WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**2115/20**
Applicant:	**Lynette Barrett**
Respondent:	**Estia Investments Pty Ltd**
Date of Determination:	**23 July 2020**
Citation:	**[2020] NSWWCC 251**

The Commission determines:

1. That the applicant sustained consequential conditions to her right shoulder and cervical spine as a result of the agreed injury to her right elbow in the course of her employment with the respondent on 30 December 2017.

2. That the lump sum claim be remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment of the cervical spine and right upper extremity (shoulder, elbow and radial nerve).

3. The documents to be referred to the Approved Medical Specialist are to include those attached to the Application to Resolve a Dispute, Reply and Application to Admit Late Documents dated 3 June 2020.

4. The Approved Medical Specialist will need to conduct an assessment in person.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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

STATEMENT OF REASONS

BACKGROUND

1. Lynette Barrett was employed by the respondent, Estia Investments Pty Ltd, when on 30 December 2017 she was assisting a resident in the shower at work. The resident was seated on a shower chair and it collapsed suddenly underneath him. Ms Barrett alleges that she was pulled towards the floor with her right arm caught in the resident's shirt. She says there was a lot of force involved and she felt immediate pain in her right arm, particularly in her elbow. In the subject proceedings, Ms Barrett also alleges that she has sustained consequential conditions in her cervical spine and right shoulder. In the alternative, she alleges she sustained injury to her cervical spine in the incident on 30 December 2017.

2. The respondent does not dispute that this event occurred or that Ms Barrett injured her right elbow. However, it disputes that Ms Barrett sustained any injury or consequential condition to her cervical spine and right shoulder.

3. The claim for compensation brought by Ms Barrett in these proceedings is confined to lump sum compensation under section 66 of the *Workers Compensation Act 1987.* Her claim is for 19% whole person impairment (WPI) based upon an assessment by Dr McKee of 4% WPI for the cervical spine and 16% WPI for the right upper extremity (comprising of impairment to the shoulder, elbow and radial nerve). There was an amendment made to her Application to Resolve a Dispute (ARD) to delete the body system "TEMPSKI/Scarring" because there was no impairment assessed for scarring.

PROCEDURE BEFORE THE COMMISSION

4. The matter was listed for conciliation conference/arbitration hearing on 11 June 2020. Mr Stuart Grant, counsel, appeared for Ms Barrett instructed by Mr Arne Cambourne, solicitor. Ms Lyn Goodman, counsel, appeared for the respondent instructed by Mr Bruce McLean, solicitor.

5. 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; and
    (c) Application to Admit Late Documents (AALD) dated 3 June 2020 and attached documents

Oral evidence

7. There was no oral evidence. Both counsel made oral submissions, which were sound recorded. A copy of the sound recording is available to the parties.

FINDINGS AND REASONS

Ms Barrett's statements

8. After relating the circumstances of the incident on 30 December 2017, to which I have referred above, Ms Barrett outlines the medical treatment she undertook. She consulted her general practitioner, Dr Bagari, on 30 December 2017 and he referred her for an ultrasound, but informed her to keep her arm in a sling. She says she continued to wear the sling until she saw Dr Vrancic, orthopaedic surgeon, on 10 January 2018 and her whole upper right arm was aching during this time. At [17] of her statement dated 6 October 2019 she described her pain as follows:

> "I would get more pain anytime I had to remove the sling, to have a shower for example. I couldn't lift or move the right arm at all and needed help showering and getting dressed. I would get more pain in the upper part of the right arm and the shoulder when the sling was removed, or I had to even slightly use the arm.[1]"

9. Ms Barrett underwent surgical repair of her right bicep on 16 January 2018 and she states following the surgery she had to keep her arm in a sling. She says following the surgery she had difficulty moving the fingers and suffered a loss of sensation in parts of her right hand. She said she could not lift her right arm to dress herself as she says, "I would get excruciating pain in the right elbow, in the bicep and in the right shoulder." Ms Barrett states that the insurer provided carers to provide her personal and domestic needs.

10. Ms Barrett describes returning to work in February 2018, still with her arm in a sling and working restricted hours and duties. She says by June 2018 her arm was out of the sling and she continued to experience pain in the right upper arm and shoulder. She states that Dr Bagari certified her fit to perform her normal work on 14 September 2018, but she relates that she still had pain in her upper right arm including the elbow and shoulder. She says at work the pain in her right shoulder particularly was aggravated significantly by any use. She says she told Ms Loretta Creevy, her supervisor, that she was having trouble coping with the work due to pain in her right arm.

11. On 7 January 2019, Ms Barrett says she saw Dr Vrancic and told her that she had a lot of pain in her entire right upper arm, including the shoulder and elbow, as well as the bicep muscle. She said she told the doctor that she did not think she could cope and would have to retire. Her last day of work was 10 February 2019. She says the pain in her right upper arm continued after she stopped work and Dr Bagari obtained an ultrasound of her right shoulder, informing her she had impingement and bursitis in the right shoulder. She underwent steroid injections into her shoulder on 27 February 2019 and 10 April 2019, but by 22 May 2019 when she saw Dr Vrancic she had a constant ache from the shoulder down through the biceps and into her elbow. She describes undertaking physiotherapy to lengthen her biceps muscle and still suffering shoulder pain.

12. In her final statement dated 13 April 2020, Ms Barrett deals with her cervical spine advising that she had undergone a cervical spine graft at the age of 29 and following that she did not experience any pain or disability in her neck until the work incident. She says she was able to work as a nurse for many years without a problem. The work incident occurred when Ms Barrett was almost 68 years old.

[1] ARD p 3.

13. Ms Barrett says during the period when she was trying to return to her work duties she began to notice pain in her neck. She says she spoke to the physiotherapist about this and began having treatment for her neck. She says the injury to her right arm has made it difficult for her to perform her usual work and domestic activities and she has had to change the way she lifts or carry things.

14. She says the pain in her neck is ongoing and it becomes worse when she is required to perform any tasks that require the repetitive use of her right arm. She says her right arm tends to hang limp at her side quite often and this causes increased pain in her right shoulder and neck after prolonged periods.

Ultrasound right shoulder

15. The ultrasound of the right shoulder dated 22 February 2019 shows no tear of the rotator cuff but there are changes consistent with mild subacromial/subdeltoid bursitis with impingement[2].

MRI Cervical Spine

16. An MRI cervical spine dated 12 November 2019 revealed degenerative changes in the cervical spine with uncovertebral osteophytes at C4/5 and C5/6 levels causing compromise of the bilateral neural foramen, with no cord compression[3].

Dr Vrancic

17. Dr Vrancic is Ms Barrett's treating specialist who performed the operative repair of her right distal biceps. The doctor noted that Ms Barrett had perioperative radial nerve palsy. Dr Vrancic has seen Ms Barrett on several occasions to review her post-operative condition. In the report dated 16 April 2018 it was noted that Ms Barrett was safe to do limited wheelchair pushing on the small residents as well as pushing the tea trolley and could drive her car for small distances. While Dr Vrancic does not refer to Ms Barrett's right shoulder and cervical spine in this or her earlier reports she does state:

> "She should continue with upper quadrant type exercises with the physiotherapist as she has developed a maladaptive posturing due to her injury.[4]"

18. In the report dated 22 May 2019, Dr Vrancic discusses the ongoing issues that Ms Barrett has in her right elbow, including residual radial nerve dysaesthesia and mild weakness in the EPL tendon to the thumb and problem with her biceps. Dr Vrancic states:

> "Having an injured elbow for 18 months has put off her upper quadrant posture and rehabilitation physiotherapy should be recommenced for at least 6 sessions to help settle down these symptoms…[5]"

19. In the report dated 18 July 2019, Dr Vrancic explains that the "biceps tendon crosses both the shoulder and elbow joint, any dysfunction in biceps will affect both of these joints[6]".

[2] ARD p 37.
[3] ARD p 40.
[4] ARD p 46.
[5] ARD p 50.
[6] ARD p 51.

Physiotherapy records

20. The physiotherapy records note that on 16 February 2018, Ms Barrett still needed a sling at work. On 27 March 2018 there is a reference to her also getting some shoulder pain. The notes contain a diagram of the body and on the rear view there is shading on the right side of the neck and over the right shoulder. In a section of the form headed "conclusion" there appears handwriting "3 areas sh, elbow & neck". It is also noted the plan was to start with the shoulder with the aim to increase the PROM, which is likely to stand for passive range of motion[7].

21. On 14 August 2019, there is an entry that Ms Barrett still has right lower cervical ache and right shoulder ache[8] and further down the page there appears to be exercises undertaken by the physiotherapist for the neck and right shoulder. On 19 August 2019 ,it is noted that the neck mobility is a little better and the shoulder movement is a little better. On 2 September 2019, it is noted she complained about her right shoulder and there was some further improvement recorded. In the cervical spine it is noted there was still crepitus but increase in active range of motion[9]. On 4 September 2019, the physiotherapist notes she called a person (whose name I cannot decipher) to discuss the progress to date with "neck/sh & elbow".

22. On 11 September 2019, it is noted that Ms Barrett complained over the last two weeks of partial recurrence of the neck and shoulder ache aggravated by packing and cleaning prior to moving house[10]. On 25 September 2019, it is noted that Ms Barrett had recent exacerbation of neck and right elbow pain after moving house. On 2 October 2019, it is noted it was a little easier to use her right arm above her shoulder.

Dr Bagari

23. Dr Bagari answered an EML questionnaire that is undated but bears at the top a fax date of 30 September 2019. The doctor notes that Ms Barrett also has right subacromial bursitis from disuse of the shoulder due to the radial nerve palsy[11].

Dr McKee

24. Dr McKee, consultant general surgeon, has provided medico-legal reports for Ms Barrett dated 1 May 2019, 5 December 2019 and 2 June 2020. In his first report Dr McKee sets out the contents of Dr Vrancic's reports regarding the treatment of the right elbow injury. Dr McKee noted that Ms Barrett experienced a constant aching pain over her right upper arm, which occasionally radiates onto the right side of her neck. He also recorded that she had become increasingly aware of intermittent pain over the front of her right shoulder without distal limb radiation. He notes that for many months she had been aware of painful and restricted shoulder movements, especially when dressing and attempting to reach upwards and outwards.

25. On examination, Dr McKee found tenderness along the anterior border of the right trapezius muscle extending outwards towards the right shoulder. He found no shoulder or shoulder girdle muscle wasting. Right shoulder movements were restricted, especially flexion and abduction. He found an estimated one-quarter loss of all cervical spine movements which he said appeared to be age-related.

[7] ARD p 61.
[8] ARD p 62.
[9] ARD p 64.
[10] ARD p 64.
[11] ARD p 66.

26. Dr McKee stated that he felt the right shoulder condition was in all probability due to the original right elbow injury. He recommended review by Dr Vrancic. In this report dated 1 May 2019 in his diagnosis section Dr McKee does not mention the cervical spine but does include the right shoulder, which he describes as post-operative development of chronic right shoulder pain and dysfunction with impingement.

27. In his report dated 5 December 2019, Dr McKee refers to Ms Barrett's current complaints as including increasing neck pain, more on the right side, as well as stiffness and all neck movements being restricted. He found similar complaints in the right shoulder as before. Dr McKee noted that her right shoulder had remained immobilised in a sling for about eight months leading to a post-traumatic subacromial/subdeltoid bursitis with impingement. Dr McKee adds that the fusion at C6/7 level that Ms Barrett had in 1979 was not aggravated by the wrenching injury at the nursing home, but the jolting resulting from the fall onto the floor on 30 December 2017 aggravated her pre-existing and largely asymptomatic cervical spine degenerative changes. Under diagnosis in this report Dr McKee again does not mention the cervical spine. He stated that the right shoulder injury was both a direct injury and consequential injury. He allowed 4% WPI for the cervical spine and an 18% Upper Extremity Impairment (UEI) of the right shoulder of 18% which when combined with 4% UEI for the right elbow equalled 21% UEI which converted to 13% WPI and he found 4% WPI for the radial nerve palsy. He combined these assessments to 19% WPI.

28. After setting out these assessments Dr McKee says the cervical spine injury was consequential to the right upper extremity injury[12].

29. In the further report dated 2 June 2020, Dr McKee was sent the physiotherapy notes for his consideration and his attention drawn to Dr Vrancic's report dated 22 May 2019 dealing with the effect of the injury on the right upper quadrant posture. He was asked a series of questions and states that the neck injury reflected a combination of direct spinal injury at the time of the accident and a consequential injury resulting from the altered upper quadrant posture.

Dr Miniter

30. Dr Miniter, orthopaedic surgeon, provided medico-legal reports for the insurer dated 5 August 2019 and 30 April 2020. In his first report, he states that the specific diagnosis was discomfort in the right upper extremity and neck secondary to operative repair of the bicipital tendon of the right arm. Then he states that the right elbow injury is definitely work related, but the right shoulder has not been injured, although he states that the complaints of discomfort in the right shoulder girdle proper may well be related to a low grade complex regional pain syndrome. Dr Miniter believed assessment of permanent impairment was premature at that time.

31. In his second report, Dr Miniter records Ms Barrett's complaints about the elbow and notes that she said her right shoulder is still stiff and she has discomfort in the neck. Dr Miniter's opinion in relation to the right shoulder was somewhat equivocal. He said her issues in the shoulder are inexplicable to him and he thought there could be an element of functional behaviour, but also that it was possible that she has a partially resolved adhesive capsulitis. He stated he could see no evidence of neurological injury.

32. Dr Miniter answered a series of questions and stated he could not see evidence that Ms Barret has ongoing cervical issues related specifically to the elbow injury.

[12] ARD p 94.

Ms Barrett's submissions

33. Mr Grant outlined the evidence in relation to the right elbow injury, including the biceps repair surgery. He noted Ms Barrett wore a sling for several months. He submitted that the symptoms in relation to the shoulder and neck occurred predominantly after the surgery due to alteration of the upper quadrant posture of the right arm. He submitted that Dr Miniter had not addressed the issue of consequential condition at all, which he argued weakened the respondent's case. Mr Grant notes that in his first report Dr Miniter does give some support to the neck being injured and in the second report, Dr Miniter seems to allow there could have been some adhesive capsulitis in the right shoulder.

34. It was submitted that Ms Barrett in her statements recounts that she had pain in the right shoulder after the surgery, and that it was aggravated by use of the right arm. Reference was made to the ultrasound of the right shoulder as showing bursitis and some impingement. He submits that the general practitioner in answering the insurer's questionnaire links the right shoulder to disuse because of the right elbow injury. Mr Grant noted that Ms Barrett's statements refer to her use of the sling for quite a while.

35. It was submitted that Dr McKee also supports a causal link with the right shoulder and the work injury, in that he attributed it to an alteration of the right upper quadrant posture.

36. Mr Grant argues that the evidence when viewed as a whole supports that Ms Barrett did sustain a right shoulder condition because of her work injury and that the evidence to the contrary is limited as Dr Miniter does not really consider such a proposition.

37. In relation to the cervical spine, Mr Grant relied upon Ms Barrett's statement that after her surgery to her neck in 1979 she had no problems. It was submitted that after the biceps surgery Ms Barrett could not use her right arm, it tended to stay limp and she says she had pain in her right shoulder and neck. It was noted that Dr McKee in his first report refers to Ms Barrett having symptoms in her neck and restriction of movement. Mr Grant noted that the MRI scan showed degenerative changes, which are most likely age-related as Dr McKee suggested in his first report. It was submitted that Dr Miniter in his first report accepted the symptoms in her neck were related to coming on after the surgery.

38. Mr Grant drew attention to the questions put to Dr McKee and his responses which suggest the doctor was of the opinion that Ms Barrett suffered a consequential condition in her cervical spine as a result of altered upper quadrant posture, and a combination of a direct injury at the time of the injury.

Respondent's submissions

39. Ms Goodman submitted that Dr McKee in his last report was being led to some extent because of the questions he was being asked. It was also submitted that Dr McKee's opinion cannot be accepted because he was of the understanding that Ms Barrett had symptoms in her cervical spine ever since the work injury on 30 December 2017, but that the medical material before the Commission does not bear this out.

40. Ms Goodman was also critical of Dr McKee because in his first report he did not have a history of the prior neck surgery undertaken by Ms Barrett. It was submitted that Dr McKee relied upon Dr Vrancic in relation to the diagnosis of right upper quadrant posture being affected in her May 2019 report. She observed that Dr Vrancic in the last available report of 18 July 2019 says nothing further about the upper quadrant posture.

41. It was submitted it is only in the last statement that Ms Barrett says anything about her neck and Ms Barrett says it was when she returned to work. Ms Goodman argues the return to work was in about March 2018 and the physiotherapy records have nothing recorded about the cervical spine at that time.

42. Ms Goodman referred to the diagram in the physiotherapy records which she said had "a few marks at the top of the shoulder". Counsel submitted the earlier references to the right shoulder in the physiotherapist's notes were not significant.

43. Ms Goodman relies upon the facts that the cervical spine was only mentioned in the physiotherapy notes after July 2019, Dr Vrancic does not specifically refer to the neck and Dr Bagari's answers to the insurer's questionnaire do not refer to the cervical spine.

Determination- Right shoulder

44. Dr Vrancic in her report dated 18 July 2019 explains that the "biceps tendon crosses both the shoulder and elbow joint, any dysfunction in biceps will affect both of these joints[13]". I find that this statement by Dr Vrancic does provide a cogent explanation why damage to the biceps tendon caused problems with Ms Barrett's right shoulder. Also, Dr Vrancic, who had seen Ms Barrett on many occasions, found she had postural changes affecting her right upper quadrant. I find this description of the right upper quadrant would include the right shoulder. Ms Goodman did acknowledge that Ms Barrett's statement does refer to pain in the right shoulder after the surgery and that she refers to the wearing of the sling.

45. Furthermore, the physiotherapist's note for 29 March 2018 does state "Also getting some shoulder pain due to (indecipherable)".

46. I do not accept the submission of the respondent regarding the physiotherapist's diagram. I find the hatching on the diagram clearly does encompass the shoulder and the right side of the cervical spine and that such an interpretation is reinforced because it is consistent with the "conclusion" section and the reference there to the shoulder and neck. Counsel submitted the earlier references to the right shoulder in the physiotherapist's notes were not significant. I cannot agree with that submission because the fact that it is documented in March 2018, that Ms Barrett was getting some shoulder pain, is consistent with her statement that she had pain including to her right shoulder when she lifted her arm to dress herself. It is also consistent with her recounting that in June 2018 when her right arm was out of the sling, she continued to experience pain in the right arm and in the right shoulder.

47. I find there is no reason to discount Ms Barrett's main statement about her right shoulder as it is not inconsistent with the available medical evidence and it is supported by the physiotherapist's notes. Also, even though Dr Vrancic does not specifically refer to the right shoulder, she does (as I have mentioned above) give an explanation for problems being experienced in the right shoulder because of the right biceps injury.

48. Dr Vrancic has been Ms Barrett's treating orthopaedic surgeon since shortly after her injury at work on 30 December 2017 until well into 2019. I regard it highly significant that Dr Vrancic comments to Dr Bagari that Ms Barrett developed maladaptive posturing due to her injury affecting her upper right quadrant. I find she is in a good position to judge matters such as postural changes as she has seen Ms Barrett on many occasions. This evidence, coupled with that in the physiotherapist's notes, I find shows the requisite causal link to the injured right elbow.

49. I am persuaded that Ms Barrett did have altered posture because of the injury to her right arm on 30 December 2017. Her description of the dysfunction of her right arm after the surgery including the use of a sling, the ongoing problems with the radial nerve, pain in the arm together with the tight biceps have been accepted by Dr Vrancic as present and the doctor has found Ms Barrett's upper quadrant posture has been affected. Dr Vrancic in report dated 22 May 2019 recommended she have physiotherapy to address this posture. The fact that the physiotherapist when recommencing treatment identified three areas, being the neck, right shoulder and elbow, I find is consistent with the right shoulder being affected by the postural issue.

[13] ARD p 51.

50. Dr Miniter has not considered the finding of Dr Vrancic about altered upper quadrant posture. In relation to the right shoulder, Dr Miniter seems to acknowledge symptoms in the shoulder and says they may be due to capsulitis but does not examine the role of altered biomechanics as to whether that could have given rise to the shoulder becoming symptomatic. Therefore, I find I can place no weight on Dr Miniter's opinion about causation.

51. On examination on 23 April 2019, Dr McKee found tenderness along the anterior border of the right trapezius muscle extending outwards towards the right shoulder. He found no shoulder or shoulder girdle muscle wasting. Right shoulder movements were restricted, especially flexion and abduction. In his report dated 1 May 2019 relating to this examination, Dr McKee found the right shoulder condition was in all probability due to the original right elbow injury. He recommended review by Dr Vrancic. In his diagnosis section Dr McKee includes the right shoulder, which he describes as post-operative development of chronic right shoulder pain and dysfunction with impingement.

52. In his second report, Dr McKee noted that Ms Barrett's right shoulder had remained immobilised in a sling for about eight months leading to a post-traumatic subacromial/subdeltoid bursitis with impingement. I find that reading Dr McKee's reports together provides support for the submissions of Ms Barrett that she did sustain a consequential condition in the right shoulder as a result of the right biceps injury on 30 December 2017. I prefer the opinion of Dr McKee to that of Dr Miniter because he has considered matters such as the wearing of a sling. Having stated that, I do acknowledge Dr McKee's opinion is not as well expressed as would be ideal. However, even if I were to disregard his opinion, I consider Ms Barrett has sufficient evidence to establish a causal connection by virtue of the reports of Dr Vrancic coupled with the evidence in the physiotherapy notes and Ms Barrett's statement.

53. Accordingly, for all of the foregoing reasons, I find that Ms Barrett did sustain a consequential condition in her right shoulder as a result of the workplace injury on 30 December 2017 and that body part can be referred to an Approved Medical Specialist (AMS), together with the other parts of the right upper extremity claimed, being the elbow an radial nerve.

Cervical spine

54. The respondent submitted that there are no complaints regarding the cervical spine for a considerable period after the injury on 30 December 2017. As a result, it was submitted there should not be a finding made that a direct injury had occurred. It was submitted that Dr McKee had proceeded on the basis that Ms Barrett's neck was symptomatic from the time of that injury and that this was incorrect. In addition, it was submitted that Dr Bagari does not refer to the cervical spine in his answers to the insurer nor does Dr Vrancic in her reports. Also, the physiotherapy notes do not mention the neck until after July 2019.

55. These are all factors that cause me to be concerned as to whether Ms Barrett has discharged her onus of proof in relation to the allegation she suffered whet Dr McKee calls a direct injury to the cervical spine. Ms Barrett's claim in this regard is not helped by her failure to mention her neck at all in her statement dated 6 October 2009.

56. The only evidence about the mechanism of a direct injury is in Dr McKee's second report. Dr McKee in his report of 1 May 2019 found restriction of neck movements which he initially attributes to age. But in his report dated 5 December 2019 he stated that he believed the jolting, resulting from the fall onto the floor on 30 December 2017 had aggravated her pre-existing but largely symptomatic cervical spine degenerative changes.

57. In her statement Ms Barrett says,

> "On 30 December 2017, I was assisting a resident in the shower at work. The resident was seated on a shower chair.
>
> The shower chair suddenly collapsed underneath the resident and we both fell towards the floor. As I was in the process of helping the resident put his shirt on at the time, I was pulled towards the floor by my right arm which was caught within the resident's shirt.
>
> My right arm was wrenched away from my body with a lot of force. There was immediate pain in my right arm particularly at the right elbow."

58. The history recorded by Dr McKee in his report dated 1 May 2019 states,

> "The client, who suffered dementia, had been fairly aggressive, and after she had helped shower him, she and another personal care worker had lifted him into the chair.
>
> As Ms Barrett bad been pulling on his shirt, the shower chair seat had slipped off the underlying bars, causing the seat and the client to slide forwards. The chair brakes had been on, but as the client and Ms Barrett had fallen downwards, her right arm had become caught behind him, causing a severe wrenching injury to her right elbow.
>
> Ms Barrett had pressed the buzzer for assistance only to discover it was not working and she had been forced to scream for help. Other workers had attended and manually lifted the client up from the floor; Ms Barrett had been able to scramble to her feet unaided, despite the severity of her right elbow pain."

59. Again, Ms Barrett does not say anything about her neck being injured. Dr McKee opines in his report dated 5 December 2019 that the jolting, resulting from the fall onto the floor on 30 December 2017 had aggravated pre-existing largely asymptomatic cervical spine degenerative changes. Dr Miniter's opinion did not consider if there had been a frank injury to the cervical spine in his first report. He certainly took no history that the same had occurred.

60. While the type of incident that Ms Barrett had been involved in could have caused a direct injury to the cervical spine, the absence of any immediate symptoms at the time or for over a year renders this unlikely in my view. Dr McKee does not provide an explanation to account for the delay in symptoms if this is to be regarded as a direct injury.

61. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [14] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712."

[14] [2008] NSWCA 246

62. On the evidence before me, particularly the lack of reference to a neck injury in Ms Barrett's main statement, I find applying the standard in *Nguyen,* that Ms Barrett has not discharged her onus of proof as I do not feel an actual persuasion that she sustained a direct injury to her cervical spine.

63. However, Ms Barrett does not base her case solely on a frank injury occurring on 30 December 2017, she also relies on a consequential condition.

64. The respondent also relies on the same lack of evidence in relation to the allegation of consequential condition. However, Dr Miniter in his first report finds the specific diagnosis was discomfort in the right upper extremity and neck secondary to operative repair of the bicipital tendon of the right arm. In his second report he seems to suggest there is not *ongoing* cervical symptoms that relate specifically to the elbow injury[15].

65. Ms Barrett informed Dr McKee at the time of his examination on 23 April 2019 (as recorded in his report dated 1 May 2019) that she had pain which he describes as "on occasions it radiates onto the right side of the neck[16]." Dr McKee examined her neck and found normal cervical lordosis, but he found an estimated one-quarter loss of all cervical spine movements which he said appeared to be age related. Therefore, while the cause of cervical symptoms at that time was not attributed to Ms Barrett's work related injury it is clear she had symptoms in her neck at that time.

66. Ms Goodman was also critical of Dr McKee because in his first report he did not have a history of the prior neck surgery undertaken by Ms Barrett. However, Ms Goodman did not explain why this was relevant, given that Dr McKee when appraised of the surgery in 1979 noted that it was undertaken many years earlier and thereafter Ms Barrett had no ongoing complaints in her neck and, so, Dr McKee treated her neck as having been asymptomatic. This approach is consistent with there being no evidence that Ms Barrett had problems with her neck before the injury. It is consistent with the fact that she was able to work in a job that had physically demanding aspects, such as the task Ms Barrett was engaged in on 30 December 2017. Therefore, while it would have been ideal for Dr McKee to be aware of this history from the outset, I am not persuaded the delay in him being informed of it renders his opinions necessarily unsound.

67. At [11(c)] of Dr McKee's report dated 5 December 2019, he said the cervical spine was consequential to the right upper extremity injury, however, the tenor of that report does not support a consequential condition arising due to altered posture.

68. Ms Barrett's solicitors sought clarification from Dr McKee and referred him the physiotherapy notes and the report of Dr Vrancic of 22 May 2019 in relation to her finding of upper quadrant posture being affected. Dr McKee agrees that Ms Barrett has suffered a consequential injury being an alteration of her upper quadrant posture contributing to her dysmetria, but he also states her neck injury is a combination of this and a direct injury.

69. Certainly, Dr McKee was not expansive in his answers and his replies to the questions did just adopt the propositions put in the questions. However, that does not necessarily render his opinions unsound. It is necessary to consider his opinions carefully because of this factor and also because his opinion seems to have developed from that expressed in his first report. I consider it relevant that Dr McKee considered Dr Vrancic's reference to the upper quadrant being affected by postural changes. He did not state that the upper quadrant does not include the neck.

[15] Reply p 8.
[16] ARD p72.

70. As with the right shoulder, I consider it highly relevant that Dr Vrancic having found the right upper quadrant of Ms Barrett's body was affected due to postural effects of the injury, she referred her to physiotherapy. It is then highly relevant, in my view, that the physiotherapist drew on the body diagram hatching over the right side of the neck. This corresponded to the complaints made by Ms Barrett to Dr McKee some months earlier. Furthermore, the physiotherapist concluded there were three areas of treatment required including the elbow, shoulder and neck and of added significance exercises were then given for the neck. For instance, on 14 August 2019 it was noted Ms Barrett still has right lower cervical ache. On 19 August 2019 she was locally tender+ at the right lower cervical spine and her neck mobility was a little better. On 26 August 2019 there was soreness of the cervical spine and the range of movement had some improvement and further entries thereafter.

71. I find these records, coupled with Dr Vrancic's finding there was an upper quadrant postural issues, provide the causal link with the work-related right elbow/biceps injury.

72. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[17] wherein Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at 462E):

> "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."

73. His Honour said at 463–464:

> "The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a 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 is required 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 opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a *novus actus.* Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

[17] (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*

74. Deputy President Roche in *Kumar v Royal Comfort Bedding Pty Ltd* [18]is authority for the proposition that *Kooragang* is the test to determine if a consequential condition arises from a work injury. Applying such principles, for the above-mentioned reasons, I am satisfied that the work-related injury to the right elbow/biceps and the subsequent surgery has set in train a series of events, one being the consequential conditions which have developed in Ms Barrett's cervical spine and right shoulder due to the maladaptive posture. The delay in symptoms being recorded in the cervical spine, which caused me to find against a direct injury, is not as determinative in Ms Barrett's case regarding the presence of a consequential condition. As Dr Vrancic comments in her report of 22 May 2019, "having an injured elbow for 18 months has put off her upper quadrant posture…" Therefore, Dr Vrancic was considering the length of time that Ms Barrett had the injured elbow as being responsible for the posture being affected.

75. In summary, I accept that Ms Barrett has sustained a consequential condition to her right shoulder and cervical spine from the right arm injury on 30 December 2018 and the cervical spine and right shoulder can be referred to the AMS for assessment of permanent impairment.

[18] [2012]NSWWCCPD 8