SHORT SHOTS

Death itself cannot be the injury

Miller v State of NSW

LINK TO DECISION

On 15 April 2011, the worker, Mrs Miller, died after suffering a severe asthma attack while she was driving a community transport vehicle in the course of her employment.

The worker was driving passengers from Brewarrina to Dubbo, when she began coughing and gasping for air. After continuing to drive while coughing for 25 minutes, the worker was persuaded by her passengers to pull over to the side of the road in a remote location. The worker attempted to alleviate her symptoms taking two puffs on a Ventolin inhaler but passed out. Two nurses who were travelling on the bus and a paramedic, who happened to be following the vehicle, administered CPR until police and a doctor with a defibrillator and resuscitation equipment arrived at the scene. Despite all of their efforts, the worker was declared dead at Nyngan Hospital approximately two hours after having lost consciousness having suffered a fatal cardiac arrest.

The deceased worker's husband made a claim for compensation pursuant to section 25 of the 1987 Act which provides that lump sum compensation is payable if death results from a workplace injury.

At the initial hearing, the arbitrator found that the worker's pre-existing medical condition (asthma) was the cause of her death which was not aggravated by her employment. The worker appealed from the decision that was affirmed by an Acting Deputy President of the Workers Compensation Commission.

An appeal was then filed in the NSW Court of Appeal in which the appellant submitted that:

'The Acting Deputy President erred in finding that the relevant 'injury' causing death was the 'aggravation, acceleration or exacerbation of the asthma condition leading to the acute asthma attack'. Rather than the 'aggravation, exacerbation or deterioration of the asthma attack and/or the cardiac arrest,each having been substantially contributed to by the ***unavailability of necessary medical treatment at the remote location at which the acute asthma attack occurred by reason of the deceased's employment'.***

The respondent submitted that: ***'it was never put, either to the Arbitrator or the Deputy President, that there was an injury simpliciter in the form of a cardiac arrest or anoxia which was the injury which was to be determined by the Arbitrator.'***

The Court of Appeal observed that the appeal was confined to an appeal "in point of law" and that the main argument was that the arbitrator had failed to address the correct injury and that the Acting Deputy President did not apply the relevant provisions of the Act to the correct injury.

The Court rejected the appellant's submissions and concluded that "*a failure to make a finding, either at first instance or on appeal that was not sought cannot be an error, let alone an error of law.*"

Irrespective of the narrow confines of the appeal, the Court indicated that the outcome of the appeal would not differ given the difficulty in establishing causation, that is, whether it was found that the worker had in fact passed away as a result of the remote location of her employment.

The Court found that there was no evidence to suggest that if the worker had not been working remotely and had recognised the seriousness of her attack, she would have sought medical treatment earlier.

Decision Number: [2018] NSWCA 152
Decision Date: 12 July 2018
Decision Maker: NSW Court of Appeal