incident to this determination, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the Registrar under the appropriate scale of the scales of costs prescribed by the Commission, and to be paid by the respondent forthwith after the date of such taxation. 10

(d) That the compensation received by the applicant under the award in Matter No. 3517 of 1964 with respect to his incapacity in 1968 shall be pro tanto satisfaction of the respondent's liability under this award.

DATED the Fifth day of November, 1968.

For the Commission,

F. Higgins

Registrar of the Commission.

IN THE SUPREME COURT )
OF NEW SOUTH WALES ) C.A. No. 148 of 1977
COURT OF APPEAL )

IN THE MATTER of S. 37(4)(b) of the Workers' Compensation Act, 1926

IN THE MATTER of determinations between -

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE 10

Respondents

Matter No. 3600 of 1975

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties 20

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant

T.H. BUSHBY

Respondent

ORDER

THE COURT ORDERS THAT :-

1. The Registrar of the Workers' Compensation Commission be joined as respondent in the case stated.

2. Question of costs to be reserved until the hearing of the case stated.

Ordered 2nd August, 1977.

Entered 7 March, 1978.

By the Court

J.A. Leslie (L.S.)

Registrar.

IN THE SUPREME COURT )
)
OF NEW SOUTH WALES )
)
COURT OF APPEAL )

C.A. No. 148 of 1977
W.C.C. No. 8102 of 1974
W.C.C. No. 3600 of 1975
W.C.C. No. 9101 of 1975

CORAM: MOFFITT, P.
HOPE, J.A.
GLASS, J.A.

Monday 28th November 1977

MORRIS v. GEORGE & ORS. 10
MORRIS v. GLENMORE PTY. LIMITED & ORS.
MORRIS v. BUSHBY

JUDGMENT

MOFFITT, P.: I agree with the judgment of Glass J.A. concerning the questions which arose in respect of s.6(3) of the Workers' Compensation Act but wish to add several comments.

S.6(3) is a provision of some antiquity which appears originally to have been designed to give a worker an effective alternative should he be unable to get from his employer the compensation to which he is entitled. It conferred on him a 20 right to resort to the principal of his employer. Later in time other amendments were made to the Act to the same end, namely to ensure that a worker, who is entitled to compensation, is not denied it by some inability to pay on the part of the person liable. Thus it was made compulsory for employers to insure (s.18) and eventually for recovery of compensation from an Uninsured Liability Scheme where an employer is uninsured. However, some imperfections have been revealed in some of these provisions. A principal liable under s.6(3)(a) is not bound under s.18 to insure against 30

such liability and the prescribed form of policy does not extend to the liability of the principal under s.6(3)(a) (Employers' Mutual Indemnity Association Ltd. v. K.B. Hutcherson Pty. Ltd. (1976) 2 N.S.W.L.R. 302). If the restrictive construction of s.6(3) contended for is applied, with the result that a worker's rights against his employer are lost once an award is made against the principal even although it is unsatisfied, then the provision made by s.6(3), 10 originally intended to ensure the worker will receive compensation to which he is entitled, will become the instrument which will deny it to him, where he obtains an award against the principal, who then becomes insolvent and whose insurer is not liable under the prescribed policy. Then, as the right against the employer, although not satisfied is lost the worker cannot be rescued by the Uninsured Liability Scheme because of the absence of liability of the employer whether or not the employer is insured.

The words of s.6(3)(a) support the construction demon- 20 strated by Glass J.A. It can be added that this view is to be preferred to the competing view contended for, in that the Act has been given a liberal rather than a restrictive interpretation on the basis that it is designed effectively to compensate workers in respect of work injuries and in that in other of its provisions the Act now permits a worker to litigate alternate rights, the prohibition only being on double satisfaction.

The second question referred to by Glass J.A. raises questions of some difficulty, but of general importance. I find it convenient, for reasons which will appear, to state the relevant facts and findings in some detail.

The worker received injury in the course of his employments with four different employers on 16th November 1964, 17th June 1966, 21st December 1972 and July 1974. Earlier claims in respect of the first two injuries were heard together in respect of various closed periods of incapacity and awards were made in favour of the worker on 15th November 1968. These awards were not the subject of any appeal, nor are they the subject of the case which the Commission (Williams J.) stated of his own motion in respect of awards made in March 1976.

The facts and findings, now to be referred to, appear in the single judgment covering all awards made in March 1976, which judgment is annexed to the stated case. At the time of the first injury the worker was aged 36 and had been engaged in bricklaying work for about 20 years. Prior to the accident which caused this first injury he had not suffered any injury to his back, nor had he suffered any disability to his back. However, as later appeared, he then had a degenerative condition of his lumbar spine. This first injury was received in the course of his employment, when he tripped and fell on his buttocks. This led to pain and disability and by reason of a

resulting total incapacity he was off work until 7th December 1964. An x-ray showed he had inter alia a narrowing of the intervertebral disc space at the L5-S1 level. This together with clinical findings, according to medical opinion, was compatible with there being a lumbar disc strain. After a return to work with various different employers, he had periodic pain and disability in his back, but lost no time from work. On and before 17th June 1966 in the course of his employment with a different employer he was obliged to carry out bricklaying work for a long period of time in a stooped position. He suffered back symptoms in the same place as previously and they became more severe as the work progressed. He was then off work for 5 days from 20th June 1966 by reason of these symptoms. Between that period and 1968 the worker's back condition deteriorated. He developed sciatic pain and foot drop, leading to the medical conclusion in March 1968 that the signs and symptoms established an inter vertebral disc protrusion at the L4-5 level. Because of the different disc space involved, the medical question arose and was debated in evidence whether this protrusion could be related to the original symptoms and injury in 1964. In April 1968 an operation was performed and the protruding disc at L4-5 was surgically excised. A little later he resumed light work. Following the operation there was medical opinion that the first accident did damage the disc the subject of the operation, that

accident "causing the chain of events that had led to its eventual protrusion which required surgical removal."

It is not necessary to detail the events relating to the third and fourth injuries. After each there was a very short closed period of total incapacity, found respectively to have resulted from such injuries. Claims that other periods of incapacity resulted from either of these injuries were rejected on the basis that these injuries did no more than precipitate incapacity symptoms for a short period, but did not change the underlying pathology existing at the time. 10

There were findings of partial incapacity resulting from each of the two first injuries (apart from the short periods of total incapacity following the third and fourth injuries) from December 1972 and of total incapacity for work as a result of each of such injuries and necessary treatment for a short period early in 1973 and of total incapacity from 18th August 1974 to February 1976 also as a result of each of such injuries. For a period from November 1974 he was at a rehabilitation centre and, following a myleogram, he had a spinal fusion operation in April 1975 at the L4-5 and L5-S1 levels. It is not in point to detail the considerable body of evidence, much in conflict, but available to link the first and second injuries with the relevant incapacities. By way of example there was a finding that each injury did damage to the disc first operated upon (L4-5) and there was a finding that the 1968 operation resulted from the effects of the first two 20

injuries, that this type of operation can and this one did produce a post laminectomy syndrome producing by July 1968 some back instability which rendered the worker unfit for heavy lifting or repeated bending, part of the ordinary work of a bricklayer. There was also a finding that the later surgical spinal fusion, which also included L5-S1, was necessary as a result of each of the first two injuries. There was also a finding in that there was a partial incapacity from 3rd February 1976 to date and continuing as a result of each of these first two injuries. In respect of the periods of incapacity from 1972 onwards, in addition to proceedings taken against each of the four employers proceedings were taken against the principal under s.6(3) in respect of the first injury and also a proceeding in which a claim was made against the Uninsured Liability Scheme on the basis that that employer was uninsured.

All the applications were heard together and the evidence given was taken to relate, so far as relevant, to each application. Although separate awards were made there was but one judgment, the purpose of which was to deal consistently with the claims the subject of the judgment.

It may well be that the Commission, whether constituted by the same or a different judge, may deal with a later claim of a worker in respect of the same incapacity against a different respondent, where accordingly there is no estoppel, in a way factually inconsistent with its decision on the earlier

claim, either by reason of a difference in the evidence presented or by reason of an error of fact in one or the other decision, so there is no ground for appellate interference on the ground of error of law. However, where a number of claims are dealt with together in one judgment as in the present case, then, if in law it is not open to find that a particular incapacity results from more than one injury, but nevertheless two such awards are made, then each must be vitiated by a threshhold error of law proper to attract the intervention of this Court. The awards in respect of the first two injuries were made on the same occasion, that in respect of the first injury a moment before the other. It was argued on behalf of T.H. Bushby, the respondent employer responsible for the second injury, that, if incapacity could result from but one injury, then the award having been made in respect of the first injury first, an award could not validly be made in respect of the same incapacity in relation to the second injury and that the award in respect of the first should stand and that in respect of the second set aside. This question is raised in the stated case question 6 as follows:-

> "Whether the Applicant was disentitled to the award of compensation specified in the Award in his favour against the Respondent T.H. Bushby once the Commission had made validly any one of the two instant Awards against the Respondents R.D. George and F.W. McKern and the Respondent Glenmore Pty. Ltd. for the payment of the same compensation as he was awarded under the Award made against the Respondent T.W. Bushby?"

The submission made on behalf of this respondent as to the

consequence of it being found there was an error of law in the respect mentioned, is too narrow and, if such an error does arise, then it invalidates the awards made in respect of both the first and second injuries, so that all awards made on 11th March 1976, which depend upon the first or second injury, will need reconsideration. If two proceedings are heard together and one judgment is given which proceeds on a basis, found erroneous in law, that incapacity may result from two injuries then both awards are infected with the error of law. It is proper then in my view to regard question 6 as raising the wider question whether it was open in law in the present proceedings to find that the relevant incapacities resulted from both the first and second injuries.

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Having regard to the evidence and medical opinion, particularly as to the vertebral spaces affected, it seems to me it was open to a tribunal of fact to determine that the incapacities following the 1968 operation and from 1972 onwards resulted from the 1964 injury and that it was open to such a tribunal to determine that such incapacities resulted from the 1966 injury. The question raised however, is whether it was open to find that such incapacities resulted from both in terms of s.9. The awards made included a determination under s.10 that the medical and like treatment in the years 1970 to 1975 resulted from each of the first two injuries, so a question similar to question 6 above quoted could arise in respect of s.10, namely whether it is open to find that

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medical and hospital treatment accepted as reasonable is a result of more than one injury. Closely allied with this question under s.10 is the original question under s.9. If it is open to find that medical treatment e.g. an operation is the result of two injuries then what of the incapacity arising from the operation? Is it open to be found that the incapacity for work due to the operative, recuperative and rehabilitative needs resulted as did the operation from the two 10 injuries?

The question raised before us is a general question, but I have set out with some care how the question arises, because the legal question falls for determination as it arises in the particular case and also because there is always some danger in determining general questions of law in isolation untested by reference to particular cases. The general question can be stated simply. Compensation is payable in respect of incapacity, where such incapacity results from a relevant work injury (s.9) or death results from a relevant work injury 20 (s.8). The question is whether incapacity or death can result from but one injury or whether it may result from more than one injury. If the answer is that it may result from more than one injury, then, as different employers may be responsible for the several injuries, more than one employer will be liable to pay compensation for the same death or incapacity. It is then pointed out that the Act provides no machinery for resolving questions of contribution, such as are provided in

respect of common law proceedings by the Law Reform (Miscellaneous Provisions) Act. Indeed this is advanced as a reason why more than one employer cannot be found liable in respect of the same incapacity.

It should be observed that the question is different from the question whether more than one employer can be found responsible, in accordance with the Act, for a particular injury being that injury from which incapacity results. As pointed out by Windeyer J. in The Commonwealth v. Butler ((1958) 102 C.L.R. 465 at 478) two distinct questions must be answered before liability to pay compensation arises. The first is whether a particular employment is connected with a particular injury in accordance with a relevant provision in the Act. The second is whether a connection in accordance with the terms of the Act exists between the injury so found and incapacity or death. It is the latter only with which we are concerned. It can be observed, however, in relation to the first question that dual liability of employers is possible and that in respect of such liabilities there is no provision in the Act for apportionment or contribution. S.7(1)(a) provides that "a worker who has received an injury whether at or away from his place of employment...shall receive compensation from his employer in accordance with this Act." By s.8 compensation is payable by the employer when "total or partial incapacity results from the injury". "Injury" is defined by s.6(1) first as "personal injury arising out of or in the

course of employment". The definition then includes within the term "injury" disease or aggravation, acceleration, exacerbation or deterioration of any disease where the employment is a contributing factor. The definition in its present form differs from the British legislation by the omission of the words "by accident" (Favelle Mort Ltd. v. Murray 1976 50 A.L.J.R. 509 at 512). The N.S.W. Act also enlarged the field of relevant injuries by the amendment in 1972, by which the substituted definition of injury replaced the word "and" by "or", so that thereafter there was a relevant injury if it arose out of the employment or if it arose in the course of the employment. (Kavanagh v. The Commonwealth (1960) 103 C.L.R. 547). It is not here in point to detail the varied circumstances in which it is possible that responsiblity under the Act for the same compensation may fall upon more than one employer because each is responsible for the same injury. As Kavanagh's case and later authority makes clear an employer may be responsible where there is no causal connection between employment and injury i.e. provided only that the injury is received in the course of the employment. It is possible that an injury be received in the course of one employment and arise out of a different employment.

I return then to the question whether a particular incapacity can result from more than one injury. The word used by the Act to define the necessary link between injury and incapacity or death is "result", while the language of the

Act in relation to any causal link between employment and injury is otherwise, namely "arising out of" or "contributing factor" "caused by" (definition of "injury" s.6(1)). If for the phrase "incapacity for work results from injury" there is substituted "incapacity for work is causally connected with the injury" or that "injury is a contributing factor of incapacity", then any injury and hence possibly more than one injury provided only it has some causal link with the incapacity would provide an appropriate chain to liability for compensation. This, however, is not the language of the Act. The word "result" nevertheless is referable to causation. The questions, as follows, then arise. What causal link is necessary before it can be said an incapacity or death results from an injury. How has this been regarded by authority? Does authority admit of two injuries resulting in one incapacity or in death?

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In Noden v. Galloways Ltd. (C.A. 1912 1 K.B. 46) it is directly stated that incapacity can result from but one injury. In the years that have elapsed since, it has not been directly said in England, in the High Court or in this State that this fundamental statement is wrong, although Noden has been frequently cited. In Noden the court was only concerned to decide whether incapacity could be found to result from a particular injury, being one sustained to a hand eight years earlier, the incapacity in question being that which was preceded by a second injury to the same hand. The county court

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judge was held to have misdirected himself by posing the question whether the earlier accident was a contributing cause of the incapacity. Fletcher Moulton L.J. said:

> "I have taken a clear case of two contributing causes, and if the law as laid down to himself by the learned deputy county court judge is right, the workman in such a case could go against the first employer or the second employer, and, for aught I see, against both employers. That is not the law. When a second cause intervenes and produces the incapacity and that second cause is in the nature of an accident, it is the second employer who is liable.

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However as has been shown by later authority, in a particular case it may be open to find that an incapacity resulted from an earlier accident. His Lordship so stated as follows:

> "It must not be thought that I hold that if the incapacity develops without the intervention of a second cause of the nature of an accident it at all follows that it cannot be attributed to the original accident. In such a case the incapacity might be, and probably is, the sequence to the original accident. But the law as laid down by the learned deputy county court judge has relieved him from the duty of considering whether a second cause has intervened - he evidently thought that this was immaterial."

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As has also often been pointed out the question of whether an incapacity results from a particular injury is a question of fact and so not open to challenge. Therefore, in a particular case, it may well be found as a fact that incapacity has resulted from the earlier of two accidents, or incidents under circumstances in which an appellate court can find demonstrated no error of law in approach, as was found demonstrated in Noden's case and no error of law otherwise, in that there is evidence which leaves the decision open.

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That differing decisions have been given, which are apparently in conflict, is because they are decisions of fact. Such conflicts are illustrated by the collection of cases referred to by Pollock M.R. in Hutchinson v. Kiveton Park Colliery Co. (1926 1 K.B. 279). However, the approach to this analysis is consistent with the observations in Noden that incapacity can result from only one injury in that cases are looked at to see whether the incapacity was found to result from the first 10 "or" the second accident (288). The judgment of Atkin L.J. (at 294) quotes the passage from Noden quoted by me and does so in terms of apparent approval, subject to a comment I will later make. Thus the differing conclusions in different cases are to be accounted for because decision in each case lies in the sphere of evidence.

Basic to the dictum in Noden that an incapacity can result from but one injury, is the matter of decision in that case that the requirement that incapacity result from the work injury cannot be met by the mere circumstance that the 20 injury is a contributory cause of the incapacity. To so decide and to substitute the question whether the injury is a contributory cause of the incapacity for the question posed by the Act, namely whether the incapacity resulted from the injury, is to err in law. Something more is required. That this is so is clearly established by a long course of authority including Hutchinson (supra); Hutchings v. Devon County Council C.A. 24 B.W.C.C. 320 at 331; Commonwealth v. Butler

102 C.L.R. 465 per Taylor J. at 477 and per Windeyer J. at 480 (and possibly by the reasoning of Fullagar J.).

At the same time it is clear and well supported by authority that an incapacity may be found to result from a particular injury although another cause may contribute to the incapacity. The other contributing cause may or may not be another injury. This is clear from the speech of Lord Loreburn L.C. in Clover, Clayton & Co. Ltd. v. Hughes 1910 A.C. 242 at 245 as explained by Cozens-Hardy M.R. and Fletcher Moulton L.J. in Noden (supra at 50-51) and affirmed by Fullagar J. in Butler (supra at 472-3). Thus where there are two injuries which are contributing causes of an incapacity, although something more is required in order to answer the question whether incapacity results from a particular one of such injuries, the causal foundation is laid, which may lead on the evidence to a factual decision that incapacity resulted from either injury. However there is still left outstanding the question which arises for our determination, namely whether it is open in law on the same evidence to find that the incapacity i.e. the same incapacity resulted from each of the two injuries. Noden and in some respects Hutchinson directly answers this question in the negative. It might be said that the course of authority supports it by the question usually being posed from which of the injuries incapacity or death has resulted or as to the extent of incapacity which has resulted from each injury or accident (Jones v. Amalgamated

Anthracite Collieries Ltd. 1944 A.C. 14 at 23). The same consideration appear to have arisen in respect of successive occlusions in relation to death producing different factual conclusions in Butler and Miller v. Conkey & Sons Ltd. (1977 51 A.L.J.R. 583). However, it is important to note that in none of those authorities did the question arise for determination whether death or incapacity could without error of law on the same facts and in a single judgment be found to result from each of two accidents. 10

I find some difficulty in dealing with the question at issue in general terms. The content of the question needs closer examination. It might be posed as an entirely general legal question having no necessary relation to the matter before the court, namely whether in any circumstances liability of two employers can be envisaged. The further question may arise whether it was open to so find in a particular class of case and in the subject proceedings. It may be that a single finding that an incapacity resulted from injury A could not 20 be found on the facts to be erroneous in law, there being evidence to support the finding and there being no error of law demonstrated in the reasoning. There of course would be such an error if it appeared that the decision was based on the sole conclusion that the injury was a contributory factor of the incapacity. It may well be that on the same facts a single finding that incapacity resulted from injury B could not be found to be erroneous in law. It does not follow,

however, from the foregoing that a decision in proceedings disposed of together that incapacity resulted from two injuries will not involve error of law. It will if such a conclusion is not open in any case or is not open in law on the facts of the case.

To answer the question posed it must first be asked what more is required than that the injury be a contributory cause of the incapacity. In the cases of successive injuries the question of whether incapacity resulted from an earlier injury has often been determined according to English authority according to whether or not the later accident provided a new cause which replaced the old. In respect of a second injury which is a contributory cause of incapacity together with some earlier contributory cause, Jordan C.J. in Salisbury (at 162) said the second may be the "catalyst" or the "addition" which produces incapacity. Taylor J. in Butler (at 476-7) said a particular death "may result from more than one cause". After pointing out the difference between the legal and philosophical concepts of "cause" discussed in Fitzgerald v. Penn (91 C.L.R. 268 at 276-8, 284, 285) he added

> "The legal concept looks to so called 'immediate' or 'direct' or 'proximate' causes rather than antecedent and predisposing circumstances. But at the same time an 'effect' may be caused, in the legal sense, by circumstances apparently remote for the chain of causation may be shown to have continued unbroken by any other intervening cause to the effect in question. It requires but little reflection to appreciate that the relationship of cause to effect must be a matter for particular consideration in every case and that it is impossible

to substitute for the word 'cause' any other expression or formula capable of providing a simple solution in all cases where difficulties arise. It should, however, be said that the cause of an event is not established in the legal sense by showing, without more, that in the absence of a proved set of circumstances the event would or may not have happened, or, that a proved set of circumstances, in the widest sense, contributed to the happening of the event." 10

Windeyer J. (at 479) said

"On those simple facts the ordinary answer of an ordinary man to the question 'did the death of the deceased result from the occlusion of September, 1955?' would surely be: 'No. He did not die from that occlusion. He died two years later from another occlusion.'

But once the simple question is elaborated by attempted paraphrases and explanations of the words 'results from', logical and philosophical difficulties emerge however much 20 judges and lawyers may assert that they are eschewing all philosophical consideration of the chain of causation. Attempted explanations of causation and consequence can, I feel, be as unhelpful and unhappy as definitions of reasonable doubt. In the search for some grounds for isolating a particular event from the totality of circumstance preceding a later event, various adjectives, such as 'direct', 'proximate', 'decisive', 'immediate', 'effective' and 'real', have been pressed into service to qualify 'cause'. From these there is an easy drift to such term 30 as 'materially contributing factor'. But such formulae do not really dispel the difficulty:"

and

"Yet the application of the statute to the facts of this or any other case does not depend upon metaphysical speculation or the actual physiological circumstances accompanying death. It depends upon asking only whether death resulted from the injury (in this case from the occlusion of September, 1955) in the ordinary acceptance of those words. The question obviously involves an idea of causal 40 sequence. But it tends to misconception if the question that the Act postulates, namely 'did death result from the occlusion', be inverted to be 'was the occlusion the cause of death'. The inversion is merely linguistic; yet in its inverted from the question somehow seems more prone to attract to its answer expressions such as 'contributing factor', which are, it seems to me, only attempts to define

> or explain an abstract idea by phrases in which the same idea lurks. The words of the statute are more easily applied without exegetical glosses."

The significance of the word "result" and that the requirement of the Act are not met simply by some causal link being shown to exist between injury and incapacity is demonstrated by the long course of authority which establishes that where it is 10 found that incapacity results from an employment injury the right to compensation for the continuance of that incapacity is not lost on the basis that, even if the worker had not received the injury, he would have subsequently become similarly incapacitated from some other non employment injury or cause including the onset of disease or age. Such authorities are collected by Jordan C.J. in Salisbury (supra) and includes the decision of the House of Lords in McCann v. Scottish Co-operative Laundry Association Ltd. 1936 1 A.E.R. 475 where Lord Macmillan, at 482 said:- 20

> "My Lords, it is now well settled, that a workman who by reason of incapacity due to an accident is entitled to compensation does not lose that right merely because through some extraneous supervening cause, such as illness or old age, a natural incapacity is added to the incapacity due to the accident. The employer cannot plead that as the workman would, by reason of his condition apart from the accident, be incapacitated in any event, he has lost his right to compensation. There is no merger of the accidental incapacity in the natural incapacity." 30

and Ward v. Corrimal Balgownie Collieries Ltd. (1938) 61 C.L.R. 120 at 129-132; 140-3.

The justification for this line of authority, derives from the word "result". Barwick C.J. in Darling Island

Stevedoring & Lighterage Co. Ltd. v. Hankinson 117 C.L.R. 19 at 25-6 warmly approved the summary of the relevant law by Jordan C.J. in Salisbury and said:

> "The relevant question in the case of an inquiry is whether incapacity resulted from it. It is not, as in the case of an action at law based on negligence, what damage has the injured party sustained."

So far as authority and perhaps practice is concerned then, there is much to support the view that the word "result" has the consequence that a particular incapacity can result from but one injury. If this is the proper conclusion, it can only be justified by resort to the substantive terms of the Act. In my view it cannot depend on the circumstance that no machinery is provided, as has been done belatedly at common law, to disentangle any competing obligations of different employers or to provide for apportionment or contribution between them. The absence of such machinery, may perhaps account for this question not having arisen for decision earlier.

However the question has been dealt with in South Australia in Bratovich v. Rheem (Aust.) Pty. Ltd. 1971-2 2 S.A.S.R. 33 where it was decided the incapacity could result from two injuries. It is necessary to go back to Ward v. Corrimal Balgownie Collieries Ltd. (supra) because the decision of Bray C.J. was considerably influenced by a passage from the judgment of Dixon J. as he then was. It is desirable to quote the entire passage quoted by Bray C.J. and to

italicizes the passage italicized by him as the passage relied upon, namely:-

> "'The word "results" [in the expression "the case of a worker whose injury results in total and permanent disablement"]...must receive the same meaning and effect as in the well-known expression..."where total or partial incapacity for work results from the injury"...It is true that the word has been held satisfied where the accident or the injury is one cause, although not the sole cause, of the incapacity. The cases cited above adopt, sometimes expressly, sometimes tacitly, this construction of the word "results". But the statement that the incapacity need not be solely caused by the accident or injury is directed to cases where, after the workman suffers incapacity by accident, he encounters some further cause preventing his earning a full livelihoold, such as a second accident or disease enough in itself to incapacitate him, or even imprisonment. Scrutton L.J. described these as "cases where loss of wages would follow from either of two independent causes, of which damage from the accident would be one" (Lewis v. Guest, Keen and Nettleford Ltd. [1928] 1 K.B. at p.40). *The statement may contemplate also a chain of causation consisting of links representing different factors or events all terminating in a single conclusion, that is to say, in one condition amounting, as the case may be, to total or to partial incapacity*. But it is not concerned with independent causes producing independent consequences, distinct bodily conditions which amount to total incapacity only because they must be added together. Cases of the latter description appear to me to be governed by the decisions relating to the loss of impairment of the sight of both eyes. The loss of the sight of one eye may or may not mean lasting incapacity, but usually it will mean no more than partial incapacity. If it is caused by an accident arising out of and in the course of the employment, the employer will, of course, be responsible to the full extent of the resulting incapacity. But if, from causes independent of the accident, the vision of the second eye is lost or impaired so that the worker becomes totally incapacitated, or his incapacity is greatly increased then the employer is not responsible for this additional consequence. The total incapacity or increased incapacity is not considered to "result" from the accident.'"

The passage italicized is an instance of the earlier statement of Dixon J. "It is true that the word (i.e. 'results') has

been satisfied where the accident or injury is one cause, although not the sole cause, of the incapacity...But the statement that the incapacity need not be solely caused..." Dixon J. in the italicized passage is dealing with a particular class of case where incapacity can be found to result from a particular injury although there are other causes. He refers to this class of case as a class distinct from that under consideration in that appeal, which he then proceeded to discuss. The class 10 of case there under consideration was where there were injuries independent of each other, which Dixon J. illustrated by reference to two successive injuries each causing loss of an eye, where the first injury was not causally related to the second injury. In such a case total blindness although contributed to by each loss of an eye, results from the second loss. In such a case any increased incapacity from total blindness as compared with incapacity, if any, by reason of being one eyed, does not result from the loss of the first eye (ibid 141-2). Reference to this class of case was directly relevant to the 20 decision in the appeal. In the case of injuries independent of each other the resulting incapacity is that added by each injury. The conclusion that total blindness resulted from the loss of the second eye is not denied because it can be stated that the loss of each eye contributes to total blindness. This is the statement in respect of which Dixon J. gave examples. The class of case where there are independent injuries, the loss of eyes in some circumstances being an example has, as a

further example, the case dealt with in Butler, where neither occlusion itself would have caused death, each was independent of the other, in the sense that the former did not cause the latter, and each combined to cause death. Death resulted from the second occlusion as blindness resulted from the loss of the second eye.

It would be a different class of case if the loss of the second eye or the second occlusion was causally related to the loss of the first eye or first occlusion. Then the causal connection of each injury with the incapacity or death would not be independent of each other, but intertwined in the same chain of causation. However to state that two injuries are causally linked one with the other and with the incapacity, for the purpose of stating an instance where incapacity may result from an injury, although another injury is a contributing cause, is not to say that therefore the incapacity results from both. An example of a case where there is a causal connection between an initial injury and a later incapacitating injury but there was found to be no evidence to justify a finding that the later incapacity resulted from the earlier work injury is Lindeman v. Colvin (1946) 74 C.L.R. 313. However as Dixon J. there indicated, on a different set of facts an employer might be found liable in respect of a later fall (ibid at 321). To say that once the two injuries are causally related to each other, then, without more, the final incapacity results from both, would be inconsistent with general

observations in Butler and the other line of authorities to which I have referred. Although the class of case referred to by Dixon J. must be considered in order to determine whether incapacity can in some circumstances result from two such causally related injuries, his observation, in my view, was not directed to and provides no authority upon the matter now in question.

However, subject to a matter I will later mention, where nothing more appears than that there are two independent i.e. causally unconnected successive injuries, the incapacity, if any, which follows the first results from it and the further incapacity which follows the second results from it. In the simplest example, if one eye is lost in one accident and quite unconnected the other eye is lost in a second accident, then the incapacity, if any, from being one eyed results from the first accident and the additional incapacity from being blind as against one eyed results from the second accident. On these simple facts there would be no evidence to find incapacity due to total blindness resulted from the first accident. Of course even where one injury does not cause the other, there may be relevant evidence which will leave open the conclusions that incapacity or death results from an earlier injury. Thus a first back injury may be of such major proportions that incapacity is recurrent and even progressive and a second accident or incident so minor or so much a part of normal activity that it is open to find that a later incapacity following the second

accident or incident resulted from the initial injury. There may be infinite variations in the evidence in this class of case which would include, for example, the case of independent coronary attacks or incidents, that it is a question of fact whether death or incapacity results from a particular injury (Conkey supra). In this class of case I can see no legal basis that would admit a conclusion that incapacity or death resulted from both injuries. At most it could be said each contributed 10 will later appear, Noden was a case of two independent injuries. I think it should be applied to cases where there are independent injuries so that a decision need be made selecting the injury from which death or incapacity resulted. If the facts permit the conclusion that the incapacity results from such an earlier injury, it can in my view only become to on the basis that it did not result from a later independent injury. This legal proposition may be blurred, but not denied, by the circumstance that at times wrong decisions of fact are made finding incapacity results from an earlier injury. 20

The other class of case is that already referred to, namely where there is some causal relation between the two injuries so that the first injury causes or is a cause of the second injury. It is at this point that the real difficulty in my view arises. It is convenient to deal with the legal question by reference to possible cases and in particular the present case on one view of the evidence. Of course the determination of any such question in a particular case must involve

its own factual questions. Accordingly reference is made to examples only to provide a context, in which the legal question is considered. Two injuries may be linked causally with each other in relation to incapacity in various ways. The first may be a cause of the second. If authority be necessary that such a finding may be open in some cases, it is to be found in the judgment of Atkin L.J. in Hutchinson and the cases there discussed. In that case a worker injured his knee at work, 10 returned to work and later at home slipped and injured the same knee. Atkin L.J. considered it was open factually to find either way that the first injury caused the second and, if so, that the incapacity following the second resulted from the first injury. The decision of fact at first instance was to the contrary, but being open was not disturbed on appeal. However, in quoting, and apparently affirming Noden and the dictum earlier referred to, Atkin L.J. drew attention to the circumstance that in Noden the first accident was not the cause of the second. Earlier he had (at 290) said:- 20

> "I find it very difficult to lay down any proposition of law that where there are two accidents, the injury which in one sense is the consequence of the second accident may not in law result from the first."

In Hutchinson the injury to the knee incapacitated the worker but was causally connected with the first injury. If it was the consequence of the second accident, but nevertheless resulted from the first accident, it is difficult to see why

in ordinary language it did not also result from the second accident.

In the class of case under discussion even accepting what I have earlier said in relation to "result" and causation in this field, it is difficult to discern why an incapacity is not open to be found to result consistently from each of two injuries, where the second is caused by the first. If it is open on the facts to find that a fall and physical injury at home is caused by an earlier work injury and that the incapacity which is the consequence of the fall results from the earlier work injury, I see no reason why it cannot be said, consistently with that conclusion, that the incapacity also resulted from the fall at home. Of course it is not necessary to make this decision if the second injury has no consequences in the matter of compensation. If however an identical fall were at work when employed by a second employer, there would be no basis to arrive at a different conclusion. At times in the authorities reference is made to whether the injury from which incapacity results or which has some relation to incapacity is a work or non work injury. Whatever may have been the benign application of the law to particular factual situations in some cases, apparently paying regard to whether an injury or incident has or has not a work connection, I see no basis in the Act or in logic to come to a different conclusion by reason of these considerations.

Other than where a first injury is a cause of the second,

there may be other ways in which two injuries are causally interrelated in a sequence of events which culminate in the incapacity. Two injuries, whether they be independent or one a cause of the other, may each cause an event or further accident or injury from which incapacity results. An example of such a case is where there are two injuries each reasonably requiring surgical intervention, such surgery then being undertaken in a single operation and itself producing incapacity. 10
What, then, if, by reason of the operation, the worker is totally incapacitated for work for a period or, because of misadventure at operation, is permanently incapacitated or dies. I find no reason applying the test of Windeyer J. in Butler and no reason otherwise in the authorities, subject to distinguishing Noden, why it is not open to be decided as a fact, first, that under s.10 the medical and hospital treatment and ambulance service and rehabilitation if reasonable were received as a result of each of the two injuries and that any incapacity or death in consequence of the operation resulted 20
from each of the two injuries.

The present case is one where the view was open that the first two injuries were causally related and further that the 1968 operation and perhaps the 1975 operation were rendered reasonably necessary by each of these injuries and that some periods of incapacity were the direct result of one or other of the operations and indeed that the continuing limitations on the worker's ability to do certain classes of work, which

was the continuing partial incapacity, resulted from one or other of the operations. What precise conclusion should become to on these matters, however, does not fall for decision, because no independent questions were raised in respect of various periods of incapacity, the case argued being on the broader ground that no finding of any kind was open making both employers liable.

It may well be that the conclusion I have expressed namely that in an appropriate case one incapacity may result from two causally interrelated work injuries, so that two employers are each liable, is little different from the observation I made at the outset, that two different employers in an appropriate case, may be found responsible for one injury from which incapacity results. If a worker sustains a leg fracture e.g. arising out of his employment with A and, while on crutches at a time when bony union is incomplete, falls in the course of employment with B and refractures his leg and occasions other injuries, it seems open to be decided that the ultimate incapacity resulted from both the first and second injuries, so both A and B are liable or that the incapacity resulted from at least the second injury and that this had such a causal connection with the employment by A that it arose out of that employment and all that it was sustained in the course of employment B, so both A and B are liable. It is not necessary positively to decide the matter on this second basis as the case was only argued on the former basis.

I agree with the answers proposed by Glass J.A.

IN THE SUPREME COURT )
OF NEW SOUTH WALES )
COURT OF APPEAL )

C.A. 148 of 1977
W.C.C. 8102 of 1974
W.C.C. 3600 of 1975
W.C.C. 9101 of 1975

CORAM: MOFFITT, P
HOPE, J.A.
GLASS, J.A.

Monday 28th November 1977

MORRIS v. GEORGE & ORS. 10

MORRIS v. GLENMORE PTY. LIMITED & ORS.

MORRIS v. BUSHBY

JUDGMENT

HOPE, J.A.: Two questions arise in this appeal, both of significance to the making of awards for workers' compensation in this State.

The first question is whether awards may be made both against an applicant's employer and against a principal within the meaning of s. 6(3) of the Workers' Compensation Act in respect of the same incapacity. I agree with the answers pro- 20 posed by Glass, J.A., to the first and second questions in the stated case, being the questions directed to this matter, and with his reasons therefor. Awards may be made both against employer and principal.

The second question is whether a particular incapacity can be held to result from more than one injury arising out of or in the course of the employment of the applicant by separate employers, and whether as a consequence an award can be made against each employer in respect of that one incapacity. Such awards were made by the Workers' Compensa- 30 tion Commission in the present case. The result was not that

the applicant was entitled to have his compensation multiplied by the number of awards. Satisfaction by an employer pursuant to the provisions of an award made against him would, pro tanto, be satisfaction of the liability of an employer under another award in respect of the same incapacity.

I agree with the answers proposed by Glass, J.A., in respect of the questions in the stated case directed to this matter, but I wish to state shortly my reasons why awards can be made against more than one employer. 10

It is necessary firstly to state the basic findings in relation to which the question arises.

1. On 16th November, 1964, the applicant received an injury arising out of and in the course of his employment with the respondents R.D. George and F.W. McKern. The injury was a lumbar disc strain, and occurred when the applicant tripped and fell in the course of his work as a bricklayer.

2. The respondent Glenmore Pty. Limited was a principal within the meaning of s. 6(3) of the Workers' Compensation Act at the time this injury occurred. 20

3. On 17th June, 1966, the applicant suffered an injury in the course of his employment with the respondent T.H. Bushby. This injury was an aggravation and exacerbation of a pre-existing condition of the lumbar spine and arose as a result of his carrying out bricklaying work for a long period of time in a stooped position.

4. On 1st April, 1968, a laminectomy operation was

performed on the applicant at the L-5 level of his spine.

5. In the years 1970, 1971 and 1973 the applicant had medical treatment in respect of his lumbar spine condition, and between 21st April, 1974, and 7th May, 1975, had medical and hospital treatment, including a spinal fusion operation, and post-operative medical treatment and rehabilitation treatment at the Mount Wilgar Centre. The Commission found that this medical, hospital and rehabilitation treatment was reasonably necessary as a result of each of the injuries of 16th November, 1964, and 17th June, 1966. 10

6. The applicant was at particular times partially incapacitated for work, and this partial incapacity resulted from each of the injuries of 16th November, 1964, and 17th June, 1966. The applicant was at other times totally incapacitated for work as a result of the effects of, and necessary treatment for the effects of, each of the injuries of 16th November, 1964, and 17th June, 1966.

The Commission made an award against the first employer in respect of the incapacity arising from the injury of 16th November, 1964, and the necessary treatment therefor which I have referred to. The Commission also made an award against the second employer in respect of the incapacity arising from the injury of 17th June, 1966, and from the same necessary treatment. The incapacity, whether total or partial, was for relevant purposes the same in each case. An award was also made against the principal in respect of the same incapacity 20

as that in respect of which an award was made against the first employer, the first employer being ordered to indemnify the principal for all compensation paid by it to the applicant under the award made against it.

The various proceedings were heard together, and the award made first in point of time was the award against the first employer. As Glass, J.A., has pointed out, although the stated case questioned whether there was evidence to support the findings of the Commission that the incapacity upon which its awards were based resulted from the first and the second injuries, these challenges were expressly abandoned by counsel appearing for the second employer and for the principal, as well as by counsel for the Registrar of the Commission, who was involved on behalf of the Uninsured Liability Fund upon which the financial burden of the award against the first employer would fall. (There was no appearance for the first employer). What was argued was that, as a matter of law, two awards cannot be made against separate employers in respect of the same incapacity on the gound that incapacity resulted from two injuries, one of which arose out of or in the course of employment of the applicant by one employer and the other of which resulted from an injury arising out of or in the course of the applicant's employment with the second employer. Since the Commission made the award against the first employer first in point of time by a few moments, it could not in law make an award against the second employer.

This seems a rather quaint result, for it is made to depend upon the order in which the awards happened to have been announced. In various ways, as for example, by announcing that awards were made in accordance with terms typed on two separate pieces of paper, awards could have been made against each employer eo instanti. However, the point is one of substance. The timing of the awards was really a vehicle to enable the substantial question to be argued: Does the Worker's Compensation Act allow awards to be made against successive employers in respect of the same incapacity in the circumstances which existed in the present case? 10

There is nothing in the legislation to point to the construction upon which the employers' submission depends, save perhaps the absence of any provision for apportionment between the employers of their insurers. I do not think that this circumstance affects the matter, and I agree with what Glass, J.A., says in this regard. Nor is there any reason why, as a matter of reality, a particular incapacity cannot result 20 from two separate injuries. In The Commonwealth v. Butler (1958) 102 C.L.R. 465 at p. 476 Taylor, J., said:-

> " In order to prove that death has resulted from an injury it is necessary to establish a causal connexion between the particular injury and the death in question. So much is, of course, beyond doubt. So also is the fact that a particular death may result from more than one cause."

In this respect incapacity is not to be distinguished from death; incapacity may result from more than one cause. It 30

is also beyond doubt that assuming there is evidence to support a finding, the question whether an incapacity has resulted from a particular injury is one of fact. If then there is no provision in the legislation which precludes a finding that an incapacity has resulted from two separate injuries, and if a finding that an incapacity did so result is possible if the evidence justifies it, an inability to make such a finding must be the result of some judicial gloss upon 10 the legislation; and this is so. The gloss may have started earlier, but its starting point now is commonly taken to be the decision of the Court of Appeal in Noden v. Galloways Limited (1912) 1 K.B. 46. Curiously the gloss was obiter; a claim was made in respect of an incapacity resulting from a second injury to the applicant's hand, but that second injury had nothing whatosever to do with the original accident on which the award of compensation was based. The applicant was not entitled to any award at all. However in the course of their judgments, Cozens-Hardy, M.R., and Fletcher Moulton, 20 L.J., made the observations quoted by Glass, J.A. It has been amply demonstrated in the reasons of both the President and Glass, J.A., that, at least, the whole of their dicta cannot stand. If there are two injuries having a causal relationship to a death or incapacity, the tribunal may find that death or incapacity resulted from the first injury. Certainly in some, and perhaps in all, of these cases it would

be possible to find that the death or incapacity also resulted from the second injury.

In the present case the laminectomy on 1st April, 1968, joined together the effects of the two injuries of 16th November, 1964, and 17th June, 1966, and to some extent this joinder was reinforced by the fusion operation in April, 1975. This circumstance is sufficient to support the findings of the Commission that the partial and total incapacities resulted 10 from each injury, and there is nothing in the authorities on the matter binding this court which would preclude its confirmation of the awards made pursuant to these findings. There is however another important issue on which I should express an opinion. In his reasons the President also supports the awards on the ground that the first injury was the cause of the second. Glass, J.A., treats them as independent injuries and concludes that this court is entitled to confirm, and should confirm, the awards even if there were nothing more in the evidence than that the relevant partial and total in- 20 capacities resulted from two independent injuries.

The authorities have been canvassed in the reasons of the President and Glass, J.A., and I do not wish to go over the same ground. As it seems to me, the decision of the High Court in Conkey & Sons Limited v. Miller (1977) 51 A.L.J.R. 583 leads to the conclusion that a tribunal can find that a particular incapacity resulted from each of two injuries and make awards against two different employers, even though those

injuries are independent injuries. In <u>Conkey</u> the evidence of Dr. Richardson (51 A.L.J.R. at pp. 584-585) was that the worker's second (fatal) infarction was, in all probability, totally unrelated to his first infarction, and that the second infarction was not caused by the first infarction. Barwick, C.J., (with whose judgment the other members of the bench agreed, save perhaps that Murphy, J., may have taken the matter further) said (at p. 585):- 10

> "The evidence did not establish that the second infarction was caused by the first. Thus is may be said, and it was said, though perhaps in a qualified way, that the fatal infarction was 'an independent event'."

An award, based on a finding that the employee's death resulted from the first, work-caused, infarction, in the sense that this infarction made it probable that the employee would not survive a further infarction, was upheld. However if the second infarction which immediately preceded the worker's death had followed some exertion in the course of the worker's 20 employment, it is impossible to imagine that the Workers' Compensation Commission would not have been entitled to find that death also resulted from the second infarction. When Barwick, C.J., described the second infarction as "the fatal infarction", he surely meant "the infarction which immediately resulted in death". He went on to say that "the death by reason of myocardial infarction when it did ultimately occur, 'resulted' from the work-caused injury of the first infarction, even if it could not be said that the final infarction was

itself caused by work-caused injury." If the fact were that the fatal infarction had been caused by a work-caused injury, in the course of another employment, surely the Commission would be entitled to find that death resulted from each injury. If it could not, upon what basis could it choose between them. Death would have resulted from the first work-caused infarction because it made it probable that the employee would not survive a further infarction; and it would have resulted also from the second, independent, injury, the further work-caused infarction which proved fatal. Similar considerations apply to the decision of this court in Pyrmont Publishing Co. Pty. Ltd. v. Peters (1972) 46 W.C.R. 27. There the applicant injured his neck at work, and suffered a second injury to his neck while rockfishing. His slipping and striking his head and back on a rock while fishing had no causal connection with the first injury. Nevertheless, an award in respect of his incapacity following his second injury but based on the first injury, was upheld. The nexus between the first injury and the incapacity was the neck condition caused by the first injury. In relation to this nexus, Jacobs, J.A. (as he then was) said, at p. 30:-

> "There must be a real connection between the pre-existing condition and the incapacity which was immediately caused by the later injury. But it is always a question of fact and remains such, provided that there is evidence of the pre-existing condition caused by the employment injury."

As in Conkey, if the second injury had been caused at work and

not while rockfishing, the Commission would have been entitled to find that the incapacity resulted also from the second injury. The "incapacity which was immediately caused by the later injury" must have resulted from the later injury, even though it also resulted from the earlier injury. It seems necessarily to follow that the Workers' Compensation Commission is not precluded, in proceedings heard together, from finding that a particular incapacity resulted from two independent injuries. If this is so, there is nothing in the Act which precludes the making of awards against separate employers in terms of these findings. The same position applies, a fortiori, in respect of proceedings heard separately. 10

Glass, J.A., has concluded in his reasons that the treatment accorded to questions of causation at common law should be applied to the question whether death or incapacity has resulted from any particular injury. This seems to have been the view of Taylor, J., in Butler (supra) in the passage in his judgment the first two sentences of which I have quoted above. The whole passage (at pp. 476-477) is as follows:- 20

> " In order to prove that death has resulted from an injury it is necessary to establish a causal connexion between the particular injury and the death in question. So much is, of course, beyond doubt. So also is the fact that a particular death may result from more than one cause. This, of course, is a very general way of stating the problem but reference to a few of the countless cases, dealing with an infinite variety of circumstances, in which the relationship of 'cause' to 'effect' had been the subject of discussion, reveals the difficulty of formulating in less general terms any criterion capable of ready application to any given set of facts. But, notwithstanding the many difficulties in the way of 30

> attempting to explain and simplify the legal concept of 'cause' one thing is certain and that is that the legal concept is vastly different from the philosophical concept (see the discussion in Fitzgerald v. Penn (1954) 91 C.L.R. 268 at pp. 276-278, 284, 285). The legal concept looks to so-called 'immediate' or 'direct' or 'proximate' causes rather than to antecedent and predisposing circumstances. But at the same time an 'effect' may be caused, in the legal sense, by circumstances apparently remote for the chain of causation may be shown to have continued unbroken by any other intervening cause to the effect in question. It requires but little reflection to appreciate that the relationship of cause to effect must be a matter for particular consideration in every case and that it is impossible to substitute for the word 'cause' any other expression or formula capable of providing a simple solution in all cases where difficulties arise. It should, however, be said that the cause of an event is not established in the legal sense by showing, without more, that in the absence of a proved set of circumstances the event would or may not have happened, or, that a proved set of circumstances, in the widest sense, contributed to the happening of the event."

His Honour treats the legal concept of causation as applicable to the question whether an injury has resulted in death or incapacity. As I understand his reasons, the principles applied by the common law to questions of causation which Glass, J.A., concludes should be applied to the question whether an injury has resulted in death or incapacity are those principles comprised within the "legal concept" of causation discussed by Taylor, J. The opinion of Taylor, J., adds strong support to the other authorities Glass, J.A., cites for his conclusion, with which I agree. But restricting myself to this present case, there is, in my opinion, no reason in law why a finding should not be made that a particular incapacity has resulted from two independent injuries.

Such a finding has been made in this case, and that finding, as a finding of fact, has not been challenged. The challenge has been whether the Commission is entitled, no matter what the evidence is, to make awards against more than one employer. I am satisfied that it can. Accordingly I agree with the answers proposed by Glass, J.A., to questions 3 to 6 of the stated case, and with the orders as to costs proposed by him.

IN THE SUPREME COURT )
OF NEW SOUTH WALES )
COURT OF APPEAL )

C.A. No. 148 of 1977
W.C.C. No. 8102 of 1974.
W.C.C. No. 3600 of 1975
W.C.C. No. 9101 of 1975.

CORAM: MOFFITT, P.
HOPE, J.A.
GLASS, J.A.

Monday 28th November 1977.

MORRIS v. GEORGE & ORS. 10

MORRIS v. GLENMORE PTY. LIMITED & ORS.

MORRIS v. BUSHBY

JUDGMENT

GLASS, J.A.: This is an appeal by way of stated case from the Workers' Compensation Commission (Williams J.). The question of law raised by the case were seven in number. In the result, however, only two questions were argued before us but they are, as will appear, of considerable importance. The first involves the construction of s.6(3) of the Act in order to determine whether an applicant may recover awards against 20 both principal and employer. The second requires consideration of a submission that there is no jurisdiction under the Act to make an award against more than one employer in respect of the same incapacity.

The evidentiary setting in which these legal contests have arisen requires a little elaboration. The applicant in the Commission had the misfortune to suffer a series of injuries to his lumbar spine. When the first injury occurred in 1964 he was employed by George & McKern (the first employer). The circumstances of his employment were such as 30

to attract the provisions of s.6(3). Glenmore Pty. Limited (the principal) was a principal within the meaning of that section. In 1968 the Commission made an award against the principal for certain closed periods in respect of the incapacity resulting from that 1964 injury. It also granted to the principal in respect of its liability under that award an indemnity against the first employer, who was uninsured. In 1966 the applicant sustained a further injury to his lumbar spine while employed by T.H. Bushby (the second employer). In 1968 the Commission made an award against the second employer for certain closed periods in respect of incapacity resulting from the second injury. Some of those closed periods coincided with some of the periods covered by the award against the principal. In 1976 the Commission heard proceedings for an award against the first employer, the principal and the second employer. It found that commencing in 1973 there had been a period of total incapacity and thereafter a continuing partial incapacity for work and that such incapacity, both total and partial, resulted from the injury in 1964 in the service of the first employer and also from the injury in 1966 in the service of the second employer. It then made awards in respect of such total and partial incapacity against the first employer, the second employer and the principal.

The appeal by the principal depends upon the proper

construction of s.6(3) which in relevant respects provides as follows:

> "(a) Where any person (in this subsection referred to as the principal) in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under this Act which he would have been liable to pay if that worker had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom he is immediately employed:
> ....................................
> (b) Where the principal is liable to pay compensation under this subsection, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the worker independently of this subsection, and all questions as to the right to and amount of any such indemnity shall in default of agreement be settled by the Commission under this Act.
>
> (c) Nothing in this subsection shall be construed as preventing a worker recovering compensation under this Act from the contractor instead of the principal."

The construction of the section has been before this Court on two recent occasions viz. in Edwards v. Mainline Constructions Pty. Ltd. (1975) 1 N.S.W.L.R. 90 and Employers' Mutual Indemnity Association Ltd. v. K.B. Hutcherson Pty. Ltd. (1976) 2 N.S.W.L.R. 302. In the former it was observed that when an applicant proceeded against the principal under s.6(3) and his employer under s.7, only one award could be made. The latter decision cited the former as authority for the proposition that there cannot be simultaneous awards against the employer

and the principal. The proposition that the Act was inconsistent with the recovery of two awards was in each instance unnecessary for the decision. In Edwards the principal ground of appeal was that an applicant who has commenced proceedings against both employer and principal must state at the commencement of the hearing which application he elects to pursue. The Court upheld the ruling in the Commission that no election was required. Since the Commission in the result made only 10 one award against the principal and dismissed the application against the employer, the statement that it could not have made two awards went beyond the exigencie of the appeal. In Hutcherson the sole question was whether a principal under s.6(3) is required by the Act to take out a policy of insurance. The proposition for which Edwards was cited appeared in the course of expounding the nature of the liability imposed by s.6(3) on a principal. The decision in no way depended upon it. In these circumstances there are, in my opinion, no consideration of policy or convenience which 20 inhibit a reconsideration of the question whether an applicant may recover awards against both employer and principal in respect of the same incapacity.

The ground upon which this Court previously expressed its view was as follows. The section was enacted in New South Wales at a time when its Imperial prototype had been so construed and it was to be inferred that the legislature was adopting the received interpretation. That interpretation

depended on two cases viz. Herd v. Summers (1905) 7 F (Ct. of Sess.) 870 and Meier v. Corporation of Dublin (1912) 2 I.R. 129. The Irish decision relies heavily on the earlier Scottish decision. When they are closely examined it appears that their reasoning is founded not on the wording of the section but upon the received procedural notions of the time. In Herd v. Summers the exact decision was that an application for compensation brought against both employer and principal was incompetent. Since their liability was several and neither joint nor joint and several, the application had been properly dismissed by the Sheriff-substitute. Each of the four judges affirmed the consequential proposition that the applicant must elect between the two parties before bringing his claim. As the Lord President put it "It would be mala praxis to have persons convened into Court, leaving it to the Court to determine against which of them a good action lay. A party must determine against whom he has a remedy before he brings his case into Court". In Meier's case the applicant obtained an award against his employer but in consequence of the bankruptcy of the latter and the liquidation of his insurance company could only recover a small part of the compensation awarded. He then made an application against the principal which was dismissed. In affirming that decision, the Irish Kings Bench Division quoted extensively from the Scottish judgment. Their application was said to be evident and decisive. According to the Lord Chancellor, when the

applicant obtained an award against his employer, "the liability of the principal was thereby suspended and determined". According to the other two judges the applicant failed because the applicant could claim from either but not from both. It will be seen that the Scottish reasons for preventing the simultaneous application for two awards were extended in Ireland to prevent successive applications for two awards.

In my view the reasoning in these two decisions is contaminated by procedural assumptions which are no longer applicable in New South Wales. Since the Law Reform (Miscellaneous Provisions) Act, 1946, it has been possible to sue several tortfeasors in the one proceeding, s.(2). The Act abrogates the rule in Brinsmead v. Harrison (1871) L.R. 7 C.P. 547 that judgment against one joint tortfeasor releases the other (s.5(1)). It also abrogates in s.5(2) the rules forbidding contribution between joint tortfeasors, Merryweather v. Nixon (1799) 8 T.R. 186, or between several tortfeasors, Horwell v. L.G.O. (1877) 2 Ex.D. 365. It provides that the opportunity of a plaintiff to sue joint or several tortfeasors in one or several actions is limited only by the inability to recover in the aggregate more than the amount of damages awarded by the first judgment (s.5(1)(b)). The procedural system in New South Wales now sanctions double claims and double judgments. It is only double satisfaction which is forbidden. I do not think the section should be construed in such manner as will accommodate the assumptions that tortfeasors cannot be sued together

and, if sued separately, judgment against one releases the other.

If the language of s.6(3) is considered free from the distorting influences of outmoded procedures, its meaning appears to me to be fairly plain. The principal incurs a liability which is identical with the liability of the employer in proceedings against the principal, the Act is applied by substituting a reference to the principal for any reference to the employer, s.6(3)(a). Any principal liable to pay 10 compensation is entitled to be indemnified by the employer, s.6(3)(b). There is nothing here which stipulates that an award against one party excludes an award against the other. But it was submitted that s.6(3)(c) upon its proper construction provides that there can be only one award against employer or principal. The first step involves the submission that "a worker recovering compensation" meant a worker obtaining an award. The second step by stressing "instead of" argued that the obtaining of awards against the contractor and principal were mutually exclusive rights. I do not find 20 either step in the argument convincing. In s.64(1)(b) recovery of compensation is referred to in circumstances which clearly assign to it the meaning "receiving payment of compensation". The context is a provision the purpose of which is to prohibit double satisfaction. No reason has been given why the same phrase in s.6(3)(c) should bear a different meaning. So understood the section makes two things clear. The first is that the liability of the employer continues to exist and

may be enforced notwithstanding the concurrent liability of the principal. The second is that when the worker has been paid compensation by the employer, this operates to extinguish the liability of the principal. Doubtless there is an implication that recovery of compensation from the principal will extinguish the liability of the employer to the worker. He will, however, be liable to indemnify the principal under s.6(3)(b). It is worth mentioning that in Hamilton v. Cole, (1972) 1 N.S.W.L.R. 34 a worker not only obtained an award under s.11(1) against his employer under s.7 and against the principal under s.6(3). He was also later successful in obtaining an award against both on the basis of notional total incapacity under s.11(2). The second award against the principal was unsuccessfully attacked in this Court on other grounds. The ground of duplicity of awards was not relied upon by counsel and attracted no notice from the Bench. For these reasons I am of opinion that s.6(3) on its proper construction forbids neither duality of application nor duality of awards. What cannot be obtained, and this is prohibited by general principle, is double satisfaction of awards. Any recovery under an award against the principal will take effect pro tanto as a recovery under the award against the employer and vice versa.

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The second question debated before us was whether the Workers' Compensation Act, apart from s.6, contemplates that in respect of a given period of incapacity there can be an

award against more than one respondent. The submission that the answer should be in the negative was put by counsel for the second employer and relied upon by counsel for the principal. If successful, it would have denied validity to all 1976 awards except that against the first employer which was the one first pronounced by the judge. The submission was resisted by counsel for the Registrar on behalf of the Uninsured Liability Fund upon which the financial burden of the award against the first employer would fall. Before considering the submission, it should be located in its evidentiary context. The learned trial judge found that the incapacity upon which his awards were based had resulted from the first and the second injuries. The stated case raised the questions whether there was evidence to support those two separate findings. However, the "no evidence" submissions were expressly relinquished by counsel appearing for the principal, the Registrar and the second employer. It follows that the submission accepts that the applicant had in point of evidence proved his entitlement to an award with respect to each injury. Nevertheless it is argued that the Commission was compelled in point of law to make an award based upon one injury alone.

The submission was put with disarming simplicity. The inquiry which must precede any award under the Act is whether death (s.8) or incapacity (s.9) results from the injury. As a matter of construction and on authority, it was argued,

incapacity or death can result from only one injury. It therefore cannot by law be the result of two injuries received in the service of two employers. The authority was Noden v. Galloways Limited (1912) 1 K.B. 46 where the applicant worker was found to be suffering from an incapacity to which accidents in 1902 and 1910 both contributed. In holding that it was an error of law to base an award on the 1902 injury, Cozens-Hardy M.R. said at 49: 10

> "In my opinion, when once it is shewn that the man having the disability occasioned by the 1902 accident met with another accident in 1910, it is the second employer who is liable and who alone is liable, and it is not relevant to say that the 1902 accident was a contributing cause."

Fletcher Moulton L.J. said at 52:

> "I have taken a clear case of two contributing causes, and if the law as laid down to himself by the learned deputy country court judge is right, the workman in such a case could go against the first employer or the second 20 employer, and, for aught I see, against both employers. That is not the law. When a second cause intervenes and produces the incapacity and that second cause is in the nature of an accident, it is the second employer who is liable."

It will be seen that the decision affirms that where two injuries contribute to the incapacity it cannot result from both and must result from the second. The decision has since been cited with approval but without endorsement of the draconian width of these two propositions. For example, in 30 Astill v. Orange Blue Metal Pty. Ltd., (1969) W.C.R. 39 it was cited by this Court which then went on to hold that it was a question of fact for the tribunal to determine whether the incapacity was attributable to the first or the second

injury. In Pyrmont Publishing Co. Pty. Ltd. v. Peters (1972) 46 W.C.R. 27, it was held by this Court after an allusion to Noden that the Commission fell into no error in deciding that the incapacity was due to the first injury, the second having occurred while the worker was engaged in non-compensable rock-fishing. There are other decisions which cite Noden but none-theless affirm the right of the tribunal to find, where the evidence warrants it, that an incapacity has resulted from the first of two successive injuries. Hutchinson v. Kiveton Park Colliery Co. Ltd.; Hutchinson v. Devon County Council 24 B.W.C.C., 320; Bradshaw v. Richardson Westgarth & Co. Ltd., 24 B.W.C.C., 64. Contests in the Commission are legion which turned upon the question which of two successive injuries resulted in the applicant's incapacity. The decisions I have quoted as well as these unreported contests of necessity reject the second Noden proposition while paying lip service to the first. So far as concerns the first Noden proposition which is the foundation of the present submission viz. that an incapacity cannot result from two injuries, no subsequent verification has been unearthed by the researches of counsel. If it were sound, it would mean that something in the Workers' Compensation Act requires that questions of causation should receive treatment which is different from that accorded to them at common law.

It is necessary to commence with certain provisions of the Act which have been settled by judicial construction.

A claim for compensation under the Act depends upon proof of two connections viz. (1) between the employment and the injury and (2) between the injury and the death incapacity The Commonwealth v. Butler (1958) 102 C.L.R. 465 at 478. The first of these connections involves a causal element where traumatic injury of the employment, Kavanagh v. The Commonwealth (1959-60) 103 C.L.R. 547. But in the case of injury in the extended sense of disease, there is necessarily involved in every instance a causal element by dint of the statutory definition which demands that the employment shall have contributed, Darling Island Stevedoring and Lighterage Co. Ltd. v. Hussey (1959) 102 C.L.R. 482. The first connection between the employment and the injury does not arise for consideration in these proceedings. But it should perhaps be observed in passing that it could sustain a basis for an award against two employers in respect of the same incapacity arising from one injury. This would be the position wherever it could be shown that the injury arose not only in the course of employment A but also arose out of employment B.

However, the relevant connection for present purposes is that between injury and death/incapacity. This being expressed as a result is undoubtedly a relationship of a causal nature. It is always necessary to ask whether the incapacity has resulted from death/injury, Darling Island Stevedoring Co. v. Hankinson (1967-68) 117 C.L.R. 19 at 25; Salisbury v. Australian Iron & Steel Ltd. 44 S.R. (N.S.W.) 157 at 160. But if

the question is restated so as to ask whether the injury has caused the incapacity/death does the changed formulation introduce a different legal question? It has been said that although the inversion is merely linguistic, it tends to misconception by introducing the notion of contributory factors, The Commonwealth v. Butler at 480. Again one may ask whether it is the same or a different question why the inversion is accompanied by a minimal linguistic shift and asks whether 10 the injury resulted in incapacity/death, Ward v. Corrimal-Balgownie Collieries Ltd. (1938) 61 C.L.R. 120 at 140. There can be few subjects which have inspired so much legal exegesis as causation. I mean no disrespect in expressing the feeling that when all the admonitions to eschew the beguiling niceties of philosophical scholarship are subtracted, little guidance remains beyond the insistence of the law that whether or not a causal connection exists should be treated as a question of fact to be decided on the evidence by the application of common sense principle Leyland Shipping Co. v. Norwich Union 20 Fire Society (1918) A.C. 350 at 362. The acceptance that one event may have a plurality of causes is embedded in the approach to questions of causation outside the Workers' Compensation Act, Stapley v. Gypsum Mines Ltd. (1953) A.C. 663 at 681. Lord Reid has said that causation in tort and under Workers' Compensation legislation cannot be differently treated, Baker v. Willoughby (1970) A.C. 467 at 492. This statement was quoted by Mason J.A. (as he then was) in his

judgment in Migge v. Wormald Bros. Industries Ltd., (1972) 2 N.S.W.R. 29 at 44, the reasons for which were explicitly adopted by the High Court, 47 A.L.J.R. 236.

Under the Act there are at least three different situations which may arise in the relationship between multiple injury and multiple incapacity. According to the state of the evidence, independent injuries may combine to cause a single incapacity or to cause two separate incapacities which severally disable to the same extent or to cause two separate incapacities which combine as parts to produce incapacity as a larger whole. In this respect the passage in the judgment of Dixon J. in Ward v. Corrimal-Balgownie Collieries Limited (1938) 61 C.L.R. 120 at 141 is highly instructive: 10

> "It is true that the word has been held satisfied where the accident or the injury is one cause, although not the sole cause, of the incapacity....But the statement that the incapacity need not be solely caused by the accident or injury is directed to cases where, after the workman suffers incapacity by accident, he encounters some further cause preventing his earning a full livelihood, such as a second accident or disease enough in itself to incapacitate him, or even imprisonment......... The statement may contemplate also a chain of causation consisting of links representing different factors or events all terminating in a single conclusion, that is to say, in one condition amounting, as the case may be, to total or partial incapacity. But it is not concerned with independent causes producing independent consequences, distinct bodily conditions which amount to total incapacity only because they must be added together." 20 30

I believe that it is possible by the extrusion from the language of the passage of all elegance and the intrusion into it of statutory jargon to extract without loss of meaning the following three propositions:

1. A worker may suffer from a double disability due to two independent injuries which equally incapacitate him. Although neither injury is the only cause, his incapacity for work is nevertheless the result of each of them.
2. A worker may suffer from a single disabling condition which has been produced by the combined operation of two independent injuries. His incapacity may be treated as the result of both. 10
3. A worker may suffer from an overall incapacity resulting from the combined effect of two disabilities independently caused by two injuries. The employer responsible for part of that incapacity is not responsible for the whole incapacity resulting from the addition to it of the other part.

In Bratovich v. Rheem (Aust.) Pty. Limited, (1971) 2 S.A.S.R. 33 at 43 Bray C.J. placed on the above passage a similar construction to that in 2. above when he took from it "the proposition that is not necessary that the incapacity should 20 result solely from the injury founded or may apply to each of the links representing different events in a chain of causation terminating in a single condition". Applying that proposition, he held that a condition of permanent incapacity for heavy work had been contributed to and resulted from two successive injuries to the applicant's spine. It is clear that for present purposes the second of the above propositions is alone relevant. Before leaving the wider field of multiple

injury and resultant incapacity, a fourth situation should be mentioned. A worker may suffer from an incapacity which has been made worse by a second injury causally connected with the original injury. The employer responsible for the first injury is liable for the full extent of the incapacity. The most common illustration of this principle is where the second injury assumes the form of medical or surgical treatment reasonably undertaken because of the first, Lindeman Ltd. v. Colvin (1946) 74 C.L.R. 313 at 317, 321; Shirt v. Calico Printers Association (1909) 2 K.B. 51; Migge v. Wormald Bros. Industries Ltd. (1972) 2 N.S.W.R. 29. 10

In Miller v. Conkey & Sons Ltd., (1977) 51 A.L.J. 583, the question of multiple causation under the Act arose in relation to a death claim. The Workers' Compensation Commission found as a fact that a myocardial infarction occurring at work in 1974 had so damaged the deceased's heart muscle that he was unlikely to survive a second infarction. Accordingly it held that the death from a second infarction in 1975 had 20 resulted from the first. Barwick C.J., with whom the rest of the Court agreed, said:

> "In my opinion, such a statement warrants the conclusion that the death by reason of myocardial infarction when it did ultimately occur, "resulted" from the work caused injury of the first infarction, even if it could not be said that the final infarction was itself caused by work caused injury."

To state that the death by reason of the second fatal infarction also resulted from the first necessarily implies that it 30

resulted from both. The decision constitutes, in my opinion, clear authority for the view that under the Act death may result from two successive injuries. If so, there can be nothing in the Act to outlaw a finding that incapacity also resulted from a plurality of injuries.

It has been argued that the absence of any machinery for the apportionment of compensation between different employers will create difficulties. This would not furnish a reason for denying a jurisdiction to make double awards which otherwise exists. However, it seems to me that if insurers are unable to agree, proceedings for a contribution between employer will lie in accordance with general principles of law and equity. A discussion of those principles may be found in Albion Insurance Co. Ltd. v. Government Insurance Office (N.S.W.), (1969) 121 C.L.R. 342 at 350-1.

I appreciate that I have advanced fairly meagre support for a proposition the adoption of which will require a radical alteration in the practice of the Workers' Compensation Commission. I can only plead in answer that the argument for the contrary point of view depends entirely on Noden. Ranged against that decision with decisive effect, it seems to me, are the following considerations viz. the impossibility no less in law than in law than in logic of treating "result from" as anything other than the reciprocal of "caused by", the settled doctrine of causality in tort law, the high authority for applying the same doctrine to questions arising

under the Act and the resounding implications of the High Court decision in Conkey.

I would propose that the questions in the stated case be answered as follows:

1. No.
2. No.
3. Yes.
4. Yes. 10
5. Yes.
6. No.
7. Not argued.

The costs of the applicant and the Registrar should be paid equally by the respondents, Glenmore Pty. Limited and T.H. Bushby. The costs of the applicant are to include the costs which he was ordered to pay to the respondent in appeal No. 279 of 1976.

IN THE SUPREME COURT )
OF NEW SOUTH WALES )
COURT OF APPEAL )

C.A. No. 148 of 1977
W.C.C. No. 8102 of 1974
W.C.C. No. 3600 of 1975
W.C.C. No. 9101 of 1975

CORAM: MOFFITT, P.
HOPE, J.A.
GLASS, J.A.

Monday, 28th November, 1977

MORRIS v. GEORGE & ORS. 10

MORRIS v. GLENMORE PTY. LIMITED & ORS.

MORRIS v. BUSHBY

Case stated by Workers Compensation Commission on its own motion - construction of s.6(3)(a) - right against principal not lost in respect of compensation not received from employer where award has been made against employer - question whether a particular incapacity e.g. for a specific period can result from more than one injury so that awards on this basis can be made in respect of the same incapacity and for the same compensation against more than one employer, despite the absence 20 of any procedures in the Workers Compensation Act for contribution - discussion of types of cases where it is open for the foregoing to occur - discussion of cases where a first injury is a cause of a second injury, where injuries are causally independent of each other, where although injuries are causally independent of each other operative or other treatment is done by reason of each with resulting incapacity and where the injury from which incapacity results arises out of one employment and in the course of another employment.

## ORDERS

The questions set out in the stated case are answered as follows:

1. No.
2. No.
3. Yes.
4. Yes.
5. Yes.
6. No. 10
7. Not argued.

The costs of the applicant and the Registrar are to be paid equally by the respondents, Glenmore Pty. Limited and T.H. Bushby. The costs of the applicant are to include the costs which he was ordered to pay to the respondent in appeal No. 279 of 1976.

The case is returned to the Workers Compensation Commission.

IN THE SUPREME COURT )
)
OF NEW SOUTH WALES ) C.A. No. 148 of 1977
)
COURT OF APPEAL ) W.C.C. No. 8102 of 1974
W.C.C. No. 3600 of 1975
W.C.C. No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain question of law which arose in proceedings before the Commission. 10

IN THE MATTER of determinations between

Matter No: 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Respondents 20

Matter No: 3600 of 1975

SYDNEY BLAIR MORRIS Applicant

GLENMORE PTY. LIMITED

Respondent

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties

Matter No: 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant

T.H. BUSHBY 30

Respondent

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of New South Wales as an added party pursuant to Order of the Court of Appeal dated the 2nd day of August, 1977

188. Order of Court of Appeal

ORDER

THE COURT ORDERS THAT -

1/(q) Whether upon the true construction of the provisions of Section 6(3) of the Act, the Award made in favour of the Applicant against the Respondents R.D. George and F.W. McKern is invalid by virtue of the fact that, at the time the Award was made, the Commission had made, on 15th November, 1968, an Award of compensation in favour of the Applicant against the Respondent Glenmore Pty. Limited under the provisions of 10 Section 6(3)(a) of the Act with respect to the injury received by the Applicant on 16th November, 1964 in the course of the Applicant's employment with the Respondents R.D. George and F.W. McKern?

1/(a) No.

2/(q) If the answer to question (1) be in the negative, whether upon the true construction of the provisions of Section 6(3) of the Act, the Award made in the instant proceedings in favour of the Applicant against the Respondent, Glenmore Pty. Limited was invalid by virtue of the fact that 20 the Award made in favour of the Applicant against the Respondents R.D. George and F.W. McKern had been made before the first mentioned Award was made?

2/(a) No.

3/(q) Whether there was any evidence to support the findings set forth in the Award made in favour of the Applicant against the Respondents R.D. George and F.W. McKern?

3/(a) Yes.

4/(q) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent Glenmore Pty. Limited?

4/(a) Yes.

5/(q) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent T.H. Bushby?

5/(a) Yes. 10

6/(q) Whether the Applicant was disentitled to the Award of compensation specified in the Award in his favour against the Respondent T.H. Bushby once the Commission had made validly any one of the two instant Awards against the Respondents, R.D. George and F.W. McKern and the Respondent Glenmore Pty. Limited for the payment of the same compensation as he was awarded under the Award made against the Respondent T.H. Bushby?

6/(a) No.

7/(q) Whether the Order made by the Commission in each of the three abovementioned matters, that the Compensation paid by the respective Respondents under the relevant Awards should be pro tanto a discharge of the liability of each of the other two Respondents under the respective Awards made against them, it or him, as the case may be, was unlawful and without force and effect? 20

7/(a) Not argued.

8. The costs of the Applicant and the Registrar are to be paid equally by the Respondents, Glenmore Pty. Limited and T.H. Bushby. The costs of the Applicant are to include the costs which he was ordered to pay to the Respondent in Appeal No: 279 of 1976.

9. The case is returned to the Workers' Compensation Commission.

ORDERED the 28th November, 1977

ENTERED the 25th ~~November~~ September, 1978 10

Seal

By the Court

J.A. Leslie
Registrar

Seal

IN THE SUPREME COURT ) "A"
)
OF NEW SOUTH WALES ) C.A. No. 148 of 1977
) W.C.C. No. 8102 of 1974
COURT OF APPEAL ) W.C.C. No. 3600 of 1975
W.C.C. No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926.

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales, constituted by Williams J., of its own Motion, in pursuance of Section 37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission. 10

IN THE MATTER of determinations between -

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS
Applicant

and

R. D. GEORGE, F. W. McKERN
and C. F. WHITEHOUSE

Respondents 20

Matter No. 3600 of 1975

SYDNEY BLAIR MORRIS
Applicant

and

GLENMORE PTY LIMITED
Respondent

and

R. D. GEORGE, F. W. McKERN
and C. F. WHITEHOUSE

Third Parties 30

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS
Applicant

and

T. H. BUSHBY

Respondent

 Notice of Motion for
Conditional Leave to Appeal

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of New South Wales as an added party pursuant to Order of the Court of Appeal dated the seventh day of August, 1977.

NOTICE OF MOTION
FOR LEAVE TO
APPEAL TO HER MAJESTY IN COUNCIL

TAKE NOTICE that on the 12th day of December, 1977 the above- 10
named GLENMORE PTY. LIMITED a Respondent in the case stated proceedings will move for an order granting leave to appeal to Her Majesty in Council from part of the judgment decision and orders of the Supreme Court of New South Wales Court of Appeal given and made on the 28th day of November, 1977 in proceedings by way of case stated by the Workers' Compensation Commission of New South Wales pursuant to sub-section 37(4)(b) of the Workers' Compensation Act, 1926, as amended, which referred to the said Court of Appeal certain questions of law arising from proceedings before the Commission and the res- 20
pective Awards and Orders made by it in the abovementioned matters and when the Court of Appeal ordered that the following questions of law set forth in the case stated:

(1) Whether upon the true construction of the provisions of Section 6(3) of the Act, the Award made in favour of the Applicant against the respondents R. D. George and F. W. McKern is invalid by virtue of the fact that, at the time the Award was made, the Commission had made, on 15th November, 1968, an award of compensation in favour of the Applicant against the Respondent Glenmore Pty. Limited 30

under the provisions of section 6(3)(a) of the Act with respect to the injury received by the Applicant on 16th November, 1964 in the course of the Applicant's employment with the Respondents R. D. George and F. W. McKern?

(2) If the answer to question (1) be in the negative, whether upon the true construction of the provisions of section 6(3) of the Act, the Award made in the instant proceed- 10 ings in favour of the Applicant against the Respondent Glenmore Pty. Limited was invalid by virtue of the fact that the Award made in favour of the Applicant against the Respondents R. D. George and F. W. McKern had been made before the first-mentioned Award was made?

(3) Whether there was any evidence to support the findings set forth in the Award made in favour of the Applicant against the Respondents R. D. George and F. W. McKern?

(4) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the 20 Applicant against the Respondent Glenmore Pty. Limited?

(5) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent T. H. Bushby?

(6) Whether the Applicant was disentitled to the award of compensation specified in the Award in his favour against the Respondent T. H. Bushby once the Commission had made validly any one of the two instant Awards

against the Respondents R. D. George and F. W. McKern and the Respondent Glenmore Pty. Limited for the payment of the same compensation as he was awarded under the Award made against the Respondent T. H. Bushby?

(7) Whether the order made by the Commission in each of the three abovementioned matters, that the compensation paid by the respective Respondents under the relevant Awards should be pro tanto a discharge of the liability of each of the other two Respondents under the respective Awards made against them, it or him, as the case may be, was unlawful and without force and effect? 10

be answered in the following manner:

(1) No.

(2) No.

(3) Yes.

(4) Yes.

(5) Yes.

(6) No. 20

(7) Not argued.

and the further order of the Court of Appeal that the costs of Sydney Blair Morris and of the Registrar of the Workers' Compensation Commission of New South Wales be paid equally by T. H. Bushby and Glenmore Pty Limited and that such costs of Sydney Blair Morris include the costs which he was ordered to pay to the respondent in Appeal No. 279 of 1976 and the further order that the case be returned to the Workers'

Compensation Commission, upon the following grounds:

(1) That the Court of Appeal was in error in law in answering the question (2) in the case stated, "NO" and should have answered that question "YES".

(2) That the Court of Appeal was in error in law in answering the question (6) in the case stated "NO" and should have answered that question "YES".

(3) That the Court of Appeal was in error in law in not answering the question (7) in the case stated and should have answered that question "YES". 10

(4) That the Court of Appeal was in error in law in not adopting the test of liability for determining incapacity, as laid down in Noden v. Galloways Limited (1912) 1 K.B. 46 at pp.49-50 and pp.51-52 and in not applying the reasoning of the Court of Appeal in that decision.

(5) That on the proper construction of the Workers' Compensation Act and authority an applicant cannot recover awards against 20

(a) both principal and employer, or

(b) a principal after an award has been made against an employer in respect of a particular incapacity.

(6) That on the proper construction of the Workers' Compensation Act and on authority an applicant cannot recover two awards

(a) in respect of the same incapacity, or

(b) in respect of the same incapacity arising in the circumstances of the instant case.

(7) That on the proper construction of the Workers' Compensation Act and on authority the Workers' Compensation Commission cannot find that a particular incapacity is the result of two or more independent injuries each having occurred in separate employments with separate employers. 10

(8) That the Court of Appeal was in error in holding that the treatment accorded to questions of causation at common law should be applied to the question whether death or incapacity has resulted from any particular injury within the meaning of the Workers' Compensation Act, 1926, as amended.

(9) That the Court of Appeal should have ordered that an award be entered in favour of the Appellant herein, Glenmore Pty Limited.

(10) That alternatively the Court of Appeal should have remitted the case stated to the Workers' Compensation Commission to be further heard, reconsidered or determined in accordance with law. 20

The matter in dispute on an appeal to Her Majesty in Council is from a final judgment of the Court where the matter in dispute amounts to or is of the value of Five Hundred pounds sterling or upwards as mentioned in the Rules regulating appeals to Her Majesty in Council from the State of New South

Wales or the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of Five Hundred pounds sterling or upwards and which Rules are set forth in Order in Council dated the 2nd day of April, 1909, and the Judicial Committee Rules 1957 and the questions involved in the Appeal are ones which, by reason of their great general or public importance or otherwise ought to be submitted to Her Majesty in Council for decision. 10

AND for an order that execution of the said judgment decision or order or the enforcement of the awards the subject of the case stated be suspended or stayed pending the determination of the Appeal.

AND for such further or other order as to this Honourable Court seems fit.

DATED this 9th day of December, 1977.

..........................................

Counsel for Glenmore Pty Limited being the Second Respondent to the case stated and the Applicant to this Motion. 20

THIS IS THE ANNEXURE MARKED "A" REFERRED TO IN THE ANNEXED AFFIDAVIT/~~DECLARATION~~ OF
JAMES MICHAEL REDMAN
..........................................
SWORN/DECLARED AT SYDNEY THIS 22ND DAY OF DECEMBER AD 1975.

A Justice of the Peace.

This Notice of Motion is filed by Hickson Lakeman and Holcombe, Solicitors, of 170 Phillip Street, Sydney, N.S.W. 2000.

TO: The within Applicant, Sydney Blair Morris and to his Attorney, Francis Joseph Liddy of W. C. Taylor & Scott, 181 Elizabeth Street, Sydney

AND

TO: The abovenamed Respondent, T. H. Bushby and to his Solicitor, Boyd, Johns & Curwood of 86 Pitt Street, Sydney 10

AND

TO: The Registrar of the Workers' Compensation Commission of New South Wales, 131 Macquarie Street, Sydney

AND

TO: The abovenamed Respondents: R. D. George (a male) of 46 Belmont Parade, Mt Colah.

F. W. McKern (a male) of 18 Dennison Street, Hornsby. 20

TO: The Registrar of the Court of Appeal, Supreme Court, Queen's Square, Sydney.

IN THE SUPREME COURT )
OF NEW SOUTH WALES )
COURT OF APPEAL )

C.A. No. 148 of 1977
W.C.C. No. 8102 of 1974
W.C.C. No. 3600 of 1975
W.C.C. No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926.

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission. 10

IN THE MATTER of a determination between -

Matter No. 8102 of 1974.

SYDNEY BLAIR MORRIS

Applicant

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Respondents

Matter No. 3600 of 1975. 20

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

and R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties

Matter No. 9101 of 1975.

SYDNEY BLAIR MORRIS

Applicant 30

and T.H. BUSHBY

Respondent

Affidavit of Alan John Apps in Support of Notice of Motion

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of N.S.W. as an added party pursuant to Order of the Court of Appeal dated the day of 1977.

AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

On the 9th day of December, 1977, I, ALAN JOHN APPS, of 170 Phillip Street, Sydney in the State of New South Wales, Solicitor, say on oath:- 10

1. I am the solicitor for the respondent and as such I have the conduct of this matter of behalf of GLENMORE PTY. LIMITED.

2. The Notice of Motion herein is a application to this Honourable Court for leave to appeal to Her Majesty in Council from part of the judgment decision and

A. Apps

-2-

orders of the Supreme Court of New South Wales, Court of Appeal given by the said Court on the 28th November 1977 whereby the said Court of Appeal made orders that certain questions of law asked in a stated case from the Workers' Compensation Commission be answered in the manner appearing in the Notice of Motion filed herein. 20

3. I crave leave to refer to the judgment of the said Court of Appeal and to the affidavit of MALCOLM NELSON JOHNS filed in support of a Notice of Motion for leave to appeal from the said judgment of the Court of Appeal filed on behalf of another party to those proceedings T.H. BUSHBY in relation to the history of the proceedings. 30

4. I verily believe that by reference to the Award and orders of the Commission in Matter No. 3600 of 1975 that the total amount of compensation ordered to be paid by GLENMORE PTY. LIMITED and awarded to the applicant under the provisions of Sections 9 and 11(i) of the Act up to the date of the said Award on the 7th July 1976 approximated FIVE THOUSAND TWO HUNDRED AND FIFTY DOLLARS ($5,250.00). The respondent GLENMORE PTY. LIMITED was further ordered to pay to the applicant worker the sum of SEVENTY DOLLARS ($70.00) per week from the 3rd February 1976 on the basis of partial incapacity, such weekly payment to continue until the same be ended, diminished, increased or redeemed in accordance with the provisions of the Act and the total sum involved under this part of the order and awarded from 3rd February 1976 to date involves a further sum of approximately SIX THOUSAND SIX HUNDRED AND FIFTY DOLLARS ($6,650.00). In addition the respondent

10

20

A. Apps

[signature] J.P.



GLENMORE PTY. LIMITED was ordered to pay medical and hospital expenses the total of which has not yet been quantified.

5. It is respectfully submitted that the matter or matters in dispute of an appeal to Her Majesty in Council amount to a sum or are of the value of FIVE HUNDRED POUNDS STERLING (£500) or upwards and that the said judgment of the Court of Appeal is a final judgment of the court and

that the appeal involves some claim or question to or respecting some civil right amounting to or of the value of FIVE HUNDRED POUNDS STERLING (£500) or upwards.

6. I respectfully request that leave be granted to GLENMORE PTY. LIMITED the applicant in this motion to appeal to Her Majesty in Council from the judgment of the Court of Appeal. 10

SWORN by the said ALAN JOHN APPS )
at Sydney on the 9th day of )
December 1977 before me: )

A Justice of the Peace.

IN THE SUPREME COURT )
) C.A. No. 148 of 1977
OF NEW SOUTH WALES ) W.C.C. No. 8102 of 1974
) W.C.C. No. 3600 of 1975
COURT OF APPEAL ) W.C.C. No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission 10

IN THE MATTER of determinations between

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R. D. GEORGE, F. W. McKERN and C. F. WHITEHOUSE

Respondents

Matter No. 3600 of 1975 20

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

R. D. GEORGE, F. W. McKERN and C. F. WHITEHOUSE

Third Parties

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant 30

T. H. BUSHBY

Respondent

Notice of Motion for Conditional Leave to Appeal by T.H. Bushby

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of N.S.W. as an added party pursuant to Order of the Court of Appeal dated 2nd day of August, 1977.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

TAKE NOTICE that on the 12th day of December, 1977 the above-named T. H. BUSHBY a Respondent in the case stated proceedings will move for an order granting leave to appeal to Her Majesty in Council from part of the judgment decision and orders of the Supreme Court of New South Wales Court of Appeal given and made on the 28th day of November, 1977 in proceedings by way of case stated by the Workers' Compensation Commission of New South Wales pursuant to sub-Section 37(4)(b) of the Workers' Compensation Act, 1926, as amended, which referred to the said Court of Appeal certain questions of law arising from proceedings before the Commission and the respective Awards and Orders made by it in the abovementioned matters and when the Court of Appeal ordered that the following questions of law set forth in the case stated:

(1) Whether upon the true construction of the provisions of Section 6(3) of the Act, the Award made in favour of the Applicant against the Respondents R. D. George and F. W. McKern is invalid by virtue of the fact that, at the time the Award was made, the Commission had made, on 15th November, 1968, an award of compensation in favour of the Applicant against the Respondent Glenmore Pty.

Limited under the provisions of Section 6(3)(a) of the Act with respect to the injury received by the Applicant on 16th November, 1964 in the course of the Applicant's employment with the Respondents R. D. George and F. W. McKern?

(2) If the answer to question (1) be in the negative, whether upon the true construction of the provisions of Section 6(3) of the Act, the Award made in the instant proceedings in favour of the Applicant against the Respondent Glenmore Pty. Limited was invalid by virtue of the fact that the Award made in favour of the Applicant against the Respondents R. D. George and F. W. McKern had been made before the firstmentioned Award was made? 10

(3) Whether there was any evidence to support the findings set forth in the Award made in favour of the Applicant against the Respondents R. D. George and F. W. McKern?

(4) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent Glenmore Pty. Limited? 20

(5) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent T. H. Bushby?

(6) Whether the Applicant was disentitled to the award of compensation specified in the Award in his favour against the Respondent T. H. Bushby once the Commission had made

validly any one of the two instant Awards against the Respondents R. D. George and F. W. McKern and the Respondent Glenmore Pty. Limited for the payment of the same compensation as he was awarded under the Award made against the Respondent T. H. Bushby?

(7) Whether the order made by the Commission in each of the three abovementioned matters, that the compensation paid by the respective Respondents under the relevant Awards should be pro tanto a discharge of the liability of each of the other two Respondents under the respective Awards made against them, it or him, as the case may be, was unlawful and without force and effect? 10

be answered in the following manner:

(1) No.

(2) No.

(3) Yes.

(4) Yes. 20

(5) Yes.

(6) No.

(7) Not argued.

and the further order of the Court of Appeal that the costs of Sydney Blair Morris and of the Registrar of the Workers' Compensation Commission of New South Wales be paid equally by T. H. Bushby and Glenmore Pty. Limited and that such costs of Sydney Blair Morris include the costs which he was ordered

to pay to the Respondent in Appeal No. 279 of 1976 and the further order that the case be returned to the Workers' Compensation Commission upon the following grounds:

(1) That the Court of Appeal was in error in law in answering the question (5) in the case stated, 'YES' and should have answered that question 'NO'.

(2) That the Court of Appeal was in error in law in answering the question (6) in the case stated 'NO' and should have answered that question 'YES'. 10

(3) That the Court of Appeal was in error in law in not answering the question (7) in the case stated and should have answered that question 'YES'.

(4) That the Court of Appeal was in error in law in not adopting the test of liability for determining incapacity, as laid down in Noden v. Galloway Limited (1912) 1 K.B. 46 at pp.49-50 and pp.51-52 and in not applying the reasoning of the Court of Appeal in that decision. 20

(5) That the Court of Appeal was in error in law in holding that in proceedings disposed of together against several different employers, the Workers' Compensation Commission on the same facts and in a single judgment could find that the same particular incapacity could result from two independent injuries in separate employments with several employers.

(6) That the Court of Appeal was in error in law in holding

that a particular incapacity could be held to result from more than one injury arising out of or in the course of the employment of the worker by separate employers and that as a consequence an award could be made against each employer in respect of that one incapacity.

(7) That the Court of Appeal should have held that as a matter of law two awards could not be made against sepa- 10 rate employers in respect of the same incapacity on the ground that incapacity could not result from two injuries one of which arose out of or in the course of employment of the worker by one employer and the other of which resulted from an injury arising out of or in the course of the worker's employment with the second employer.

(8) That the Court of Appeal should have held that the Workers' Compensation Act did not allow awards to be made against successive employers in respect of the same incapacity or the same period(s) of incapacity and in 20 respect of the worker in the circumstances existing in the case stated.

(9) That the Court of Appeal should have held that as the Workers' Compensation Commission had made prior awards in respect of the subject incapacity, it could not in law make an award in respect of the same incapacity against T. H. Bushby.

(10) That the Court of Appeal should have held that on the

proper construction of the Workers' Compensation Act and on authority an Applicant worker cannot recover two awards of compensation -

(a) in respect of the same incapacity;

(b) in respect of the same incapacity or period(s) of incapacity arising in the circumstances of the instant case. 10

(11) That the Court of Appeal was in error in law in holding that the decision of the High Court of Australia in Miller v. Conkey & Sons Ltd. (1977) 51 A.L.J.R. 583 constituted authority for the view that the Commission could find that a particular incapacity resulted from each of two injuries and make awards against two different employers even though the said injuries were independent injuries.

(12) That the Court of Appeal was in error in holding that the treatment accorded to questions of causation at 20 Common Law should be applied to the question whether death or incapacity has resulted from any particular injury within the meaning of the Workers' Compensation Act, 1926, as amended.

(13) That the Court of Appeal should have ordered that an award be entered in favour of the Appellant herein, T. H. Bushby.

(14) That alternatively the Court of Appeal should have

remitted the case stated to the Workers' Compensation Commission to be further heard, reconsidered or determined in accordance with law.

(15) That the Court of Appeal was in error in law in holding that if double awards were made then the apportionment of compensation could be determined as and between the employers in proceedings for contribution between employers and in accordance with general principles of law and equity. 10

The matter in dispute on an appeal to Her Majesty in Council is from a final judgment of the Court where the matter in dispute amounts to or is of the value of Five hundred pounds sterling or upwards as mentioned in the Rules regulating appeals to Her Majesty in Council from the State of New South Wales or the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of Five hundred pounds 20 sterling or upwards and which Rules are set forth in Order in Council dated the 2nd day of April, 1909, and the Judicial Committee Rules 1957.

AND the questions involved in the Appeal are ones which, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision.

AND for an order that execution of the said judgment decision

or order or the enforcement of the Awards the subject of the case stated be suspended or otherwise stayed pending the determination of the Appeal.

AND for such further or other order as to this Honourable Court seems fit.

DATED this 9th day of December, 1977.

.........................................

Counsel for T. H. Bushby being the Third Respondent to the case stated and the Applicant to this Motion. 10

THIS Notice of Motion is filed by Malcolm Nelson Johns, Solicitor of 86 Pitt Street, Sydney, NSW, 2000.

TO: The within Applicant, Sydney Blair Morris and to his Attorney, Francis Joseph Liddy of W. C. Taylor & Scott, 181 Elizabeth Street, Sydney,

AND

TO: The abovenamed Respondent, Glenmore Pty. Limited and to its Solicitors, Hickson, Lakeman & Holcombe, 170 Phillip Street, Sydney, 10

AND

TO: The Registrar of the Workers' Compensation Commission of New South Wales, 131 Macquarie Street, Sydney,

AND

TO: The abovenamed Respondents: R. D. George (a male) of
46 Belmont Parade,
MT. COLAH.

F. W. McKern (a male) of 20
18 Dennison Street,
HORNSBY. .

TO: The Registrar of the Court of Appeal,
Supreme Court, Queens Square, Sydney.


Notice of Motion for
Conditional Leave to Appeal
by T.H. Bushby

IN THE SUPREME COURT )
) C.A. No. 148 of 1977
OF NEW SOUTH WALES ) W.C.C. No. 8102 of 1974
) W.C.C. No. 3600 of 1975
COURT OF APPEAL ) W.C.C. No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission 10

IN THE MATTER of determinations between -

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R. D. GEORGE, F. W. McKERN and C. F. WHITEHOUSE

Respondents

Matter No. 3600 of 1975 20

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

R. D. GEORGE, F. W. McKERN and C. F. WHITEHOUSE

Third Parties

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant 30

T. H. BUSHBY

Respondent

Affidavit of Malcolm Nelson Johns in Support of Notice of Motion

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of N.S.W. as an added party pursuant to Order of the Court of Appeal dated 2nd day of August, 1977.

AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION
FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

ON the 9th day of December, 1977, I, MALCOLM NELSON JOHNS of 86 Pitt Street, Sydney, in the State of New South Wales, Solicitor, say on oath: 10

1. I am a partner in the firm of Messrs. Boyd, Johns &

M. Johns

-2-

Curwood, the Solicitors for T. H. BUSHBY, a Respondent to the case stated herein and who is the Applicant in this motion for leave to appeal to Her Majesty in Council and as such have the conduct of the matter on behalf of T. H. Bushby.

2. The Notice of Motion herein is an application to this Honourable Court for leave to appeal to Her Majesty in Council 20 from part of the judgment decision and orders of the Supreme Court of New South Wales Court of Appeal given by the said Court of Appeal on the 28th November, 1977 whereby the said Court of Appeal made orders that certain questions of law asked in the stated case of the Workers' Compensation Commission be answered in the manner appearing in the Notice of Motion filed herein.

3. The said stated case referred to the Court of Appeal certain questions of law arising from proceedings before the Commission and the respective Awards and Orders made by it in 30 the abovementioned matters.

4. In the said matters the worker claimed to be entitled to payments of compensation, and a claim by the Applicant/Worker Sydney Blair Morris (hereinafter referred to as 'the Applicant') under Section 18C of the Uninsured Liability Scheme, for the payment to him from the Fund of Compensation that might be awarded against the abovenamed Respondents, R.D. George, F.W. McKern and a further Respondent not joined as a Respondent in the sub- 10
ject case stated and two further matters in which the Applicant claimed to be entitled to compensation under the Act from two other Respondents, his former employers, namely, Hull and Lowrey and D. O'Brian & Co. Pty. Limited, were all heard together on the 11th and 19th March and the 1st April, 1976 when judgment was reserved. Judgment was given

M. Johns

-3-

by the Workers' Compensation Commission on the 7th July, 1976. Judgment was given on the three abovementioned matters the sub- 20
ject of the stated case by the making of an Award in favour of the Applicant against each of the three abovementioned Respondents, including T.H. Bushby and certain Orders were also made in connection with such said Awards of compensation.

5. In his respective Applications against the first and third abovementioned Respondents (and in the case stated) the latter Respondent being T.H. Bushby, the Applicant alleged that on the 16th November, 1964, he had received an injury to his low back arising out of and in the course of his employment with the

firstmentioned Respondents, R.D. George, F.W. McKern (and C.F. Whitehouse) and that on the 17th June, 1966, he had received a further injury to his low back arising out of and in the course of his employment with the third abovementioned Respondent, T.H. Bushby.

6. The Application against the Respondent, Glenmore Pty. Limited was also in respect of the injury of the 16th November, 1964, at which said point of time Glenmore Pty. Limited was a principal within the meaning of Section 6(3) of the Workers' Compensation Act. 10

7. The various proceedings in respect of the Applications were heard together and the Commission made Awards including an Award against the Respondent, T.H. Bushby. The Awards were made in the order as appearing in the case stated.

8. The Commission made an Award of compensation against the first Respondent in respect of the incapacity arising from the injury of the 16th November, 1964 and the necessary medical and hospital treatment in respect thereof. The Commission further made an Award of compensation against 20

M. Johns



the Respondent, T.H. Bushby in respect of the incapacity arising from the injury of the 17th June, 1966 and from the same necessary treatment. An Award was further made against the Respondent, Glenmore Pty. Limited, a principal within the meaning of Section 6(3) of the Act in respect of the same incapacity

and treatment as that in respect of which an Award was made against the first employer - or first Respondent. Under the Awards made against the three Respondents abovementioned the compensation awarded the Applicant under the provisions of Sections 7, 9 11(1) and 10 of the Act was identical. Further, the firstnamed Respondent was ordered to indemnify Glenmore Pty. Limited as principal for all compensation paid by it to the Applicant/worker under the Award made against it. 10

9. In the Awards made against each of the abovementioned Respondents, the Commission ordered that compensation paid to the Applicant/worker under each of the said Awards should, pro tanto, discharge the liability of the other abovementioned Respondents (including T.H. Bushby) under the respective Awards made against each of them.

10. I verily believe that by reference to the Award and Orders of the Commission in Matter No. 9101 of 1975 that the total amount of compensation ordered to be paid by T.H. Bushby and awarded the Applicant under the provisions of Sections 9 and 11(1) of the Act up to the date of the said Award of the 7th July, 1976, approximated the sum of $5,250.00. The Respondent, T.H. Bushby was further ordered to pay to the Applicant/worker the sum of $70.00 per week from the 3rd February, 1976 on the basis of partial incapacity such weekly payment to continue until the same be ended, diminished, increased or redeemed in accordance with the said Act and the total sum involved under this part of the 20

M. Johns

Order and Award from 3rd February, 1976 to date involves a further sum of approximately $6,650.00. In addition the third Respondent, T.H. Bushby was further ordered to pay the Applicant/worker's medical and hospital expenses pursuant to Section 10 of the Act. This sum has not yet been quantified by the Applicant. 10

11. It is respectfully submitted that the matter or matters in dispute on an appeal to Her Majesty in Council amounts to a sum or is of the value of Five hundred pounds sterling or upwards and that the said judgment of the Court of Appeal is a final judgment of the Court involving such aforesaid matters in dispute or that the appeal involves, directly or indirectly, a claim or question to or respecting some civil right amounting to or of the value of Five hundred pounds sterling or upwards.

12. It is respectfully requested that leave be granted to T.H. Bushby, the Applicant to this motion to appeal to Her Majesty in Council from the said judgment of the Court of Appeal. 20

SWORN by the Deponent on the )
day and year first hereinbefore )
written at Sydney, before me: )

A Justice of the Peace.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

C.A. No. 148 of 1977
W.C.C. No. 8102 of 1974
W.C.C. No. 3600 of 1975
W.C.C. No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission 10

IN THE MATTER of determinations between -

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R. D. GEORGE, F. W. McKERN and C. F. WHITEHOUSE

Respondents

Matter No. 3600 of 1975 20

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

R. D. GEORGE, F. W. McKERN and C. F. WHITEHOUSE

Third Parties

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant 30

T. H. BUSHBY

Respondent

Further Affidavit of Malcolm Nelson Johns in Support of Notice of Motion

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of N.S.W. as an added party pursuant to Order of the Court of Appeal dated 2nd day of August, 1977.

AFFIDAVIT.

ON the 9th day of December, 1977, I, MALCOLM NELSON JOHNS of 86 Pitt Street, Sydney, in the State of New South Wales, Solicitor, say on oath: 10

1. I am a partner in the firm of Messrs Boyd, Johns &

-2-

Curwood, the Solicitors for T. H. BUSHBY, a Respondent to the case stated herein and who is the Applicant in this motion for leave to appeal to Her Majesty in Council and as such have the conduct of the matter on behalf of T. H. Bushby.

2. I crave leave to refer to my Affidavit in Support of Notice of Motion for leave to appeal to Her Majesty in Council sworn on the 9th day of December, 1977 and to be filed herein.

3. I verily believe that one of the firstnamed Respondents, 20 R. D. George, did not appear to the proceedings in the Court of Appeal. I am informed and verily believe that he resides at an unknown address somewhere in the Wyong area.

4. I verily believe that J. P. Grogan Esq., Solicitor of Messrs J. P. Grogan & Co., Solicitors, 14 Hunter Street, Hornsby, acts for the Respondent/Third Party, F. W. McKern. Hereunto annexed and marked with the letter 'A' is a true copy of a letter dated July 29, 1977 from Messrs J. P. Grogan & Co., to The Registrar, Workers' Compensation Commission of

N.S.W. I am further informed and verily believe that the said J. P. Grogan Esq., filed in this Honourable Court a Notice of Ceasing to Act. On the 8th day of December, 1977 I was present when Mr. G. Curran of the Workers' Compensation Commission of N.S.W. telephoned the office of Messrs J. P. Grogan & Co., and spoke with a person apparently in their employment, a Mr Faulkner. I am further informed and verily believe that Mr Faulkner informed Mr Curran that Messrs J. P. Grogan & Co., had instructions to accept service of the Notice of Motion and Affidavits in support herein. 10

5. I verily believe that the Respondent/Third Party, C. F. Whitehouse, did not appear to the proceedings in the Court of Appeal. I am informed and verily believe that the said C. F. Whitehouse died some time ago.

-3-

6. I respectfully request this Honourable Court to:

(1) Abridge the time for service of the Notice of Motion for leave to appeal to Her Majesty in Council and the Affidavits in support thereof herein; 20

(2) Dispense with service of the Notice of Motion and Affidavits in support upon R. D. George.

(3) Order service upon F. W. McKern of the Notice of Motion and Affidavits in support herein by service upon Messrs J. P. Grogan & Co., Solicitors, 14 Hunter Street, Hornsby.

(4) Dispense with service of the Notice of Motion and Affidavits in support upon C. F. Whitehouse.

SWORN by the Deponent on the )
day and year first hereinbefore)
written at Sydney, before me: ) ........................

..............................
A Justice of the Peace.

'A'

J. P. GROGAN & CO.
SOLICITORS

TELEPHONES:
47-0327

J.P.GROGAN,LLB.

14 HUNTER STREET
HORNSBY 2077

P.O. BOX 97,
HORNSBY 2077

C.D.E. 907

IN REPLY
PLEASE QUOTE
CRF.JC.

29th July, 1977.

The Registrar,
Workers' Compensation Commission of N.S.W.,
131 Macquarie Street,
SYDNEY, N.S.W. 2000

10

Dear Sir,

Re: McKern & Ors, Workers' Compensation Proceedings.

We refer to the above matter and acknowledge receipt of the Notice of Motion filed by you, which is for hearing on the second day of August, 1977.

We confirm our oral advise that our client has been unable to obtain Legal Aid in regard to the proceedings in the Court of Appeal and has no funds available to obtain his own representation in the matter.

20

We shall be filing a Notice of Ceasing to Act in the matter in the near future.

Yours faithfully,

J.P. GROGAN & CO.

THIS is the annexure marked with the letter 'A' mentioned and referred to in the Affidavit of MALCOLM NELSON JOHNS sworn at Sydney this 9th day of December, 1977) Before me:-

J.P.

..........................
A Justice of the Peace.

30

Annexure "A" to Further
Affidavit of Malcolm Nelson Johns
in Support of Notice of Motion

MNJ:GK:8

February 7, 1978

Mr. G. Curran,
c/- Workers' Compensation Commission
of New South Wales,
131 Macquarie Street,
SYDNEY. N.S.W. 2000

Dear Sir,

Re: T.H. Bushby & Ors. ats. Morris
Privy Council Appeal 10

We refer to our client's Notice of Motion for leave to appeal to Her Majesty in Council dated the 9th December, 1977.

Our client T.H. Bushby hereby abandons Ground No. 1 namely: -

"(1) That the Court of Appeal was in error in law in answering the question (5) in the case stated, 'YES' and should have answered that question 'NO'."

That ground is stated on page four (4) of the Notice of Motion. 20

It is our client's present intention to proceed on the remaining grounds being numbered 2 to 15 inclusive.

Yours faithfully,

Letter from Boyd, Johns and Curwood to Registrar, Workers' Compensation Commission

IN THE SUPREME COURT )
) C.A. No. 148 of 1977
OF NEW SOUTH WALES ) W.C.C. No: 8102 of 1974
) W.C.C. No. 3600 of 1975
COURT OF APPEAL ) W.C.C. No. 9101 of 1975

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decision of the Court of Appeal certain questions of law which arose in proceedings before the Commission. 10

IN THE MATTER of determinations between -

Matter No: 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Respondents

Matter No: 3600 of 1975 20

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties

Matter No: 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant 30

T.H. BUSHBY

Respondent

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of N.S.W. as an added party pursuant to Order of the Court of Appeal dated 2nd day of August, 1977.

ORDER GRANTING CONDITIONAL

LEAVE TO APPEAL

THE COURT ORDERS THAT :

1. Leave to appeal to Her Majesty in Council from the Judgment of this Court be and the same is hereby granted to T.H. Bushby (hereinafter referred to as the "First Appellant") UPON CONDITION - 10

(i) that the First Appellant do, within three (3) months of the date hereof, give security to the satisfaction of the Prothonotary in the amount of $1,000.00 for the due prosecution of the said Appeal and the payment of such costs as may become payable to the Respondent in the event of the First Appellant not obtaining an Order granting him final leave to Appeal from the said Judgment or of the Appeal being dismissed for non prosecution or of Her Majesty in Council ordering the First Appellant to pay the Respondent's costs of the said Appeal, as the case may be ; 20

(ii) that the First Appellant do within fourteen (14) days of the date hereof deposit with the Prothonotary the sum of $50.00 as security for and towards the costs of the preparation of the transcript record for the purposes of the said Appeal ;

(iii) that the first Appellant do within three (3) months of the date hereof take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed ;

(iv) finally that the First Appellant do obtain a final order of this Court granting him leave to Appeal as aforesaid. 10

2. Leave to Appeal to Her Majesty in Council from the Judgment and Orders of this Court be and the same is hereby granted to Glenmore Pty. Limited (hereinafter referred to as the "Second Appellant")

UPON CONDITION -

(i) that the said Second Appellant do, within three (3) months of the date hereof, give security to the satisfaction of the Prothonotary in the amount of $1,000.00 for the due prosecution of the said Appeal and the payment of 20 such costs as may become payable to the Respondent in the event of the Second Appellant not obtaining an Order granting it final leave to Appeal from the said Judgment or of the Appeal being dismissed for non prosecution or of Her Majesty in Council ordering the Second Appellant to pay the Respondent's costs of the said Appeal, as the case may be ;

(ii) that the Second Appellant do within fourteen (14) days of the date hereof deposit with the Prothonotary the sum of $50.00 as security for and towards the costs of the preparation of the transcript record for the purposes of the said Appeal ;

(iii) that the Second Appellant do within three (3) months of the date hereof take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed ;

(iv) finally that the Second Appellant do obtain a final Order of this Court granting it leave to Appeal as aforesaid.

3. The aforesaid Appeals be consolidated and grant leave to Appeal to the First Appellant and to the Second Appellant by a single Order.

4. The costs of all parties to the Applications of the First and Second Appellants and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final Orders do follow the decision of Her Majesty's Privy Council with respect to the costs of the said Appeals or do abide the result of the said Appeals in case the same or either of them shall stand or be dismissed

for non prosecution or be deemed so to be subject however to any Orders that may be made by this Court up to and including the said final Orders or under any of the Rules next hereinafter mentioned that is to say Rules 16, 17, 20 and 21 of the Rules of the 2nd day of April One thousand nine hundred and nine regulating Appeals from this Court to Her Majesty in Council.

5. The costs incurred in New South Wales payable under the terms hereof or under any Order of Her Majesty's Privy Council by any party to these Appeals be taxed and paid to the party to whom the same shall be payable. 10

6. So much of the said costs as become payable by the Appellants or either of them under this Order or any subsequent Order of the Court or any Order made by Her Majesty in Council in relation to the said Appeals or either of them may be paid out of any moneys paid into Court as such security as aforesaid so far as the same shall extend AND that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellants. 20

7. Each party is to be at liberty to restore this matter to the List upon giving two (2) days notice thereof to any other party for the purpose of obtaining any necessary rectification or modification of this Order.

8. Stay of execution in respect of moneys payable to Morris refused.

Ordered 12 December 1977

Entered 21 February 1978

By the Court

Registrar

| | |
|---|---|
| IN THE SUPREME COURT | ) |
| | ) C.A. No. 148 of 1977 |
| OF NEW SOUTH WALES | ) W.C.C. No. 8102 of 1974 |
| | ) W.C.C. No. 3600 of 1975 |
| COURT OF APPEAL | ) W.C.C. No. 9101 of 1975 |

IN THE MATTER of the Workers' Compensation Act, 1926

IN THE MATTER of a case stated by the Workers' Compensation Commission of New South Wales constituted by Williams J., of its own Motion, in pursuance of S.37(4)(b) of the said Act, referring for the decisions of the Court of Appeal certain questions of law which arose in proceedings before the Commission. 10

IN THE MATTER of determinations between -

Matter No. 8102 of 1974

SYDNEY BLAIR MORRIS

Applicant

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Respondents

Matter No. 3600 of 1975 20

SYDNEY BLAIR MORRIS

Applicant

GLENMORE PTY. LIMITED

Respondent

R.D. GEORGE, F.W. McKERN and C.F. WHITEHOUSE

Third Parties

Matter No. 9101 of 1975

SYDNEY BLAIR MORRIS

Applicant 30

T.H. BUSHBY

Respondent

AND IN THE MATTER of the Registrar of the Workers' Compensation Commission of New South Wales as an added party pursuant to Order of the Court of Appeal dated 2nd day of August, 1977.

THE COURT ORDERS THAT :-

1. The Registrar of the Workers' Compensation Commission's Motion for Leave to Appeal from the Judgment of this Court be and that the same is hereby dismissed and that there be no Order as to costs. 10

2. The Registrar of the Workers' Compensation Commission be a party to the consolidated Appeal.

Ordered 31st January 1978

Entered 7 MARCH 1978

DATED this 31st day of January, 1978.

By the Court

SGD. J.A. LESLIE

Registrar.

## CERTIFICATE OF THE REGISTRAR OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

I, JOHN ANTHONY LESLIE, Registrar of the Court of Appeal of the Supreme Court of New South Wales

DO HEREBY CERTIFY as follows:-

That this transcript record contains a true copy of all such Orders, Judgments and documents as have relation to the matter of this Appeal and a copy of the reasons for the respective Judgments pronounced in the course of the proceedings out of which the Appeal arose. 10

That the Respondent herein has received notice of the Order of Her Majesty in Council giving the Appellant Special Leave to appeal to Her Majesty in Council AND has also received notice of the dispatch of this transcript record to the Registrar of the Privy Council.

DATED at Sydney in the State of New South Wales this 23rd day of August One thousand nine hundred and seventy-nine.

[signature]

Registrar of the Court of Appeal of the Supreme Court of New South Wales 20

Certificate of Registrar Verifying Transcript Record of Proceedings