

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2038/20
Applicant: Adolfo Sanchez
Respondent: Sydney Building Corporation Pty Ltd
Date of Determination: 3 July 2020
Citation: [2020] NSWCC 222

The Commission determines:

1. The applicant suffered an injury to his left upper extremity (shoulder), lumbar spine and left lower extremity (knee) in the course of his employment with the respondent on 13 January 2017.
2. As a result of the injury referred to in (1) above, the applicant developed a consequential condition to his right upper extremity (shoulder).
3. The matter is remitted to the Registrar for placement into the pending list for referral to an Approved Medical Specialist (AMS) to assess the permanent impairment arising from the following:

Date of injury:	13 January 2017
Body systems referred:	Left upper extremity (shoulder); Right upper extremity (shoulder); Lumbar spine; Left lower extremity (knee).
Method of assessment:	Whole person impairment.

4. The documents to be referred to the AMS to assist with their determination are to include the following:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) Application to Resolve a Dispute and attachments, and
 - (c) Reply and attachments.

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.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. On 13 January 2017, Adolfo Sanchez (the applicant) was attempting to unplug a power lead from a meter box in the course of his employment with Sydney Building Corporation Pty Ltd (the respondent) when he slipped on a wet cement pipe. As a result, the applicant's left leg twisted and gave way, causing him to fall onto his left arm and back.
2. The applicant notified the respondent of the injury, and liability was accepted for injury to the left shoulder, lumbar spine and left knee.
3. The applicant alleges that over time he developed a consequential condition in his right shoulder as a result of an inability to use his left shoulder, particularly after the left shoulder was operated on in 2017 by Dr Petchell, treating orthopaedic surgeon.
4. On 18 October 2019, the applicant's solicitors made a claim for permanent impairment compensation in respect of injuries to the left shoulder, left knee, lumbar spine and a consequential condition to the right shoulder. On 27 November 2019, the respondent issued a section 78 notice disputing liability in respect of the consequential condition to the right shoulder. That notice accepted liability for the left knee, back and left shoulder injuries, though the respondent contends the accepted injuries have not given rise to permanent impairment greater than 10%.

ISSUES FOR DETERMINATION

5. The parties agree that the only issue which remains in dispute is whether the applicant suffered a consequential condition to his right shoulder as a result of the accepted injury on 13 January 2017. The parties agree that regardless of the outcome of that dispute, the accepted injuries to the left shoulder, lumbar spine and left knee will be referred to an Approved Medical Specialist (AMS) for determination of whole person impairment.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation/arbitration hearing before me on 1 July 2020. On that occasion, Mr L Morgan of counsel instructed by Ms A Giuttari appeared for and with the applicant, whilst Mr G Young of counsel appeared for the respondent on instructions from Mr A Murphy.
7. The parties were unable to resolve their differences, and accordingly the matter proceeded to an arbitration hearing.

EVIDENCE

Documentary evidence

8. 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, and
 - (b) Reply and attached documents.

Oral evidence

9. There was no oral evidence called at the hearing

FINDINGS AND REASONS

Consequential condition to the right shoulder

10. The applicant bears the onus of proving that he suffered a consequential condition to his right shoulder as a result of the accepted injuries suffered on 13 January 2017.
11. It is important at the outset to establish the relevant test for determining the presence of a consequential condition. 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 an accepted back injury. At [35] and following, Roche DP stated:
 - “35. By asking if Mr Kumar has suffered a section 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 contended 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 section 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] NSWCCPD4 (*Davis*); *Vivaldo*; *Moon v Conmah Pty Ltd* [2009] NSWCCPD 134 (*Moon*); *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*)”.
12. The Deputy President then referred to the facts of *Kooragang* and to the judgement of Kirby P (as he then was) in the oft quoted paragraph where his Honour stated:

“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...”

The imputation of notions of proximate cause by the use of the phrase ‘results from’, is now not accepted. By the same token, the mere proof that certain events occurred which predisposed the 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 requires is a common-sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death ‘results from’ the impugned work injury (or in the event of a disease, the relevant aggravation of the disease) is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinion.”
13. At [55] in *Kumar*, the Deputy President noted it is not necessary for an injured worker to establish they have significant pathology in the claimed body part when asserting the presence of a consequential condition. The reasoning of Roche DP in *Kumar* was followed in cases such as *Trustees of the Roman Catholic Church for the Dioceses of Parramatta v Brennan* [2016] NSWCCPD 23 (*Brennan*). In that matter, Snell DP referred to a number of Presidential decisions dealing with claims in respect of consequential conditions, including

the decision of Roche DP in Moon, in which the injured worker experienced significant restrictions in the use of his right arm and shoulder for several years as a result of an accepted injury with the respondent. As a result, the worker used his left arm and shoulder to compensate for the right shoulder condition. The Commission held it was not necessary for the applicant to establish that he suffered an “injury” to his left shoulder within the meaning of that term in section 4 of the *Workers Compensation Act 1987* (the 1987 Act). All that needs to be established is the symptoms and restrictions in the body part affected by the claimed consequential condition have resulted from the accepted injury.

14. In this matter, there is no issue that the applicant had prior problems with his shoulders following an earlier injury in or about 2012. As a result of that injury, the applicant had to use crutches for a protracted period of time and developed problems with both shoulders.
15. Nevertheless, I accept Mr Morgan’s submission that the nature of the applicant’s heavy work as a full-time formwork carpenter was such that, if he was continuing to experience difficulties with his shoulders before the incident at issue, he would not have been able to carry out that work.
16. The applicant attested to the previous injury, and in relation to the incident at issue in these proceedings on 13 January 2017, stated at paragraph 15 of his statement:
 - “15. I had a lot of pain and problems with my left shoulder. I recall I would avoid using my left arm at all costs following my injury, especially not to do any lifting or overhead activities. I could no longer lift my left arm above my head and my arm would become numb. I could not lift any items such as grocery bags, from the floor to the table. I recall not even being able to lift a litre jug of water with my left arm, in order to refill the coffee machine. I could not hang clothes on the line with my left arm and I found driving difficult. I struggled to turn the steering wheel with my left arm. I recall showering also became difficult as I could not reach parts of my body with my left arm that I once used to. I could no longer rely on my left arm and even the simplest of tasks became difficult.
 16. Following my injury, over time I started to notice the onset of pain in my right shoulder. The pain became progressively worse and I eventually consulted my general practitioner about the problems I was having.
 17. I believe the onset of my problems with my right shoulder developed as a result of my overreliance on the right arm in order to compensate for and protect my left shoulder. For example, when I would go grocery shopping, I would have to do all the lifting with my right arm, when normally I would distribute the grocery bags evenly between both my hands. I recall when hanging out clothes, I would only use my right arm. Whenever I had to do any heavy lifting at home such as picking up the vacuum cleaner or carrying the washing basket, I would rely on my right arm. When I would drive, I would only use my right arm in order to turn the steering wheel. When taking out the bins, I would pull with my right arm and would no longer rely on my left arm for assistance.”
17. The applicant was referred for an x-ray and ultrasound of his right shoulder on 14 October 2017, which revealed a full thickness tear. He was eventually referred to Dr Petchell, orthopaedic surgeon in respect of his ongoing left shoulder complaints, and Dr Petchell performed a left shoulder arthroscopic acromioplasty and cuff repair on 19 January 2018.
18. Notwithstanding the surgery, the applicant states he continued to experience constant pain in his left shoulder.

19. The only doctor who has treated the applicant both before and after the January 2017 injury is his general practitioner, Dr Ngo. At pages 34 and 35 of the Application, Dr Ngo disclosed there was a small tear to the applicant's right shoulder in 2015 and said it had been aggravated by the incident at issue.
20. Mr Morgan submitted, and I accept that the fact the applicant's right shoulder had been asymptomatic until after the left shoulder injury in January 2017 is very compelling evidence. When one considers the uncontested evidence of the applicant regarding additional and overuse of his right shoulder after the left shoulder injury, in my view there is a causal chain established between the left shoulder injury and the onset of right shoulder symptoms of which the applicant currently complains.
21. Dr Bentivoglio, the respondent's Independent Medical Examiner (IME) indicated that in the absence of any investigations of the applicant's right shoulder, he could not say there was any consequential condition to it as a result of the left shoulder injury. Dr Bentivoglio did not have the benefit of the right shoulder radiological investigations, which set out pathological changes to the right shoulder following the left shoulder injury. I am unable to accept Dr Bentivoglio's opinion in relation to the right shoulder, as he quite appropriately indicated that his view is conditional upon the findings of radiological investigations which, through no fault of his own, he has not seen.
22. For the respondent, Mr Young relied upon two reports of Dr Petchell. The first, found at page 45 of the Application is dated 30 May 2017. Dr Petchell had the benefit of the history of the previous shoulder difficulties and noted:

"Four years ago he developed shoulder pain following a foot injury sustained at work where he required the use of crutches for six months. He had a good effect from a corticosteroid injection at that stage. Adolfo denies a previous history of left shoulder pain or injury."

23. In his report to Dr Ngo dated 30 October 2017, Dr Petchell said:

"As you know, Adolfo also reports increased pain in his right shoulder and an ultrasound has revealed a full thickness cuff tear. I have explained to him that the right shoulder is not part of his WorkCover claim and perhaps it could be addressed to the later date. In the interview I have glenohumeral joint steroid injection."

Mr Young submitted that when one takes into account the pre-existing right shoulder problems, a reasonable inference can be drawn from Dr Petchell's comments in his October 2017 report that the right shoulder is not a consequential condition arising from the compensable injury at issue, but rather was something caused by the previous workplace injury.

24. I do not accept that submission, primarily because it is not clear from Dr Petchell's report of October 2017, the precise context in which he opines the right shoulder is not part of the applicant's WorkCover claim. Whether Dr Petchell is referring to a matter of causation, or to the right shoulder not being the subject of a treatment regime paid for by the insurer at that time is unclear. Moreover, in light of the history of the right shoulder set out to the doctors in the matter and in his own statement, I am satisfied on the balance of probabilities that the applicant's right shoulder condition has arisen as a consequence of the accepted left shoulder injury.
25. Both Dr Ngo and Dr Assem (applicant's IME) specifically deal with the question of causation and received histories consistent with that provided to Dr Bentivoglio. As already stated, Dr Ngo accepted the right shoulder problems were by way of an aggravation caused by overuse after the left shoulder injury, while Dr Assem referred to the right shoulder condition as "degenerative rotator cuff tear aggravated by favouring the right side."

26. In making a finding in favour of consequential condition to the right shoulder, I have taken into account the applicant's lay evidence, and the opinions of Dr Bentivoglio and Dr Petchell. I accept the proposition put by Mr Morgan that, had the applicant's right shoulder problems been present since the injury in 2012 or 2013 when he was on crutches for six months, then he would not have been able to work as a formwork carpenter up until the time of the injury at issue. There is no question that work is heavy, repetitive and requires bilateral use of his arms overhead.
27. On balance, I am of the view that the preponderance of the treating and IME medical evidence supports a finding that the applicant's right shoulder condition has arisen as a consequence of the accepted left shoulder injury.

SUMMARY

28. For the above reasons, the Commission will make orders as set out on page 1 of the Certificate of Determination.