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RANKIN ELLISON CASE NOTES

NO “PERMANENT IMPAIRMENT” IF INJURY IMMEDIATELY PRECEDES DEATH

Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger [2018] NSWCA 178

The Court of Appeal recently heard an Appeal against the Supreme Court’s judicial review of a Medical Appeals Panel decision. The Appeal turned on the interpretation of the phrase “permanent impairment” contained in Section 65 and 66 of the *Workers Compensation Act 1987* (NSW) (“1987 Act”) and Section 322(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (“1998 Act”).

Material Facts

Ryan Messenger, the Deceased, was employed by the Hunter Quarries Pty Ltd, the Appellant, at the time of his work related death. The Deceased was operating an excavator which rolled and crushed the cabin in which he was seated. He suffered a high force crushing injury to his upper body which immediately rendered him unconscious. He consequently died several minutes later. The Appellant accepted liability for the Deceased’s death and paid lump sum death benefits and funeral expenses to the Deceased’s estate.

The Administrator for the Estate of the Deceased, the Respondent, subsequently made a claim for lump sum compensation under Section 66 of the 1987 Act (as distinct from lump sum death benefits) in respect of permanent impairment suffered by the Deceased immediately prior to his death. That claim was declined and the matter was referred to an Approved Medical Specialist (“AMS”), who assessed 100% Whole Person Impairment (“WPI”). A

reconsideration of the Medical Assessment Certificate was later undertaken pursuant to the request of the Appellant. It was determined that the Deceased had not in fact suffered any permanent impairment.

That assessment was subsequently overturned by the Workers Compensation Commission Medical Appeal Panel (“MAP”). The MAP found that it was highly probable that the Deceased’s injuries would have been with him for the remainder of his life and therefore assessed 100% WPI.

Application for Judicial Review

The Appellant made an Application to the Supreme Court for judicial review of the MAP’s decision. The primary issue in dispute determination was the meaning of the term “permanent impairment” in the context of Sections 65 and 66 of the 1987 Act and Section 322 of the 1998 Act.

The Appellant contended that the phrase “permanent impairment” did not encompass impairment so serious that death inevitably follows within a short time frame. The State Insurance Regulatory Authority, which was joined to the proceedings, submitted that there must be some continued and enduring experience of living in order for an impairment to be “permanent”. In contrast, the Respondent argued that “permanent impairment” encompasses impairments so serious that an injured worker cannot recover from them, regardless of the length of time for which the impairment subsists.

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The primary Judge upheld the decision of the MAP, finding that the term “permanent impairment” involved an assessment of whether an injury has resulted in “permanent” as opposed to “temporary” impairment. Her Honour made the distinction that if a worker is killed instantly then the injury would result in death and there would be no permanent impairment. Notwithstanding the Deceased’s short period of survival, it was concluded that the sequelae of his injury was permanent and compensable. The Appellant’s Application was dismissed.

Court of Appeal

The Appellant appealed against the primary Judge’s decision on the basis that her Honour incorrectly construed the expression “permanent impairment”, and therefore erred in failing to set aside the MAP’s assessment. The Appellant maintained that the expression “permanent impairment” in Section 66 of the 1987 Act does not extend to encompass an impairment so serious that death inevitably follows within a short time.

The Court held that the language used in Section 66 of the 1987 Act imports a need for the worker to have suffered some impairment or reduction in function that is lasting or enduring. It followed that continued and enduring life is imperative to establishing the existence of “permanent impairment”. The Court concluded that an injury which inevitably results in death seconds or minutes later is not consistent with the expression “permanent impairment”.

The Court considered the application of Section 3 of the 1998 Act for the purpose of providing context to the provisions of the 1987 Act. Though one object of the 1987 Act is undoubtedly to benefit injured workers, it was determined that it would be going too far to say that every grant of a workers compensation entitlement ought to be construed broadly simply because it is part of a beneficial scheme.

It was ultimately determined that “permanent impairment” within the meaning of 1987 and 1998 Acts does not encompass circumstances where inevitable death follows shortly after the subject injury. On that basis the Appeal was allowed and both the primary Judge and MAP assessments were set aside.

Implications

Evidently, the purpose of Section 66 of the 1987 Act is to compensate workers for injuries that result in impairment or reduction in function and persists throughout the continuance of their lives. The salient point from the Court’s decision is that there cannot be any “permanent impairment” unless the injured worker continues to live beyond the subject injury.

Interestingly, the Court of Appeal commented that the provisions of the 1987 Act should not be interpreted so broadly so as to give an injured worker the utmost benefit in every case simply because it is part of a beneficial scheme.

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