WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1619/20**
Applicant: **Josephine Hough**
Respondent: **Australian Unity Pty Ltd t/as Better Home Care**
Date of Determination: **15 September 2020**
Citation: **[2020] NSWWCC 324**

The Commission determines:

1. The applicant suffered an injury to her right upper extremity (shoulder) and cervical spine on 24 February 2015 pursuant to section 4(a) of the *Workers Compensation Act 1987*.

2. The applicant suffered a consequential condition to her left upper extremity (shoulder) as a consequence of her right shoulder injury.

3. Award for the respondent in respect of the claim of injury to the lumbar spine on 24 February 2015.

4. The applicant suffered an injury to the cervical spine and lumbar spine arising from the nature and conditions of her employment pursuant to section 4(b) (ii) of the *Workers Compensation Act 1987*.

5. The proposed surgery to the cervical spine is reasonably necessary.

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

E BEILBY

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 E BEILBY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Josephine Hough (the applicant) commenced working for the Illawarra Nursing Service as an in-home care worker in October 2013. The Illawarra Nursing Service was taken over by Australian Unity Pty Ltd (the respondent) in September 2014.

2. The applicant was required to provide what can only be described as heavy personal assistance to clients. This included room attendance and cleaning, changing bed linen, and personal care which included showering, toileting and dressing, transfers and manual handling.

3. The applicant describes in her statement[1] that on approximately 90% of occasions she would be working on her home and would be required to perform these duties with no partner or any type of assistance.

4. On 24 February 2015 the applicant was assisting a significantly paralysed elderly female resident and was working alone. The applicant was using a bed slider to transfer the resident from her bed to a shower chair in circumstances where no hoist was available. Immediately after the transfer the applicant says that she felt severe pain in her right shoulder and much of her right arm felt numb and dead.

5. The applicant describes herself in her statement as someone who rarely attended upon doctors however because the shoulder pain troubled her she did end up consulting her general practitioner Dr Gemenis on 13 April 2015. The applicant was given anti-inflammatories and referred for an ultrasound of the right shoulder.

6. The applicant underwent the ultrasound of the right shoulder which confirmed subacromial bursitis with a partial supraspinatus tear and impingement of the right shoulder.

7. The applicant underwent ultrasound guided steroid injections on both 21 May 2015 and then on 28 July 2015 with no satisfactory result.

8. The applicant was referred to Dr Herald by her general practitioner whom she first saw on 12 August 2015. Dr Herald recommended an MRI and an arthroscopic repair of the right shoulder.

9. The applicant then consulted Dr Goldberg, shoulder surgeon, for a second opinion in September 2015 who also agreed that surgery was required at that stage.

10. The applicant says that in approximately November 2015 she observed fatigue and pain in her left shoulder which she says is because she was favouring her right shoulder. However at that time the applicant's main focus of concern was her right shoulder for which she had begun physio treatment and hydrotherapy treatment.

11. On 11 March 2016 the applicant underwent the proposed surgery under the care of Dr Herald to repair the supraspinatus rotator cuff tear in the right shoulder. The applicant's recovery was initially good however shortly thereafter in June 2016 she once again felt significant pain in her shoulder. Dr Herald opined the applicant was suffering bursitis and referred her for a further ultrasound and x-ray. The scans confirmed the applicant was suffering from mild bursitis and recommended further treatment which included another cortisone injection, anti-inflammatories and massage therapy. Fortunately for the applicant the results from the cortisone injection this time were good.

12. The applicant returned to work on light duties on 12 September 2016.

[1] Page 2 of the Application

13. The applicant continued to experience flare-ups and pain in her right shoulder and underwent a further steroid injection on 31 October 2016 which unfortunately did not have a result as positive as the previous injections had been. Her final injection took place on 31 January 2017 which provided no benefit to the applicant.

14. In respect of the left shoulder, the applicant says that she continued to favour her left shoulder both before and after the surgery to her right shoulder (11 March 2016). The applicant says she complained to her general practitioner about aching in her left shoulder and underwent an ultrasound which diagnosed the applicant as suffering from tendinopathy. The applicant also complained to Dr Herald of her left shoulder when she saw him in November 2016 and as a result was referred for scans on 13 January 2017. The scans confirmed the applicant was suffering from subacromial bursitis and a partial thickness rotator cuff tear in her left shoulder.

15. In respect of the cervical and lumbar spine pain, the applicant says that she understood that Dr Herald was concerned in February 2017 that pain was radiating into the neck as well and as a result she was referred off for an MRI. The applicant underwent an MRI on 16 March 2017[2] which disclosed significant degenerative disc and facet joint changes, most pronounced on the left C5/6 and C6/7. Dr Herald after receiving the MRI, diagnosed the applicant having a C5/6 disc prolapse and impingement on both nerve roots. Dr Herald referred the applicant to Dr Michael Donnellan neurosurgeon.

16. The applicant first saw Dr Donnellan on 28 April 2017 and was referred for a CT and a bone scan. The applicant says that in that consultation she informed Dr Donnellan that she was suffering from pain in her lower back and into her right leg. Dr Donnellan recommended that the applicant have a C5/6 injection which she underwent with some temporary relief.

17. Dr Donnellan has recommended the applicant undergo a two-level surgery in the cervical spine by way of fusion at C5/6 and then C6/7 some three months later. He also recommended an L4/5 decompression on the right side which is not being pursued in this application.

PROCEDURE BEFORE THE COMMISSION

18. The parties attended an arbitration on 20 June 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. 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.

19. At the Arbitration the applicant amended the claim to allege injury to the right shoulder, cervical spine and lumbar spine as a result of an event on 24 February 2015 when she was moving a resident.

20. The parties were directed to provide written submissions, the applicant going first and then the respondent. The applicant was afforded an opportunity to provide submissions in reply and elected not to. The applicant provided submissions dated 7 July 2020 and the respondent's submissions were dated 22 July 2020.

ISSUES FOR DETERMINATION

21. The parties agree that the following issues remain in dispute:

    (a) Has the applicant suffered an injury to the cervical spine, lumbar spine and right and left shoulders? If so; what role do the nature and conditions of employment and/or the incident on 24 February 2015 play?

[2] Application page 111

(b) Is the proposed cervical spinal surgery reasonably necessary?

Matters not in dispute

22. At the Arbitration the applicant and respondent were able to resolve the dispute in relation to weekly compensation with an agreement that the respondent pay the applicant $300 per week from 13 March 2018 to 1 December 2018 pursuant to s 37 of the *Workers Compensation Act 1987* (the 1987 Act). The applicant discontinued the claim in respect of the proposed lumbar spinal surgery.

23. My notes from the Arbitration also reflect that in light of the agreement reached in respect of weekly compensation, the psychological claim was not being pursued at this stage. I observe that the parties have prepared short written submission on this issue. The parties are to indicate to the Registry if they now want that matter determined.

24. The claim in respect of injury to both shoulders arising from the nature and conditions of employment does not appear to be subject to discrete submissions in the applicant's submissions dated 7 July 2020. If the applicant seeks a determination respect of this issue, they are to file submissions addressing this issue forthwith.

EVIDENCE

Documentary Evidence

25. 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 to the Application to Resolve a Dispute;

(c) Late documents dated 4 June 2020, and

(d) Late documents dated 16 June 2020.

Oral Evidence

26. There was no application to adduce oral evidence

Medical Evidence

27. The written submissions prepared by both the applicant and respondent helpfully describe the medical treatment the applicant has been afforded. I will now look at the medical opinion and the treatment records to assist in determining this dispute.

Dr Donnellan

28. The applicant first saw Dr Donnellan (neurosurgeon) on 28 April 2017.[3] Dr Donnellan had a history of the incident on 23 February 2015 and that at that time the applicant "noticed that her right arm was feeling dead. She also developed right-sided neck pain and pain going into her right shoulder and into her right upper arm." Dr Donnellan was concerned that part of the pain syndrome was emanating from C5/6 level perhaps due to nerve root impingement or referred pain from a discal facet joint arthropathy. Dr Donnellan at that stage recommended a steroid injection to the affected level together with a CT scan and bone scan.

29. The applicant was reviewed by Dr Donnellan on 29 May 2017 after having her CT scan, bone scan and steroid injection. The applicant explained to Dr Donnellan that she had not

[3] Pages 153-154 of the Application

been given any significant relief from her shoulder pain but had received two or three days of relief of neck pain. Dr Donnellan observed the applicant had facet joint arthritis in the L4/5 level of the lumbar spine and there was significant inflammation at C5/6 disc in the neck.

30. At that stage Dr Donnellan considered that the only surgical remedy for the applicant's neck pain was a fusion.

31. The applicant saw Dr Donnellan again on 5 June 2017 and 21 September 2017 after having a further cervical spine injection at C5/6. Once again Dr Donnellan recommended C5/6 and C6/7 anterior cervical disc fusion.

32. The applicant saw Dr Donnellan again[4] on 19 December 2017 complaining of brachialgia and sciatica. Dr Donnellan suggested an occupational physician consultation may assist with getting surgery approved.

33. In respect of the spine Dr Donnellan in his report dated 27 June 2018[5] opined that the nature and conditions of employment most likely caused the injury to the cervical spine. Further, it was Dr Donnellan's opinion that the lumbar spine condition with associated right-sided sciatica was caused by the nature and conditions of work and her spinal dysfunction was caused by a mechanical injury on 24 February 2015.

34. In a further report dated 10 July 2019[6] Dr Donnellan described the application as working at the "coal face" of nursing and had had a hard-working life. This had put a strain on her joints and discs in the neck and made it more likely she sustained the injury that she suffered on 24 February 2015. Dr Donnellan once again recommended the applicant having the proposed cervical surgery as all conservative treatment had failed and therefore it was reasonably necessary. Dr Donnellan clearly attributes the injury to the cervical spine to the nature and conditions of work up to 24 February 2015 and the event of that date.

35. In respect of the lumbar spine, Dr Donnellan[7] opined that the applicant had a degenerative lumbar spine due to the nature and conditions of her work and that the canal stenosis at L4/5 and the synovial cyst were likely to be there as a direct result of the nature and conditions of employment both before the accident and then acutely by the accident on that date. That is, the applicant has experienced wear and tear in the facet joints of the lumbar spine due to the type of work she has performed over many years and the incident on 24 February 2015 would have been likely to cause the development of the synovial cyst due to the already degenerative condition as a result of work.

Dr Herald

36. The applicant first saw Dr Herald on 14 September 2015.[8] At that stage Dr Herald had the benefit of an MRI scan which he said showed right shoulder moderate glenohumeral arthritis and subacromial bursitis and a partial thickness rotator cuff tear with a type 3 spur. Dr Herald thought at that stage that right shoulder arthroscopy should be explored.

37. Dr Herald reviewed the applicant on 28 September 2015 and at that stage he recommended a right shoulder arthroscopy due to failed conservative treatment and a repair of the rotator cuff and treatment.

38. Dr Herald reviewed the applicant again on 7 December 2015[9] and understood that the applicant's right shoulder pain was not improving and that she had commenced physiotherapy. Once again Dr Herald recommended arthroscopy to treat the rotator cuff tear.

[4] Page 160 of the Application
[5] Page 167 of the Application
[6] Page 181 of the Application
[7] Page 183 of the Application
[8] Page 132 of the Application
[9] Page 135 of the Application

39. On 7 December 2015, Dr Herald wrote to the respondent's insurer answering questions that were posed for him to answer. In this short handwritten report, Dr Herald confirmed the need for rotator cuff surgery to the right shoulder. Dr Herald was of the view that the applicant's psychological state at that stage was not contra-indicative to surgery and suggested there could be a worse result if the applicant did not have the surgery.

40. The applicant was reviewed once again by Dr Herald on 5 February 2016. At that stage the applicant presented with a deteriorating right shoulder pain. Once again Dr Herald recommended the arthroscopic repair.[10]

41. On 11 March 2016, the applicant underwent surgery performed by Dr Herald and then saw Dr Herald for follow-up post-surgery on 1 April 2016. On 10 June 2016, the applicant presented with significant pain and as a result Dr Herald sent the applicant for a cortisone injection (which was performed on 1 July 2016). The applicant also underwent an ultrasound scan of her right shoulder[11] on 20 June 2016, which revealed tendinopathy of the right supraspinatus and subscapularis tendons and a mild thickening of the subacromial/subdeltoid bursa.

42. In his report dated 21 June 2018, Dr Herald's opinion[12] was that the nature and condition of the applicant's work including the incident of 24 February 2015 was the most likely cause of the genesis of the complaint of injury to the right shoulder. Indeed, he opined that the event on 24 February 2015 was the most likely incident responsible for the tear found in the applicant's shoulder. He also opined that the applicant had developed a consequential condition of the left shoulder and had cervical pathology. It is therefore Dr Herald's opinion that the applicant has suffered a right shoulder injury due to the nature and conditions of work and due to the events of 24 February 2015 and a consequential injury to the left shoulder.

43. The applicant was once again reviewed by Dr Herald on 5 August 2016[13]. At that stage Dr Herald understood the applicant was undergoing hydrotherapy, physiotherapy and massage therapy. Dr Herald then recommended the applicant could return to work on light duties only.

44. Dr Herald saw the applicant again on 21 October 2016[14] and on examination found a markedly positive impingement sign in the right shoulder. Dr Herald thought that there may have been a flare-up of bursitis and recommended an MRI scan and a further cortisone injection.

45. The applicant then underwent the ultrasound guided steroid injection and an MRI scan of the right shoulder. The MRI displayed intact rotator cuff repair, scarred supraspinatus tendinopathy as expected, moderate subacromial bursitis and prominent capsular scarring. There was also residual scarring of the under surface of the acromion.

46. The applicant saw Dr Herald on 25 November 2016 after having a cortisone injection and Dr Herald observed that the applicant had not received any relief but indeed had increased pain. It was at this consultation that the applicant also complained of left shoulder pain.

47. On 13 January 2017, Dr Herald reviewed the applicant once again in respect of both her left and right shoulder. On examination, the left shoulder exhibited positive impingement signs on examination. Dr Herald thought that there may be a small partial thickness rotator cuff tear and subacromial bursitis in the left shoulder. He recommended an injection of cortisone and anaesthetic into left shoulder.

[10] Page 138 of the Application
[11] Page 145 of the Application
[12] Page 166 of the Application
[13] Page 147 of the Application
[14] Page 148 of the Application

48. On 24 February 2017, after undergoing a right shoulder CT-guided steroid injection, the applicant saw Dr Herald again and reported that the local anaesthetic and cortisone injection had not provided her with any relief. On examination, Dr Herald found pain in the parascapular muscles radiating to the neck and also positive impingement signs. Dr Herald opined that the applicant continued to suffer from subacromial bursitis and suggested that it would be appropriate for the applicant to undergo an MRI of her cervical spine to assist in determining any cause for the ongoing discomfort.

49. On 16 March 2017, the applicant underwent x-ray and MRI scanning of the cervical spine as referred by Dr Herald. The MRI concluded that there was significant degenerative disc and facet joint changes most pronounced on the left at C5/6 and C6/7. There was also foraminal stenosis at the right C5/6 level.

50. The applicant once again consulted with Dr Herald on 31 March 2017 who observed that the applicant continued to have neck and shoulder pain. Dr Herald had the benefit of the MRI scans which showed minimal bursitis and a C5/6 disc prolapse with impingement on both nerve roots, the left as well as the right. Dr Herald then was concerned that the pain was emanating from the neck rather than the shoulder and referred the applicant off to Dr Donnellan for assessment.[15]

51. On 26 May 2017, the applicant once again was reviewed by Dr Herald. Dr Herald observed the applicant was now complaining of back pain and sciatica down her right leg.

52. Dr Herald has prepared a report dated 21 June 2018[16] which sets out clearly his opinion and understanding of the applicant's injury. He observes that the applicant has pain and restriction in the right shoulder which is uncontroversial. He observes that there have been cortisone injections and surgery performed but the applicant still has difficulty with the shoulder. The applicant still had stiffness and a frozen shoulder and ultimately it had been discovered that there is a disc prolapse in the cervical spine. Dr Herald commented that the last time he examined the applicant on 26 May 2017 he had found tenderness in the cervical spine and lumbar spine with positive straight leg raising and gross neurological abnormalities in the right arm and right leg.

53. Dr Herald opined that the nature and conditions of the applicant's work as an AIN and the incident on 24 February 2015, were the most likely cause of the complaint of injury to the right shoulder. He opined that the incident of 24 February 2015 was the most likely incident responsible for the tear found in the right shoulder and that the applicant had subsequently developed left shoulder and neck problems.

54. In respect of the left shoulder, Dr Herald's opinion is that there are complaints as early as November 2016 in respect of symptomatology in the left shoulder which was a time when the applicant's general practitioner had referred her off for scans. Dr Herald also supported injury to the neck resulting from the nature and conditions of work and opined that the surgery to the right shoulder was reasonably necessary.

Dr Ho

55. The applicant was referred to Dr Ho, orthopaedic surgeon, who has prepared a report dated 14 January 2020. Dr Ho opined that the right shoulder pathology was directly from the work injury by way of aggravation. He also observed the applicant may have strained her neck when she injured her right shoulder but quite clearly Dr Ho did not accept a consequential left shoulder condition or a lumbar spine condition. Dr Ho did consider that the proposed surgery was reasonably necessary and in respect of the right shoulder and neck, supports injury due to the nature and conditions of work.

[15] Page 152 of the Application
[16] Page 165 of the Application

Dr Patrick

56. Dr Patrick has provided two reports[17] where he considers the applicant's injuries. It is his opinion that the applicant has significant ongoing symptoms of both the left and right shoulders and cervical spine.

57. In his second report dated 2 September 2019, Dr Patrick opines that the applicant's right shoulder injury was caused both at the time of the incident on 24 February 2015 and due to the nature and conditions of employment up to that date.

58. In respect of the left shoulder symptomatology, Dr Patrick's opinion was that the problems came to a head when the applicant underwent the right shoulder surgery. He opined that the left shoulder problems can reasonably be regarded as a consequential injury arising from both the continued nature and conditions of employment subsequent to the accident dated 24 February 2015 and also consequential overuse of the left shoulder subsequent to Dr Herald's right shoulder surgery on 11 March 2016.

59. In respect of the cervical spine, Dr Patrick's opinion was that the extent of degenerative arthritic condition in the cervical spine could reasonably be regarded as having been aggravated, exacerbated and accelerated both by the workplace accident on 24 February 2015 as well as the nature and conditions of employment. In respect of the surgical intervention proposed, Dr Patrick is of the view that the surgery is both reasonable and necessary.

60. In respect of the lumbar spine, Dr Patrick opined that the degenerative condition of the lumbosacral spine had been aggravated, exacerbated and accelerated by both the workplace accident on 24 February 2015 as well as the nature and conditions of her employment as an AIN.

Dr Maloney

61. Dr Moloney has prepared a report at the request of the respondent's solicitor dated 31 January 2020.[18] Dr Moloney helpfully outlines a thorough history of the applicant's treatment and investigations in his report. On examination, Dr Moloney observed the applicant's cervical spine and lumbar spine movements were restricted.

62. Dr Moloney opined that the applicant had suffered an injury possibly to her right shoulder and to her neck in the course of her employment on 24 February 2015. He also thought that there could be a problem with her back however could not see a causal link between the back problem and the injury sustained on 24 February 2015. He also observed that the applicant had been diagnosed with depression and anxiety secondary to the injuries that she had sustained and this would appear reasonable on the basis of the longstanding neck and shoulder symptoms. Dr Moloney therefore opined that the applicant sustained an injury to her right shoulder when she was managing a polio patient with limited mobility. He also thought that on balance it was at this time that she sustained injury to her neck given that her complaints following the injury were of neck, shoulder and arm pain and numbness.

63. In respect of the left shoulder Dr Moloney thought that the left shoulder injury was as a consequence of the injury to the right shoulder because of the added wear and tear to the left shoulder caused by the injury to the right neck and shoulder.

[17] Pages 81 and 121 of the Application
[18] Page 123 of the Application

64. Dr Moloney does not provide significant support in respect of the lumbar spine claim of injury as there was no reporting of a back issue at the time of the injury to her neck and shoulder on 24 February 2015. However, further in his report[19] Dr Moloney did opine that work was probably a contributing factor by way of the nature and conditions of employment to the applicant's lumbar spine condition.

65. In respect of the proposed surgery recommended by Dr Donnellan, Dr Moloney agreed that the C5/6 and C6/7 surgery was reasonable and should be undertaken. This is in circumstances where Dr Moloney understands that there has been a significant length of time from the injury which would mitigate against a good outcome from surgical intervention. Dr Moloney however considers that given that Dr Donnellan has carried out blocks at C5/6 and C6/7 which had been diagnostically positive, surgical intervention should be undertaken.

Dr Rimmer

66. Dr Rimmer has prepared two reports at the request of the respondent insurer. In his first report dated 24 July 2017[20], Dr Rimmer took a history of the gradual onset of pain in the cervical spine, lumbar spine and right-sided sciatica some two and half years after the frank incident. In relation to left shoulder, the applicant reported that in November 2016 she experienced the gradual onset of pain in the left shoulder and could not recall a specific initiating event.

67. Dr Rimmer accepted the right shoulder injury and expressed concern regarding abnormal illness behaviour. Dr Rimmer opined that the applicant had pre-exiting degenerative change in the other claimed body parts.

68. In his second report dated 1 February 2019[21] Dr Rimmer again expressed concern about abnormal illness behaviour and narcotic dependence. He accepted the applicants claim regarding the right shoulder but again rejected all other body parts, In respect of claimed of pain in cervical spine, lumbar spine and left shoulder, Dr Rimmer opined that there was no relationship to the work incident or the nature and conditions of her employment.

Dr Stephenson

69. Dr Stephenson examined the applicant has prepared a report dated 16 December 2016[22]. The report seems concerned primarily in relation to the right shoulder condition which Dr Stephenson agrees has a rotator cuff tear. In his opinion, Dr Stephenson assesses that there is no contribution from any constitutional issues such as age or weight to the applicant's right shoulder condition. Whilst Dr Stephenson understands the applicant is a experiencing some symptomatology in her left shoulder he makes no discrete diagnosis in respect of it.

Submissions- Considered

Frank Incident 24 February 2015

70. The respondent accepts that the applicant suffered an injury to her right shoulder in the incident on 24 February 2015, however it is denied that the applicant suffered injury to her cervical or lumbar spine. The respondent further denies liability for the injury to the right shoulder on the basis that she recovered from the effects of the incident on 24 February 2015.

[19] Page 6 of the report
[20] Page 363 of the Reply
[21] Page 373 of the Reply
[22] Page 353 of the Reply

71. The respondent also points to the treatment and investigations that the applicant had following the incident on 24 February 2015 were only in respect of the right shoulder.[23] This includes the following matters:

    (a) On 16 April 2015, the applicant underwent a right shoulder ultrasound;[24]

    (b) On 21 May 2015, the applicant underwent an ultrasound-guided steroid injection to her right shoulder;[25]

    (c) On 28 July 2015, the applicant underwent an ultrasound-guided cortisone injection in the subacromial bursa;[26]

    (d) The applicant was referred to Dr John Herald whom she first saw on 31 August 2015 where there was only a complaint in respect of the right shoulder;[27]

    (e) Dr Herald referred the applicant for an x-ray and an MRI of her right shoulder which was undertaken on 3 September 2015;[28]

    (f) The applicant saw Dr Herald on five further occasions where there was no recorded complaint of any other body part other than the right shoulder;

    (g) On 11 March 2016, the applicant underwent surgery on her right shoulder at the hands of Dr Herald;[29]

    (h) The first mention of any other body part other than the right shoulder was on 25 November 2016 to Dr Herald[30] when the doctor recorded the applicant as saying she had discomfort in the left shoulder;

    (i) Dr Gemenis has not provided a report and his clinical records are not in evidence. However, there are numerous workers compensation medical certificates in evidence.[31] Not one of the medical certificates mentions the neck or cervical spine, and

    (j) Dr Rimmer who saw the applicant on 24 July 2017[32] obtained a history from the applicant that there was a gradual onset of cervical spine pain and lumbosacral pain and right-sided sciatica approximately 2½ years after the injury.[33] The respondent submits that this lends weight to the proposition that the applicant only suffered an injury to her right shoulder in the incident on 24 February.

72. Further the claim form submitted by the applicant on 16 October 2015[34], signed by the applicant, only refers to an injury to the right shoulder.

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[23] Paragraph 7 of the respondent's submissions
[24] Page 96 of the Application
[25] Page 97 of the Application
[26] Page 98 of the Application
[27] Page 131 of the Application
[28] Page 99 of the Application
[29] Page 139 of the Application
[30] Page 149 of the Application
[31] Page 187-288 of the Application
[32] Page 363 of the Reply
[33] Page 364 of the Reply
[34] Application page 14

73. There is a lack of evidence, even from the applicant in her statement ,that she experienced lumbar symptomatology at the time of the incident. This to my mind is significant. The onset of lumbar pain appears to be years after the frank incident as illustrated in May 2017 when complaint was made to Dr Herald. In those circumstances, it is difficult to see how a finding can be made in the applicant's favour relating to the lumbar spine.

74. In rejecting the claim regarding the lumbar spine arising from the frank incident, I do take into account the opinions of Dr Herald, Dr Donellan and Dr Patrick who have found injury arising from the frank incident. I am not however persuaded of an injury arising from the frank incident in circumstances where there is no contemporaneous evidence in respect of complaint or symptomatology at all.

75. In relation to the cervical spine the respondent directed attention to the lack of contemporaneous complaint. It is quite true that there is no contemporaneous evidence of any neck discomfort at the time of the event or shortly thereafter. The only evidence is in relation to Dr Patrick who in his first report dated 12 February 2018[35] noted that soon after the event the applicant was aware of significant neck discomfort.

76. Against the lack of contemporaneous report, the applicant clearly complains of numbness in her right arm in her statement and in histories given to various doctors who examined the applicant later in time. It really isn't until February 2017[36], that Dr Donnellan, turns his mind to the cervical spine. Quite clearly pathology is then found on MRI investigation.

77. The respondent has raised issues in relation to the applicant's credit in its submissions to the extent of the applicant had pre-existing symptomatology in the lumbar spine and cervical spine and this history has not been provided.

78. In respect of the cervical spine it appears that the applicant had a CT scan of her neck on 22 September 2004 and 5 November 2004. Then there was a further cervical x-ray on 7 May 2007. None of these investigations appear to be part of the history provided to the doctors who examined the applicant in respect of this dispute.

79. The lack of disclosure in respect of these previous investigations is concerning though not fatal to the applicant's claim on my assessment. The cervical spine does not appear to have been treated actively for many years before the frank incident. If there had been concurrent treatment and had not been disclosed this would have caused a serious assault on the applicant's credit. Given that the previous investigations were some five years before the frank incident does not to my mind raise an issue of credit.

80. The applicant statement is quite clear that at the time of the frank incident she felt symptomatology going down her right arm. This is a history that I accept from the applicant and is supportive of a cervical spine injury at that time.

81. The failure of the applicant to complain respect of the cervical spine is not surprising given the right shoulder symptomatology that she was experiencing.

82. There is significant medical support for injury to the cervical spine in the frank incident. This includes Dr Donnellan, Dr Herald, Dr Ho and Dr Patrick. Dr Moloney also considers that it was possible that the applicant injured her neck in the event. Dr Rimmer do not accept that there has been an injury as claimed in that respect.

[35] Page 82 of the Application
[36] Application page 151

83. Given the support from the two treating surgeons, Dr Donnellan and Dr Herald, who have seen the applicant on many, many occasions, I accept that the applicant has suffered an injury to her cervical spine arising from the frank incident. Dr Donellan and Dr Herald 's opinion is should be given more weight given their active treatment of the applicant over time

84. Based upon my reasoning in the preceding paragraph, it follows that there is a positive finding in relation to injury to the cervical spine arising from the frank incident.

85. I therefore find in favour of the applicant in respect of an injury to the cervical spine as a result of the incident on 24 February 2015. I find in favour of the respondent in respect of the claim of injury to the lumbar spine on 24 February 2015.

Left Shoulder- Consequential injury 24 February 2015

86. In respect of the left shoulder, this is claimed as a consequential condition.

87. The applicant must establish that she suffered a condition in the left shoulder consequent on the accepted right shoulder injury, that is the left shoulder condition "resulted from" the right shoulder injury. The test to be applied is in the principle set out by Kirby P in *Kooragang Cement Pty Ltd v Bates*[37] namely:

> "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 a relevant causative explanation of the incapacity or deaths on which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

88. It is not necessary for the applicant to establish that he suffered an "injury" to the left shoulder within the meaning of section 4 of the 1987 Act, only that the symptoms and restrictions in the left shoulder resulted from the right shoulder injury

89. Dr Ho did not accept that the applicant had any significant problem with her left shoulder. He found it difficult to accept that the left shoulder problems were due to favouring the right rather that the applicant may have had some stiffness and pain in the left shoulder due to referred pain from the cervical spine.[38]

90. Likewise, Dr Rimmer was of the view that the applicant demonstrated abnormal illness behaviour and that any symptoms the applicant was claiming were not due to the employment with the respondent.

91. The first complaint in respect of the left shoulder appears to be to Dr Herald on 25 November 2016.[39] Dr Herald referred the applicant for an MRI scan of the shoulder which was said to show subacromial bursitis and a small partial thickness tear in the left shoulder. There is therefore positive pathology beyond the symptomatology the applicant complains of.

92. Dr Herald accepted the applicant had a consequential condition in her left shoulder. As I have previously stated, Dr Herald's opinion should be afforded significant weight given his close treatment of the applicant over time.

93. There is evidence from the applicant that she favoured her right shoulder as a consequence of her injury. Dr Patrick also accepts the injury. It seems to me to follow in the company of pathology, which is well above the threshold issue of symptomatology, that there has been a consequential condition in the left shoulder.

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[37] (1994) 35 NSWLR 452 at 462 (*Kooragang Cement*)
[38] Page 404E of the Reply
[39] Page 149 of the Application

94. I therefore find that there has been a consequential condition to the left shoulder as a consequence of the right shoulder injury on 24 February 2015. The date of injury should be 24 February 2015.

Nature and Conditions Claim

95. The applicant claims that she has suffered an injury to her right and left shoulders, cervical and lumbar spine arising from the heavy nature and conditions of employment.

96. To my mind there is no doubt, and it has not been put in dispute, that the applicant's work was indeed heavy.

97. I will now look at each body part relation to the claim.

98. So far as the right shoulder is concerned, the respondent points to the opinion of Dr Stephenson, who prepared a report at the request of the insurer dated 16 December 2016[40] was that the applicant's injury to the right shoulder was that of a frank injury by way of rotator cuff tear, not a disease injury.

99. The respondent then criticises Dr Herald's opinion in that he appears to attribute the injury to both the frank incident on 24 February 2015 and the nature and conditions of employment. This is in circumstances where he states that the rotator cuff tear was likely to have been caused on the 24 February 2015.

100. Whilst I can see the apparent contradiction, Dr Herald is referring to the need for surgery as opposed to the whole condition of the shoulder. Dr Herald's opinion is quite clearly that both the nature and conditions of employment and the events on 24 February 2015 have a role to play in the applicant's condition.

101. The respondent further criticises Dr Herald's opinion on the basis that he does not appear to have taken a history of what the nature and conditions of employment involved. In response to this criticism, a doctor with the experience that Dr Herald has would be well versed in the role that an assistant in nursing would perform daily basis

102. Supporting the opinion of Dr Herald however we have Dr Patrick and Dr Donnellan, both supporting a right shoulder injury arising from the nature and conditions of work. As I've previously indicated I placed significant weight on the opinion of Dr Herald and Dr Donellan who have been treating the applicant for a significant period and are well placed to provide an opinion as to causation and diagnosis.

103. I accept that Dr Rimmer does not concede injury to the right shoulder arising from the nature and conditions of employment however his opinion is contrary to the treating doctors who are afforded significant weight to.

104. I am therefore persuaded that the applicant has indeed suffered an injury to her right shoulder arising from the nature and conditions of employment.

105. In respect of the cervical spine is quite clear that the first mention of symptomatology in the cervical spine is on 24 February 2017 when the applicant consults Dr Herald. The respondent raises concern about the hiatus in complaint in respect of the neck.

106. In respect of the delay in complaint, it appears to my mind it is not until Dr Herald turned his mind to the possibility of separate pathology in the cervical spine that this is investigated. This is a reasonable explanation for the hiatus in complaint and investigation, particularly given the applicant significant right shoulder injury.

[40] Page 354 of the Reply

107. The respondent also points to the examination by Dr Gurgo on 29 May 2017[41] at the request of the insurer who could find no evidence of acute disc protrusions in the cervical spine and thought that the applicant had no true upper limb symptoms. This however is at odds with the well accepted pathology found by the treating doctors in this dispute.

108. Dr Maloney also accepts and ultimately concedes that the nature and conditions of employment have contributed to the lumbar spine condition.

109. A claim for the nature conditions of employment injury to cervical spine is supported by Dr Donnellan, Dr Herald and Dr Patrick. As I previously stated I give greater weight to the treating doctors in this case, who have seen the applicant on more occasion.

110. This is consistent with the view of Dr Moloney who opined[42] that the ongoing problems in respect of lower back pain and leg pain were not as a result of the injury in 2015 however had been contributed to in a large part by the nature and conditions of the employment, to the left shoulder. This is also consistent with the opinion of Dr Herald to some extent[43] that it is the nature and conditions of employment that have contributed to the neck condition.

111. I am therefore persuaded, on balance, that the nature and conditions of employment have caused injury to the applicant cervical spine.

112. In respect of the lumbar spine the respondent observed that the first complaint regarding back pain is to Dr Herald on 26 May 2017. On that occasion Dr Herald observed the applicant developed back pain and sciatica down her right leg.

113. It is quite clear that it is Dr Donnellan's opinion that the lumbar spine condition had been caused by the applicant's role as an assistant in nursing. This is supported by the opinion of Dr Patrick who observes the applicant's work was very labour-intensive working with disabled people.

114. It is important to do to note that Dr Donellan has treated the applicant in respect of her lumbar condition is provided treatment by way of a lumbar epidural at L45 amongst other treatment. As Dr Donellan has actively treated the applicant in respect of her lumbar condition, I afford significantly more weight to his opinion so far as diagnosis and causation is concerned.

115. The respondent is critical of the opinion of Dr Patrick in that it is submitted that Dr Patrick does not explain why there is no complaint of neck pain or lumbar pain until two years after the incident. This however is easily explained as there was a focus on the right shoulder condition. The applicant also explains that she did not regular attend upon doctors for treatment in her statement.

116. I observe that both Dr Ho and Dr Rimmer do not accept the lumbar injury. For reasons I have outlined above, I prefer the opinions of the treating specialists who support a finding respect of an injury arising from the nature and conditions of employment.

Proposed surgery

117. Section 60 of the 1987 Act provides:

> **"60 COMPENSATION FOR COST OF MEDICAL OR HOSPITAL TREATMENT AND REHABILITATION ETC**
>
> (1) If, as a result of an injury received by a worker, it is reasonably necessary that--

[41] Page 380 of the Reply
[42] Page 129 of the Application
[43] Page 166 of the Application

(a) any medical or related treatment (other than domestic assistance) be given, or

(b) any hospital treatment be given, or

(c) any ambulance service be provided, or

(d) any workplace rehabilitation service be provided,

the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2). "

118. Burke CCJ in *Rose*[44] considered what reasonably necessary treatment was. In the context of section 10 of the *Workers Compensation Act 1926*[45]:

> "Treatment, in the medical or therapeutic context, relates to the management of disease, illness or injury by the provision of medication, surgery or other medical service designed to arrest or abate the progress of the condition or to alleviate, cure or remedy the condition. It is the provision of such services for the purpose of limiting the deleterious effects of a condition on restoring health. If the particular 'treatment' cannot, in reason, be found to have that purpose or be competent to achieve that purpose, then it is certainly not reasonable treatment of the condition and is really not treatment at all. In that sense an employer can only be liable for the cost of reasonable treatment."

119. In *Diab v NRMA Ltd*[46] Deputy President Roche cited *Rose* with approval. He summarised the principles as follows:

> "In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in Rose namely: (a) the appropriateness of the particular treatment; (b) the availability of alternative treatment, and its potential effectiveness; (c) the cost of the treatment; (d) the actual or potential effectiveness of the treatment, and (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective."

120. Of some assistance in determining disputes such as the present one, Deputy President Roche helpfully stated:

> "With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts."

121. It is accepted that a condition can have multiple causes, but the applicant must establish that the injury materially contributed to the need for surgery. This was confirmed by Deputy President Roche in *Murphy v Allity Management Services Pty Ltd*[47], where he stated:

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[44] *Rose v Health Commission NSW* (1986) 2 NSWCCR 32 (*Rose*).
[45] Par 42.
[46] [2004] NSWCCPD 72 (*Diab*)
[47] [2015] NSWCCPD 49 (*Murphy)*

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have "multiple causes"…… The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act. Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury."

122. The applicant also relies on the opinions of Dr Donnellan in respect of the cervical spine surgery. It is quite evident that conservative treatment has not alleviated the applicant's pain.

123. The respondent raises an issue that there is no evidence from a treating physiotherapist to support a finding that the applicant has indeed had physiotherapy. This to my mind is of little moment given the support provided for the surgery as opined by Dr Ho, Dr Patrick and Dr Maloney. This satisfies that criteria of 'appropriateness' and 'potential effectiveness of the treatment'.

124. Dr Rimmer does not accept that the surgery is reasonably necessary. His opinion is based on eth non acceptance of the applicant's cervical injury and is therefore of limited assistance on this issue,

125. No submissions were made regarding the cost of the surgery and it therefore does not appear to be relevant in this determination.

126. To my mind therefore the surgery is indicated and is reasonably necessary.

SUMMARY

127. The applicant suffered an injury to her right upper extremity (shoulder) and cervical spine on 24 February 2015 pursuant to section 4(a) of the 1987 Act.

128. The applicant suffered an injury to her left upper extremity (shoulder) as a consequence of her right shoulder injury.

129. The applicant suffered an injury to the cervical spine and lumbar spine arising from the nature and conditions of her employment pursuant to section 4(b) (ii) of the 1987 Act.

130. The proposed surgery to the cervical spine is reasonably necessary.