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Injured Worker Can't Waive

By Henry Gottlieb

Last Monday's workers' compensation ruling by the state Supreme Court in favor of the widow of a welder who died of lung cancer looks like an important victory for plaintiffs and evidence that the liberal impulse is alive among New Jersey's justices.

So why does a lawyer who represents workers' comp claimants and who filed an amicus brief on behalf of trade and industrial unions hate the decision?

Because, he says, it went further than was necessary to correct the specific wrong in the case and created a huge procedural burden on the Division of Workers' Compensation.

"The Court's reach was longer than it had to be," says Craig Livingston, of Nutley's Ball Livingston, who argued the case for the New Jersey State AFL-CIO and several of its affiliated unions.

At issue in *Kibble v. Weeks Dredging & Construction Co.*, A-38 [digested in this issue at page 73] was whether a worker who settles a compensation claim under N.J.S.A. 34:15-20 and surrenders future rights to compensation arising from the claim, also waives the future right of a spouse to assert a statutory claim for dependency benefits in the event of the worker's death.

Carl Kibble, who contracted "welder's lung" over three decades in the trade, agreed to a \$36,000 settlement in 1989, but when he died of lung cancer in 1994 his wife Mary filed a depen-

dependency claim. Following traditional practice surrounding Sec. 20 settlements, the compensation court dismissed the claim and the appeals court affirmed the dismissal in an unpublished opinion.

But by a 4-3 vote, the justices said an injured worker may not unilaterally waive dependents' rights to future death benefits, but must have the informed consent of his or her spouse and other dependents.

In the future, Justice Gary Stein said in the majority opinion, parties who contemplate waiver of dependency claims in the event of the employee's death must satisfy the Division of Workers' Compensation that they waive all future dependency claims. The Court left the details of the procedures to the division, but concluded that the waiver had to be "given knowingly, intelligently and voluntarily."

Chief Justice Deborah Poritz, and Justices Daniel O'Hern and Alan Handler were also among the majority.

Justice James Coleman Jr., who was a judge in the Division of Workers' Compensation before his 1973 appointment to the Union County Superior Court, dissented sharply and was joined by Justices Marie Garibaldi and Stewart Pollock.

By Coleman's reckoning, workers can surrender dependency rights in Sec. 20 settlements because that's allowed by the plain language of the statute. Indeed, that was the intent of

the Legislature when it created Sec. 20 in 1980, he wrote. The purpose of the section was to allow in-court settlements of what had previously been private agreements between workers and employers.

Coleman wrote that the forms currently used by the division seem adequate to insure that the worker understands that he or she is surrendering future rights, but he also said it would be good to have the spouse attend the Sec. 20 hearing and receive an explanation of its effects. That's a lot less formal than the waivers required under the majority's ruling.

Livingston says that the Court could easily have granted Kibble her dependency rights without making such a sweeping change in Sec. 20 settlement procedure. In this case, he says, the transcript of the Sec. 20 hearing was lost. The justices should have ruled that there was no record to establish that Kibble himself had properly surrendered dependency rights, giving the plaintiff a victory without establishing a glittering new procedure.

Livingston says the methods currently used by the Division of Workers' Compensation are good enough to ensure that the rights of workers and their dependents are safeguarded.

"Instead of recognizing that, the Court created a whole new due process involving waivers," Livingston says. "It's going to slow down the process."

"The majority was right on the facts and wrong on the law and Coleman was wrong on the facts and as a result we have a mess," Livingston says. ■