ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

THE COMMISSIONER FOR RAILWAYS

V.

WATERS

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on TUESDAY, 1st AUGUST 1961

W. M. Houston, Govt. Print., Melb.

THE COMMISSIONER FOR RAILWAYS
(N.S.W.)

v.

WATERS

ORDER

Appeal allowed. Order of the Supreme Court of New South Wales set aside. In lieu thereof, order that the questions in the Case stated to that court be answered that on the material in the said Case stated it was not open to the Workers' Compensation Commission to find, or to make an award on the footing, that William James Waters deceased in the said Case mentioned died from injury arising in the course of his employment by the Commissioner for Railways.

Order that the respondent pay the appellant's costs in the Supreme Court and in this Court.

THE COMMISSIONER FOR RAILWAYS (N.S.W.)

v.

WATERS

JUDGMENT

KITTO J.
TAYLOR J.
MENZIES J.
WINDEYER J.

THE COMMISSIONER FOR RAILWAYS (N.S.W.)

v.

WATERS

This is an appeal from an order of the Supreme Court of New South Wales (Full Court) by which answers were given to two questions contained in a case stated to that court by the Workers' Compensation Commission of New South Wales (Judge Rainbow) under the provisions of s. 37(4) of the Workers' Compensation Act, 1926-1958 (N.S.W.).

The section authorizes the Commission (and requires it, if requested by a party), when any question of law arises in any proceeding before it, to state a case for the decision of the Supreme Court thereon, and to do so notwithstanding that an award has been made by the Commission. The decision of the court is to be binding upon the Commission and upon all the parties to the proceeding: subs. (7). There is thus provided a means for submitting the Commission's determination to the Supreme Court for review within the limits of the questions of law raised, and the valid operation of the award as a determination of the proceedings before the Commission depends upon the answers which the court gives to those questions: Smith v. Mann (1932) 47 C.L.R. 426, at p. 446. This is the only form of appeal or challenge which the Act permits: s. 37(1)(2)(3). The procedure has its disadvantages, and unless sufficient care is taken to ensure that a case is so stated as to bring out clearly what questions of law have arisen, and to set out all the facts, both primary and ultimate, which have been found by the Commission and are material to the questions, not only is the task of the Supreme Court and of this Court on appeal made unnecessarily difficult, but excessive delay and expense to the parties is likely to result. What this Court said in Reg. v. Rigby (1956)

100 C.L.R. 141, at pp. 150-152 ought to be borne in mind by all concerned in the preparation of such cases.

The proceeding before the Commission was an application by the widow of a deceased railway guard for compensation under the Act in respect of the death of her husband. The matter came before Judge Rainbow, who made an award in the applicant's favour. The respondent employer, the Commissioner for Railways, then requested the learned judge to state a case to the Supreme Court. This he did, and presumably he included in the case all that either party considered material. But unfortunately the case does not make clear, in the body of it at least, what question or questions of law arose before the Commission, and it is neither complete nor precise in its narration of the facts found. The formal determination of the Commission which accompanies the case contains a finding that the deceased's death resulted from injuries received in the course of his employment with the respondent, and a finding to that effect was expressed in the reasons delivered by the judge. In the body of the case stated, however, there is no statement that the finding was in fact made. Nor does it there appear that any question had arisen as to whether the deceased's injuries arose out of the employment. There is certainly nothing to suggest that a finding upon that question was made, but oddly enough the first and principal question asked of the Supreme Court is (omitting certain inappropriate words) whether there was any evidence on which his Honour could find that the injury to the deceased worker arose out of or in the course of his employment.

When the case stated came first before the Supreme Court, the learned judges who then considered it decided to remit it to the Commission in order that the Commission should state its finding, if any, as to the time when the deceased worker

received the injuries which caused his death. Their Honours at the same time drew attention to paragraph 17 of the Case, and asked whether the paragraph amounted to a statement of a finding that death took place after 4.00 a.m. and before 6.20 a.m. on 24th April 1957, and, if not, whether any finding was made as to the time of death. These questions were of great and obvious importance for the determination of the matter. The case was then mentioned before the Commission, and the learned judge delivered what is described in the appeal book as a supplementary judgment. In the course of it he made some observations as to the time of death, which are not readily reconcilable one with another or with the evidence. A supplemental case should have been stated, dealing precisely with the questions which the Supreme Court had asked, but unfortunately the parties brought the matter on again before the Supreme Court with nothing but the learned judge's oral observations to eke out the inadequacies of the original case stated. The Supreme Court, constituted this time by different judges, proceeded with the matter and gave a decision in favour of the widow. It is from that decision that this appeal is brought.

As we have pointed out, the first of the questions in the Case falls into two parts. As the question whether the injury arose "out of" the employment does not appear to have arisen before the Commission, and as no ultimate finding was made to which it is relevant, we think that it ought not to be answered, and accordingly we do not propose to address ourselves to it. At one stage the deficiencies of the Case caused us to doubt whether we could deal satisfactorily even with the question whether it was open to the judge to make the finding he did make, that the deceased's injury arose "in the course of" his employment; and we contemplated remitting the Case to the Commission so that it might be re-stated. But by a process of sorting out the material

facts from the body of the Case, from a transcript of the evidence which accompanies the Case, and from the reasons delivered by the judge - a process which we should not have had to go through - we have satisfied ourselves that we can answer that one question. The onus of proof in regard to it lay upon the applicant; and the conclusion we have reached is that for lack of evidence as to the place or the manner or the circumstances of the death of the deceased the ultimate finding that was made in the applicant's favour is not supportable in law; for it was not open to the learned judge to make a positive finding that the injury causing death occurred while the deceased was doing what a man employed as he was might reasonably have been doing within a time during which he was employed and at a place where he might reasonably have been during that time to do that thing: cf. per Lord Loreburn in Moore v. Manchester Liners Ltd. (1910) A.C. 498, at pp. 500, 501.

The deceased, as we have said, was a railway guard. His dead body was found at 6.30 a.m. or thereabouts on Wednesday, 24th April 1957; and the circumstances were such that it is a possible, though by no means the only possible, hypothesis that he either fell from a moving train or was struck by a train. But the place where the body lay was some distance from any point to which the execution of his duties would normally have taken him; and there was neither direct proof nor foundation for inference as to how his body came to be there. That he had been dead for some hours was clearly established, but there could be no certainty as to when it was that he died. This, it will be remembered, was a point upon which the Supreme Court as first constituted to hear the case directed questions to Judge Rainbow. Paragraph 17 of the case stated had set out that a post mortem examination conducted at about 10.00 a.m. on 25th April (the judge said later that this should read 24th April, but 25th was correct) did not enable the doctor who conducted it to fix the

time of death more definitely than "about 24-30 hours previously". That would have been about between 4.00 a.m. and 10.00 a.m. on 24th April. What the doctor in fact had said was that the deceased had been dead "at least 24 hours" before the post mortem examination (i.e. before 10.00 a.m. on 25th), and that on an assumption that the body was more or less rigid at 6.30 a.m. on 24th April (in fact it was quite rigid) he "had been dead some hours then". In his supplementary judgment Judge Rainbow at first said that it had been in his mind, and he thought it was implicit in the general words of his original judgment, that death occurred between 8.00 p.m. and 8.30 p.m. on 23rd April 1957; but he said also that he "accepted....the fact that death had taken place about twenty-four hours to thirty hours prior to 10.00 a.m. on 25th April 1957". His Honour then added that the word "about" connoted to him "that it might also have been between twenty hours and thirty-six hours and even then it would have been only an approximation". Even thirty-six hours would carry the time back no further than 10.00 p.m. on 23rd, and it can hardly be right to regard thirty-six hours as "about" thirty hours. The fact is that there is nothing in the medical evidence to justify a finding that death occurred between 8.00 p.m. to 8.30 p.m. on 23rd.

The finding that it did occur between those times seems to have been made only because it fits the evidence as to the known movements of the deceased on the evening of the 23rd and as to the programme of work which he appeared to be following when last spoken to.. In outline the work assigned to him for the evening was as follows. (1) He was to report for duty at the Guard Foreman's office at Central Station, Sydney, apparently about 6.00 p.m. . (2) Then he was to travel to the Macdonaldtown shunting yards, and act as guard on a train leaving those yards at 7.01 p.m. for Sydney. (3) He was to return from Sydney to

Macdonaldtown by passenger train, and act as guard on a train leaving the shunting yards there at 8.27 p.m. for Sydney. (4) There he was to prepare a train to leave for Goulburn at 9.18 p.m., and he was to act as guard on the journey.

There was evidence upon which the following facts might be, and apparently were, found. The deceased did not report at the Guard Foreman's office, but telephoned that office to say that he would pick up the 7.01 p.m. train at Macdonaldtown. This he did. The journey to Sydney takes about eight minutes, so that he probably arrived there at about 7.10 p.m. . About 7.20 p.m. he appeared at the Guard Foreman's office, where he remained for about forty minutes. He was then dressed in a shirt, vest and trousers, with no coat or cap. Whether he had anything on his feet the officer who saw him was not in a position to see. He was not observed to be affected by liquor. He had brought his hand bag containing personal effects, but was not seen to have any lamp.. About 8.00 p.m. he departed, without his bag, which he left on a shelf, and without a lamp, saying that he would go to Macdonaldtown and pick up the rest of his work. He was not seen alive after that by any person who gave evidence, and there is no clue to his subsequent movements save the fact that his body was found next morning not far from Macdonaldtown station. In particular, he did not join the train which left Macdonaldtown for Sydney at 8.27 p.m..

If the body had been found on the Sydney side of Macdonaldtown station and near a set of rails on which trains travelling from Sydney and stopping at Macdonaldtown were running that night, it might have been thought likely that he fell out of a train on his way to pick up the 8.27 p.m. train. It was found, however, not there, but at a point some sixty yards beyond the Macdonaldtown station, and on the outside of the extreme right-hand line as you go from Sydney, a line used only by long-distance trains

travelling towards Sydney and not stopping at Macdonaldtown. The deceased could not have been at that point, or anywhere close to it, in the ordinary course of his journey to pick up the 8.27 p.m. train at the shunting yards. The railway premises at Macdonaldtown consist of three pairs of lines, two platforms and the shunting yards. Looking from Sydney, the two lines on the extreme left carry respectively down and up local trains, and they are separated from one another by a platform. The middle lines carry down and up suburban trains, and they too are separated from one another by a platform. The lines on the right carry down and up main line trains, and they are not served by any platform. Between the up main line and the boundary premises, where there is a retaining wall beyond and beneath which is a public street, there is a strip of level ground five or six feet wide and then, alongside the wall, a set of electric signal cables in troughing. The body was found lying on the level ground, at right angles to the up line, with the head near the rail and the feet under the signal troughing.

There is nothing to suggest that the deceased met with the injuries that caused his death anywhere nearer to Sydney than the place at which his body was found. The lines in that locality run east and west, Sydney being to the east. The body was found sixty yards west of the western end of the Macdonaldtown platforms and on the north edge of the permanent way. The entrance to the shunting yards lies some two hundred yards away, and to the south east of the platforms. If the deceased had followed the normal method of getting from Sydney station to the shunting yards he would have travelled to Macdonaldtown by passenger train, alighted onto the suburban line platform, walked to its eastern extremity, and then gone down a ramp to the level of the lines, across the line by which his train had come and the two local lines, and down a flight of stairs. There was no other

way of entering the yards from the station.

When the body was found there were socks on the feet, but no shoes. Search was made for the shoes, but they were not found or accounted for in any way. Not far from the body were a railway guard's book and lamp, the glass and surrounding metal of the lamp being broken. Examination of a number of trains that had passed produced no clue to the mystery.

Putting aside more extreme hypotheses, such as that the deceased may have been killed away from the railway premises, and the body, book and lamp thrown over the fence from the adjacent street, there are several which suggest themselves. One is that the deceased may have set out from Sydney for Macdonaldtown early enough to perform the duties of guard on the 8.27 p.m. train from the shunting yards, and may have been overcarried and been killed in endeavouring to alight when he realized that his train had passed through Macdonaldtown station. Or, having been overcarried to a station beyond Macdonaldtown, he may have caught a return train and fallen out of it before reaching Macdonaldtown. Or, having been overcarried to the next station, Newtown, he may have set out to walk back along the permanent way and been struck by a Sydney-bound country train. Of these suggestions, the first and the second invite the objection that the body was not found near the suburban line, but in a position, on the far side of the main line, to which it must be supposed, if either hypothesis be accepted, that the deceased was flung or managed after the accident to drag himself. To the third hypothesis the objection does not apply; but, while there is nothing against it, neither is there anything to support it. The same must be said of still another theory that was advanced, namely, that the deceased, having alighted at Macdonaldtown on his way to the shunting yards, may have seen some person trespassing on the permanent way to the west of the station and, in the zealous performance of his general duty

as a railwayman, may have gone over to the place where his body was ultimately found, in order to warn off the trespasser. Such suggestions do no more than underline the fact, which of course must be recognized, that it was not impossible for the deceased to have got to the place where he met his death while performing his duties or while doing something incidental to their performance. But no less must it be recognized that this cannot be so unless something out of the ordinary occurred to take him to that place: he cannot have been adhering to the ordinary course of the particular duties which had been assigned to him for performance on the evening of 23rd April.

One intriguing fact is the non-discovery of his shoes. The suggestion that the impact of a fast-moving train may have torn them from his feet, leaving the socks still on, can hardly be taken seriously. The disappearance of the shoes gives some plausibility to the idea that the deceased may have been affected by liquor, left Sydney on the 9.18 p.m. Goulburn train (without having attended to the 8.27 p.m. train from the shunting yards), taken off his shoes in the train, fallen out of it after it had passed Macdonaldtown, and crawled or been hurled to the far side of the up line. A post mortem examination of his blood disclosed an alcoholic content which is consistent with such a theory. It is also consistent with another possible explanation that has been put forward, namely that the deceased, after he left the Guard Foreman's office at Sydney station, may have spent some time away from railway premises, drinking; and that he may have climbed from the street over the wall on to the line with some idea of getting by that method back to his duties at the shunting yards. Such probability as these theories may possess because of the amount of alcohol found in the blood is hardly to be disposed of by pointing to evidence of general good conduct, or even to evidence, which the Supreme Court seems to have considered relevant, to the

effect that the deceased was an enthusiastic gardener, a dahlia exhibitor, and a member of the local horticultural society. Nevertheless it is all in the realm of guesswork, with not a single fact to provide a foothold for an inference as to what in truth the deceased was about when he met with his fatal injuries. The case is eminently one for a careful observance of the difference between inference and conjecture.

In the result, we are of opinion that the appeal should be allowed, the answers given by the Supreme Court to the questions in the case stated should be set aside, and in lieu thereof the questions should be answered that on the evidence it was not open to the Commission to find, or to make an award on the footing, that the deceased worker died from injury arising in the course of his employment.