

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 4936/20  
**Applicant:** MAROUN  
**Respondents:** ONE WAY DEVELOPMENT & CONSTRUCTION PTY LIMITED  
**Date of Determination:** 23 DECEMBER 2020  
**Citation No:** [2020] NSWCC 423

The findings of the Commission are as follows:

1. The surgery proposed by Dr M Gupta in his report dated 23 April 2020, namely revisionary surgery to the applicant's left shoulder, is reasonably necessary medical treatment within the meaning of section 60 of the *Workers Compensation Act 1987* as amended (1987 Act).
2. The respondent is to pay the reasonable costs of and incidental to the proposed left shoulder surgery.

PHILIP YOUNG  
**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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Maroun (the applicant) is a 46 year old man who was employed by One Way Development and Construction Pty Limited (the respondent). On 7 March 2019 in the course of his employment, he suffered an injury to his left shoulder whilst pulling a heavy concrete feeder.
2. The applicant came to surgery which is the subject of a report of 10 September 2019 and this surgery was paid for by the insurer.
3. The current claim is for the cost of revisionary surgery to the same left shoulder proposed by Dr M Gupta. This surgery is arthroscopic rotator cuff repair involving the use of a “bio-inductive augmentation device” which is branded “Regeneten” (the surgery).
4. A dispute has arisen because the insurer obtained an opinion from Associate Professor P Minitier (Dr Minitier) the subject of a report of 15 May 2020.
5. The claim by the applicant is for a declaration pursuant to section 60(5) of the *Workers Compensation Act 1987* (the 1987 Act) that the proposed surgery is reasonably necessary and an order that the insurer pay the costs of, and incidental to, the surgery.

### ISSUES FOR DETERMINATION

6. The issue is whether the proposed treatment is reasonably necessary within the meaning of section 60 of the 1987 Act.

### PROCEDURE BEFORE THE COMMISSION

7. The matter initially came for conciliation and arbitration hearing on 23 November 2020. Mr C Tanner of counsel instructed by Mr F Dous appeared for and with the applicant. Mr F Doak of counsel instructed Ms M McDonald appeared for the respondent. Ms A Markley represented the insurer.
8. On 23 November 2020 the Commission raised an issue concerning Regulation 44 in that the respondent was seeking to rely upon opinions from Dr P Minitier as well as Dr D Duckworth. Both Doctors are orthopaedic surgeons. An issue arose as to whether Dr Duckworth was a treating doctor. This was because Dr Duckworth’s involvement was recommended by Dr Minitier and then on this recommendation the applicant’s general practitioner, Dr N Rajanayagam, had completed a referral to Dr Duckworth, at Dr Minitier’s suggestion.
9. On 23 November 2020 this Commission made Directions requiring the respondent to provide evidence, in effect detailing the insurer’s involvement in the applicant’s attendance upon Dr Duckworth. That evidence was attached to, and the subject of, an Application to Admit Late Documents (AALD) filed by the respondent on 27 November 2020. This Commission wanted to ensure that the respondent’s insurer, in its dealings on this aspect of the matter, should be referred for investigation of any potential non-compliance with the Model Litigant Policy as it applies to litigation in NSW.
10. The matter was adjourned to 30 November 2020. On this occasion appearances were as before. The most part of 30 November 2020 was spent in submissions concerning whether or not Dr Duckworth’s report should be admitted into evidence. The respondent’s position, broadly speaking, was that Dr Duckworth’s report was not a forensic medical report, but rather a treating doctor’s report. The applicant’s position was that Dr Duckworth was not a treating doctor.

11. Available to the parties is a recording of the Commission's interlocutory decision on the admissibility of Dr Duckworth's report. The report was not admitted into evidence.
12. Because these matters occupied much of the time available on 30 November 2020, a Direction for written submissions was issued concerning substantive matters and those submissions are now to hand. They are:
  - (a) respondent's written submissions prepared by Mr Doak dated 7 December 2020, and
  - (b) applicant's written submissions prepared by Mr Tanner dated 14 December 2020.

No further submissions in reply, or otherwise, are to hand.

## **EVIDENCE**

### **Documentary evidence**

13. The following documentary evidence (in addition to the submissions) was before the Commission:
  - (a) Application to Resolve a Dispute filed on 1 September 2020 and attachments (Application);
  - (b) Reply filed on 22 September 2020 and attachments (Reply);
  - (c) documents the subject of AALD filed by the applicant on 17 November 2020 and attachments including letter, reports of the general practitioner and others and the applicant's supplementary statement (AALD1);
  - (d) documents the subject of AALD filed by the respondent's solicitors on 17 November 2020 (coincidentally the same date as in (c) above) being clinical records of Dr Duckworth produced pursuant to a Direction for Production (AALD2), and
  - (e) AALD filed by the respondent on 27 November 2020 and attachments in answer to this Commission's Direction of 23 November 2020 (AALD3).

### **Oral evidence**

14. No oral evidence was given.

## **SUBMISSIONS**

15. It is unnecessary to summarise in detail the submissions provided in this matter as both parties prepared written submissions.

## **DISCUSSION**

16. The submissions of both parties accept that the relevant legal principles for the consideration of this matter are set out by Deputy President Roche in *Diab v NRMA Limited* [2014] NSWCCPD 72. There are five general criteria to be considered, but it would appear that those criteria are not necessarily exhaustive. Nevertheless, both parties appear to have approached their submissions with emphasis upon those five criteria.

17. For the sake of completeness, the criteria are recorded as follows:
- (a) the relevance and appropriateness of the proposed treatment;
  - (b) whether there is any available alternative treatment;
  - (c) the costs of the proposed treatment;
  - (d) the actual and potential effectiveness of the proposed treatment, and
  - (e) the acceptance of medical experts of the treatment as appropriate and likely to be effective.
18. It will be observed that the criteria in *Diab* rely to a large extent upon medical opinion. But the exercise as identified by Roche DP is not one where effectiveness (for example) must be scientifically considered to be guaranteed, because in all forms of treatment there is always an uncertainty (or risk) that the particular treatment might not be effective, either generally, or in the case of the particular applicant. In this jurisdiction, there is not a scientific approach to effectiveness (nor for that matter any other criteria) but rather a decision based upon the balance of probabilities.
19. Documents the subject of the respondent's AALD2 include those concerning treatment of the applicant by Dr Duckworth for the applicant's left shoulder symptoms in 2005. The respondent suggests that between 2005 and July 2019 when the applicant consulted Dr Rajanayagam, there is no evidence of consultations with any general practitioner. The respondent also submits that between the applicant's injury on 7 March 2019 and July 2019 there is no detail of consultations with general practitioners.
20. That submission is I think a "two edged sword". The applicant claims no prior relevant injury or disability. The respondent does not present evidence (apart from the Dr Duckworth notes) of any serious incapacitating pathology before the injury claimed. The prior left shoulder symptoms were about 14 years earlier with no evidence of treatment in the intervening period. There is no evidence of any ongoing (post 2005) left shoulder disability.
21. An ultrasound of the applicant's left shoulder occurred on 29 July 2019. It noted left shoulder pathology including a tear of the supraspinatus tendon, a possible tear of the long head of the biceps tendon, subacromial and subdeltoid bursitis and degenerative changes in the acromioclavicular joint.
22. The applicant was referred by his general practitioner to Dr Gupta. Dr Gupta obtained approval from the insurer for the surgery (including Regeneten) which was performed on 10 September 2019, which surgery was approved and paid for by the insurer.
23. In December 2019 the applicant was sent for an MRI scan of the left shoulder. This showed<sup>1</sup> "quite prominent thinning of the cuff repair". The applicant saw Dr Gupta and then underwent a further MRI scan and ultrasound of the left shoulder on 17 April 2020 and 20 May 2020 respectively. Dr Gupta wrote to Dr Rajanayagam on 23 April 2020 confirming that the applicant had sustained a recurrent tear of the rotator cuff.
24. Dr Minter in his report of 15 May 2020 acknowledges that he had not seen the original operation report of Dr Gupta concerning the procedure conducted on 10 September 2019. Dr G Soo provided an independent medical report of 13 July 2020 which recommends that the revisionary surgery suggested by Dr Gupta should occur. Dr Minter is the only doctor to suggest that the surgery is not appropriate, or to use the words of the section, not reasonably necessary. The respondent has made much of the fact that the applicant saw Dr Duckworth

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<sup>1</sup> MRI report 10 December 2019.

in 2005 for left shoulder pain. The fact remains however that the applicant was able to perform his work up until his injury on 7 March 2019 (14 years later) and does not give any history of significant pre-existing problems in his left shoulder before that injury. The applicant has the report of Dr G Soo in support of the proposed surgery. The insurer has consented to the use of Regeneten in the applicant's earlier surgery. It follows I believe that the insurer's current criticism of the therapeutic benefit of the use of Regeneten in Australia must be, in my view, without merit.

25. The applicant has the benefit of the treating surgeon and the opinion of Dr Soo which both support the view that further operative procedure using Regeneten offers potential for reducing further pathology in the left shoulder. As Dr Gupta is the treating surgeon he has seen the applicant many times. Dr Gupta and Dr Soo's views are supported by the general practitioner, Dr Rajanayagam.
26. Dr Minter's opinion must be seen to be qualified because the fact that he had recommended a further opinion of Dr Duckworth (also an orthopaedic surgeon) infers that Dr Minter was unsure whether the surgery should proceed, or alternatively was unsure of his own ability and/or experience to "make a call" in that regard.
27. In the circumstances, the Declaration sought is appropriate on the balance of probabilities.

### **Conclusion - Findings and Awards**

28. The determination of the Commission is as follows:

#### **Findings**

29. The surgery proposed by Dr M Gupta in his report dated 23 April 2020, namely revisionary surgery to the applicant's left shoulder, is reasonably necessary medical treatment within the meaning of section 60 of the 1987 Act.
30. The respondent is to pay the reasonable costs of and incidental to the proposed left shoulder surgery.

