

## WORKERS COMPENSATION COMMISSION

### CERTIFICATE OF DETERMINATION

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

**Matter Number:** 5682/19  
**Applicant:** Richard Anslow  
**Respondent:** Pool Werx Operations Pty Limited  
**Date of Determination:** 7 January 2020  
**Citation:** [2020] NSWCC 8

The Commission determines:

1. The applicant has not established that he suffered injury to the neck on 9 May 2007.
2. Application dismissed.

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

Paul Sweeney  
**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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A MacLeod*

Ann MacLeod  
Acting Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### INTRODUCTION

1. On 9 May 2017, Richard Anslow (the applicant) slipped and fell in the course of his employment as a pool technician with Pool Werx Operations Pty Limited (the respondent). It is not disputed that he suffered an injury to his left shoulder at that time. The respondent's workers compensation insurer accepted liability for that injury and paid the applicant compensation during his absence from work.
2. On 27 March 2019, the applicant was examined by an orthopaedic surgeon, Dr Medhat Guigis, on behalf of his solicitors. Dr Guigis expressed the opinion that the applicant also suffered a traumatic injury to his neck in the incident at work on 9 May 2017. The respondent has denied liability in respect of the alleged injury to the neck.

### PROCEDURE BEFORE THE COMMISSION

3. By these proceedings the applicant claims permanent impairment compensation in respect of injuries to his left shoulder and neck pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act). It is common ground that he can only maintain a claim for permanent impairment compensation if he can establish an injury to his neck on 9 May 2017. That is because section 66(1) of the 1987 Act limits the entitlement to permanent impairment compensation to workers who have suffered impairment of greater than 10 per cent as a result of injury. The assessment of permanent impairment on which the claim is based assesses impairment of the left shoulder at 10 per cent, ie, not greater than 10 per cent.
4. When the matter came on for conciliation and arbitration on 11 December 2019, Mr Carney of counsel appeared for the applicant and Ms Balendra of counsel appeared for the respondent. I was informed by counsel that the parties were unable to resolve the threshold issue of whether the applicant suffered injury to his neck in the incident in May 2017. I am satisfied that the parties, who were represented by experienced counsel, had ample opportunity to resolve the issue but were unable to reach a mutually satisfactory settlement.

### DOCUMENTS

5. The only documents before the Commission are:
  - (a) the Application to Resolve a Dispute (the Application) and the documents attached, and
  - (b) the Reply and the documents attached.
6. There was no objection to the material referred to above at the arbitration hearing. Neither party sought to adduce further evidence. There was no application to adduce oral evidence by either party.
7. At the arbitration hearing, the parties accepted that the Application should be amended so that the systems claimed under the heading permanent impairment should read left upper extremity and cervical spine in lieu of what there appears.

## SUBMISSIONS

8. As the only issue is whether the applicant suffered injury to the neck at the time of the incident in May of 2017, the submissions of counsel were unusually brief. Both counsel addressed the clinical record and the opinions of the orthopaedic surgeons who had expressed opinions for the purposes of the proceedings on either side of the record. As the submissions of counsel are recorded, I do not propose to reiterate them in these short reasons. I will refer to the main thrust of counsel's argument when necessary in resolving the issue in dispute.
9. In order to understand the submissions of counsel and the way in which the Commission has resolved the dispute it is necessary to briefly review the evidence of the applicant and the clinical record of his treatment following the injury of May 2017. What appears below is not intended to be a comprehensive survey of that evidence.

## THE EVIDENCE OF THE APPLICANT

10. The applicant's evidence is found in two signed statements. The first, which is dated 15 June 2017, was obtained by an investigator on behalf of the respondent's insurer. The second statement, which is dated 21 October 2019 was prepared by the applicant's solicitor.
11. By his first statement, the applicant describes his injury as follows:

"I was about halfway down the end in the steps when I slipped and lost my footing. As a result, I have thrown my left arm out as a natural reaction to grab something and my left arm has hit the retaining wall, forcing my arm backwards and stretching my shoulder. I have continued to fall down and I have landed on my left shoulder when I hit the ground.

I have then felt immediate pain in my left shoulder. I would describe the pain as a burning sensation."
12. The applicant says that following the injury he reported its occurrence to his supervisor and attended the Milperra Medical Centre where he saw Dr Cao.
13. The applicant returned to work on 15 May 2017 but continued to experience pain and restriction of movement in his shoulder. On 31 May 2017, he advised Dr Cao that he was experiencing severe pain in his shoulder. At that time, he was issued with a SIRA certificate for total incapacity. He underwent physiotherapy, which the applicant says was "slowly starting to work", as he could feel "a slight improvement in the shoulder, at the time he signed the statement. He was also prescribed medication. He states that the specific diagnosis made by Dr Cao was "a damaged rotator cuff with no tear".
14. By his supplementary statement the applicant provides a further, consistent account of the injury. He says that he "felt immediate pain in my left shoulder and found difficulty moving."
15. The applicant records that following cessation of work with the respondent, he did not work until September 2018, at which time he commenced employment with the Metropolitan Rehabilitation Hospital at Petersham as a maintenance officer.
16. The only reference to his neck/cervical spine in his statement evidence is to be found in his account of his examination by Dr Guigis. He says:

"During the course of the examination, flexed and twisted my neck and noted that my capacity to turn my neck to the right was greatly reduced. He advised that it is not unusual when a significant injury is sustained to or other [sic] of the shoulders that this affect the cervical spine as well as the degree of rotation of the cervical spine. I also noted that I suffer significant pain upon movement when I turn my head to the right at the extent of my rotation capacity.

Accordingly, I have been advised, and I accept, that in addition to sustaining an injury to my left shoulder I also sustained an injury to my cervical spine which adversely affects me today."

17. The applicant says that he continues to suffer from pain and restriction of movement of his left shoulder and intermittent pain in his cervical spine which is less troubling than his shoulder.

#### **Dr Cao**

18. There is no comprehensive report from Dr Cao, however, his serial medical certificates, a short-written report and his letter of referral to an orthopaedic surgeon are attached to the respondent's Reply.
19. The WorkCover/SIRA certificate, which is dated 9 May 2017 contains an account by the applicant of the circumstances in which he suffered injury on that date. It records that he "immediately felt pain in my left shoulder" at the time of the incident. The doctor certifies that the applicant's diagnosis was "sprained left shoulder". By the certificate dated 15 June 2017, the doctor's diagnosis was refined in that he certified that the injury was:

"Sprain left shoulder/rotator cuff injury."

20. Thereafter, the medical certificates issued on a regular basis by Dr Cao until 8 March 2018 record the same diagnosis. From 4 March 2018 the applicant was certified as fit for selected duties on a fulltime basis. The doctor, however, continued to issue certificates until, at least 27 September 2018.
21. On 9 August of 2018 the doctor provided a handwritten report to Rehabilitation Services, who had been appointed by the respondent's workers compensation insurer to attempt to place the applicant in suitable employment. By that letter the doctor described the applicant's "current diagnosis" as:

"Supraspinatus tendonitis + bursitis.

Early OA gleanoid joint."

22. On the same day, Dr Cao wrote to Dr Jeffrey Petchell requesting that he provide an opinion and management of the applicant's shoulder pain. He noted that the applicant had a past history of rotator cuff injury on 9 May 2017.

#### **Dr Petchell**

23. Dr Petchell, the orthopaedic surgeon, saw the applicant at the request of Dr Cao on 10 September 2018. He recorded that the applicant experienced "acute severe pain in his left shoulder" as a result of attempting to break a fall with his left arm in May 2017. The doctor diagnosed traumatic subacromial bursitis and rotator cuff contusion in conjunction with a flare-up of his AC joint osteoarthritis. He recommended that the applicant continue with physiotherapy.

## Rehabilitation Services

24. Rehabilitation Services first saw the applicant at the request of the GIO on 5 June 2017. The executive summary of the closure report of 12 October 2018 records a history of the incident of May 2017 as follows:

“Mr Anslow reported he slipped when descending uneven stairs and hyperextended his left upper limb whilst attempting to brace his fall. Mr Anslow reported he experienced immediate pain symptoms at the time of the incident.”

25. The report which is jointly signed by an exercise physiologist and an occupational therapist then provides an account of the applicant's gradual recovery, his job seeking and his eventual return to employment. There is no reference to a complaint of neck pain in the report.

## DISCUSSION AND FINDINGS

26. The applicant's case in respect of injury to the neck was put solely on the basis of a direct injury at the time of the incident. It was not suggested that the applicant suffered a consequential medical condition of the cervical spine as a result of the injury to the left shoulder. That is not surprising as there is no medical evidence which would support such a finding.
27. At the arbitration hearing, Ms Balendra submitted that the absence of any reference to a complaint of neck pain in the applicant's initial statement or in the clinical record which I have summarised above was fatal to the applicant's case of injury. Mr Carney, on the other hand, submitted that the only medical opinion which specifically addressed the issue of injury to the neck was that of Dr Guigis. Dr Wallace, the orthopaedic surgeon retained by the respondent, did not explicitly deny that the applicant suffered an injury to his neck at the time of the incident.
28. Dr Wallace saw the applicant at the request of the respondent's solicitors on 17 June 2019. He noted in that report that the applicant suffered intermittent aching pain at his left scapular radiating “intermittently to the left lateral aspect of the neck”. He recorded that the applicant suffered increased pain when driving long distances, overreaching with his left arm or playing golf. After examining the applicant, he expressed the opinion that the applicant suffered a rotator cuff strain, an aggravation of pre-existing supraspinatus tendinosis and subacromial impingement of his left shoulder at the time of the incident. He asserted that these injuries had “now resolved”.
29. Curiously, Dr Wallace had access to the report of Dr Guigis dated 27 March 2019 by which Dr Guigis opined that the applicant suffered an injury to his neck in the incident of 9 May 2017. Dr Wallace makes no attempt to refute or criticise Dr Guigis's theory of the origins of the applicant's neck pain, he merely says that he does not agree with Dr Guigis's opinion that the applicant suffered permanent impairment as a result of the injury. The failure to engage with a theory of the aetiology of a medical condition propounded in the applicant's case may be interpreted as acquiescence with the theory. In this case, however, the failure of Dr Wallace to engage in the medico-legal debate is, in my opinion, not decisive of the outcome. That is because there are difficulties in accepting the opinion of Dr Guigis on the nexus between the injury and the applicant's neck pain, which I have found insurmountable.
30. Relevantly, Dr Guigis took the following history:
- “On that day he was negotiating a spiral set of timber steps with a retaining wall to his left. The steps were slippery because it was raining that day. His foot slipped and in a reflex action he tried to grab something with his left arm when he felt pain in his left shoulder and adjoining area of his neck.”

31. After examining the applicant, Dr Guigis concluded that he had suffered injury to the left shoulder and a post-traumatic mechanical derangement of the cervical area of the spine. This had been:

“Caused by musculoligamentous sprain/strain as a result of sudden unguarded muscle contraction with eccentric loading of the spine. This had also triggered & aggravated to the effects of underlying asymptomatic age-appropriate degenerative changes”.

32. I accept that the opinion of Dr Guigis on the relationship between the injury and the applicant’s neck condition was open to the doctor on the history that he recorded. However, there are considerable doubts about the accuracy of the history. As I have recorded above, there is nothing in the material from the applicant’s general practitioner, from Dr Petchell or from the rehabilitation provider which could suggest that the applicant suffered a neck injury in May 2017. On the contrary, the material from Dr Cao, particularly his certificates, is inconsistent with the applicant’s symptoms being explained, in part, on the basis of a neck/cervical problem.

33. The absence of a reference to neck/cervical symptoms in the clinical record requires that Dr Guigis’s opinion on a causal nexus should be carefully scrutinised. There are several reasons why I do not accept it. In neither of his statements does the applicant assert that he suffered neck pain at the time of the incident in May 2017. By his statement of 21 October 2019, the applicant says that following the incident he felt “immediate pain” in his left shoulder. Subsequently, on his return to work, he continued to suffer increasing “discomfort and restriction of movement” in his left shoulder. This is consistent with the handwritten account the applicant gave of the incident, and his symptoms following it, in the handwritten passage attached to Dr Cao’s first medical certificate.

34. As far as I can ascertain, there is nothing in the applicant’s written evidence which is confirmatory of the history obtained by Dr Guigis of neck symptoms at the time of the incident of May 2017. On the contrary, the applicant’s written evidence appears to studiously avoid an assertion that he felt neck pain at the time of the incident.

35. It is, of course, the applicant’s evidence that he only became aware of sustaining a separate injury to his cervical spine at the time of his consultation with Dr Guigis, almost two years after the incident. He recounts that he was advised by Dr Guigis that a shoulder injury may “affect the cervical spine” and the degree of rotation of the cervical spine. That suggests that the applicant may have been told that a shoulder injury can cause a secondary or consequential medical condition of the neck. That argument, however, is not one which the Commission has to address in the circumstances of this case.

36. The second concern I have with Dr Guigis’s opinion is that his assertion of neck injury is completely unsupported by radiological or other medical investigation. That is because, at least, at the time that Dr Guigis’s provided his report, there were no such investigations. Neck symptoms can, of course, have many causes apart from the traumatic injury asserted by Dr Guigis. In the absence of radiological or other investigation, both diagnosis and attribution of these symptoms must involve an element of speculation.

37. Thirdly, there is no medical opinion evidence from a treating doctor in support of Dr Guigis’s opinion. The evidence of treating doctors has traditionally been given considerable weight in issues of history and causal nexus in the Commission. Patently, a treating general practitioner who has seen the applicant on many occasions over the course of treatment for an injury, is often in the best position to offer an opinion. Of course, in this case the material from Dr Cao suggests that he may not be supportive of Dr Guigis’s proposition that the applicant injured his neck at the time of the incident.

38. Certainly, Dr Petchell, the orthopaedic surgeon, to whom Dr Cao referred the applicant did not believe that it was necessary to attribute the symptoms of which the applicant complained at his examination to pathology in the neck.
39. Finally, and of considerably less significance, Dr Wallace's examination of the applicant's neck is very different to that recorded by Dr Guigis. While I have criticized the adequacy of his report, I note that Dr Wallace recorded that on examination the applicant's rotation and lateral tilt to the left and right were equivalent, whereas Dr Guigis suggests that the right rotation is considerably less than right rotation, a factor that he relied upon in reaching his diagnosis and attribution.
40. In the circumstances, I have concluded that the applicant has not established on the balance of probabilities that he suffered an injury to his neck/cervical spine in the incident in May of 2017. There is no confirmatory evidence from the applicant of such an injury, the available treating medical record is inconsistent with the occurrence of such an injury, and Dr Guigis's opinion must involve an element of speculation. His findings are inconsistent with those of Dr Wallace and are not supported by any medical investigation. Accordingly, I find that the applicant has not proven that he suffered injury to his neck on 9 May 2017.
41. As there is no medical evidence, which asserts that the applicant has an entitlement to compensation pursuant to section 66 by reason only of his shoulder injury, I decline to refer the issue of whole person impairment to an Approved Medical Specialist and I dismiss the application.

Commented [PS1]: