

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3656/19
Applicant: ANN RILEY
Respondent: JAYCAM TRADING PTY LIMITED
t/as AMAROO AGED CARE FACILITY
Date of Determination: 4 October 2019
Citation: [2019] NSWCC 323

The Commission determines:

1. I remit the matter to the Registrar for referral to an Approved Medical Specialist to determine the extent of the applicant's whole person impairment, if any, which results from injury to her left shoulder (left upper extremity), neck (cervical spine) and consequential condition to her right shoulder (right upper extremity) with injury date 10 November 2013.
2. I request the Registrar place before the Approved Medical Specialist a copy of the Application to Resolve a Dispute and attachments, a copy of the Reply and attachments, a copy of the Application to Admit Late documents and attachments and a copy of these Reasons for Decision.
3. Liberty is granted to the parties to request a further teleconference after receipt of the Medical Assessment Certificate, if so required.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ann Riley (the applicant) is a 46-year-old lady who was employed by Jaycam Trading Pty Ltd (the respondent). She alleges that on 10 November 2013 she suffered injury in the course of her employment with the respondent, namely injury to her left shoulder and cervical spine and consequentially an injury to her right shoulder.
2. There is no dispute between the parties about injury to the applicant's left shoulder and cervical spine. The applicant is seeking a referral to an Approved Medical Specialist (AMS) and is saying that she suffered a consequential injury to her right shoulder.
3. This matter concerns an Application to Resolve a Dispute (the Application) pursuant to section 66 of the *Workers Compensation Act 1987* (1987 Act). Liability is in dispute in relation to alleged consequential injury to the applicant's right shoulder.

ISSUES FOR DETERMINATION

4. The issue for determination is whether the applicant suffered a consequential right shoulder condition resulting from accepted injuries to her left shoulder and cervical spine.

PROCEDURE BEFORE THE COMMISSION

5. This matter came for conciliation and arbitration in Newcastle on 20 September 2019. Mr C Hart of Counsel instructed by Mr M Evers, Solicitor, appeared for and with the applicant. Ms L Goodman of Counsel instructed by Ms M McDonald, Solicitor, appeared for the respondent.
6. I am satisfied that the parties to the dispute engaged in conciliation and were unable to resolve their differences. I am satisfied that the parties understand the nature of the Application and the legal implications of assertions made in the information supplied. I have used my best endeavours to attempt to bring the parties to the dispute to a settlement acceptable to both of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and they have been unable to reach agreement. The matter accordingly proceeded to arbitration hearing.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application dated 23 July 2019;
 - (b) Reply registered 13 August 2019;
 - (c) Application to Admit Late Documents (AALD) dated 10 September 2019 filed by the respondent.

Oral evidence

8. No oral evidence was given. At the outset of the proceedings Mr Hart enquired whether the applicant was required for cross examination and Ms Goodman indicated that no application to cross examine the applicant was sought.

THE APPLICANT'S SUBMISSIONS

9. There is no doubt that the applicant suffered injury on 10 November 2013. Ever since then, her left shoulder condition has not resolved and she has suffered increasing pain in her right upper extremity since this date of injury, including after her surgery to the left shoulder.
10. There is no reference to any neck or right arm problems before the date of injury and the injury to the left shoulder is well documented.
11. In terms of the right shoulder, there is an occupational therapy report of Mr Burns¹ which includes a pain diagram² referring to bilateral indications of pain, marked from the thoracic spine to the top of the applicant's right arm. There is a recommendation that the applicant not carry out manual handling.³
12. On the same day, namely 18 February 2014, the insurer directed Mr Burns to close his file. An exercise physiologist, Mr P Rees, was then engaged. On 14 March 2014, Mr Rees referred to "secondary influences of muscular...throughout her girdle". This is consistent with compensatory injury to the whole of the applicant's shoulders.
13. On 20 March 2014, Dr O'Keefe, orthopaedic surgeon questioned the origin of the applicant's cervical spine complaints. He referred to trapezius muscle spasms which he regarded as "a protective mechanism" experienced by the applicant.
14. The applicant then saw Dr Posel, treating orthopaedic surgeon, who received approval for the applicant's operation, namely arthroscopic surgery⁴ which noted acute inflammation.
15. By 9 October 2014, the applicant had undergone this operation and had seen Dr Prickett. At this time, she was back working normal duties but the duties were slightly modified because the applicant still had problems with her left shoulder.
16. Doctor Posel saw the applicant in April 2015. Although there was no reference in his report to right shoulder pain, the applicant had tried to stay at work and in fact was back at work on her full usual duties.
17. The applicant's statement refers to her having, as a result of her left shoulder problem, noticed an altered posture and she gradually experienced continued problems with her right arm and shoulder.

¹ Application page 176

² Application page 178

³ Application page 179

⁴ Application page 211

18. In December 2015, the applicant was made redundant⁵ and from 17 October 2015, the insurer stopped payments to her, resulting in a letter from the insurer of 27 November 2015⁶ advising that the claim had been denied.
19. In the meantime, on 5 May 2015 the applicant saw Doctor Ticehurst.⁷ She had returned to work and there were no restrictions on her duties, as per her request. But she was not coping well. She could not afford not to be at work.
20. The applicant saw Dr Bodel on 29 March 2016.⁸ On examination, there was tenderness on the left side of the shoulder, but this was most restricted on rotation to the right. There was a good range of movement for both the right and left shoulders.
21. The applicant then came under the care of Dr Osborne who operated on 6 November 2017. This was a repeat left shoulder acromioplasty and distal clavicle excision.
22. The applicant was then seen by Dr Bodel on 23 October 2018.⁹ Doctor Bodel took a history and recorded a reduced range of the applicant's neck in all directions but noted that she now had restricted range of movement in both shoulders which was not present when he last saw her (2016).
23. The contest in the matter concerns Dr Bodel's opinion of 9 May 2019, namely consequential condition of the right shoulder, which is undisputed. Doctor Powell in his second report makes a number of assertions which are baseless. Doctor Powell concentrates upon the absence of complaint of right shoulder problems at the time of injury, he relies upon the fact that the applicant returned to pre-injury duties and engaged in subsequent employment, he assumes that the subsequent employment was causative of the applicant's right shoulder problems and he points to the fact that the applicant did not seek treatment in relation to her right shoulder after she was made redundant.
24. Doctor Powell's opinion ignores the fact that if the applicant had bilateral degenerative changes, why would the applicant's left shoulder problems occur first with the right problems coming on later? The conclusion must be that the Commission would be satisfied that the applicant's left shoulder condition has left the applicant over- compensating, protecting her left shoulder and thus causing a consequential right shoulder condition.

THE RESPONDENT'S SUBMISSIONS

25. There is a complete absence of complaint by the applicant of any problems with her right shoulder from the date of injury (10 November 2013) until her statement of 5 May 2019. Even Dr Bodel does not record any complaint of right shoulder problems.
26. In her statement of 5 May 2019, the applicant says that between her date of injury and now she has experienced consistent symptoms of pain and restriction in movement in relation to her right shoulder.

⁵ Application page 164

⁶ Application page 165

⁷ Application page 161

⁸ Application page 72

⁹ Application page 77

27. The applicant continued to perform her duties and reported no complaint of problems with her right shoulder.
28. Doctor Bodel's report of 4 October 2016 makes no reference to the applicant's right shoulder. The Dr¹⁰ records a good range of movement in relation to the right shoulder. Doctor Bodel's assessment¹¹ does not make reference to the right shoulder.
29. In his report of October 2018¹² Dr Bodel notes that the applicant's range of movement is different and less than his previous report. Doctor Bodel then assesses 2% for the right upper extremity but provides no explanation as to how the applicant's employment with the respondent contributed to this disability.
30. On 1 April 2019, Dr Powell, after receiving Dr Bodel's report of October 2018, only assesses the applicant's left shoulder and neck but obtains no history of any right shoulder condition. This is because no claim had been made regarding the applicant's right shoulder.
31. Although Dr Bodel's report of 9 May 2019 referred to the applicant's right shoulder, Dr Bodel did not have material upon which he could support any proposition that the right shoulder was related to the left shoulder and/or cervical spine injury.
32. There is no reference in the applicant's statement of 5 May 2019 to the material facts concerning how she had to rely upon her right arm. Doctor Bodel's report of 9 May 2019 is just a few days after the applicant's statement of 5 May 2019.
33. Up until this time, there are many examples where the applicant had an opportunity to complain about her right shoulder. For example, the medical certificate of Dr Marsh of 9 July 2016 does not mention the right shoulder. Doctor Posel's report¹³ refers only to the left shoulder and neck. Doctor Osborne's report of 3 August 2015¹⁴ contains no reference to the right shoulder.
34. The applicant is right hand dominant. One would expect that predominately the applicant would perform activities with her right arm. The applicant has not articulated what activities she was doing with her right arm which she normally wouldn't do. There is a reference to vacuuming (household) with her right hand but where is the overuse in respect of the right hand? One would expect that a right handed dominant person might lift with their right hand. The applicant refers to "unnatural movements" in her history to Dr Bodel but does not tell Dr Bodel what those movement involved.
35. In the circumstances, relying upon *Ireland*¹⁵ the Commission cannot be satisfied that any deterioration in the condition of the applicant's right shoulder results from her left shoulder condition. The complaints the applicant makes occur in 2019, six years after the events complained of.
36. The Commission must be actually persuaded that the applicant's condition resulted from the original injury. The applicant's statement is not corroborated by medical treatment providers.

¹⁰ Application page 72

¹¹ Application page 74

¹² Application page 77

¹³ Application page 92

¹⁴ Application page 101

¹⁵ *Department of Education & Training v Ireland* [2008] NSWCCPD 134

37. Doctor Powell's report is simply trying to voice his opinion in the language used by the Commission. His comments concerning "a possible injury" should read "sufficiently concerned to complain". Doctor Powell in his report of 1 April 2019 comments about differences in his assessment to the assessment of Dr Bodel. The explanation is that there was difference in range of movement (right shoulder) between October 2016 and April 2019.
38. In terms of the Human Rehabilitation Report, it is noted that¹⁶ the applicant is right hand dominant and submitted that this pictorial is not the applicant's drawing. This is because in the accompanying report¹⁷ there was no complaint of pain on the right side, nor anything about the right arm, hand, or shoulder at all.
39. In a report of 10 March 2014, Dr Prickett, who is a pain management specialist, does not record any mention of pain in the right shoulder.
40. Mr Rees' report again does not refer to any complaint of right shoulder problems.¹⁸ The clinical notes make no mention of right sided problems. Doctor O'Keefe¹⁹ refers to neck and left shoulder pain but the range of movement of the right shoulder was normal.
41. Doctor Watson in his report of 6 March 2015 records no complaint of injury to the right shoulder.
42. The medical certificate of 21 May 2015²⁰ records left shoulder and cervical spine problems, but no reference to the right shoulder.
43. The complete absence of complaints concerning the right shoulder until the applicant's statement in May 2019 is important. Doctor Bodel's report of October 2018 assesses 2% whole person impairment concerning the right shoulder but there is no explanation of causation and no linkage until after the applicant provided her statement in May 2019.
44. In accordance with *Irwin*²¹ and *Nguyen*²² the Commission should not be satisfied that any problems which the applicant experienced concerning her right shoulder, if any, result from the injury of 10 November 2013.

APPLICANT'S SUBMISSIONS IN REPLY

45. Doctor Prickett's opinion of 10 March 2014 refers to "shoulder girdle pain", so it is not confined to the left shoulder.
46. The applicant was not cross-examined concerning many of the matters raised by the respondent. The respondent did not challenge the diagram prepared by Mr Burns. The early occupational therapist report and Mr Rees' explanations talk about "compensatory effects".

¹⁶ Application page 177

¹⁷ Application page 177

¹⁸ Application page 185

¹⁹ Application page 190

²⁰ Application page 238

²¹ *Irwin v Director General of School Education* (1998 unreported)

²² *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246

SUBSEQUENT SUBMISSION

47. Ms Goodman submitted that it was unnecessary to cross examine applicants in this jurisdiction.

FINDINGS AND REASONS

48. Counsel's submissions demonstrate in large part that the real issue is the extent to which the applicant made any complaint of pain, pathology or restriction of movement before May 2019.
49. It is clearly not the applicant's case that she injured her right shoulder at the time she injured her left shoulder and neck on 10 November 2013. The applicant's case at paragraph 12 of her statement²³ is that she has "noted an uptake in pain and discomfort in (her) right shoulder **since** the date of (her) injury" (emphasis added). I interpret this use of the word "since" to mean "at some time after" the 10 November 2013 incident. The applicant goes on to confirm that since 10 November 2013 she has had to rely more heavily upon her right arm and shoulder so as to protect her injured left shoulder. She noticed that over time, the range of motion that she had in her right arm had diminished, further, before 10 November 2013 the applicant did not ever have any problems with her right shoulder.
50. In terms of the history given to Dr Powell, the applicant states that she tried to give Dr Powell a history of problems with her right shoulder but he indicated that he was not interested because he had only been asked to assess the left shoulder and neck.²⁴ The respondent has not, it seems, put this proposition to Dr Powell.
51. The submission of the respondent makes it clear that there is very scant history given by the applicant, at least to treating and independent doctors, concerning complaints regarding the right shoulder.
52. That is, however, not entirely conclusive for a number of reasons. First, case authority has recognised that applicants are not always perfect historians and further that medical practitioners tend to focus upon the most severe injuries first, in treating an applicant.²⁵ It follows that the applicant may well have had progressive and incidental problems with her right shoulder, but either did not bring it to the attention of the drs nor raised it but it was regarded as being of little significance relative to the applicant's other body conditions. The latter conclusion is supported by the fact that at all times the extent of the right shoulder condition has been relatively minor in comparison to the applicant's cervical spine and left shoulder conditions.²⁶
53. My own view is that common sense suggests that the relative insignificances of the right shoulder symptoms at least to 2018, explains why the applicant may not have made any extensive complaint in that regard.

²³ Application page 3

²⁴ Application's statement paragraph 14

²⁵ *Palise v ANZ Banking Group Limited* [2018] NSWCCPD 13 per Keating P; *Mason v Demasi* [2012] NSWCA 210 per Basten JA

²⁶ See, for example, Doctor Bodel's reports of 23 October 2018 at Application page 77

54. But the second and most powerful reason for accepting the applicant's complaint of right shoulder pain and restriction of movement emerges from the diagram contained in the report of occupational therapist, Mr Burns.²⁷ At page 3 of this report there appears a sketch upon which is marked the location of the applicant's pain as at 18 February 2014. This is about three months after the applicant's initial injury. The diagram contains shaded imagery of the location of the pain and on both front and rear views highlights not only the neck and left shoulder, but also pain in the applicant's right shoulder. This is powerful evidence that the applicant was describing (at least) pain in the right shoulder at least as early as 18 February 2014.
55. The respondent's answer to this diagram was offered by Ms Goodman as being that we only had a photocopy of the diagram, not the original, and that anyone could have supplanted extra marks upon this diagram. Further, Ms Goodman noted that the remainder of Mr Burns' report did not mention the right shoulder. The difficulty for the respondent is that if it is suggested that someone else apart from Mr Burns marked the diagram, there is absolutely no evidence offered by the respondent in that regard.
56. The third reason to consider is the extent to which the respondent should have sought to require the applicant for cross examination, if indeed it was suggested that either the applicant or someone on her behalf made alterations to the diagram. At the outset of the proceedings, Mr Hart of Counsel specifically asked whether the applicant was required for cross examination and the respondent's response was in the negative. The respondent must be taken to be aware that in matters where very serious allegations are made about alteration of documentation, where a worker is not cross examined, there is some difficulty in upsetting an Arbitrator's decision.²⁸ I would add that no criticism is offered regarding the respondent's approach in this regard, because I apprehend that in the result and without tendering the original document (which incidentally was addressed to the respondent's insurer) any such cross examination would be futile.
57. For the reasons set out in Mr Hart's submissions at paragraph 23 above, I believe that Dr Powell's opinion and report should be rejected. I accept Ms Goodman's submission that because the applicant was right hand dominant she would of course perform many activities with her right arm. But that is in my view, no answer to an obvious suggestion that the existence of the left shoulder condition imposed additional stress and strain on the applicant's right arm and shoulder, as the applicant suggests.
58. As to Mr Hart's submission concerning Mr Rees' mention on 14 March 2014 of "shoulder girdle", I believe that this expression produces an equivocal outcome. The words may mean one shoulder girdle, or both, and do not in my view either advance nor negate the applicant's case.
59. The matters I have just mentioned encapsulates my reasons for concluding that at least from February 2014, the applicant was beginning to experience pain and disability in her right shoulder consequent upon the reason she advances in her statement of 5 May 2019. The applicant in fact not only says that she was protecting her left shoulder, but she developed underlying discomfort in her right shoulder associated with that action of protection.
60. In the result, I find that the applicant in the course of her employment on 10 November 2013 suffered injury to her left shoulder and neck and subsequently a consequential condition affecting her right shoulder.

²⁷ Application page 176

²⁸ *Matar v Zeineddine* [2008] NSWCCPD 52 at [67]

ORDERS

61. I remit the matter to the Registrar for referral to an AMS to determine the extent of the applicant's whole person impairment, if any, which results from injury to her left shoulder (left upper extremity), neck (cervical spine) and consequential condition to her right shoulder (right upper extremity) with injury date 10 November 2013.
62. I request the Registrar place before the AMS a copy of the Application, a copy of the Reply, a copy of the AALD and a copy of these Reasons for Decision.
63. Liberty is granted to the parties to request a further teleconference after receipt of the Medical Assessment Certificate, if so required.

