Privy Council Appeal No. 89 *of* 1924.

The Victoria Insurance Company, Limited - - - - *Appellants*

v.

The Junction North Broken Hill Mine - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1924.

Present at the Hearing:

LORD DUNEDIN.
LORD ATKINSON.
LORD WRENBURY.

[*Delivered by* LORD WRENBURY.]

The appellants are an Insurance Office, the respondents are employers of labour. They carry on the business of mining for sulphide ore. They effected with the Insurance Office two policies of insurance in identical terms, the one insuring them in respect of workmen engaged below ground and the other insuring them in respect of workmen engaged above ground against liability for compensation under the Workmen's Compensation Act, 1916, of New South Wales and against damages at common law for personal injury or fatal accident. Each policy was issued in pursuance of a proposal dated the 30th July, 1920, which was to be the basis of the contract. The proposal contained a request for the issue of a policy indemnifying against legal liability to pay to or in respect of any direct employee (*a*) compensation under the Workmen's Compensation Act, 1916, or (*b*) damages at common law for personal injury or fatal accident within a certain pecuniary limit and it was stipulated that all employees were to be included. The policy provided that the proposal should be the basis of the contract and witnessed that if between the 1st July, 1920, and the 1st July, 1921, the insured should be liable to pay to or in respect of any direct employee (1) compensation under the Workmen's Compensation Act, 1916, or (2) damages at common law for personal injury or fatal accident, the Company would indemnify them against all such sums for which the insured should

be so liable. There were conditions appended to the policy including :—

> "10. The name and earnings of every direct employee shall be entered regularly in a proper Wages Book so that a record may exist of such employees as are entitled to call upon the Insured for compensation."

The certifying surgeon under the Act gave to seven direct employees of the Company certificates of disablement by reason of suffering from lead poisoning, naming dates of disablement of various dates after the 1st July, 1921, namely, dates ranging from July to December, 1921. The workmen had all been employed by the insured within the period from the 1st July, 1920, to the 1st July, 1921. It was not disputed that they contracted nystagmus during their employment and within the year covered by the policy. They claimed compensation under the Act. They received payment from the insured. The insured claimed to be indemnified by the appellants. The Supreme Court in New South Wales held that the appellants were liable to indemnify. This is an appeal from that decision.

The appellants rest their case upon Section 12 (*a*) of the Act of 1916, which is in the following words :—

(*a*) The disablement or suspension shall be treated as the happening of the accident.

The "accident" which gave rise to the liability of the employer must be taken, they contend, to have happened after the 1st July, 1921, and there is no liability under the policy.

In the case of an accident liability arises only in the employer who was employer at the date of the accident. It is a condition of liability that the person said to be liable shall have been employer at that date. The accident must arise "in the course of the employment." In the case of an industrial disease which the Act introduces into the Act by the words "as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment," there are no words excluding this condition, but on the contrary, there are words to enforce it. For if during the 12 months there have been successive employers a later employer may escape liability if he proves that the disease was contracted whilst the workman was in the employment of an earlier employer. The date of contraction of the disease and not the date of its ascertainment or its certification is the date for fixing liability. In this state of things their Lordships cannot give to Section 12 (*a*) the meaning for which the appellants contend. They argue that the words "The disablement or suspension shall be treated as the happening of the accident" mean "the disablement or suspension shall be treated as *the date of the* happening of the accident." That in their Lordships' judgment is not their meaning. They mean only that that which is not an accident shall, for the purposes of the Act, be treated as if it were an accident and disablement or suspension is to be the event by whose happening the existence of this statutory accident is to be established. The disablement or suspension

establishes the happening of the accident, but not the date at which it happened. It fixes the date as from which compensation begins and with reference to which the 12 months mentioned in Section 12 are to be ascertained. The disease which their Lordships have called a statutory accident has peculiar features, which are provided for by the Act. It is an accident to be attributed in point of date so far as liability is concerned to the time at which the disease was contracted, but subject to " modification " as mentioned in Section 12 (*a*), that is to say as regards " compensation " (which is the last preceding subject mentioned in that section), the accident is to be taken as having happened when disablement or suspension supervened. The workman is entitled to compensation as if the disease were an accident in the course of his employment subject to the modification that so far as compensation is concerned the disablement or suspension is to be treated as the happening of the accident. Sub-clause (*a*) is a modification of the rights as regards compensation and has no bearing upon liability.

If this be not the right view of the Act it would result that if the workman were out of employment at the date of disablement or suspension he would be without remedy. Mr. Clauson pointed out as matter of illustration the consequence which would ensue in this case if the appellants' contention were sound. Suppose that the policy had been renewed for a second year, commencing the 1st July, 1921, the intention of both contracting parties, of course, would have been that the insured should be covered in respect of liability to which he became exposed during the currency of either of the two policies. But upon the appellants' view he would have no claim on the first policy because the disablement was after the 1st July, 1921, and inasmuch as the workman having left his employment before the 1st July, 1921, could not be named in the list of employees required by No. 10 of the conditions in the second policy, he would have no claim under that policy either.

The exact point dealt with above was the subject of decision in the Court of Session in Scotland in *Keary* v. *Russell, Ltd.* (1915 S.C. 672). The relevant language of the British Act is the same as that of the New South Wales Act. Their Lordships think that that case was rightly decided.

The appellants also rested some argument upon the words " liable to pay " in the policy. There was, they contend, no liability to pay until after 1st July, 1921. This is not the true construction of the Act. The liability to pay arose so soon as the disease was contracted. It arose and remained in the employer earlier in date (if there were one), notwithstanding that before the date of disablement he had ceased to employ. The liability had not matured into a sum due, but that is another matter. The first payment fell due after the 1st July, 1921, but the liability to pay that sum attached when the disease was contracted.

Their Lordships are of opinion that this appeal fails and will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

THE VICTORIA INSURANCE COMPANY, LIMITED

v.

THE JUNCTION NORTH BROKEN HILL MINE.

DELIVERED BY LORD WRENBURY.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1924.