

RECENT DECISIONS

Employer to pay both death benefits and permanent impairment compensation

Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger [2017] NSWSC 1587 (22 November 2017)

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Summary

On 22 November 2017, Justice Schmidt of the Supreme Court of NSW found that an employer was liable to pay both death benefits and permanent impairment under the *Workers Compensation Act 1987* (NSW) ('1987 Act') in respect of fatal injuries sustained by a worker.

Background

The late worker was employed by Hunter Quarries Pty Limited (Hunter Quarries) as a machine operator.

On 9 September 2014, the worker died at his workplace from injuries to his chest sustained while he was operating a 40 tonne excavator, which tipped over and crushed the cabin in which he was working. Soon after, the worker was pronounced life extinct.

Hunter Quarries accepted liability for death benefits and funeral expenses under sections 25 and 26 of the 1987 Act, respectively.

The late worker's estate then made a claim under section 66 of the 1987 Act for whole person impairment. The claim was referred to Dr Phillipa Harvey-Sutton ('the AMS') who found that the worker's injuries were such that death was inevitable, within a very short timeframe. The worker's permanent impairment was initially assessed to be 100% though, on reconsideration, the AMS assessed it to be 0%.

The Appeal Panel disagreed with the above assessment, finding the worker's permanent impairment to be 100%.

On appeal, Hunter Quarries submitted that it could not have been the intention of the legislature to afford double compensation for the one injury. Further, Hunter Quarries contended that the term "permanent impairment" does not encompass impairment so serious that death will inevitably follow, within a short time frame.

Decision

Her Honour did not accept the submission of Hunter Quarries. She noted that Hunter Quarries did not contend that the term "permanent impairment" excluded all impairments which inevitably lead to a worker's death, only those where death followed "shortly after injury". Her Honour found that such a construction of the term would only serve to introduce uncertainties which do not presently exist. For example, issues would then arise as to how long after an injury which causes permanent impairment which proves to be fatal an injured worker would have to survive before an entitlement to compensation for permanent impairment arose.

Her Honour referred to *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 which observed at [40] that "the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament, because alternating the language of the provision in such a case may be 'too far-reaching'". She opined that the uncertainties which

would follow from the adoption of the limitations on interpretation which Hunter Quarries was proposing would advance into the 'too far reaching territory'.

In any event, her Honour found at [100-101]:

"In my view, had the Parliament intended that in such an event that death results shortly after the injury, the injured worker has not suffered a "permanent impairment", Parliament would have expressly provided for that result.

That these concepts are not only not to be found in this statutory scheme, but do not have an obvious or fixed meaning, precludes their adoption on the construction of the statutory term. It is not for the Court to legislate for such exceptions to the obligations which the Parliament has imposed upon employers when it enacted sections 9, 25 and 66 in their current forms."

Therefore, her Honour found that, had the intention of the legislation been to avoid any overlap between sections 9, 25 and 66 of the 1987 Act, it would be expressly stated. Instead, in this instance, each of these relevant sections operates in unison.

Her Honour ultimately accepted the Appeal Panel's finding that the late worker's permanent impairment was permanent, there being no suggestion that he could recover from it. She found that the assessment of 100% permanent impairment reflected that it had later resulted in the worker's death.

Her Honour dismissed the proceedings with an order for costs in favour of the Estate.

Implications

This decision illustrates that there is 'permanent impairment' for the purposes of section 66 of the 1987 Act when a worker suffers injury so serious that he or she cannot recover from it, even with treatment. Therefore, in circumstances such as these, it is open to an Estate to claim both death benefits and permanent impairment compensation under the 1987 Act in respect of a fatal injury sustained by a worker.

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