



# RANKIN ELLISON CASE NOTES

## RANKIN ELLISON WINS ON APPEAL.

### Vaughan v Secretary, Department of Education [2018] NSWCCPD (10 January 2018)

Rankin Ellison Lawyers recently defended the Insurer of the Secretary, Department of Education (“Respondent”) in an action brought by Mr Vaughan (“Appellant”) in the Workers Compensation Commission. Upon losing his claim, the Appellant appealed the Arbitrator’s first instance decision.

#### Material Facts

The Appellant was formerly employed by the Respondent as a High School teacher. The Appellant allegedly suffered injury to both shoulders and his right biceps in the course of his employment whilst bearing the weight of several sheets of metal that had fallen from a shelf. The Respondent voluntarily paid for the Appellant’s surgical treatment in respect of both shoulder injuries.

The Appellant subsequently made a claim for lump sum compensation in respect of 16% Whole Person Impairment at the left and right upper extremities. The Respondent accepted injury to the right biceps but declined liability for both shoulders.

At Arbitration it was found that the Appellant had in fact sustained a work-related injury to his right biceps. However, the Arbitrator concluded that the available medical evidence did not sufficiently prove that the left and right shoulders were injured as alleged. Further, it was determined that the Respondent’s acceptance of liability for the respective shoulder surgeries did not of itself constitute an admission of liability. Accordingly, the Arbitrator found in favour of the Respondent.

The Appellant subsequently appealed that decision.

#### On Appeal

The Appellant’s initial Applications to Appeal were defective and were rejected by the Commission. Consequently, the relevant Application to Appeal was filed outside the 28 day timeframe within which an Appeal can be made. The Appellant sought an extension of time pursuant to Rule 16.2 of the *Workers Compensation Commission Rules 2011* on the basis that delay in receipt of the rejection letters precluded his solicitor from filing an amended Application within the legislative timeframe.

The Respondent contended that the Appellant was bound by his solicitors’ conduct and that the solicitors’ ignorance did not constitute “exceptional circumstances” that would warrant an extension of time. Further, the Respondent alleged that even if time were extended, the Appeal would fail.

Acting President Snell agreed that it was necessary to consider the merits of the Appeal in determining whether to exercise the Commission’s discretion to extend time.

The various grounds of the Appellant’s appeal came down to two primary submissions:

1. The Arbitrator exceeded his statutory power in determining that the Appellant had not suffered any shoulder injuries.
2. The Arbitrator erred in his analysis of the evidence.

In respect of the former, the Appellant asserted that the Arbitrator exceeded his Jurisdiction by determining a

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medical dispute about the nature of the shoulder injuries. It was contended that the Arbitrator's Jurisdiction extended only so far as determining whether a work-related injury had been sustained, and that assessment of the injury itself was reserved for an Approved Medical Specialist.

Acting President Snell agreed with the Respondent that, in determining liability, it was imperative for the Arbitrator to make findings as to whether a work-related injury had been sustained to the shoulders as alleged. It was clarified that, in any event, Arbitrators are legislatively barred from referring injuries to an AMS until the issue of liability is first determined.

In the alternative, the Appellant argued that even if the Arbitrator did have the relevant Jurisdiction, his/her findings were at odds with the weight of the evidence.

The Respondent argued that the Arbitrator's decision was simply a factual finding in preference of certain evidentiary materials over others.

The Acting President ruled that the Arbitrator was entitled to draw subjective inferences from the evidence. It was confirmed that an Arbitrator's findings can only be overturned in the event that the evidence unequivocally proves that the findings are wrong. It is not sufficient that another Arbitrator/Presidential Member may have reached a different inference. That was not the case in this Appeal and the Acting President therefore made an Award for the Respondent.

Interestingly, the Appeal also involved an application to admit additional evidence. In the context of workers compensation, litigants are not permitted to rely upon fresh evidence on appeal without leave from the Commission. Leave may be granted only in circumstance that the fresh evidence was not available and could not be reasonably obtained by the litigant prior to the commencement of proceedings or if failure to grant leave

would cause substantial injustice in the case. In respect of the latter, it must be demonstrated that the fresh evidence would, if accepted, likely demonstrate that the original decision was erroneous. The Appellant's Application to rely on fresh evidence did not satisfy either of the two threshold questions. The Application was therefore dismissed.

### Implications

The salient findings of this case can be summarised as follows:

- Arbitrators of the Commission have the Jurisdiction to determine issues of liability.
- The voluntary payment of medical expenses does not of itself constitute an admission of liability.
- An injury cannot be referred to an AMS until the issue of liability is first determined.
- An Arbitrator is entitled to draw inferences from evidentiary material.
- The presence of "exceptional circumstances" is to be considered in respect of an Application to extend time to Appeal an Arbitrator's decision.
- Reliance upon fresh evidence on Appeal is permitted only in very limited circumstances.

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