

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2091/19
Applicant: Pieter Homburg
Respondent: Medusa1 Pty Ltd t/as ACG National Pty Ltd
Date of Determination: 25 July 2019
Citation: [2019] NSWCC 252

The Commission determines:

1. I remit this matter to the Registrar for referral to and Approved Medical Specialist for a whole person impairment assessment on the following bases:
 - (a) Date of injury: 30 July 2014
 - (b) Matters for assessment: Right upper extremity (shoulder)
Left upper extremity (shoulder)
Cervical spine
 - (c) Evidence: ARD and attached documents
Reply and attached documents

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Pieter Homburg (the applicant) brings a claim for lump sum compensation in relation to injuries and consequential conditions that he sustained on 30 July 2014 when, during the course of his employment for Medusa 1 Pty Ltd t/as ACG National Pty Ltd (the respondent) as a security officer at Sydney University, he tripped on a flight of stairs and fell injuring his right shoulder, cervical spine and left shoulder. The cervical spine and left shoulder injuries were claimed to be consequential conditions.
2. A s 74 and related notices were issued on 4 June 2015, 19 December 2018 and 6 May 2019.
3. Mr Homburg issued the Application to Resolve a Dispute (ARD) on or about 1 May 2019. A Reply was issued on or about 22 May 2019.

ISSUES FOR DETERMINATION

4. The parties agree that the following issue remains in dispute:
 - (a) Were the symptoms in the left shoulder a consequence of the injury of 30 July 2014.

PROCEDURE BEFORE THE COMMISSION

5. This matter was heard on 4 July 2019 at Sydney. Mr Bruce McManamey of counsel appeared for the applicant and Ms Lyn Goodman of counsel for the respondent. 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.

EVIDENCE

Documentary Evidence

6. 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.

Oral Evidence

7. No application was made in respect to oral evidence.

FINDINGS AND REASONS

8. The dispute is confined to the question of the cause of the left shoulder symptoms. Liability is admitted in relation to the claim for lump sum compensation in respect of the cervical spine and the right upper extremity (shoulder).

9. Mr Homburg made two statements dated 8 March 2016¹ and 22 April 2019². He advised that on 30 July 2014, when he was patrolling a student accommodation building in Redfern he tripped on the top step of a set of stairs he was climbing and fell forward landing heavily on both his arms. His symptoms initially were primarily concerned with the right shoulder and he underwent an MRI arthrogram examination of that shoulder with Dr Stuart Jansen on 27 November 2014. This failed to improve his symptoms and further surgery was recommended. This was resisted by the respondent but on 29 November 2015 Consent Orders were issued from the Commission noting that the respondent agreed to cover the cost of the further surgery recommended by Dr Jansen.
10. Mr Homburg said in his statement of 8 March 2016³:
- “18. I have begun to rely on my left arm more. As a result, I also began to develop pain in my left shoulder due to this over-reliance. Sometime it is worse than the right because I use it a lot.”
11. In his later statement of 22 April 2019, he related that he returned to work on restricted duties in January 2015. He worked in security at a car depot in Kembla Grange and was restricted to lifting less than 2kgs and avoiding lifting his arms above shoulder height. He was also required to conduct hourly patrols of the depot. He said at [28]⁴:
- “I found that when completing my duties at work, due to the ongoing pain in my right shoulder, I became heavily reliant on my left shoulder and this in turn increased the pain in my left shoulder and neck.”
12. In or around July 2015, Mr Homburg was suspended from work due to his medical condition. He said that over the next “couple of years” that he experienced ongoing symptomatology in both shoulders and his neck. He found difficulty in performing his activities of daily living particularly in relation to opening jars, washing his car and playing with his daughter.
13. The surgery that was the subject of the Certificate of Determination on 29 November 2015 took place on 30 March 2017. Mr Homburg said that overall, he had a very poor result from that procedure. The pain and stiffness in his right shoulder increased and he said that this made him even more reliant on his left shoulder and neck when performing activities of daily living.
14. Mr Homburg described the restrictions and disabilities from which he was suffering as a result of his right shoulder injury:
- “Since sustaining injury to my right shoulder, I have continued to suffer from the following restrictions and disabilities:
- a) I struggle mowing the lawn, vacuum the house and tidy up;
 - b) I am unable to play with my daughters this includes lifting them or carrying them;
 - c) I struggle to help out my family with shopping;
 - d) I am unable to scratch my back without pain;
 - e) I am unable to drive for any longer than 20 minutes;
 - f) I cannot swim for any length of time;
 - g) I used to use a metal detector but the straps hurt my shoulder;
 - h) I used to be a avid motorbike rider;
 - i) I struggle to make phone calls as this involves holding the phone up to my ear and always require speaker phone;
 - j) I Struggle to sleep without medication due to pain.”

¹ ARD 1

² ARD 3

³ ARD 2

⁴ ARD 6

15. Mr Homburg related that he suffered a prior injury to his left shoulder in 2007 when he was working for another employer. He came to surgery on 25 September 2008 on the left shoulder with Dr Jansen in the form of a rotator cuff repair. Mr Homburg said he had a very good result and returned to work about three weeks after the surgery. He said by the time six months has elapsed he had made a full recovery.
16. On 10 February 2009, he was cleared to return to full time, unrestricted pre-injury work duties. He said that he returned to work in a full-time basis and remained very physical and active in his daily life up until the injury of 30 July 2014. He said at [11]⁵:
- “...Up until the subject injury, I did not experience any ongoing pain, restriction or symptoms in my left shoulder.”
17. At [38] Mr Homburg repeated that, up to the injury on 30 July 2014, his left shoulder had been pain free and he had made a full recovery from his earlier surgery. He said at [38]⁶:
- “...It wasn't until the over-reliance on my left shoulder and neck because of my right shoulder injury preventing my activities of daily living when I started to feel pain and restriction to my left shoulder.”
18. Mr Homburg's complaint of difficulties occurring in the left shoulder were corroborated by a contemporaneous report from his rehabilitation consultant, Ms Sophia Papadopoulos dated 3 November 2014⁷. She said⁸:
- “*Pieter advised will be moving house soon. Pieter has been informed to provide all parties with new postal address once he has moved which Pieter advised will be by the 08.11.
- * Pieter advised his left arm is now starting to hurt due to over- compensating as has been assisting his wife with packing boxes and moving things for house move....”
19. Dr Stuart Jansen, Orthopaedic Surgeon, supplied a number of reports as Mr Homburg's treating specialist. In his report of 20 March 2019 he said⁹:
- “Prior to his injury in 2014 Pieter had a good recovery with his left shoulder surgery in 2008. He complained of no pain and no restriction of activities in the left shoulder at his first presentation on 30th September 2014. Pieter's increasing pain in his left shoulder does appear to be from overuse due to his significant right shoulder disability. Prior to his fall, he was able to do all activities with his left shoulder and return to full time work.”
20. Dr Jansen first noted complaints of increasing pain in the left shoulder on 25 February 2019. He was primarily treating the right shoulder and had been seeing Mr Homburg regularly every few months since 2017.
21. Mr Homburg qualified Dr Mohammed Assem, Rehabilitation Specialist, as his medico-legal referee. Dr Assem wrote two reports; one dated 2 December 2015¹⁰ and the other 5 September 2018¹¹. In his report of 2 December 2015, he took a consistent history of the injury and medical treatment to the right shoulder. He said:

⁵ ARD 4

⁶ ARD 7

⁷ Reply 137

⁸ Reply 137

⁹ At 52

¹⁰ ARD 35

¹¹ ARD 41

"[Mr Homburg] returned to work on suitable full-time duties in January 2015 with GTS Security. He was relying on the compensatory use of his uninjured left arm for most of his activities. As a consequence, he developed increasing discomfort in his left shoulder."

22. Dr Assem noted that Mr Homburg suffered from a marked restriction in the right shoulder motion and "mild to moderate restriction in the left shoulder motion". Dr Assem was asked whether employment was a substantial contributing factor and answered¹²:

"He has a clear history of a work-related injury that is causally related to the development of his symptoms and need for treatment including surgery to his right shoulder. Unfortunately, as a consequence of compensatory over-use of his uninjured left arm, he has developed similar symptoms in his left shoulder."

23. The respondent relied on reports of Dr Robert Breit dated 13 November 2018 and 22 November 2018. It became clear during submissions that there had been an earlier report from Dr Breit. It was referred to in a s 74 notice of 4 June 2015¹³ and it was dated 20 April 2015. That opinion was obtained as a result of the dispute that arose as to whether the second bout of surgery on the right shoulder, the subject of the COD of 29 November 2015, was reasonably necessary. Dr Breit's opinion was summarised in the notice¹⁴:

"Dr Breit considered that your ongoing right shoulder pain post-surgery and new tears found in the recent MRI scan related to your pre-existing non-work-related pathology."

24. In his report of 2 December 2015 Dr Assem referred to Dr Breit's 20 April 2015 report, saying:¹⁵

"Dr Breit appears to have placed too much weight on the presence of pre-existing asymptomatic degenerative rotator cuff pathology without taking into consideration the mechanism of injury, the symptoms and limitations after the injury, the radiological evidence of a large joint effusion indicating an acute injury to an underlying condition and the need for surgical treatment."

25. On 5 October 2016, an Approved Medical Specialist (the AMS) issued a Medical Assessment Certificate regarding the necessity for the right shoulder revision surgery.¹⁶ The AMS said:

"...Dr Breit in his report on 20 April 2015 does not agree the rotator cuff tear is primarily from the injury which I am not going to elaborate on this point as I was only asked to assess whether operation at this time is a reasonable and necessary treatment."

26. In his report of 13 November 2018, Dr Breit's opinion as to the cause of the right shoulder pathology was amended. He said:¹⁷

¹² At 39 [7]

¹³ Reply 172

¹⁴ At 173

¹⁵ ARD 39

¹⁶ ARD 20

¹⁷ Reply 5

"The fall did not produce the pathology noted on the initial investigations. That showed a massive, long-standing, retracted, irreparable tear of the rotator cuff and the subsequent history has confirmed that it is irreparable. The fall did aggravate that pathology."

27. Mr McManamey said that he did not object to Dr Breit's other reports filed with the Reply. He submitted however that in view of the fact that Dr Breit gave a different opinion as to causation of the right shoulder injury, there were some real doubts about his opinion in any event.
28. In his examination of 13 November 2018 Dr Breit noted a restriction of movement to the left shoulder¹⁸. He was asked:

"6. The whole person impairment, if any, resulting from the alleged injuries. Do you consider the injuries to the cervical spine and left shoulder to [be] the result of the original fall of 30 July 2014?"

29. Dr Breit failed to give an opinion regarding the left shoulder in his answer. He received a subsequent request from the respondent's solicitors, which he answered on 22 November 2018. The request was:

"1. Could you please prepare a supplementary report addressing whether the worker's alleged injury to the left shoulder is a result of the original fall of 30 July 2014...."

30. Dr Breit's reply was¹⁹:

"You presented a report from Dr Assem, a Rehabilitation Physician, from 5 September 2018, he has assessed both shoulders and the cervical spine indicating those areas to be secondary to the left shoulder injury and I do agree."

31. Dr Assem in fact assessed that the development of neck and left shoulder pain was secondary to the *right* shoulder injury. I assume that Dr Breit intended to refer to the right shoulder rather than the left, given the terms of the question.
32. Whilst it would thus appear that Dr Breit concurred with the opinion of Dr Assem (that the left shoulder was a consequential condition caused by the right shoulder injury), later in his opinion, he said:²⁰

"My brief was to assess the right shoulder and neck only, it was clear that the left shoulder could not be used as a comparator so that only a cursory assessment was performed."

33. Further down the page, Dr Breit said:

"This gentleman had left shoulder injury and in 2008 left rotator cuff repair. This never leads to a normal shoulder and the range of movement displayed was consistent with that which one would expect to see post-repair. There is nothing to indicate that there was a further injury from 30 July 2014 or that his problems on that side are in any way secondary to this fall. They are due to his previous injury and surgery."

¹⁸ Reply 5

¹⁹ At 7

²⁰ At 8

SUBMISSIONS

34. Ms Goodman relied on Dr Breit's opinion. She referred to the Medical Assessment Certificate regarding the necessity for surgery dated 5 October 2016, to which I have referred above. She submitted that there was no evidence that Dr Breit had categorically changed his mind regarding the cause of the right shoulder injury. She submitted that Dr Breit's opinion was then concerned with whether the proposed revision surgery to the right shoulder was reasonably necessary. It followed that therefore his finding as to causation in 2018 of the right shoulder injury was not inconsistent.
35. Ms Goodman conceded that Dr Breit's apparent agreement with the opinion of Dr Assem that 'both shoulders and the cervical spine' were 'secondary to the left shoulder injury' "did not help." However, she asserted that on an overview of Dr Breit's two reports in 2018, I would find that Dr Breit was not indicating that the left shoulder was a consequential condition from an injury to the right shoulder.
36. Mr McManamey submitted that I would not accept Dr Breit's opinion. The evidence showed that there was a development of symptoms in the left shoulder as alleged by Mr Homburg in his statement, and that those assertions were corroborated by contemporaneous evidence by Dr Jansen and Ms Papadopoulos.
37. Mr Homburg had support from the medico-legal report of Dr Assem whose opinion was straightforward and conformed to the facts.

DISCUSSION

38. I found the evidence of Mr Homburg to be unsatisfactory in a number of respects. He stated that he developed pain in his left shoulder due to "over- reliance," and that he became dependant on his left shoulder whilst completing his duties "at work". He did not describe either the nature of those duties, or when he first noticed the onset of left shoulder problems. He said following the termination of his employment that he found it difficult to perform his activities of daily living particularly opening jars, washing his car, playing with his daughter, and that those restrictions were caused by ongoing pain in both shoulders and the neck. Mr Homburg's statements were unclear as to the time when he developed the left shoulder symptoms. On one view, it may not have been until he had ceased work during the next "couple of years" that he experienced the onset of his left shoulder symptomatology whilst simply doing the activities of daily living.
39. Be that as it may, the contemporaneous reports of the health professionals demonstrate that the left shoulder symptomatology was present in late November 2014, and January 2015. Ms Papadopoulos confirmed the onset of left arm symptoms in her report of 3 November 2014 symptoms, and Dr Assem noted complaints on 2 December 2015 of the onset of symptoms in the left shoulder since he had been back at work with the respondent in January 2015.
40. Dr Breit's opinions were conflicted and difficult to understand. With regard to the right shoulder it appeared that on 20 April 2015 he found that the injury of 30 July 2014 to the right shoulder had not caused Mr Homburg's right shoulder problems, but rather they were due to pre-existing degenerative pathology. He appears to have later changed that opinion in finding that the right shoulder pathology was in fact aggravated by the subject injury.

41. He then agreed, perhaps (as best I can make out), with Dr Assem that the left shoulder was a consequential condition to the right shoulder injury. However, later in the same report he resiled from that position, finding that the left shoulder symptoms had been caused by the 2008 surgery.
42. I find that latter opinion difficult to accept in any event, given that the evidence shows that no complaints regarding the left shoulder were made until at least in November 2014. Moreover, it does not appear that Dr Breit examined Mr Homburg's left shoulder.
43. The treating surgeon, Dr Jansen, had been caring for Mr Homburg since the left shoulder injury of 2008. He confirmed that Mr Homburg had made a good recovery with no complaints regarding the left shoulder when he first consulted Dr Jansen on 30 September 2014 in relation to the subject injury.
44. I accordingly accept Mr Homburg's evidence that he made a full recovery from that earlier left shoulder surgery as he returned to full duties and had been working for some years without any difficulty.
45. I accept the opinion of Dr Assem, that compensatory over-use of the left shoulder as a result of the restrictions caused by the subject injury to the right shoulder is the cause of Mr Homburg's left shoulder pathology. On a common sense evaluation of the causal chain, I am satisfied that the subject injury materially contributed to the onset of the symptoms in Mr Homburg's left shoulder, to adopt the test in *Murphy v Allity Management Services Pty Ltd*.²¹

SUMMARY

46. According I find that the applicant has suffered a consequential condition in his left shoulder resulting from the injury to his right shoulder on 30 July 2014.
47. I remit this matter to the Registrar for referral to and AMS for a whole person impairment assessment on the following bases:
 - (a) Date of injury: 30 July 2014
 - (b) Matters for assessment: Right upper extremity (shoulder)
Left upper extremity (shoulder)
Cervical spine
 - (c) Evidence: ARD and attached documents
Reply and attached documents



²¹ [2015] NSW WCC PD 49 per DP Roche at [24]; adopted in *Wyllie-Gray v Fitness First* [2019] NSW WCC PD 32 per DP Wood at [37]