WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **113/20**
Applicant: **Pauline Vernon**
Respondent: **Calvary Home Care Services Limited t/as Calvary Silver Circle**
Date of Determination: **28 April 2020**
Citation: **[2020] NSWWCC 135**

The Commission determines:

1. The matter to be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, of the right upper extremity and left upper extremity as a result of injury deemed to have occurred on 3 July 2014.

2. The matter to be placed in the medical assessment pending list.

3. The documents to be forwarded to the AMS are those admitted into evidence by consent in these proceedings as follows:

    (a) The Application to Resolve a Dispute and all documents attached.
    (b) The Reply and all documents attached.
    (c) The late documents filed by the Respondent being the reports of Dr Osborne dated 30 October 2017, 11 December 2017, 23 January 2018 and 1 March 2018.

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

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application) the applicant, Ms Pauline Vernon (Ms Vernon) seeks lump sum compensation under section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of injury to her right upper extremity deemed to have occurred to on 3 July 2014. She also seeks lump sum compensation as a result of an alleged consequential condition in her left upper extremity as a result of injury to her right upper extremity deemed to have occurred on 3 July 2014.

2. The respondent is Calvary Home Care Services Limited t/as Calvary Silver Circle (Calvary). Calvary was insured at the relevant time for the purposes of workers compensation by Catholic Church Insurances Limited (the insurer).

3. Calvary denied liability for the claim resulting from the alleged consequential condition in the left upper extremity.

ISSUES FOR DETERMINATION

4. Ms Vernon brings a claim for lump sum compensation as a result of injury to her right upper extremity deemed to have occurred on 3 July 2014 as a result of the "nature and conditions" of her employment with Calvary as a community support worker. This is how injury to the right upper extremity was "pleaded" in the Application and as I was informed by counsel for Calvary that injury to the right upper extremity was not disputed, I have approached the determination of this matter on this basis.

5. In addition, Ms Vernon brings a claim for lump sum compensation as a result of a consequential condition in her left upper extremity that she alleges she suffers from as a result of the injury to her right upper extremity deemed to have occurred on 3 July 2014.

6. It is not disputed that Ms Vernon came to surgery as a result of her injury in the form of arthroscopic acromioplasty to her right shoulder at the hands of Dr Osborne on 23 August 2017, paid for by the insurer.

7. It is disputed that Ms Vernon suffered a consequential condition in her left shoulder as a result of her undisputed right shoulder injury.

8. The dispute before me therefore is whether Ms Vernon has suffered a consequential condition in her left shoulder as a result of the right shoulder injury deemed to have occurred on 3 July 2014.

9. In the event, Ms Vernon is successful before me, the parties agree that the matter should be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, of the right upper extremity and left upper extremity as a result of injury deemed to have occurred on 3 July 2014. The documents to be forwarded to the AMS are agreed to be the documents admitted into evidence in these proceedings.

10. In the event the Respondent is successful in disputing liability for the left shoulder condition, the parties agree that there would be an award for the Respondent in respect of the allegation of injury to the left shoulder and an award for the Respondent in respect of the claim for lump sum compensation as a result of injury to the right upper extremity deemed to have occurred on 3 July 2014. The latter order arises because the assessment for the right upper extremity, upon which the Ms Vernon relies to bring her lump sum claim, is below threshold.

PROCEDURE BEFORE THE COMMISSION

11. The parties attended a conciliation conference/arbitration hearing by telephone on 24 March 2020. The parties were both legally represented. Mr Bartter of counsel represented Ms Vernon and Mr Saul of counsel represented Calvary. 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.

EVIDENCE

Documentary evidence

12. The following documents filed by the parties were admitted into evidence before the Commission by consent and taken into account in making this determination:

    For Ms Vernon:
    (a) The Application and all attached documents.
    (b) It is noted that counsel for Ms Vernon did not press the admission of any other documents.

    For Calvary:
    (a) Reply and all attached documents.
    (b) Late documents filed 18 March 2020 being the reports of Dr Osborne dated 30 October 2017, 11 December 2017, 23 January 2018 and 1 March 2018.

Oral evidence

13. Ms Vernon did not seek leave to adduce further oral evidence and counsel for Calvary did not seek leave to cross-examine Ms Vernon.

FINDINGS AND REASONS

14. It is not disputed that Ms Vernon suffered an injury to her right shoulder which is deemed to have occurred on 3 July 2014.

15. She came to surgery on her right shoulder at the hands of Dr Osborne on 23 August 2017 and paid for by the insurer.

16. She alleges that she has suffered a consequential condition in her left shoulder as a result of favouring her right arm following the surgery to her right shoulder.

17. Calvary disputes that the left shoulder condition is consequential upon Ms Vernon's undisputed right shoulder injury.

18. The law dealing with consequential conditions is clear. It is not necessary for Ms Vernon to establish that the consequential condition in her left shoulder is an "injury" (including "injury" based on the disease provisions) within the meaning of section 4 of the *Workers Compensation Act 1987* (the 1987 Act). This means that section 9A also does not apply here. That is, Ms Vernon does not have to establish that her employment was a substantial contributing factor to the consequential condition alleged in her left shoulder. The disease provisions do not apply such that Ms Vernon does not have to establish that her employment was the main contributing factor to the aggravation of any pre-existing disease in her left

shoulder. It is well settled that, as it is a consequential condition in her left shoulder that is being alleged, all Ms Vernon has to establish is that the symptoms and restrictions in her left shoulder have resulted from right shoulder injury.

19. Deputy President Snell in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23 (*Brennan*) provided a useful summary of the case law dealing with consequential conditions as follows:

> "100. There have been a number of Presidential decisions dealing with the nature of claims in respect of consequential conditions. The principles are described in a number of these decisions, for example *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 (*Moon*) and *Kumar v Royal Comfort Bedding* [2012] NSWWCCPD 8 (*Kumar*). It is unnecessary for a worker alleging such a condition to establish that it is an 'injury' (including 'injury' based on the 'disease' provisions) within the meaning of s 4 of the 1987 Act.
>
> 101. In *Moon* (involving a compensable injury to the right shoulder, allegedly resulting in a consequential condition of the left shoulder) Roche DP at [44]–[46] described what is required:
>
> > '44. The evidence in support of this allegation is brief but clear. It is obvious that Mr Moon has experienced significant restrictions in the use of his right arm and shoulder for several years. It is not disputed that that restriction has resulted from his employment with Conmah. As a result, he has used his left arm and shoulder to compensate for his right shoulder condition. Therefore, Mr Moon is claiming compensation for a consequential loss. That is, a loss or impairment that he alleges has resulted from his previous compensable injury to his right shoulder (see *Roads & Traffic Authority (NSW) v Malcolm* (1996) 13 NSWCCR 272).
> >
> > 45. 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.
> >
> > 46. 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).'
>
> 102. In *Kumar*, one of the qualified medical witnesses approached the issue of whether there was a consequential condition of the right shoulder, by asking whether the worker had suffered a 'work related injury' to that shoulder and whether employment was a substantial contributing factor to the condition of that shoulder. Roche DP at [57] said of the evidence of that medical witness:
>
> > 'Even assuming, as the respondent has urged, that Dr Wallace rejected the totality of the claim for "consequential loss" in respect of the right shoulder, his failure to address the correct issue, and his focus on whether Mr Kumar suffered a work related injury to his right shoulder, means that his report is fundamentally flawed. For these reasons, the Arbitrator should have rejected Dr Wallace's conclusion.'"

20. Deputy President Snell went onto apply the above to the case before him:

> "103. Did Dr Wilcox's report suffer from such a fundamental flaw? If so, the Senior Arbitrator was justified in rejecting the report (consistent with the approach in *Kumar*).
>
> 104. The respondent submitted that the opinion of Dr Wilcox going to the consequential conditions was 'tainted' by his views on the presence and causation of muscle tension dysphonia.
>
> 105. The proceedings were conducted on the basis that the respondent suffered from the condition of muscle tension dysphonia, this being a compensable injury deemed to have occurred on 4 April 2011. What was in issue was whether there were consequential conditions involving the neck and shoulders, which resulted from the conceded injury of muscle tension dysphonia.
>
> 106. For reasons discussed above, I have (at [81]) formed the view that, on a fair reading of his report, Dr Wilcox did not accept the appropriateness of the diagnosis of muscle tension dysphonia or the fact that it resulted from employment. There are passages where the doctor pursues an argument to this effect.
>
> 107. There are passages of the report (see that quoted at [97] above for example) where Dr Wilcox excluded muscle tension dysphonia from his expressed views on causation. However, consistent with the discussion above going to the First Argument put in support of Ground 1, there are other passages where the doctor argues to the contrary.
>
> 108. The passages of Dr Wilcox's opinion quoted at [97] and [98] above are consistent with his report involving the same flaw as that which affected the opinion of the medicolegal expert in *Kumar*. The issue before the Senior Arbitrator was not whether the respondent suffered injury to the neck and shoulders caused by overusing her voice in February/March 2011, under the 'disease' provisions or otherwise. It was not necessary, for the respondent to succeed on the consequential conditions, that she establish 'injury' to these parts within the meaning of s 4 of the 1987 Act.
>
> 109. The weight to be afforded to the opinion of Dr Wilcox was dependant, amongst other things, on its relevance to the issue between the parties. That issue was whether, accepting the conceded compensable injury of muscle tension dysphonia, the alleged consequential conditions resulted from that injury.
>
> 110. The views of Dr Wilcox were 'fundamentally flawed', to appropriate the language in *Kumar*. It follows that the Senior Arbitrator was correct to reject the opinion of Dr Wilcox."

21. That is, it is well settled that it is not necessary for Ms Vernon to succeed in respect of the consequential condition in the left shoulder that she alleges here, to establish "injury" to her left shoulder within the meaning of section 4 of the 1987 Act but that the symptoms and restrictions in her left shoulder have resulted from her right shoulder injury.

22. Accordingly, the question for determination is whether Ms Vernon suffered a consequential condition in her left shoulder as a result of the injury to her right shoulder deemed to have occurred on 3 July 2014.

23. Turning then to an examination of the evidence in this case.

24. Ms Vernon gave evidence in a statement dated 7 October 2016. This statement of evidence deals with her right shoulder injury and is evidence given before the right shoulder surgery took place on 23 August 2017. Her right shoulder injury is not in dispute and the insurer has paid for the surgery performed by Dr Osborne on her right shoulder.

25. Ms Vernon gave further evidence in her statement dated 19 September 2019 that she came to surgery in the form of arthroscopic acromioplasty at the hands of Dr Osborne on 23 August 2017. She gave evidence that she was unable to use her right arm for a number of months following the surgery and was heavily reliant on her left arm as follows:

> "15. Following the surgery to my right shoulder, I was unable to use my right arm for a number of months and I was heavily reliant upon my left arm to perform day to day tasks. Approximately I two months following the surgery, I began to experience pain into my left shoulder. I believe that this left shoulder pain was due to compensatory overuse resulting from my right shoulder injury."

26. Ms Vernon went onto give evidence that she attended on Dr Osborne for reviews of her right shoulder after surgery on 4 September 2017, 3 November 2017, 23 January 2018 and 1 March 2018. I note that the reports of Dr Osborne following these reviews are in evidence having been filed by Calvary.

27. She went onto give evidence as follows:

> "17. In or about April/early May 2018, I attended upon my GP and he recommended that I undergo an X-ray and ultrasound of my left shoulder.
> 18. In or about mid May 2018 I underwent an X-ray and ultrasound of my left shoulder which I understand demonstrated pathology.
> 19. On 22 May 2018 I underwent an ultrasound guided steroid injection into the left subacromial bursas.
> 21. In or about July/August 2018 I attended upon my GP and he recommended that I attend upon Dr Osborne for further opinion and management referrable to my left shoulder.
> 22. On 3 September 2018, I attended upon Dr Osborne for a follow up review with respect to both my right and left shoulder injuries. During that consolation, we discussed the possibility of surgery to my left shoulder. After consideration of the pros and cons of undergoing that surgery, and the disappointing outcome of my previous right shoulder surgery. I decided not to proceed with the left shoulder surgery.
> 23. In or about November 2018 I attended upon my GP and he recommend that I undergo an injection to my left shoulder.
> 24. On 29 November 2018 I underwent a left subacromial subdeltoid bursa injection under ultrasound guidance.
> 25. Between December 2018 and March 2019, I continued to undergo physiotherapy and attend upon my GP regularly for follow up reviews and continued to make complaints of the significant ongoing pain that I was experiencing in both my righty and left shoulders.
> 26 By way of letter dated 10 April 2019 I understand and verily believe that the workers compensation insurer declined liability with respect to the consequential injury that I have sustained to my left upper extremity (shoulder).
> 27. I strongly disagree with the insurer's decision in that regard.
> 28. In or about July 2019, I attended upon my GP and he recommended that I attend upon Dr Osborne for further opinion and management.
> 29. On 6 August 2019 I attended upon Dr Osborne and we once again discussed the possibility of surgery to my left shoulder. Once again, I decided that I do not wish to proceed with surgery to my left shoulder.

30. I continue to attend upon my GP for regular follow up reviews.
31. I continue to experience significant pain, stiffness and restriction of movement in birth my left and right shoulders.
32. I continue to experience pain intermittently radiating into both my left and right arms.
33. I am unable to perform any tasks that require my arms outstretched or overheard.
34. I have difficulty performing heavier household chores.
35. I experience difficulty with heavy lifting or carrying.
36. I continue to rely on pain killing medication.
37. I continue to experience considerable sleep disturbance."

28. Ms Vernon's allegation of a consequential condition in the left shoulder is supported by the opinion of her usual treating general practitioner (GP) Dr McQueen.

29. Dr McQueen provided a report dated 24 May 2018 to Ms Vernon's lawyers as follows:

> "The patient has developed (L) shoulder subacromial bursitis presumably secondary from overuse, she has chronic (R) subacromial bursitis and favours her (L) arm."

30. On 1 November 2019, Ms Vernon's lawyers wrote to Dr McQueen to clarify the date of first report of complaints with respect to the left shoulder. Dr McQueen responded as follows:

> "Further to your letter dated 01 November 2019, yes the above patient first came to see me on 11 May 2018 in regards to the left shoulder. Patient was referred for X-ray and ultrasound for the left shoulder on 15 May 2018 and report was made on 24 May 2018."

31. Dr Osborne is the treating orthopaedic surgeon who performed the surgery on Ms Vernon's right shoulder on 23 August 2017.

32. There are a series of reports from Dr Osborne in evidence, both attached to the Application and the Reply as well as the reports placed into evidence by Calvary as late documents and admitted by consent.

33. On 30 October 2017, Dr Osborne wrote to Dr McQueen as follows:

> "I reviewed Pauline today regarding her right shoulder. She of course has pain which I would expect. She has demonstrated today active forward elevation at 170*. She internally rotates to lumbosacral junction.
> I am very pleased with her range of motion today. She understands that I would not expect her to be pain free and over the coming months we want to see her maintain her excellent range of motion and see the pain settle.
> Here I would recommend that she continue working with Stewart and from my point of view I am happy for preform push, pull and elevation repetitively with annoyance of pain, strength and endurance.
> I will see her in 3 months. I am happy for her to have increasing duties at wok as she is able to tolerate over that period of time, I will let you know how we get on."

34. Counsel for Calvary highlights that there is no mention of complaint about the left shoulder.

35. On 11 December 2107, Dr Osborne wrote to the Rerun to work Co-Ordinator Ms Denk at the insurer as follows:

> "I am happy for Ms Vernon to do first aid training, manual handling and CPR refresher trading, respite care, domestic assistance and home care and ordinal care immediately within restrictions of pain, strength and endurance to her shoulder."

36. I note that Ms Vernon did not actually return to work, Calvary being unable to offer her suitable duties.

37. On 23 January 2018, Dr Osborne reviewed Ms Vernon again regarding her right shoulder and he wrote to Dr McQueen on the same day reporting as follows:

> "I revived Pauline today regarding her right shoulder. Pauline still has some pain in her right shoulder but more significantly she complains of worsened parathesia in her right ulnar nerve distribution fingers.
>
> Examination of her shoulder today shows her to have a normal active range of motion, she has a negative Neer and Hawkins impingements signs. Her range of notion is very comfortable with no hitching and normal rhythm.
>
> In this situation I am very pleased with her shoulder and I would now be happy fir her to use her shoulder without restrictions.
>
> With regards to the parathesia in her hand, she tells me that its worse than it was prior to surgery and is she wishes to have nerve conduction studies for this to exclude a neuropathy I would be happy to order this for her. She had indicated she would like to proceed this what, I will see her again once they have been done. I will let you know how she gets on."

38. Counsel for Calvary highlights that she has a normal active range of motion and that she is cleared to use her right arm without restriction. I note however that this is some 5 months after surgery that Ms Vernon is first cleared by the treating surgeon to use her right arm without restriction. Her evidence is that she favoured her right arm following surgery and compensated with her left arm and shoulder.

39. As the evidence shows, she continues to be troubled by pain and restriction in her right shoulder which she continues to report to Dr Osborne on review.

40. Dr Osborne wrote again to Dr McQueen after the nerve condition studies and after further review of Ms Vernon on 1 March 2018. He acknowledges that she is till troubled by pain in her right shoulder and that it will take another six months to see maximal medical improvement. He writes as follows:

> "I reviewed Pauline today regarding her right shoulder. Her never conduction studies were unremarkable. I have re-examined her shoulder once again and once again she has normal range of motion with negative impingement signs.
>
> Accordingly, I think that she will make a good outcome. I do acknowledge that she still has some residual pain in the shoulder but she's significantly better than she was prior to the surgery. I would like her to take another 6 months as it would be this long before I would consider her maximally medically improved. I will see her at that stage. I will let you know how we get on."

41. Counsel for Calvary submitted that Dr Osborne's reports evidence the objective signs that Ms Vernon was not as restricted in her right shoulder movements as she purports in her statement and hence would not have had the need to rely heavily on her left arm as she purports. The evidence of Dr Osborne must be considered in its entirely. What they show is that Ms Vernon was reporting that she was still troubled by pain and restriction in her right shoulder.

42. Dr Osborne duly reviewed Ms Vernon six months later on 3 September 2018. Dr Osborne notes that she still has a moderate amount of pain in her right shoulder but that nothing more can be done for this by way of surgery or other treatments. By this stage Ms Vernon's left shoulder is significantly worse. Dr Osborne reported to Dr McQueen on 3 September 2018 as follows:

> "I reviewed Pauline today regarding her right shoulder. She still has a very moderate amount of pain in her right shoulder but now her left shoulder is significantly worse. I do note she had a cortisone injection into the bursa which has not resolved her pain.
>
> With regards to the right shoulder, she has a normal range of motion with a negative Beer but a very moderately positive Hawkins impingement sign. This is in stark contrast to her contralateral shoulder which is exquisitely painful through all movements and associated strongly positive Neer and Hawkins impingement signs.
>
> David, I am very pleased that Pauline is better than she was before the surgery but it's clear that she still has residual pain and I think it's likely that nothing else is going to change this in her right shoulder and certainly do not think any other surgeries or treatments are indicated.
>
> With regards to the right shoulder, I have not made any further follow up appointments for her. Certainly, from my point of view once again if she would like to talk to me about her left shoulder in a more formal manner, I would be happy to do so. I suspect that she going to get to a point where she can't live with her left shoulder. I have invited her to return to me at any stage."

43. It is very clear that Ms Vernon, consistent with her evidence, has been left with residual signs and symptoms in the right shoulder following surgery. By September 2018 when the treating surgeon says she would have reached maximal medical improvement following surgery, she still has what he describes as "moderate" pain. By September 2018 her left shoulder symptoms are significantly worse. She is reluctant to proceed with surgery to her left shoulder, given the pain she has been left in after the right shoulder surgery.

44. The final report from Dr Osborne that is in evidence is that dated 6 August 2019. Dr Osborne wrote to Dr McQueen after reviewing Ms Vernon that day as follows:

> "Thank you very much for asking Pauline to return to see me regarding her left shoulder. I do acknowledge when I saw her roughly a year ago, she volunteered that her right shoulder was significantly better than her left shoulder. Unfortunately, this has continued to be the case. Pauline of course is now 40 years of age. She complains of left shoulder pain which started roughly five months ago following her right shoulder surgery. She attributes it to overuse in her recovery period. It is not weal. It is not stiff. It does wake her. She is unable to perform overhead activities. She is unable to dress herself in a normal manner. She denies any other injuries or surgeries to the left shoulder. She has had treatments with panadeine, codeine, endone and two cortisone injections. The last of these she reacted badly to. I note no change in her health since the last time I saw her.
>
> On examination today, she has scars over her right shoulder girdle. Her shoulder girdles are otherwise symmetrical. On the left side she has normal skin integrity and no wasting. On her right shoulder she has normal range of motion with negative impingement signs. On the left side she has tenderness to palpation around the greater tuberosity. She active forward elevates to 170* through a painful arc with abnormal rhythm. She internally rotates to T8 with a normal lift off. Glenohumeral external rotation is to 70*with Grade 5 power of infraspinatus. Glenohumeral abduction is to 90* with Grade 5 power of supraspinatus with pain. She has strongly positive Neer and Hawkins Impingements signs, a negative speed sign and normal biceps mechanism.

She is distally neurovascularly intact. Her x-ray was unremarkable. Her ultrasound shows bursitis and impingement.

I know that Pauline has been through this before and she has not had a perfect result on her right shoulder but it is clear that her right shoulder is significantly better than the left one as she is today. She has had appropriate non operative treatments which have not resolved her left shoulder pain. It would be reasonable to consider an arthroscopic acromioplasty."

45. Ms Vernon relies on the opinion of Dr Patrick, General & Vascular Surgeon, Trauma Surgeon, an independent medical expert (IME).

46. Dr Patrick first saw Ms Vernon on 12 November 2015 and he provided a report dated 27 June 2016.

47. At that time Dr Patrick saw Ms Vernon in relation to her right shoulder.

48. He took a history, conducted a physical examination and reviewed the radiological investigations. He supported the need for surgical intervention after MRI investigation of the right shoulder. I do not need to go into the detail of Dr Patrick's opinion of 27 June 2016 because the right shoulder injury is not disputed. What is noteworthy is that in the course of his physical examination he examined the left shoulder and recorded his findings as:

> "range of active notion at left shoulder is full and free in all directions."

49. This finding contrasts markedly with Dr Patrick's physical findings about the left shoulder when he sees Ms Vernon again on 31 August 2018.

50. Dr Patrick saw Ms Vernon again on 31 August 2018 and he provided a report to her lawyers on 5 December 2018.

51. Under "further progress" Dr Patrick writes:

> "Since last seen by me she continues to be seen by her usual treating GP Dr David McQueen of Cessnock. She had been having physiotherapy. Symptoms at her injured right shoulder were deteriorating rather than improving.
>
> She has subsequently eventually come to surgical integration at her significantly injured right shoulder, and this was carried out by orthopaedic surgeon Dr Don Osborne on or about 23 August 2017. A very difficult time for her followed. She was unable to use her right arm much at all for a number of months, and about two months subsequent to her right shoulder surgery she was experiencing significant and rapidly worsening pain and stiffness at her left shoulder. She was using her left arm for everything. She is naturally right arm dominant. There appears little doubt her significant left shoulder problems now has been a consequential injury as a result of having not to use her previously dominant right arm at all.
>
> She had come to progress MRI right shoulder on 18 April 2017 more than four months prior to the right shoulder surgery. I have seen copy of the arthroscopic prints from the right shoulder arthroscopic acromioplasty surgery of 23 August 2017 at which time there was a large amount of inflamed bursa, and arthroscopic acromioplasty was carried out with conversion to a type 1 (flap) acromion. Submenu to her developing the problematic left shoulder symbolism she has come to plain X-ray and ultrasound left shoulder demonstrating significant subacromial bursal thickening with impingement and supraspinatus tendinopathy.

> The situation at present is that Ms Vernon is so disappointed overall with the right shoulder that she believes she will not be proceeding to any left shoulder surgery. She was to be revived by Dr Osborne in September or October 2018 and is continuing to see usual treating GP DR David McQueen."

52. I note Ms Vernon has given a consistent history of the onset of her left shoulder symptoms post-surgery to her right shoulder in the recovery period. She has also consistently reported that she is disappointed with the outcome of her right shoulder surgery and that she had ongoing symptoms of pain and restrictions in her right shoulder.

53. Dr Patrick records present symptoms as "ongoing troublesome pain at both right and left shoulders". He notes:

> "There have been very little improvements in range of active movement at her operated right shoulder since last seen by me- probably some minimal improvement in elevation. Left shoulder now is if anything somewhat worse than the right. she has pain also posteriorly over the scapular regions".

54. He recorded sleep disturbance and difficulty with household tasks and the heavier tasks and that she continues on strong analgesic medication. The history of these difficulties and the need for ongoing pain relief medication is consistent with the evidence Ms Vernon has given in these proceedings and reported to the medical professionals whose reports are in evidence before me.

55. Dr Patrick undertook a physical examination which he records positive findings in respect of both the left and right shoulders. I note that the positive findings in the left shoulder contrast markedly with the findings of full and free movement in all directions for the left shoulder when Dr Patrick first saw Ms Vernon on 12 November 2015 which was prior to surgery on the right shoulder.

56. Dr Patrick reviewed the further three relevant imaging study reports that had become available since his last report.

57. Dr Patrick came to the following conclusion:

> "Further examination of Miss Pauline Vernon on this occasion does not cause me to ignorantly alert the "opinion" as expressed on pages 4,5 and 6 of my previous substantive report of 27 June 2016 except in relation to the fact that since last sees she has come to right shoulder surgery by Dr Don Osborne on 23 August 2017 at which time arthroscopic acromioplasty surgery has been undertaken with just limited improvement. Also I believe that clearly Pauline Vernon has sustained significant consequential injury to her left shoulder as a consequence of favouring (sparing) the injured and operated right shoulder over a considerable period of time.
>
> As she presents now, she is I believe clearly impacted for her preinjury duties as a care worker.
>
> The further history since last seen is as outlined above, as are the findings now on clinical examination.
>
> I do causally relate Pauline Vernon's injuries to both her right and left shoulder and ongoing symptomology /disabilities to the nature and conditions of her employment.
>
> I do believe that her employment /work with Silver Care is the main contributing factor to her injuries at both right and left shoulders, and proceeding to arthroscopic acromioplasty at the right shoulder on 23 August 2017 as described."

58. Counsel for Calvary submitted that Dr Patrick has "contradictorily" attributed Ms Vernon's left shoulder condition to the nature and conditions of her employment. Dr Patrick's report must be read as a whole. Dr Patrick's has clearly expressed his view earlier in the report that the left shoulder is consequential of favouring (sparing) the injured and operated right shoulder over a considerable period of time. At no point, in the substance of his report did he attribute the left shoulder condition to the nature and conditions of employment. The right shoulder injury is claimed to be as a result of the nature and conditions of employment. The left shoulder is claimed to be consequent on the right shoulder injury. Nothing turns on the manner in which Dr Patrick has expressed himself at the end of the opinion part of the report because the report must be read as a whole.

59. Dr Patrick goes onto discuss Ms Vernon's capacity for employment, ongoing treatment needs and to assess whole person impairment of both upper extremities.

60. Dr Wallace, orthopaedic surgeon, was the independent medical expert qualified on behalf of the Respondent. He provided an opinion in a report dated 1 February 2019.

61. Dr Wallace provided a report dated 1 February 2019 after examination of Ms Vernon on 30 January 2019.

62. Dr Wallace took a detailed history from Ms Vernon. He recorded a consistent history of Ms Vernon's ongoing symptoms in the right shoulder leading up to the surgery on 23 August 2017.

63. He notes the history of surgery to the right shoulder with no improvement in symptoms and a history of the onset of left shoulder symptoms in the post-operative period:

> "She was admitted to hospital on 23 August 2017 and underwent arthroscopic debridement at the right shoulder with acromioplasty. She noted no improvement in her right shoulder's symptoms after this procedure.
> In the post-operative period, she was referred for physiotherapy which continued for 8 months.
> She is currently continuing with the use of medications of Pane diene forte, Endone and Diazepam.
> She has had no further therapeutic intervention at the right shoulder.
> In relation to her left shoulder condition, she claims that in October 2017, two months after
> her right shoulder surgery she noted the onset of pain at her left shoulder without a history of injury. She underwent two cortico-steroid bijections at the left shoulder.
> She has had no further treatment for her left shoulder condition."

64. Dr Wallace notes that Ms Vernon reported no previous history of injury at her bilateral shoulders.

65. Under "present complaints", Dr Wallace records a history of:

> "Ms Vernon now complains of global aching about her bilateral shoulders, worse on the right-side radiating to the lateral aspects of her arms to the level of than hands involving the ulnar fingers if her hands bilaterally.
> The pain is worse with doing housework or driving and is relieved by analgesic medication.
> She complains of paraesthesia and numbness at the ulnar aspect of her palms and the ulnar two fingers if her hands bilaterally.
> She complains of weakness at her upper limbs.
> She is right hand dominant.
> She notes stiffness at her bilateral shoulders."

66. Dr Wallace noted restrictions on her current activities including a current certification to return to work part time on light duties doing office duties only.

67. Dr Wallace conducted a physical examination which had positive findings at both the left and right shoulders.

68. Dr Wallace had regard to the radiological investigations.

69. He came to the following diagnosis:

> "3 July 2014 – work injury
> 1. Musco-ligamentous strain right shoulder gridle".

70. Dr Wallace did not offer a diagnosis in respect of the left shoulder. This is because he did not consider Ms Vernon had suffered an injury to her left shoulder. This is explained in his opinion on causation as follows:

> "Ms Vernon's right shoulder condition is due to her work injury of 3 July 204.
> Her employment with Calvary Silver Circle Home care is a substantial contributing factor to her right shoulder condition.
> There is no objective medical evidence that Ms Vernon suffered any work-related injury at her left shoulder.
> She did not note the onset of symptoms at her left shoulder until October 2017, some 21/2 years after she ceased work.
> There is no medical evidence to support the notion of overcompensation injuries. There is evidence of that if patients suffer an injury to one limb, they use both limbs less.
> Clearly Ms Vernon was at a reduced level of capacity after ceasing work in April 2015 considering she was carrying out limited housework duties, no leisure time pursuits and did not previously do home maintenance activities and had remained off work for 2 ½ years prior to the onset of symptoms at her left shoulder.Her left shoulder condition is unrelated to her employment with Calvary Silver Circle Home Services."

71. In relation to prognosis Dr Wallace opined:

> "She is now 4/12 years post injury and has a poor prognosis for further recovery of function at her right shoulder despite ongoing conservative treatment."

72. He noted that she remained unfit to return to her pre-injury duties.

73. He considered that:

> "she would not be fit for activities involving repetitive bending or twisting movements at her right shoulder, any overhead use at her right arm or repetitive lifting above 5kg at her right shoulder."

74. He considered she had reached maximal medical improvement and went onto assessed impairment of the right upper extremity but not the left. He assessed 0% WPI.

75. When weighing Dr Wallace's opinion in the balance with the other evidence, I note that he does not consider Ms Vernon has suffered an injury to the left shoulder because the onset of symptoms is in October 2017 which he remarks is some two and half years after she stopped work. The relationship of the onset of symptoms to ceasing employment is simply irrelevant in this case. Ms Vernon's case is that she developed a consequential condition in her left shoulder as a result of favouring her right arm after the right shoulder surgery which resulted from the undisputed injury to the right shoulder. Dr Wallace has taken a history of the onset of symptoms in October 2017 some two months after the surgery took place but ignores that history in favour of identifying an irrelevant relationship to the cessation of work. Dr Wallace goes onto state that there is "no medical evidence to support the notion of over compensation injuries". This view is baldly stated without reference to any body of evidence, medical papers or medical journal articles upon which this view is based. In these circumstance Dr Wallace's report can be given very little weight when weighed in the balance with the other evidence that is before me.

76. When I weigh all of the evidence in the balance, I take into account that Ms Vernon has given evidence in her statement that after her right shoulder surgery in August 2017 she had to rely heavily on her left arm to perform day to day activities. I note she is right arm dominant. She gave evidence that she developed symptoms of pain and restriction in her left arm in about October 2017, about two months after her right shoulder surgery. She was not cross-examined about this evidence. She did not report the problems in her left shoulder until May 2018 when she reported them to her usual treating GP Dr McQueen. The delay in this reporting is not determinative of Ms Vernon's case but it is part of the evidence that I weigh in the balance with all of the other evidence. Counsel for Ms Vernon made a submission that this delay is explained by her pre-occupation with the ongoing problems she was having with her right shoulder after the surgery. Submissions are not evidence. Ms Vernon did not give direct evidence that she did not report the problems in her left shoulder to her GP until May 2018 because she was pre-occupied with the problems in her right shoulder. She does however give evidence that she had ongoing problems with her right shoulder following the surgery and that her symptoms of pain and restriction had not been relieved by the surgery. Ms Vernon's ongoing problems with her right shoulder following surgery are well documented in the reports of Dr Osborne that are in evidence and that I have dealt with in detail above. Counsel for Calvary has referred to the reports of Dr Osborne as painting a picture that Ms Vernon had a good outcome from her surgery and that her veracity is called into question by her suggesting otherwise and that she had need to rely on her left arm. When all of Dr Osborne reports are weighed in the balance they are consistent with Ms Vernon's evidence that she had ongoing problems with her right shoulder following the surgery. Dr Osborne himself notes that she has been left with moderate pain and that the result has been less than perfect. The reports from Dr Osborne show that Ms Vernon was not cleared to use her right arm without restriction until January 2018 some five months after surgery. She is right arm dominant. Her evidence that she had to rely heavily on her left arm in the post-operative recovery period accords with common-sense and she was not cross-examined about this evidence. Her case that the left shoulder condition is consequential is supported by the opinion of her GP Dr McQueen and the IME Dr Patrick. Dr Patrick recorded no positive findings in respect of the left shoulder when he first examined her in November 2015 prior to the right shoulder surgery. This finding contrast markedly with the positive findings on examination when he saw her again in August 2018. I note Dr Osborne and Dr Wallace both record positive findings on examination of the left shoulder when they examine the left shoulder in 2019. There is no other medical opinion to explain the problems with the left shoulder from which Ms Vernon now suffers. Dr Wallace does not give an alternate explanation for the left shoulder condition, he simply does not accept that there has been a work injury for reasons which I consider flawed that I have dealt with above. When I weigh all of the evidence in the balance, I prefer the evidence of Ms Vernon, supported by the opinion of Dr McQueen and Dr Patrick, and I am satisfied, on the balance of probabilities, that she has suffered a consequential condition in her left shoulder as a result of the undisputed injury to the right shoulder and subsequent surgery.

77. Accordingly, when I weigh all of the evidence in the balance, I am satisfied on the balance of probabilities that Ms Vernon suffered a consequential condition in her left shoulder as a result of the right shoulder injury deemed to have occurred on 3 July 2014.

78. In the event this was my finding, the parties agreed that the matter should be remitted to the Registrar for referral to an AMS to assess the degree of permanent impairment, if any, of the right upper extremity and left upper extremity as a result of injury deemed to have occurred on 3 July 2014. The documents to be forwarded to the AMS are agreed to be the documents admitted into evidence in these proceedings.