

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter Number:** 2159/20  
**Applicant:** Nabil Safi  
**Respondent:** Rheem Australia Pty Limited  
**Date of Determination:** 19 June 2020  
**Citation:** [2020] NSWCC 206

### The Commission determines:

1. The applicant has a consequential condition affecting his right shoulder, as a result of the injury he sustained to his left shoulder on 28 April 2015.
2. The injury sustained by the applicant to his left shoulder materially contributes to his right shoulder condition.
3. The injury sustained by the applicant to his left shoulder and the injury sustained to the right shoulder do not result from the same injurious event.
4. There can be one assessment of permanent impairment of the left upper extremity (shoulder) and right upper extremity (elbow and shoulder).
5. The deemed date of injury for the claim for permanent impairment made by the applicant is 22 July 2019.

### The Commission orders:

1. This matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) as follows:
  - Date of injury: 22 July 2019 (deemed)
  - Body Parts: Left upper extremity (shoulder); right upper extremity (elbow, houlder)
  - Method of Assessment: Whole Person Impairment
2. The following documents are to be forwarded to the AMS:
  - (a) Application to Resolve a Dispute with attachments;
  - (b) Reply with attachments;
  - (c) Application to Admit Late Documents with attachments filed by the applicant on 7 May 2020;
  - (d) Application to Admit Late Documents with attachments filed by the respondent on 20 May 2020, and
  - (e) This Certificate of Determination and Statement of Reasons.

A brief statement is attached setting out the Commission's reasons for the determination.

John Isaksen  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Reynolds*

Antony Reynolds  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. The applicant, Nabil Safi, has sustained a number of injuries in the course of his employment as a seam welder with the respondent, Rheem Australia Pty Limited.
2. The respondent has accepted liability for an injury to the lumbar spine and right knee sustained in March 2011.
3. The respondent has accepted liability for an injury to the left shoulder and right elbow sustained in April 2015.
4. The respondent has accepted liability for an injury to the right shoulder sustained in September 2018.
5. The applicant has made a claim for 25% permanent impairment for injury to the lumbar spine, right knee, left shoulder, right elbow and right shoulder by way of a disease injury, with a deemed date of injury of 22 July 2019, being the date when the claim for the section 66 lump sum payment was made.
6. In the alternative, the applicant claims that his right shoulder condition is a consequential condition that results from the injury to the left shoulder and/or that the injury to the left shoulder materially contributed to the applicant's right shoulder condition.
7. The respondent disputes that the assessment of impairments from the injuries sustained by the applicant can be aggregated.
8. The respondent disputes that the applicant's right shoulder condition is a consequential condition which results from the injury to the left shoulder, or that the injury to the left shoulder has materially contributed to the right shoulder condition.
9. The respondent also disputes that the injury to the left shoulder and the injury to the right shoulder result from the same incident, which would otherwise allow both upper limbs to be assessed together.

### ISSUES FOR DETERMINATION

10. The parties agree that the following issue remains in dispute:
  - (a) whether the applicant has a consequential condition affecting his right shoulder which results from the injury he sustained to his left shoulder on or about 28 April 2015;
  - (b) whether the injury to the left shoulder has materially contributed to the injury to the right shoulder, so as to allow both upper limbs to be assessed together, and
  - (c) whether the injury to the left shoulder and right elbow, and the injury to the right shoulder, are all disease processes which arise from the same type of work undertaken by the applicant, so as to allow all three body parts to be assessed together.

## **PROCEDURE BEFORE THE COMMISSION**

11. The parties attended a conference and hearing on 11 June 2020. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
12. Mr Ryan Brown appeared for the applicant, instructed by Ms De Freitas. Mr Phillip Perry appeared for the respondent, instructed by Mr Vrettos, with Ms Huang from icare also in attendance.
13. The hearing was conducted by telephone in accordance with the protocols set out by the Commission as a result of the coronavirus pandemic.
14. At the commencement of the hearing, Mr Brown discontinued the claim for any permanent impairment for injury to the lumbar spine and right knee.

## **EVIDENCE**

### **Documentary evidence**

15. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application to Resolve a Dispute and attached documents;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents filed by the applicant on 7 May 2020, and
  - (d) Application to Admit Late Documents filed by the respondent on 20 May 2020.

### **Oral evidence**

16. There was no application to cross examine the applicant or to adduce oral evidence.

## **FINDINGS AND REASONS**

### **The applicant's evidence**

17. The applicant underwent an arthroscopic arthroplasty and rotator cuff repair of the left shoulder on 9 February 2016, performed by Dr Bokor. Liability for that surgery was accepted by the respondent. The applicant states that he returned to work with the respondent about three months after that surgery.
18. The applicant states that he was placed in the insourcing section and then the tarapunch section. He states that on 5 September 2016 he sustained a laceration injury to his left index finger while operating a machine at work. The applicant states that he returned to work a few weeks later and was placed back in the insourcing section. He states that he was supposed to be rotated between three jobs but was placed on the one machine to operate all day long.
19. The applicant states that the machine was difficult to operate. He states that he had to pull down a safety guard with his arms and operate a foot pedal. He states that the process required lids to go through the machine and be punched with holes, and then the completed product was put back on a pallet.

20. The applicant states:

“Due to my left shoulder injury, I favoured my right hand while operating the machine, which is difficult for an uninjured to operate with two arms.”.

21. The applicant states that he started to develop pain in his right shoulder and was referred back to Dr Bokor. The applicant underwent an arthroscopic arthroplasty and double row cuff repair of the right shoulder on 4 December 2018, performed by Dr Bokor.

22. The applicant states that he has pain in both shoulders, the right shoulder worse than the left shoulder, and that it is difficult to reach out and upwards with his right arm.

23. The applicant completed a claim form on 26 September 2018 wherein he writes that the task that he was doing when injured was “Repetitive movement pulling down safety guard”. The applicant answers a question of whether he previously had another injury/condition that relates to this injury/condition with: “L shoulder injury related to supraspinatus tear.”

### **The medical evidence**

24. There are 14 reports from Dr Bokor that are in evidence and which relate to both operations which the applicant underwent.

25. In a report to Allianz dated 23 October 2015, Dr Bokor writes in regard to the applicant’s left shoulder injury:

“...this gentleman has worked as a welder doing heavy lifting, carrying, moving a lot of repetitive heavy steel plates. He is 41 years old and his issues for his shoulder are those related to his employment.”

26. In a report dated 24 August 2016, being some six months after the left shoulder surgery, Dr Bokor writes that the applicant “is going very well” and “has almost full range of motion, only very minimal pain and good strength.”

27. In a report to MP Safety Management dated 30 August 2016, Dr Bokor is asked if the applicant is permitted to reach with his left arm if not holding a load, and he answers that the applicant can reach overhead and go through any range of motion. Dr Bokor also writes that he anticipates the applicant going back to unrestricted use of the left arm by the beginning of November. That is the last report from Dr Bokor in relation to his treatment of the applicant’s left shoulder.

28. There is a report from Dr Bokor simply dated “2018” but it is apparent that this is the first report to the applicant’s general practitioner for treatment for the applicant’s right shoulder condition. Dr Bokor writes:

“He injured himself at work doing a lot of repetitive actions on a processing machine and pulling down the safety guard with increasing antero-lateral pain worse at night and aggravated with movement, elevation and use.”

29. Following that first consultation, Dr Bokor writes in a report dated 29 October 2018 that a MRI scan confirms a virtual full thickness tear of the supraspinatus.

30. There are two reports from Dr Bokor following the applicant’s right shoulder surgery in December 2018 which are in the Reply and which report that the applicant is progressing well.

31. There are 12 reports in evidence from Dr Sundaraj, pain medicine physician, which date from November 2017 to April 2020.

32. In his first report dated 27 November 2017, Dr Sundaraj writes that the applicant's main areas of pain are in the head and neck and radiating pain into the left shoulder, and also the lower back. He also writes that the applicant is troubled with bilateral elbow pain including the shoulders.
33. The reports from Dr Sundaraj during the course of 2018 are dominated by complaints of, and treatment for, neck pain, recurring headaches, and tinnitus. Dr Sundaraj reports these problems arose from a motor accident which the applicant was injured in on his way home from hospital following his left shoulder surgery in February 2016. By June 2018 Dr Sundaraj also reports that the applicant is troubled by low back pain. There is little reference in those reports of any problems the applicant was having with his left shoulder. In a report dated 20 December 2018, Dr Sundaraj notes that the applicant recently had surgery to his right shoulder.
34. In the most recent report of Dr Sundaraj dated 16 April 2020, he records the applicant having troubles with his right shoulder. Dr Sundaraj writes:
- “As a consequence of favouring his right shoulder and upper limb, there has been an ‘overuse factor’ to the right upper limb and currently troubled with right shoulder problem as well. This is not an uncommon association particularly with patients who have had a rotator cuff muscle tear in one shoulder and favouring this causes problems in the opposing shoulder as well.”
35. The applicant was examined by Dr Millons on two occasions at the request of his solicitors. The first report from Dr Millons is dated 1 August 2017. Dr Millons records that the applicant had persisting pain in the left shoulder and neck and lower back. He records that the applicant “sits at a bench, making up kits for the plumbers” and that the applicant “is not rotated through any area.”
36. Dr Millons records that abducted rotation of the left arm is painful, suggestive of some possible impingement. He finds no tenderness around the right shoulder and records that abducted rotation of the right arm is not painful. There is no record made of any problems that the applicant is having with his right shoulder. Dr Millons makes an assessment of 10% whole person impairment for the injury to the left shoulder.
37. The applicant is examined again by Dr Millons on 25 June 2019, being about six months after the applicant has undergone surgery on his right shoulder.
38. In his report dated 27 June 2019, Dr Millons records that it was possibly sometime in 2018 that the applicant spent a few months working on a machine whereby he pulled down safety guards with both arms. He records that the applicant developed some pain in the right shoulder around the middle of 2018.
39. Dr Millons makes a diagnosis of subacromial impingement issues of the right shoulder as a result of working on the pressing machine in 2018. When asked if the applicant's right shoulder injury arose as a result of the nature and conditions of his employment, Dr Millons responds:
- “Mr Safi did have two reach up and pull down a gate on the press with both hands prior to operating a foot pedal to press out the metal. Such activity over a period of time may well have caused some issues in the subacromial region and the history is reasonably consistent.”
40. Dr Millons provides a further report dated 2 March 2020 without a further examination of the applicant. He notes that he previously recorded that it was in 2018 that the applicant worked on the machine which required the applicant to pull down safety guards but based upon correspondence provided to him by the applicant's solicitors states that the dates appear to be wrong in his history and that work should have been in 2017.

41. Dr Millons is asked if the left shoulder injury materially contributed to the applicant's right shoulder condition and responds:

"Having had his left shoulder operated on, one might presume that he would perhaps be using his right arm more to pull down the safety guards with both arms.

It is also quite probable that the mere act of reaching up with both arms and pulling them down could have aggravated some possible degenerative changes in the right subacromial region, giving rise to impingement issues which eventually led to him coming to surgery.

In answer to your inquiry then, it would seem that the left shoulder injury, deemed to have been sustained on 28 April 2016 may have contributed to the right shoulder condition, that the right shoulder condition seems to perhaps relate more to the nature and conditions of his work with symptoms coming in 2017 with now the deemed date of injury of 19 September 2018.

I do not think one can be any more definite than that."

42. Dr Breit has provided a number of reports at the request of the respondent. In his report dated 14 June 2018, Dr Breit records that the applicant had returned to normal hours of light duty work but usually does not work the whole week because of pain. He records the applicant's right shoulder is starting to get sore and the applicant being restricted in getting his right hand behind his back, as well as overhead.
43. Dr Breit records that he is told by the applicant that the left shoulder feels good. Dr Breit finds on examination that there is generalised discomfort of the left shoulder. He opines that the injury to both upper limbs are related to the nature and conditions of the applicant's employment.
44. Dr Breit assesses 3% permanent impairment of the left shoulder in a subsequent report dated 3 July 2018 but states that he has not used the range of movement guide because of marked inconsistency and maximisation by the applicant.
45. In his report dated 8 October 2019, Dr Breit records details of the work undertaken by the applicant prior to surgery on his right shoulder in December 2018:

"He would do six to eight pallets with 200 lids and said that he would have to pull down a gate using both hands, it was at about shoulder height, before the machine would operate."

46. Dr Breit confirms in that report that the applicant's employment is the cause of his diagnosis of a right rotator cuff tear.
47. In a further report dated 15 May 2020, Dr Breit writes: "he had an injury to the right shoulder pulling down a machine guard which, contrary to his statement, is obviously not overhead and not requiring significant force."
48. Dr Breit then states that it is impossible to indicate whether the applicant was protecting his left shoulder when pulling down the machine guard, particularly as the applicant had ill feeling towards his employers. Dr Breit writes:

"Problems with the opposite shoulder are secondary to overuse where there is prolonged dysfunction are well recognised. The information from Dr Bokor in August 2016 suggest that he wasn't having any problems in the left shoulder, so that I find it very difficult to accept this gentleman's claim that he was protecting that side and that the right shoulder is a consequential injury."

49. Dr Breit is also asked whether the right shoulder is an independent injury and Dr Breit again refers to the applicant's "presentation and satisfaction with his employers and that the claim of pain from using the arm overhead is not supported by the objective evidence." He opines that the right shoulder injury should be treated as a separate event.

**Whether the applicant has a consequential condition affecting his right shoulder which results from the injury he sustained to his left shoulder on or about 28 April 2015**

50. The determination of whether a pathological condition suffered by a worker is as a consequence of a work injury was considered by DP Roche in *Moon v Conmah Pty Limited* [2009] NSWCCPD 134 (*Moon*). In that matter the worker claimed whole person impairment from symptoms experienced in the left shoulder as a consequence of an accepted injury to the right shoulder. DP Roche said at [45-46]:

"It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with *Conmah* they asked the wrong question.

The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss 'resulted from' the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648)."

51. Deputy President Roche then proceeded to state that the expression "results from" should be applied using the principles set out by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*). In *Kooragang* Kirby P said at [462]:

"It has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act".

52. Kirby P then said at [463-4]:

"...What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury... is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions".

53. I accept from a review of all the evidence that the applicant continued to have problems with his left shoulder after he underwent surgery in February 2016 and despite the optimistic observations found in the reports of Dr Bokor subsequent to that surgery.

54. Although the clinical notes from the applicant's general practitioner, Dr Lachlan Smith, which are in evidence do not go beyond January 2017, there is an entry on 24 January 2017 of an ongoing problem with the left shoulder and right elbow. This is almost one year after the applicant underwent surgery to the left shoulder. There are also references in the clinical notes of Workcover certificates issued for the left shoulder on 22 September 2016 and 21 October 2016.



55. In August 2017 Dr Millons records the applicant having persisting pain in the left shoulder and finds that abducted rotation of the left arm is painful. The restriction of movement in the left shoulder is sufficient to warrant an assessment of 10% permanent impairment for that body part.
56. In June 2018 Dr Breit finds generalised discomfort of the left shoulder even though he is critical of the applicant for marked inconsistency and maximisation.
57. I acknowledge the submission made by Mr Perry that there is very little reference to problems that the applicant was having with his left shoulder in the reports of Dr Sundaraj. The treatment provided by Dr Sundaraj during the course of 2018 is the same period in which the applicant's right shoulder condition is worsening and which will ultimately led to surgery.
58. However, it does not follow that the lack of complaints of symptoms in the left shoulder or treatment of the left shoulder by Dr Sundaraj means that the applicant was not having any problems with the left shoulder during this time. Reading through the reports of Dr Sundaraj it is clear that the applicant's primary concern was for his neck pain, recurring headaches and tinnitus, which Dr Sundaraj records as having arisen from the motor accident which the applicant was injured in. In April 2018 Dr Sundaraj records the applicant saying: "I cannot take this head and neck pain anymore."
59. Later in that same year the treatment provided by Dr Sundaraj concentrates on the applicant's lower back pain.
60. The preponderance of medical evidence does support a finding that the applicant did have ongoing problems with his left shoulder following his surgery in February 2016.
61. The next question to consider is whether the applicant overused his right arm due to ongoing symptoms he was experiencing in the left shoulder. The applicant only identifies the machine that he was working on with the respondent from late 2016 as being the source of additional strain being placed upon his right hand. He does not claim that he has overused his right arm in any of his lifestyle activities.
62. The applicant states in his own evidence that he "favoured" his right hand. He does not state that he overused his right hand or right arm or put additional strain or pressure on his right arm to operate the machine. The applicant's use of the word "favoured" is ambiguous, and it would have been helpful for some additional evidence to be provided as to the amount and duration of effort that he undertook to operate the machine. I do accept, however, from his statement that: "Due to my left shoulder injury, I favoured my right hand while operating the machine, which is difficult for an uninjured to operate with two arms", that the applicant was placing additional stress and strain upon his right arm when operating the machine.
63. There are photos of the machine that the applicant was working on in the Reply. The applicant does not dispute that this was the machine that he worked on. The photos indicate that the safety guard would have been pulled down from no higher than shoulder height. Ty Gock from the respondent states in an email dated 25 February 2020 that there was no above shoulder reaching. Dr Breit records that the applicant pulled the safety guard "at about shoulder height."
64. The applicant does not state that he used his right arm above shoulder height when operating this machine. It is Dr Breit who makes that assumption in his final report dated 15 May 2020.
65. The applicant writes in the claim form in September 2018 that the task that he was doing at the time he was injured was the repetitive movement of pulling down the safety guard. The applicant does not provide any evidence of how often he undertook this action during a shift, but there is no evidence from the respondent which disputes that it was repetitive work.

66. The decision of *Arquero v Shannons Anti Corrosion Engineers Pty Ltd* [2019] NSWCCPD 3 (*Arquero*) involved an issue as to whether a worker had a consequential condition affecting his left knee as a result of an injury to the right knee. DP Wood said at [157]:

“At arbitration, Shannons submitted that Mr Arquero’s evidence fell short of providing details of what he was doing that placed greater strain on the left knee. The submission ignores the evidence in Mr Arquero’s first statement that he had difficulty doing housework, walking long distances, using stairs and took longer to do the gardening. It is a common sense proposition that a person who is not immobilised, and attempts to carry out everyday activities despite his right knee difficulties, would be walking and otherwise using his lower limbs as a matter of course.”

67. In my view it is a common sense proposition that the applicant, who was experiencing ongoing pain and discomfort in the left shoulder, would have placed greater stress upon his right arm in order to pull the safety guard on the machine that he was working on continuously throughout a shift at work. I accept that evidence.

68. I acknowledge that Dr Sundaraj does not record the specific work activities which the applicant identifies as the cause of his right shoulder condition when Dr Sundaraj opines in his report dated 16 April 2020 that there has been an “overuse factor” to the applicant’s right shoulder condition.

69. I also acknowledge that Dr Millons is uncertain on this issue and can only say that the left shoulder injury may have contributed to the right shoulder condition.

70. No opinion has been provided by Dr Bokor on this issue. Dr Bokor would be in an ideal position to provide an opinion because of his treatment of both of the applicant’s shoulders between 2015 and 2019.

71. DP Roche said in *State Transit Authority v El-Achi* [2015] NSWCCPD 71 (*El Achi*) at [72]:

“In the Commission, an Arbitrator must determine, having regard to the whole of the evidence, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.”

72. I have accepted that the applicant continued to have ongoing problems with his left shoulder following the surgery he underwent in February 2016 and that as a result of those ongoing problems the applicant was applying additional pressure with his right arm when operating a machine whilst employed with the respondent. I accept the opinion of Dr Sundaraj that the overuse of the applicant’s right arm has led to symptoms in that arm as a result of the applicant endeavouring to protect the already injured left shoulder. I accept that opinion because although Dr Sundaraj does not specifically record the work undertaken by the applicant, he has treated the applicant for several different conditions and is therefore in a good position to provide an opinion of this issue.

73. I also consider there is sufficient support on this issue from Dr Millons. Dr Millons exercises caution but concedes that the left shoulder may have contributed to the right shoulder condition. He does not reject the proposition.

74. Dr Breit also concedes that it is well recognised that problems with the opposite shoulder are secondary to overuse where there is prolonged dysfunction. However, I find the opinions which Dr Breit then expresses in respect of the applicant to be flawed for a number of reasons.

75. Firstly, Dr Breit assumes from reading reports of Dr Bokor that the applicant was not having any problems with his left shoulder some eight months after his surgery, whereas there is plenty of medical evidence that the applicant was having ongoing problems with his left shoulder.
76. Secondly, the applicant does not state that he had to lift his arms above shoulder level to operate the machine. Dr Breit assumes this in his final report and then relies upon this to doubt the applicant's claim.
77. Thirdly, Dr Breit refers to ill feeling that the applicant has towards the respondent and also relies upon this to doubt the applicant's claim, whereas I could locate no evidence of this. The applicant expresses disappointment that he was never rotated to other jobs but instead was kept on the same machine during 2017 and 2018. However, despite suffering injuries and conditions to several parts of his body whilst employed with the respondent, he has persevered with his employment, and when the applicant made his second statement in December 2019, he was still working in insourcing. I find no basis for Dr Breit forming an opinion based upon alleged ill feeling that the applicant has towards the respondent.
78. I am therefore satisfied that the applicant suffered restrictions and symptoms in the right shoulder as a result of the injury he suffered to his left shoulder. The applicant has a consequential condition affecting his right shoulder which results from the injury to the left shoulder. The injury to the left shoulder (and right elbow) and consequential condition affecting the right shoulder are one injury for the purposes of assessing permanent impairment.

#### **Whether the injury to the left shoulder has materially contributed to the injury to the right shoulder**

79. Although I have found that the applicant has a consequential condition affecting his right shoulder which results from the injury to the left shoulder, I also consider that the injury to left shoulder has materially contributed to the applicant's right shoulder condition, and that also allows both body parts to be assessed together.
80. Mr Brown relies upon the decision of *Ozcan v Macarthur Disability Services Limited* [2020] NSWCCPD 21 (*Ozcan*) to support this argument. In *Ozcan* the worker sustained injury to her lumbar spine and thoracic spine on 14 November 2011, 3 May 2012, and 26 September 2012. The worker sought to have those body parts assessed together for the one assessment of permanent impairment. DP Wood said at [112-113]:

“...consideration must be given to the common law principles in respect of causation, but such consideration cannot be given without regard to the statutory context. In this case, the statutory context is s 322 of the 1998 Act.

I see no reasons why s 322 of the 1998 Act, which by the text itself invites a consideration of causation of the permanent impairment, should operate without a consideration of that necessary element. That is, if the appellant can establish the fact that the first injury materially contributed to the total impairment, then the total impairment is attributable to the injury on 14 November 2011.”

81. DP Wood proceeded to re-determine the issue of whether all of the impairments resulting from the three injuries were to be compensated as a single whole person impairment, and after reviewing the evidence said at [129]:

“Given that there was no issue that the thoracic spine was injured, which injury resulted in an impairment and that the subsequent injuries caused further impairment I see no reason why the second category described in *Oakley* (as set out at [55] above) is not satisfied in respect of the thoracic

spine. The damage sustained was greater because of aggravations of the earlier injury and the additional damage resulting from the aggravated injury should be causally connected to the original injury.”

The “second category described in *Oakley*” had been set out by DP Wood from the decision of *State Government Insurance Commission v Oakley* (1990) 10 MVR 570; [1990] Aust Torts Reports 81-003 as follows:

“...where the further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the defendant’s negligence;”

82. Each dispute turns on its own facts and evidence and in *Ozcan* DP Wood was satisfied from the evidence that the first injury materially contributed to the later injuries sustained by that worker so as to allow the one assessment of permanent impairment. In this dispute I have accepted that the applicant continued to have ongoing problems with his left shoulder following the surgery he underwent in February 2016, accepted that he was placing additional strain upon his right arm as a result of those ongoing problems when operating a machine whilst employed with the respondent, and have accepted from a review of the medical evidence that this additional strain or overuse resulted in restrictions and symptoms in the right shoulder.
83. From those findings it can be found that the injury to left shoulder materially contributed to the subsequent condition which the applicant developed in his right shoulder. The need to place additional strain upon the right arm when operating the machine due to the ongoing effects of the left shoulder injury was a significant contribution to the symptoms which the applicant began to experience in the right shoulder by 2018. That is what is accepted by Dr Sundaraj and regarded as a real possibility by Dr Millons.
84. I am satisfied that this second argument that has been made by the applicant in favour of the one assessment of impairment for both upper limbs has also been established from the evidence.

**Whether the injury to the left shoulder and right elbow, and the injury to the right shoulder, are all disease processes which arise from the same type of work undertaken by the applicant, so as to allow all three body parts to be assessed together**

85. I have already found in favour of the applicant on two arguments seeking the one assessment of permanent impairment. However, to complete the issues that are in dispute, it is my view that the injury to the left shoulder and to the right shoulder do not result from the same injurious incident or event, and the applicant fails on this particular argument.
86. The applicant relies upon the decision of *Department of Ageing, Disability and Home Care v Findlay* [2011] NSWCCPD 65 (*Findlay*). In that decision DP Roche considered the issue as to whether an injury to the cervical spine could be assessed for permanent impairment together with an injury to the lumbar spine, as both conditions resulted from the same injurious incident and said at [55]:

“While the injury to Ms Findlay’s cervical spine may well be the same as the injury to the lumbar spine, I prefer to base my decision on the fact that the injuries (whether or not they resulted in the same pathology) have resulted from the same injurious incident, namely, the heavy repetitive duties Ms Findlay performed with the Department since 1997.”

87. DP Roche reviewed some previous Court of Appeal decisions and then said at [58]:

“It follows from the above authorities, and from Ms Findlay’s evidence, that she developed a slow deterioration of problems in her *back and neck* in performing her work tasks over time, that the aggravation injury to her cervical spine and lumbar spine has resulted from the ‘same incident’ under s 322 (3) of the 1998 Act, and any impairments resulting from that incident should be assessed together.”

88. I am not satisfied that the injury to the applicant’s left shoulder and to his right shoulder result from the same incident. The applicant states that on 28 April 2015 he was welding sockets into cylinders when he felt a pop in his left shoulder. There was some debate during the hearing between counsel as to whether the injury on 28 April 2015 was a frank injury which caused a tear in the left shoulder or whether the event was the end result of a disease process caused by heavy work.

89. In my view this is of no consequence in respect of this argument because the injury sustained by the applicant to his right shoulder resulted from an entirely different incident, namely the repetitive use of the arms, especially the right arm, in pulling down the safety guard. As DP Roche also said in *Findlay* at [56]:

“The Commission determines whether a worker has received ‘an injury’ by applying s 4, not s 15 or s 16. Mahoney AP explained this point in *Crisp v Chapman* (1994) 10 NSWCCR 492. In that case, it was submitted that the worker’s case had been pressed on two alternative bases, ‘the section 15 basis and the section 16 basis’. In response to that submission, his Honour said (at 495):

‘It is, I think, a confusion to treat section 15 or section 16 of the 1987 Act as, in the sense here relevant, creating liability for compensation. In general, each of the sections assumes that an injury has occurred and each provides the means of determining when the injury is deemed to have happened, by whom compensation is payable, and other ancillary matters. In principle, it remains for the worker to prove that an injury has occurred and accordingly that section 9(1) had been satisfied. To prove that, it is necessary for the worker to prove the ‘happening’ of an injury within section 4. However, section 15 applies essentially in the case of an injury of the second kind to which I have referred [a work-caused disease] and section 16 to an injury of the third kind [a work-aggravated disease]. It is, therefore, no doubt convenient to refer to injuries of those kinds as cases within section 15 and section 16 respectively. However, it is necessary in doing so to recall that essentially the injuries are those provided for in section 4.’”

90. That the injury to the left shoulder and right shoulder are both caused by disease processes is not relevant to the approach taken in *Findlay*. What is required is an investigation of the injurious event or incident which caused the injury. In this dispute the injury to the left shoulder and injury to the right shoulder have resulted from two separate injurious incidents.

91. However, as I have already found, there can be one assessment of permanent impairment because I am satisfied that the right shoulder condition is a consequence of the left shoulder injury and that the left shoulder injury materially contributed to the right shoulder condition.

## The date of injury for the referral for the assessment of permanent impairment

92. I agree with the submission made by Mr Brown that the date of injury for the claim for permanent impairment should be the date when the claim was made, being 22 July 2019.
93. That the date of the claim for permanent impairment is the deemed date of the injury is well summarised by Keating P in *Westpac Banking Corporation v Hungerford* [2018] NSWCCPD 50 when, after referring to *SAS Trustee Corporation v O'Keefe* [2011] NSWCA 326, the President said at [70]:

“The circumstances of this case are similar to those in *O'Keefe*, namely, as the fresh evidence establishes, Ms Hungerford was in receipt of weekly benefits paid voluntarily by the insurer. Ms Hungerford made a subsequent claim for lump sum compensation. As Handley AJA's remarks make clear, s 16(1)(a)(i) of the 1987 Act only applies to a claim for weekly compensation and the authorities establish that if the claim is for lump sum compensation any earlier claim for weekly compensation is irrelevant. A permanent impairment injury is deemed to have happened when the lump sum compensation claim is made.”

94. I am satisfied that the injury to the left shoulder and the right shoulder were caused by disease processes. Although Mr Perry argued that the injury to the left shoulder resulted from a frank incident on the day of 28 April 2015, there is good compelling medical evidence to find that the injury to the left shoulder was a disease injury. Dr Bokor opines in a report dated 23 October 2015:

“This gentleman's requirement for surgery is related to the nature of his occupation which is repetitive lifting over a sustained duration. The workplace incident on 28 April is simply the 'straw that broke the camel's back' as they say.”

95. In a supplementary report dated 27 April 2018, Dr Millons writes:

“I felt when I saw Mr Safi that *left shoulder and right elbow* problems would not have come about instantly but could have crept up on him over a period of time as he went about his daily labours.”

96. There will be a referral for assessment of whole person impairment of the left upper extremity (shoulder) and right upper extremity (elbow and shoulder) with a deemed date of injury of 22 July 2019.

