# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1529/20
**Applicant:** Cameron Alexander Colliss Parrett
**Respondent:** Medical Equipment & Gases Australia Pty Ltd
**Date of Determination:** 4 June 2020
**Citation:** [2020] NSWWCC 188

The Commission directs:

1. The Application to Resolve a Dispute is amended as follows:

   (a) at page 7, in relation to the injury on 27 April 2018 (deemed), to omit from the "injury description" reference to all body parts other than the cervical spine and lumbar spine, and

   (b) at page 8, in relation to the injury on 27 April 2018 (deemed), to omit from the "injury details" reference to all systems claimed other than the cervical spine and lumbar spine.

The Commission determines:

1. The applicant sustained a consequential condition affecting his right shoulder as a result of the injury to his left shoulder on 26 November 2017.

The Commission orders:

1. The matter is remitted to the Registrar to be referred to an Approved Medical Specialist (AMS) for the following assessments:

   (a) Date of injury: 26 November 2017
   Systems: Left upper extremity (shoulder)
   Right upper extremity (shoulder) (consequential)
   Skin (TEMSKI)
   Method: Whole Person Impairment

   (b) Date of injury: 27 April 2018 (deemed)
   Systems: Cervical spine
   Lumbar spine
   Method: Whole Person Impairment

2. The materials to be referred to the AMS are to include the Application to Resolve a Dispute and all attachments, the Reply and all attachments and the supplementary report prepared by Dr Eugene Gehr, dated 5 August 2019, attached to an Application to Admit Late Documents filed by the applicant on 17 April 2020.

3. The referrals are to be placed on the Medical Assessment Pending list.

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

Rachel Homan
**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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

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

# STATEMENT OF REASONS

## BACKGROUND

1. Mr Cameron Alexander Colliss Parrett (the applicant) was employed by Medical Equipment & Gases Australia Pty Ltd (the respondent) as a supervisor, commencing in or around October 2016.

2. The applicant claims that on 26 November 2017, while descending the steps of a truck carrying 20 kilogram gas cylinders in each arm, he injured his left shoulder. The applicant subsequently underwent arthroscopic surgery to his left shoulder on 20 April 2018. The applicant claims that he developed a consequential condition at his right shoulder due to the left shoulder injury.

3. The applicant made a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) on 16 May 2019. On 26 November 2019, GIO issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing the claimed consequential right shoulder condition and the applicant's entitlement to lump sum compensation.

4. The applicant claimed to have sustained a second injury at his cervical spine, lumbar spine and bilateral upper extremities as a result of repetitive heavy lifting, squatting, twisting and other duties throughout the course of his employment up until 27 April 2018.

5. A claim for lump sum compensation pursuant to s 66 of the 1987 Act in respect of the second injury was made on 7 June 2019. The claim was managed by EML. There is no dispute notice in relation to that claim in evidence.

6. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 18 March 2020, seeking lump sum compensation in respect of both the 26 November 2017 frank injury and the nature and conditions injury deemed to have occurred on 27 April 2018.

## PROCEDURE BEFORE THE COMMISSION

7. The parties attended a teleconference on 16 April 2020, during which, leave was granted to the respondent pursuant to s 289A(4) of the 1998 Act to dispute the nature and conditions injury deemed to have occurred on 27 April 2018.

8. The parties appeared for conciliation conference and arbitration hearing by telephone on 19 May 2020. The applicant was represented by Mr Luke Morgan of counsel, instructed by Mr Luke Power. The respondent was represented by Mr Fraser Doak of counsel, instructed by Mr Brad Quillan.

9. During the conciliation conference, the parties reached agreement that the claim for lump sum compensation in respect of the nature and conditions injury to the applicant's bilateral shoulders and left axillary nerve would be discontinued. It was agreed that the injury to the applicant's cervical spine and lumbar spine with a deemed date of 27 April 2018 could be referred to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment.

10. The parties were unable to reach agreement in relation to the consequential right shoulder condition alleged to have occurred as a result of the left shoulder injury on 26 November 2017.

11. 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.

## ISSUES FOR DETERMINATION

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

    (a) whether the applicant sustained a consequential condition affecting his right shoulder as a result of the injury to his left shoulder on 26 November 2017;

    (b) the degree of permanent impairment resulting from the injury on 26 November 2017, and

    (c) the degree of permanent impairment resulting from the injury deemed to have occurred on 27 April 2018.

## EVIDENCE

### Documentary evidence

13. 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 documents, and

    (c) supplementary report prepared by Dr Eugene Gehr, dated 5 August 2019, attached to an Application to Admit Late Documents filed by the applicant on 17 April 2020.

### Applicant’s evidence

14. The applicant’s evidence is set out in written statements made by him on 25 February 2020 and 6 March 2020.

15. The applicant said his duties for the respondent involved making deliveries, lifting and manoeuvring oxygen cylinders weighing between 20 and 80 kg. Although the applicant was provided with a trolley for manoeuvring and lifting cylinders, he was frequently required to lift cylinders up a set of stairs.

16. On 26 November 2017, the applicant was descending the steps of a truck whilst carrying a 20 kg oxygen cylinder in each arm. After descending the last step, the applicant felt a jarring injury to his left shoulder.

17. The applicant had felt discomfort previously at his left shoulder but persevered at work hoping that his symptoms would subside. Following the incident on 26 November 2017, the applicant experienced persistent pain and stiffness and sought medical attention. After radiological examination, the applicant’s doctors ascertained that he had a 10 mm tear to his left supraspinatus tendon.

18. The applicant underwent physiotherapy without any benefit and was then referred to Dr Matthew Sherlock who performed arthroscopic surgery on 20 April 2018. Approximately seven days after the surgery, the applicant’s position at work was terminated.

19. The applicant said that as a result of the injury to his left shoulder he began to overcompensate with his right shoulder, which then started to cause him difficulty. After the surgery on 20 April 2018, the overcompensation was prominent.

20. The pain in the applicant's right shoulder started to intensify in July 2018. A small tear was identified to the supraspinatus tendon. Dr Sherlock advised the applicant to continue with conservative management of the right shoulder.

21. The applicant said that completing domestic duties was slow and he generally only attempted duties such as vacuuming, washing and packing away dishes with his right hand. Despite being right hand dominant, the applicant found this hard but he did not want to use his left hand and arm for support as he did not want to re-injure or aggravate the problems in his left shoulder. The applicant said that the repetitive motion of washing dishes and packing way plates, cups and pans into cupboards above shoulder height using only one limb caused a build-up of pain at the applicant's right shoulder. The applicant said it was also difficult for him to do the washing or make his bed using only one limb. The applicant would try to put all the dirty washing into the washing machine using only his right arm.

22. The applicant said that overcompensating with his right arm had resulted in significant physical restrictions and pain in the right shoulder.

**Evidence from the applicant's treating doctors**

23. The clinical notes of the Warringah Medical & Dental Centre are in evidence. Those notes show that the applicant reported left shoulder pain on 26 November 2017:

> "Lt shoulder pain 1/12.
> Operating forklift and 2/52 was avoiding Lt arm use while operating it b/o pain.
> no previous problems with shoulder
> No wasting. no tenderness
> full ROM with pain on abduction. painful resisted abduction ++ and rather weak"

24. The applicant was referred for ultrasound which showed a rotator cuff tear.

25. On 29 November 2017, the applicant's general practitioner, Dr Vladimir Brodski reported that the applicant had decided to proceed with a WorkCover claim as work was likely to be a major contributing factor (moving gas bottles). A WorkCover certificate of capacity issued by Dr Brodski on 29 November 2017 certifies the applicant as having capacity for some type of employment for eight hours a day five days per week. The only restriction identified in the certificate was "minimal use of left arm".

26. The applicant was referred for an MRI, the results of which were discussed at a consultation on 5 December 2017. The applicant was referred to orthopaedic surgeon, Dr Matthew Sherlock.

27. Dr Matthew Sherlock, wrote to Dr Brodski on 7 December 2017 recording a history as follows,

> "Cameron has had problems with his left shoulder for approximately 6 weeks.
> He does not recall a specific injury or traumatic event though he relates it to using quite a heavy strap to hold large medical gas bottles on the back of trucks as well as using a forklift. He developed pain which he locates mostly in the lateral shoulder and pain in the mid upper arm which bothers him at rest and with activity. Any lifting or load overhead and lifting his arm into abduction is painful. There is slight weakness with activity due to pain."

28. Dr Sherlock said an MRI scan showed evidence of a small but significant intrasubstance tear of the supraspinatus at its footprint of 8 to 9 mm. There was also significant bursitis. Dr Sherlock did not recommend surgical intervention at that point but referred the applicant for a 10-week course of physiotherapy.

29. On 28 February 2018, Dr Sherlock reported to Dr Brodski that:

> "Cameron would be a good candidate for an arthroscopic rotator cuff repair, +/- sub pectoral biceps tenodesis, +/- decompression if there is evidence of CA ligament thickening or a spur."

30. On 8 March 2018, the Warringah Medical & Dental Centre notes recorded that the applicant complained of right shoulder pain to Dr Joseph Morgante. The applicant was referred for ultrasound.

31. On 20 March 2018, Dr Brodski recorded:

> "Has surgery booked for 30/4 Lt shoulder
> Still happy to continue modified duties.
> recent Rt shoulder USS discussed"

32. On 10 May 2018, Dr Sherlock reported to Dr Brodski that the applicant's pain was settling and his wounds were healed 10 days post left shoulder rotator cuff repair. Dr Sherlock said:

> "Cameron knows not to put weight or load through his arm. He will continue to wear the brace for another 3½ however I am happy for him to remove the brace and rest his arm on a pillow when at home."

33. On 14 May 2018, Dr Brodski reported that two weeks post left shoulder reconstruction the applicant's pain was slowly settling. On 21 May 2018, Dr Brodsky reported that there had been some improvement in the applicant's pain and he was happy to start light duties if available. On 2 June 2018, the applicant requested Panadeine Forte for pain control.

34. On 8 June 2018, Dr Thieu Hoan Diec at the Warringah Medical & Dental Centre noted:

> "30/4 had L shoulder repair surgery
> due to see Dr Sherlock on 20/5 for r/v
> requested script for Panadeine forte
> no adverse effects
> taking 2 tabs nocte pm
> L shoulder pain comes on towards the evening
> he has started physio
> L arm in a sling"

35. On 20 June 2018, Dr Sherlock noted that the applicant was coming along well. The applicant was wearing a sling and brace when out in the community but not at home. The applicant was noted to have "not yet put any load through his shoulder."

36. On 27 June 2018, Dr Brodski recorded a conference with the applicant as follows:

> "Lt shoulder continue to improve slowly, 9/52 post-surgery
> apparently had Rt shoulder problem at least from March.
> Felt that overcompensated with Rt arm for Left injured arm and then developed Rt shoulder pain
> Attended JMO March 2018, USS showed small tears in supraspinatous and subscapularis

**Examination:**

full ROM Rt shoulder with pain on abduction and AF
good IR.
pain on resisted abduction."

37. The clinical notes for 17 July 2018 recorded:

> "here for results
> R shoulder MRI - small tear of subscapularis and supraspinatus tendons with tendonitis, scuffing of labrum
> discussed
> gave pt copy
> pt is seeing Dr Sherlock
> he had surgery for his L shoulder 9/52 ago"

38. On 23 July 2018 the clinical notes stated:

> "would like a script for his right shoulder pain
> currently only 5/10
> using panadeine forte a bit
> rest
> warm pads
> a trial of Mobic"

39. On 24 July 2018 the clinical notes stated:

> "History: L shoulder operation 11 weeks ago
> R shoulder pain refer ortho after MRI"

40. A letter from Dr Brodksi to GIO, dated 11 July 2018, stated that the applicant first presented with complaints of right shoulder pain on 8 March 2018. Dr Brodski stated:

> "USS showed small supraspinatous tendon tear and small subscapularis tendon tear, subacromial bursitis. Later on further questioning myself he stated that he developed Rt shoulder pain first during his modified duties work, at least from March 2018. Cameron felt that he was overcompensating with Rt shoulder work (while Lt shoulder was painful). When I examined his Rt shoulder in June 2018, there was full ROM with pain on abduction, anterior flexion and resisted abduction."

41. On 26 July 2018, Dr Sherlock reported that the applicant had seen him in relation to his right shoulder. Dr Sherlock stated.

> "Cameron came to see me in the rooms now 3 months post left shoulder surgery. He has been experiencing problems in his right shoulder which he says came on approximately 2 weeks after he first noticed the onset of his left shoulder pain. He has approval from WorkCover to see to see me with respect to his right shoulder problems as well as approval for an MRI scan. He locates the pain in his right shoulder mostly in in the anterior aspect which occurs with reaching out in front and overhead. He has been using his right shoulder more since he has been favouring his left shoulder following his surgery on this side."

42. Dr Sherlock said the applicant had minor pathology at his right shoulder which did not warrant any surgical intervention. Dr Sherlock was hopeful that once the applicant's left shoulder recovered, his right shoulder would improve.

43. A different general practitioner, Dr Sebastian Calvache-Rubio prepared a report for GIO on 2 August 2018, in which he reported:

> "On Sunday, 26 November 2017 Mr Parrett reported that whilst at work he suffered a L) shoulder injury from climbing down the stairs of the truck carrying a full oxygen cylinder. He continued working doing full duties aggravating his condition, and injuring his R) shoulder from overcompensation."

44. Dr Calvache-Rubio made a diagnosis as follows:

> "L) Shoulder Strain, full thickness tear of supraspinatus tendon (U/S); L) Shoulder arthroscopy (supraspinatus repair); R) Shoulder Strain; subscapularis and supraspinatus tendon tear (MRI); Chronic pain with psychological barriers (K10: 34; DASS 21: 19/10/17)."

**Dr Assem**

45. The applicant relies on medicolegal reports prepared by Dr Mohammed Assem, rehabilitation specialist, dated 8 April 2019 and 1 August 2019.

46. Dr Assem took a history of the incident on 26 November 2017 which was consistent with the applicant's written statement:

> "Mr Parrett reported a two month history of left shoulder pain that he attributed to the nature and conditions of his employment. While descending a set of stairs and carrying an oxygen cylinder in each hand weighing 20 kg, there was a further jarring injury to his left shoulder causing immediate pain. He persevered at work performing his pre-injury duties by relying on the compensatory use of his uninjured right arm. He developed similar symptoms in his right shoulder."

47. Dr Assem's examination noted several arthroscopic surgical scars involving the applicant's left shoulder. There was tenderness anteriorly. There was no tenderness over the applicant's right shoulder and no joint crepitations or instability. There was reduced range of motion in both shoulders.

48. In his first report, Dr Assem gave a diagnosis as follows.

> "Mr Parrett has bilateral rotator cuff tears attributed to the nature and conditions of his employment. He required arthroscopic surgery on his left shoulder with a fair result. There is still residual intermittent discomfort and stiffness."

49. With regard to the alleged consequential condition affecting the applicant's right shoulder, Dr Assem stated:

> "There was a gradual onset of pain over a two month period before he sustained an aggravation on 26 November 2017. While he persevered at work performing his pre-injury duties, he began to develop similar symptoms in his right shoulder due to compensatory over-use."

50. Dr Assem said the applicant had pain and stiffness in both shoulders and assessed 5% Whole Person Impairment (WPI) at the right shoulder and 7% WPI at the left. This gave a combined 12% WPI.

51. In his supplementary report, Dr Assem was asked whether his assessment of WPI was solely confined to the frank incident on 26 November 2017. Dr Assem responded that the condition was predominantly due to the injury on that date.

52. Dr Assem was asked to confirm whether his assessment was distinct from the nature and conditions injury with a deemed date of 27 April 2018 for which a separate claim had been lodged. Dr Assem responded:

> "Mr Parrett was capable of working in a regular and reliable manner despite experiencing intermittent left shoulder symptoms when engaging in heavy manual work. It was not until the frank injury that he sustained on 26 November 2017, that he developed severe left shoulder pain, stiffness and weakness requiring him to undergo surgery and resulting in a permanent impairment. Unfortunately, he developed a secondary right shoulder impairment due to compensatory overuse."

**Dr Gehr**

53. The applicant qualified another orthopaedic surgeon, Dr Eugene Gehr, to provide a medicolegal opinion in relation to the nature and conditions injury. Dr Gehr provided reports dated 4 June 2019 and 5 August 2019.

54. In his first report, Dr Gehr took a history as follows:

> "The accident occurred on 27/4/2018. He was working as supervisor for Medical Equipment and Gases PL. He was delivering to an Eastern Suburban Veterinary Surgery. He was carrying gas bottles in both arms and that amounted to 44 kg in both arms. He was stepping from the truck onto the roadway and jarred his left shoulder. He would constantly carry heavy gas cylinders weighing from 10 to 80 kgs, and he developed severe pain over the anterior aspect of the left shoulder. He felt as if he pulled a muscle.
> …
> He says about a month later after the accident, he developed problems with his right shoulder with pain and reduced movement, and they found some 5 mm tears in the right shoulder, but Dr. Sherlock said that the tears in the right shoulder were not bad enough to operate on."

55. Relevantly, Dr Gehr diagnosed:

> "1. Left shoulder rotator cuff injury requiring surgery, left residual pain and stiffness.
> 2. Right shoulder rotator cuff injury, treated non-operatively and left residual pain and stiffness."

56. Dr Gehr assessed 10% WPI after making a one tenth to deduction for previous surgery at the left shoulder and 9% WPI at the right shoulder. Dr Gehr additionally assessed 2% WPI for scarring following the left shoulder surgery.

57. In his supplementary report, Dr Gehr clarified that he had assessed the injury of 27 April 2018 which was due to the nature and conditions of the applicant's employment, which involved performing heavy and repetitive lifting, twisting and other duties.

**Dr Machart**

58. The respondent relies on medicolegal reports prepared by orthopaedic surgeon, Dr Frank Machart, dated 18 July 2019 and 16 October 2019.

59. In his first report, Dr Machart took a history of the frank incident on 26 November 2017 and subsequent treatment that was consistent with the applicant's evidence. Dr Machart noted that following surgery by Dr Sherlock, the applicant was in a sling for nine and half weeks, going beyond the six week mark because he reported that pain was too severe for him to walk without a sling.

60. With regard to the right shoulder, Dr Machart recorded:

> "He was apparently advised by the GP that he should be on modified duties. He was not aware of specific limitation imposed on his lifting activity once he reported the injury. He described that he was working in his usual capacity essentially normal duties up till the time of the operation on the left shoulder. He described that he developed pain in the right shoulder because he was using the right arm to a greater extent protecting the painful left shoulder in that time doing full duties. He saw Dr Sherlock about the right shoulder. He was treated conservatively with exercises. Surgical intervention was not conducted."

61. Dr Machart made a diagnosis as follows:

> "The incident on 26 November 2017 caused disruption of left shoulder rotator cuff on the background of intrasubstance degenerative changes. The rotator cuff was repaired. There is a mild degree of post-traumatic stiffness, which was documented by the treating doctor as 10% to 15% global loss of movement.
>
> In the right shoulder, there is intrasubstance degeneration, which is causing impingement/painful arc. Attributability is difficult to establish. If it is true that he was doing full duties up to the time of surgery on the left shoulder, then there could be a case made for overuse. If on the other hand he was doing light duties, then he would have been subjected to underuse. This would then not bear validity in assessing that the right shoulder pathology related to left. Documentation of his work duties between the time of onset of symptoms, report to the company, and the time of onset of right shoulder pain is important. I noted from the medicals that the documentation so far suggested that he was on light duties when he developed pain in the right shoulder."

62. Dr Machart commented further:

> "If the right shoulder was classified as 'overuse' then I would have expected a substantial diminution of symptoms and improvement in range of movement once he stopped working, which is now a year ago. Such is not the case. Reasons are not immediately obvious."

63. In his supplementary report, Dr Machart indicated that he had reviewed some additional material. With regard to diagnosis, Dr Machart expressed the opinion:

> "<u>Right shoulder:</u> Minor tear rotator cuff. No specific injury. Claimed to be as a result of overuse. He was on full duties when handicapped by the condition of the left shoulder awaiting surgery. It is reasonable to therefore conclude that there was some degree of extra use of the left [sic] shoulder that caused the small rotator cuff tear to be symptomatic. The diminished movement was beyond the pathology, nonorganic."

64. Dr Machart made an assessment of 8% WPI at each shoulder.

**Respondent's witness evidence**

65. Attached to the Reply are witness statements from Andrea Chilcott and David Watson, dated 27 August 2019.

66. Ms Chilcott said she was employed as the administration manager for the respondent. Ms Chilcott said:

> "On December 7, he advised of an injury. He said it was a work-related injury. He did not explain that there was an incident, he told me what was on the incident report, it was just general moving things around. He only gave us the date he gave to the doctor; I don't think he knew what the date the injury occurred on. He has continued working until his surgery in April 2018. I believe that 27 April was his last day."

67. Mr Watson gave evidence that he was the applicant's direct supervisor. Mr Watson said:

> "In November 2017, Cameron alleges he hurt himself. I know he says he was carrying cylinders down stairs, one in each hand. It is impossible to carry two cylinders down the truck stairs, the stairs are 600 mm wide and the larger cylinders are too long and awkward to carry in one hand sideways down the stairs. I don't know of a way that it would be possible to carry the larger cylinders down the stairs. This injury was not reported until approximately 7 December 2017, when he did report to Ondy Chilcott.
> …
> Ondy has then notified WorkCover that Cameron was injured and on what date he alleged. Cameron had reported minor injuries and misses before, so we were surprised he did not report this one until much later.
>
> At this time, he still had no time off work. Cameron had 10 weeks of physio, however, was still working on his full duties. He was just being more careful."

**Rehabilitation report**

68. An "Initial and Workplace Assessment Report" dated 22 March 2018, prepared by Rehabilitation Services by Altius, records a reported history as follows:

> "Mr Parrett advised that he had a gradual onset of pain symptoms in his shoulder over 'a few' months leading up to the date he first consulted with his Treating Doctor, Dr Brodski. Mr Parrett said he did recall one incident which he thinks was in late October, where he was carrying a gas cylinder on a flight' of stairs and felt a sharp pain in his shoulder, and that the shoulder was noticeably more painful after that time. Mr Parrett said that he first consulted Dr Brodski, Treating Doctor, near the end of November, after he'd had some time off work and noticed that even swimming was painful."

69. With regard to the availability of suitable duties at the respondent's place of employment, the report stated:

> "Mr Parrett's Employer has advised that due to the nature of work flow and practicalities around how tasks are allocated, there are no options for separating tasks such as driving, or just the lighter aspects of the manual handling. Mr Parrett's employer has also advised that due to the size of his business, there are no additional suitable duties available. For these reasons it has been established that it is unlikely that there will be any availability of suitable duties post-operatively until Mr Parrett is back to the capacity he now possesses, or better.
> …
> Mr Parrett and his Employer have confirmed that he is performing his pre-injury duties presently, however the certificate of capacity indicates a restriction on capacity."

**Applicant's submissions**

70. Mr Morgan submitted that the present case required a common sense analysis of the causal chain between the injury and the subsequent development of a consequential condition at the right shoulder in accordance with the authority in *Kooragang Cement Pty Ltd v Bates*[1].

71. Mr Morgan said the applicant gave evidence that he returned to work following the left shoulder injury in difficult circumstances. The WorkCover certificate from the applicant's general practitioner stated that he should not use his left arm but there were no other restrictions on his employment. The clinical records from the applicant's general practitioner confirmed that the applicant made complaints of symptoms at his right shoulder reasonably adjacent to the left shoulder injury.

72. Mr Morgan submitted that the weight of evidence supported a finding that there was a consequential condition in the right shoulder. The only competing view was the interpretation given to the report of Dr Machart by the respondent.

73. Mr Morgan said Dr Machart's reasoning supported the occurrence of a consequential condition in circumstances where there had been relevant overreliance. In the absence of any other explanation for the emergence of symptoms on the contralateral side, Mr Morgan said I would be more than comfortably satisfied that the applicant had established the relevant chain of causation between the accepted injury and the right shoulder condition.

74. Mr Morgan referred me to the applicant's evidence and that of his treating practitioners referred to above. Mr Morgan said there was a consistency between the applicant's evidence and the reporting of complaints at the right shoulder. The treating medical evidence was also consistent with the applicant's evidence in confirming the relationship between the right shoulder and the fact that the applicant was not using his left arm following the injury.

75. The views of the applicant's treating doctors with regard to the cause of the applicant's right shoulder symptoms were confirmed by Dr Assem. Dr Assem also considered that the applicant was experiencing pain at his right shoulder as a result of compensatory overuse.

76. Mr Morgan submitted that the reports of Dr Machart were quite supportive of the applicant's claim that the right shoulder condition was related to the injury. Dr Machart conceded that the pathology shown at the right shoulder was consistent with what might be expected if it were established that there was overreliance on that right shoulder.

77. Having regard to the unchallenged evidence of the applicant, the consistent reporting in the clinical notes, and the consistent nature of the restrictions imposed by the WorkCover certificates, Mr Morgan submitted that I would be comfortably satisfied that the causative chain had been established.

**Respondent's submissions**

78. Mr Doak agreed with the applicant's submissions regarding the applicable legal principles. Mr Doak said the relevant question was whether there was a material contribution from the left shoulder injury to the condition at the applicant's right shoulder, applying a common sense test.

79. While there was no doubt that there was support for the applicant's contentions in the medical evidence, Mr Doak said the medical opinions stood or fell on the histories provided to the doctors.

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[1] (1994) 10 NSWCCR 796.

80. Mr Doak noted that the clinical notes on 26 November 2017 referred to the onset of left shoulder symptoms in the context of operating a forklift, which was inconsistent with the applicant's evidence that he was lifting gas bottles. The symptoms in the right shoulder were being reported to the applicant's general practitioners by 8 March 2018.

81. Mr Doak noted that the applicant's statement referred to being constantly required to carry gas bottles in both arms weighing in the vicinity of 20 kg each. Mr Doak submitted that the applicant's evidence did not support a finding that he was favouring his left arm and overusing his right. The applicant's evidence suggested he was using both arms equally whilst at work.

82. Mr Doak said the history given to Dr Gehr was consistent with the applicant's evidence in indicating that the applicant was carrying gas bottles in both arms. There was no reference to overusing the right by favouring the left arm. Dr Gehr reported that a month after the accident, the applicant developed pain in his right shoulder. Mr Doak submitted that Dr Gehr's history did not sit well with the history recorded in the clinical notes or the applicant's overuse contention.

83. Mr Doak submitted that the WorkCover certificates contained a recommendation by the doctor as to how the applicant should perform his duties but did not constitute a history of what actually occurred. Looking at the clinical records, Mr Doak said it was important to note that at no stage was there a record of favouring the left arm.

84. Mr Doak noted that the applicant's statement referred to avoiding use of his left arm in the performance of his domestic duties but contained no reference to the manner in which he used his arms at work following the left shoulder injury. Dr Gehr took a clear history that the problem in the right shoulder came on in the context of performing work.

85. Mr Doak submitted that despite the medical opinions supporting a connection between the condition in the right shoulder and the injury to the left shoulder, the underlying factual matrix was problematic. There were problems flowing both from the applicant's statement and the history given to Dr Gehr. Dr Machart's opinion would only be supported if the history given to him was correct. Mr Doak submitted that I would have considerable doubt that the history was correct.

86. Although Dr Brodski referred to overuse in a report to the insurer, the contemporaneous clinical notes contained no reference to there being overuse of the right arm. Mr Doak submitted that Dr Brodski's report was therefore inconsistent with the contemporaneous material.

87. Mr Doak noted reference in the clinical records to the applicant performing modified duties. Mr Doak said this was not supportive of Dr Machart's conclusion that the applicant was continuing to perform full duties. Mr Doak said this was also inconsistent with the applicant's evidence that he continued to use both arms.

88. Mr Doak submitted that I would not be satisfied factually that there was overuse of the right arm and the applicant had therefore failed to establish a consequential condition to the right shoulder.

**Applicant's submissions in reply**

89. Mr Morgan noted that the applicant's evidence made it tolerably clear that he was relying on his right shoulder following his return to work and said this was borne out by the contemporaneous material.

90. Mr Morgan noted that in the Initial and Workplace Assessment Report of 22 March 2018, the employer conceded that there would be no suitable duties available to the applicant following surgery other than the work he was doing. Mr Morgan submitted that both the applicant and his employer had confirmed that he was performing his pre-injury duties although the WorkCover certificate of capacity indicated a restriction on capacity.

91. Having regard to Dr Machart's opinion, given that the applicant continued to perform the full range of duties following the left shoulder injury, Mr Morgan submitted that it was probable, on balance, that he would develop problems on the right side.

92. Mr Morgan concluded that I would be satisfied that there was a right shoulder condition as a result of the injury to the applicant's left shoulder.

**Respondent's further submissions**

93. Mr Doak submitted that the Initial and Workplace Assessment Report did not take the matter further. The critical question was how the applicant was performing his pre-injury duties following the left shoulder injury. If the applicant was doing what he said in his statement and what he told Dr Gehr, that is, carrying gas cylinders in both arms, it could not be said that there was overuse of the right shoulder.

94. In those circumstances, the onset of symptoms in the right shoulder may have been consistent with a nature and conditions injury but inconsistent with there being a consequential condition as a result of overreliance, as claimed.

**FINDINGS AND REASONS**

95. Section 9 of the 1987 Act provides that a worker who has received an "injury" shall receive compensation from the worker's employer. The term "injury" is defined in s 4 of the 1987 Act as follows:

> **"4 Definition of 'injury'**
>
> In this Act:
> **injury:**
>
> (a) means 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."

96. It has been accepted by the respondent that the applicant sustained an "injury" pursuant to s 4 to his left shoulder on 26 November 2017. It is not necessary for the applicant to establish that the condition in his right shoulder is itself an 'injury' pursuant to s 4 of the 1987 Act. Deputy President Roche in *Moon v Conmah*[2] observed at [45]-[46]:

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

97. A commonsense evaluation of the causal chain to determine whether the condition at the applicant's right shoulder resulted from the injury to his left shoulder is required. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[3], where Kirby P said (at 461) (Sheller and Powell JJA agreeing):

> "From the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate…
>
> Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

98. His Honour said at 463–464:

> "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 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 commonsense 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 the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré 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."

[2] [2009] NSWWCCPD 134.
[3] (1994) 10 NSWCCR 796 at [810].

99. The Court of Appeal in *Nguyen v Cosmopolitan Homes*[4] has found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

> (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
>
> (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
>
> (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found, and
>
> (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.

100. There is no dispute that the applicant has a condition at his right shoulder. There is also a consistency in the medical opinions before me that the condition in the applicant's right shoulder is causally related to the applicant's left shoulder injury. The respondent disputes, however, that there is a fair climate for the acceptance of the medical opinions on the basis that they are founded upon a problematic factual history.

101. I accept that there has been a degree of inconsistency and confusion in the evidence as to how the applicant's left shoulder injury occurred. The applicant has described a frank incident occurring on 26 November 2017 when he stepped down from a truck carrying a gas cylinder and felt a jarring in his left shoulder.

102. The contemporaneous clinical note recorded by the Warringah Medical & Dental Centre on 26 November 2017 did not indicate there was a frank incident on that date but rather the onset of pain a week earlier driving a forklift. Three days later on 29 November 2017, the clinical note of Dr Brodski indicated that the left shoulder was due to moving gas bottles. The initial history given to Dr Sherlock was of left shoulder pain for approximately six weeks related to using a heavy strap to hold large medical gas bottles on the back of trucks as well as using a forklift.

103. A description of a frank incident on 26 November 2017 consistent with that described by the applicant in his written statement appears in the report of Dr Calvache-Rubio on 2 August 2018 and the WorkCover certificate issued on the same date. It is also set out in the histories later recorded by the medicolegal experts, Dr Assem and Dr Machart.

104. The applicant initially pursued claims in respect of permanent impairment of the shoulders resulting from both a frank incident on 26 November 2017 and a nature and conditions injury.

105. It is on this background that the history recorded by Dr Gehr must be viewed. Dr Gehr took a history of a frank incident on 27 April 2018 which is attributed by the applicant and the other experts to 26 November 2017. Dr Gehr also referred to the applicant developing left shoulder pain in the context of constantly carrying heavy gas cylinders weighing from 10 to 80 kgs. In this regard, it appears that Dr Gehr has initially conflated the frank injury and the nature and conditions injury. Dr Gehr appears to have been asked to provide an opinion only on the nature and conditions claim, however, and he clarified this in his supplementary report.

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[4] [2008] NSWCA 246.

106. Dr Assem also appears to have had some difficulty differentiating the frank incident and the nature and conditions claim. In his initial report, Dr Assem made a diagnosis of "bilateral rotator cuff tears attributed to the nature and conditions of his employment". When asked, however, whether the applicant sustained injury to his left shoulder as a result of a frank incident on 27 November 2017, Dr Assem said there was an aggravation on 26 November 2017 and subsequent overuse of the right shoulder.

107. Notwithstanding this confusion, it has been accepted by the respondent that there was a frank left shoulder injury on 26 November 2017 and the applicant has elected to withdraw his claim of a nature and conditions injury to his shoulders in these proceedings. Whether or not there was a nature and conditions injury to the shoulders, the task befalling me, therefore, is to determine whether the condition at the applicant's right shoulder results from the left shoulder injury of 26 November 2017.

108. It is the applicant's contention that following the incident of 26 November 2017, he favoured his injured left shoulder and, as a result, over-used his right arm and shoulder. The applicant's statement describes the manner in which he considered that he had overused his right arm in a domestic setting, that is by performing household chores with only his right arm. The applicant's submissions at arbitration, however, asserted that there had also been overuse of the right arm in the performance of the applicant's work duties following the injury.

109. I am satisfied on the evidence before me that the applicant continued to perform his normal duties for the respondent following the left shoulder injury until going off work for the surgery performed by Dr Sherlock. This is evident from the witness statement of the applicant's direct supervisor, Mr Watson, in the Reply and the Initial and Workplace Assessment Report.

110. Although there is reference to the applicant performing modified duties in the clinical notes and in Dr Brodski's report to the insurer, there is no other evidence of modified duties being made available to the applicant. The Initial and Workplace Assessment Report tends to confirm that no modified duties would have been available to the applicant having regard to the nature of the respondent's business. The only restriction identified in the WorkCover certificates during this period is "minimal use of left arm".

111. Mr Doak submits that the critical issue is how the applicant in fact performed his duties. Dr Doak submits that the applicant's written statements and the history provided to Dr Gehr suggest that the applicant used both arms to perform his work, carrying heavy gas cylinders in each arm.

112. The difficulty with this submission is that the applicant's statements and the report of Dr Gehr were prepared at a time when the applicant was pursuing both a nature and conditions claim and the claim now under consideration. Whilst I am satisfied that the applicant's statement provides an accurate description of the manner in which he performed his duties prior to the injury on 26 November 2017, I am not satisfied that there is any direct evidence from the applicant as to the manner in which he performed his work in the period following the injury of 26 November 2017 until the cessation of work.

113. The applicant did give a history to Dr Assem that he performed his pre-injury duties by relying on the compensatory use of his uninjured right arm. The applicant also told Dr Machart that he was working in his usual capacity up until the surgery, using the right arm to a greater extent in order to protect the painful left shoulder. More contemporaneously, Dr Brodski reported that the applicant felt that he was overcompensating with his right shoulder at work while his left shoulder was painful.

114. This manner of performing his work would have been consistent with the restriction identified on the WorkCover certificates at the time. It is also consistent with the evidence regarding the applicant's left shoulder symptoms at the time. On 7 December 2017, Dr Sherlock reported that there was pain in the left shoulder with any lifting or load overhead and lifting his arm into abduction was painful. There was slight weakness with activity due to pain.

115. The applicant's claim that he overused the right shoulder whilst at work after 26 November 2017 is also broadly consistent also with the timing of the first reports of right shoulder pain in the contemporaneous medical evidence. The first report of right shoulder symptoms appears in the clinical notes on 8 March 2018, at which time the applicant was referred for an ultrasound. The right shoulder was discussed again with Dr Brodski on 20 March 2018.

116. The applicant claims that the pain at his right shoulder became more prominent following the left shoulder surgery in April 2019. The contemporaneous medical evidence confirms that the applicant wore a sling and avoided putting any load through the left shoulder for around two months after the surgery. The applicant's view that he was using his right arm more as a result of his left shoulder injury is confirmed in the records and reports of Dr Brodski and Dr Sherlock in June and July 2018.

117. After a careful review of the evidence, I accept that the applicant continued to perform his normal duties, after 26 November 2017, by avoiding using his injured left shoulder and using his right arm and shoulder to a greater extent. I am also satisfied that the applicant continued to avoid using his left arm following the cessation of work.

118. On this factual background, I accept that there is a fair climate for the acceptance of the opinions expressed by Dr Assem and Dr Machart that there is a condition at the applicant's right shoulder that has resulted from compensatory overuse due to the left shoulder injury.

119. I am satisfied, on the balance of probabilities, that there is a consequential condition at the applicant's right shoulder that has resulted from the left shoulder injury on 26 November 2017.

120. The medicolegal experts qualified by the parties have both assessed a degree of permanent impairment resulting from the injury on 26 November 2017 that is greater than 10%, although they differ in their assessments. In the circumstances, I consider it appropriate that a referral to an AMS be made. I note that Dr Gehr in assessing the applicant's left shoulder found an assessable impairment of the skin (TEMSKI) as a result of the surgery performed by Dr Sherlock. Whilst Dr Assem noted the presence of surgical scars, permanent impairment of the skin was not assessed by Dr Assem or Dr Machart, I consider it appropriate that the referral to the AMS include that body part also.

**SUMMARY**

121. The applicant sustained a consequential condition affecting his right shoulder as a result of the injury to his left shoulder on 26 November 2017.

122. The matter is remitted to the Registrar to be referred to an AMS for the following assessments:

| | | |
|---|---|---|
| (a) | Date of injury: | 26 November 2017 |
| | Systems: | Left upper extremity (shoulder)<br>Right upper extremity (shoulder) (consequential condition)<br>Skin (TEMSKI) |
| | Method: | Whole Person Impairment |
| (b) | Date of injury: | 27 April 2018 (deemed) |
| | Systems: | Cervical spine<br>Lumbar spine |
| | Method: | Whole Person Impairment |

123. The materials to be referred to the AMS are to include the ARD and all attachments, the Reply and all attachments and the supplementary report prepared by Dr Eugene Gehr, dated 5 August 2019, attached to an Application to Admit Late Documents filed by the applicant on 17 April 2020.

124. The referrals are to be placed on the Medical Assessment Pending list.