

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1963/20
Applicant: Mirza Semic
Respondent: Brighton Australia Pty Ltd
Date of Determination: 3 August 2020
Citation: [2020] NSWCC 262

The Commission finds:

1. The applicant has failed to satisfy his onus of proof in his claim that the subject injury has resulted in consequential conditions to both shoulders, the digestive system and the cardiovascular system.
2. The applicant is accordingly unable to establish that his whole person impairment is over 10%, and his case cannot therefore be referred to an Approved Medical Specialist for assessment.

The Commission orders:

- (a) There is an award in favour of the respondent in respect of all claims.

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

John Wynyard
Arbitrator

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

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. Mirza Semic, the applicant, brings an action against Brighton Australia Pty Ltd, the respondent, for lump sum compensation in relation to impairments to the right upper extremity, left upper extremity, digestive system, cardiovascular system and the lumbar spine. These impairments were alleged to have resulted from an injurious event on 12 April 2016.
2. This matter has a chequered history in that it has been before the Commission on two earlier occasions but discontinued for want of adequate preparations.
3. Section 74 notices were issued on 14 November 2017, 28 November 2017, 9 July 2018 and 14 June 2019.
4. The Application to Resolve a Dispute (ARD) in its final shape was duly lodged and the Reply shortly thereafter.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Was the left shoulder condition consequential upon the admitted back injury of 12 April 2016?
 - (b) Was the right shoulder condition consequential upon the admitted back injury of 12 April 2016?
 - (c) Were the impairments to the digestive system and the cardiovascular system consequential upon the admitted back injury of 12 April 2016?

PROCEDURE BEFORE THE COMMISSION

6. The matter was heard at teleconference by way of conciliation and arbitration on 24 June 2020. The applicant was represented by Mr Robert Taylor of counsel instructed by Mr Anthony Macri from NSW Compensation Lawyers. The respondent was represented by Mr Graham Barter of counsel instructed by Mr Bill Pardy from Messrs Hicksons Lawyers. 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

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply and attached document, and
 - (c) email dated 22 June 2020 from the applicant answering further request for particulars.

Oral evidence

8. No application was made in relation to oral evidence.

FINDINGS AND REASONS

9. Mr Semic was born in 1974 and came to Australia as a refugee from Bosnia in 1994. He is married with two young children. Mr Semic started work for the respondent as a labourer and plasterer in 2005. On 12 April 2016, he injured his lower back whilst lifting a panel from a pallet in the installation of air-conditioning ducts at a building site. As indicated, his claim has been accepted regarding that injury.
10. He went off work until 21 April 2016, when he returned with a light duties certificate.
11. On or about 28 April 2016, (both counsel agreed that the date was uncertain but was probably about one week after Mr Semic's return to work) he alleged that he suffered a consequential injury to his left shoulder.

EVIDENCE

The shoulders

Mr Semic's statements

12. Mr Semic supplied two statements date 21 October 2019 and 11 February 2020 respectively¹. Mr Semic's wife, Adisa Semic also provided a statement dated 11 February 2020.²
13. Mr Semic's statements had been prepared with some assistance, as they were helpfully constructed, and extremely detailed. His first report was 50 pages and 270 paragraphs long, and his second was of 13 pages and 60 paragraphs. Much of the material was not germane to my inquiry, and appeared to be concerned with detail more appropriate to an action at common law.
14. Be that as it may, Mr Semic described the occurrence of his left shoulder condition from paragraph 141 in his first statement. Mr Semic was at pains to describe in as much detail as possible how it was that his shoulder came to be injured. That detail concerned the postures he had to adopt as a result of his back injury in carrying a 50 kg post as part of his duties. I have attempted to distil that detail, much of it being repetitive, in the following extracts:
 - 141. Towards the end of the second week following my return to work, my symptoms remained the same and Bobby began pressuring me to Increase my workload more and more.....”
 - 142. Bobby then asked me If I could Install some steel posts, each of which weighed approximately 50 kilograms.....
 - 146. Because of the Injury to the right side of my lower back I decided that I would carry the posts on my left side, so as to minimise any weight or pressure on my right side, I would lift one end of a post, then raise It onto my left shoulder, balancing It whilst carrying It the 15 to 20 metre distance to the required stairwell.

¹ ARD pages 1 and 402 respectively.

² ARD page 415.

- 149 on this occasion and because I had a back Injury and nerve pain In my right leg, I had to be careful about my movements, I was unable to tolerate any extra weight on my right side because It aggravated my right-sided nerve pain, so I tried to lift the steel posts In a different way because of my back Injury. I stood to the right side of the end of the post and bent my knees whilst trying to keep my back as straight as possible. I put most of the weight on my left leg and began to lift the steel post with my left arm In order to favour the right side of my back and right leg. In attempting to lift the steel post in this way and into the vertical position using my left arm, I felt a sharp pain in my left shoulder....”

15. In his statement of 11 February 2020, Mr Semic gave further evidence regarding the injury to his left shoulder.³ Again, to distil his account:

“27. I actually managed to lift two of the heavy steel posts into position before I suffered injury to my left shoulder and felt the pain in my shoulder when I was lifting the second pole.... I was experiencing with my back which was being felt primarily on the right hand side. I had previously noticed, doing the other lighter duties, that if I put any weight or stress or strain on my right side that I experienced increased pain in my lower back and right leg..... I would not have been doing that if I had not previously injured my low back and had problems with my right leg.

28. After my back injury, because I was trying to avoid any stress or strain on my right side, just about all of the weight of the pole was being taken by my left arm and with my left arm stretched above head height. I actually felt the pain when I was actually pushing the pole up to the vertical position.....”

16. I was referred to many more paragraphs by Mr Taylor in his thorough submissions as to this injury, for which I was grateful. They were most useful, but did not shed any more light on the relevant issues than those I have referred to above.

Mrs Adisa Semic

17. Mrs Adisa Semic’s statement related that she was the applicant’s wife, and that on 12 April 2016 she visited him “at the doctors” (presumably Dr Eftekhar’s practice) following his injury.⁴ She said, relevantly:⁵

“5. I am also aware that after some time my husband was being pressured to return to work but despite this, my husband wanted to give it a go because we needed the income. However, around this time, I distinctly recall that my husband was finding it very difficult to move around....

6. I distinctly recall that when my husband returned to work, he came back home and that evening, he complained about left shoulder pain. He explained to me that even though he was doing light duties, he was given heavy work to do and that he injured himself when he was lifting a heavy pole. I recall him saying that he was struggling to lift the pole because he had back pain and he put all the weight on his left arm and that injured his left shoulder.

³ ARD page 407.

⁴ ARD page 415.

⁵ ARD page 416.

7. I cannot recall exactly how long my husband was doing light duty work, but I do remember that he did it. I do not recall the exact dates. After he injured his left shoulder he then had trouble using that arm because it was so painful. He complained of pain and weakness in that arm because of the pain in the shoulder....”
18. Mrs Semic then went on to say that she observed her husband avoiding “certain things” because of the pain in his back and left shoulder. She said:
- “...I observed my husband to be using his right arm and right shoulder more as time progressed. Once again, I don't know the exact time that this happened, but I know that it happened after he injured his left shoulder....”

Dr Mohammed Eftekhar

19. Mr Semic reported to his GP, Dr Mohammed Eftekhar, whose clinical notes were lodged. Mr Semic had been attending the practice (Advance Liverpool Medical Centre) since June 2010. In view of the significance of the evidence concerning Mr Semic and Dr Eftekhar, it is necessary to consider the contents of the clinical notes in more detail than would ordinarily be the case.
20. The entry for the date of the back injury, 12 April 2016, reported a consistent history of injury to the back whilst carrying and repositioning a speed panel. The entry noted that Mr Semic was suffering pain and stiffness with pain radiating into the right buttock and thigh.⁶
21. Mr Semic attended on Dr Eftekhar thereafter on 18 April 2016 and 21 April 2016. On that latter date, the entries showed that Mr Semic was certified fit for light duties for two weeks.⁷
22. The next entry recorded was on 4 May 2016, and the reason given for Mr Semic's attendance was for a case conference regarding his back pain. The following day the entry read:⁸
- “... came for W/C as discussed yesterday at case conference ongoing back pain stated pain getting worse after continuing work after back injury.”
23. The entry continued that a plan was formed for light duties, painkillers and physiotherapy.
24. The next entry indicated that there had been a consultation recorded by reception on 7 May 2016 which involved rehabilitation with Brighton Australia regarding both a return to work and suitable duties.
25. The notes indicated that Mr Semic saw Dr Eftekhar next on 19 May 2016. The entry noted that Mr Semic was under rehab and had received a letter from “Rehab physiotherapy” Dr Eftekhar noted:
- “was given brace which increased pain and numbness left leg stop using it not on any duties had a case conference plan
- same
 - light duties
 - Pilates- form of yoga.”

⁶ ARD page 141.

⁷ ARD page 142.

⁸ ARD page 142.

26. The next consultation between Mr Semic and Dr Eftekhar occurred on 24 May 2016, and was concerned with a tooth infection.
27. On 2 June 2016, Dr Eftekhar recorded a further visit by Mr Semic. The reason for the visit was said to be "W/C" and Return to work plan 4 was discussed. Dr Eftekhar indicated that Mr Semic was happy with the plan which involved light duties for the next eight weeks.
28. On 21 June 2016, an entry in Dr Eftekhar's notes recorded that Mr Semic had visited in connection with his workers compensation case ("W/C"). Mr Semic had undergone an MRI, and was "under a physio" with the "same plan for work." Mr Semic was also complaining of a cough, and he was examined by Dr Eftekhar and told to return if there was no improvement.
29. On 30 June 2019, Dr Eftekhar recorded complaints of ongoing back pain with no improvement with physio. The entry noted that a letter had been written to Dr Renata Abraszko and a further need to refer Mr Semic to a physiotherapist who did traction physio was noted.
30. On 14 July 2016, Dr Eftekhar recorded a further consultation with Mr Semic, the reason being again with regard to the workers compensation case. The entry read:

"same management:
pain not improving
did not make appointment with neurosurgeon
getting traction (indecipherable) with no benefit."
31. The entry for 21 July 2017 read⁹:

"left shoulder pain stated it is related to work as well
pain started when Mirza commenced light duties during lifting steel post
which he forgot to mention."
32. Dr Eftekhar's notes show that there were further consultations on 5 August 2016, 30 August 2016 and 31 August 2016.

Mr Semic's comments as to Dr Eftekhar's notes

33. With regard to the absence of any contemporaneous support from Dr Eftekhar, Mr Semic said in his statement of 21 October 2019:¹⁰

"One afternoon, on or around 5th May 2016, I returned to consult Dr Eftekhar. During this consultation, I advised him that not only was the pain in my lower back worse than it had been when I last attended him, but that I was now also suffering from pain in my left shoulder, I am certain that this left shoulder pain developed in the last days of the period in which Dr Eftekhar had certified me fit for light duties only, when Bobby had assigned me to undertake work that I should not have been undertaking pursuant to my Medical Certificate, Dr Eftekhar did not take much notice of my complaint to him of the left shoulder but was concentrating on my lower back instead."

⁹ ARD page 145.

¹⁰ ARD pages 28 and 29.

34. At paragraph 168 of the same statement, Mr Semic said:¹¹

“168. On 2st June 2016, I attended Dr Eftekhar, and I asked him why he had not told Rehab Options about my left shoulder pain. He said that he was unaware of my left shoulder injury. I was quite put out by this, as I had complained about my left shoulder pain to Dr Eftekhar consistently since 5th May 2016, almost six weeks earlier. I believe that this confusion was due to the language difficulties I had been experiencing with Dr Eftekhar, and I felt that, perhaps, he had not understood me when I had Initially told him about the pain In my left: shoulder.

169. Dr Eftekhar immediately issued me a referral for an x-ray and ultrasound of my left shoulder however I was forced to wait for the Insurer to approve these procedures...”

35. In his second statement of 1 February 2010 Mr Semic said:¹²

“32. I am certain that when I saw Dr Eftekhar on or about 5 May 2016, which was shortly after I had hurt my left shoulder, I told him not only of pain in my lower back which had worsened because I had been doing work which was reasonably heavy, but that I was also experiencing pain in my left shoulder.

33. Unfortunately, it appears Dr Eftekhar may not have taken notice of my complaint of left shoulder pain but instead concentrated on my complaint of low back pain and the fact that it has worsened whilst I was performing lighter duties work.”

Dr Kris Tomka

36. Mr Semic transferred to Dr Kris Tomka as his general practitioner. In a report dated 2 September 2019 Dr Tomka stated that he had been Mr Semic’s treating doctor since 6 September 2016. He gave a consistent history of the back injury on 12 April 2016. He then reported¹³:

“While on light duties his supervisor ordered him to install a steel post which was approximately 50kgs heavy. In lifting heavy steel parts-he sustained injury to left shoulder which never recovered and he was lifting more and more right shoulder which he subsequently injured while overusing right shoulder.”

37. The clinical notes of Dr Tomka were tendered, but no history at all was recorded on the first attendance, 6 September 2016. In fact no mention of the left shoulder was made by Dr Tomka until 10 May 2017, although in the previous entries he had recorded complaints of pain in the back or the lumbosacral spine.¹⁴

38. The first medical certificate in evidence that mentioned Mr Semic’s left shoulder was dated 28 September 2016, issued by Dr Tomka. Dr Tomka’s next medical certificate, dated 26 October 2016, did not mention the left shoulder, although it mentioned the right shoulder.¹⁵ No medical certificates were lodged by the applicant.

¹¹ ARD page 31.

¹² ARD page 408.

¹³ ARD page 80.

¹⁴ ARD page 121.

¹⁵ Reply page 36.

Physiotherapy

39. In his statement of 21 October 2019 Mr Semic also suggested that he had advised his physiotherapist of his left shoulder injury. He said:¹⁶

“152. Around 15th May 2016 I commenced undergoing physiotherapy treatment with Steven Ngo, Physiotherapist at Actlv Therapy In Liverpool. I could not commence undergoing this treatment until it was approved by the Insurer.

154. Soon afterwards, I attended Rehab Options, who were looking after my return to workplan, At this time, the pain in my left shoulder and lower back was, if anything, increasing.”

40. In his statement of 11 February 2020, Mr Semic said:¹⁷

“34. When I attended for physiotherapy treatment in May 2016 I am confident my recollection is accurate that they were treating not only my low back but also my left shoulder, because I told them about the problems I was also experiencing with pain in the left shoulder at that time.”

41. No evidence was tendered from any physiotherapist.

42. In a report of 6 April 2019, Dr Vijay Panjratana recorded the following:¹⁸

“He had physiotherapy for the left shoulder and Theraband exercises (the green colour Theraband), Physiotherapy was not helpful,”

Injury claim form

43. The employer lodged a worker's injury claim form which was dated 26 July 2016.¹⁹ This was the first claim form completed regarding Mr Semic's back injury of 12 April 2016. However the injury was described in handwriting as follows:

“low back, lumbar disc prolapse, leg numbness, left shoulder.”

44. These injuries were said to have been caused “due to nature and conditions whilst working alone for employer and lifting speed panelling sheets.” The date and time given for the occurrence of these injuries was “12/04/16” at “9:30 AM (deemed date)”.²⁰ Dr Eftekhari was named as the nominated treating Doctor, and I note that the claim form was dated five days after Mr Semic had first reported the left shoulder condition to Dr Eftekhari.

Medico-legal reports

Dr T Mastroianni

45. The medico-legal referee retained by Mr Semic was Dr T Mastroianni, Consultant Occupational Physician. On 22 November 2018 he took the following history:

“Whilst lifting a speed panel off a pallet, he injured the lower back. Whilst lifting a steel post he injured the left shoulder. He developed pain in the right shoulder with time as a result of favouring the left shoulder (consequential injury).”

¹⁶ ARD pages 28 and 29.

¹⁷ ARD page 408.

¹⁸ ARD page 370.

¹⁹ Reply page 24.

²⁰ Reply page 25.

46. Dr Mastroianni recorded a consistent history of the injury to the back. He said:

“After 10 days [Mr Semic] returned to work on selected duties. After 4 – 6 days of selective duties, he was instructed to install 50 kg steel posts.

As he carried steel posts on the left shoulder, his back pain got worse and he developed pain in the shoulder.”

47. This was the first record in the evidence of the mechanism of the alleged injury to the left shoulder.

48. The left shoulder was investigated and the diagnosis given by Dr Mastroianni was of left shoulder tendonitis and impingement²¹.

49. In a subsequent report of 7 February 2020 Dr Mastroianni was asked to answer questions from his retaining solicitors²². He indicated that the lumbar problem was caused by a lumbosacral disc lesion involving right leg sciatica, and that Mr Semic’s complaints were consistent with the underlying pathology.

50. Dr Mastroianni was then asked the following question:

“2. Is it consistent that someone experiencing those symptoms would attempt to alleviate those symptoms by undertaking work in a different manner and by putting stress or weight on the left side of the body and, in doing so, avoiding or reducing pain or aggravation of pain on the right hand side of the body/back and leg.”

51. In response Dr Mastroianni said²³:

“Generally, when one is experiencing pain, they [sic] will adopt different postures and do activities differently to minimise aggravation of the injured area.”

52. The next question was:

“3. Is it consistent that the injured worker did injure his left shoulder in the way indicated in doing activities he says he was performing at the time and that, if he was able to use both arms and distribute weight evenly, would be less likely he would have injured his left shoulder.”

53. Dr Mastroianni said²⁴:

“On page 2 of my report, I recorded the history that he carried steel posts on the left shoulder which aggravated the back and he developed pain in the shoulder.

The post weighed in the order of 50kg and lifting and carrying the post in the left shoulder in my opinion caused the injury to the shoulder.

²¹ ARD page 53.

²² ARD page 393.

²³ ARD page 393.

²⁴ ARD page 393.

Had he not had the back problem and able to exert normal force with both arms he may not have injured the left shoulder. As he favoured applying force with the right arm as it aggravated the back, and in adopting different posture and way of doing things to minimise the aggravation of the back it was more likely to cause injuries elsewhere, in this case the left shoulder.”

54. Dr Mastroianni reviewed the MRI investigations of the shoulders and found that Mr Semic had degenerative rotator cuff disease bilaterally that had been asymptomatic. He said²⁵:

“The left shoulder became asymptomatic [doctor clearly meant ‘symptomatic’] as he started favouring the right side of the body because of his back pain and sciatica and the abnormal lifting mechanism and different postures adopted to avoid aggravating the back. This has precipitated symptoms from the underlying rotator cuff disease and aggravated same with the symptoms persisting as at the date of my examination in November 2018.”

Dr Vijay Panjratan

55. For the respondent Mr Semic was assessed by Dr Vijay Panjratan, Orthopaedic Surgeon, on 6 April 2019.²⁶ He took a consistent history of the injury to the back of 12 April 2018. Dr Panjratan took a history that after Mr Semic had been on suitable duties for about 10 days following the back injury he was required to install 60 kg steel posts single-handed. Dr Panjratan recorded that after Mr Semic had installed to posts, his back pain became worse and he stopped work, never to return. He recorded that Mr Semic injured his left shoulder at the same time as the low back whilst pushing the steel post.
56. With regard to the right shoulder, Dr Panjratan took a history that the condition occurred about 1 ½ years after 12 April 2016. The history given by Mr Semic was that he had no idea why that happened, but that his GP had advised that it was due to overuse.
57. Dr Panjratan found that the left shoulder had a Type III acromion which predisposed to impingement and was not work-related. He accepted that there were restrictions in both shoulders, but said that those restrictions were not work related²⁷.

The right shoulder

58. The right shoulder claim is dealt with in the reasons.

The digestive system

Mr Semic

59. Mr Semic conceded that he had been suffering from heartburn and reflux since 2010, for which he had been prescribed Nexium, which he continued to take whenever he was suffering from heartburn from that time.²⁸ He said that from May 2016 his symptoms increased when he relied on Panadeine Forte for pain relief from his back symptoms. He also said that the symptoms recorded in 2010 had gone away and that he had not had any ongoing symptoms for many years before the accident.²⁹ Mr Semic stated that both Dr Eftekhar and Dr Tomka told him that his digestive symptoms were the result of all the medication he was taking.

²⁵ ARD page 394.

²⁶ ARD page 368.

²⁷ ARD page 376.

²⁸ ARD page 13 [76].

²⁹ ARD page 30 [160].

Medico-legal reports

Dr Antony Greenberg

60. Mr Semic relied upon reports by Dr Anthony Greenberg, General and Gastrointestinal Surgeon, to support his claim. Dr Greenberg wrote three reports dated 9 November 2018, 13 November 2019 and 21 February 2020.

61. In his first report, Dr Greenberg noted:³⁰

“PAST MEDICAL HISTORY

No past history of any previous gastrointestinal problems, No past history of any abdominal Operations.”

62. Dr Greenberg took a history of the symptoms Mr Semic was experiencing, and conducted an examination. He noted that long-term use of analgesics and antidepressants were recognised to alter bowel motility and to have significant side-effects. Dr Greenberg concluded that the symptoms described by Mr Semic were consistent with the history taken, and the diagnosis. He noted that the cause of bowel dysmotility was not well understood, but concluded that on the probabilities Mr Semic’s symptoms were related to the medication he was taking.

63. In his second report of 13 November 2019, Dr Greenberg repeated that Mr Semic had no past history of any previous gastrointestinal problems, and confirmed his earlier opinion.³¹

64. In his third report of 21 February 2020 he was asked the following question by his retaining solicitors:

“Having regard to the differences in symptoms pre-accident when compared to post-accident, is it your opinion that the increase in symptoms are related to post-accident medication intake and whether that medication intake (which is consequential upon his physical injury) has materially aggravated the pre-existing condition.”

65. Dr Greenberg responded:³²

“In my opinion, the aggravation and increase in intensity of the upper gastrointestinal symptoms described by Mr Semic is consistent and known to occur in patients who require long-term medications required for pain relief and mood disorder.”

66. Dr Greenberg made no attempt to correct the history he had taken, nor did he consider whether the pre-existing gastrointestinal condition, which had required the ingestion of Nexium since 2010, affected his opinion.

Dr John Garvey

67. The respondent relied upon the opinion of Dr John Garvey, General and Diagnostic Surgeon, in relation to the claim regarding the digestive tract. Dr Garvey wrote three reports dated 8 January 2018, 14 March 2018 and 23 April 2019. He did not obtain the history of Mr Semic’s pre-existing condition, but was of the opinion that Mr Semic’s epigastric condition was not work-related.

³⁰ ARD page 59.

³¹ ARD page 379.

³² ARD page 396.

The cardiovascular system

Mr Semic

68. Mr Semic, in referring to his blood pressure symptoms said in his second statement:³³

“Before the accident I understand, with medication, I was commonly being measured with blood pressure of about 120/80. Currently my blood pressure is commonly something in the order of 140 – 150/90. That’s also with increased medication.”

69. Mr Semic said that he had been diagnosed with hypertension by Dr Phan, a general practitioner with Advanced Liverpool Medical Centre, in July 2013. Mr Semic stated he had no memory of what his hypertension had been caused by, and that he had never taken “anti-anxiety medication”, although he said he was then prescribed Atacand,³⁴ which he was still taking “for hypertension” at the time of the subject injury.³⁵ Entries in the clinical notes on 11 July 2013 showed a diagnosis of “high blood pressure”, and on 13 July 2013 as “hypertension,” when he was started on Atacand.³⁶

Dr Mark Herman

70. Mr Semic relied on the medico-legal opinion of Dr Mark Herman, Cardiologist, who supplied three reports dated 4 February 2019, 6 February 2020, and 2 March 2020.

71. In his report of 4 February 2019, Dr Herman took a consistent history of the onset of hypertension recorded by Dr Pham on 11 July 2013, finding that Mr Semic had a history of chronic hypertension. He found that the subject injury caused an exacerbation, and that “his blood pressure has allegedly been more labile (according to patient and his general practitioner’s notes).”³⁷

72. Dr Herman reported further on 6 February 2020, confirming his opinion that Mr Semic’s blood pressure had increased “substantially” as a result of factors arising from the subject injury. He made an assessment of 10% whole person impairment (WPI), from which he deducted one half for the pre-existing hypertension.

73. Dr Herman’s third report of 2 March 2020 consisted of an affirmation of some leading questions from his retaining solicitors, and did not take the matter any further.

Dr Richard Haber

74. The respondent retained the services of Dr Richard Haber, Physician, who reported on 27 May 2019. Dr Haber noted the opinion of Dr Herman, and gave a diagnosis of “essential hypertension not significantly aggravated by chronic pain and anxiety.”³⁸

³³ ARD page 413 – 414 [57].

³⁴ ARD page 14 [84].

³⁵ ARD page 17 [104].

³⁶ ARD page 135.

³⁷ ARD page 72.

³⁸ ARD page 358.

SUBMISSIONS

Mr Barter

75. Mr Barter submitted that the occurrence of the left shoulder symptomatology was caused by a discrete and distinct episode. He submitted that even if it were found that the other claims for consequential conditions were successful, without a finding that the left shoulder was consequential, the matter could not be referred to an AMS, as the applicant would be unable to demonstrate that he had an entitlement of over 10% WPI.
76. I was referred to *Warwar v Speedy Courier (Australia) Pty Ltd*³⁹ and the reference therein to the well-known test of causation in this jurisdiction in *Kooragang Cement Pty Ltd v Bates*⁴⁰ and *March v Stramare*.⁴¹ Mr Barter submitted that a common sense evaluation of the causal chain would demonstrate that some links were missing, as I understood him.
77. If there had been a connection between Mr Semic's left shoulder condition and his employment, the evidence demonstrated that it was not materially contributed to by the back injury. Mr Semic said that whilst carrying a 50 kg pole on his left shoulder he suffered injury as he put it down. Mr Barter referred to the 14th century principle known as "Occams razor" that the simplest explanation is most likely the right one. If there was a connection between the employment and the left shoulder condition, it had clearly been caused by an injury that was independent of any connection with the back injury.

Mr Taylor

78. Mr Taylor submitted that Mr Barter's theory had to be subject to the description of the surrounding circumstances. The discrete and distinct injury occurred, Mr Taylor submitted, because Mr Semic had been asked to do work that was outside the terms of his light duty certification. The evidence showed that Mr Semic's back symptoms had caused him to manoeuvre the 50 kg post relying on his left shoulder.
79. Mr Taylor addressed submissions to the allegation that Mr Semic's digestive symptoms were consequential to the back injury. He conceded that there was evidence of prior symptoms of Gastro Oesophageal Reflux Disease, but relied on Dr Greenberg's third report that there had been a substantial aggravation of that condition as a result of the ingestion of pain medication. The symptoms prior to the back injury had been intermittent and mild, Mr Taylor asserted, and they contrasted with the increased and more serious symptoms Mr Semic experienced thereafter.
80. Mr Taylor conceded also that Mr Semic had been receiving treatment for his hypertension prior to the back injury but he submitted that the subject injury caused that condition to worsen. The condition had not been "formally diagnosed" prior to the back injury, although Dr Phan, Mr Semic's GP in 2013, recorded anxiety symptoms expressed by Mr Semic. Mr Taylor referred to the statement of Mrs Adisa Semic which supported Mr Semic's version of events.
81. With regard to the report of Dr Mastroianni, Mr Taylor submitted that the report of 22 November 2018 provided some contemporaneous support for the onset of the left shoulder injury, and that it negated any question that it had been an invention to support the back claim, as I understood his submission.

³⁹ [2010] NSWCCPD 92.

⁴⁰ (1994) 35 NSWLR 452 at 463-4.

⁴¹ [1991] HCA 12 at 15.

82. Mr Taylor submitted that I would prefer the reports of Dr Greenberg to that of Dr Garvey with regard to the gastrointestinal complaints. He also submitted that the applicant had made out his claim with regard to the consequential exacerbation of the hypertension condition which had been supported by Dr Herman.
83. With regard to the extremely detailed and exhaustive particularity with which the circumstances of the shoulder injury was described many times in the two statements made by Mr Semic, Mr Taylor submitted that although such detail had not hitherto been given, the exigencies of litigation required such attention.
84. Mr Taylor finally referred to the entry in the clinical notes by Dr Eftekhar of 21 July 2016. He submitted that the fact of the entry was sufficient, as I understood him, to raise a prima facie case that the left shoulder condition in fact occurred. He said that there was no application to cross-examine either Dr Eftekhar or the applicant on the contents of that entry. It was the first contemporaneous record of the onset of the left shoulder condition and the underlying causation issues, being legal issues, could not reasonably be expected to be addressed within a clinical note. Mr Taylor submitted that there was no dispute about the nature of the work Mr Semic was doing when he experienced the onset of the left shoulder symptoms and there was accordingly a common sense causal link between the subject injury and the left shoulder condition. In that regard he referred to the well-known principle of *March v Stramare*,⁴² that the manner in which Mr Semic was asked to carry the steel post was so connected with his loss that as a matter of ordinary common sense and experience, it should be regarded as the cause of it.
85. Mr Taylor submitted that the allusion to Occam's razor therefore "slices both ways."

Mr Barter in response

86. In reply, Mr Barter referred to *Murphy v Allity Management Services Pty Ltd*⁴³ as authority for the proposition that in order to establish that a condition was consequential to an injury, it had to be shown that the injury substantially contributed to the alleged condition. The applicant had failed in this case, he submitted.
87. Mr Barter also referred to further cases regarding consequential conditions, *Bennett v Qantas Airways Ltd*⁴⁴ and *WDS (Mining) Pty Ltd v Piper*⁴⁵.
88. Mr Barter submitted that the evidence showed that whilst the applicant may have been susceptible to injury in the left shoulder, it had been injured by a discrete and distinct mechanism of injury, which constituted a novus actus interveniens, as I understood him.
89. Some discussion during submissions raised the question of the applicability, if any, of the recent Court of Appeal decision in *Secretary, New South Wales Department of Education v Johnson*.⁴⁶ Mr Taylor submitted that there was no novus actus interveniens involved in the onset of Mr Semic's left shoulder condition, and it could not be said that the onset of the condition was a separate proposition to the subject injury.

⁴² *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506; (1991) 9 BCL 215.

⁴³ [2015] NSWCCPD 49.

⁴⁴ [2019] NSWCCPD 23.

⁴⁵ [2013] NSWCCPD 19.

⁴⁶ [2019] NSWCA 321.

DISCUSSION

The onus of proof

90. I am grateful to counsel for the authorities to which they have referred me. I should add, however, that I was not assisted by the “Occams razor” analogy.
91. In this jurisdiction, the onus of proof has long been accepted as described by Kirby P, as he then was, in *Kooragang Cement Pty Ltd v Bates*⁴⁷. Mr Barter referred me to the reference to His Honour’s dicta in *Warwar v Speedy Courier (Australia) Pty Ltd*⁴⁸ per DP Roche at [95]. However that citation was not complete. It was cited in full by DP Wood in *Ozcan v Macarthur Disability Services Ltd* at [105]:⁴⁹

“The result of the cases is that each case where causation is in issue in a workers’ compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use the phrase ‘results from’ is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. *What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.* In each case, the question whether the incapacity or death ‘results from’ the impugned work injury (or in the event of a disease, the relevant aggravation of a disease), is a *question of fact to be determined on the basis of evidence, including where applicable expert opinions.* Applying the second principle which Hart and Honore identify, *a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped.* This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death ‘resulted from’ the work injury which is impugned.” [Emphasis added].

92. The onus of proof lies upon an applicant to establish his claim on the balance of probabilities and to a sense of actual persuasion of the existence of the facts.⁵⁰
93. There are a number of links in the applicant’s chain of causation that need to be considered in Mr Semic’s case. They are:
- The lack of independent contemporaneous evidence to support Mr Semic’s allegation that his left shoulder condition was consequential to the subject injury.
 - The evidence regarding the claim for the right shoulder condition.
 - The inconsistencies in the expert medical opinions.
 - The inconsistencies in Mr Semic’s evidence.

⁴⁷ (1994) 35 NSWLR 452 at 463-4.

⁴⁸ [2010] NSWCCPD 92.

⁴⁹ [2020] NSWCCPD 21.

⁵⁰ *Department of Education and Training v Ireland* [2008] NSWCCPD 134.

The left shoulder

94. Mr Barter did not go so far as to submit that the left shoulder injury did not happen, and preferred to concede that the event occurred. He suggested the date of the event was late April 2016. (As indicated above, I do not think anything turns on the precise date.) On one view, that was a generous concession. Nonetheless, it does not become necessary to consider this concession, as an applicant is required first to establish a prima facie case. The following matters are relevant to that requirement.

The statements

95. Mr Semic's statements were made on 21 October 2019 and 11 February 2020. As indicated, they provided a thorough and detailed narrative as to the circumstances under which the left shoulder condition was allegedly acquired. He was supported by evidence from his wife, Mr Sarkis Adisa Semic in her statement, also dated 11 February 2020. The events Mr and Mrs Semic described were by then between three and a half and four years old.
96. Whilst no doubt Mr and Mrs Semic were doing their best to assist the Commission with their recollections, without support for those memories, their evidence must be approached with caution. In the first place the mere effluxion of time raises the possibility that accuracy of recall might be affected by innocent but inaccurate reconstruction. Secondly, when the financial interests of both parties are involved in the outcome of proceedings, that caution is increased. Mr Taylor's submission that the exigencies of litigation required that the details of the injuries be fleshed out as much as possible in order to deal with the question of causation, needs to be measured against these considerations.

Dr Tomka's clinical notes

97. Mr Semic relied upon support from Dr Tomka, who gave a history in his report of 2 September 2019 that was consistent with that contained in Mr Semic's statements. However, although Dr Tomka then described how Mr Semic had been lifting the 50 kg steel poles at the time of his alleged injury, there was no such description given within Dr Tomka's notes, nor within the one certificate that was before me that mentioned the left shoulder.
98. The failure by Dr Tomka to record any injury at all in his first clinical note, when Mr Semic transferred to him on 6 September 2016, is quite odd. I bear in mind that the contents of clinical notes of health professionals must be approached with some caution when considering matters of causation, as was pressed by Mr Taylor.
99. In *Mason v Demas*⁵¹ (*Mason*) Basten JA at [2] urged caution when dealing with inconsistencies based upon clinical notes. In the Commission in *Qannadian v Bartter Enterprises Pty Limited*⁵² President Judge Keating said:

"35. *Mason* is from a line of appellate authority dealing with the use of clinical notes in the fact finding process. A number of these authorities are referred to in *Winter v New South Wales Police Force* [2010] NSWCCPD 121 (which was reversed on appeal, on a different basis), where Roche DP at [183] said:

⁵¹ [2009] NSW CA 227.

⁵² [2016] NSWCCPD 50 (*Qannadian*).

'It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349 at [54]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]; *King v Collins* [2007] NSWCA 122 at [34]–[36]).'

37. The authorities (including *Mason*) do not preclude the use of such evidence in the fact finding process, nor do they provide that such evidence should not be relied on, in the absence of evidence from the author of the clinical notes. The authorities require the use of caution by a fact finder, including having regard to the circumstances in which such notes are brought into existence."
100. Bearing that caution in mind, however, it is nonetheless remarkable that a general practitioner, on interviewing a new patient for the first time, would make no clinical note as to the reasons for the visit, including at least a record of the nature of his new patient's problems. All that was recorded in Dr Tomka's note of 6 September 2016 was that the "visit type" was a "Surgery Consultation"; that Mr Semic was allergic to penicillin; that Mr Semic was prescribed Nexium; and that his blood pressure was 130/80.
101. It is also remarkable, in view of the detailed history given by Dr Tomka on 2 September 2019, that no such history was recorded by Dr Tomka at any earlier point in time.
102. Accordingly, the clinical notes of Dr Tomka do not support Mr Semic in his claim that the back injury materially contributed to the onset of his left shoulder condition.

Medical certificates

103. I have indicated above that the applicant did not lodge any medical certificates. The only certificates before me were the three certificates lodged by the respondent, referred to above.
104. In forming any view as to the weight to be ascribed to the evidence of Dr Tomka, I bear in mind that clinical notes rarely purport to constitute a complete record of the consultation. However, in the context of the other matters to which I shall refer, I have considerable difficulty in according to the belated history given in Dr Tomka's report of 2 September 2019, any corroborative support for Mr Semic's account of the onset of his left shoulder condition.
105. Whilst the certificate of 28 September 2016 confirms a complaint of left shoulder pain at that time, the mention of the right shoulder complaint in the following certificate raises some doubt as to which shoulder Dr Tomka intended to nominate, and the failure to mention the left shoulder again until 10 May 2017 suggests that, if it were the left shoulder, it was not a significant injury that required follow-up.
106. There is no doubt, as was conceded by the respondent, that Mr Semic has pathology in both shoulders. This was acknowledged by Dr Mastroianni and Dr Panjraton. It is however incumbent upon the applicant to show that the pathology later demonstrated was caused by, or materially contributed to by, a work related injury.

Dr Eftekhar's clinical notes

107. Mr Semic sought to rely on entry in the clinical notes of Dr Eftekhar of 21 July 2016 to establish that connection. As indicated, Mr Semic insisted that he had notified Dr Eftekhar of his left shoulder condition at the beginning of May 2016. He asserted that he had told Dr Eftekhar about it on or around 5 May 2016 in both his first and second statements, and he alleged further in his first statement that he had discussed the subject with Dr Eftekhar on

“the 21 June 2016.” I assume that Mr Semic meant to refer to 21 July 2016, as there was no attendance on 21 June 2016. The first documented report of any problem with the left shoulder is 21 June 2016. Further, Mr Semic went on to assert that following this alleged conversation, Dr Eftekhar referred him off for imaging of the left shoulder, which is noted in Dr Eftekhar’s entry of 21 July 2016.

108. In any event, Mr Semic alleged that on this occasion he had asked why Dr Eftekhar had not told Rehab Options about his left shoulder pain, to which Dr Eftekhar was said to have replied that he was unaware of the left shoulder injury. (I note in passing that at this same point in the narrative Mr Semic alleged that he had told Dr Eftekhar “consistently since 5 May 2016, almost 6 weeks earlier... .”)
109. Mr Semic advanced two principal reasons as to why Dr Eftekhar might not have recorded his complaint on 5 May 2016. He firstly said, as I have outlined, that Dr Eftekhar did not take much notice of the complaints Mr Semic was making about his left shoulder as he “was concentrating on my lower back instead.” Mr Semic advanced that theory again in his second statement.
110. The second reason, however, was advanced at paragraph 168 of his first statement, Mr Semic said that he had been experiencing language difficulties with Dr Eftekhar, and felt that “perhaps, he had not understood me when I had initially told him about the pain in my left shoulder.”
111. Mr Semic made no attempt to reconcile those apparent inconsistencies, and I am left with a doubt as to whether he was aware that he had given two different theories to explain the absence of any earlier record regarding the left shoulder.
112. Another problem raised by the explanation regarding language difficulties also lies in the content of the clinical notes of Dr Eftekhar. Mr Semic’s back injury was being managed by Dr Eftekhar from 12 April 2016 through to 31 August 2016. I have reproduced above the entries for the eleven occasions Mr Semic consulted Dr Eftekhar between 12 April 2016 and 21 July 2016. No note was made by Dr Eftekhar of any language difficulties, and until the allegation appeared in Mr Semic’s statement of 21 October 2019, Mr Semic had not hitherto mentioned them either.
113. A further difficulty with this claim also arises from the content of the entry in Dr Eftekhar’s notes of 21 July 2016. As indicated, Mr Taylor submitted that clinical notes were not usually concerned about matters of causation, and indeed in the above citation from *Qannadian*, President Judge Keating referred to a comment by DP Roche that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. Dr Eftekhar however included in the entry, having duly recorded the complaint about the left shoulder, the observation “which he forgot to mention.”
114. Against the background of this case, that observation is significant, and again affects the reliability of Mr Semic’s evidence as to the occurrence of the left shoulder injury. Mr Taylor submitted that I should regard that entry as being a contemporaneous record of the onset of the left shoulder condition. He submitted that the underlying causation issues could not reasonably be expected to be addressed within a clinical note, and in that regard he has the weight of the authorities to which I have referred to rely on. However each case must turn on its own facts, and the inclusion of Dr Eftekhar’s observation in the clinical note leaves me in some doubt as to whether Dr Eftekhar accepted what he had been told about the left shoulder.
115. It also casts doubt on Mr Semic’s theories that Dr Eftekhar was so pre-occupied with his back that he ignored Mr Semic’s alleged complaints about the left shoulder, or that Dr Eftekhar could not understand him.

116. The notes up to that entry were comprehensive, and did not elicit any communication difficulties. Moreover, I infer from the language used by Dr Eftekhar in the entry that he made that observation because he questioned Mr Semic as to why he had not mentioned the shoulder until that time, and recorded the answer.

Physiotherapy

117. Dr Panjratn, as I have related, obtained a history that Mr Semic had physiotherapy for the left shoulder, and that doctor recorded the detail that Mr Semic had been given “Theraband” exercises, using a green colour.
118. In his second statement Mr Semic said that he was “confident” that his recollection was accurate that he told the physiotherapists when he was having treatment in May 2016 about his left shoulder.
119. As I have already observed, no evidence was lodged by the physiotherapy treater, identified by Mr Semic as Mr Steven Ngo of Activ Therapy in Liverpool. No explanation has been given as to the absence of that evidence, which in view of the difficulties to which I have referred, one would have expected to have been obtained, or at least an explanation given as to why it had not been obtained. I accordingly draw a *Jones v Dunkel* inference that such evidence would not have assisted the applicant.

Blood pressure readings

120. There were further inconsistencies in Mr Semic’s evidence related to the cardiovascular system. Mr Semic averred that before the accident his blood pressure was commonly being measured. That much was true, however he then said that he understood his blood pressure was about 120/80, and it had increased after the subject injury to the order of 140-150/90.
121. The clinical notes of Advance Liverpool Medical Centre show the following readings:
- 11 July 2013 – 170/90
 - 13 July 2013 – 160/100
 - 10 August 2013 – 140/80
 - 10 September 2013 – 180/85
 - 8 April 2014 – 120/60
 - 27 August 2014 – 140/80
 - 2 May 2015 – 148/87
 - 6 October 2015 – 155/87
122. It can be seen that Mr Semic’s evidence as to his pre-existing level of blood pressure cannot be accepted. With regard to measurements made following the accident, there were no further measurements taken whilst Mr Semic was being treated at the Advance Liverpool Medical Centre. Dr Tomka’s notes show the following measurements:
- 6 September 2016 – 130/80
 - 11 October 2016 – 140/100
 - 26 October 2016 – 140/90
 - 17 February 2017 – 140/80
 - 12 April 2017 – 140/90
 - 7 August 2017 – 140/80
123. It follows that, contrary to Mr Semic’s evidence, his blood pressure has not increased as he alleged. This has implications for the veracity of the assumptions relied upon by his medico-legal referee, Dr Haber, but it also reflects unfavourably on the reliability of Mr Semic’s evidence.

Dr Mastroianni

124. I reject Dr Mastroianni's opinion as to causation. I was not assisted by the causative link he advanced that pain caused one to alter one's posture and do activities to minimise one's aggravation. Dr Mastroianni's further explanation was that (doing the best I can with his meaning) Mr Semic's right sciatic back pain caused him to favour the right side of his body, which made him adopt different postures, which in turn made his lifting mechanism abnormal, resulting in the left shoulder injury.
125. Dr Mastroianni was clearly dealing with a difficult history, and his attempt to connect a left shoulder injury to the back injury I cannot accept, with respect. It is based on speculation and his assumptions are not supported by the evidence or commonsense.

Mrs Semic

126. I was not assisted by Mrs Semic's statement. It was made almost four years after the events she was describing, and was so general in its terms that it lacked the detail that would persuade me that her memory was reliable.
127. It was inconsistent with Mr Semic's claim that he injured his left shoulder towards the end of two weeks or so on light duties, as she indicated that the injury occurred on the day Mr Semic resumed light duties. Like Mr Semic, she was unable to point to any corroborative support for her assertions, and like Mr Semic, the passage of time since the events she attempted to describe may have caused her to innocently reconstruct events. This is so particularly as the self interest in describing the events as favourably as possible may have coloured the memories of both Mr and Mrs Semic over the intervening years. Mrs Semic could not be described as an independent witness impartial to the outcome of her husband's case.
128. For the above reasons the applicant has failed to satisfy his onus. There will be an award for the respondent with respect the claim for the left shoulder.

The right shoulder

129. Mr Semic complained in his first statement that the pain in his right shoulder commenced as a "small pain" that grew with time. Since he stopped using his left shoulder, he said, he was almost exclusively using his right arm and shoulder. He conceded that he had not had any investigations, "but will see Dr Tomka about finding out what is wrong with my right shoulder."⁵³
130. Dr Mastroianni took a similar history, and described the right shoulder symptoms as consequential to the favouring of the left shoulder. This opinion he confirmed in his second report.
131. In his second statement, he said that he had told his GP about his right shoulder problem, and MRI scans were consequently done on 4 November 2019. The pain began, Mr Semic said, because he was using his right shoulder repetitively for grooming, driving, holding onto rails if he had trouble walking, leaning on tables to alleviate back pain, getting up off chairs, and just doing general things around the home.⁵⁴
132. Dr Panjraton took a history that Mr Semic was advised by his GP that his right shoulder problem had been caused by overuse, although Mr Semic told Dr Panjraton that he had no idea why it had happened.

⁵³ ARD page 38 [225A].

⁵⁴ ARD page 412-413 [52].

133. I note that Mr Semic alleged to Dr Panjraton that it was 1½ years before the right shoulder symptoms became apparent, whilst the best estimate he gave in his statement and to Dr Mastroianni was that it developed “with time.”
134. Mr Taylor supported this claim but faintly. Mr Semic is right handed, and the activities he described were no more than the everyday activities that could reasonably have been expected from a right handed man. There was no reason to use his left shoulder and therefore no reason to protect it. In any event, he has not made out that his left shoulder condition was work related. This claim was dependent upon Mr Semic being accepted as a reliable witness, and I have already expressed my reservations as to his reliability in dealing with the claim for the left shoulder.

The digestive system

135. This claim may be dealt with shortly. The probative weight of Dr Greenberg’s opinion was affected by the unexplained contradiction in his three reports as to Mr Semic’s past history. The history of Mr Semic’s ingestion of Nexium for varying periods since 2010 was a matter of some relevance, as the Nexium had been prescribed for his pre-existing gastrointestinal condition. Whether that pre-existing condition was the same as that which Mr Semic subsequently complained of is accordingly not adequately addressed. Dr Garvey’s opinion was that Mr Semic’s condition was not work related, although he too was unaware of the pre-existing history. I am therefore not persuaded that Mr Semic has satisfied his onus in this regard, and there will accordingly be an award in favour of the respondent.

The cardiovascular system

136. I have already analysed the blood pressure readings in my consideration of the reliability of Mr Semic’s evidence, and found that the contemporaneous evidence did not establish that there had been an increase in Mr Semic’s blood pressure following the subject injury.
137. Dr Herman’s opinion was based on an assumption that “allegedly” Mr Semic’s pre-existing hypertension had become more labile since the subject injury. This assumption was said to be based upon the patient’s history and the clinical notes of Advanced Liverpool Medical Centre. I was not referred to those notes during submissions, but a perusal of them did not establish that Mr Semic’s condition following the subject injury was more labile, as I have found.
138. I note that Dr Herman used the word “allegedly”, and in the light of what the record actually revealed, assume that he has accepted Mr Semic’s word as to the content of the notes.
139. The assumption on which Dr Haber based his opinion was wrong and Dr Herman’s opinion has no probative weight. In this claim, too, the applicant has failed to satisfy his onus, and there will be an award for the respondent.

Summary

140. There will be awards for the respondent, for the reasons given above.
141. The remaining claim relates to the lump sum application regarding the accepted back injury. Mr Barter submitted that in the event that Mr Semic could not prove an entitlement to over 10% WPI, the matter could not be referred to an AMS. A similar situation arose in *Etherton v ISS Property Services Pty Ltd*,⁵⁵ in which President Judge Phillips confirmed that Arbitrators now have power to make such findings following the 2018 amendments.

⁵⁵ [2019] NSWCCPD 53.

142. The highest estimate of WPI was that of Dr Mastroianni, who assessed a 7% WPI.⁵⁶

143. There will accordingly be an award for the respondent in respect of the claim for the back.

Decision

144. The Commission finds:

- (a) The applicant has failed to satisfy his onus of proof in his claim that the subject injury has resulted in consequential conditions to both shoulders, the digestive system and the cardiovascular system.
- (b) The applicant is accordingly unable to establish that his WPI is over 10%, and his case cannot therefore be referred to an Approved Medical Specialist for assessment.

145. The Commission orders:

- (a) There is an award in favour of the respondent in respect of all claims.

⁵⁶ ARD page 66.