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RANKIN ELLISON CASE NOTES

Rankin Ellison Wins on Appeal

Jasbir Singh v B & E Poultry Holdings Pty Ltd [2018] NSWWCCPD 52

Rankin Ellison have successfully defended an Appeal by Jasbir Singh ("Appellant") in the Presidential Division of the Workers Compensation Commission. The Commission has handed down judgment pertaining to the interpretation of Section 322A of the Workplace Injury Management and Workers Compensation Act 1998 (NSW) ("1998 Act").

Facts

For a comprehensive summary of the material facts see our case note on the Commission's first instance decision by clicking here

In short, the Appellant lodged a claim for lump sum compensation in 2015 in respect of 13% WPI against B & E Holdings Pty Ltd ("Respondent"). The matter was referred to an Approved Medical Specialist who assessed 14% WPI. The Appellant Discontinued the proceedings before a Certificate of Determination was issued.

The Appellant subsequently obtained further forensic medical evidence and made a further claim for lump sum compensation in 2018, this time in respect of 16% WPI. That claim was declined by the Respondent and the matter proceeded to the Commission for determination. The Respondent argued that the Appellant had exhausted his one claim for lump sum compensation under Section 66 of the *Workers Compensation Act 1987* (NSW) ("1987 Act") and that Section 322A of the Workplace Injury Management and Workers Compensation Act 1998 ("1998 Act") permits only one Medical Assessment Certificate in respect of any particular injury. The Arbitrator accepted the Respondent's submissions and dismissed the Appellant's claim.

The Appellant ultimately lodged an Appeal against the decision of the Arbitrator (as distinct from an Application for Reconsideration of the Medical Assessment Certificate under Section 329 of the 1998 Act). The Appellant contended that the Arbitrator had erred in law by failing to exercise her statutory powers to determine the proceedings.

Presidential Decision

The Appeal could be distilled into two primary issues – (i) whether the Arbitrator erred by not ordering a reconsideration of the Medical Assessment Certificate ("MAC"); and (ii) whether the Applicant had in fact made a second claim for lump sum compensation.

As noted above, the Appellant lodged an Appeal against the decision of the Arbitrator and not an Application for Reconsideration of the MAC. President Snell accepted the Respondent's submission that, since no application for Reconsideration was made before the Arbitrator,

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Arbitrator could not have fallen into error by not making that Order. In the absence of any such application the Applicant was not entitled to be referred to an AMS for re-assessment of his permanent impairment.

Deputy President Snell found that in any event an Application for reconsideration of the MAC would have been futile. An Arbitrator's power to refer a MAC for reconsideration under Section 329 of the 1998 is discretionary and is to be considered in the context of the particular claim. The Appellant opted not to exercise his statutory right to Appeal the MAC under Section 327 of the 1998 Act. Rather, he sought to Discontinue proceedings and subsequently institute fresh proceedings in respect of the same injury but for a higher degree of Whole Person Impairment. On Appeal, he sought that the matter be referred for a further assessment pursuant to Section 329 of the 1998 Act. It was determined that the discretionary power ought not to be exercised in the circumstances. To do so would invariably permit injured workers to avoid the application of Section 322A of the 1998 Act – which permits only one MAC in respect of any particular injury. The implications of doing so would be that an injured worker who was dissatisfied with his/her medical assessment could simply Discontinue the proceedings with the effect that the MAC was not binding. Provided he/she could subsequently obtain a higher WPI assessment, then he/she could simply amend his/her claim and repeat the process until they received what they considered to be a satisfactory assessment. Deputy President Snell concluded that the Arbitrator was therefore correct to conclude that the Applicant was not, in the circumstances, entitled to obtain a new MAC.

In respect of the second limb to the Appeal, Section 66 of the 1987 limits an injured worker to one claim for lump sum compensation in respect of a particular injury. The Appellant contended that he had not lodged a fresh claim but rather had sought to amend his initial claim. The Respondent submitted that the Appellant had lodged a new claim for the same injury which was prohibited. Since the first limb of the Appeal failed it followed that the Appeal could not succeed. Accordingly, Deputy President Snell did not consider this issue.

Implications

Deputy President Snell affirmed the Arbitrator's interpretation of Section 322A of the 1998 Act. He also adopted a strict interpretation of Section 329 of the 1998 Act, thereby restricting the ability of an injured worker to seek re-consideration of an earlier MAC. Clearly, a more liberal interpretation of that provision would have adverse effects for employers. This decision is important as it affords protection to employers by precluding injured workers from avoiding the effect of an unfavourable MAC by simply Discontinuing proceedings.

If you have any questions about a particular workers compensation matter, please contact our team by phoning 02 4929 9333 (Newcastle) or 02 8297 5900 (Sydney).