WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2990/20**
Applicant: **Robert Swinton**
Respondent: **Secretary, Department of Education**

Date of Determination: **19 August 2020**
Citation: **[2020] NSWWCC 280**

The Commission determines:

1. The applicant suffered injury to the left upper extremity (shoulder) and cervical spine as a result of injury in the course of employment with the respondent on 14 June 2013 within the meaning of section 4 of the *Workers Compensation Act 1987.*

2. The employment concerned was a substantial contributing factor to the injury within the meaning of section 9A of the *Workers Compensation Act 1987.*

3. Matter remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment of the left upper extremity (shoulder) and cervical spine, in accordance with the American Medical Association's *Guidelines to the Evaluation of Permanent Impairment 5th edition* and *the NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment 4th edition*, as a result of injury on 14 June 2013.

4. Registrar to forward the following documents to the Approved Medical Specialist:

    (a) Application to Resolve a Dispute and attached documents;
    (b) Reply and attached documents, and
    (c) Application to Admit Late Documents filed by the applicant dated 20 July 2020.

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

Grahame Edwards
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 GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Robert Swinton (the applicant) claims lump sum compensation pursuant to s 66 of the W*orkers Compensation Act 1987* (the 1987 Act) in respect of permanent impairment of his cervical spine and left upper extremity as a result of injury when his left shoulder struck a wall cabinet while trying to avoid items lying in a corridor at the Georges River College, Peakhurst campus, in the course of employment as a school teacher with the Secretary, Department of Education (the respondent) on 14 June 2013.

2. Mr Swinton, relying upon the assessment of an independent medical examiner (Dr Stephenson), claims he suffers with the combined permanent impairment of 20% of his cervical spine and left upper extremity as a result of the injury.

3. The respondent issued a notice dated 23 March 2020 pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing Mr Swinton is entitled to permanent impairment compensation because its independent medical expert (Dr Panjratan) assessed the degree of permanent impairment of the cervical spine and left upper extremity as 6%, less than the legislative threshold prescribed by s 66(1) of the 1987 Act.

4. Mr Swinton commenced proceedings in the Commission upon filing an Application to Resolve a Dispute (the Application) dated 29 May 2020.

5. The documentary evidence attached to the Application included the clinical records of Ramsay Street Medical Centre recording consultations Mr Swinton had with nominated treating doctors after the injury.

6. The respondent issued a further notice dated 15 June 2020 pursuant to s 78 of the 1998 Act after the filing of the Application.

7. The respondent in the further s 78 notice disputed Mr Swinton suffered injury to his cervical spine and left shoulder in the course of employment on 14 June 2013.

8. The respondent asserted in the s 78 notice that the clinical records of the Ramsay Street Medical Centre suggested that the injury to the cervical spine and left shoulder occurred as a result of a manipulation of Mr Swinton's back, not as a result of any work injury.

9. On 16 June 2020, the respondent filed its Reply to the Application to Resolve a Dispute (the Reply) in the Commission.

10. On 26 June 2020, the Registrar listed the matter for telephone conference before me. Mr Carney of counsel, instructed by Mr Eggins, solicitor, represented Mr Swinton. Ms Dyson, solicitor, represented the respondent in the interests of the insurance scheme agent.

11. The issuing of the s 78 notice dated 15 June 2020 was discussed with the legal representatives and the need for the respondent to make an application for leave to be granted pursuant to s 289A(4) of the 1998 Act to put in issue the previously unnotified issue disputing injury.

12. While a direction was not issued to Mr Swinton, leave was granted for him to file a supplementary statement dealing with the liability issues raised by the respondent in the s 78 noticed dated 15 June 2020 based upon the clinical records of the Ramsay Street Medical Centre.

13. On 20 July 2020, Mr Swinton filed an Application to Admit Late Documents attaching his supplementary statement and other documentary evidence.

ISSUES FOR DETERMINATION

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

    (a) Did the applicant suffer injury to his left upper extremity (shoulder) and cervical spine in the course of employment with the respondent on 14 June 2013?

    (b) The degree of permanent impairment of the left upper extremity (shoulder) and the cervical spine as a result of injury on 14 June 2013?

Matters previously notified as disputed

15. The respondent disputed that the degree of permanent impairment of the cervical spine and left upper extremity was greater than 10% as prescribed by s 66(1) of the 1987 Act.

Matters not previously notified

16. The respondent had not disputed injury until the issuing of the s 78 notice dated 15 June 2020 after commencement of proceedings by Mr Swinton.

PROCEDURE BEFORE THE COMMISSION

17. On 4 August 2020, conciliation conference/arbitration hearing was conducted via telephone because of the Covid-19 regulations. 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.

18. Mr Carney, instructed by Mr Eggins, represented Mr Swinton.

19. Mr Adhikary of counsel, instructed by Ms Dyson, represented the respondent in the interests of the insurance scheme agent.

20. Mr Brown, representative of the insurance scheme agent, was also a party to the conciliation conference/arbitration hearing.

21. The arbitration hearing was sound recorded.

Interlocutory application – s 289A(4) of the 1998 Act

22. The respondent's application to put in issue the previously unnotified issue of injury was granted pursuant to s 289A(4) of the 1998 Act.

23. To ensure the parties received a timely determination of the dispute, the reasons for granting the respondent leave to put in issue the previously unnotified issue of injury were given orally.

EVIDENCE

Documentary evidence

24. The following documents were in evidence before the Commission and taken into account in making this determination:

Applicant

(a) Application and attached documents, and
(b) Application to Admit Late Documents dated 20 July 2020.

Respondent

(a) Reply and attached documents.

Oral evidence

25. No application was made by either party to adduce oral evidence. No application was made by the respondent to cross-examine the applicant.

FINDINGS AND REASONS

Issue 1 – Did the applicant suffer injury to his cervical spine and left upper extremity in the course of employment with the respondent on 14 June 2013?

26. The matter was conducted on the basis Mr Swinton suffered injury to his left shoulder and cervical spine in the course of employment with the respondent on 14 June 2013.

27. Mr Swinton has provided two statements: dated 19 May 2020[1] (the first statement) and 16 July 2020 and (the second statement)[2].

28. The relevant part of the first statement as to the mechanism of the injury is set out as follows:

> "7. On 14 June 2013, I was running between classes during examinations at Peakhurst Campus, George [sic] River College. The corridor had a tarpaulin and art cabinets in preparation for a music show called Mad Hatter's Tea Part. I tried to avoid all items in the corridor and I struck a cabinet directly with my left shoulder and felt instant pain in the left shoulder and neck area. I reported the injury to the office."

29. The relevant part of the second statement as to the mechanism of the injury are set out as follows:

> "4. On 14 June 2013, I was at Peakhurst Campus, George [sic] River College at Peakhurst High School. There was a large sheet of plastic like a slip and slide down the middle of the corridor from end to end with a lot of students were [sic] painting a mural. I was trying not to slip on the plastic or walk into the students. I banged my left shoulder into an art display cabinet sticking out of the wall. The cabinet has since been removed due to safety reasons."

[1] Application – pp 1-2
[2] Application to Admit Late Documents filed by the applicant – pp 1-2

30. The relevant parts of the first statement as to complaints and treatment are set out as follows:

> "8. I consulted by [sic] general practitioner, Dr Paul Ristuccia of Ramsay Street Medical Centre, 112 Ramsay Street, Haberfield on 26 June 2013. My symptoms were deteriorating with increasing pain in the left arm with weakness and numbness in the left arm, I started physiotherapy and was given some pain medication.
>
> 9. In July 2013, I was referred to Dr Todd Gothelf, orthopaedic surgeon, who gave me a cortisone injection in my left shoulder and an ultrasound of my left shoulder. I developed quite significant wasting of my left shoulder girdle muscles.
>
> 10. On 5 July 2013, I had an MRI scan of my cervical spine and then a [sic] MRI scan of my left shoulder on 29 July 2013.
>
> 11. Following the MRI scan on my left shoulder I was treated with physiotherapy for about one month and then took medication. It took me about six months before I could get my left shoulder moving again.
>
> 12. My neck pain improved slowly.
>
> 13. I got back to work full time initially on restricted duties but was unable to play any of my musical instruments.
>
> 14. I still have neck pain going into the left arm and into my left hand."

31. The relevant parts of the second statement as to complaints and treatment are set out as follows:

> "5. My left shoulder and neck were initially not so painful but as the day and evening progressed the pain worsened and I began to lose movement from the left shoulder down into my left hand.
>
> 6. On that day, I was very excited to be seeing a friend that evening, I have [sic] not seen him for 20 years since my Conservatorium days.
>
> 7. When I arrived home from work, my car radiator died and I needed to get it replaced. I still was very keen to see my mate so I drove to his place at Bondi. By the time I got to his place in Bondi my left shoulder was very sore and I asked my mate if he could give me a massage. This is not something I usually ask someone to do and he actually thought it was a bit 'gay'.
>
> 8. My mate was very gentle during the massage as I was in a lot of pain in my left shoulder and arm. During the massage I realised I could no longer move my left arm. I ended up staying the night at my mate's place as I could not drive home.
>
> 9. On Saturday 15 June 2013, I attended Dr Stephen Carran at Ramsay Street Medical Centre. I was in a state of shock when I consulted Dr Carran as I could not move my left arm. The incident reminded me of my previous injury when I lost the use of my left arm for two years. I was fearing the worst when I consulted Dr Carran. I was not really thinking of how the injury occurred. I was only concerned that my arm would not move. I was also suffering from anxiety at the time. Dr Carran

gave me a medical certificate stating I was suffering from a frozen shoulder and would be unfit for work from 15 June 2013 to 17 June 2013. I attach a copy of that medical certificate.

10. On 17 June 2013, I consulted Dr Anita Lo Mascolo at the same surgery. Dr Mascolo also gave me a medical certificate stating I was suffering from acute tendonitis of the left shoulder and would be unfit for work from 17 June 2013 to 23 June 2013. I attach a copy of that medical certificate.

11. On 21 June 2013, I completed the New South Wales Department of Education and Training incident report form on line. I attach a copy of that incident form completed by me on 21 June 2013.

12. On 22 June 2023, I consulted Dr Carran at the same surgery. I explained to Dr Carran how the accident occurred on 15 June 2013 and he recorded the correct history. Dr Carran gave me a WorkCover medical certificate stating I was unfit for work from 14 June 2013 to 28 June 2013. I attach a copy of that WorkCover medical certificate."

32. The relevant entries of Mr Swinton's consultations with nominated treating doctors at the Ramsay Street Medical Centre after the injury are set out as follows:[3]

"**Saturday June 15** [emphasis in original]
Dr Stephen Carran

Mate was wkng [working] on his back cracking vertebrae back into place when had sudden loss of arm fxn [function]
Had a bizarre palsy when younger and couldn't use his arm for 2 yrs!!??
Pain +++ with all ROM
Getting some sensory changes down left arm also

O/E Appears to have frozen shoulder
However spasm in the Traps and supraspinatus

Imp: ?Frozen shoulder
?Cervical disc

Monday June 17 2013 [emphasis in original]
Dr Anita Lo Mascolo

History: [emphasis in original]
Severe L shoulder pain.
Unable to drive due to pain.
Started 2 days ago after back was manipulated.
Examination: [emphasis in original]
very limited L shoulder movement in all direction.
Actions: [emphasis in original]
Diagnostic imaging requested: CT – Spine – lumbar
Diagnostic imaging requested: US – Shoulder L, x ray L shoulder
Letter Created – re A – MEDICAL CERTFICATE

Thursday June 20 2013 [emphasis in original]
Dr Shahana Afroze
Actions: [emphasis in original]
Diagnostic imaging requested: CT – Spine – Thoracic,

[3] Application – pp 48-49

CT – Spine – Cervical, CT – Sp0ne – Lumbar – thoracic pain, lt [left] shoulder weakness and reduced ROM following manipulation
Friday June 21 2013 [emphasis in original]
Dr Mohamed Safi
Hx, as above
? frozen shoulder
Needs physio and ? specialist R/V
However, he requested WC MC
Management: [emphasis in original]
Information

Saturday June 22 2013 [emphasis in original]
Dr Stephen Carran

Initially injured his Left arm banging it into an art cabinet at school
got a friend to try a manoeuvre to lession [sic] the pain of this injury but went wrong with pain ++ and decr [decreased] ROM +++
Been back several times since but need me to complete the WorkCover cert as saw him 1st.
Has been for CT and L-spine [lumbar spine – not in original] CT scans and a left shoulder u/s/s [ultrasounds – not in original]
C4 left nerve root impingement and shoulder bursitis/capsulitis and impingement!!
So appears to be a mixed picture

O/E as above decr [degreased] ROM +++

Plan: (emphasis in original]
Went over all the results with him
See scanned docs
also for ref to Ortho who can cover both shoulder and C-spine [cervical spine – not in original] esp.
WorkCover docs completed"

33. On 17 June 2013, Mr Swinton was referred for radiological investigations of his left shoulder, cervical spine, thoracic spine and lumbar spine.

34. On 29 June 2013, Mr Swinton was referred to Dr Gothelf, orthopaedic surgeon, for management and treatment of his left shoulder and cervical spine.

35. On 4 July 2013, Mr Swinton underwent an ultrasound guided injection into the left shoulder.[4]

Applicant's submissions

36. Mr Carney submitted Mr Swinton suffered a "direct injury" to the left shoulder and an exacerbation of pre-existing degenerative condition of the cervical spine as a result of the injury.

37. Mr Carney submitted the history of injury to the left shoulder hitting the wall cabinet was accepted by the treating medical practitioners.

38. Mr Carney submitted there was a "distinct blow" to the left shoulder when it struck the wall cabinet aggravating the cervical spine and left shoulder pathology as shown in the radiological investigations.

[4] report of Dr Healy dated 4 July 2013 – Application – p 33

39. Mr Carney submitted Dr Gothelf considered that the cause of the left shoulder muscular wasting was likely to be a neurological problem emanating from the cervical spine, recommending an MRI scan.[5]

40. Mr Carney submitted Dr Gothelf found on examination the symptoms of acute weakness of the left upper extremity and left shoulder muscular wasting consistent with viral neuritis of the shoulder.[6]

41. Mr Carney submitted Dr Gothelf provided the causal link between the pain and severe weakness of the left shoulder and the injury on 14 June 2013.[7]

42. Mr Carney submitted the clinical records of the Ramsay Street Medical Centre of a history of "something relating to the back" cannot be anatomically correct because the referral to Dr Gothelf was for the left shoulder.

43. Mr Carney submitted the history recorded on 17 June 2013 by Dr Lo Mascolo was likely to have been "repeating the notes" (referring to the consultation on 15 June 2013); and it was not until the 22 June 2013 that a correct history was recorded by Dr Carran, only a matter of seven days after the first consultation.

44. Mr Carney submitted Mr Swinton was experiencing pain in his left shoulder and down the arm as a result of the injury, and that he asked his friend to massage it: "clearly there were fears" over the loss of use of the left arm when he consulted Dr Carran the next day.[8]

45. Mr Carney submitted Dr Carran accepted the correct history at the consultation on 22 June 2013, issuing an approved WorkCover medical certificate.

46. Mr Carney submitted there is a real prejudice to Mr Swinton because he is unable to obtain a statement from his friend as they have had a "falling out".

47. Mr Carney submitted the histories as to the mechanism of the injury recorded by Drs Panjratan, Stephenson and Gothelf are consistent.

48. Mr Carney submitted Dr Carran correctly recorded the mechanism of the injury in the WorkCover certificate date 22 June 2013.[9]

49. Mr Carney submitted the allegation by the respondent that the accident did not happened should be rejected; and the matter referred to an Approved Medical Specialist for assessment of the degree of permanent impairment of the cervical spine and left upper extremity as a result of injury on 14 June 2013.

Respondent's submissions

50. Mr Adhikary submitted the issue is whether Mr Swinton suffered injury to his left shoulder and cervical spine in the course of employment on 14 June 2013.

51. Mr Adhikary submitted the evidence does not allow a finding that Mr Swinton suffered injury to his left shoulder and cervical spine in the course of employment on 14 June 2013.

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[5] report of Dr Gothelf dated 22 July 2013 – Application – p 27
[6] report of Dr Gothelf dated 9 August 2013 – Application – p 28
[7] report of Dr Gothelf dated 9 August 2013 – Application – p 28
[8] Applicant's supplementary statement dated 16 July 2020 – Application to Admit Late Documents – p 1 – [4]-[9]
[9] Application to Admit Late Documents – p 8

52. Mr Adhikary submitted Mr Swinton has not discharged his onus of proof on the balance of probabilities that he suffered injury to his left shoulder and cervical spine in the course of employment on 14 June 2013.

53. Mr Adhikary submitted that there should be an award for injury in favour of the respondent.

54. Mr Adhikary submitted there are inconsistencies in the applicant's evidence that the injury allegedly occurred.

55. Mr Adhikary, in support of his submissions as to the inconsistencies of Mr Swinton's evidence, referred to the following evidence:

    (a) Paragraph 7 of the first statement: "tried to avoid all items in the corridor and I struck a cabinet directly with my left shoulder and felt instant pain in the left shoulder and neck area. I reported the injury to the office".

    (b) The applicant first reported the alleged workplace injury to Dr Carran on 22 June 2013, 12 days after the alleged incident in the corridor at the school.

    (c) Paragraph 8 of the first statement: "My left shoulder and neck were initially not so painful but as the day and evening progressed the pain worsened and I began to lose movement from the left shoulder down into my left arm".

    (d) Paragraph 6 of the second statement: excited about seeing his friend that night (13 June 2013) whom he had not seen for some 20 years.

    (e) Paragraph 7 of the second statement: "By the time I got to his place in Bondi my left shoulder was very sore and I asked my mate if he could give me a massage".

    (f) Paragraph 8 of the second statement: "My mate was very gentle during the massage as I was in a lot of pain in my left arm and shoulder. During the massage I realised I could no longer move my left arm. I ended up staying the night at my mate's place as I could not drive home".

    (g) Mr Swinton attended upon Dr Carran on 15 June 2013 complaining he could not move his left arm, who gave him a medical certificate certifying he was suffering with a "frozen shoulder" and unfit for work until 17 June 2013.

    (h) Paragraph 12 of the second statement: consulted Dr Carran on 22 June 2023, first account as to how the alleged workplace injury occurred.

    (i) Paragraph 14 of the second statement: Mr Swinton and his friend who gave the massage had a falling out and have not spoken for a number of years.

    (j) Mr Swinton did not, in his second statement, refer to reporting the incident to the office or the name of the person to whom he reported the incident.

56. Mr Adhikary submitted Mr Swinton's evidence as to alleged injury should not be accepted.

57. Mr Adhikary, in support of this submission, referred to the following evidence:

    (a) Clinical records of the consultation with Dr Carran on 15 June 2013 do not support the alleged injury.

    (b) Dr Carran recorded the mate massaging the back: “cracking vertebrae back into place when had a sudden loss of arm function”.

    (c) No mention to Dr Carran of the alleged incident at work.

    (d) Mr Swinton consulted Dr Lo Mascolo on 17 June 2013 about “severe left shoulder pain”.

    (e) Dr Lo Mascolo recorded that the left shoulder pain “started 2 days after back was manipulated”.

    (f) No mention to Dr Lo Mascolo of the alleged incident at work.

    (g) Mr Swinton consulted Dr Safi on 21 June 2013 complaining of “frozen shoulder”.

    (h) No mention to Dr Safi of the alleged incident at work.

    (i) The first mention of a workplace injury was not until the consultation with Dr Carran on 22 June 2013: “initially injured his left arm banging it into an art cabinet at school”.

    (j) The history recorded at the consultations on 15 and 17 June 2013 was about back massage only; there was no history recorded about a workplace injury.

58. Mr Adhikary submitted Mr Swinton has not provided any reason in his second statement why he did not mention the alleged workplace incident of injury to his left shoulder and neck at the consultations prior to the consultation with Dr Carran on 22 June 2013.

59. Mr Adhikary submitted the incident was not reported to the respondent by Mr Swinton until 21 June 2013.[10]

60. Mr Adhikary submitted that Mr Swinton contacted the insurance scheme agent’s claim manager on 28 June 2013, who made a file note[11]stating the shoulder “wasn’t immediately sore”, which is inconsistent with his first statement that he felt instant pain in his left shoulder and neck when his shoulder struck the cabinet.

61. Mr Adhikary submitted that the history provided to the claim’s manager was also inconsistent with the history given to Dr Stephenson[12] of feeling instant pain in the left shoulder and neck area when his shoulder struck the cabinet.

62. Mr Adhikary submitted another inconsistency in Mr Swinton’s evidence is the history given to Dr Stephenson that Mr Swinton reported the injury to the office “by leaving a telephone message two days later”.[13]

[10] Incident Report dated 21 June 2013 – Application – pp 17-19
[11] Reply – p 20
[12] report of Dr Stephenson dated 2 December 2019 – Application – pp 13-14
[13] supra

63. Mr Adhikary submitted that the clinical notes of the Ramsay Street Medical Centre supports a finding that the injury did not occur as alleged by Mr Swinton but was caused by the friend's massage.

64. Mr Adhikary submitted that while clinical notes of busy medical practitioners should be treated with some care[14], the reference to the "back" being worked on and manipulated is referred to by Drs Carran and Lo Mascolo at two different consultations; and that the history of back manipulation should be accepted.

65. Mr Adhikary submitted there was no mention at any of the consultations prior to 22 June 2013 of a workplace injury.

66. Mr Adhikary submitted that Mr Swinton in his second statement was seeking to explain why he did not mention the history of the workplace injury to the general practitioners prior to 22 June 2013.

67. Mr Adhikary submitted it is not a "creditable explanation" of the gentle massage of the left shoulder by the friend.

68. Mr Adhikary submitted that Mr Swinton's explanation of his failure to mention the workplace injury at the first consultation with Dr Carran should not be accepted.

69. Mr Adhikary submitted that no evidence has been provided by the friend who is "clearly a material witness"; and an adverse inference should be drawn that his evidence would not be favourable or of assistance to Mr Swinton's case[15].

70. Mr Adhikary submitted that Mr Swinton at paragraph 14 of his second statement is seeking to explain why the friend's evidence has not been obtained, and that the explanation should not be accepted.

71. Mr Adhikary submitted that Mr Swinton's explanation of him falling out with his friend is not a satisfactory explanation because the friend's name has not been provided; there is no evidence as to enquiries to locate the friend so he could be interviewed for the purpose of obtaining a statement.

72. The nominated treating doctors and the independent medical experts have accepted the history as provided to them by Mr Swinton, which is not a fair climate.[16]

Applicant's submissions in reply

73. Mr Carney submitted: "it is trite to say there is inconsistency between the first statement and the second statement", which were made some seven years after the injury.

74. Mr Carney submitted the file note taken by the claim's manager supports Mr Swinton's complaint that his shoulder "has been pretty sore".

75. Mr Carney submitted that it is an anatomical impossibility for the left shoulder pain to come on from "cracking vertebrae back into place" as recorded by Dr Carran.

76. Mr Carney submitted the witness has to be available for an adverse inference to be drawn in accordance with the principle in *Jones v Dunkel*.

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[14] *Winter v New South Wales Police Force* [2010] NSWWCCPD 121 at [183]
[15] *Jones v Dunkel* (1959) 101 CLR 298
[16] *Paric v John Holland (Constructions Pty Ltd* [1985] HCA 58

77. Mr Carney submitted that no adverse inference should be drawn by the failure to call the friend because there was a falling out several years ago, which has been explained by Mr Swinton in his second statement.

78. Mr Carney submitted that the points raised by the respondent as to purported inconsistencies in the evidence are not "great points" which in reality only arose over the last two months.

Discussion and findings

79. Radiological investigations in the form of CT scans of the cervical spine, thoracic spine, and lumbar spine; and ultrasound and x-ray of the left shoulder were requested by Dr Lo Mascolo on 17 June 2013.

80. Dr Afroze referred to the request for radiological investigations at the consultation on 20 June 2013.

81. Dr Carran discussed the results of the radiological investigations with Mr Swinton at the consultation on 22 June 2013, creating a referral letter to Dr Lawrence Kohan, orthopaedic surgeon, for review and management of the left shoulder and cervical spine.

82. While the referral letter from Dr Carran to Dr Kohan is not in evidence, Dr Stephenson referred to Dr Carran's letter in his report dated 2 December 2019[17]. Dr Stephenson set out the relevant parts of the referral letter as follows:

> "Thank you for seeing Mr Swinton, whom I consulted today. Could you kindly review and advise in regard to his apparent frozen shoulder. He has a likely disc prolapse causing C4 left nerve root compression and also changes on ultrasound of adhesive capsulitis, impingement and bursitis."

83. It is apparent the referral to Dr Kohan was for management of the left shoulder and the cervical spine.

84. The clinical records of the consultation with Dr Ristuccia on 29 June 2013 indicates a referral letter was created for Mr Swinton to see Dr Gothelf.

85. Dr Gothelf reported to Dr Ristuccia on 22 July 2013[18] that he saw Mr Swinton in relation to his left shoulder problem. Dr Gothelf reported that his examination revealed obvious wasting of the musculature around the shoulder including the deltoid muscle with subjective numbness around that muscle.

86. Dr Gothelf took a history of walking down a corridor and jamming the left shoulder into the wall and problems with the shoulder since that time.

87. Dr Gothelf was of the opinion that the most likely cause of the left shoulder problems was neurological emanating from the cervical spine, commenting that he understood an MRI scan of the cervical spine showed "some changes". Dr Gothelf recommended Mr Swinton undergo an MRI scan of the left shoulder to evaluate any rotator cuff problems, and referral to a neurologist or neurosurgeon to investigate the cervical spine.

88. I find the referral to Dr Gothelf was for management of the left shoulder and the cervical spine only.

[17] report of Dr Stephenson dated 2 December 2019 – Application – p 17
[18] report of Dr Gothelf dated 22 July 2013 – Application – p27

89. Dr Gothelf was of the opinion that the acute weakness in the left shoulder was consistent with viral neuritis but said there could be other causes such as cervical radiculopathy, taking the liberty of referring Mr Swinton to a neurologist and arranging for an MRI scan of the cervical spine. Dr Gothelf returned Mr Swinton to the care of Dr Ristuccia. There are no further reports from Dr Gothelf in evidence.

90. While the clinical records of Dr Ristuccia dated 9 August 2013 refer to Dr Gothelf's diagnosis of neuritis and that Mr Swinton was to see a neurologist, Dr Panjratan reported that he was told by Mr Swinton the referral to a neurologist was declined.[19]

91. Dr Stephenson concluded the radiological findings of the left shoulder and cervical spine were consistent with the clinical findings on examination.

92. Dr Stephenson found the "direct blow to the left shoulder" resulted in left shoulder and neck pain with restricted movement related to rotator cuff tendinitis associated with subacromial subdeltoid bursitis and impingement of the left shoulder; and that the left radiculopathy related to the cervical spine pathology as revealed by the radiological investigations.

93. While no history was provided to Dr Stephenson of the massage of the left shoulder by Mr Swinton's friend, that history was given to Dr Panjratan at the assessment on 12 February 2020 when injury was not in dispute.

94. Dr Panjratan recorded the history of the massage as follows[20]:

> "After work, he had massage from a friend. Halfway through the massage he could not move the shoulder although the massage was gentle.
>
> The following day, he consulted his GP and had shoulder & cervical imaging after which he was referred to Dr Todd Gothelf, Shoulder Surgeon, whose report dated 22/7/2013 is at hand".

95. Dr Panjratan diagnosed adhesive capsulitis and aggravation of the pre-exiting degenerative changes in the cervical spine as a result of the injury, and that the employment concerned was a substantial contributing factor to the injury.

96. The respondent submitted that the injury should not be accepted because of inconsistencies in the evidence and the lack of recorded history in clinical records of the Ramsay Street Medical Practice about a workplace injury until the consultation with Dr Carran on 22 June 2013.

97. The respondent's submissions as to inconsistencies in Mr Swinton's evidence was on the basis of statements made several years after the event as to the reported level of pain of the shoulder at the time of the incident; reporting the incident to the office at the time or two days later by telephone; completing the incident report on line on 21 June 2013, and the level of pain of the left shoulder reported to the claim's manager, are, in my view, "distinctions which are too nice"[21] to make an adverse finding as to Mr Swinton's credit.

98. The respondent's assertion in the s 78 notice dated 15 June 2020 that the injury to the "cervical spine and left shoulder occurred as a result of a manipulation of your back, not as a result of any work injury", is not supported by the evidence.

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[19] report of Dr Panjratan dated 13 March 2020 – Reply – p 24
[20] supra at 20 – p 23
[21] *Articulate Restorations & Developments Pty Ltd v Crawford* (1994) 10 NSWCCR at 765 per Mahoney JA

99. While the initial clinical records refer to manipulation of the back, the complaints were about the left shoulder and the cervical spine. Treatment and assessment were of the left shoulder and neck. Dr Carran recorded his clinical impression at the consultation on 15 June 2013 as “frozen shoulder” and “cervical disc”.

100. I agree with the submission of counsel that care must be exercised when considering recorded histories in clinical records of busy general practitioners.

101. While Dr Carran’s record of the consultation on 15 June 2015 refers to the friend working on the back: “cracking vertebra into place”; the clinical examination records sensory changes down the left arm consistent with radiculopathy as found by Dr Stephenson resulting from cervical pathology and reported upon by the radiologist, Dr Healy.

102. Dr Carran’s examination found there was spasm in the trapezia and the supraspinatus with a preliminary diagnosis of “frozen shoulder” and “cervical disc”.

103. The history given to Dr Lo Mascolo on 17 June 2013 was severe left shoulder pain with very limited movement in all directions.

104. Dr Lo Mascolo referred Mr Swinton for an ultrasound and x-ray of the left shoulder.

105. Dr Afroze referred Mr Swinton for CT scan of his cervical spine on 20 June 2013.

106. Dr Healy reported to Dr Lo Mascolo on 20 June 2013 that the investigations of the left shoulder revealed adhesive capsulitis, bursitis and impingement, and that the likely cause of the complaints of radiculopathy was compression of the exiting left C4 nerve root.[22]

107. Mr Swinton underwent an ultrasound guided cortisone injection to the left shoulder on 29 June 2013.[23]

108. I find the treatment was for management of the left shoulder and the cervical complaints evidenced by the reports of the nominated treating doctors, the radiological investigations, and the clinical records of the Ramsay Street Medical Centre.

109. I agree with Mr Carney’s submission that it is not anatomically possible for the manipulation or massage of the back to cause injury to the left shoulder and cervical spine without medical evidence to support a finding as submitted by Mr Adhikary that the injury was caused by the massage.

110. The respondent’s submission that the injury to the left shoulder and cervical spine was caused by the friend’s massage is speculative; not supported by the evidence.

111. I accept Dr Stephenson’s clinical findings of radiculopathy resulting from the cervical spine, supported by the CT scan as reported upon by Dr Healy showing severe foraminal narrowing on the left at the C3/4 level of the cervical spine likely to be compressing the existing left C/4 nerve root.[24]

112. The findings and opinions of Drs Stephenson and Panjratan accord with the findings on examination by the nominated treating doctors, and the opinion of Dr Ristuccia of left shoulder capsulitis and bursitis with left radicular pain resulting from cervical spine nerve encroachment.

[22] report of Dr Healy dated 20 June 2013 – Application – pp 31-32
[23] report of Dr Ristuccia dated 19 June 2019 – Application – p 25

113. I am unable to accept the respondent's submission that Mr Swinton's evidence as to the mechanism of the injury should not be accepted because of the absence of any record of a workplace injury in the clinical records of the Ramsay Street Medical Centre until the consultation with Dr Carran on 22 June 2013.

114. I accept Mr Swinton's evidence that when he first attended Dr Carran, he was concerned about his left arm function because of the past history of hereditary neurological pressure palsy commented upon by Dr Stephenson as reported by Dr Carran in his referral letter to Dr Kohan.

115. I accept Mr Carney's submission that the history of the mechanism of the injury as recorded in the clinical records of the consultation with Dr Carran on 22 June 2013 is consistent with the history of injury provided to the nominated treating doctors and the independent medical experts.

116. I find that Dr Carran, after receiving the history of the workplace injury on the background of the friend's massage provided to him at the first consultation, issued an approved WorkCover medical certificate.[25]

117. Dr Panjratan found the workplace injury of the left shoulder hitting the wall cabinet caused adhesive capsulitis and aggravated the pre-existing degenerative changes in the cervical spine.

118. I find Dr Panjratan had a fair climate upon which to base his opinion as to causation of the left shoulder and cervical symptomatology as a result of the injury.

119. I accept Mr Swinton's evidence that he struck the wall cabinet with his left shoulder in the course of employment on 14 June 2013.

120. I am unable to accept the respondent's submission that an adverse inference should be drawn that the friend's evidence would not assist Mr Swinton by his failure to call him to give evidence because there was a falling out between them several years ago, and, in any event, the history of the shoulder becoming worse during the friend's massage was provided by Mr Swinton to Dr Panjratan, who found the incident of the left shoulder hitting the wall cabinet caused adhesive capsulitis and aggravation of pre-existing degenerative changes in the cervical spine.

121. I find that Mr Swinton suffered injury to his left shoulder and cervical spine in the course of employment with the respondent on 14 June 2013 within the meaning of s 4 of the 1987 Act; and that the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act.

122. I propose to remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the degree of permanent impairment of the left upper extremity (shoulder) and cervical spine as a result of injury on 14 June 2013.

[25] Application to Admit Late Documents filed by the applicant dated 20 July 2020 – pp 8-10