WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**2314/19**
Applicant:	**Murray Dyball**
Respondent:	**Suez Recycling and Recovery Pty Limited**
Date of Determination:	**26 July 2019**
Citation:	**[2019] NSWWCC 255**

The Commission determines:

1. The name of the respondent is amended to Suez Recycling and Recovery Pty Limited.

2. The applicant sustained an injury to the rotator cuff of the left shoulder arising out of or in the course of his employment with the respondent on 23 February 2011.

3. The applicant sustained a further injury to the rotator cuff of the left shoulder in August 2016 as a result of his employment with the respondent.

4. The costs of the surgery to the applicant's left shoulder on March 2018 were reasonably necessary as a result of the injuries in 2011 and 2016.

5. The applicant was totally or partially incapacitated from 15 January 2018 to 30 July 2018 as a result of his injuries.

The Commission orders:

6. The respondent to pay weekly compensation in accordance with sections 36 and 37 of the *Workers Compensation Act 1987* for the period from 15 January 2018 to 30 July 2018, the amount to be agreed between the parties, noting that the PIAWE is agreed and that the applicant will be entitled to recrediting of leave entitlements during that period. There will be liberty to apply in respect of weekly payments if required.

7. The respondent to pay the reasonably necessary costs of surgery in March 2018 pursuant to section 60 of the *Workers Compensation Act* 1987.

8. I remit this matter to the Registrar for referral to an Approved Medical Specialist pursuant to section 321 of the *Workplace Injury Management and Workers Compensation Act 1998* for assessment of the whole person impairment of the applicant's left upper extremity (shoulder) due to injuries sustained on 23 February 2011 and August 2016.

9. The documents to be reviewed by the Approved Medical Specialist are:

    (a) Application to Resolve a Dispute and attached documents; and

    (b) Reply and attached documents.

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

Jill Toohey
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 JILL TOOHEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Murray Dyball, the applicant, is aged 59. On 8 March 2004, he commenced employment as a full-time truck driver for the respondent, then known as SITA Australia, now Suez Recycling and Recovery Pty Limited.

2. There is no dispute that Mr Dyball sustained an injury to his left shoulder at work on 23 February 2011, when he was turning the steering wheel of a truck to make a left hand turn to avoid another vehicle. His claim was finalised on 29 April 2011.

3. On 19 February 2018, the insurer, Allianz Australia, issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) apparently in response to WorkCover certificates of various dates from Mr Dyball's general practitioner which referred to an aggravation on 6 January 2018 of the injury sustained at work in 2011. The insurer disputed that Mr Dyball had suffered an injury within the meaning of s 4 and s 9A of the *Workers Compensation Act 1987* (the 1987 Act). It said the medical evidence did not confirm a recurrence of the 2011 injury. Rather, the applicant suffered an injury while mowing at home on 6 January 2018, unrelated to the 2011 injury, which had long since resolved.

4. On 17 October 2018, Mr Dyball claimed compensation under s 66(1) of the 1987 Act for 11% whole person impairment (WPI) of his left shoulder arising out of the 2011 injury.

5. On 17 December 2018, the insurer issued a s 74 notice confirming that only quantum of the impairment was in dispute and denying liability to compensate Mr Dyball on the ground that he had whole person impairment of 7% arising from the injury on 21 February 2011.

6. By letter dated 21 March 2019 to the respondent, Mr Dyball's solicitors claimed that, in August 2016, he aggravated his left shoulder "due to the heavy use in operating a steering wheel" and in "late August or early September 2017" when trying to remove a blanket that was jammed in the mechanism of the truck. As a consequence of his injuries he underwent surgery on 27 March 2018. Mr Dyball sought compensation for weekly benefits, medical expenses and lump sum for 11% WPI.

7. By an Application to Resolve a Dispute (ARD) registered in the Commission on 14 May 2019, Mr Dyball claimed compensation for personal injuries to the left shoulder as follows:

    (a) on 21 February 2011 [sic] described as occurring "While driving and turning steering wheel to make a left hand, turn he felt pain in the left shoulder";

    (b) in "August 2016" described as occurring when he "Aggravated left shoulder due to heavy use in operating a steering wheel"; and

    (c) in "Late August/early September 2017" described as occurring when "Trying to remove a blanket that was jammed in the mechanism of the truck when again injured left shoulder".

8. Mr Dyball claims weekly benefits from 15 January 2018 to 30 July 2018, medical expenses of $9840.74 being the cost of surgery in March 2018, and lump sum compensation for 11% WPI of his left upper extremity and scarring arising from the injuries on 21 February 2011 [sic], August 2016 and "August/September 2017".

ISSUES FOR DETERMINATION

9. At a telephone conference on 11 June 2019, the respondent was granted leave to dispute the pleaded injuries in 2016 and 2017 pursuant to sections 4 and 9A of the 1987 Act and sections 254 and 261 of the 1998 Act.

10. The parties agree that the following issues remain in dispute:

    (a) whether Mr Dyball sustained injuries to his left shoulder in 2016 and 2017 within the meaning of sections 4(a) and 9A of the 1987 Act;

    (b) whether Mr Dyball gave notice of those injuries in accordance with ss 254 and 261 of the 1998 Act;

    (c) whether Mr Dyball is entitled to weekly payments within the meaning of s 33 of the 1987 Act during the period claimed;

    (d) whether Mr Dyball's medical expenses were reasonably necessary as a result of injury within the meaning of s 60 of the 1987 Act, and

    (e) whether Mr Dyball is entitled to lump sum compensation pursuant to s 66 of the 1987 Act.

11. Parties agree that Mr Dyball's average actual earnings for the relevant period are as set out in a Summary of Pay Slips document provided by the respondent.[1] It is agreed that the applicant was paid his normal wage throughout this period and, if his claim is successful, that he is entitled to recrediting of leave used during the period 15 January 2018 to 30 July 2018.

PROCEDURE BEFORE THE COMMISSION

12. The parties attended a hearing on 2 July 2019. Mr Greg Niven of counsel appeared for the applicant. Mr David Saul of counsel appeared for the respondent.

13. During the conciliation phase of the hearing, Mr Saul sought to tender a letter from the respondent concerning efforts to locate documents relevant to notice of the August/September 2017 injury, and attempts to contact, and obtain a statement from, the supervisor to whom Mr Dyball says he reported that injury. Mr Niven objected on the ground that the document had not been produced until the hearing. He submitted that fairness would require that Mr Dyball have an opportunity to obtain statements from the persons he says witnessed his conversation with the supervisor, which would delay proceedings. I agreed with Mr Niven. I was not persuaded that it was in the interests of justice that the document should be admitted and I rejected its tender.

14. 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

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

[1] ARD at pages 133-135

(a) Application to Resolve a Dispute and attached documents;

(b) Reply and attached documents.

Oral evidence

16. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

FINDINGS AND REASONS

The applicant's statement

17. Mr Dyball provided a written statement dated 7 May 2019[2] in which he said he commenced employment with the respondent in 2004. He described his duties, which included driving a garbage truck collecting rubbish, as follows:

> "As part of my duties I am required to get in and out of the vehicle on many occasions during the day. It is quite often the case that this occurs up to 15 times per day. As I get in and out of the vehicle, I am required to use 3 points of contact to assist me getting in and out of the truck. My arms are hyper-extended in all these manoeuvres. As I get into the truck my first point of contact is the first step, which is a height of 50 cms. The second point of contact is my left arm to the handle height of 1.62 metres and my third point of contact is my right arm to a handle height of 1.94 metres. As I am getting out of the vehicle, my first point of contact is my step height of 50 cm. My second point of contact is my left arm to a handle height of 1.75 metres and my third point of contact is my right arm to a handle height of 1.94 metres. I am also required to pull bins off the kerb to the truck which can weigh up to 70-80 kgs when full. Bin heights are typically about 1 metre high and these full bins often need to be moved up and down gutters and around cars and other obstacles. Sometimes I am also required to climb up the side of the truck to the hopper to retrieve bins that have fallen into the hopper."

18. Mr Dyball described how the injury to his left shoulder occurred on 23 February 2011. He said he was turning the steering wheel to make a left-hand turn when he felt a sharp pain in his left shoulder. He attended on his general practitioner, Dr Eric Barlow, who referred him for an ultrasound and x-ray of his left shoulder, and certified him fit for suitable duties. He had physiotherapy treatment until "approximately April 2011" after which he returned to normal duties.

19. Mr Dyball stated:

> "I continued to have ongoing pain in my left shoulder however the symptoms subsided but they never went away. I continued to have ongoing problems with my left shoulder from time to time. There were many episodes where the pain in my left shoulder would flare up for a week or so and then settle down."

20. In 2016, Mr Dyball said he had "another episode" where he aggravated his left shoulder. He could recall being sent for an ultrasound. He stated:

> "I did not report this aggravation to work and I did not have any time off. At this time, I was due to leave on holidays. I had 3 weeks holidays and the pain subsided by the time I was due to return back to work."

[2] ARD at pages 1-3

21. On 27 September 2017, Mr Dyball stated, he suffered a further aggravation of his left shoulder at work. While driving his truck collecting rubbish, he noticed a blanket stuck in the lifter on the rollers. While trying to dislodge it, he "jerked and wrenched" both arms. As he did, he immediately noticed a sharp stabbing pain in his left shoulder and some pain in his right shoulder. On his return to the yard, he reported this incident to Shane Barlow, the supervisor at the Lucas Heights office. On 2 October 2017, he was still in a lot of pain and again spoke to Mr Barlow regarding his injury. He did not consult any doctors for treatment at this time.

22. On Friday, 5 January 2018, Mr Dyball stated, that on finishing work he again noticed pain in his left shoulder. He went home and rested. The next morning his shoulder felt a little bit better so he mowed the lawn. By Saturday night the pain had increased and by Sunday it was intense. On Monday morning, he rang his boss and said he was unable to come into work.

23. On 8 January 2018, Mr Dyball attended upon his general practitioner, Dr Azmir, who referred him for an ultrasound and x-ray of his left shoulder. Dr Azmir referred him to orthopaedic specialist, Dr Michael Stening who referred him for an MRI which was performed on 19 February 2018. Dr Stening recommended surgery and, on 27 March 2018, he performed a left rotator cuff repair. Liability having been denied by the respondent, Mr Dyball paid for the surgery and post-operative treatment himself.

24. Mr Dyball stated that, following surgery, he had approximately six physiotherapy treatments. He then went on holidays. He was off work from 8 January to 29 January 2018 during which time he was paid sick leave. He returned to work on 30 January to 19 February 2018 and received normal pay. From 20 February to 30 July 2018 he was off work and used his sick leave and long service leave. He resumed normal duties from 31 July 2018. (The respondent's records confirm these dates.)

25. In relation to whether he notified his employer of the 2017 injury, Mr Dyball has provided a copy of a letter he sent to Alex Wade, the "EQ&S Coordinator" for the respondent, dated 25 April 2018 in which he refers to injuring his left shoulder on 27 September 2017. He states that he returned to the office around 12.15pm and reported the incident to Mr Barlow around 12.30pm. He named three persons who were present at the time, and says Mr Barlow told him to "go home and ice it". He says that, on 2 October 2017, he told Mr Barlow he was still having pain. He states:

> "I was unaware that Shane had not written my injury up in an incident (SIMS) report that that I had been injured from a work-related incident. I was unable to follow this up as I went on leave."

General practitioners' records and investigative scans

The 2011 injury

26. On 23 February 2011, in relation to the accepted injury, Dr Shamsul Alam certified Mr Dyball fit for suitable duties from 23 February 2011 to 2 March 2011. He described the injury as "left shoulder strain".[3]

27. On 4 March 2011, Dr John Barlow certified[4] Mr Dyball fit for suitable duties from 4 March 2011 to 18 March 2011. He diagnosed left rotator tear and subacromial bursitis. He referred Mr Dyball for physiotherapy, noting that an ultrasound showed "tendinosis, SSP tear and subacromial bursitis".[5]

[3] Reply at page 1
[4] ARD at page 51
[5] ARD at page 29

28. An x-ray and ultrasound of Mr Dyball's left shoulder on 25 February 2011[6] showed:

> "Subscapularis and supraspinatus tendinosis and a small bursal surface partial thickness tear of the supraspinatus tendon distally. Probable mild subacromial bursitis."

29. In response to a questionnaire from the insurer dated 3 March 2011,[7] Dr Barlow confirmed his diagnosis of "(L) rotator cuff (partial)" and subacromial bursitis. He stated he was not aware of any previous left shoulder injury and said Mr Dyball was likely to have recovered by approximately 18 March 2011 when he should be able to return to pre-injury duties.

30. On 18 March 2011, Dr Eric Barlow certified Mr Dyball fit for pre-injury duties.

2016

31. Handwritten notes[8] of Dr Azmir, general practitioner, dated 13 August 2016 are not altogether easy to decipher but they appear to show "bilateral shoulder pain L>R". On 3 September 2016, they appear to show "rotator cuff injury" and "frozen (R) shoulder". Neither appears to indicate the cause of pain or injury.

32. A report of an x-ray and ultrasound of Mr Dyball's left shoulder on 25 August 2016 showed:[9]

> "A full thickness tear in subscapularis tendon 1.7 x 1.1 cm.
> A full thickness tear in the anterior to mid third supraspinatus tendon 2 x 2.1 cm.
> Thickened subacromial-subdeltoid bursa with impingement on abduction.
> Impingement at 80A, A.
> Degenerative change of the AC joint."

2018 clinical records – Dr Azmir and Centahealth Menai General Practice

33. Mr Dyball next saw his doctor in relation to his left shoulder on 8 January 2018 when Dr Azmir's handwritten notes appear to show "sore (L) shoulder/neck 3/52".[10]

34. On 10 January 2018, Dr Azmir referred Mr Dyball to Dr Stening. His hand-written referral is difficult to read in parts but appears to state that Mr Dyball had a history of left rotator cuff injury in 2016 which appeared to settle with time. For about "3/52" he had "complained of sore neck and last few days developed frozen shoulder".[11]

35. An ultrasound and x-ray on 11 January 2018 showed:[12]

> "1. Complete tear of the supraspinatus tendon with retraction. Partial thickness and tendinitis of the subscapularis tendon and infraspinatus tendon.
> 2. Subacromial and subdeltoid bursitis without evidence of left shoulder impingement. The patient may benefit from a steroid injection."

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[6] ARD at page 28
[7] ARD at page 30
[8] ARD at page 70
[9] ARD at page 32
[10] ARD at page 71
[11] ARD at page 56
[12] ARD at page 33

> "There is mild osteoarthritis in the glenohumeral joint There is moderate osteoarthritis in the acromioclavicular joint. No fracture or other focal bony abnormality is identified. There is mild elevation of the femoral head against the acromion."

36. On 15 January 2018, Dr Mohammad Ali at Centahealth Menai General Practice (Centahealth) recorded, relevant to Mr Dyball's left shoulder:[13]

> "CC: left Shoulder injury 06 yrs ago. Osteoarthritic Changes in Shoulder and AC joint and Partial tear supraspinatous and tendeinosis. Physiotherapy helps. Lawn mowing on Saturday AN, lifted Rubbish and on Sunday morning 07/01/18, pain in left side of neck and unable to raise left arm.
>
> Cervical X-ray done on 8/1/18 and Early cervical spondylosis in C5/6.
> Shoulder X-ray and USG done on 11/01/18
> Complete tear of Left Supraspinatous and mild bursitis."

37. Dr Azmir issued an undated medical certificate certifying Mr Dyball would be unable to work from 22 January 2019 to 26 January 2018 due to "L shoulder and [illegible] neck".[14]

38. On 29 January 2018, Dr Shahrian Chowdhury at Centahealth certified Mr Dyball fit for suitable duties from 30 January 2018 to 9 February 2018.[15] The certificate showed the date of injury as 4 March 2011, and the diagnosis "Complete tear of the supraspinatus tendon, partial tear subscapularis and infraspinatus tendon". As to how the injury was related to work, Dr Chowdhury stated:

> "Initially sustained the injury at work in 2011. Aggravated this existing injury on the 6/1/2018 when it progressed to full thickness tears of the shoulder tendons."[16]

39. Dr Chowdhury's notes for 29 January 2018 show:

> "REOPEning claim for work cover
> injury 2011
> see documents
> worsened since jan 2018"[17]

40. On 9 February 2018,[18] Dr Chowdhury issued a Workcover certificate in the same terms as that issued on 29 January 2019, certifying Mr Dyball fit for suitable duties from 9 February to 23 February 2018. His notes record the reason for visit as "Left shoulder pain" and noted "insurance company a/w work cover".

Dr Stening's reports

41. On 5 February 2018,[19] Dr Stening reported to Dr Azmir that Mr Dyball presented with "worsening shoulder pain". He noted that Mr Dyball "originally injured his shoulder at work in 2011" and that scans at the time demonstrated "a bursal sided tear of supraspinatus in association with acromioclavicular joint degenerative change and an inferior spur".

[13] ARD at page 40
[14] ARD at page 24
[15] ARD at page 21
[16] ARD at page 21
[17] ARD at page 39
[18] ARD at page 25
[19] ARD at page 59

42. Dr Stening then recorded that "more recently approximately 3 months ago" Mr Dyball felt a sudden onset of pain while removing a jammed bin from the truck. Since then, he had had fluctuating pain and limited active range of motion. He noted that the recent ultrasound and x-ray showed "early glenohumeral joint cuff arthropathy and advanced osteoarthritis of the acromioclavicular joint with evidence of a complete tear of supraspinatus with retraction". He recommended an MRI to assess whether the tear was repairable.

43. The MRI on 19 February 2018 showed:[20]

> "• Rupture of the supraspinatus tendon with retraction.
> • Sunbscapularis tendonosis [sic].
> • Bicipital tendinosis of the intra-articular portion.
> • Synovitis.
> • Moderate osteoarthritis of the acromioclavicular joint."

44. On 26 February 2018, Dr Stening reported to Dr Azmir that the results of the MRI showed a large supraspinatus tear retracted 2.7cms with only mild fatty atrophy, indicating it was not chronic. He noted associated advanced acromioclavicular joint degeneration with an inferior spur. He said:

> "Interestingly he states he felt a strain in the shoulder at work in mid-August – early September when he was removing a jammed blanket from a roller … He reported this to his employer, however, the incident was not logged".

45. Dr Stening concluded that, "in view of this", he had recommended rotator cuff repair in conjunction with excision of the outer end of the clavicle. He did not mention an injury or episode in 2016. On 28 March 2018,[21] he performed a left rotator cuff repair and acromioplasty. He reviewed Mr Dyball on 4 April 2018 and 18 April 2018 and reported to Dr Azmir. Neither report comments on the cause of the tear. [22]

Dr Conrad's reports

46. On 17 September 2018,[23] Dr Peter Conrad, orthopaedic surgeon, assessed Mr Dyball at the request of his solicitors. He provided a report of the same date. He took a history of the 2011 injury when Mr Dyball "wrenched the steering wheel with his left hand [and] felt a sharp pain in his left shoulder", after which he returned to work "despite ongoing pain and stiffness in his left shoulder".

47. Dr Conrad took a history that "in about August 2016 (he cannot recall the exact date)" Mr Dyball aggravated his left shoulder injury "due to heavy use of the left arm in using the steering wheel." He noted that Mr Dyball saw his general practitioner and an ultrasound showed a full thickness tear in the subscapularis and supraspinatus. He did not report it to work but "struggled on in pain". Shortly after, he went on holidays and rested. He returned from holidays and continued having pain.

48. Dr Conrad noted that Mr Dyball's left shoulder "got worse" in late August/early September 2017 when trying to remove a blanket jammed in the truck's mechanism. He reported this but "continued working in pain until his symptoms deteriorated in January 2018 and he was off work for three or four weeks then on light duties for three or four weeks". Dr Conrad noted that Mr Dyball was told the insurer denied his claim on the basis that the injury to his left shoulder was due to mowing lawns. He noted that Dr Stening undertook left rotator cuff repair in March 2018.

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[20] ARD at page 34
[21] ARD at page 35
[22] ARD at pages 67, 68
[23] ARD at page 89

49. Dr Conrad noted the reports of the x-ray on 25 February 2011, the ultrasound and x-ray on 11 January 2018, and the MRI on 18 February 2018. Although he took a history that x-rays and an ultrasound in 2016 showed a full thickness tear in the subscapularis and supraspinatus, Dr Conrad referred only to the results of the 2011 and 2018 scans in the later part of his report.

50. In Dr Conrad's opinion:

> "In 2016, Mr Dyball aggravated his left shoulder at work and subsequently in August or early September 2017, when trying to remove a blanket that was jammed, aggravated the injury. Eventually, an MRI scan and ultrasound were done, which showed a complete tear of the rotator cuff, which was repaired by Dr Stenning [sic] with excision of the outer part of clavicle and a repair of the rotator cuff. Mr Dyball has some ongoing pain and stiffness in his left shoulder, which in my view will be permanent. He has permanent restriction of movement in his left shoulder."

51. In response to the question whether the operation performed by Dr Stening was "reasonable and necessary", Dr Conrad said:

> "In view of the fact that Mr Dyball had a full thickness tear of the rotator cuff, the operation performed by Dr Stening was reasonable and necessary."

52. As to whether Mr Dyball's "present condition" was a work-related injury or whether it had "anything to do with the domestic duties of lawn mowing", Dr Conrad said:

> "Having carefully taken a detailed history from Mr Dyball, I am of the view that 100% attributability rests with the conditions of work and accidents at Sita Environmental Solutions and as far as I am able to ascertain, no contribution was made by any of the domestic activities such as lawn mowing."

53. Dr Conrad assessed WPI as 11%, including 1% for TEMSKI scarring.

54. In a supplementary report dated 25 September 2018,[24] Dr Conrad confirmed that he took a history that, on 5 January 2018, Mr Dyball finished work and had soreness in his left shoulder. The next day he mowed his lawn and had increased pain on Sunday. Dr Conrad said that, from the history he took, he did not believe the lawn mowing would have aggravated the shoulder and so had made no deduction for this in his assessment of WPI.

Dr Panjratan's report

55. Dr Vijay Panjratan, orthopaedic surgeon, saw Mr Dyball on 15 November 2018 at the request of the insurer. He took a history of the 2011 injury consistent with that taken by Dr Conrad. He noted that Mr Dyball resumed normal duties and that "[t]here was always some discomfort in the shoulder but not significant enough for him to go off work."[25]

56. Dr Panjratan recorded that, in 2016, Mr Dyball "aggravated the same shoulder at work."[26] He said:

> "In the process of his work he had to get in and out of the cabin of the truck using the hand rail. While using the left hand to lever up he kept on aggravating the shoulder. He has short legs and the cabin of the truck is high, his arm would stretch and wrench the shoulder at times."

[24] ARD at page 96
[25] Reply at page 11
[26] Reply at page 11

57. Dr Panjratan recorded that Mr Dyball could not cope with the pain and saw Dr Azmir. An ultrasound showed full thickness tear in the supraspinatus and subscapularis, and osteoarthritic changes were seen in the glenohumeral and AC joints on x-rays.

58. Dr Panjratan noted that Mr Dyball went on holidays a week later "and the aggravation settled down although he continued to have some niggling left shoulder pain."[27]

59. According to Dr Panjratan, Mr Dyball said he thought his pain became worse around September 2017 when he wrenched his shoulder while pulling a rag from a roller on the truck. He went on holidays again, after which the pain settled down until "a new incident on 6 January 2018"[28] while he was mowing his lawn at home. When asked by "the doctor" (I take this to mean his general practitioner), Mr Dyball said all he did was mow the lawn on the weekend. Dr Panjratan recorded that the mower was self-propelled and does need pushing but drives itself; the ground is at a gradual gradient but not steep; it takes about an hour to mow the lawn. Mr Dyball said he not feel pain while using the mower on Saturday but he felt pain on Sunday night.

60. Dr Panjratan noted the reports of the x-ray and ultrasound in 2011. In response to the question whether "the full thickness tear" occurred as a result of the 2011 injury "being a partial thickness tear", he said:

> "The ultrasound showed a small bursal partial thickness tear which logically should have healed in time. Unfortunately, there were no follow-up ultrasounds. The remainder of the tendon showed tendinosis indicating degenerative change. The subscapularis tendon also showed tendonosis." [29]

61. Dr Panjratan noted that, five years later on 25 August 2016, another ultrasound showed full thickness tears of the supraspinatus and subscapularis tendons. He noted the ultrasound was done "for increased pain" and said Mr Dyball "claims this was due to steering the garbage truck with the left arm and the strain from repeatedly going up and down using the railing." Dr Panjratan then said:

> "Again, it is not clear, why he was not referred for specialist review and surgical intervention in 2016 when a full thickness tear was seen on ultrasound and appreciable tears. An MRI and surgery were indicated at that point."[30]

62. In January 2018, Dr Panjratan noted, the scans showed a complete tear of the supraspinatus tendon with retraction, partial thickness tear and tendonitis of subscapularis tendon and infraspinatus tendon, subacromial and subdeltoid bursitis without evidence of left impingement, mild osteoarthritis in the glenohumeral joint and moderate osteoarthritis in the acromioclavicular joint.

63. Dr Panjratan said, he formed the view that the full thickness tear does not appear to be related to the 2011 injury, which was a minor tear and appeared degenerative."[31] He said:

> "Ultimately what was likely to happen happened, with the tendon giving way and retracting back, requiring semi-urgent repair."[32]

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[27] Reply at page 11
[28] Reply page 11
[29] Reply at page 15
[30] Reply at page 15
[31] Appears to mean in 2018
[32] Reply at page 15 (in in Jan 2018). He doesn't really say about 2016

64. Dr Panjratan said he formed the view that the full thickness tear and retraction did not appear related to the 2011 injury. He concluded the "full thickness tear was degenerative and not work-related".

65. Asked whether the injury on 21 February 2011 [sic] was "a substantial contributing factor to the left shoulder injury resulting in a rotator cuff repair some 7 years later", Dr Panjratan said he did not, and he not consider Mr Dyball's employment a cause of his "current left shoulder diagnosis". He reiterated his opinion that:

> "Briefly, the initial tear was minor and should have healed. There were degenerative changes in the tendon of the supraspinatus and subscapularis seen in 2011 which would have increased with time as is the natural course of the disease".[33]

66. In relation to mowing the lawn, Dr Panjratan said the "non work-related injury from mowing in a degenerate tendon with full thickness tear was enough for the tendon to give way completely and retract … in spite of using a self-propelled mower requiring minimal effort."

67. Dr Panjratan assessed WPI of the left shoulder as 7%. He said scarring did not attract an impairment rating as it was "standard for arthroscopy due to shoulder repair".

SUBMISSIONS

68. The following is a summary of the respondent's submissions, the submissions on behalf of Mr Dyball, and the respondent's submission in reply.

The respondent's submissions

69. Mr Saul submits the evidence shows that the pathology and its effects of the 2011 injury were negligible and the injury was "self-limiting". Mr Dyball was certified fit for suitable duties from 23 February 2011 to 18 March 2011 and for pre-injury duties from 18 March 2011.[34] On 29 April 2011, the file was closed. Mr Dyball says he had ongoing pain which subsided but never went away, but there is no medical evidence of any complaint until 2016.

70. Dr Panjratan[35] took a history of the 2011 injury and noted that x-rays at the time showed mild osteoarthritic changes in the shoulder and the acromioclavicular joint. There was no rotator cuff calcification. The ultrasound showed subscapularis and supraspinatus tendinosis and small bursal surface partial thickness tear of the supraspinatus tendon distally. Dr Panjratan concluded the initial tear was minor and should have healed, and the degenerative changes in the tendon of the supraspinatus and subscapularis seen in 2011 would have increased with time as is the natural course of the disease.

71. Mr Saul submits the alleged aggravation in 2016 was not a frank injury as pleaded. He relies on *Jaffarie v Quality Castings Pty Ltd* (*Jaffarie*)[36] and submits that Mr Dyball has said only that he had an "episode" of pain, he has provided no details such as a particular incident or date of anything that occurred in 2016. Whatever occurred did not lead him to report it to his employer or to have time off. In Mr Saul's submission, the inference is that, whatever occurred, it did not lead to any pathological problem.

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[33] Reply at page 16
[34] Reply at page 3
[35] Reply at page 9
[36] *Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79

72. Mr Saul acknowledges the ultrasound in 2016 showed "significant pathology" but says that is all. He submits that all that is known is that a tear had occurred, not how or when it occurred, and the Commission could not be satisfied in the balance of probabilities that it was caused by Mr Dyball's employment. Dr Azmir's notes indicate the ultrasound was done for increased pain but they do not refer to a cause. Mr Dyball says it was due to using the steering wheel and repetitive climbing up and down, and he outlines clearly in his evidence the heavy nature of his employment, but he does not rely on a repetitive-type injury.

73. Mr Saul submits that the history Dr Panjratan took of an aggravation in 2016, including that Mr Dyball "kept on aggravating the shoulder" and "his arm would stretch and wrench the shoulder at times" appears consistent with "continuous traumata" while getting in and out of his truck and operating the steering wheel. In contrast, Mr Dyball relies in the ARD on heavy use of a steering wheel on a particular day.

74. In respect of the 2017 injury, Mr Saul submits that no specific date is pleaded in the ARD but Mr Dyball in his statement indicates there was an incident at work on 27 September 2017. Mr Saul acknowledges that his evidence indicates there was an incident in 2017 when Mr Dyball felt pain in his shoulder while pulling on a blanket that had become jammed but submits that, following *Jaffarie*, Mr Dyball must prove a change in pathology.

75. Mr Saul submits that, whatever occurred in September 2017, Mr Dyball had no time off and continued his normal heavy work. He did not consult his doctor until January 2018 when, it is not in dispute, he felt pain while mowing the lawn which led him to see his doctor and, ultimately, to surgery. Dr Azmir's handwritten notes[37] on 8 January 2018 show "sore left shoulder/neck 3/52", consistent with his referral to Dr Stening[38] which states the left rotator cuff injury in 2016 appeared to settle with time" and that approximately three weeks previously he complained of sore neck and then developed frozen shoulder. Mr Saul submits that whatever happened in 2017 must have resolved, until three weeks before Mr Dyball consulted Dr Azmir. Dr Azmir's notes confirm that Mr Dyball felt increased pain but do not explain why he experienced pain.

76. Applying *Kooragang Cement Pty Ltd v Bates*[39] (*Kooragang*), and considering that Mr Dyball had not seen his doctor for his left shoulder since 2016, and that he felt intense pain after mowing the lawn, Mr Saul submits that common sense says the aggravation seen on scans in 2018 was caused by mowing. There was an underlying degenerative problem, Mr Dyball had a recurrence of symptoms, and the mowing was the proximate cause for seeing his doctor and, ultimately, the need for surgery. Mr Saul submits the respondent is not liable for the cost of that surgery because it was not the result of compensable injury.

77. With respect to the independent assessments, Mr Saul submits that Dr Panjratan says[40] the full thickness tear is degenerative and not work-related. The non-work-related lawn-mowing was sufficient to cause the tendon to give way completely and retract. The difference that gave rise to the need for surgery was the retraction seen on the 2018 ultrasound. In Dr Panjratan's opinion, it was bound to happen in the natural course of the degenerative disease.

78. In Mr Saul's submission, Dr Panjratan describes repetitive movements when Mr Dyball climbed in and out of the truck, and when using the steering wheel over time, and Dr Conrad also refers to the conditions of Mr Dyball's employment. Mr Saul submits that, together with Mr Dyball's evidence, they suggest, if anything, injury due to the "nature and conditions" of Mr Dyball's employment but that is not how Mr Dyball's case has been pleaded, and the disease provisions are not relied upon.

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[37] ARD at page 71
[38] ARD at page 56
[39] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452
[40] Reply at page 16

79. Further, Mr Saul submits, Dr Conrad records that Mr Dyball aggravated his left shoulder at work in 2016 at work and again in 2017, and refers to injury as a result of work accidents *and conditions* (emphasis added), but Mr Dyball does not rely on the nature and conditions of his employment.

80. Mr Saul submits that Dr Conrad's opinion carries little weight. He saw Mr Dyball once, in September 2018. He took a history that about August 2016, Mr Dyball aggravated his shoulder due to heavy use of the steering wheel. In Mr Saul's submission, this does not suggest something occurring on one day. In particular, he did not take a history of mowing in January 2018. In his supplementary opinion, he stated that using a self-propelled mower would not cause injury to the left shoulder but gave no reasons for his opinion.

81. Dr Stening took a history of the 2011 injury and the incident "approximately three months ago" when Mr Dyball felt a sudden onset of pain while removing a jammed bin. Dr Stening did not take a history of anything in 2016 or of Mr Dyball mowing the lawn in 2018. In Mr Saul's submission, any opinion as to causation is compromised as a result.

82. Mr Saul submits that I will not be satisfied, on the balance of probabilities, that any one of the pleaded incidents singly, or any combination, resulted in the need for surgery. Further, he submits, there are other factors at play including the nature and conditions of Mr Dyball's employment which have put strains on his left shoulder, according to his own evidence and the evidence of the experts.

83. With respect to the issue of notice of injury and claim, Mr Saul submits that the form completed by Mr Dyball in relation to the 2011 injury[41] shows that he knew that he had to, and how to, give notice of an injury and make a claim but he failed to do either in respect of his injuries.

84. Mr Saul submits that s 261(1) of the 1998 Act requires Mr Dyball to make a claim within six months after the injury. Time runs from when an applicant first became aware of the injury: s 261(6). Mr Dyball says he felt pain at the time of the alleged 2016 injury but never reported it. The respondent disputes that he gave notice of the 2017 injury as claimed. Mr Saul submits that Mr Dyball cannot rely on ignorance, because he knew how to make a claim, and he has given no evidence of any other reasonable cause.

The applicant's submissions

85. Mr Niven submits that the medical evidence shows Mr Dyball had an injury in 2011 to his rotator cuff injury and supraspinatus tendon. He then had a series of frank injuries referable to the 2011 injury. Mr Niven submits that common sense says they are related.

86. Mr Niven submits that Dr Stening says Mr Dyball "originally injured his left shoulder at work" in 2011 and noted the bursal sided tear of supraspinatus in association with acromioclavicular joint degenerative change and inferior spur. Dr Stening noted the incident "approximately three months ago" when Mr Dyball felt a sudden onset of pain while trying to remove a jammed bin. Further, he noted the recent scans which showed "complete tear of supraspinatus with retraction". As I understand this submission, it is that "originally" indicates the first link in a chain of causation.

87. In respect of the 2016 aggravation, Mr Niven submits it is "historical" in that it shows the deterioration in Mr Dyball's shoulder since the 2011 injury.

[41] Reply at page1

88. Mr Niven submits it is clear Mr Dyball was suffering worsening pain before he mowed the lawn in January 2018. Contrary to Mr Saul's submission that Mr Dyball felt pain while mowing the lawn, that is not Mr Dyball's evidence; it is that he felt pain on 5 January after he finished work, before the weekend, and the pain increased on Saturday night after mowing.

89. Mr Niven submits it is clear Mr Dyball sustained an initial injury in 2011 to the rotator cuff and supraspinatus tendon. Over the course of his employment, with the things he does, he has complained of ongoing pain referrable to that injury, and he sustained further injuries. By 2016, the evidence is that he had a full tear of the supraspinatus tendon. In Mr Niven's submission, there was a series of frank events which, applying a common sense approach as in *Kooragang*, are referable to the original injury.

90. Mr Niven submits that Mr Dyball continued to have pain after 2011. His evidence is that he continued having symptoms which would flare up from time to time. It is clear that they were referable to the 2011 injury and the tendon deteriorated over time until there was a complete tear in 2016.

91. Whether Mr Dyball reported the 2016 injury is, in Mr Niven's submission, irrelevant for the purposes of considering whether he suffered a work-related injury. Mr Dyball's evidence shows there was an incident sufficient for him to see his doctor and have an ultrasound. Mr Niven submits Mr Dyball had reasonable cause for not reporting the injury because he went on leave shortly after, the injury resolved while he was on leave, and he was able to return to full duties.

92. Mr Niven submits that what occurred in January 2018 was a "chronological benchmark" at which Mr Dyball suffered unusual pain a day later. It marked the onset of the acute pain which led to surgery. The surgery was reasonable and necessary as a result of the tendon completely detaching from the shoulder which caused the onset of intense pain and the operative intervention. It may be assumed that the complete retraction of the tendon identified on the scans occurred about 24 hours after Mr Dyball mowed the lawn but the evidence shows the pain had been increasing for three weeks or months (depending on the medical reports) leading up to the mowing incident which led to the complete detachment.

93. In Mr Niven's submissions, the root cause of what occurred later was the 2011 injury which led to the partial tear. The causal link over the years is obvious. It had clearly deteriorated by the incidents in 2016 and 2017. They were all injuries to same body part. It would be a nonsense to say the lawnmowing was the only thing that led to the need for surgery.

94. Mr Niven relies on *Strasberger Enterprises Pty Ltd trading as Quix Food Stores v Serna*[42] (*Strasberger*) at [20] in which, in the context of a work injury damages claim, Basten J considered three different injuries and referred to *Leppington Pastoral Co Pty Ltd v Juweinat*[43], and *Woolage v State of New South Wales*[44]. Basten J said the plaintiff was entitled to claim as the injury for which he sought compensation the condition which resulted from the three incidents in his employment.

95. Mr Niven relies also on the decision in *Trustees of Roman Catholic Church for the Diocese of Parramatta v Barnes*[45] (*Barnes*) in which the issue was the meaning of "injury" in s 66(1) of the 1987 Act and, specifically, whether that phrase is restricted to a single injury or can include more than one injury. DP Roche decided in that case it is not so restricted.

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[42] *Strasberger Enterprises Pty Ltd trading as Quix Food Stores v Serna* [2008] NSW CA 354
[43] *Leppington Pastoral Co Pty Ltd v Juweinat* [2002] NSWCA 440
[44] *Woolage v State of New South Wales* [2001] NSWCA 256
[45] *Trustees of Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWCCPD 35

96. Mr Niven submits that the authorities support the proposition that, when considering an injury involving the same pathology in the same employment, the ultimate consideration of the WPI relates to the incidents that have occurred regarding the same discrete pathology and same employment.

97. Mr Niven submits there is a clear connection between the various incidents at work and the condition which led to Mr Dyball needing surgery in 2018. In applying a common sense approach to causation, Mr Niven submits, it is relevant that Mr Dyball has always been motivated to work, has never shirked work, and paid for his own surgery when the insurer declined to so.

The respondent's submissions in reply

98. Mr Saul submits that *Barnes* cannot be relied on for the submission that the three injuries alleged are essentially the one injury. The present case is distinguishable because the evidence does not show the 2011 injury led to the pathological change in 2016. There is evidence of pathological change in 2016 but not what caused it. Even if an incident in 2017 is accepted, there is no evidence as to what pathological change occurred then.

99. Mr Saul submits there is no claim here for ongoing aggravation of the left shoulder due to conditions of Mr Dyball's employment, as Dr Conrad suggests, and the Commission cannot be satisfied there is an unbroken line of causation between the three events he relies on or that in total they gave rise to the need for surgery.

CONSIDERATION

100. "Injury" is defined, relevantly, in s 4 of the 1987 Act as follows:

> " 'injury' :
>
> (a) means personal injury arising out of or in the course of employment,
> (b) includes a "disease injury", which means:
>
> (a) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (b) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease,
> …"

101. Section 9A(1) of the 1987 Act provides that no compensation is payable in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury. Section 9A(2) sets out a non-exhaustive examples of matters that may be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury.

102. Mr Niven was clear that Mr Dyball does not rely on the disease provisions in s 4 of the 1987 Act. Accordingly, the relevant provision in this case is s 4(a).

103. The onus of establishing "personal injury" falls on Mr Dyball.

104. A “personal injury” is a “dramatic physiological change or disturbance of the normal physiological state” (Gleeson CJ and Kirby J in *Kennedy Cleaning Services Pty Ltd v Petkoska*[46], not necessarily sudden, but ascertainable or identifiable: *Military Rehabilitation and Compensation Commission v May*[47] . “Injury” refers to both the event and the pathology arising from it: *Lyons v Master Builders Association of NSW Pty Ltd*[48].

105. The standard of proof is on the balance of probabilities, meaning that I must feel an actual persuasion or satisfaction of the existence of a fact: *Nguyen v Cosmopolitan Homes.*[49]

106. The mere fact that a physiological change is somehow connected to an underlying disease process does not of itself prevent the change being classified as a “personal injury”: *Zickar v MGH Plastic Industries Pty Ltd*[50]. The fact that an event may be connected to an underlying disease does not prevent an injury from being a personal injury: *North Coast Area Health Service v Felstead*[51].

107. The issue of causation must be determined based on the facts in each case. The accepted view regarding causation was set out in *Kooragang* where Kirby J stated:

> “The result of the cases is that each case where causation is in issue in a worker’s 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.”

108. Considering a “common sense approach”, the High Court in *Comcare v Martin*,[52] said:

> “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 text construed and applied in its statutory context in a manner

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[46] *Kennedy Cleaning Services Pty Ltd v Petrovska* [2000] HCA 45
[47] *Military Rehabilitation and Compensation Commission v May* [2016] HCA 16
[48] *Lyons v Master Builders Association of NSW* (2003) 25NSWCCR 496
[49] *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246
[50] *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310
[51] *North Coast Area Health Service v Felstead*.
[52] *Comcare v Martin* [2016] HCA 43

> which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any "common sense" approach to causation which can provide a useful, still less universal, legal norm.
>
> Nevertheless, the majority in the Full Court construed the phrase "as a result of" in s.5A(1) as importing a "common sense" notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context and purpose."

109. While High Court expressed concerns about a "common sense" approach, it did not suggest it has no place in the application of the legislation to the facts of a particular case. In the end, the question is always whether the incapacity, medical expenses or loss "results from" the injury.

110. Turning to the facts of this case, there is no dispute that Mr Dyball sustained an injury to his left shoulder on 23 February 2011 in the course of his employment. On the same day, he consulted Dr Alam who initially thought he had a shoulder strain and certified him fit for suitable duties. Investigative scans on 23 February 2011 showed:

> "Subscapularis and supraspinatus tendinosis and a small bursal surface partial thickness tear of the supraspinatus tendon distally. Probable mild subacromial bursitis."

111. On 4 March 2011, Dr John Barlow certified[53] Mr Dyball fit for suitable duties from 4 March 2011 to 18 March 2011. Noting the results of the scans, he diagnosed left rotator tear and subacromial bursitis, and referred Mr Dyball for physiotherapy. In response to the insurer's questionnaire Dr Barlow said Mr Dyball was likely to have recovered from his injury by 18 March 2011. That is what apparently happened, and Mr Dyball was certified fit to return to pre-injury duties by 18 March 2011.

112. As Mr Dyball recalls, he did not in fact return to normal duties until "approximately April", after he completed physiotherapy. It is not surprising that he cannot recall the exact date more than eight years later, and nothing turns on a difference of two or three weeks.

113. Although Mr Dyball resumed normal duties within a matter of weeks, as Dr Barlow predicted, Mr Dyball's evidence is that he continued to have ongoing pain in his left shoulder. The symptoms "subsided but they never went away"; he had ongoing problems with his left shoulder from time to time and there were "many episodes" where it would flare up for a week or so and then settle down.

114. Dr Conrad and Dr Panjratan took histories that were broadly consistent with Mr Dyball's account of continuing symptoms in his left shoulder after 2011. Dr Conrad noted that Mr Dyball resumed work "despite ongoing pain and stiffness in his left shoulder". (He also noted that Mr Dyball "struggled on in pain" after the 2016 ultrasound revealed the full thickness tear, and continued having pain after he returned from holidays). Dr Panjratan recorded there was "always some discomfort in the shoulder, though not significant enough for him to go off work."[54]

115. I have no reason to doubt Mr Dyball's evidence. I accept that his symptoms persisted and he was never really pain-free after 2011, even though he had no time off and did not see his doctor or seek treatment for his left shoulder again for five years. I am satisfied that Mr Dyball has always been motivated to work and has continued to work despite continuing symptoms.

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[53] ARD at page 51
[54] Reply at page 11

116. Dr Conrad did not express an opinion specifically as to whether the partial tear of the supraspinatus tendon seen in 2011 would have had ongoing effects or would have healed. Dr Stening did not offer an opinion on this issue, and the general practitioners' notes do not assist. Dr Panjratan thought that "logically [it] "should have healed in time". He did not say how long "in time" might be. Significantly, in my view, however, he followed that statement by noting that "unfortunately" there were no follow up scans.

117. Considering that Dr Panjratan only put the likelihood of the partial tear healing as high as saying it "should" have healed, and there were no further diagnostic scans until 2016 to indicate whether it had, and considering that Mr Dyball continued to have symptoms in his left shoulder, I am satisfied, on the balance of probabilities, that it did not heal by 2016, or not completely.

118. Coming to August 2016, I have had considerable difficulty with the way in which the case has been pleaded, and the submissions on Mr Dyball's behalf. I agree that in many respects it has the appearance of a "nature and conditions" claim. Moreover, it is not clear to me why, in Mr Niven's submission, the 2016 injury is "historical".

119. That said, there is no dispute that the ultrasound in August 2016 showed Mr Dyball had a full thickness tear of both the supraspinatus and the subscapularis tendons (and other pathology). The subscapularis tear was not seen in 2011 but the supraspinatus tear was. It had clearly progressed by 2016. It was an identifiable change in physiology or pathology.

120. The cause of the change is not clear from the evidence. The pleaded injury description of injury is "Aggravated left shoulder due to heavy use in operating a steering wheel". Mr Dyball's evidence is that, in August 2016, "there was another episode" where he aggravated his left shoulder. Insofar as he described to Dr Conrad and Dr Panjratan what happened in 2016, I agree with Mr Saul that he appears to describe repetitive actions in the "nature and conditions" of his employment, rather than a particular occasion or event.

121. Dr Conrad took a history that Mr Dyball aggravated his left shoulder in about August 2016 "due to heavy use of the left arm in using the steering wheel". It would be unfair to over-analyse Mr Dyball's particular choice of words, or Dr Conrad's paraphrasing. That description might apply to a particular incident of use, or to repetitive use.

122. Dr Panjratan also took a history suggestive of increased pain as a result of repetitive actions. He recorded:

> "In the process of his work he had to get in and out of the cabin of the truck using the hand rail. While using the left hand to lever up he kept on aggravating the shoulder. He has short legs and the cabin of the truck is high, his arm would stretch and wrench the shoulder at times.
> He could not cope with the pain and consulted Dr Azmir …"

123. Dr Azmir's notes for 13 August 2016 and 3 September 2016, which record bilateral shoulder pain, apparently worse in the left, and then rotator cuff injury (presumably after the results of the ultrasound) make no reference to cause, in particular to Mr Dyball's employment. The Court of Appeal has cautioned about reliance on clinical notes. In *Winter v NSW Police Force*,[55] DP Roche said:

> "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant*

[55] *Winter v NSW Police Force* [2010] NSWCCPD 121

v Clancy [2007] NSWCA 349; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34; *King v Collins* [2007] NSWCA 122 at [34-36])."

124. All that can be inferred from Dr Azmir's notes is that Mr Dyball was experiencing sufficient pain in his left shoulder around August 2016 to consult him, and for Mr Azmir to think an ultrasound was warranted.
125. Dr Stening's reports do not assist. He does not mention anything occurring in 2016 and he does not appear to have had the 2016 scans available.

126. "Injury" in s 4 includes an injurious event and the pathology that caused it. In *Jaffarie*, DP Roche said, following *Lyons*, that the correctness of that statement has never been challenged:

> "… the Commission has consistently applied it in several decisions (see, for example, *Bouchmouni v Bakhos Matta t/as Western Red Services* [2013] NSWWCCPD 4 at [31]). Consistent with this approach, Giles JA (Hodgson JA and Brownie AJA agreeing) said in *Wyong Shire Council v Paterson* [2005] NSWCA 74 where his Honour explained (at [38]) that "[i]n general, a frank injury means a specific occasion of injury while a nature and conditions claim relies on the accumulated effect of a worker's activities. These, however, are descriptions of mechanisms for suffering an injury".
>
> In other words, an "incident" (an injurious event) is only a mechanism for suffering an injury and is not itself a s 4 injury. The relevant "injury" in s 4 is the pathology that has arisen out of or in the course of the employment. As explained [in *Kennedy*] a "personal injury" is "a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state". The cause of the injury (the injurious event) is "not the important matter" (Latham CJ in *Ward v Corrimal-Balgownie Collieries Ltd* [1938] HCA 70; 61 CLR 120 at 129) in determining the compensation payable."

127. In *Strasberger*, considering a submission that the 1987 Act requires an injury to be identified by reference to a particular incident, Basten J said at [22]:

> "If this analysis is to operate, it must do so in some circumstances but not others. For example, there will undoubtedly be injuries, falling within the definition of "injury" in s 4 of the Workers Compensation Act, which do not arise from a specific incident or event. The term "injury" includes a "disease" which, as is recognised by s 15, may be contracted by a gradual process. Other forms of personal injury, which may or may not constitute a disease, may result from exposure to work conditions over time. The elements of the definition, at least in pars (a) and (b), are not exclusive of each other: see Favelle Mort Ltd v Murray [1976] HCA 13; 133 CLR 580 at 588-589 (Barwick CJ); Zickar v MGH Plastic Industries Pty Ltd [1996] HCA 31; 187 CLR 310 at 329-330 (Toohey, McHugh and Gummow JJ). All that is required is that the injury arise out of or in the course of employment, or, in the case of a disease, be contracted in the course of employment. The contention that the injury must be connected with a specific incident or event harks back to the long since repealed requirement of the Workmen's Compensation Act 1916 (NSW) which referred to "personal injury by accident" arising out of and in the course of employment: s 5(1), discussed by Kirby J in *Zickar* at 339."

128. Considering the totality of the evidence, Mr Dyball's duties at the time, including heavy use of the steering wheel, that he had increased pain sufficient to see his doctor for the first time in five years, and that an identifiable pathological change was evident on ultrasound, I am satisfied that, more probably than not, his employment in 2016 aggravated the 2011 injury and caused the full thickness tear. I am satisfied that, more probably than not, the aggravation occurred sometime shortly before 13 August 2016 when Mr Dyball first attended on Dr Azmir in relation to his increased pain, and arose out of, or in the course of, his employment.

129. Coming to what occurred in or around September 2017, Mr Dyball describes a sudden onset of pain when trying to remove the jammed blanket. I do not think it matters that his claim was for injury in "late August/early September 2017" and in his statement, he said it occurred on 27 September 2017. I have no reason to doubt his evidence that an incident occurred as he describes around that time.

130. However, what does not appear from the evidence is that Mr Dyball sustained an injury within the meaning of s 4(a) of the 1987 Act at that time. He did not see his doctors or seek treatment and he had no time off work after the incident. That is not so surprising, given that he was evidently well-motivated to work and had not taken time off in the past on account of his symptoms. However, there is no contemporaneous or other medical evidence of a pathological change occurring around that time, or as a result of that event.

131. Dr Conrad said Mr Dyball aggravated his left shoulder again in August or September 2017 but he did not explain the basis for his opinion other than that was the history he took from Mr Dyball. Dr Panjratan's report was similar, noting only that Mr Dyball thought his pain became worse around that time when he tried to remove the jammed blanket.

132. Dr Stening's reports do not, in my view, assist. As far as the 2017 injury, he says only that "interestingly" Mr Dyball said he felt a strain in the shoulder at work in mid-August – early September when removing a jammed blanket from a roller.

133. I do not accept, as Mr Niven submits, that an injury in 2017 can be inferred as a matter of common sense. The totality of the evidence is that Mr Dyball felt a sharp pain at the time. He continued working. He did not see his doctor. There is no medical evidence of a physiological or pathological change in the left shoulder. Considering the totality of the evidence, I am not satisfied, on the balance of probabilities, that Mr Dyball sustained an injury to his left shoulder within the meaning of s 4(a) around August to September 2017.

134. Coming to the events of January 2018, Mr Dyball's evidence is that he finished work on Friday 5 January 2018, and "had noticed once again" pain in his left shoulder. It is not clear from his statement whether he felt pain during work, or only after but, in any event, the next morning it felt "a little better" and he mowed the lawn.

135. Contrary to Mr Saul's submission that he felt pain while mowing the lawn, Mr Dyball's evidence is that by Saturday night the pain had increased, and by Sunday morning he had "intense" pain in his left shoulder. He rang his boss on Monday morning and said he was unable to come to work. This appears to be the first occasion of such intense pain and the first time that Mr Dyball could not go to work on account of his left shoulder.

136. The MRI ordered by Dr Stening showed the rupture of the supraspinatus with retraction. Leaving aside for now the cause, none of the reports explain specifically the significance of "retraction" but Dr Panjratan explained that the tendon, which already had a full thickness tear (and degeneration) "gave way completely". That was an identifiable pathological change which, it appears, occurred around the time Mr Dyball was mowing the lawn or close to that time. In light of Dr Azmir's notes that he had been feeling pain in his left shoulder for approximately three weeks, it may have occurred earlier although the evidence suggests it was closer in time to when he mowed the lawn.

137. Dr Conrad and Dr Panjratan have different views as to whether mowing the lawn would have caused the changes seen on the MRI. It is not correct that Dr Conrad did not take a history of lawnmowing. He explained in his supplementary report that he did take that history. On the other hand, he did not explain his reasons for saying it made no contribution. Dr Panjratan's report indicates that he took a more detailed history of the time Mr Dyball spent mowing and that the lawn was on a slight gradient. He noted the mower was self-propelled and "did not need pushing" but he concluded that mowing "in a degenerate tendon with full thickness tear was enough for it to give way completely and retract ... in spite of using a self-propelled mower requiring minimal effort".

138. On balance, I prefer Dr Panjratan's opinion to that of Dr Conrad who states, without further explanation, that no contribution was made by any domestic activity such as lawn mowing. I find it more probable than not that using the mower on that weekend led the tendon to give way completely. That said, in Dr Panjratan's view, in August 2016, the pathology in the left shoulder, being the complete tear of the supraspinatus seen on the ultrasound, warranted MRI and surgery at that time. I am therefore satisfied that the pathology was well-advanced in 2016, that it probably required surgery at that time, and was not substantially altered in January 2018.

139. For completeness, I would add that I place no weight on Dr Chowdhury's medical certificates which state, without further explanation, that Mr Dyball initially sustained injury to his left shoulder and aggravated it on 6 January 2018. Dr Chowdhury does not appear to have known the details of the injury in 2011 or to been aware of what occurred in 2016 or 2017.

Substantial contributing factor

140. Submissions at the hearing focussed on causation, and neither counsel addressed on the issue of s 9A of the 1987 Act. I am satisfied, however, that I have sufficient information to determine this issue.

141. Section 9A provides:

> "(1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> **...**
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
>
> (a) the time and place of the injury,
> (b) the nature of the work performed and the particular tasks of that work,
> (c) the duration of the employment,
> (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
> (e) the worker's state of health before the injury and the existence of any hereditary risks,
> (f) the worker's lifestyle and his or her activities outside the workplace.

(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:

(a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,
(b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.

(4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies."

142. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree (*Dayton v Coles Supermarkets Pty Limited*[56]; *McMahon v Lagana*[57]) to be decided after a consideration of all the evidence. See also *WorkCover Authority of NSW v Walsh*[58].

143. Employment must be a substantial contributing factor to the injury, not to the incapacity, need for treatment, or loss: *Rootsey v Tiger Nominees*[59]. Section 9A involves a causative element and a causal connection that it real and of substance.

144. There is no dispute that Mr Dyball's employment was a substantial contributing factor to his injury in 2011. I am satisfied that it was also a substantial contributing factor to the 2016 injury. Mr Dyball had continued performing the same duties after 2011 that led to that injury, in particular the duties he described in detail to Dr Conrad and Dr Panjratan. He had performed those duties full-time for five years after the original injury. His evidence is that he had another episode of pain from heavy use of the steering wheel which was the activity that caused the 2011 injury. There is no evidence that he undertook any activities outside of work that were likely to have caused the injury.

145. Dr Conrad's view was that "100% attributabi!ity" for Mr Dyball's injuries rests with the "conditions of work and accidents" in his employment with the respondent. I have some difficulty with his opinion in relation to the 2016 injury because it is not clear how much he knew of that injury. I also have some difficulty with Dr Panjratan's report. He did not consider Mr Dyball's employment a substantial contributing factor to the left shoulder injury resulting in the need for surgery "some 7 years later". He based his opinion in part on his view that the partial thickness tear in 2011 "should have healed with time", and he does not appear to have considered the fact that it progressed to a full thickness tear in 2016. As well, he appears to have considered the lawnmowing to be the main factor, along with degenerative disease for his "present condition". Assuming that degenerative disease was a factor, that does not prevent a finding that Mr Dyball's employment also was a substantial contributing factor. I am satisfied that it was.

Medical expenses and weekly benefits

146. Counsel did not address the issues of whether the rotator cuff repair undertaken by Dr Stening was reasonably necessary as a result of workplace injury or whether Mr Dyball was incapacitated for the period claimed while he recovered. However, I am satisfied that I can determine both issues on the information before me.

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[56] *Dayton v Coles Supermarkets* [2001] NSWCA 153
[57] *McMahon v Lagana* [2004] NSWCA 164
[58] *Workcover Authority of NSW v Walsh* [2004] NSWCA 186
[59] *Rootsey v Tiger Nominees Pty Ltd* [2002] NSWCC 48

147. I have no reason to question Dr Stening's recommendation that surgery be carried out in March 2018. Dr Conrad said that, in view of the full thickness tear, the surgery performed was "reasonable and necessary". Dr Panjratan did not specifically offer an opinion, because he was not asked, but it is reasonable to infer from his statement that surgery was warranted in 2016, that he would have formed the same view, that surgery in 2018, which he described as "semi-urgent" was reasonably necessary.

148. I am satisfied that the medical expenses related to the surgery performed by Dr Stening incurred were reasonably necessary as a result of the combined effects of Mr Dyball's injuries in 2011 and 2016.

149. Counsel also did not address in particular the claim for weekly benefits. As pleaded, Mr Dyball claims weekly benefits compensation from 15 January 2018 to 15 April 2018 pursuant to s 36 of the 1987 Act, and from 16 April to 30 July 2018 pursuant to s 37. His agreed PIAWE is $1833.78.

150. According to Mr Dyball's evidence, he was off work from 8 January to 29 January 2018 during which time he was paid sick leave. He returned to work on 30 January and worked until 19 February 2018 during which time he received normal pay. From 20 February to 30 July 2018 he was off work during which time he used his sick leave and long service leave. He resumed normal duties on 31 July 2018.

151. There does not appear to be a medical certificate for the period 8 January to 19 January 2018 but, according to the agreed Summary of Pay Slips, Mr Dyball was off work from 8 January to 29 January 2018. Dr Azmir issued a non-Workcover certificate for the period 22 January to 26 January 2018 certifying him unable to work. Dr Chowdhury issued Workcover certificates certifying Mr Dyball fit for suitable duties for the period 30 January to 23 February 2018, which was consistent with Mr Dyball's evidence that he returned to work during that period. There does not appear to be medical evidence specifically concerning the period between 23 February 2018 and 27 March 2018 when Dr Stening performed surgery but the Summary of Pay Slips records that Mr Dyball was off work from 20 February to 30 July 2018. The Operation Record indicated that Mr Dyball was to remain off work "until further notice".[60]

152. It was agreed between parties at the hearing that the Summary of Pay Slips accurately records Mr Dyball's time off after 8 January 2018 and that, if his claim is successful, the practical effect will be that he is entitled is to recrediting of leave used during the period 15 January 2018 to 30 July 2018.

153. There will be an order that Mr Dyball is entitled to weekly benefits compensation for the period 15 January 2018 to 30 July 2018. I note that the PIAWE is agreed and that the practical effect of the order will be to recredit Mr Dyball the leave entitlements he used during that period. Given that there may be some uncertainty regarding the precise dates, parties have liberty to apply in the event that they are unable to reach agreement as to the calculation of his entitlement.

Notice of injuries

154. Section 254(1) of the 1998 Act relevantly provides that compensation is not recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury. Failure to give notice as required is not a bar to recovery of compensation if it is found that there are special circumstances: s 254(2).

[60] ARD at page 66

155. Section 254(3) provides, relevantly, that each of the following constitutes special circumstances:

> (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
>
> (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause.

156. The onus is on Mr Dyball to prove that circumstances exist to excuse his failure to make a claim, and by extension, to give notice to his employer: *Bluescope Steel Ltd v Eason*[61]. He concedes he did not give the respondent notice of the August 2016 injury but it is submitted that his failure was reasonable in circumstances in which he was due to go on holidays and the pain had subsided by the time he returned to work three weeks later.

157. I accept, as Mr Saul submits, that Mr Dyball's claim in 2011 indicates that he was aware of the procedure for notifying and making a claim. I agree that his failure to give notice of the 2016 injury was not caused by ignorance, mistake or absence from the State. I have some difficulty with Mr Niven's submission that his failure to give notice was reasonable because his symptoms subsided during the three weeks he was on leave; the pain was sufficient for him to see his doctor and for Dr Azmir to refer him for an ultrasound which showed pathological change.

158. On the other hand, the evidence indicates that Mr Dyball has consistently been motivated to return to work and continued working despite pain in his left shoulder and "flare-ups" of pain over the years. Even though the increased pain in 2016 led him to see his doctor, I accept that he did not regard it as out of the ordinary when it subsided while on leave. Moreover, according to Dr Panjratan, he was not referred for MRI and surgery, both of which were indicated at that point. Had he been so referred, it would be difficult to see why he would not have given notice of injury. As it was, I accept that he did not give it further thought when he settled down. Considering all the circumstances, I am satisfied they provide reasonable cause for Mr Dyball's failure to give notice of injury.

159. Although not asserted by Mr Niven, the respondent does not suggest it has been prejudiced in respect of the proceedings by Mr Dyball's failure to give notice of injury in 2016 and I am satisfied that it was not. In the circumstances, the delay has not been substantial. Contemporaneous scans were available to the assessing doctors and, in particular, regardless of his opinion as to what came later, Dr Panjratan had the 2016 scans available and considered that an MRI and surgery were indicated at that time.

160. I am satisfied that there were special circumstances as provided by s 254(2) and that Mr Dyball's claim is not barred by reason of his failure to give notice of the 2016 injury.

161. Section 261(1) of the 1998 Act relevantly provides that compensation cannot be recovered unless a claim for the compensation has been made within six months after the injury or accident happened. By s 261(4), failure to make claim within the required period is not a bar to compensation if it is found to have been occasioned by ignorance, mistake, absence from the State or other reasonable cause, and if the claim is made within three years after the injury or accident happened. For the purposes of s 261, if an injured worker first becomes aware of an injury after it was received, the injury is taken to have been received when the worker first became so aware: s 261(6).

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[61] *Bluescope Steel Ltd v Eason* [2007] NSWCCPD 172

162. Although according to the ARD, Mr Dyball claimed compensation for the 2016 aggravation "shortly thereafter", it does not appear the claim was actually notified until his solicitors' letter to the respondent dated 21 March 2019. In the meantime, a claim had been made for permanent impairment which did not include the 2016 or 2017 injuries. As I understand Mr Niven's submissions, Mr Dyball's symptoms had settled by the time he returned from holidays and he did not give further thought to giving notice or claiming compensation. It is not clear when it was first discussed with his solicitors and, unfortunately, the reason for the delay is not dealt with in his statement of evidence.

163. The delay is considerable and comes close to the three years allowed by s 261(4). A stronger or clearer argument might be expected as to why compensation is not barred. All that said, I think it fair in the circumstances, to accept there was reasonable cause for the delay. Mr Dyball has continued to perform relatively heavy duties despite continuing symptoms. He appears to be motivated to work and probably quite stoic. Dr Panjratan evidently thought the ultrasound in 2016 should have been followed up but it was not. It is probably understandable that Mr Dyball did nothing further himself. The issue is finely balanced but, in the end, I am satisfied that the totality of the circumstances in which the 2016 injury occurred provided reasonable cause for Mr Dyball's failure to claim compensation within six months.

164. In respect of the claimed 2017 injury, Mr Dyball has provided a sworn statement that he reported incident to his supervisor on his return to the yard that day, and again the following Monday. In a separate letter, he has identified three other persons whom he says were present at the time and says his supervisor told him to "go home and ice it", which he did.

165. Nothing in Mr Dyball's evidence or doctors' reports suggest he is not a witness of truth. I accept his uncontradicted evidence that he notified his supervisor of this incident and that he had hurt his left shoulder. However, for the reasons set out above, I am not satisfied that he suffered an injury related to his employment in or around September 2017.

DETERMINATION

166. The Commission determines:

(a) The name of the respondent is amended to Suez Recycling and Recovery Pty Limited.

(b) The applicant sustained an injury to the rotator cuff of the left shoulder arising out of or in the course of his employment with the respondent on 23 February 2011.

(c) The applicant sustained a further injury to the rotator cuff of the left shoulder in August 2016 as a result of his employment with the respondent.

(d) The costs of the surgery to the applicant's left shoulder on March 2018 were reasonably necessary as a result of the injuries in 2011 and 2016.

(e) The applicant was totally or partially incapacitated from 15 January 2018 to 30 July 2018 as a result of his injuries.