[HIGH COURT OF AUSTRALIA.]

WICKS . . . . . APPELLANT;
APPLICANT,

AND

UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . . } RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 15, 24.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Injury—Compensation—Amount prescribed by statute—Further payments—Liability of employer—"Total and permanent disablement"—Proof—Workers' Compensation Act 1926 (*N.S.W.*) (*No.* 15 *of* 1926), *sec.* 9 (3).

Case Stated—Ultimate finding of tribunal—Reasons therefor—No special findings of fact stated—Matter remitted to tribunal.

Sec. 9 (3) of the *Workers' Compensation Act* 1926 (N.S.W.) provided that the total liability of an employer in respect of compensation under that section "shall not, except in the case of a worker whose injury results in total and permanent disablement, exceed one thousand pounds in any one case."

Held, that the expression "total and permanent disablement" refers to a worker who by reason of the injury is physically incapacitated from ever earning by work any part of his livelihood. This condition is satisfied when capacity for earning has gone except for the chance of obtaining special employment of an unusual kind.

A case stated contained no special findings by a Commission, and consisted only of a brief account of the nature of the proceedings, a copy of some medical certificates and of the notes of evidence, and a statement of the Commission's ultimate finding against the worker.

Held, that in the circumstances the question whether upon the evidence the worker was entitled to an award as for total and permanent disablement

was one which the High Court should not decide. The matter should be remitted to the Commission for further consideration, including the hearing of further evidence, and if the Commission adhered to its decision, for the full statement of the material facts as it found them so as to ensure a proper case stated upon which the correctness in point of law of the Commission's conclusion might be examined.

Decision of the Supreme Court of New South Wales (Full Court): *Wicks* v. *Union Steamship Co. of New Zealand*, (1933) 33 S.R. (N.S.W.) 267; 50 N.S.W.W.N. 92, reversed.

CASE STATED.

A case stated by the Workers' Compensation Commission of New South Wales, at the request of the applicant, Sydney Arthur Thomas Wicks, for the determination of certain questions by the Supreme Court of New South Wales, was substantially as follows :—

1. This is a case stated by the Workers' Compensation Commission of New South Wales at the request of the applicant for the decision of the Supreme Court of the questions set out hereunder. The said questions arose during the hearing before the Commission on 15th August 1932 of the application by the applicant for a determination as to whether he was entitled to be paid compensation by the respondent under sec. 9 (3) of the *Workers' Compensation Act* beyond the aggregate sum of £1,000 already paid to him by way of weekly payments under the Act.

2. The following facts were admitted by the parties or proved in evidence :—(i) The applicant was employed by the respondent as a wharf labourer and on 13th September 1927 received personal injury in the course of his employment as a worker employed by the respondent. On that date the applicant was engaged in the work of slinging timber on to the respondent's ship when a log fell on his right leg and foot causing a compound fracture. As a result of the said injury applicant became immediately incapacitated for work, and from then on was paid by the respondent compensation under the Act at the rate of £4 per week on the basis of total incapacity. Such payments were continued up to 10th May 1932 by which date the applicant had received the aggregate sum of £1,000 in compensation under the Act. (ii) By orders of the Commission made under sec. 51 of the Act applicant was examined by Medical Boards and on the dates mentioned hereunder certificates were given by the said Medical

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Board such certificates being respectively as follows:—(*a*) "We hereby give you notice that having duly examined the said Sydney Arthur Thomas Wicks of Spring Street, South Grafton, in accordance with the order of the Commission, we certify as follows:—*Condition of the worker.*—Scars on inner and outer side of lower part of right leg. Ankle ankylosed in good position. Some traumatic flat foot. Oedema up leg nearly to knee. Some fluctuation above inner malleolus. *His fitness for employment*, specifying where necessary the kind of employment for which he is fit: Not fit for employment. The only permanent disability he has is a bony ankylosis of right ankle which we assess at twenty per cent loss of full efficient use of right leg. But at present he is unfit for work on account of sequestra and inflammatory changes which are curable. And express an opinion as to whether or to what extent incapacity is due to the injury: Due to injury. The facts as to the employment alleged by the worker, and on which this certificate is granted, are as follows:—Worker alleges that on 13th September, 1927, a girder, one and one-half tons, fell on his right leg and foot causing compound fracture.—Dated this 4th day of December, 1928. F. Collier. H. G. Wallace. Medical Board." (*b*) "We hereby give you notice that having duly examined the said Sydney Arthur Thos. Wicks of Spring Street, South Grafton, in accordance with the order of the Commission, we certify as follows:—*Condition of the worker*: X-ray shows still some active necrosis at lower third of fibula. No definite evidence of sequestra in this region. There is a small sequestrum in posterior aspect of tibia. *His fitness for employment*, specifying where necessary the kind of employment for which he is fit: Not fit. And express an opinion as to whether or to what extent incapacity is due to the injury: See previous report. The facts as to the employment alleged by the worker, and on which this certificate is granted, are as follows:—See previous report. Dated this 24th day of June, 1929. F. Collier, H. G. Wallace, Medical Board." (*c*) "We hereby give you notice that having duly examined the said Sydney Wicks of Spring Street, South Grafton, in accordance with the order of the Commission, we certify as follows:—*Condition of the worker*: A new scar behind and below internal malleolus. Two small unhealed areas on the ankle. *His*

fitness for employment, specifying where necessary the kind of employment for which he is fit: Not fit. And express an opinion as to whether or to what extent incapacity is due to the injury: See previous report. The facts as to the employment alleged by the worker, and on which this certificate is granted, are as follows: —See previous report. Dated this 28th day of January, 1930. F. Collier, H. G. Wallace, Medical Board." (*d*) "We hereby give you notice that having duly examined Sydney Arthur Thomas Wicks in accordance with the Order of Reference of the Commission, we certify as follows:—*Condition of the worker*: A sinus has broken out over the fibula. Otherwise the ankle is as before. X-ray shows a cavity in fibula roughly corresponding to position of the sinus. *His fitness for employment*, specifying where necessary the kind of employment for which he is fit: Not fit. Dated this 9th day of September 1930. F. Collier, H. G. Wallace, Medical Board." "Opinion of Medical Board: The facts as to the employment and happening of the injury alleged by the worker, are, contained in history sheet, and our opinion on those facts, and the findings contained in the certificate above, is: Due to injury (see previous report). F. Collier, H. G. Wallace, 9/9/1930."

3. All of the above-mentioned certificates of the Medical Board were admitted in evidence before the Commission and in addition thereto other evidence was taken a copy of which evidence is contained in the transcript forwarded herewith. This evidence is to be taken as part of the case stated.

4. It was submitted on behalf of the applicant *inter alia* that on the above-mentioned certificates of the Medical Board, and, on the evidence, the Commission was bound to hold that the applicant's injury had resulted in total and permanent disablement within the meaning of sec. 9 (3) of the Act. The respondent by its answer denied that there was total and permanent disablement.

5. After hearing counsel for the respective parties, the Commission ruled that it was not bound to find that the applicant was totally and permanently disabled—as submitted by applicant's counsel—but that it should take the whole of the evidence and find on that whether the applicant was, or was not, totally and permanently disabled. Having done this, the Commission found that the applicant's injury

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did not result in his total and permanent disablement for work, his disability being not as great as that of a man who had lost one leg, and therefore declined to make an award in his favour for the payment to him of weekly compensation under the Act beyond the aggregate sum of £1,000 already paid him.

In evidence Wicks stated that, at the date of this application, he was sixty-five years of age and that since the age of seventeen years he had never done other than labouring work. In a report dated 2nd June 1932, and put in evidence on behalf of Wicks, a medical practitioner stated that "an X-ray examination, carried out to-day shows evidence of chronic osteitis in the lower part of the tibia and of the fibula, and the bones of the tarsus are rarefied, and in the plates show very little internal structure. In my opinion the condition is not curable. I do not consider Wicks will ever be able to follow his former occupation. I consider his ankle would prevent him from following anything but a sedentary occupation provided that he had the necessary training and qualifications. I treated Wicks on the day of his accident and have seen him from time to time ever since." Another medical witness, called on behalf of Wicks, stated in evidence that the actual condition which caused disability was, firstly, the bone on close examination by X-ray showed there was definite evidence that there had been long continued chronic sepsis of a compound fracture in the lower end of the fibula and in the ankle joint itself. Though it was healed at the moment nobody could positively say that the wound and the scar would not break down again and further bone be discharged. The other point was that the fracture had involved Wick's ankle, which was now a disorganized joint. The effect was that it rendered Wicks unfit to walk more than a short distance. Even walking a short distance of say half-a-mile, he could not walk without a stick, but he could only do it with a limp, slowly and painfully. Wicks' condition was, continued the witness, undoubtedly absolutely permanent. There could be no restitution of parts of the ankle joint, particularly in view of his age, but even in a man twenty years younger it would still be permanent. Apart from that bad leg Wicks was otherwise normal. The witness agreed that Wicks would be able to follow sedentary light occupation under certain conditions.

There was not any evidence that Wicks had endeavoured to obtain employment and had failed.

The Commission submitted the following question for the decision of the Court :—

" The applicant worker having been certified by Medical Boards on 4th December 1928, 24th June 1929, 28th January 1930, and on 9th September 1930, in terms of the certificates set out in par. 2, as being unfit for employment, is the Commission, in view of the said Medical Boards' certificates and/or the evidence taken bound to find that his injury has resulted in total and permanent disablement within the meaning of the above-mentioned Act ? "

At the request of the respondent the Commission also submitted the following question for determination by the Court :—" Was the Commission entitled to find on the evidence before it that the injury to the applicant had not resulted in total and permanent disablement within the meaning of the said Act ? "

The questions submitted were answered No, and Yes, respectively, by the Full Court of the Supreme Court : *Wicks* v. *Union Steamship Co. of New Zealand* (1).

From that decision Wicks now, by special leave, appealed, *in forma pauperis*, to the High Court.

Miller, for the appellant. The certificates given by the Medical Boards amount to certificates that, at the relevant times and during the relevant periods, the appellant was totally unfit for work within the meaning of sec. 9 (3) of the *Workers' Compensation Act* 1926 (N.S.W.), and further, if there is any difference between total unfitness and total disablement, that he was totally disabled within the meaning of that sub-section. The interpretation given by the Supreme Court to the Act is too narrow and lays down a requirement which it is impossible to fulfil. A worker is not required to show that the injury complained of reduced him to a state of complete crippledom. The injury sustained by the appellant has, on the evidence, left him with only a residuum of capacity which reduces his range of employment to a very narrow compass. His capacity

(1) (1933) 33 S.R. (N.S.W.) 267 ; 50 N.S.W.W.N. 92.

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is nondescript in the labour market. There is no type of employment to which his capacity can be fitted. His ability to obtain employment will not depend upon the work in the labour market but upon the kind hospitality of some person finding a special job for him, that is, he must depend upon specially compassionate employment. The Act does not stipulate permanently totally disabled, but merely total and permanent disablement. There was no evidence before the Commission that the appellant was fit for any kind of employment. The evidence was a mere repetition of the certificates of the medical boards, as a matter of construction and determination of the rights of the parties. The Commission should have dealt with the appellant's claim entirely on its own facts, paying particular regard to his age, and to the fact that throughout his " working " life he had followed the occupation of a labourer. The liability to pay continues for so long as the worker is unfit for employment (*Birch Brothers Ltd.* v. *Brown* (1)) and is uninfluenced by the age of the worker.

[EVATT J. referred to *Willis' Workmen's Compensation Acts*, 28th ed. (1932), p. 209, and *Jamieson* v. *Fife Coal Co.* (2).]

Sec. 9 (3) of the Act provides that in a case of total and permanent disablement the amount of compensation payable is not limited to the sum of £1,000. " Permanent " has reference to the worker's fitness for work, and not to his physical condition. Sec. 12 of the Act has no application to the matter. There was no evidence before the Commission that the appellant was fit for employment of a light or sedentary nature. The onus of furnishing such evidence is upon the respondent. If the evidence establishes that the appellant is within the doctrine enunciated by *Fletcher Moulton* L.J. in *Cardiff Corporation* v. *Hall* (3), then, in the absence of evidence that there was a special employer ready and willing to take the appellant for a special job, his incapacity is total within the meaning of the Act. Disablement means inability to earn. See also *Crossley Bros. Ltd.* v. *Brunyee* (4). The evidence shows that the appellant had left with him a capacity for certain special uses. It is not sufficient to say, however, that theoretically he is no longer incapacitated and,

(1) (1931) A.C. 605.
(2) (1903) 5 F. (Ct. of Sess.) 958.
(3) (1911) 1 K.B. 1009, at pp. 1018-1021.
(4) (1925) 18 B.W.C.C. 320.

therefore, his right to compensation must be stopped. The respondent must show that such uses can be found.

E. M. Mitchell K.C. (with him *Jaques*), for the respondent. It is important to remember that the Commission was assisted by a medical assessor and medical boards. The Commission, itself having large experience in these matters, is at liberty to use its own knowledge of the work available to the appellant, and using that knowledge to say that there were many kinds of general work within the recognized field of labour, not generosity. As shown by the medical evidence given on behalf of the appellant there was an avenue of employment in that field of labour described as sedentary work. The evidence showed an improvement in the appellant's condition. He was not totally incapacitated from employment but suffered from a permanent injury resulting in partial incapacity for work, that is, on the evidence, it is a case of permanent partial disablement and not one of permanent total disablement. The whole permanent disability is confined to the loss of function of a leg, which is only a twenty per cent loss.

[STARKE J. Once the Commission has a set of facts before it, and it finds the ultimate fact that the worker is not totally disabled, can this Court do anything ? It may be a question of law whether there was any evidence to support the Commission's conclusion ? See *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1).

[DIXON J. Here is a case stated without any specific statement of the facts before the ultimate fact. Where all the occurrences are established the question is treated as one of law. Here there are not any findings which precisely describe anything.

[EVATT J. referred to *Birch Brothers Ltd.* v. *Brown* (2).]

If there is no evidence at all it is a question of law, not if there is strong evidence one way and no evidence the other way. The Commission was entitled to form its own view as to the appellant's fitness for employment. Having regard to the opinions of the doctors that the appellant was fit for light sedentary occupation, the Commission arrived at the only possible conclusion, and unless the appellant shows that he is utterly unfit for any form of work he is not entitled to compensation.

(1) (1915) A.C. 433, at pp. 465 *et seqq.* (2) (1931) A.C. 605.

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[McTIERNAN J. The evidence of the doctors does not show that the appellant is fit for sedentary occupation in a general sense. It seems to suggest that he is fit for some specialized form of sedentary occupation.]

So far as the appellant's physical condition is concerned he can follow any sedentary occupation; his only handicap would be lack of training.

[STARKE J. The appellant's age is a very relevant fact for consideration.]

The onus was upon the appellant to prove total incapacity. That onus was not discharged by merely proving that he had lost the use of one leg. The Commission found that two factors affected the appellant's chance of obtaining employment, namely, his injury and his age. When totality of the injury has disappeared and only partial result of the injury is left, and the loss of value on the labour market is on account of the worker's age and not his injury, then the employer is not liable beyond the amount of £1,000 specified in sec. 9 (3) (*Lewis* v. *Wrexham and Acton Collieries Ltd.* (1)). In a case, such as here, where the full amount specified in sec. 9 (3) has been paid, and the worker claims a continuance of payments the onus is upon him to establish his claim; he must show affirmatively that he has sustained total and permanent disablement (*Anglo-Australian Steam Navigation Co.* v. *Richards* (2); *Barnes* v. *L. and N.-E. Railway Co.* (3)). The Commission was entitled to find on the facts before it that the appellant had not proved that he was totally incapacitated (*Earl* v. *Thomas W. Ward Ltd.* (4)). If there are fields of labour open to him an injured worker is not entitled to an award on the basis of total incapacity. In such a case it is only incumbent upon the employer to show, as here, that special employment is open to him (*Cook* v. *Severn Canal Carrying Co.* (5)). The appellant has not shown that he has made any attempt to obtain such special employment, that is, a light sedentary occupation.

Miller, in reply. If the facts adduced from the evidence before the Court of first instance show that the residuum of capacity fits

(1) (1916) 9 B.W.C.C. 518.
(2) (1911) 4 B.W.C.C. 247.
(3) (1929) 22 B.W.C.C. 205.
(4) (1930) 23 B.W.C.C. 229
(5) (1922) 15 B.W.C.C. 286.

the injured worker only for special uses, that is, he is in effect an "odd lot," then a Court of Appeal is entitled to draw the conclusion which the lower Court should have drawn. Where an injured worker is an "odd lot" on the labour market the onus of proving that he can actually obtain work is on the employer (*Harris* v. *Bellamy's Wharf & Dock Ltd.* (1)). Questions as to the injured worker's ability to earn wages, and the effect of the appropriate kind of employment not being reasonably accessible are dealt with in *Ball* v. *William Hunt & Sons Ltd.* (2), *Bevan* v. *Nixon's Navigation Co.* (3), and *Wemyss Coal Co.* v. *Walker* (4). On the evidence the only conclusion open to the Court is that the appellant was and is totally disabled.

Cur. adv. vult.

Nov. 24.

The COURT delivered the following written judgment:—

In substance the questions submitted to the Supreme Court by the Workers' Compensation Commission inquire whether it was bound to find that the injury to the worker resulted in total and permanent disablement within the meaning of the exception in sub-sec. (3) of sec. 9 of the *Workers' Compensation Act* 1926-1927, or whether it was entitled to find that the injury had not so resulted.

The case stated contains no special findings by the Commission, and consists of nothing but a brief account of the nature of the proceedings, a copy of some medical certificates, and of the notes of evidence, and a statement of the Commission's ultimate finding against the worker. It is difficult, if not impossible, to collect from the case stated what the Commission intend to state as the subsidiary or detailed facts upon which it founded its conclusion. But it appears certain that the following facts were accepted by that tribunal. The worker, who was employed by the respondent as a wharf labourer, on 13th September 1927 suffered a serious injury to his right leg, arising out of and in the course of his employment. He was then sixty-one years of age and had done no work but that of a labourer for over forty years. During the greater part of that time he had

(1) (1924) 17 B.W.C.C. 93.
(2) (1912) A.C. 496.
(3) (1928) 21 B.W.C.C. 237.
(4) (1929) 22 B.W.C.C. 366.

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resided and earned his living at Grafton. The worker was incapacitated for work, and, from the date of the accident, until 11th May 1932, received weekly payments of compensation calculated as for total incapacity. On that date, the aggregate amount of the payments reached £1,000 and no further payments were made, because the respondent did not admit that his total incapacity was permanent. The injury to his limb has reached a permanent condition of physical impairment, which disables him from walking or standing for anything but a very short time and then only with a stick, and he will always remain unable to do any but sedentary work in which his right leg would be at rest. Upon the evidence it might reasonably be inferred that he could never be employed in any work unless of some unusual or special kind. The worker applied for a determination of the question whether, under sec. 9 (3) of the Act as it then stood, he was entitled to be paid compensation by the respondent beyond the aggregate sum of £1,000 already received by him. The sub-section then excepted from the limitation cases of permanent and total disablement. The Commission was, therefore, called upon to decide whether the worker had been permanently and totally disabled, an expression which, in our opinion, means physically incapacitated from ever earning by work any part of his livelihood. This condition is satisfied when capacity for earning has gone except for the chance of obtaining special employment of an unusual kind.

He was then sixty-six years of age, he was completely disabled from doing any of the work by which hitherto he had earned his living, he could not do any work except such as could regularly be done seated, and no evidence was given that any work was or would ever be available at Grafton or elsewhere of this character, which he was qualified or could qualify himself to perform. The Commission upon a proper application of the exception in sec. 9 (3) might, in these circumstances, have found that the worker was permanently and totally disabled because his lasting situation had become that described in *Wemyss Coal Co.* v. *Walker* (1). What in fact the tribunal did is expressed as follows in the case stated:—"After hearing counsel for the respective parties, the Commission ruled

(1) (1929) 22 B.W.C.C. 366.

that it was not bound to find that the applicant was totally and permanently disabled—as submitted by applicant's counsel—but that it should take the whole of the evidence and find on that whether the applicant was, or was not, totally and permanently disabled. Having done this, the Commission found that the applicant's injury did not result in his total and permanent disablement for work, his disability being not as great as that of a man who had lost one leg, and therefore declined to make an award in his favour for the payment to him of weekly compensation under the Act beyond the aggregate sum of One thousand pounds (£1,000) already paid him."

This statement leaves it quite uncertain whether the Commission applied the right test, or whether, on the contrary, it thought that it was confined to considering if the worker's injury removed for ever his physical ability to do anything which could be denominated work: or whether it reasoned that because, under sec. 16, £600 is assigned as compensation for loss of a leg, the Legislature could not mean to treat complete lameness in one leg as a possible cause of total and permanent incapacity; or that because many, if not most, one-legged men, can earn the whole or some part of a living, therefore this worker could not be wholly incapacitated from doing so. In the complete absence of any statement of the Commission's exact findings, a deficiency in the case stated which is not mitigated by any information as to how its conclusion was reached, unless the reason be contained in the reference to the man who loses a leg, we are of opinion that a decision of the matter in favour of the respondent should not be given or be allowed to stand. In the circumstances the question debated before us, viz., whether upon the evidence the worker is entitled to an award as for permanent and total disablement, is one which we should not decide. We think that the matter should be remitted to the Commission for further consideration, including the hearing of further evidence if the parties have any to offer, and, if the Commission adheres to its decision, for the full statement of the material facts as it finds them, so that the Supreme Court will have before it a proper case stated upon which the correctness in point of law of the Commission's conclusion may be examined.

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The appeal to this Court should be allowed, and, as the appellant prosecuted the appeal as a pauper, there will be no costs of the appeal.

The order of the Supreme Court should be discharged and in lieu thereof it should be ordered that the application by the appellant to the Commission be remitted to it for its reconsideration.

The costs of the case stated in the Supreme Court should be made costs in the application.

Appeal allowed. Order of the Supreme Court discharged. In lieu thereof order that the application by the appellant to the Workers' Compensation Commission be remitted for its reconsideration. Costs of case stated in the Supreme Court to be costs in the application to the Workers' Compensation Commission.

Solicitors for the appellant, *F. McGuren & Son*, Grafton, by *F. R. Cowper, Stayner & Wilson.*

Solicitors for the respondent, *Sparke & Helmore*, Newcastle, by *A. P. Sparke & Broad.*

J. B.