

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 6319/20  
**Applicant:** Ramendra Nair  
**Respondent:** Westwise Recruitment Pty Limited  
**Date of Determination:** 5 February 2021  
**Citation No:** [2021] NSWCC 40

The Commission determines:

1. Matter remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment, in accordance with the American Medical Association's *Guidelines to the Evaluation of Permanent Impairment 5th edition* and the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment 4th edition*, of the following body parts as a result of injury on 6 August 2018:
  - (a) left upper extremity (shoulder), and
  - (b) right upper extremity (shoulder).
2. Registrar to forward the following documents to the Approved Medical Specialist:
  - (a) Application to Resolve a Dispute and attached documents;
  - (b) Application to Admit Late Documents filed by the applicant dated 18 January 2021, and
  - (c) Reply and attached documents.
3. Registrar to place the matter in the "medical assessment pending list" because assessment of the applicant by the Approved Medical Specialist requires physical examination to assess the degree of permanent impairment of the referred body parts.

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

Grahame Edwards  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

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



## STATEMENT OF REASONS

### BACKGROUND

1. Mr Ramendra Nair (the applicant) claims lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of his left upper extremity (shoulder) and right upper extremity (shoulder) as a result of personal injury suffered in the course of employment with Westwise Recruitment Pty Ltd (the respondent) on 6 August 2018.
2. The respondent accepts Mr Nair suffered injury to his left shoulder while lifting a metal panel, weighing about 12 kilograms (kg), off hooks in the course of employment with it on 6 August 2018.
3. Mr Nair claims he suffers with a consequential condition of the right shoulder as a result of injury to the left shoulder “due to incapacity of the left shoulder” with “over-reliance” on the right upper extremity.
4. The respondent disputed Mr Nair suffers with a consequential condition of the right shoulder as a result of injury to the left shoulder upon issuing a notice dated 27 May 2020 pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
5. The respondent also disputes Mr Nair is entitled to lump sum compensation in respect of the left upper extremity on the basis the injury to the left shoulder has not resulted in permanent impairment greater than 10% (s 66(1) of the 1987 Act).

### ISSUES FOR DETERMINATION

6. The parties agree that the following issue remains in dispute:
  - (a) does the applicant suffer with a consequential condition of the right shoulder as a result of injury to the left shoulder?

### PROCEDURE BEFORE THE COMMISSION

7. Conciliation conference/arbitration hearing was conducted vial telephone on 28 January 2021 due to COVID-19 regulations. I am satisfied 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.
8. Mr Loukas of counsel, instructed by Mr Naddaf, represented the applicant who was in attendance at the hearing.
9. Mr Baker of counsel, instructed by Mr Quillan, represented the respondent in the interests of the insurance scheme agent.
10. Ms Lacono, representative of the insurance scheme agent, was in attendance at the hearing.
11. The arbitration hearing was sound recorded.

## **EVIDENCE**

### **Documentary evidence**

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

#### ***Applicant***

- (a) Application to Resolve a Dispute (the Application) and attached documents, and
- (b) Application to Admit Late Documents (ALD – A) dated 18 January 2021.

#### ***Respondent***

- (a) Reply to the Application to Resolve a Dispute (the Reply) and attached documents.

### **Oral evidence**

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

## **FINDINGS AND REASONS**

### **Issue 1 – does the applicant suffer with a consequential condition of the right shoulder as a result of injury to the left shoulder?**

#### ***Background***

#### ***Left shoulder***

14. In January 2018, Mr Nair commenced employment with the respondent as a process worker on a part-time basis working eight hours per week, but he said it was common for him to work 12 hours over-time each week.
15. In April 2018, Mr Nair was directed by the respondent to work for an entity styled “Actron Air”. Mr Nair described his duties with “Actron Air” as follows<sup>1</sup>:
- “a. Carry heavy air conditioner parts to different sections of the process line;
  - b. Lift air conditioner parts onto hooks to be painted;
  - c. Transfer the parts from hooks into a cage; and
  - d. Complete general duties incidental to the role of a process worker in a factor [sic].”

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<sup>1</sup> Application – p 1 – applicant’s statement dated 19 May 2020 – [8].

16. On 6 August 2018, Mr Nair was working the evening shift at the premises of “Actron Air”. His duties required him to lift large air conditioner parts, weighing between 7 kg and 30 kg, on and off hooks so they could be painted. Mr Nair experienced sudden onset of a sharp pain in his left shoulder while lifting a long metal panel, weighing at least 12 kg, off the hooks<sup>2</sup>. He stopped work immediately and reported the injury to his supervisor, Mr Michael Burton. Mr Nair was taken to the office by Mr Burton where he received first aid and an ice pack was applied to his shoulder. An ambulance was called, and Mr Nair was taken to Blacktown Hospital where he underwent an x-ray and an ultrasound of his left shoulder. Mr Nair was prescribed medication and discharged into the care of his general practitioner.
17. On 7 August 2018, Mr Nair consulted Dr Renigeris at the Wentworth Medical Centre. Mr Nair had been attending this medical practice since 2011. Dr Renigeris referred Mr Nair for an ultrasound of the left shoulder.
18. On 8 August 2018, Mr Nair underwent the ultrasound. The radiologist, Dr Singh, reported upon the ultrasound as showing a partial thickness tear (17 mm) of the supraspinatus tendon and sub-deltoid bursitis<sup>3</sup>.
19. On 6 September 2018, Mr Nair underwent an ultrasound guided left subacromial injection by Dr Singh<sup>4</sup>.
20. On 20 September 2018, Mr Nair was initially assessed by Energise Physiotherapy<sup>5</sup> on referral from Dr Renigeris.
21. On 3 October 2018, Mr Nair consulted Dr Duckworth, orthopaedic surgeon, on referral from Dr Renigeris. Dr Duckworth reported that Mr Nair presented with an acute injury affecting his left shoulder, which had been exacerbated by the subacromial injection<sup>6</sup>. Dr Duckworth referred Mr Nair for an MRI scan of his left shoulder.
22. On 4 October 2018, Mr Nair underwent the MRI scan, which was reported upon by the radiologist, Dr Lucas, as showing a prominent subacromial bursitis with a small full-thickness supraspinatus tendon tear probably acute-on-chronic with a subacromial spur<sup>7</sup>.
23. On 9 October 2018, Dr Duckworth reviewed Mr Nair and the MRI scan, recommending an arthroscopy of the left shoulder; advising it would take six months to get over the procedure and that the left arm “will never be 100%”<sup>8</sup>.
24. On 8 November 2018, Mr Nair underwent an arthroscopy of the left shoulder in the form of a mini-open supraspinatus tendon repair, biceps tenodesis and removal of the subacromial spur by Dr Duckworth at the Norwest Private Hospital<sup>9</sup>.
25. On 18 December 2018, Dr Duckworth reviewed Mr Nair, reporting to Dr Renigeris that the left shoulder was painful and stiff, recommending gentle physiotherapy and removal of the sling<sup>10</sup>.

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<sup>2</sup> supra at [11].

<sup>3</sup> report of Dr Singh dated 8 August 2018 – Application – p 67.

<sup>4</sup> report of Dr Singh dated 6 September 2018 – Application – p 68.

<sup>5</sup> report of Doris Qua, physiotherapist, dated 20 September 2018 – Application – pp 29-30.

<sup>6</sup> report of Dr Duckworth dated 3 October 2018 – Application – p 53.

<sup>7</sup> report of Dr Lucas dated 4 October 2018 – Application – p 69.

<sup>8</sup> report of Dr Duckworth dated 9 October 2018 – Application – p 54.

<sup>9</sup> operation report dated 8 November 2018 – Application – p 32.

<sup>10</sup> report of Dr Duckworth dated 18 December 2018 – Application – p 55.

26. On 29 January 2019, Dr Duckworth reviewed Mr Nair, reporting to Dr Renigeris that while Mr Nair had done well, he still had a lot of pain and stiffness in the shoulder, recommending continuation of physiotherapy and commencement of hydrotherapy<sup>11</sup>.
27. In February 2019, Mr Nair consulted Dr Nazha, pain specialist (no report from Dr Nazha in evidence)<sup>12</sup> on referral from Dr Duckworth<sup>13</sup>.
28. In March 2019, Mr Nair commenced hydrotherapy at the Granville swimming pool<sup>14</sup>.
29. On 12 March 2019, Mr Nair consulted Dr Duckworth<sup>15</sup> (report of consultation not in evidence).
30. On or about 29 March 2019, Mr Nair underwent a cortisone injection to the left shoulder<sup>16</sup> (no medical report in evidence).
31. On 30 April 2019, Mr Nair consulted Dr Duckworth<sup>17</sup> (report of consultation not in evidence).
32. On 16 July 2019, Mr Nair consulted Dr Duckworth<sup>18</sup> (report of consultation not in evidence).
33. On or about 30 July 2019, Mr Nair underwent a further cortisone injection into the left shoulder<sup>19</sup> (no medical report in evidence).
34. In August 2019, Mr Nair consulted Dr Nazha (no medical report in evidence) and was referred to Ms Watson for physiotherapy<sup>20</sup>.
35. In September 2019, Mr Nair consulted Ms Watson.
36. On 25 October 2019, Mr Nair underwent a steroid injection into the left shoulder by Dr Nazha<sup>21</sup> (no medical report in evidence).
37. On 4 December 2019, Ms Watson reviewed Mr Nair, reporting to Dr Nazha that he had been performing exercises and making a good attempt to use the left arm<sup>22</sup>.
38. On 10 December 2019, Dr Duckworth reviewed Mr Nair at the request of Dr Renigeris. Dr Duckworth reported further improvement in range of motion and strength of the left shoulder, recommending continuation of physiotherapy<sup>23</sup>. He returned Mr Nair to the care of Dr Renigeris.
39. On 15 January 2020, Ms Watson reported to Dr Nazha that functional levels in Mr Nair's left arm had increased with reduction in pain levels; advising she had spoken to Mr Nair and his general practitioner vial telephone link who reported he had been certified fit for normal duties<sup>24</sup>.

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<sup>11</sup> report of Dr Duckworth dated 29 January 2019 – Application – p 80.

<sup>12</sup> statement of the applicant dated 19 May 2020 – Application – p 4 – [29].

<sup>13</sup> report of Dr Renigeris dated 23 September 2020 – Application – p 26.

<sup>14</sup> supra – [30].

<sup>15</sup> statement of the applicant dated 19 May 2020 – Application – p 5 – [32].

<sup>16</sup> supra – [33].

<sup>17</sup> supra – [34].

<sup>18</sup> supra – [36].

<sup>19</sup> supra – [37].

<sup>20</sup> supra – 38].

<sup>21</sup> supra – [39].

<sup>22</sup> report of Jane Watson dated 9 December 2019 – Reply – p 14.

<sup>23</sup> report of Dr Duckworth dated 10 December 2019 – Reply – p 15.

<sup>24</sup> report of Jane Watson dated 15 January 2020 – Reply – p 16.

### **Consequential condition of the right shoulder**

40. Mr Nair said that he was “entirely reliant” on his right shoulder following surgery “due to incapacity of my left shoulder”, and as a result his right shoulder and right arm “became increasingly sore”<sup>25</sup>.
41. Mr Nair said he had been advised by Dr Duckworth that he had capsulitis in the left shoulder and while the cortisone injection gave some short-term relief, he continued to suffer with a frozen shoulder, relying upon his right arm to carry out his activities of daily living.
42. Mr Nair said his right shoulder “remained incredibly stiff and sore due to my continual reliance on my right shoulder”<sup>26</sup>.
43. Mr Nair said he continues to suffer with pain in both shoulders; that he has restricted movement in both shoulders; loss of strength in both arms and an inability to lift heavy objects<sup>27</sup>.
44. Mr Nair relies upon the opinions of Dr Renigeris and independent medical expert, Dr Lai, that he suffers with a consequential condition of the right shoulder as a result of the injury to the left shoulder.

### **Discussion and findings**

45. Presidential members of the Commission have considered and explained the difference between an “injury” and a condition that has resulted from an injury in a number of decisions.
46. It is not necessary for Mr Nair to establish that he suffered an “injury” to his right shoulder within the meaning of s 4; and that the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act<sup>28</sup>. All that is necessary is that the condition has resulted from the accepted injury<sup>29</sup>.
47. Deputy President Roche in *Bouchmouni v Bakhos Matta t/as Western Red Services*<sup>30</sup> said:

“While the word ‘injury’ has more than one meaning, in that it refers to the injurious event and the pathology caused by that event, that is irrelevant ... The distinction in the present case is not between an injurious event and the pathology caused by that event, but between an ‘injury’ and a consequential condition that has resulted from an injury.”
48. In considering the difference between an “injury” and a condition that has resulted from an “injury”, the Commission has consistently applied the principles in *Kooragang Cement Pty Ltd v Bates*<sup>31</sup> (*Kooragang*).
49. The result of the cases is that each case where causation is in issue in a workers compensation claim, it must be determined on its own facts. In each case, whether the consequential condition results from the injury, is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinion. What is required is a common sense evaluation of the causal chain. If the chain is unbroken and provides the relevant causative explanation, it will be open to the Commission to find the consequential condition results from the injury<sup>32</sup>.

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<sup>25</sup> statement of the applicant dated 19 May 2020 – Application – p 4 at [25].

<sup>26</sup> *supra* at 24 – p 5 – [35].

<sup>27</sup> *supra* – pp 7-8 – [47].

<sup>28</sup> *Moon v Conmah Pty Ltd* [2009] NSWCCPD 134 at [43], [45] and [50].

<sup>29</sup> *Dwyer* at [101]; *Rootsey v Tiger Nominees Pty Ltd* (2002) 23 NSWCR 725; *Bielecki v Rianthelle Pty Ltd* [2008] NSWCCPD 53 at [19]-[25].

<sup>30</sup> [2013] NSWCCPD 4 at [76].

<sup>31</sup> (1994) 35 NSWLR 452 at 416G-F; 10 NSWCCR 796.

<sup>32</sup> *Ibid*.

50. Acting Deputy President Parker in *Schembri v Blacktown City Council*<sup>33</sup> (*Schembri*), referring to *Comcare v Martin*<sup>34</sup>, said:
- “The expression ‘as a result of’ requires more than a common sense approach. Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory test construed and applied in its statutory context to effect the statutory purpose. The expression ‘common sense approach’ does not provide a useful, much less a universal, norm.”
51. It is not determinative when the symptoms of the consequential condition developed: *Australian Traineeship System v Turner* (*Turner*)<sup>35</sup>. Deputy President Roche at [61] said:
- “The appellant’s submission seemed to have assumed that Mr Turner cannot (or should not) succeed because his left shoulder symptoms started while the Club employed him in 2005. This approach is misconceived. Exactly when the shoulder symptoms developed is not determinative. The relevant question is not when those symptoms started, or what he was doing at that time, but whether they resulted from the right shoulder injury. If, because of the restrictions in his right shoulder, Mr Turner used his left shoulder more and developed symptoms in that shoulder, it does not matter that the left shoulder symptoms developed while working for a different employer. They resulted from the original injury.”
52. The term “consequential condition” is not referred to in the 1987 Act.
53. I accept Mr Loukas’ submission that Mr Nair suffered a severe injury to his left shoulder as a result of the injurious event (meaning both the event and the pathology, if any, as a result of the event)<sup>36</sup>, resulting in the need for surgery undertaken by Dr Duckworth.
54. I accept Mr Nair’s evidence that he did not achieve a good outcome from the surgery with him undergoing an extensive rehabilitation programme, including physiotherapy, hydrotherapy, and cortisone injections to the left shoulder.
55. Dr Renigeris reported<sup>37</sup> that Mr Nair was reviewed by Dr Duckworth on 12 March 2019 and 19 March 2019, who reported that Mr Nair was suffering with severe capsulitis of the left shoulder confirmed by an MRI scan. While Dr Duckworth’s reports dated 12 March and 19 March 2019 are not in evidence, Dr Renigeris quoted Dr Duckworth from his report dated 12 March 2019:
- “He is still reluctant to move his left arm and has developed significant capsulitis. He has not responded to physiotherapy or a cortisone injection. He could only elevate to 60 degrees and externally rotate to zero. He has severe pain. I have thus ordered an MRI”.
56. Dr Renigeris reported that the MRI scan ordered by Dr Duckworth showed the rotator cuff to be intact but that there was severe capsulitis, “which explains his symptoms”.
57. Dr Renigeris reported at the consultation on 21 August 2020 that Mr Nair stated he still had pain in the left shoulder and “now he was developing pain in his right shoulder due to overuse and avoiding the use of his right shoulder”.

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<sup>33</sup> [2020] NSWCCPD 35 at [58], [105] and [136].

<sup>34</sup> [2016] HCA 43.

<sup>35</sup> [2012] NSWCCPD 4 at [28] and [29].

<sup>36</sup> *Lyons v Master Builders Association of NSW Pty Ltd* 92003] 25 NSWCR 422; *Spicer Axle Australia Pty Limited v Merza* [2007] NSWCCPD 145; *Rail Services Australia v Dimovski & Anor* [2204] NSWCSA 267 and *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* (1998) 45 NSWLR 606.

<sup>37</sup> report of Dr Renigeris dated 23 September 2020 – Application – pp 25-26.

58. Dr Renigeris also reported that Dr Duckworth in his last report to him stated: "Mr Nair has post-operative pain (via capsulitis) and will have it for the rest of his life".
59. Dr Duckworth's comment about Mr Nair having pain in his left shoulder for the rest of his life as reported by Dr Renigeris is in accordance with his report dated 9 October 2018 that the left arm "will never be 100%"<sup>38</sup>.
60. Dr Lai found on examination of the left shoulder there was significant tenderness to palpation "all around the shoulder anteriorly, posteriorly and superiorly"<sup>39</sup>.
61. Dr Lai reviewed Mr Nair on 5 November 2019. Dr Lai found on examination of the left shoulder that there was still significant tenderness to palpation over the anterior posterior and superior aspects of the left shoulder resulting in a continual inability to use the left upper limb properly<sup>40</sup>.
62. Dr Quain, independent medical expert qualified by the respondent, opined that Mr Nair sustained a probable acute on chronic supraspinatus tendon tear as a result of the left shoulder injury, concluding his findings on examination resulted in 15% upper extremity impairment (UEI), which converts to 9% whole person impairment (WPI) under table 16.3 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> edition (AMA5).
63. Dr Lai assessed 19% UEI, which converts to 11% WPI under AMA5.
64. While Dr Quain and Dr Lai's assessment of the left upper extremity vary slightly as to the degree of permanent impairment, there is not a great dissimilarity in their findings of the UEI of the left shoulder.
65. The evidence establishes Mr Nair suffered a significant injury to his left shoulder as a result of the injurious event on 6 August 2018.
66. I find that Mr Nair suffered injury to his left shoulder in the course of employment with the respondent on 6 August 2018 within the meaning of s 4 of the 1987 Act; and that the employment concerned was a substantial contributing factor to the injury within the meaning of s 9A of the 1987 Act.
67. I agree with Mr Loukas' submission that Dr Quain did not consider or provide an opinion whether Mr Nair suffers with a consequential condition of the right shoulder caused by overuse of the right upper extremity as a result of the injury to the left shoulder.
68. Dr Quain found the "right shoulder essentially was normal" on examination, noting the respondent had declined liability for the right upper extremity<sup>41</sup> without any further consideration whether Mr Nair had developed a consequential condition of the right shoulder as a result of the injury to the left shoulder.
69. The respondent submitted Mr Nair's evidence contained in his statement dated 19 May 2020 (first statement) that he had not sustained any significant injuries or suffered from any significant medical conditions that impacted upon his ability to work or his daily activities, and his history of no previous injuries given to the independent medical examiners was "disingenuous" and should not be accepted.
70. The respondent also submitted the submission by Mr Loukas on behalf of Mr Nair that prior injuries as recorded in the clinical records of the Wentworthville Medical Centre were "temporary or fleeting" should not be accepted.

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<sup>38</sup> supra at 8.

<sup>39</sup> report of Dr Lai dated 19 March 2019 – Application – p 36.

<sup>40</sup> report of Dr Lai dated 5 November 2019 – Application – p 43.

<sup>41</sup> report of Dr Quain dated 19 February 2020 – Reply – p 19.



71. The respondent further submitted it was inconceivable Mr Nair had no time off work as claimed in his first statement or that he had not suffered any prior injury.
72. The respondent submitted that the clinical records of the Wentworth Medical Centre show Mr Nair suffered with left and right shoulder complaints as well as other injuries prior to the injury on 6 August 2018, and that those injuries resulted in no capacity for work.
73. The respondent submitted there is no reference in the clinical records of the Wentworthville Medical Centre or the reports and clinical notes of Dr Duckworth in evidence recording any complaint about the right shoulder as a result overuse following surgery.
74. The respondent submitted that the first recorded complaint about the right shoulder was not made until 21 August 2020 when Mr Nair consulted Dr Renigeris on that date<sup>42</sup>.
75. The respondent submitted there is no unbroken chain or causal link between the left shoulder injury and the right shoulder condition.
76. The respondent, in support of its submission that Mr Nair's evidence was "disingenuous" and "contrary" to his first statement, referred to medical records as follows:
  - (a) 24 August 2011 – fractured rib, torn intercostal muscle, torn trapezius while lift at "primo" – WorkCover medical certificate issued<sup>43</sup>.
  - (b) 30 November 2011 – left shoulder dislocation – left sided neck pain – slipped and fell onto bath tap – left shoulder relocated by friend – left arm sling – refer to an orthopaedic surgeon – referred for x-ray – left shoulder and cervical spine<sup>44</sup>.
  - (c) 12 December 2011 – WorkCover medical certificate issued – left shoulder and neck pain – left shoulder sling<sup>45</sup>.
  - (d) 12 December 2011 – presents with fall 15 days ago – left shoulder injury – dislocation – relocated by a friend – also sore neck – left shoulder<sup>46</sup>.
  - (e) 11 January 2012 – letter to Dr Maniam<sup>47</sup>.
  - (f) 25 January 2012 – referral for physiotherapy of the left shoulder at the request of Dr Maniam<sup>48</sup>.
  - (g) 27 January 2012 – referred for physiotherapy – left shoulder<sup>49</sup>.
  - (h) 29 January 2012 – team care plan – referred to physiotherapy by Dr Maniam – left shoulder injury<sup>50</sup>.
  - (i) 1 February 2012 – low back pain down into right thigh – having MIR scan and meeting with Dr Maniam<sup>51</sup>.

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<sup>42</sup> Report of Dr Renigeris dated 23 September 2020 – Application – p 26.

<sup>43</sup> Application – p 128.

<sup>44</sup> Application – p 127.

<sup>45</sup> supra.

<sup>46</sup> Report of Dr Heang dated 12 December 2011 – Application – pp 167-168.

<sup>47</sup> Application – p 127.

<sup>48</sup> supra – pp 370-372.

<sup>49</sup> supra.

<sup>50</sup> supra – p 126.

<sup>51</sup> supra – p 125.

- (j) 2 February 2012 – back pain from sprain – shoulder problem<sup>52</sup>.
- (k) 6 February 2012 – referred for MRI scan - shoulder<sup>53</sup>.
- (l) 8 February 2012 – MRI scan – left shoulder<sup>54</sup>.
- (m) 14 March 2012 – WorkCover medical certificate issued – wants medical certificate to go back to work – off work four months – 27 November 2011 to 29 March 2012 – left shoulder<sup>55</sup>.
- (n) 27 April 2012 – sustained a fall while working for Primo – dislocated left shoulder – incident occurred in May 2011<sup>56</sup>.
- (o) 1 May 2012 – hit by car – right leg<sup>57</sup>.
- (p) 11 May 2012 – x ray – CT scan – right knee<sup>58</sup>.
- (q) 26 June 2012 – lifting at work – CT lumbar spine<sup>59</sup>.
- (r) 7 July 2012 – back still sore – left old job<sup>60</sup>.
- (s) 22 August 2012 – medical certificate – tetanus vaccination – workplace required<sup>61</sup>.
- (t) 7 June 2013 – lower back pain – back of thigh – 3 to 4 months – CT scan<sup>62</sup>.
- (u) 13 June 2013 – CT – x-ray – lumbar spine<sup>63</sup>.
- (v) 14 June 2013 – Centrelink medical certificate – refer to neurosurgeon<sup>64</sup>.
- (w) 25 November 2013 – cervical spine – x- ray – left side neck pain – neck and leg – acupuncture – pins and needle sensation – left side arm – Panadeine Forte<sup>65</sup>.
- (x) 25 November 2013 – CT scan – cervical spine – radiologist’s findings – C5/6 uncovertebral osteoarthritis and bilateral radiculopathy<sup>66</sup>
- (y) 28 November 2013 – CT – C5/6 osteoarthritic changes and radiculopathy – needs to see specialist<sup>67</sup>.
- (z) 29 November 2013 – lower back pain – off work – medical certificate<sup>68</sup>.

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<sup>52</sup> supra.

<sup>53</sup> supra.

<sup>54</sup> supra.

<sup>55</sup> Application – pp 124-125.

<sup>56</sup> report of Dr Maniam dated 27 April 2012 – Application – p 159.

<sup>57</sup> Application – p 124.

<sup>58</sup> supra.

<sup>59</sup> supra.

<sup>60</sup> supra – p 123.

<sup>61</sup> supra.

<sup>62</sup> supra.

<sup>63</sup> supra.

<sup>64</sup> Application – pp 122-123.

<sup>65</sup> supra – p 121.

<sup>66</sup> report of Dr Pascoe dated 25 November 2013 – Application – pp 148-149.

<sup>67</sup> Application – p 121.

<sup>68</sup> supra.

- (aa) 17 March 2015 – right hip/low back pain after fall in bathtub – off work medical certificate<sup>69</sup>.
- (bb) 27 December 2015 – lumbar spine – not getting better – forklift driving – avoid heavy lifting<sup>70</sup>.
- (cc) 21 July 2016 – door dropped on right foot – x-ray – WorkCover certificate<sup>71</sup>.
- (dd) 22 July 2016 – previous injury (right foot) – work related<sup>72</sup>.
- (ee) 8 August 2016 – drink driving – complaining of pain in middle of back<sup>73</sup>.
- (ff) 10 August 2016 – off work – medical certificate – acute back pain since 8 August 2016 – unfit to 12 August 2016<sup>74</sup>.
- (gg) 20 September 2016 – referral letter to Westmead Hospital – face – upper and lower limbs numb – pain right side of head and neck<sup>75</sup>.
- (hh) 1 November 2016 – right sided shoulder pain – unable to move in all direction for last 4-6 weeks – gradually getting worse – works as a forklift driver – ROM – overhead abduction – restricted on right side – supraspinatus impingement positive – likely rotator cuff pathology<sup>76</sup>.
- (ii) 1 November 2016 – referral letter to Wentworthville Imaging Centre – right shoulder pain for last 6 weeks - ultrasound<sup>77</sup>.
- (jj) 1 November 2016 – referral letter to physiotherapist – right shoulder suggestive of rotator cuff tendinopathy<sup>78</sup>.
- (kk) 3 November 2016 – had motor vehicle accident about 2 months ago<sup>79</sup>.
- (ll) 3 November 2016 – right shoulder – motor vehicle accident 2 months ago – on examination – all movements OK – can go back to normal duty from 4 November 2016<sup>80</sup>.
- (mm) 16 January 2017 – complaining of right trapezius – cervical spine – pain – few months – accident last year – referred for physiotherapy<sup>81</sup>.
- (nn) 27 May 2017 – motor vehicle accident on 19 May 2017 – fractured ribs<sup>82</sup>.
- (oo) 15 June 2017 – Centrelink medical certificate – fractured ribs still painful – off work certificate<sup>83</sup>.

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<sup>69</sup> supra – p 120.

<sup>70</sup> supra – pp 119-120.

<sup>71</sup> Application – p 119

<sup>72</sup> supra.

<sup>73</sup> supra – p 118.

<sup>74</sup> supra and p 222.

<sup>75</sup> supra – p 221.

<sup>76</sup> supra – p 117.

<sup>77</sup> supra – p 218.

<sup>78</sup> supra- p 220.

<sup>79</sup> supra – p 117.

<sup>80</sup> report of Dr Dewan dated 3 November 2016 – Application – p 217.

<sup>81</sup> Application – p 117.

<sup>82</sup> supra – p 116.

<sup>83</sup> supra – p 116.

- (pp) 7 September 2017 – Blacktown Hospital – discharge summary – right shoulder injury – intoxicated last night – assaulted by neighbour – complained of ongoing right shoulder pain – Dr Sriram, junior medical officer<sup>84</sup>.
- (qq) 8 September 2017 – right shoulder – sling – facial injury – needs analgesics – requests Endone – needs repeat x-ray – wants Centrelink certificate for a month<sup>85</sup>.
- (rr) 8 September 2017 – referral letter – Dr Das – x-ray – right shoulder – grade 3 ACJ diasthesis -injury right shoulder<sup>86</sup>.
- (ss) 8 September 2017 – medical certificate – Dr Das – right shoulder injury – assaulted by intoxicated neighbour – unfit for work 8 September 2017 to 8 October 2017<sup>87</sup>.
- (tt) 13 September 2017 – grade 3 AC joint injury – pain getting better – should avoid heavy lifting for at least 4 weeks – should not do any forceful repetitive movement of right shoulder – will wait to see the ortho team<sup>88</sup>.
- (uu) 19 September 2017 – x-ray report – evidence of approximately 2 cm of superior displacement of the outer aspect of the right clavicle at AC joint consistent with AC joint ligament disruption<sup>89</sup>.
- (vv) 20 September 2017 – x-rays – both shoulders<sup>90</sup>.
- (ww) 28 September 2017 – 20 Endone tablets – right AC joint dislocation – Centrelink certificate till 8 October<sup>91</sup>.
- (xx) 9 October 2017 – 20 Endone tablets – persisting pain – under orthopaedic specialist at Blacktown Hospital<sup>92</sup> – Centrelink medical certificate – unfit for work – 9 October 2017 to 9 December 2017<sup>93</sup>.
- (yy) 4 December 2017 – persisting right shoulder pain – awaiting surgery after MRI at Blacktown Hospital<sup>94</sup>.
- (zz) 14 December 2017 – painful and swollen right knee – off work – medical certificate<sup>95</sup>.
- (aaa) 28 February 2018 – abdomen and pelvis – off work certificate – joint aches<sup>96</sup>.
- (bbb) 3 April 2018<sup>97</sup> – right shoulder pain – right AC joint disruption – caused dislocation – awaiting surgery – Dr Sartor – needs Centrelink certificate<sup>98</sup>.

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<sup>84</sup> supra- p 346.

<sup>85</sup> Application – p 115.

<sup>86</sup> supra – p 204.

<sup>87</sup> supra – p 346.

<sup>88</sup> supra.

<sup>89</sup> supra – p 138 and p 344.

<sup>90</sup> supra.

<sup>91</sup> supra – pp 114-115.

<sup>92</sup> supra – p 114.

<sup>93</sup> supra – p 343.

<sup>94</sup> supra – pp 113-114.

<sup>95</sup> supra.

<sup>96</sup> supra – p 113.

<sup>97</sup> Application – p 113.

<sup>98</sup> supra – p 339.

- (ccc) 10 June 2018 – right loin pain – 2 weeks – radiating to the back of the thigh to the shoulder<sup>99</sup>.
- (ddd) 25 July 2018 – left shoulder pain – 1-2 weeks – on examination – left shoulder – limitation to movement in all directions – pain with all rotator cuff signs – referred for x-ray and ultrasound<sup>100</sup>.
- (eee) 25 July 2018 – medical certificate issued by Dr Singh<sup>101</sup>.
- (fff) 25 July 2018 – referral letter – Dr Singh – left shoulder – x-ray/ultrasound<sup>102</sup>.
- (ggg) 25 July 2018 – ultrasound – left shoulder – diffuse shoulder pain with limitations to movement in all directions – rotator cuff pathology – frozen shoulder<sup>103</sup>.
- (hhh) 6 August 2018 – left shoulder injury<sup>104</sup>.
- (iii) 21 February 2018 – ultrasound of the left shoulder<sup>105</sup> at the request of Dr Maniam showed the same pathology as revealed in 2018.

77. The respondent submitted the medical records establish Mr Nair suffered “significant injuries” prior to the accepted injury to the left shoulder and that they were not “fleeting incidents” as submitted by Mr Loukas on behalf of Mr Nair.
78. The respondent submitted that Dr Renigeris was “solely reliant on the history given to him by Mr Nair as to the development of pain in the right shoulder from overuse as a result of the left shoulder injury”, and it was not until August 2020 that he received that history.
79. The respondent submitted the history given by Mr Nair to Dr Lai that he “never had any previous operations or injuries”<sup>106</sup> is incorrect and “extraordinary” in light of the histories contained in the medical records.
80. The respondent submitted there is no reference to problems with the right shoulder recorded in the reports and medical records of Dr Duckworth or in his last report to Dr Renigeris returning Mr Nair to his care<sup>107</sup>.
81. The respondent submitted Mr Nair failed to provide Dr Lai with the history of the problems with the right shoulder, referring to the alleged assault in September 2017; attendance at Blacktown Hospital and x-ray reported upon as showing approximately 2 cm of superior displacement of the outer aspect of the right clavicle at the acromioclavicular joint consistent with acromioclavicular joint ligament disruption.
82. The respondent submitted that the history of Mr Nair experiencing pain in his neck radiating into his right shoulder<sup>108</sup> is not what he relies upon in these proceedings.
83. The respondent submitted that Dr Lai was not provided with reports of the radiological investigations of the right shoulder.

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<sup>99</sup> supra – p 112.

<sup>100</sup> supra – p 111.

<sup>101</sup> supra – p 187.

<sup>102</sup> supra – p 189.

<sup>103</sup> report – Wentworthville Imaging Centre – dated 25 July 2018 – Application – p 188.

<sup>104</sup> Application – p 111.

<sup>105</sup> supra – p 361.

<sup>106</sup> report of Dr Lai dated 19 March 2019 – Application – p 34.

<sup>107</sup> report of Dr Duckworth dated 10 December 2019 – Reply – p 15.

<sup>108</sup> supra at 105 – p 36.

84. The respondent submitted there is no reference to the right shoulder in the medical records of the Wentworthville Medical Centre, the last entry in the clinical notes in evidence being 19 February 2019<sup>109</sup>.
85. The respondent submitted the range of movements of the right shoulder has improved, referring to findings on physical examination by Dr Lai on 19 March 2019 and 5 November 2019, and assessment by the physiotherapist on 5 November 2019.
86. The respondent submitted that not one of the WorkCover medical certificates<sup>110</sup> issued referred to the right shoulder; and that the special investigations relate to the left shoulder only<sup>111</sup>.
87. The respondent submitted there was no mention of problems with the right shoulder to Ms Watson in her report dated 15 January 2020 to Dr Nazha<sup>112</sup>.
88. The respondent submitted the WorkCover medical certificates issued by the nominated treating doctor dated 11 January 2020<sup>113</sup> and 26 February 2020<sup>114</sup>, while certifying Mr Nair fit for pre-injury duties, made no reference to the right shoulder.
89. The respondent submitted the WorkCover Medical Certificate dated 3 February 2020<sup>115</sup> certified Mr Nair had the capacity to lift weights up to 20 kg.
90. The respondent submitted Mr Nair underwent a functional capacity evaluation on 29 January 2020<sup>116</sup>, reporting his current symptoms as “some anterior left shoulder pain at night in bed” and “occasional left triceps twinge type pain without specific precipitating factors” with Mr Nair reporting no restriction with activities of daily living.
91. The respondent submitted the capacity functional evaluation revealed Mr Nair had unrestricted pain free range of movement of the shoulders bilaterally<sup>117</sup>.
92. The respondent submitted there should be an award in its favour for the alleged consequential condition of the right shoulder as a result of injury to the left shoulder.
93. Mr Loukas in reply submitted injury to the left shoulder was not in issue, and the only issue to be determined is whether there is a consequential condition of the right shoulder resulting from the injury.
94. Mr Loukas submitted that Mr Nair was certified fit for pre-injury duties on 14 March 2012<sup>118</sup> because the injury to the left shoulder had “dissipated”<sup>119</sup>.
95. Mr Loukas submitted there was no need for surgery in 2011 but the injury in 2018 resulted in the need for surgery.
96. Mr Loukas submitted the histories about lumbar pain, right knee pain and fractured ribs are not relevant to the issue in dispute.

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<sup>109</sup> Application – p 106.

<sup>110</sup> supra – pp 56-66.

<sup>111</sup> supra – pp 67-69.

<sup>112</sup> report of Jane Watson, physiotherapist, dated 15 January 2020 – Reply – p 16.

<sup>113</sup> Reply – p 47.

<sup>114</sup> supra – p 50.

<sup>115</sup> supra – p 55.

<sup>116</sup> report of Strategic Rehab Solutions dated 3 February 2020 – Reply – pp 56-57.

<sup>117</sup> supra – p 59.

<sup>118</sup> Application – p 125.

<sup>119</sup> applicant’s supplementary statement – ALD – p 1 at [9]-[10].

97. Mr Loukas submitted Mr Nair experienced pain in his right shoulder in October 2016 as a result of repetitive heavy lifting at work and after consulting his general practitioner and after resting, the pain went away with him returning to his pre-injury duties<sup>120</sup>.
98. Mr Loukas submitted that Mr Nair has given evidence that to the best of his recollection he did not suffer an injury to his right shoulder when assaulted by the neighbour on 7 September 2017<sup>121</sup>, but developed pain in the shoulder after sleeping on 13 September 2017<sup>122</sup>.
99. Mr Loukas submitted the reference to right shoulder pain in the clinical records of the Wentworthville Medical Centre dated 3 April 2018<sup>123</sup> are addressed by Mr Nair in his supplementary statement when he experienced “spontaneous episode of right shoulder pain”<sup>124</sup>.
100. Mr Loukas submitted the previous incidents to the shoulders were “minor”, and the injury suffered on 7 September 2017 when assaulted by the neighbour had resolved as reported by Dr Renigeris in his report dated 23 September 2020<sup>125</sup>.
101. Mr Loukas submitted Dr Lai was provided with a letter from Mr Nair’s solicitors setting out the history of complaints to both shoulders, which he dealt with in his supplementary report dated 15 December 2020<sup>126</sup>, maintaining his opinion that Mr Nair suffers with a consequential condition of the right shoulder resulting from the injury to the left shoulder.
102. Mr Loukas submitted the Commission would be satisfied the pathology in the right shoulder was aggravated by the injury to the left shoulder caused by overuse of the right arm evidenced by the entry recorded in the clinical records of the Wentworthville Medical Centre on 18 September 2018: “using rt [right] arm only”<sup>127</sup>; and Dr Renigeris’s opinion that it would make it easier to result in inflammatory right capsule pain if the load on it increased for long periods<sup>128</sup>.
103. Mr Loukas submitted the respondent has not provided any relevant report dealing with the issues raised by it in its submissions; and no further report from Dr Quain “debunking” Dr Lai’s opinion about causation of the consequential condition resulting from the injury to the left shoulder has been obtained.
104. Mr Nair’s evidence in his first statement that he had never sustained any significant injuries or suffered from any significant medical condition that impacted upon his ability to work or carry out his daily activities is inconsistent with the medical records of the Wentworthville Medical Centre as referred to by the respondent in its submissions.
105. The histories provided by Mr Nair to Dr Lai that he had never had any previous injuries and to Dr Quain denying any previous injury to either shoulder is incorrect.
106. The medical records of the Wentworthville Medical Centre established that Mr Nair suffered injury to his left shoulder in the form of a dislocation when he slipped and fell onto a bath tap in November 2011, resulting in referral to Dr Maniam, physiotherapy and an MRI scan on 4 February 2012<sup>129</sup>.

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<sup>120</sup> applicant’s supplementary statement – ALD – p 2 at [10].

<sup>121</sup> supra – p 2 at [11].

<sup>122</sup> supra – at [12].

<sup>123</sup> Application – p 113.

<sup>124</sup> Applicant’s supplementary statement – ALD – p 2 at [13].

<sup>125</sup> Application – p 26.

<sup>126</sup> ALD – p 9.

<sup>127</sup> Application – p 109.

<sup>128</sup> supra – p 26.

<sup>129</sup> report of Dr Ho dated 4 February 2012 – Reply – pp 25-26.

107. I am unable to accept Mr Nair's evidence that he had no pain in his right shoulder<sup>130</sup> as a result of the incident involving the neighbour on 7 September 2017. Mr Nair's evidence is inconsistent with the discharge summary of Blacktown Hospital<sup>131</sup> and his presentation with his right arm in a sling at the Wentworthville Medical Centre the following day<sup>132</sup>; the x-ray reported upon by Dr Pasco as showing evidence of approximately 2 cm superior displacement of the outer aspect of the right clavicle at the acromioclavicular joint with an acromioclavicular joint ligament disruption<sup>133</sup>, and certification of no capacity for work until 9 December 2017<sup>134</sup>.
108. I reject the submission that the incidents involving the shoulders were "temporary or fleeting". The submission is inconsistent with the medical evidence showing Mr Nair was referred for special investigations, physiotherapy, prescribed pain relief medication, and referral to orthopaedic surgeons, Dr Maniam in 2012 (left shoulder) and Dr Sartor in early 2018 (right shoulder)<sup>135</sup>.
109. On the basis of the inconsistency between Mr Nair's evidence and medical records of his treating doctors, his evidence about the development of right shoulder pain from "over-reliance" as a result of the left shoulder injury has to be given careful consideration in the acceptance of his evidence as to the development of pain in his right shoulder following the left shoulder surgery.
110. While the respondent submitted that there is no recorded complaint in the medical records of the nominated treating doctor and Dr Duckworth about the right shoulder, it is not determinative when the symptoms of the consequential condition developed (*Turner*).
111. The medical records of the Wentworthville Medical Centre in evidence are not a complete record with the last consultation recorded as 19 February 2019<sup>136</sup>. Dr Duckworth returned Mr Nair to the care of Dr Renigeris at his last review on 10 December 2019<sup>137</sup>.
112. Mr Nair's evidence that he is "over-reliant" on his right arm because of the left shoulder injury is corroborated by his reported use of the right arm only to Dr Renigeris on 18 September 2018<sup>138</sup>. The recorded entry by Dr Renigeris of Mr Nair using his right arm only is consistent with the progress reports of Dr Duckworth dated 12 March 2019 (still reluctant to move his left arm; has developed significant capsulitis and has not responded to physiotherapy or a cortisone injection; has severe pain)<sup>139</sup>; and 9 October 2018 (post-operative pain via capsulitis) and will have it for the rest of his life, and his arm will never be 100%)<sup>140</sup>.
113. Dr Renigeris reported that at the consultation on 21 August 2020 Mr Nair stated "that now he was developing pain in his right shoulder due to overuse and avoiding the use of his right shoulder"<sup>141</sup>.
114. Mr Nair gave a similar history about the development of right shoulder pain as a result of the left shoulder incapacity to Dr Lai at the assessment on 19 March 2019<sup>142</sup>.

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<sup>130</sup> applicant's supplementary statement dated 18 January 2021 – ALD – p 2 at [12].

<sup>131</sup> Application – p 346.

<sup>132</sup> supra – p 115.

<sup>133</sup> supra – p 138 and p 344.

<sup>134</sup> supra – p 343.

<sup>135</sup> supra – p 113.

<sup>136</sup> supra – p 106.

<sup>137</sup> Reply – p 15.

<sup>138</sup> Application – p 109.

<sup>139</sup> supra – p 25.

<sup>140</sup> supra – p 54.

<sup>141</sup> supra – p 26.

<sup>142</sup> Application – p 35.



115. Mr Nair's evidence that the discomfort in his right shoulder had resolved before 6 August 2018<sup>143</sup> is supported by Dr Renigeris who said that while Mr Nair sustained a right acromioclavicular joint dislocation with a 2 cm displacement as a result of the incident with the neighbour it was treated and "resolved" [emphasis in original]<sup>144</sup>.
116. Dr Renigeris opined that the underlying pathology in the right shoulder "would make it easier to result in inflammatory right capsule pain if the load on it increased for long periods such as occurred in this case"<sup>145</sup>.
117. After carefully considering all the evidence, both medical and factual, I accept Mr Nair's evidence that he has been reliant upon his right arm because of pain and discomfort in the left shoulder. His evidence about pain and discomfort in the left shoulder accords with the opinion of Dr Duckworth that "his arm will never be 100%" (referring to the left shoulder).
118. Dr Lai assessed Mr Nair on two occasions, and after reviewing the history of bilateral shoulder complaints recorded in the clinical records of the Wentworthville Medical Centre and the report of Dr Renigeris dated 23 September 2020 at the request of Mr Nair's solicitors, confirmed his opinion that Mr Nair suffers with a consequential condition of the right shoulder as a result of "over reliance (overuse) following his work related left shoulder injury"<sup>146</sup>.
119. Dr Lai agreed with Dr Renigeris' opinion that the previous injury (referring to the incident with the neighbour on 7 September 2017) would make it easier to result in inflammatory right capsule pain if the load on it increased for long periods of time.
120. While the respondent made submissions based upon the clinical records and medical reports of the nominated treating doctors, including radiological investigations, ostensibly in regard to credit issues and acceptance of Mr Nair's evidence as to prior bilateral shoulder problems and other injuries, Dr Quain provided no opinion whether Mr Nair suffers with a consequential condition of the right shoulder other than to report that his examination was normal and commenting that the respondent had declined liability.
121. The medical evidence established Mr Nair suffered a significant injury to the left shoulder as a result of the injurious event resulting in surgery with an outcome that he will have pain for the rest of his life and the arm will never be 100% as opined by Dr Duckworth with him compensating for the pain and discomfort in it by relying or overusing his right arm resulting in a consequential condition as a result of the left shoulder injury.
122. I find on a commonsense evaluation of the factual and medical evidence that there is an unbroken causal link of chain between the left shoulder injury and the development of the consequential condition in the right shoulder by reliance or overuse on the right arm compensating for the left shoulder injury.
123. I find that Mr Nair suffers with a consequential condition of the right shoulder as a result of injury to the left shoulder in the course of employment with the respondent on 6 August 2018.
124. I propose to remit the matter to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment of the left upper extremity (shoulder) and right upper extremity (shoulder) as a result of injury on 6 August 2018.
125. The name of the respondent is amended to Westwise Recruitment Pty Limited as particularised in the Reply.

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<sup>143</sup> ALD – p 3 at [15].

<sup>144</sup> Application – p 26.

<sup>145</sup> supra.

<sup>146</sup> ALD – p 9.

