WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2217/19**
Applicant: **Van Nguyen**
Respondent: **Pasarela Pty Ltd (External Administration)**
Date of Determination: **11 September 2019**
CITATION: **[2019] NSWWCC 297**

The Commission determines:

1. The applicant suffered an injury to his left wrist in the course of his employment with the respondent on 7 October 2015.

2. As a result of the injury in paragraph 1 above, the applicant suffered a consequential condition to his right upper extremity (shoulder).

3. The injury to the left upper extremity (wrist) and consequential condition to the right upper extremity (shoulder) is to be referred to an Approved Medical Specialist for determination of the level of permanent impairment arising from the following:

Date of injury:	7 October 2015.
Body system referred:	left upper extremity (wrist); right upper extremity (shoulder)
Method of assessment:	whole person impairment.

4. The documents to be referred to the Approved Medical Specialist to assist in their consideration are to include the following:

   (a) The Application to Resolve a Dispute and attachments;
   (b) The Reply and attachments, and
   (c) This Certificate of Determination and Statement of Reasons.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer

As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Van Nguyen (the applicant) seeks lump-sum compensation and weekly benefits arising from alleged physical injuries to his left upper extremity (wrist) and lumbar spine while at work on 7 October 2015. As a result of overuse of the right upper extremity, the applicant alleges he suffered consequential condition in his right shoulder and secondary psychological injuries.

2. The applicant commenced employment with Pasarela Pty Ltd (the respondent) in or about 2012 on a full-time basis. The respondent's business was that of a clothing and fashion importer, and the applicant was employed as a picker and packer in a warehouse environment.

3. The applicant alleges he works approximately seven and a half hours per day, five days per week. He said his duties included unloading and unpacking boxes of clothing, repacking clothing items according to orders, repetitive heavy lifting of boxes weighing in excess of 20 kg, repetitive manual work involving both hands, scanning label items on clothes and forklift driving. He said he needed to perform some overhead work in order to access certain boxes on the shelves and his role also involved prolonged standing and sitting, as well as bending and twisting of his torso.

4. The applicant alleges that on 7 October 2015, he started his day as normal, however, at approximately 11.00 am he was standing on a hand trolley, in order to look into a box on a shelf which was above shoulder height. As he stepped back down to the floor of the hand trolley, he says his left shoe became stuck in the trolley and as a result he fell backwards, landing on his buttocks and using his hands which were outstretched to break his fall. The applicant said he felt immediate pain in his left wrist, right wrist, right shoulder, left shoulder and lower back region. He was helped to his feet by his co-workers, notified his employer of the injury and was advised to see his doctor.

5. The applicant consulted his treating general practitioner, Dr Nguyen on the same day and was referred for an x-ray of his left wrist.

6. According to the applicant, he was away from work for approximately one week following the incident and when he returned, he worked approximately three days per week on restricted hours and light duties, which consisted of scanning barcodes of clothing items and placing them in boxes. He says he could not cope with even these light duties and restricted hours due to the pain in his right shoulder. The applicant says that in or about October 2015, Dr Newman certified him as unfit to work owing to the pain in his right shoulder and wrist.

7. The applicant was made redundant by the respondent in February 2016, as the company became insolvent.

8. The applicant made claims in relation to his left wrist, low back and right upper extremity. He commenced proceedings in relation to those injuries in February 2018, at which time it was alleged all of the body parts had suffered frank injury within the meaning of section 4 of the *Workers Compensation Act 1987* (the 1987 Act).

9. On 19 May 2017, the respondent's insurer issued a section 74 notice denying liability with respect to the alleged injuries to the applicant's right shoulder and lower back. The injury to the left wrist was admitted. That notice alleged that the applicant did not suffer an injury

arising out of or in the course of his employment with the respondent as required under section 4 of the 1987 Act, and that his employment with the respondent was not a substantial contributing factor to any injury which he may have sustained, as required under section 9A of the 1987 Act.

10. The applicant brought proceedings number 765/18 in relation to all of his alleged injuries, seeking lump-sum compensation in respect of them. The respondent maintained its denial of liability with respect to the lower back and right upper extremity. On 16 May 2018, Arbitrator Wynyard heard that matter, and delivered extemporaneous oral reasons in which he made an award in favour of the respondent, on the basis that the applicant did not suffer injuries to his right upper extremity and lower back, and noting that the accepted injury to the left upper extremity did not, on the applicant's own case, meet the threshold requirements of section 66 of the 1987 Act.

11. The applicant then commenced further proceedings in 2019, which were discontinued on the date of hearing on 3 March 2019. The applicant then commenced these proceedings by way of Application to Resolve a Dispute (the Application) on 8 May 2019. The current proceedings alleged, as already indicated, that the right shoulder injury is a consequential condition as opposed to a frank injury.

12. On 31 May 2019, the respondent filed a Reply, which not only maintained the earlier denial with respect to injury and consequential condition, but also alleged the applicant is estopped from having any entitlement to compensation in respect of any alleged injury or consequential condition to the lumbar spine and right shoulder as a result of the decision of Arbitrator Wynyard in the previous proceedings.

13. I note that at the telephone conference of this matter, the claim for weekly benefits was discontinued, and the only claim before the Commission was that for lump-sum compensation.

ISSUES FOR DETERMINATION

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

    (a) Whether the applicant is estopped from bringing a claim in respect of either injury or consequential condition relating to the lumbar spine and/or the right shoulder;

    (b) Whether further referral to an Approved Medical Specialist (AMS) is barred by virtue of the operation of section 66(1A) of the 1987 Act, and

    (c) In the event the applicant is neither estopped nor a further referral is barred, did the applicant suffer a consequential injury to his right upper extremity.

15. I note the applicant's claim for lump-sum compensation relates only to the left upper extremity (left wrist) and right upper extremity (right shoulder). The alleged injury or consequential condition to the lumbar spine does not give rise to an allegation of whole person impairment and accordingly is not an injury or condition which, if found in the applicant's favour, will be referred to an AMS.

PROCEDURE BEFORE THE COMMISSION

16. The parties attended a hearing on 16 July 2019. On that occasion Mr B Carney of counsel appeared for the applicant and Mr M Strachan, solicitor, appeared for the respondent.

17. I am satisfied that the parties to the dispute understand the nature of the Application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all

of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

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

    (a) The Application and attached documents, and
    (b) The Reply and attached documents.

19. The respondent provided the Commission with a written outline of submissions at the hearing. The applicant provided a list of authorities to the Commission, following which further submissions were made by the respondent on 19 July 2019 in writing and the applicant made submissions in Reply to those further submissions of the respondent on 22 July 2019.

Oral evidence

20. No oral evidence was called at the hearing.

Respondent's submissions

21. Mr Strachan set out the history of the matter and noted the three sets of proceedings which had taken place. He drew the Commission's attention to the decision of Arbitrator Wynyard, who found an award for the respondent in relation to the alleged lumbar spine, right shoulder and wrist and left shoulder injuries. Mr Strachan took the Commission to Arbitrator Wynyard's previous decision which is found at page 201 of the Reply.

22. The respondent's submission was the applicant's claim must fail. Broadly speaking, Mr Strachan set out three bases founded on the doctrine of an estoppel which the respondent based its defence upon. They were:

    (a) Res judicata, namely the matters between the parties have been determined;

    (b) If there is no res judicata, the right shoulder injury has clearly been determined and accordingly an issue estoppel arises, and

    (c) The existence of the consequential condition must have been known to the applicant before the decision of Arbitrator Wynyard, and the failure to present the consequential condition in the earlier proceedings gives rise to an Anshun estoppel.

23. In relation to the question of res judicata, Mr Strachan referred the Commission to the decision of President Judge Phillips in *Fourmeninapub Pty Ltd v Booth* [2019] NSW WCCPD 25 (6 June 2019) (*Booth*). Mr Strachan set out the President's discussion concerning the various forms of estoppel and noted the indicia in relation to res judicata are as follows:

    (a) A judicial decision has been pronounced;

    (b) A Certificate of Determination has been issued;

    (c) There is no dispute as to the jurisdiction of the Commission in making the decision;

(d) The decision is final and on its merits, and

(e) The previous proceedings determined the same question (in this matter, the entitlement to lump-sum compensation).

24. Mr Strachan submitted that there was an issue of estoppel with respect to the injuries to the right shoulder and lumbar spine, which he said had been determined by Arbitrator Wynyard in the previous proceedings. He referred the Commission to Arbitrator Wynyard's decision in the previous proceedings and in particular to the following paragraph found at line 14 of page 209 of the Reply:

> "I cannot be satisfied that the injury to the right wrist, the shoulders and the lumbar spine are connected to the injury and, in that respect, there will be an award for the respondent."

25. The respondent submits the decision by Arbitrator Wynyard in the previous proceedings, and in particular the paragraphs at page 209 of the Reply meet the requirements for issue of estoppel. Mr Strachan then noted President Phillips' discussion of the three indicia for the issue of estoppel in Booth at [91]:

(a) The same question has been decided;

(b) The decision reached was final; and

(c) The parties in both sets of proceedings are the same.

26. In relation to Anshun estoppel, Mr Strachan referred to the respondent's written submissions from [15] and following. He noted the dispute provisions of the Workers Compensation Legislation place a significant onus on an insurer to provide precise reasons why a claim for compensation is disputed. He submitted the respondent had met this obligation and had issued, prior to the first proceedings, section 74 notices dated 19 March 2017 and 2 January 2018, together with a section 78 notice which was issued on 13 December 2018 and 18 April 2019.

27. The section 74 notice which was dated 2 January 2018 (before the first proceedings were commenced) denied that the applicant had suffered an injury or a consequential condition to his lumbar spine, right upper extremity and left upper extremity as a result of the injury on 7 October 2015. The respondent said that this section 74 notice was the subject of Arbitrator Wynyard's determination, and the arbitrator's finding that "I cannot be satisfied that the injury to the right wrist, the shoulders and the lumbar spine are connected to the injury and, in that respect there will be an award for the respondent" means the question of consequential condition was in issue in those proceedings, together with a question of frank injury.

28. Mr Strachan referred the Commission to the decision of Arbitrator Wynyard in *Karen Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWWCC 215 (*Israel*). In that matter, there were consent findings entered in the first proceedings, and a consequential condition was later pleaded. The applicant was unsuccessful in the second proceedings in seeking to rely upon a consequential condition, because she was aware when the first proceedings were brought as to the nature of the injury and its true onset.

29. Mr Strachan submitted there was no explanation as to why the alternative position of a consequential injury was not raised in the first proceedings and that the applicant was clearly on notice before those proceedings were issued in relation to the right shoulder and lumbar spine injuries, but decided not to press the question of consequential condition at that time. He submitted that it would have been clear to anyone turning their mind to the nature of the onset of the applicant's conditions and symptoms that he may well have been suffering a

consequential condition, and that the question of consequential condition should have been raised in the first proceedings. Concerning the applicability of section 66(1A) of the 1987 Act, Mr Strachan conceded that on the medical evidence relied on by the applicant in these proceedings, the left wrist injury can now arguably meet the whole person impairment threshold. However, Mr Strachan submitted that the applicant has already had one claim in relation to the left wrist injury and is therefore disentitled to seek for that injury to be referred to an AMS. In so submitting, Mr Strachan relied upon the decision of *Cram Fluid Power Pty Ltd v Green* [2014] NSWWCCPD 84 (*Cram Fluid*).

The applicant's submissions

30. In relation to estoppel, Mr Carney noted that res judicata is an estoppel on the pleadings and that a determination on the merits had not taken place regarding consequential condition in the first proceedings. He submitted there accordingly cannot be a res judicata in this matter.

31. Mr Carney submitted that the same arguments apply in relation to issue estoppel, however, conceded that the lower back injury will not be subject to any referral. From a practical point of view, this does not affect the applicant's claim for lump-sum compensation in these proceedings, as the lower back injury does not sound in whole person impairment even on the applicant's own case.

32. Concerning Anshun estoppel, Mr Carney noted that the line of authority relating to those principles was brought about for public policy reasons. He noted the decision in *Booth* related to an allegation of a psychological injury in the nature of post-traumatic stress disorder and a finding of aggravation of bipolar disorder. He submitted that *Booth* was capable of differentiation from these proceedings on the basis that it was a case concerning a disease rather than a consequential condition. Mr Carney said that in this matter, the applicant was now pleading for the first time a consequential condition which arises from the admitted injury to the left wrist. Mr Carney took the Commission to paragraph 90 of the president's decision in *Booth*, which reads as follows:

> "90 Issue estoppel may arise as a consequence of a state or fact of the law being determined, which would prevent a party from bringing, or defending, a claim in relation to a different benefit. In *Thompson v George Weston Foods* [1990] NSWCC 18, Chief Judge McGrath observed:
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> > 'It is clear that issue estoppel can arise as a consequence of an adjudication on a particular issue, which would prevent a party bringing, or defending, a claim in relation to a different benefit. I do not consider that there is any rule which would prevent a worker bringing an action claiming one type of benefit, and living another type of benefit for a time, or other, adjudication. In doing this he may in some cases risk being penalised in costs, or risk failing on an issue which would debar the other claim. If he was on the issue of injury he could not succeed in gaining compensation for a consequential benefit, whether it was included in the original Application, or not.'"

33. Mr Carney said the quoted paragraph from *Thompson* clearly demonstrates that there is no need for a worker to explain why they have changed from pleading a frank injury under section 4 of the 1987 Act to a consequential condition, and is likewise authority for the proposition that it has never been the case that an applicant is precluded from coming back and raising consequential condition.

34. The applicant noted that the original report of Dr Dias, upon which he relied indicated the body parts at issue in these proceedings were frank injuries, and took the Commission to a paragraph of the relevant doctor's report page 76 of the Reply, where the doctor said:

> "In summary, I believe that Mr Nguyen's employment with Pasarela Pty Ltd was and remains the main substantial contributing factor to his injuries affecting his lumbar spine, right shoulder, left shoulder, left wrist and right wrist. Mr Nguyen did not have any pre-existing injuries or previous known conditions affecting these regions prior to the frank incident on 7 October 2015. He has experienced chronic symptoms of pain, stiffness and discomfort affecting these regions on a day-to-day basis over the course of the past 20 months. Therefore I believe that his employment remains a substantial contributing factor to his compensable physical injuries."

35. Mr Carney noted that at no stage did Dr Dias indicate that there was a consequential condition to the applicant's right wrist, and for that reason alone there cannot be said to be enough evidence to grant an Anshun estoppel in this matter. He said that as the president noted in Booth, it would be improper to run a case if there was no evidence, and when the first proceedings were commenced by the applicant no evidence was available to him to run a consequential condition claim.

36. Mr Carney submitted that the Certificate of Determination from the previous matter makes a determination in relation to the applicant's left wrist injury, however, at that time the applicant's evidence did not provide a basis for referring that injury to an AMS as the applicant's assessed level of whole person impairment at that time did not exceed the 10% threshold.

37. Concerning section 66(1A), Mr Carney submitted that consistent with the decision of Deputy President Roche in *Woolworths Ltd v Stafford* [2015] NSWWCCPD 36 (*Stafford*), a completed claim is defined as one where compensation has been paid. He said that this was not the case in this matter, as the claim for permanent impairment in relation to the left wrist had not been determined. Mr Carney contrasted the circumstances of this matter with those in *Yildiz v Fullview Plastics Pty Ltd* [2019] NSWWCCPD 24 (*Yildiz*). In that case, it was held that a claim may be deemed completed where it was made for a whole person impairment of greater than 11% and found to be less than the threshold amount. Mr Carney noted that in this matter, there is no finding as to the whole person impairment of the accepted injury. Rather, an initial claim was made which was never the subject of an assessment by an AMS, and now a further one is being pursued relying upon the report of Dr Endrey-Walder dated 5 November 2018, found at page 64 of the Application.

38. Rather than the applicant's claim for the accepted injury having been completed, Mr Carney submitted that it had been in effect amended because it had never been sent to an AMS for determination. Mr Carney submitted the circumstances of this matter were similar to those in *Gilliana v Souvenir World (Airport) Pty Ltd* [2018] NSWWCC 116, where senior Arbitrator Capel dealt with questions of a number of claims which were held to be amended, notwithstanding the second letter of claim failing to specify that it was "an amended claim".

39. In summary, Mr Carney submitted that, there being no completed decision relating to the degree of permanent impairment to applicant's left wrist, the claim for that injury has effectively been amended and accordingly can be referred to an AMS for determination.

40. In relation to the question of consequential condition, Mr Carney referred to the applicant's three statements, the last two of which deal with the question of consequential condition. He noted the supportive medical evidence of Associate Professor Myers and Dr Lam.

41. Mr Carney noted that Dr Lam began treating the applicant in relation to the right upper extremity on 23 March 2017, some 15 months post injury. He submitted this was consistent with the main injury being that to the left upper extremity, and the right then suffering a consequential condition as a result of overuse. In summary, Mr Carney submitted the preponderance of the medical evidence supports the finding of consequential condition in the right shoulder. A discussion of the medical evidence in this matter is found later in these reasons.

The respondent's submissions in Reply

42. In relation to the various estoppels, Mr Strachan submitted that the only person who could know of the onset of the symptoms in his right upper extremity is the applicant. He noted that at paragraphs 27 and 28 of the applicant's first statement, he described being in immediate pain, however, in his second statement, after the finding was made against him by Arbitrator Wynyard in the first proceedings, it says that the symptoms came on later. Mr Strachan submitted the applicant must have known when his symptoms came on before the first proceedings were commenced, and the fact is the applicant gave a different history to the doctors in relation to those proceedings to that provided in this matter.

43. In relation to the issue of consequential condition, Mr Strachan noted that the applicant gives an initial history of onset of right shoulder symptoms straight after the injurious event. He submitted that it was not open to the applicant to return to the Commission and now argue the problem has only started after several months or years and is a consequential condition. He impressed upon the Commission the report of Dr Pillemer, Independent Medical Examiner (IME) for the respondent, who described the applicant's presentation as bizarre and prone to exaggeration.

44. Mr Strachan submitted that the Commission would give little weight to the applicant's statements and that the initial comments relating to bilateral upper extremity injuries have not been explained, and accordingly the Commission could not be satisfied that there was a consequential condition. He noted that the applicant's general practitioner Dr Nguyen had refused to comply with the direction for production in the previous proceedings and that his records are not available. Mr Strachan submitted that in order to decide whether the applicant was suffering from a frank injury or a consequential condition, those records would be fundamental and without them the Commission's task is made more difficult.

Summary of the issues

45. It follows that if one of the estoppels raised by the respondent is successful, then the applicant's claim will fail. If, however, none of the estoppels apply, then the Commission will need to determine the applicability of section 66(1A). Should that section apply, the applicant's claim would likewise fail, however, in the event that section is not applicable to this matter, the Commission will then have to make a determination as to whether the applicant suffered a consequential condition to his right upper extremity (shoulder). If the Commission finds against the applicant on the consequential condition, then only his claim in relation to the left wrist will be referred to an AMS. Should a finding be made in favour of the applicant on the question of consequential condition, then both the left wrist and right shoulder injuries will be referred to an AMS for assessment of permanent impairment.

46. Given the discreet legal issues raised and that the factual background to the proceedings is largely uncontroversial, it is appropriate to deal with the alleged arguments in turn, and in the order raised in the respondent's submissions.

DISCUSSION

Res Judicata

47. The respondent bears the onus of proving the existence of an estoppel or res judicata. The doctrine of res judicata (also known as "cause of action" estoppel) provides that a cause of action which has been determined by a court of competent jurisdiction, or by a lawfully constituted tribunal, may not be re-litigated.

48. In *The Doctrine of Res Judicata* by Spencer Bower, Turner and Handley, 3rd edition, 1996 (Spencer Bower), the authors (at 19) specify the constituent elements of a res judicata estoppel:

- The decision was judicial in the relevant sense;
- It was in fact pronounced;
- The tribunal had jurisdiction over the parties and the subject matter;
- The decision was:
  (a) final, and
  (b) on the merits;
- It determined the same question as that raised in the later litigation; and
- The parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.

The constituent elements will be considered in turn.

49. It is necessary that the preceding decision (in respect of which res judicata is asserted) "was pronounced according to judicial principles" and emanated from "a tribunal in the exercise of its adjudicative functions": Spencer Bower (at 20). The authors (at 21) reject "the antiquated view that only a court of record can be a judicial tribunal" for the purposes of the application of the res judicata doctrine.

50. Arbitrators in the Commission would ordinarily consider themselves bound by res judicata estoppels emanating from judicial decisions, providing all the constituent elements of the doctrine have been met.

51. A judicial decision is noted by the authors of Spencer Bower (at 30) to include judgments, orders, decrees, sentences, judicial declarations, and the like, whether the decision was an issue of fact, law, or both fact and law, whether the jurisdiction was original or appellate, and a decision resulting from an equal division of the tribunal.

52. The provision at section 354 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), that the Commission "is not bound by the rules of evidence but may inform itself on any matter in such manner as the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits", does not detract from the judicial nature of its decisions. The authors of Spencer Bower (at 23) note that the "decisions of a statutory tribunal may be 'judicial' for present purposes, although there are no pleadings and it is not bound by the rules of evidence or legal procedure".

53. The respondent submits the applicant's current cause of action for lump sum compensation has already been determined by the Commission in the previous proceedings.

54. Dealing with the requirements for res judicata as set out by President Judge Phillips in *Booth*, there seems to me little doubt the first four prerequisites are made out, namely:

- A judicial decision has been pronounced;
- A Certificate of Determination issued;
- There was no issue Arbitrator Wynyard had jurisdiction to make the previous decision, and
- The decision was a final one made on the merits.

55. The contentious question on the issue of res judicata in this matter is whether the previous proceedings determined the same question. In my view, they did not. The respondent characterised the question for determination as the applicant's entitlement to lump sum compensation, however, with respect I do not agree with that characterisation.

56. Where a question has been decided by a tribunal or court in proceedings between particular parties (the prior proceedings), one of those parties will only be able to assert res judicata estoppel in subsequent proceedings if a question to be decided in those subsequent

proceedings is identical to that decided in the prior proceedings. According to Browne LJ in *Turner v London Transport* [1977] ICR 952 (Court of Appeal) it is for the party who seeks to rely on the estoppel to establish the relevant identity of the question previously decided, and to be decided in the subsequent proceedings. In this matter, the respondent sought to categorize that question as the applicant's entitlement to lump sum compensation. For the following reasons, I disagree with that categorization.

57. It is well known that the requirements for a finding of injury pursuant to section 4 of the 1987 Act, which was the basis on which the applicant brought the prior proceedings, are different to those for a finding of consequential condition. As has been noted in decisions such as *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 (*Castro*), what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro* a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

58. Consistent with *Castro*, the decision in *Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear* [2014] NSWWCCPD 47 (*Kear*) added:

> "In any event, the authorities do not support the proposition that, on its own, an elevation in blood pressure is a personal injury. That is because, without more, it is not a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state. It is no more than a temporary physiological change in the body's functioning, similar to the atrial fibrillation that occurred in Castro, without any accompanying lesion or pathological change (*Castro* at [138])." (at [60])

59. The requirements for establishing a consequential condition are different, and less onerous than the requirements of establishing an injury pursuant to section 4 of the 1987 Act. In *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 (*Kumar*), Deputy President Roche dealt with the issue of whether the injured worker's shoulder condition resulted from mobilising whilst recuperating from accepted back surgery. At [35], Roche DP stated:

> "By asking if Mr Kumar has suffered a s 4 injury to his right shoulder, the Arbitrator erred in his approach and asked the wrong question. This error affected his approach to the medical evidence and his conclusion. Mr Kumar's claim was always, as the respondent has conceded on appeal, that the right shoulder condition, and the need for surgery, resulted from the accepted back injury. It was not necessary for him to prove that he suffered a s 4 injury to his right shoulder."

60. Likewise, the decision of Deputy President Snell in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23 (*Brennan*) dealt with the question of consequential condition at [100] and following:

> "100. There have been a number of Presidential decisions dealing with the nature of claims in respect of consequential conditions. The principles are described in a number of these decisions, for example *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 (Moon) and *Kumar v Royal Comfort Bedding* [2012] NSWWCCPD 8 (Kumar). It is unnecessary for a worker alleging such a condition to establish that it is an 'injury' (including 'injury' based on the 'disease' provisions) within the meaning of s 4 of the 1987 Act.
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> 101. In Moon (involving a compensable injury to the right shoulder, allegedly resulting in a consequential condition of the left shoulder) Roche DP at [44]–[46] described what is required:

'44. The evidence in support of this allegation is brief but clear. It is obvious that Mr Moon has experienced significant restrictions in the use of his right arm and shoulder for several years. It is not disputed that that restriction has resulted from his employment with Conmah. As a result, he has used his left arm and shoulder to compensate for his right shoulder condition. Therefore, Mr Moon is claiming compensation for a consequential loss. That is, a loss or impairment that he alleges has resulted from his previous compensable injury to his right shoulder (see Roads & Traffic Authority (NSW) v Malcolm (1996) 13 NSWCCR 272).

45. It is therefore not necessary for Mr Moon to establish that he suffered an "injury" to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an "injury" to his left shoulder in the course of his employment with Conmah they asked the wrong question.

46. The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss "resulted from" the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648).'

102. In Kumar, one of the qualified medical witnesses approached the issue of whether there was a consequential condition of the right shoulder, by asking whether the worker had suffered a 'work related injury' to that shoulder and whether employment was a substantial contributing factor to the condition of that shoulder. Roche DP at [57] said of the evidence of that medical witness:

'Even assuming, as the respondent has urged, that Dr Wallace rejected the totality of the claim for "consequential loss" in respect of the right shoulder, his failure to address the correct issue, and his focus on whether Mr Kumar suffered a work related injury to his right shoulder, means that his report is fundamentally flawed. For these reasons, the Arbitrator should have rejected Dr Wallace's conclusion.'"

61. The authorities disclose that determining whether an applicant has suffered an injury to a given body part requires the Commission to address different considerations to those which it must address if an applicant pleads they have suffered a consequential condition. In the latter case, all that is required to be shown is that an applicant's symptoms and restrictions in the body part at issue have resulted from an accepted injury.

62. In the previous proceedings, the Commission finally determined the applicant's rights with regards to alleged injuries to his right upper extremity and lower back. It did so against a background of the applicant having pleaded frank injuries to those body parts. The Commission did not determine whether the applicant had suffered a consequential condition to those body parts, as it was not required to by virtue of the manner in which the case was pleaded. Rather, Arbitrator Wynyard found for the respondent on the question of whether there were injuries to the lumbar spine and right upper extremity, as that term is defined in section 4 of the 1987 Act.

63. Accordingly, I am of the view that there is no res judicata applicable to these proceedings.

Issue Estoppel

64. Issue estoppel, like res judicata estoppel, has its foundation in judicial decisions. As stated in *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA 213:

> "In *Outram v Morewood* (1803) 3 East 346 at 355; 102 ER 630 at 633, in a statement cited by Fullagar J in *Jackson v Goldsmith* [1950] HCA 22; 81 CLR 446 at 466, Lord Ellenborough explained that an issue estoppel precludes the parties and their privies 'from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them ... has been, on such issue joined, solemnly found against them'." (at [22])

65. The differences are important, and serve to define these respective types of estoppel. The relevant distinction was held by Dixon J in *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464 to be as follows:

> "The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state or fact of law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order." (at [532])

66. With respect to factual questions, the issue estoppel applies to what are described as "ultimate" facts and does not extend to "mere evidentiary facts": per Fullagar J in *Jackson v Goldsmith* [1950] HCA 22; 81 CLR 446 at 467.

67. Estoppel does not pertain to circumstances which are capable of change (see *Roche v Australian Prestressing Services Pty Ltd* [2013] NSWWCCPD 7 at [32] – in that case, the extent of whole person impairment) and will not constrain a subsequent decision-maker or medical assessor in relation to findings as to facts which came into existence after a prior decision. That principle is essentially an expression of the requirement that, for an estoppel to operate (whether by reason of res judicata or issue estoppel), it is necessary that the issue in the subsequent proceedings be identical to that determined in the prior proceedings.

68. As was noted in *Pond v WorkCover/ Allianz Australia (Wunda Joinery)* [2001] SAWCT 69 (*Pond*):

> "Workers compensation disputes arising under the Act present a particular challenge to the application of this principle because, unlike conventional disputes, there is a contemplation of multiple hearings focused towards particular issues relevant at particular points in time. Whereas in an action for damages at common law a judgment necessarily embraces and discharges all injuries resulting from the wrongful act, each and every permanent disability arising out of a compensable disability, subject to the caveat that there cannot be double compensation, can give rise to an independent entitlement pursuant to s.43 See, for example*: Salmon Street v Jorgensen* [1991] SASC 2963; (1991) 56 SASR 158. A finding of ongoing incapacity for work does not foreclose the capacity of a compensating authority to subsequently determine that incapacity has ceased. A finding that incapacity has ceased does not foreclose the capacity of a worker to subsequently assert that incapacity has recommenced.
>
> For these reasons, one needs to approach the application of the principle of issue estoppel in the context of workers compensation disputes with much caution. The policy considerations upon there being a need for there to be an end to litigation might not be so relevant or important in respect of such disputes. But that is not to say that the principle does not have a role to play." (at [22] and [23])

69. The decision of Pollin JA in *Willoughby v Clayton Utz (No.2)* [2009] WASCA 29 involved a consideration of cases relevant to res judicata and issue estoppel. Reference was made at [11] to a dissenting decision of Fullagar J in *Jackson v Goldsmith* [1950] HCA 22; (1950) 81 CLR 446:

> "… it follows from the very nature of the difference between the plea of res judicata and the plea of issue estoppel that different materials are relevant in each case. Where the plea is of *res judicata*, only the actual record is relevant. Where the plea is of issue estoppel, any material may be looked at which will show what issues were raised and decided. Reasons given for the judgment pronounced are likely to be particularly important for this purpose." (at 467)

70. In Pond at [19], the Tribunal referred to the distinction between Res Judicata and Issue Estoppel in the following terms:

> "The principles of res judicata and issue estoppel are both based on the premise that a party cannot re-litigate that which has already been decided. In the case of res judicata, one need go no further than the formal judgment or order of the relevant adjudicating authority. It speaks for itself. In the case of issue estoppel, one can go further to the sub-stratum of findings upon which the formal judgment or order is based, although there are limitations. These are sometimes described as 'facts fundamental to the decision arrived at': *Hoystead v Commission of Taxation [*1926] AC 155; *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464 at 531 - 533 per Dixon J (as he then was)."

71. In *Ramsay v Pigram* [1968] HCA 34; (1968) 118 CLR 271 Barwick CJ considered an issue estoppel as being:

> "... available to prevent the assertion in ... proceedings of a matter of fact or of law in a sense contrary to that in which the precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties in the same respective interests or capacities ... The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case." (at 276)

72. In *Aylett v Peter Rowland Catering Pty Ltd* [2008] VSC 467 Pagone J held that "[a]n issue estoppel will not arise merely because an issue was raised in a former proceeding, even if a finding is made upon it". It was held that an issue estoppel "will only arise where an issue ruled upon by the Court in earlier proceedings was indispensable or fundamental to the ultimate decision in the case", as held by Dixon J in *Blair v Curran*. It is important to remember, as stated by Roche DP in *Eraring Energy v Graf and Anor* [2007] NSWWCCPD 6 (Graf), that "in compensation cases under the 1987 Act there may be several different causes of action but the entitlement to compensation always requires as a starting point that the same test of causation be satisfied" (at [41]). A finding of injury is a fundamental finding, regardless of the type of compensation being claimed.

73. In *Booth*, his Honour President Phillips dealt with questions of issue estoppel. In that matter, the worker suffered an injury by way of Post-Traumatic Stress Disorder (PTSD). In the first set of proceedings, she also claimed she suffered Bipolar Disorder. In the first set of proceedings, a finding was made that her Bipolar Disorder was not causally connected with employment. In a later set of proceedings, the worker claimed she had suffered an aggravation of her underlying Bipolar condition as a result of the PTSD and the medication which she had taken for it. The arbitrator at first instance held there was no issue estoppel as the causation question in the second proceedings was concerned with the effects of an alleged aggravation of a disease process rather than, as had been pleaded in the earlier proceedings, a consequential condition.

74. On appeal, President Phillips also found that there were findings in the first proceedings concerning injury and consequential condition, but not in relation to aggravation or exacerbation of a disease process. At [108] and following, his Honour noted that arguments relating to res judicata and issue estoppel had been made interchangeably in the second proceedings, and stated:

> "For the purposes of the present claim for lump sum compensation, the state or fact of law giving rise to the entitlement for compensation, namely, whether Ms Booth suffered a disease injury within the meaning of s 4(b)(ii), was not decided by [the first proceedings]. It follows that the principle of issue estoppel does not apply. Accordingly, Ms Booth is not estopped by the principle of issue estoppel from pursuing her claim for a different type of benefit in the present proceedings…
>
> The cause of action claimed and determined in the [first] proceedings, being compensation in respect of a personal injury pursuant to s 4(a), is separate and has an independent existence to the current cause of action for compensation under s 4(b)(ii). Therefore, the fundamental elements of res judicata are absent as the very right or cause of action claimed in [the second] proceedings was not passed into judgment in [the first proceedings]."

75. In my view, there is no issue estoppel arising from the previous proceedings. In the previous matter, Arbitrator Wynyard was concerned with whether the applicant had suffered an injury as that term is defined in section 4 of the 1987 Act to his lumbar spine and right upper extremity. In the current proceedings, the applicant alleges he suffered a consequential condition to his right upper extremity (noting the lumbar spine does not, on the applicant's own case, ground any claim for whole person impairment and therefore does not require consideration in these proceedings). As already noted, the requirements for establishing a consequential condition are different and less onerous than those for establishing an injury under section 4.

76. As such, I do not believe a state or fact of law in the current proceedings was a matter that was necessarily decided by Arbitrator Wynyard. That is, in the circumstances of the present matter, Arbitrator Wynyard was not concerned with whether the injury to the right upper extremity (or indeed the lumbar spine) were consequential conditions. Rather, the matter necessarily decided in the previous proceedings was the question of whether there had been an injury to those body parts within the meaning of section 4 of the 1987 Act.

Anshun Estoppel

77. The respondent also raises a defence that the applicant is estopped from bringing the present proceedings pursuant to the principals set out in *Port Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 489 (*Anshun*). That decision stands for the proposition that a party may be estopped from relying on a claim or defence if it unreasonably refrained from including it in earlier proceedings. Gibbs CJ, Mason and Aickin JJ said:

> "In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding." [70]

78. In *Booth*, President Phillips said at [130] and following:

> "It is clear that the objective of Anshun estoppel is the public policy that there are no conflicting judgments on the same set of facts. Applying the relevant principles, it must be determined whether the claim or defence was so closely related to the earlier subject matter that it would reasonably have been expected to have been raised. To answer this question the onus lies on the appellant to demonstrate that the failure to bring a claim in the earlier proceedings was unreasonable, and that there was no valid reason for refraining from doing so...
>
> 131. It is accepted that Ms Booth did not specifically bring a claim for a disease injury pursuant to s 4(b)(ii) in proceedings that were determined by Arbitrator O'Moore. For the reasons discussed above, under ground one, I am not satisfied that Arbitrator O'Moore determined whether a compensable disease condition had been sustained pursuant to s 4(b)(ii). That is because what was in issue was whether Ms Booth sustained a personal injury under s 4(a) arising out of or in the course of employment. As Ms Booth submits, s 4(a) and s 4(b)(ii) are separate and distinct causes of action which materialised when the evidence was available to pursue those claims."

79. Whilst I have regard to Mr Strachan's submission that the applicant must have known about the nature and onset of his stated symptoms, I accept Mr Carney's submission that until such time as there is medical evidence to support a finding of consequential condition, the applicant should not seek to prosecute a cause of action unsupported by any evidence, and to do so in the first proceedings without an expert opinion in support would have been inappropriate. Mere complaint of pain or restriction of movement is not, in my view, sufficient to ground a cause of action without the support of medical evidence.

80. Whilst it is the case that the respondent's section 74 notice dated 2 January 2018 denied liability based on consequential injury, there was no medical report available to the applicant at that time which grounded a basis for a consequential condition claim. As President Phillips noted in *Booth* at [136]:

> "I do not accept the appellant's submissions that to succeed on the bipolar condition claim under one iteration of the concept of injury in the second proceedings (before Arbitrator Edwards), having failed in the first (before Arbitrator O'Moore), is an affront to the administration of justice. Firstly, that is because, for the reasons discussed above, there was no evidence available at that time to support a s 4(b)(ii) claim and because Arbitrator O'Moore did not make factual findings pursuant to s 4(b)(ii). Secondly, it is because Arbitrator Edwards' decision on s 4(b)(ii) and Arbitrator O'Moore's decision are not inconsistent in respect of the same transaction. Thirdly, the mere fact that the two proceedings are closely related is insufficient to find Anshun estoppel. Accordingly, having regard to the subject matter of the earlier proceedings and the evidence available at that point in time, it was not unreasonable for Ms Booth not to bring a claim for s 4(b)(ii) in the earlier proceedings."

81. With respect, I find the situation in these proceedings analogous to those in *Booth*, and am not satisfied the respondent has discharged the onus of proof that the evidence establishes, on the balance of probabilities, that it would have been unreasonable for the applicant not to rely on consequential condition to the right shoulder in the previous proceedings.

Section 66(1A)

82. The respondent relies on section 66 (1A) of the 1987 Act, which reads:

> "Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury."

83. In my view, section 66A does not apply to this claim. The applicant now makes a claim for whole person impairment with respect to the left upper extremity (wrist) of 11%. In the previous proceedings, liability for the left wrist was accepted, however, at that time the applicant's degree of permanent impairment was not assessed, as on his own case at that time he did not meet the threshold pursuant to section 66 of the 1987 Act. In *Woolworths Ltd v Stafford* [2015] NSWWCCPD 36, the Commission held that "claim" is not to be interpreted narrowly to mean any "demand" for lump sum compensation. At [68], the Commission noted that there is no justification in the legislation for a worker who makes any demand for lump sum compensation, no matter how defective, from being permanently barred from recovering such compensation. In my view, absent a determination by an AMS of the applicant's whole person impairment arising from his accepted left wrist injury, there is no bar to that body part being referred to an AMS, now the applicant has medical evidence which supports a claim for whole person impairment which exceeds the threshold under section 66.

84. I accept the applicant's submissions that the circumstances of this case are analogous to those in *Gilliana v Souvenir World (Airport) Pty Ltd* [2018] NSWWCC116, in which it was held that a further letter of claim referrable to a previous injury serves as an amendment to a previous claim, rather than a new claim, and that given there has been no finding as to the level of impairment to the applicant's left wrist, section 66(1A) does not apply.

Consequential condition

85. Notwithstanding my findings in favour of the applicant with regards to the various estoppels, the applicant bears the onus of proving he suffered a consequential condition to his right upper extremity (shoulder).

86. It is important at the outset to establish the relevant test for establishing the presence of a consequential condition. This is particularly so where the respondent seeks to rely on an absence of established pathology in the left knee as a basis for a finding that no consequential injury has taken place.

87. In *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 (*Kumar*), Deputy President Roche dealt with the issue of whether the injured worker's shoulder condition resulted from mobilising whilst recuperating from accepted back surgery. At paragraph 35 and following, Roche DP stated:

> "35. By asking if Mr Kumar has suffered a s 4 injury to his right shoulder, the Arbitrator erred in his approach and asked the wrong question. This error affected his approach to the medical evidence and his conclusion. Mr Kumar's claim was always, as the respondent has conceded on appeal, that the right shoulder condition, and the need for surgery, resulted from the accepted back injury. It was not necessary for him to prove that he suffered a s 4 injury to his right shoulder.
>
> 36.The Commission has considered claims of this kind in several decisions (*Cadbury Schweppes Pty Ltd v Davis* [2011] NSWWCCPD 4 (Davis); *Vivaldo*; *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134; *Australian Traineeship System v Turner* [2012] NSWWCCPD 4 (Turner)) and has consistently applied the principles in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (Kooragang)."

88. At paragraph 55 of the decision in *Kumar*, the Deputy President noted:

> "It is not necessary for Mr Kumar to establish that he has significant pathology in his shoulder, only that the proposed surgery is reasonably necessary as a result of the injury on 19 March 2009. Dr Wallace's opinion may well be relevant to the ultimate question of whether the shoulder surgery is reasonably necessary, but it does not determine the question of whether the right shoulder condition has resulted from the back injury."

89. Likewise, the decision of Deputy President Snell in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWWCCPD 23 (*Brennan*) dealt with the question of a consequential injury. In that matter, a school teacher made a claim for consequential conditions to her cervical spine and shoulders following an accepted initial injury involving an injury to her power of speech. The Senior Arbitrator at first instance found there was a consequential injury and the employer appealed.

90. In *Brennan*, at first instance the Senior Arbitrator said:

> "I am satisfied that Ms Brennan has complained of pain in her neck and that there is an unbroken chain of causation from the injury to that condition. The injury to her neck is therefore a consequential condition."

She continued, saying "the issue with respect to Ms Brennan's shoulders caused me greater difficulty. However, her complaints with respect to pain in her shoulders have been consistent." She referred to the opinion of Dr Endrey-Walder that it was not likely that there was shoulder pathology. She continued:

> 'However my role is not to determine whether there is in fact pathology, but merely whether there is a consequential condition.
>
> I am satisfied that there is sufficient evidence to also refer the question of permanent impairment resulting from the condition in Ms Brennan 's shoulders to an Approved Medical Specialist.'"

91. At paragraph 100 and following in *Brennan*, Snell DP summarised a number of Presidential decisions concerning consequential injury, including *Kumar*, as follows:

> "100. There have been a number of Presidential decisions dealing with the nature of claims in respect of consequential conditions. The principles are described in a number of these decisions, for example *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134 (Moon) and *Kumar v Royal Comfort Bedding* [2012] NSWWCCPD 8 (Kumar). It is unnecessary for a worker alleging such a condition to establish that it is an 'injury' (including 'injury' based on the 'disease' provisions) within the meaning of s 4 of the 1987 Act.
>
> 101. In Moon (involving a compensable injury to the right shoulder, allegedly resulting in a consequential condition of the left shoulder) Roche DP at [44]–[46] described what is required:
>
> > '44. The evidence in support of this allegation is brief but clear. It is obvious that Mr Moon has experienced significant restrictions in the use of his right arm and shoulder for several years. It is not disputed that that restriction has resulted from his employment with Conmah. As a result, he has used his left arm and shoulder to compensate for his right shoulder condition. Therefore, Mr Moon is claiming compensation for a consequential loss. That is, a loss or impairment that he alleges has resulted from his previous compensable injury to his right shoulder (see *Roads & Traffic Authority (NSW) v Malcolm* (1996) 13 NSWCCR 272).
> >
> > 45. It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with Conmah they asked the wrong question.

> 46. The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss 'resulted from' the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648).'
>
> 102. In Kumar, one of the qualified medical witnesses approached the issue of whether there was a consequential condition of the right shoulder, by asking whether the worker had suffered a "work related injury" to that shoulder and whether employment was a substantial contributing factor to the condition of that shoulder. Roche DP at [57] said of the evidence of that medical witness:
>
> > 'Even assuming, as the respondent has urged, that Dr Wallace rejected the totality of the claim for 'consequential loss' in respect of the right shoulder, his failure to address the correct issue, and his focus on whether Mr Kumar suffered a work related injury to his right shoulder, means that his report is fundamentally flawed. For these reasons, the Arbitrator should have rejected Dr Wallace's conclusion.'"

92. It can therefore be seen that the applicant bears the onus of establishing a consequential condition, however, the requirements for a consequential condition are not the same as those for an injury under section 4 of the 1987 Act. All the applicant in this matter must establish is that any restrictions and symptoms in his right shoulder have resulted from, on a common sense basis, the accepted injury to the left wrist.

93. In his initial statement, the applicant said at [27]:

> "I felt immediate pain [following the fall at issue] in my left wrist, right wrist, right shoulder, left shoulder and lower back region.
>
> I could not stand up due to the pain in my left wrist, right wrist, right shoulder, left shoulder and lower back region."

94. The applicant took a week off work before returning on restricted duties for a few days. He says he could not cope with those light duties "due to the pain at my right shoulder." He alleges he attempted to arrange for appointments to have his right shoulder investigated, but these were ignored. He says in his first statement that Dr Nguyen certified him unfit for work in mid-October 2015 because of his right shoulder symptoms.

95. In his second statement dated 4 June 2018 (after Arbitrator Wynyard's decision of 16 May 2018), and found at page six of the Application, the applicant said:

> "I was injured on 7 October 2015 after I fell from a trolley onto my backside and back. As I was falling, I extended my arms to try to break my fall. This did not work well because I have now injured my arms, wrist, back and shoulder…
>
> My right shoulder started to become a real problem after I started to use my right arm for everything. I could not use my left. I can't do the basic things around the home like I used to - I can't vacuum or wash my car, raising my arm at all causes me pain."

96. The applicant provided an updated statement dated 14 March 2019, in which he maintained his right shoulder condition arose from over use consequent upon the left wrist injury. In that statement, he said:

> "As I could not use my left arm following the injury to the wrist because it was in a cast, I had to use my right.

> For example, I had to use my right arm to open and close the garage door. The very limited household work that I could do such as dusting and food preparation, I had to use my right arm. My right arm and shoulder hurts every day, even if the doctor gives me the injection to try to reduce the pain it does not work. Even when I am resting my shoulder hurts. I cannot lift or carry any more. As a result of the overuse of my right arm, I have developed pain in my right shoulder."

97. I accept the submissions of Mr Strachan made at the hearing that the applicant's evidence as to the onset of these symptoms was at odds with that given in the first proceedings. Moreover, I also accept Mr Strachan's submission that the applicant would have been well aware of the onset of the symptoms when he provided histories to various doctors, however he made no mention of his right shoulder until November 2016 at the earliest. Accordingly, in my view the applicant's own evidence should be treated with caution and, unless corroborated in relation to the onset of symptoms, not accepted.

98. This being the case, it is appropriate to examine such contemporaneous material as is available to determine whether I can be satisfied on the balance of probabilities that a consequential condition in the right shoulder is present.

99. Unfortunately, the applicant's former general practitioner, Dr Nguyen, failed to produce records in answer to a Direction for Production. As such, there are no contemporaneous clinical records from the treating doctor to provide assistance as to the onset of symptoms in the applicant's right shoulder save for a medical certificate dated 11 November 2016, in which Dr Nguyen described the injury as:

> "Fell off a step at work in the warehouse and landing on the left wrist: pain bilateral shoulders, low back and fracture left wrist."

100. There are clinical records supplied by other general practitioners dated 21 March 2017, when the applicant consulted Bonnyrigg Family Medical Centre. Those clinical records reveal right shoulder investigations and findings of pathology in February 2017, including a full thickness tear of the supraspinatus an overlying fluid in the subdeltoid bursa.

101. The applicant underwent a vocational assessment by ProCare on 8 December 2016. That assessment makes no mention of any issue with the applicant's right shoulder, and records a history of injury which entailed immediate pain in the applicant's left wrist. The ProCare assessment notes Dr Nguyen's certification of the applicant as fit for work as at 11 November 2016 for work "with right hand only and very limited working on left hand as tolerated."

102. The WorkCover medical certificates attached to the Reply confirm the applicant had for many months before the ProCare assessment been placed on a lifting restriction of 5kgs, and that lifting was to take place only with the right hand.

103. Of some note, the medical certificate to which the ProCare report refers lists for the first time the applicant as suffering bilateral shoulder pain. The ProCare report does not refer to the right shoulder symptoms, despite them being listed on the Certificate dated 11 November 2016, which as noted at [99] above, states:

> "Fell off a step at work in a ware house and landing onto left wrist: Pain bilateral shoulders, low back and # L wrist."

Previous certificates from Dr Nguyen had only listed the left wrist injury.

104. There is no explanation for Dr Nguyen referring to the applicant's shoulders for the first time in November 2016, and as noted, despite requests and Directions, she has not provided her clinical records.

105. At page 32 of the Application, the ProCare report dealt with lifting and carrying capacity and stated:

> "Mr Nguyen is of the belief that he would only be capable of lifting/ carrying less than 2 kilograms with his right arm. This was reported to be due to fear of overcompensation of the left arm.
>
> In addition, Mr Nguyen advised that he does not perform bilateral lifts with both hands as he is apprehensive in causing further aggravation of his left wrist/ arm, and injury with his right arm."

106. Associate Professor Myers provided an IME report to the respondent dated 27 April 2017. At page 159 of the Application, Dr Myers said:

> "With regard to the right shoulder:
>
> He said that he noticed pain in the right shoulder when he returned to work wearing the splint. He noticed issues when moving packages at work.
>
> He said this was about one week after the incident."

107. Those histories are provided before the findings of Arbitrator Wynyard, and are broadly consistent with each other and with those contained in the applicant's later statements; namely that the applicant developed right shoulder symptoms after returning to work and over compensating with his right arm.

108. That history is, in my opinion, reinforced by the clinical records of Bonnyrigg Medical Centre. The entry dated 21 March 2017 records sharp stabbing pain in the right shoulder, worse with lifting and elevation, together with numbness in the arm when the pain is intense. Those complaints are supported by an ultrasound of 2 February 2017 which notes a full thickness tear of the supraspinatus tendon and overlying fluid in the subdeltoid bursa.

109. Dr Endrey-Walder, IME upon whose report the current claim is pressed, took a clinical history of the applicant's complaints being limited to his left wrist until an entry in physiotherapy notes on 31 January 2017. Dr Endrey-Walder asked the applicant about the lack of complaint until that time and recorded the following response:

> "He acknowledged that he had some pain at the shoulders at the time of the fall, but the right shoulder pain had only become problematic from the time of the plaster case preventing him using his left upper limb in a functional sense for weeks to come, and the ongoing difficulties at the wrist led to his almost complete reliance for any activity of consequence on his right upper limb."

110. The above histories stand in contrast with the first statement of the applicant, in which he described immediate pain in both shoulders, together with the left wrist and an inability to cope with even restricted duties after a week off, owing to right shoulder problems. There is no evidence the applicant complained to any treating medical practitioner at this time about the right shoulder. As noted, for this reason, I treat the applicant's statements regarding the onset of shoulder symptoms with caution and attach little weight to them.

111. The histories also contrast with that provided to Dr Pillemer, whose report dated 7 December 2017 notes that following the incident at issue, the applicant "was immediately aware of pain in both wrists and both shoulders and his back and his neck and has had significant ongoing problems since then."

112. In my view, there is little question the applicant suffered a serious injury to his left wrist by way of fracture. The reports of Dr Chin, treating orthopaedic surgeon, reveal a consistent history of ongoing complaints of pain and weakness to the left wrist which culminated in Dr Chin referring him to Dr Kadir, hand surgeon. Dr Kadir's report dated 6 October 2016 indicated malunion of the left wrist fracture. On further review on 24 October 2016, Dr Kadir recommended left wrist osteotomy, however, the applicant declined the operation, fearing a negative outcome.

113. A report from Jessica Salmon, hand physiotherapist to Dr Nguyen dated 31 January 2017 refers to the applicant's fracture being complicated by ligament involvement, requiring a leather wrist brace and extensive home exercise. That same report refers to the right shoulder symptoms having been "sustained during his initial injury. He reports his pain is continuing to worsen and is impacting on his functional performance."

114. Notwithstanding my stated caution with regards to the applicant's own evidence, in my view the preponderance of the medical evidence supports a finding of consequential condition in the right shoulder. There is no question the applicant's left wrist fracture is serious and has required him to modify his activities of daily living by limiting the use of his left arm and hand. There are a number of Medical Certificates which specifically limit the applicant's lifting to his right arm only. The fact he has had to predominantly use his right arm for an extended period is, adopting a common sense approach, consistent with the development of a consequential condition arising from overuse.

115. It is noteworthy that the applicant told ProCare of his fear of over compensating with his right hand as a result of his left wrist injury, and in my view the fact there is no record of complaint to the right shoulder until late 2016 is actually supportive of the development of a consequential condition caused by overuse. In so finding, I have had regard to the contemporaneous material, which reveals the applicant complaining in approximately November 2016 of shoulder symptoms, and the presence of right shoulder pathology by February 2017 against a background of complaints of pain to his new treating general practitioner.

116. I have had regard to the opinion of Dr Pillemer concerning the applicant's presentation and complaints. Dr Pillemer notes the presence of the pathology in the right shoulder, however, he offers no explanation for its aetiology, rather he simply dismisses the possibility of that pathology being in any way work related or indeed having any effect on the applicant.

117. With respect to Dr Pillemer, I find his view that there is no explanation for right upper extremity symptomology to be contrary to the objective findings concerning the right shoulder, namely a full thickness tear of the supraspinatus, and for this reason I do not prefer his view to that of Dr Endrey-Walder and the contemporaneous records, which show the development over time of right shoulder symptoms consistent with a consequential condition. Dr Pillemer, in my view, simply dismisses out of hand any basis for right shoulder symptoms, and in doing so ignores the objective radiological evidence of supraspinatus tear.

118. It follows from the above findings that, notwithstanding my concerns regarding the applicant's own statement evidence; the contemporaneous records and medical evidence on balance support a finding of consequential condition in the right upper extremity (shoulder).

SUMMARY

119. Accordingly, the Commission will make the following findings and Orders:

    (a) The applicant suffered an injury to his left wrist in the course of his employment with the respondent on 7 October 2015.

(b) As a result of the injury in (a) above, the applicant suffered a consequential condition to his right upper extremity (shoulder).

(c) The injury to the left upper extremity (wrist) and consequential condition to the right upper extremity (shoulder) is to be referred to an AMS for determination of the level of permanent impairment arising from the following:

Date of injury:	7 October 2015.
Body system referred:	left upper extremity (wrist); right upper extremity (shoulder)
Method of assessment:	whole person impairment.

(d) The documents to be referred to the AMS to assist in their consideration are to include the following:

(i) The Application and attachments;
(ii) The Reply and attachments, and
(iii) This Certificate of Determination and Statement of Reasons.