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IN THE HIGH COURT OF AUSTRALIA.

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PETERSEN

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v.

COLEMAN

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REASONS FOR JUDGMENT.

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*Judgment delivered at* SYDNEY

*on* 12th April, 1938.

ON APPEAL from THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

NORMAN PETERSEN

(Applicant) Appellant

- and -

A. W. COLEMAN

(Respondent) Respondent

Before their Honours Mr. Justice ~~Stark~~  
Mr. Justice ~~Rich~~ and Mr. Justice ~~Dixon~~.

The Twelfth day of April in the year One thousand  
nine hundred and thirty eight.

WHEREAS on the twenty seventh day of May One thousand nine hundred and thirty five the abovenamed Appellant issued out of the Workers' Compensation Commission of New South Wales an Application for Determination claiming from the abovenamed Respondent compensation under and by virtue of the Workers' Compensation Act 1926/29 AND WHEREAS in the said Application it was claimed by the Appellant that as a result of an injury sustained by him on the tenth day of October One thousand nine hundred and twenty eight in the course of his employment with the said Respondent he had suffered total and permanent disablement within the meaning of Section 9 (3) of the said Act AND WHEREAS the said Application for Determination came on for hearing before the Workers' Compensation Commission on the twenty fourth day of September One thousand nine hundred and thirty five AND WHEREAS on the twenty second day of October One thousand nine hundred and thirty five the said Commission made its award in which the Appellant was declared totally and permanently disabled within the meaning of the said Section and entitled to compensation accordingly AND WHEREAS on the seventeenth day of April One thousand nine hundred and thirty six the Respondent applied to the said Commission by Notice of

Motion for an order that the said award made in favour of the Appellant be rescinded upon the grounds therein set out AND WHEREAS the said Notice of Motion came on for hearing before the said Commission on the fourth fifth and eighth days of March and on the fifteenth day of April One thousand nine hundred and thirty seven upon which last-mentioned date the said Commission made an order rescinding the said award of the twenty second day of October One thousand nine hundred and thirty five upon the grounds set out in the Judgment of the said Commission AND WHEREAS on the first day of October One thousand nine hundred and thirty seven the said Commission at the request of the Appellant stated a case for the opinion of the Supreme Court of New South Wales referring the following questions of law which arose upon the hearing of the said Notice of Motion for rescission of the said award:

1. Was there any evidence on which the Commission could find that the worker had earned since June One thousand nine hundred and thirty one a material part of his livelihood in his ~~Bourke Street~~ residential business?

2. Did the Commission err in law in holding that on the facts now proved the worker's partial incapacity for work could not be deemed to have been total?

3. Was there any evidence justifying the Commission in finding that the worker's capacity for remunerative employment was not limited to the chance of obtaining special employment of an unusual kind?

4. Was there any evidence on which the Commission could find that the worker :

- (a) Had given false evidence?
- (b) Had grossly or otherwise exaggerated the degree of his incapacity for work in the proceedings before the Commission on which the award of 22nd. October 1935 was made ? or
- (c) Had fraudulently concealed material facts?

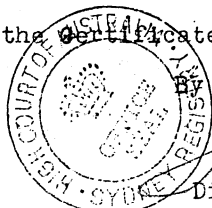
5. Did the Commission err in law in admitting the evidence

of Messrs. Gammie and MacFarlane as to matters subsequent to the award of 22nd. October 1935?

AND WHEREAS the said stated case came on for hearing before the Supreme Court of New South Wales on the fourth fifth and tenth days of November One thousand nine hundred and thirty seven when the said questions of law were answered in manner following that is to say:

Question No. 1.	Yes.
" " 2.	No.
" " 3.	Yes.
" " 4.	(a) Yes.
	(b) Yes.
	(c) Yes.
" " 5.	No.

AND WHEREAS on the first day of December One thousand nine hundred and thirty seven the Appellant duly filed and served a Notice of Appeal from the said Judgment of the said Supreme Court of New South Wales and this appeal coming on to be heard on the eleventh and twelfth days of April One thousand nine hundred and thirty eight WHEREUPON AND UPON READING the certified copy of the documents transmitted by the Prothonotary of the said Supreme Court to the New South Wales District Registry of this Court AND UPON HEARING what was alleged by Mr. Eric Miller and Mr. Levine of Counsel for the Appellant and by Mr. E. M. Mitchell of King's Counsel with whom was Mr. E. Ingham of Counsel on behalf of the Respondent THIS COURT DOETH ORDER that this appeal be and the same is hereby dismissed AND THIS COURT DOETH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Respondent of and incidental to this appeal and that such costs when so taxed and certified be paid by the Appellant to the Respondent or to Messrs. Tietjens McLachlan & Co. his Solicitors after service of a copy of the Certificate of Taxation.

By the Court  
  
*J. Hardman*  
 District Registrar.

P E T E R S O N         v         C O L E M A N

The question on which the appellant's right to receive further compensation depends is whether his injury sustained on 10th October 1928 has resulted in total and permanent disablement.

In Wicks v Union S.S.Co. of N.Z. Ltd 1934 50 C.L.R. 328, we attempted to define that condition. We said it meant physical incapacity on the part of the worker from ever earning by work any part of his livelihood. But we said that this condition was satisfied when his capacity for work had gone except for the chance of obtaining a special employment of

an unusual kind.

The appellant sustained severe injuries, now almost ten years ago, which included the fracture of one leg. He can scarcely flex his knee and the use of his leg is very much limited. His trade at the time of his injury was that of a builder's labourer. He had been a sailor. The year of his birth appears to be about 1899. On the occasion on which the Workers' Compensation Commission made the order now under consideration it found as a fact that the appellant was not totally and permanently disabled. The Commission held that the disablement was not permanent. In arriving at this

conclusion sec. 12 of the Act of 1926-1927 was not overlooked  
by the Commission.

Briefly, the circumstances which led to the finding were that the appellant had for many years since his injuries co-operated with his wife in conducting two lodging houses. His injuries had not precluded him from doing the multifarious jobs, none of them heavy, which attend the work of looking after lodgers and the premises where they lodge. But the decision of the Commission that the appellant's injuries had not resulted in total and permanent disablement was not the first determination it had given upon that question. In October 1935, the Commission had decided that the injury had resulted in total and

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permanent disablement. At that time the appellant did not disclose to the Commission the fact that he was carrying on the business of a lodging house proprietor ,or as it is called a " residential business ". He represented himself as unable to perform any remunerative work.

Under sec. 36 (2) of the Act of 1926-1927, the Commission may reconsider any matter which has been dealt with by it and rescind alter and amend any order previously made. By a rule, viz. rule 51, it is provided that the Commission may set aside or vary an award or order when the Commission is satisfied that it has been obtained by fraud or other improper means or should



be set aside or varied for any other sufficient reason.

The Commission found that its former order or award had been obtained by the appellant's *SUPPRESSION OF MATERIAL FACTS*

The appellant now says that there was no evidence to support this finding and that the finding that he was not totally disabled is wrong in law both because of a want of evidence and because the Commissioner misapplied the authorities on total incapacity to the circumstances of the case.

The Supreme Court, whose decision is now under appeal, were of the opinion that the questions involved were entirely questions of fact and that, as there was legal evidence before

the Commission which entitled them to make the findings, the order of the Commission must stand.

An order of the Commission can only be reviewed by the Supreme Court on a question of law.

We agree in this opinion of the Supreme Court.

No doubt the authorities show that where it is established that the capacity left by the injury is not enough to enable the man to work in any well recognized branch of labour, the burden of showing that he can gain part of a livelihood by some special or unusual work is thrown upon the employer. But, reading the Commission's reasons, we think that they showed no

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failure to appreciate the niceties of the very difficult questions of degree involved in the existence or non-existence of total incapacity or disablement. It was, we think, clearly open for the Commission to find that the facts disclosed by the evidence left the appellant with a residuum of capacity for work which made his labour marketable.

The finding that he had dishonestly suppressed facts is one which it was not necessary for the Commission to make in order to justify the re-opening of the former order or award.

The appellant attacks the finding, but, apart from the fact that in the circumstances of the case this issue was peculiarly

for the Commission to consider and it was for it to draw such inferences as appeared to arise, to set aside the finding would not mean that the power of the Commission to reconsider the former award was affected.

The appeal should be dismissed.

Before parting with this case we wish to express our disapproval of the form in which these cases are presented to the Court. The Commission should state the ultimate facts proved or admitted and the question of law which emerges from its finding of fact.

What a case stated contains must necessarily depend on the questions which have arisen or which it is intended to submit. But as was pointed out in Smith v. Mann, 47 C.L.R. 426 the provisions of sec. 37(4) now cover the statement of a case the object of which is to obtain the reconsideration by the Supreme Court of the questions of law upon which the determination of the Commission depends. This makes it highly desirable that the case should contain distinct findings of fact in relation to the actual occurrences and circumstances upon which the Commission's conclusions or inferences are based as well as distinct statements of those inferences.

Owing to the varying character of the questions of law which can arise in Workers' Compensation proceedings it is not possible to say more than that the separation of questions of fact from questions of law should be made as far as possible in stating the case, see re Lowenstein, 57 C.L.R. 765 and the cases there cited and Mack v. Commissioner of Stamp Duties (1920) 28 C.L.R. 373.