

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3410/19
Applicant: GAIL MAUREEN SCHACHT
Respondent: LIRO FASHIONS (PURCHASER) PTY LIMITED
Date of Determination: 12 November 2019
Citation: [2019] NSWCC 364

The Commission determines:

1. The applicant suffered injuries to her neck and left arm at or above the elbow together with a consequential condition to her right arm at or above the elbow as a result of the injury on 11 August 1997.
2. As a result of the nature and conditions of her employment with the respondent, the applicant suffered an injury to her back (lumbar and thoracic spines) with a deemed date of injury of 30 November 1997.
3. Award for the respondent on the claim for injury to the right leg at or above the knee.
4. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:
 - (a) Date of injury: 11 August 1997
Body systems referred: Neck, left arm at or above the elbow, right arm at or above the elbow
Method of assessment: Table of Disabilities
 - (b) Date of injury: 30 November 1997 (deemed)
Body systems referred: Back (lumbar and thoracic)
Method of assessment: Table of Disabilities.
5. The documents to be referred to the AMS to assist with their assessment are to include the following:
 - (a) this Certificate of Determination
 - (b) the Application and attachments;
 - (c) the Reply and attachments;
 - (d) the applicant's Application to Admit Late Documents (AALD) dated 16 September 2019 and attached documents; and
 - (e) the respondent's AALD together with attachments dated 17 September 2019.

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

CAMERON BURGE
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Gail Schacht (the applicant) brings proceedings seeking lump sum compensation under the former Table of Disabilities in respect of injuries allegedly sustained to her left arm at or above the elbow on 11 August 1997 and her back on 30 November 1997.
2. The applicant commenced employment as a nurse's aide with the respondent, which formerly operated as Maroubra Junction Nursing Home, in or about 1994. In her statement, she says she suffered the following injuries in the course of her employment with the respondent:
 - (a) on 1 September 1995, the applicant was attempting to lift a male patient who had fallen to the floor. As she did so, she fell, causing the patient to fall on top of her, and the applicant sustained an injury to her neck and left shoulder. She had approximately two months away from work before resuming her pre-injury duties;
 - (b) on 11 August 1997, the applicant was pushing a meal trolley which became stuck in the carpet, and whilst trying to release it, she injured her neck and left shoulder, and
 - (c) during the course of her employment, the applicant was required to shower, toilet and dress patients and conduct heavy lifting, bending and carrying. She alleges that as a result of these duties, she sustained an injury to her back and her right hip.
3. The applicant states her left arm had always been stronger than her right, and she mostly used her left arm whilst working. She states that following the injury on 11 August 1997, she was unable to use her left arm and relied on her right. She then began to feel pain after some time in her right arm and shoulder, which was initially mild, but which over the years became more significant.
4. She said she is unable to sleep on her right side as the pain in her right hip becomes unbearable and the areas around her neck where she has had surgery often break out in a rash and become very itchy.
5. The applicant brought proceedings in the Compensation Court in 2002, and a settlement was achieved on the basis the respondent paid the applicant the following lump sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act):
 - (a) \$10,000 in respect of a 25 per cent permanent impairment of the applicant's neck;
 - (b) \$6,000 in respect of a 10 per cent permanent impairment of the applicant's back;
 - (c) \$11,250 in respect of a 15 per cent permanent impairment of the applicant's left arm at or above the elbow, and
 - (d) compensation for pain and suffering pursuant to section 67 of the 1987 Act in the sum of \$12,750.
6. The applicant brought further proceedings in the Commission in 2011, and on 17 October 2011 consent orders were executed between the parties to the following effect:
 - (a) the respondent pays the applicant \$2,000 in respect of a further 5 per cent permanent impairment of the neck as a result of injuries on 1 September 1995 and 11 August 1997, and

7. In the present proceedings, there is an allegation of a consequential condition having been suffered to the applicant's right shoulder. That consequential condition is disputed by the respondent. The applicant's injuries to the neck and left arm are not in dispute. In relation to her injuries suffered on 11 August 1997, the applicant claims:
 - (a) 55 per cent loss of the left arm at or above the elbow;
 - (b) 35 per cent permanent impairment of the neck, and
 - (c) 20 per cent loss of the right arm at or above the elbow.
8. As a result of the nature and conditions claim with a deemed date of injury of 30 November 1997, the applicant alleges injury to her back and right leg (hip). The injuries to the back and leg are disputed by the respondent. The applicant claims in respect of this date of injury the following:
 - (a) 35 per cent permanent impairment of the back, and
 - (b) 5 per cent loss of right leg at or above the knee.
9. The applicant's solicitors submitted a permanent impairment claim form in relation to the above claims dated 26 February 2019. On 20 May 2019, the respondent's insurer issued a section 78 notice. In that notice, the respondent determined there was insufficient medical evidence to support a finding that the applicant's right shoulder condition is consequential to the left shoulder and neck injuries which were sustained on 11 August 1997.
10. In relation to the lumbar spine and right hip claims, the respondent also disputed the sufficiency of medical evidence to support the contention those conditions arose from the injury on 30 November 1997, and alleged the only accepted injury caused by the nature and conditions of the applicant's employment was to her thoracic spine.
11. Following receipt of the section 78 notice, the applicant's solicitors commenced these proceedings on 10 July 2019.

ISSUES FOR DETERMINATION

12. The parties agree that the following issues remain in dispute:
 - (a) whether the applicant suffered a consequential condition to her right shoulder as a result of the accepted injuries to her neck and left shoulder suffered on 11 August 1997, and
 - (b) whether the applicant's nature and conditions claim includes an injury to the lumbar spine and right hip, or whether, as contended by the respondent, the applicant's claim in relation to her back injury was limited only to her thoracic spine.

PROCEDURE BEFORE THE COMMISSION

13. The parties attended a conference/hearing on 24 September 2019.
14. At the hearing, Mr G Young of counsel appeared for the applicant and Mr H Halligan of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attached documents;
 - (c) the applicant's Application to Admit Late Documents (AALD) dated 16 September 2019 and attached documents, and
 - (d) the respondent's AALD together with attachments dated 17 September 2019.

Oral evidence

16. At the outset of the hearing, Mr Young sought leave to lead evidence-in-chief from the application concerning the nature of the symptoms in her back since the injury with a deemed date of 30 November 1997. That application was not opposed by Mr Halligan and leave was accordingly granted.
17. The applicant's oral evidence was to the effect she had suffered symptoms in her lumbar and thoracic spine for the entire time since she finished work in November of 1997.

SUBMISSIONS

The applicant's submissions

18. For the applicant, Mr Young noted the secondary right shoulder condition was placed in issue. He referred the Commission to the applicant's second statement dated 16 September 2019 at page 1 of the applicant's AALD. In that statement, the applicant note she said at paragraph 8 of her first statement that she began to experience symptoms in her right shoulder "approximately ten years ago." The applicant then refers to the report of Dr Steven Faux dated 1 May 2001, in which he says at page 3, "Her second most significant [sic] is right shoulder pain which is more like a clicking sensation. It is intermittent and can last up to two days and it is a visual analogue score today of 0/10." The applicant said reading this report from Dr Faux reminded her that her right shoulder pain stems from at least 2001. She states she can recall telling her treating doctors about the symptoms in the right shoulder and that body part being treated by Nadine Judelman, physiotherapist.
19. The report of Dr Faux is attached to the applicant's AALD at page 5. The report confirms the applicant having provided a history of right shoulder symptoms as early as 2001.
20. The Commission was referred to the report of Judith Davidson, occupational and hand therapist, dated 15 May 2001 and found at page 7 of the applicant's AALD. Mr Young noted that at page 2 of that report, in relation to the complaints expressed by the applicant at the time of the examination, Ms Davidson recorded, "Pain in both shoulders with left shoulder worse than right shoulder."
21. Mr Young then took the Commission to the applicant's first statement, where she explains how the problems with her right shoulder developed. He said the Commission should accept the applicant's uncontested evidence at paragraph 7 of her first statement as follows:

"My left arm has always been the stronger than the right and I have worked mostly using my left arm. Following the injury on 11 August 1997, I was unable to use my left arm very much and relied on my right arm.

8. About ten years ago [we now know that number should be approximately 18 years ago] I started to feel pain in my right arm and right shoulder. Initially it was mild but over the years, it became more and more significant. It is now very painful and it is difficult for me to use my right arm and shoulder.”

22. Mr Young submitted it was obviously apparent the applicant had been complaining of problems with her right shoulder from at least 2001, and the Commission would have little difficulty in accepting her evidence that the right shoulder problems arose from overuse as a consequence of the accepted left shoulder injury.
23. In relation to the nature and conditions claim concerning the lumbar spine, Mr Young asked the Commission to accept the applicant’s evidence given at the hearing to the effect that the history taken by the respondent’s independent medical examiner (IME) Dr Rowe was incorrect. That history recorded by the doctor says the applicant told him the symptoms in her lower back developed approximately 1.5 years after the deemed date of injury in November 1997. The applicant gave evidence, which was not contested, that this history was incorrect. Mr Young also impressed upon the Commission the applicant’s evidence to the effect that she had suffered symptoms in her whole spine since her workplace injury in November 1997.
24. Mr Young referred to the Medical Assessment Certificate (MAC) of Dr Weisz, Approved Medical Specialist (AMS) found at page 27 of the Reply. He was critical of the AMS for the following reasons.
25. Mr Young noted Dr Weisz referred to a CT scan dated February 2011 of the applicant’s entire spine, which was described in the report of Dr Bye, IME, dated 1 March 2011. He noted Dr Bye referred to the lumbar spine scan in his report of that date, however, Dr Weisz did not. He noted Dr Weisz referred to the applicant having suffered an injury to her mid back in 1997 but also referred to present symptoms involving low back and right hip pain. Mr Young reinforced the applicant had always indicated she suffered from lumbar and thoracic spine pain since her workplace injury, and indicated the examination carried out and reported upon at page 29 of the Reply was cursory at best in relation to the lumbar spine.
26. Mr Young further submitted there was no reference to the lumbar spine by Dr Weisz yet there was no compelling evidence to suggest the applicant’s difficulties in that region were positively excluded by him.
27. In relation to the report of Dr Bye, IME for the respondent dated 1 March 2011, Mr Young noted he was focused on the September 1995 work incident which related to the neck and left upper extremity injury, rather than the nature and conditions claim which concerned the applicant’s spine. Mr Young noted Dr Bye did not take a history at all concerning any nature and conditions claim, but nevertheless at page 22 of the Reply noted an assessment was provided of the thoracolumbar spine as follows:

“Assessment of the thoracolumbar spine revealed exaggerated kyphosis, loss of lumbar lordosis and flexion of the lumbar spine to mid-shin level but an inability to straighten out her spine to the neutral position. Lateral rotation was more limited on the right side and lateral tilt was also more limited on the right side, provoking lower lumbar back pain.”
28. It was submitted by Mr Young that Dr Weisz had unreasonably restricted his assessment to the thoracic spine, and it was apparent from the report of Dr Bye that the applicant was suffering from lumbar symptoms for which she was being treated and which she had attributed to the nature and conditions of her employment.

29. Mr Young submitted the opinion of Dr Weisz is not binding as to the cause of the applicant's lumbar spine issues, and submitted the Commission should disregard it in the circumstances, as he simply did not consider the lumbar spine at all and his failure to do so was an error.
30. Mr Young contrasted the views of Dr Weisz with those of Dr Guirgis in his report dated 6 August 2001. In that report, Dr Guirgis took a history in relation to the applicant's back as follows:

“She indicated to me that over the last seven years or so of her nursing career she started developing episodes of pain and stiffness in the middle and lower parts of her back. These episodes were particularly felt after heavy lifting of heavy lifting/bending activities [sic]. Since 1996 the situation worsened in her lower back and on presentation she also complained of pain and stiffness in the lower back.”
31. The report of Dr Guirgis, Mr Young submitted, is evidence of the applicant suffering from lumbar spine complaints as early as 2001 but stemming from the last few years of her work with the respondent.
32. In summary, Mr Young submitted the applicant had been consistent and that her complaints in her spine had always been in relation to both her thoracic and lumbar vertebra. Accordingly, he submitted the Commission would accept the applicant when she says her whole back had always been involved with pain since the nature and conditions injury developed.
33. Mr Young proposed the Commission would make the following orders:
 - (a) the applicant suffered injuries to her neck and left arm at or above the elbow together with a consequential condition to her right arm at or above the elbow as a result of the injury on 11 August 1997;
 - (b) the body parts referred to in (a) above should be referred to an AMS for an assessment of the applicant's whole person impairment assessed under the Table of Disabilities;
 - (c) as a result of an injury with a deemed date of 30 November 1997, the applicant suffered injury to her thoracic and lumbar spine and a consequential condition to her right leg at or above the knee, and
 - (d) the body systems referred to in (c) above should be referred to an AMS for an assessment of the applicant's thoracic spine, lumbar spine and her consequential condition in the right hip.

The respondent's submissions

34. Mr Halligan submitted that when dealing with the applicant's back injury, Dr Weisz has provided an assessment of 10 per cent, however, he confined that impairment to the thoracic spine. He said Dr Weisz did not speak of the lumbar spine or the lower back at all in making his assessment, and noted Dr Weisz had Dr Bye's report. He submitted that if Dr Weisz had not been called upon to deal with the lumbar spine, it is understandable he would not discuss it in his MAC.

35. Mr Halligan submitted the mere fact a scan of the applicant's entire spine was in existence and referred to by Dr Bye does not inform the Commission that a justifiable case was brought by the applicant in relation to her lower back. He submitted Dr Bye gives no attempt to deal with the back at all, even the thoracic spine. As such, Mr Halligan submitted Dr Bye's report is of limited utility to the applicant as he does not give an assessment of permanent impairment on any body parts relating to the nature and conditions claim. In summary, Mr Halligan submitted the MAC of Dr Weisz could not have been commissioned on any basis other than a pure assessment of the applicant's thoracic spine.
36. In relation to the right hip complaint, Mr Halligan took the Commission to the report of the Sydney South Eastern Local Health District Pain Management clinic dated 5 December 2017 at page 111 of the applicant's AALD. That report recorded:
- "Four weeks ago, she also has spontaneous onset of the right hip and low back pain. She had a plain X-ray done, however, I have no report. She will be reviewed in February and clinically there is no antalgic gait when she is walking and I think she is very unlikely to have any hip fractures."
37. Mr Halligan submitted the fact of a report of "spontaneous" right hip and lower back pain does not give rise to a concept of something which has been longstanding. He submitted that even the report of Dr Guirgis from 2001 still took a history some four years after the deemed date of injury in November 1997. He said Dr Guirgis' report predates the first terms of settlement by approximately two years, so one might speculate the report would have been part of the material before the court. He submitted Dr Guirgis being an IME means there was no particular force to his opinion, and certainly not the same weight as that which would be attributed to a treater.
38. In summary, Mr Halligan submitted that when the Commission examined the relevant medical material and the chronology applied by Dr Guirgis, together with a proper reading of Dr Weisz and the 2003 terms of settlement, a clear picture emerges that the back condition was confined to the thoracic spine, particularly given the lack of opinion by any treating doctor.
39. Mr Halligan submitted there is very little material to support the applicant's claim for a consequential condition to her right hip. He referred to the material produced by Coogee Physiotherapy in the respondent's application to admit late documents and noted there is no mention there of any issue with the lower back. He said the right hip and lower back form part of the same allegation of injury, but the hip is not supported by any treating practitioner material at all.
40. Concerning the right shoulder, Mr Halligan submitted it was important that there be some understanding in relation to the dynamics of the development of any alleged condition. He submitted the applicant's complaints were not sufficiently specific to indicate what she had been doing to cause the problems with her right shoulder. He noted that by the time the applicant came to see Dr Weisz, there was no complaint of injury in the right shoulder. Likewise, Mr Halligan submitted that the report of Dr Cusi found at page 41 of the Application and dated 22 December 2005 makes no mention of the applicant's right shoulder at all. Mr Halligan properly conceded the report of Dr Faux from 2002 does refer to the right shoulder and arm but noted that was also some time after the deemed date of injury.

41. Mr Halligan also relied on the report of Dr Bye at page 22 of the Reply which noted on examination a full range of movement in the right shoulder and no significant pain experienced. He submitted there was no report from either Dr Negrine or Dr Goldberg, the latter of whom is a well-recognised shoulder surgeon, and someone from whom the Commission would expect to hear if there were contemporaneous issues with the right shoulder.
42. In summary, Mr Halligan submitted that whilst there may be diffuse references to the right shoulder, the Commission must be satisfied on the balance of probabilities that:
 - (a) the lower back condition developed beyond November 1997;
 - (b) Dr Weisz has improperly crafted his report and omitted a relevant body part;
 - (c) be satisfied that the right hip condition has been present and arose from the same 1997 incident, and
 - (d) suffered from a consequential condition to her right shoulder.
43. Mr Halligan submitted on balance, the Commission would not be satisfied the applicant had suffered either injury or consequential condition to the contentious body parts and would therefore simply make orders that the applicant's neck and left shoulder be referred to an AMS.

The applicant's submissions in reply

44. Mr Young conceded the applicant bears the onus of proof in relation to the allegedly injured body parts. He took the Commission to paragraphs 7 through 11 of the applicant's first statement and submitted there was ample evidence in those paragraphs to satisfy the Commission as to the activities which gave rise to overuse of the right shoulder and therefore the consequential condition. He noted there was an ultrasound report from April 2019 which revealed a full thickness tear to the right shoulder and submitted it was apparent previous x-rays which did not show any particular abnormality had not provided the full story of the applicant's problems.
45. In summary, Mr Young submitted the Commission would be satisfied that the applicant overused her right shoulder as a consequence of her left shoulder injury and suffered a condition as a result.
46. In relation to the lower back and hip, Mr Young submitted the respondent's submission that right hip and lower back pain had arisen "spontaneously" in 2017 is not accurate, given complaints recorded by Dr Weisz in relation to the lumbar spine and right hip in 2011 and recorded by Dr Guirgis to the same body parts in 2001. He submitted the Commission would find the use of the word "spontaneous" was simply an error and inappropriate when it was noted in 2017.

DISCUSSION

Injury

47. The applicant bears the onus of proving that her disputed alleged injuries and consequential conditions are work-related. In determining the cause of an injury, the Commission must apply a common-sense test of causation. In the workers compensation context, the appropriate test for causation was set out by Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 (*Kooragang*) where his Honour said:

“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 of 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 death or 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.” (at 810; emphasis added)

48. “Injury” is defined in s 4 of the 1987 Act as follows:

“In this Act: injury means

- (a) personal injury arising out of or in the course of employment,
- (b) includes a ‘disease injury’, which means:
 - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
 - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers’ Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.”

49. There is a useful review of the authorities concerning the issue of injury in *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 (*Castro*). That case makes clear that what is required to constitute “injury” is a “sudden or identifiable pathological change”. In *Castro* a temporary physiological change in the body’s functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

50. In this matter, the issue is whether the applicant suffered an injury to her lumbar spine and right leg as a result of the nature and conditions of her employment with the respondent, or whether her claim for injury to the back which has previously been the subject of determination by the Compensation Court and the Commission was limited only to the thoracic spine. The pleadings from the prior proceedings are not in evidence before the Commission.

51. On balance, having regard to the entirety of the medical evidence, particularly the reports of practitioners from as early as 2001, I find the back injury caused by the nature and conditions of the applicant’s employment included the lumbar spine. The applicant gave uncontested evidence that she has suffered pain in her low back as well as her thoracic spine since the nature and conditions injury first manifested itself, and I note there is evidence from Dr Guirgis from as long ago as 2001 to the effect:

“She indicated to me that over the last 7 years or so of her nursing career she started developing episodes of pain and stiffness felt in the middle and lower parts of her back. These episodes were particularly felt after heavy lifting of heavy lifting/bending activities. Since 1996 the situation worsened in her lower back and on presentation she also complained of pain and stiffness in the lower back.”

52. In the same report, Dr Guirgis found the following on examination:

“LUMBAR SPINE

The normal lumbar lordosis was maintained. Tenderness was elicited over the lower 2 lumbar spines and spaces. Movements of the lumbar spine were restricted 25 % of the range, with spasm of the para-spinal lumbar muscles on exceeding that range. Straight leg raising was positive on the right side at 70 and on the left side at 70. There were no neurological deficits in the lower limbs.”

He then provided the following opinion:

“The above described lumbar spinal problem resulted from the effects of fatigue loading on the lumbar area of the spine associated with the nature of the patient's duties as a nurse which included a lot of heavy lifting and lifting bending activities. Such activities would affect the disc structure and the facet joints and also result in chronic sprain/strain of the musculo-ligamentous and fascial structures. There was also triggering of the symptoms of &/or aggravation of the effects of underlying degenerative changes.”

53. It is therefore apparent Dr Guirgis took a history of the applicant developing problems in her lumbar spine in the last few years of her work with the respondent, that at the time of his examination she continued to have problems and in his view, the cause of the lumbar spine issues was the nature and conditions of employment with the respondent.
54. In light of this relatively contemporaneous evidence, and absent any other evidence to the effect the applicant's lumbar spine was excluded from her claim in relation to her back, I am satisfied to the requisite standard that she did suffer an injury to her lumbar spine owing to the nature and conditions of her employment.
55. Notwithstanding the MAC of Dr Weisz from 2011 assessed only the applicant's thoracic spine, nothing in the report other than mere omission suggests the lumbar spine was not part of the relevant injury. Certainly, the MAC does not specifically exclude the lumbar spine. Rather, Dr Weisz noted the presence of low back and right hip pain but conducted only a cursory examination, which he considered unremarkable at that time. In my view, the absence of any impairment rating with regards to the lumbar spine in the 2011 MAC does not preclude the applicant from making a claim in respect of that body part, nor can it in anyway be said to have ruled out the lumbar spine as an injured and assessable body part.
56. Accordingly, the applicant's claim for injury to the back which is to be referred to an AMS will include an assessment of the lumbar spine.
57. I am not, however, satisfied to the requisite standard that the applicant suffered a right leg (hip) injury as a result of the nature and conditions of her employment. Unlike the lower back injury, there is no contemporaneous documentation which corroborates any right leg (hip) claim. The applicant must discharge her onus of proof, and in my view, there is no evidence which satisfactorily establishes any causal link between the nature and conditions of her employment and the alleged right hip injury. I note Dr Guirgis attributes the right hip condition to the lumbar spine injury in his most recent report of 12 February 2019, however, that report comes more than two decades after the applicant last worked for the respondent, and there was no complaint of any hip issues in the earlier medical evidence.

58. Accordingly, there will be an award for the respondent on the claim for injury to the right leg at or above the knee.

Consequential condition

59. It is important at the outset to set out the relevant test for establishing the presence of a consequential condition.

60. In *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWCCPD 8 (*Kumar*), Deputy President Roche dealt with the issue of whether the injured worker's shoulder condition resulted from mobilising whilst recuperating from accepted back surgery. At [35] and following, Roche DP stated:

“35. By asking if Mr Kumar has suffered a s 4 injury to his right shoulder, the Arbitrator erred in his approach and asked the wrong question. This error affected his approach to the medical evidence and his conclusion. Mr Kumar's claim was always, as the respondent has conceded on appeal, that the right shoulder condition, and the need for surgery, resulted from the accepted back injury. It was not necessary for him to prove that he suffered a s 4 injury to his right shoulder.

36. The Commission has considered claims of this kind in several decisions (*Cadbury Schweppes Pty Ltd v Davis* [2011] NSWCCPD 4 (*Davis*); *Vivaldo; Moon v Conmah Pty Ltd* [2009] NSWCCPD 134; *Australian Traineeship System v Turner* [2012] NSWCCPD 4 (*Turner*)) and has consistently applied the principles in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*).”

61. At [55] of the decision in *Kumar*, the Deputy President noted:

“It is not necessary for Mr Kumar to establish that he has significant pathology in his shoulder, only that the proposed surgery is reasonably necessary as a result of the injury on 19 March 2009. Dr Wallace's opinion may well be relevant to the ultimate question of whether the shoulder surgery is reasonably necessary, but it does not determine the question of whether the right shoulder condition has resulted from the back injury.”

62. Likewise, the decision of Deputy President Snell in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWCCPD 23 (*Brennan*) dealt with the question of a consequential injury. In that matter, a school teacher made a claim for consequential conditions to her cervical spine and shoulders following an accepted initial injury involving an injury to her power of speech. The Senior Arbitrator at first instance found there was a consequential injury and the employer appealed.

63. At [100] and following in *Brennan*, Snell DP summarised a number of Presidential decisions concerning consequential injury, including *Kumar*, 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] NSWCCPD 134 (*Moon*) and *Kumar v Royal Comfort Bedding* [2012] NSWCCPD 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.’

64. As the above lines of authority clearly demonstrate, it is not necessary for an applicant to demonstrate a consequential condition by proving a change in pathology to the standard required to establish an injury under section 4 of the 1987 Act. Rather, the applicant must show that the symptoms and restrictions in her right arm (shoulder) have resulted from her accepted left shoulder injury.

65. Taking into account the applicant’s evidence as to the extent to which she relied on her right arm after her accepted left arm injury, I am satisfied on the balance of probabilities that her right arm condition is consequential upon the accepted left arm injury.

66. In making this finding, I have had regard to the reports of Dr Faux, treating rehabilitation physician dated 1 May 2001 and 12 March 2002. In his first report, which is addressed to Dr Pell, Dr Faux records “Her second most significant problem is right shoulder pain which is more like a clicking sensation. It is intermittent and can last up to 2 days and is at a visual analogue score today of 0/10.” In the later report, addressed to Dr McKenzie, Dr Faux says:

“She is independent in showering, toileting and dressing. She has pain on putting on her jumpers. Her daughter and husband do all the heavy cleaning. She walks daily for 1 hour and undertakes an exercise program in the gym 3 days a week. She also does breast stroke at a heated pool 3 days a week. She continues to have left arm pain and now reports right arm pain at a visual analogue score of 6/10.

On examination she had right sided impingement syndrome at 90° with full external and internal rotation. I was unable to inject the shoulder and have referred her.

Plan:

- 1) Right subacromial injection under II guidance.
- 2) Referral to the Activate program.
- 3) Maintain current therapy.
- 4) Review in 6 months.”

67. It is apparent from these reports the applicant began suffering symptoms in her right shoulder sometime after her left shoulder injury, which occurred on 11 August 1997. The left shoulder (and indeed neck) injury arising out of that incident is accepted. When combined with the evidence contained in the applicant’s own statements as to her overuse of the right arm after the left shoulder injury, in my view the evidence which supports a finding of consequential condition to the right shoulder is compelling.
68. Notwithstanding Mr Halligan’s submission to the contrary, in my view the applicant has set out by way of lay and medical evidence the mechanism of overuse of the right shoulder, and accordingly the consequential condition to the right arm (shoulder) will also be referred to an AMS for assessment.

SUMMARY

69. Given the above reasons, the Commission will make the following findings and reasons:
- (a) The applicant suffered injuries to her neck and left arm at or above the elbow together with a consequential condition to her right arm at or above the elbow as a result of the injury on 11 August 1997.
 - (b) As a result of the nature and conditions of her employment with the respondent, the applicant suffered an injury to her back (lumbar and thoracic spines) with a deemed date of injury of 30 November 1997.
 - (c) Award for the respondent on the claim for injury to the right leg at or above the knee.
 - (d) The matter is remitted to the Registrar for referral to an AMS for determination of the permanent impairment arising from the following:
 - (i) Date of injury: 11 August 1997
Body systems referred: Neck, left arm at or above the elbow, right arm at or above the elbow
Method of assessment: Table of Disabilities
 - (ii) Date of injury: 30 November 1997 (deemed)
Body systems referred: Back (lumbar and thoracic)
Method of assessment: Table of Disabilities.

- (e) The documents to be referred to the AMS to assist with their assessment are to include the following:
- (i) This Certificate of Determination
 - (ii) The Application and attachments;
 - (iii) The Reply and attachments;
 - (iv) The applicant's AALD dated 16 September 2019 and attached documents, and
 - (v) The respondent's AALD together with attachments dated 17 September 2019.

