WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4765/19
Applicant: Gaetano Parasiliti
Respondent: Ausgrid
Date of Determination: 12 December 2019
Citation: [2019] NSWWCC 403

The Commission determines:

1. The applicant has not discharged the onus of establishing that he sustained an injury to his right shoulder as a result of the nature and conditions of his employment with the respondent.

2. The applicant sustained a consequential condition at his right shoulder as a result of the injury to his left shoulder deemed to have occurred on 1 May 2012.

The Commission orders:

3. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment as follows:

   Date of injury: 1 May 2012 (deemed)

   Body parts: Lumbar spine
   Left upper extremity (shoulder)
   Right upper extremity (shoulder) (consequential condition)

   Method: Whole person impairment.

4. The materials to be referred to the AMS are to include the Application to Resolve a Dispute and all attachments, the Reply and all attachments and this Certificate of Determination and accompanying statement of reasons.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Gaetano Parasiliti (the applicant) was employed by Ausgrid (the respondent) as an electrical cable technician between 1989 and 9 January 2015. The applicant claims that due to the nature and conditions of his employment with the respondent, he sustained injury to his lumbar spine, left shoulder and right shoulder. In addition, the applicant claims to have sustained a consequential condition at his right shoulder as a result of the injury to his left shoulder.

2. On 18 July 2016, the applicant made a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) for permanent impairment of his lumbar spine and bilateral upper extremities (shoulders) as a result of injury deemed to have occurred on 18 July 2016. On 26 September 2016, the claim was amended to allege a deemed date of injury of 1 May 2012.

3. On 15 December 2016, the respondent issued a dispute notice pursuant to former s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). The respondent disputed that the applicant had sustained a right shoulder injury pursuant to ss 4 and 9A of the 1987 Act and had any entitlement to lump sum compensation pursuant to s 66 of the 1987 Act.

4. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 12 September 2019. The applicant seeks lump sum compensation pursuant to s 66 of the 1987 Act for 17% whole person impairment (WPI) as a result of the injury deemed to have occurred on 1 May 2012.

ISSUES FOR DETERMINATION

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

   (a) whether the applicant sustained injury to his right shoulder as a result of the nature and conditions of his employment with the respondent on 1 May 2012 (deemed); and /or

   (b) whether the applicant sustained a consequential condition at his right shoulder as a result of the injury to his left shoulder arising from the nature and conditions of his employment with the respondent on 1 May 2012 (deemed); and

   (c) the degree of permanent impairment resulting from injury deemed to have occurred on 1 May 2012 and entitlement to lump sum compensation under s 66 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

6. The parties appeared before the Commission for conciliation conference and arbitration hearing on 12 November 2019. Mr Craig Tanner of counsel appeared for the applicant and Mr Tom Grimes of counsel appeared for the respondent.

7. At the commencement of the arbitration hearing an application pursuant to s 289A(4) of the 1998 Act was made by the respondent to amend the dispute to include an allegation that there were separate frank injuries to the applicant's left shoulder in 1998 and lumbar spine in 2011, which could not be assessed together with the nature and conditions injury pleaded in the ARD. Submissions on the application were heard and recorded. For reasons given orally and which would appear on the transcript, the application was declined.

8. 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

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

   (a) ARD and attached documents; and
   (b) Reply and attached documents.

10. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

11. The applicant's evidence is set out in written statements made by him on 21 May 2013 and 12 July 2019.

12. The applicant indicated that he had been employed by the respondent since April 1986 and held various positions during that time including labourer, driver, cable jointer and field coordinator. From 2008 onwards, the applicant was a field coordinator at the respondent's premises at Zetland.

13. During 2011, the applicant experienced pain and discomfort in his whole body. The applicant underwent several investigations but the applicant's doctors were not able to give him a proper diagnosis. Towards the end of 2011 and in early 2012, the applicant began to experience intense pain and discomfort in both of his legs, pain and discomfort in both shoulders and hands and difficulty picking things up with his hands, especially his left hand. The applicant stopped working in May 2012 and took leave until 13 May 2013.

14. During this period, the applicant consulted his general practitioner, Dr Kumaran, and attended other specialist appointments. Dr Kumaran referred the applicant to a consultant rheumatologist, Dr Fredrick Joshua. Dr Joshua referred the applicant for several tests performed at St George Hospital. Dr Joshua informed the applicant that he had fibrosis in the lungs and a tear in his left shoulder region. Dr Joshua gave the applicant a cortisone injection in his left shoulder and referred him to an orthopaedic surgeon, Dr Ivan Popoff. Dr Popoff gave the applicant a further injection to his left shoulder and referred him for physiotherapy.

15. The applicant returned to work under a WorkCover medical certificate certifying him as fit for suitable/light duties. The applicant commenced work in the administration department at the respondent's Zetland premises.

16. The applicant said his work for the respondent over many years had been very physically demanding due to the weight of the items he was handling, including 40 to 50 kg cables. When he commenced employment with the respondent, the applicant was a labourer and this involved manually digging trenches. Until 1990, the applicant continued to do a lot of manual digging and would frequently operate a jackhammer. This placed a lot of stress on the applicant's shoulders and back. In around 1990, the applicant changed roles to be a cable jointer. This required the applicant to repetitively pull heavy cables and join them. Occasionally the applicant would have to use tools such as pick shovels and jackhammers. The applicant had to manually pull the heavy cables, placing a lot of strain on his shoulders. These tasks were performed every shift.

17. The applicant indicated that he had made a number of previous claims for work injuries.

18. On 19 April 1996, the applicant sustained an injury to his left shoulder whilst taking out a cast iron termination box from a crammed area.

19. On 17 October 1996, the applicant injured his lower back lifting something heavy at work. The applicant was referred to orthopaedic surgeon, Dr Ronald Clark, took pain medication and was referred for physiotherapy. The applicant had some time off then resumed pre-injury duties.

20. On 17 July 1998, the applicant was lifting a steel pit lid with another colleague, which weighed more than 150 kg. The applicant sustained an injury to his left shoulder. The applicant underwent some physiotherapy and, after some time off, returned to pre-injury duties.

21. The applicant said that throughout his employment he would have problems with both shoulders from time to time. Pain would come and go whilst he was working. It was never anything serious and the applicant did not do anything about it. The applicant got on with things and kept working. Whenever the applicant's left shoulder was painful, the applicant would rely on his right arm and vice versa.

22. Around 2011 to 2012, the applicant began experiencing constant pain and discomfort in his lower back and left arm and shoulder. The applicant went to see Dr Kumaran. On 1 May 2012, the applicant injured his left shoulder whilst pulling heavy cables at work. The applicant had been experiencing problems with his left shoulder in the lead up to this injury but never bad enough to have to take time off work.

23. The applicant expressed the belief that in 2013 he was being treated by a physiotherapist mainly in relation to his left shoulder and back but also for his right shoulder.

24. The applicant ceased employment on 9 January 2015 due to his health and because the job was becoming too much for him physically. The applicant had been working six to seven days per week most weeks. The applicant was offered a voluntary redundancy and took it.

25. Over time, the applicant began to experience lingering problems in his right shoulder. As the pain became worse, the applicant sought medical attention from Dr Kumaran and was referred for an x-ray of the right shoulder on 16 February 2015. The applicant was referred for further x-ray and ultrasound of the right shoulder on 28 February 2017, which revealed a tear.

26. The applicant expressed the belief that his problems with his right shoulder arose because of a combination of both the nature of the work and the constant reliance placed on the right arm in order to protect his left shoulder after it was injured in 2012. The applicant recalled relying on his right arm to perform any lifting or overhead work and pull cables and use tools. The applicant said he should have been using both arms but did not want to risk further injury to his left shoulder. At home, the applicant would rely on the right arm to perform housework.

Evidence from the applicant's treating practitioners

27. Before me is a large volume of medical evidence from the applicant's general practitioner, Dr S Senthil Kumaran's file, not all of which is relevant to the present proceedings. Where particularly relevant I have referred it in more detail below.

28. The report of an x-ray of the applicant's left shoulder dated 7 January 2013 indicated mild osteoarthritic changes in the acromioclavicular joint and degenerative cysts in the head of humerus.

29. On 11 March 2013, consultant rheumatologist, Dr Fredrick Joshua prepared a report for Dr Kumaran. Dr Joshua took a history of the applicant developing soreness in his back in February the previous year. At the same time, the applicant noticed that his left shoulder became painful to touch. The applicant's left shoulder became increasingly painful and symptoms had gradually increased to the point where he was unable to work. Dr Joshua noted that the applicant did not describe any pain at his right shoulder. Dr Joshua asked the applicant to have an MRI of the left shoulder.

30. An MRI of the left shoulder performed on 16 April 2013 was reported to show:

> "… supraspinatus tendonosis together with a small 8mm partial thickness articular sided tear in its anterior portion. This involves more than 50% of the tendon substance. No muscle atrophy. There is tendonosis of the subscapularis and infraspinatus. The biceps is intact. Large slap lesion. There is a degree of capsulitis. No significant glenohumeral OA."

31. Also in evidence are handwritten clinical notes from Beverly Hills - Kingsgrove Physiotherapy and Sports Injury Centre. The initial examination report dated 14 May 2013 took a history of insidious onset of left shoulder pain 6 ½ months earlier. The applicant was noted to be under the care of Dr Popoff and previously Dr Joshua.

32. On 18 July 2013, the physiotherapist's notes indicated that rotation was limited on the left and right sides.

33. Dr Kumaran's clinical records of 16 February 2015 state:

> "Monday February 16 2015 07:55:46
> Dr S Senthil Kumaran
> History:
> h/o injury during work Lawyers wants X rays done.
>
> Reason for contact:
> Pain
>
> Actions:
> Diagnostic Imaging requested: X-ray - Hand (R), X-ray- Shoulder (R), X-ray- Spine - Lumbo-sacral - h/o work related injury
> Anxious++"

34. X-rays of the right shoulder and lumbar spine were performed the same day. The x-ray of the right shoulder was reported to show,

> "Significant DJD of the AC joint. Spurring of the acromial process can cause impingement symptoms. An MSK ultrasound should be considered."

35. The lumbar x-ray showed mild to moderate lumbar spondylosis with narrowing at the L5/S1 disc without evidence of trauma.

36. On 15 February 2017, the clinical notes reveal a complaint of right shoulder pain without history of trauma. The applicant was given a short course of Mobic.

37. On 28 February 2017 the clinical notes reveal,

> "Tuesday February 28 2017 07:52:02
> Dr S Senthil Kumaran
> History:
> c/o (R) shoulder pain > 1 month

Examination:
Painful restricted abduction of the (R) shoulder
Clinically Capsulitis - as a result of his diabetes

Reason for contact:
Right Frozen shoulder
Actions:
Diagnostic Imaging requested: X-ray- Shoulder (R), US - (R) Shoulder - NIDDM c/o pain and restriction of abduction ? Capsulitis"

38. On 29 June 2017, Dr Griff Richards, a physician and rheumatologist prepared a report for Dr Kumaran which recorded the following,

> "In the course of his work, about 5-6 years ago had several injuries to the left shoulder. He was referred to a rheumatologist in 2012 and later to an orthopaedic surgeon. Mr Parasiliti was advised to have surgery which he declined, instead had 3 steroid injections that seemed to give him some symptomatic Improvement. He was off work for about 1 year, returned back to light duties but retired in 2015. He still has ongoing issues with the left shoulder and he is due to have a review in this regard.
>
> As far as his right shoulder problem is concerned, he complains of pain in the shoulder and has noted gradual loss of shoulder mobility with variable pains that occasionally tend to wake him up at night but mostly with certain arm movements. He has found taking Mobic and Panadol helpful in relieving his pain. Clinical examination of the right shoulder revealed prominent AC joints of right and the left, limitation of active arm abduction and to a lesser extent external and rotational movements. He had a strongly positive impingement sign of the right shoulder. He had reasonable range of left shoulder movements with a positive impingement sign and a painful arc."

39. Orthopaedic surgeon, Dr Ivan Popoff prepared a report for the applicant's lawyers dated 17 May 2019. Dr Popoff indicated that he had first seen the applicant in May 2013 at which time he noted,

> "Gaetano developed problems with his left shoulder due to over-use at work. It first became a significant problem in 2011 and had deteriorated since. This was severe enough for him to have repetitive absences at work.
>
> His shoulder deteriorated to the extent that he had to stop his normal employment.
>
> The pain he complained of was deep to the deltoid and into his periscapular musculature, associated with forward flexion abduction and he had significant night pain. He had a decrease in function secondary to pain.
>
> At the time of his first review he had had one corticosteroid injection which gave some benefit. He had not yet had any physiotherapy.
>
> An MRI scan which he had with him at the time was suggestive of a partial thickness articular surface tear of the supraspinatus, a SLAP tear and a possible subscapularis tear.
>
> On examination Gaetano had a decrease of active range, had poor scapular posture and control, he demonstrated a painful arc in forward flexion abduction, impingement test was positive, Job's test was positive for pain but not weakness, external rotation strength was 5 out of 5, Napoleon's test was mildly abnormal and a bear hug test was positive for pain but not for weakness.

> My opinion was that Gaetano 's left shoulder problems were directly related to his work.”

40. Dr Popoff noted that he last reviewed the applicant on 13 September 2013 at which point his shoulder had failed to improve and he was still having significant problems.

41. Dr Popoff noted that the applicant had subsequently developed problems with his right shoulder. Dr Popoff commented,

> “Regarding his right shoulder, it is common after having a significant shoulder injury on one side, that over-use of the nonaffected side can result in significant problems. It appears to have happened in Gaetano's case.”

42. Contemporaneous reports from Dr Popoff to Dr Kumaran, dated 10 May 2013, 7 June 2013, 1 August 2013 and 12 September 2013 are also in evidence

43. On 20 June 2019, Dr Kumaran prepared a brief report for the applicant’s current representatives. Dr Kumaran confirmed that the applicant was working for the employer and during the course of his employment felt that he sustained injury to his back and left shoulder. The applicant presented to Dr Kumaran in early January 2013 and was later referred to Dr Joshua and Dr Popoff for assessment. Dr Kumaran expressed concurrence with the opinion of Dr Giblin that the applicant had sustained soft tissue injury and that his work may be a contributing factor to the shoulder pain and discomfort.

Dr Giblin

44. The applicant replies on medicolegal reports prepared by orthopaedic surgeon, Dr Peter E Giblin.

45. Dr Giblin provided a report for the applicant’s previous lawyers on 16 May 2016. In that report, Dr Giblin took a history of the applicant’s work as a cable jointer from 1986 through to 9 January 2015. Dr Giblin recorded that the applicant complained of symptoms in his lower back in both legs, as well as right arm in 2011 whilst doing these duties and would take a few days off work here and there. In early 2012, he developed increasing symptoms in the left shoulder and sought medical advice. The applicant had several steroid injections and about 50 sessions of physiotherapy as well as regular home-based exercises. The applicant was placed on permanent light duties in 2012.

46. Dr Giblin performed an examination and considered x-rays of the left shoulder dated 7 January 2013, MRI of the left shoulder dated 16 April 2013, and x-rays of the lumbar spine and right shoulder dated 16 February 2015.

47. Dr Giblin made a diagnosis as follows:

> “Based upon his history and examination he has the provisional diagnosis of a soft tissue injury to his back with referred symptoms to his legs and soft tissue injury to his shoulders and hands, reasonably causally related to the nature and conditions of his work environment as being the main contributing factor.”

48. In a supplementary report prepared for the applicant’s current lawyers, dated 4 December 2018, Dr Giblin took a history of an acute injury to the applicant’s left shoulder on 17 July 1998 whilst lifting a steel pit lid weighing more than 150 kg. The applicant was noted to have been treated in a conservative fashion.

49. Dr Giblin re-examined the applicant and concluded,

> "It is my opinion that his left shoulder injury commenced on 17 July 1998 and that the subsequent recurrent low-grade symptoms in his right shoulder were due to favouring the left shoulder injury as well as the nature and conditions of his work environment. This is a common, reasonable, and probable clinical explanation for his current right shoulder symptoms. His low back injury has been related to the nature of his job in 2011."

50. In a separate report of the same date, Dr Giblin assessed the applicant as having 6% WPI of the left extremity (shoulder), 4% WPI of the right upper extremity (shoulder) and 7% WPI of the lumbar spine, totalling 17% WPI.

Evidence relating to previous claims

51. Amongst the material attached to the ARD is a claim for workers compensation dated 29 April 1996 for an injury dated 19 April 1996. The injury was described as "twinge in left shoulder". The injury was described as occurring when the applicant was taking out a cast iron termination box in a cramped area.

52. A WorkCover medical certificate for the applicant dated 22 April 1996 identified the injury as pain over the left side of the neck and shoulder. The cause of injury was said to be lifting a heavy termination box.

53. A letter to the applicant dated 9 May 1996 indicated that his claim for compensation in respect of the injury on 19 April 1996 had been accepted.

54. A letter dated 18 December 1996 to the applicant indicated a claim for a back strain on 17 October 1996 had been accepted and confirmed that the applicant had been certified fit to resume normal duties from 25 November 1996.

55. A letter from orthopaedic surgeon, Dr Ronald F Clark dated 6 November 1996 states,

> "He stated that he had lifted something heavy at work on the 17/10/96 and felt a pain in the right side of his back. He has continued working but finds the symptoms worse towards the end of the day. The pain does tend to radiate around the right side of his chest but there has been no sciatica. In the past he denied any previous similar complaints."

56. The claim form for this injury indicated that the applicant had "pulled muscles middle to lower back" when "lifting pit lid to ID cable".

57. A claim for compensation dated 4 September 1998, indicates that the applicant had sustained an injury in the nature of tendonitis to the shoulder. The injury was described as a "progressive injury – incurred over time due to continuous strain". A date of injury of 17 July 1998 was nominated.

58. A letter to the applicant indicating that the claim for compensation in respect of the left shoulder injury had been accepted appears in the ARD. As at 19 October 1998, the applicant had been certified as fit for pre-injury duties.

59. A report from orthopaedic surgeon, Dr Ronald F Clark dated 23 September 1998 to Dr Kumaran indicates that he had reviewed the applicant in relation to his left shoulder. The applicant had been continuing with physiotherapy and felt there had been an improvement. The applicant had a good range of shoulder movements with no local tenderness. Dr Clark considered the symptoms may be arising in the AC joint. Dr Clark recommended x-rays if the applicant experienced further pain.

60. A report from Dr Kumaran to a senior claims officer for the respondent, dated 22 October 1998, indicated:

> "The above patient consulted me on 17.7.98, with a history of pain around his left shoulder area. He had pain towards the end range of the movement of the shoulder. He was given analgesics and arrangements were made for him to have an ultrasound of the left shoulder. The ultrasound was reported normal. He presented to me on 28.8.98, with persisting pain and as such he was referred to an Orthopaedic Specialist. The Specialist felt that Gaetano had work related Tendinitis of the left shoulder."

61. An Energy Australia Safety, Health & Environment report in respect of the injury dated 17 July 1998 described the applicant as having sustained an injury to his left shoulder which was described as a "progressive injury occurred over a period of time".

62. A claim for workers compensation form completed in respect of the current claim indicates that on a date "unknown" the applicant sustained injury to his "left shoulder". The applicant claimed that the injury occurred, "performing numerous jointing tasks over a long period of time (years)".

Dr Machart

63. The respondent relies on a medicolegal report prepared by orthopaedic surgeon, Dr Frank Machart, dated 28 November 2016.

64. Dr Machart took a history of the applicant working for the respondent between 1984 and 2015 performing duties he described as difficult and labour-intensive, including pulling heavy cables. About 10-12 years earlier, the applicant developed low back pain but could not remember the details. The applicant felt it was due to the nature and conditions of employment including some of the heavier aspects of his work. The applicant continued to suffer low back pain without radiation. The applicant continued to work until 1 May 2012 when he sustained injury to the left shoulder pulling heavy cables. The left shoulder had been symptomatic for several months but not to the extent where it was disabling.

65. Dr Machart said the applicant developed pain in the right shoulder about two or three months after he stopped working on 1 May 2012. The applicant claimed that this was as a result of overuse but he was unable to give specifics.

66. Dr Machart performed an examination and considered some medical evidence provided to him but no x-rays. Dr Machart made a diagnosis of aggravation of degenerative changes in the left shoulder, predominantly in the rotator cuff through the nature and conditions of employment. There was also evidence of aggravation of degenerative changes in the lumbar spine. Dr Machart said it was reasonable to assume that the strenuous activities had caused symptoms of left shoulder degenerative changes and in the back. Dr Machart said the degenerative age-related condition may have become symptomatic anyway at this time in the applicant's life but probably not to the same degree if not for the worker's employment.

67. With regard to the right shoulder, Dr Machart said,

> "There was no evidence of injury to the right shoulder. While overuse was claimed, there is no substantive evidence to validate such claim medically. Pain did not develop until 2 or 3 months after he stopped working, and he had never resumed full duties. The notion of 'overuse' does not bear validity. At the time that symptoms developed, he was doing less, and was subjected to underuse."

68. Dr Machart assessed 0% WPI at the right shoulder and lumbar spine and 6% WPI (after a one tenth deduction) for the left shoulder.

Applicant's submissions

69. Mr Tanner submitted that there was a dispute as to injury to the applicant's right shoulder.

70. Mr Tanner referred me to the x-ray on 16 February 2015 and the pathology noted in the associated report.

71. Mr Tanner referred me to the description of heavy work set out in the applicant's statement and submitted that it had been accepted that the nature of that work had taken its toll on the applicant's left shoulder. Mr Tanner submitted that it could also be regarded as having taken a toll on the applicant's right shoulder. The applicant had given evidence that he experienced pain in both shoulders that would come and go whilst working.

72. The applicant additionally recalled that when he suffered left shoulder difficulties he would rely solely on his right arm. Similarly, when his right shoulder caused him some difficulty, the applicant would rely on his left arm. The applicant had described the deterioration of symptoms after ceasing work.

73. Mr Tanner submitted that I would accept as a matter of fact the applicant's evidence that there was constant over reliance placed on the right arm in order to protect the left shoulder which was injured in 2012. Mr Tanner submitted that there was no countervailing evidence in this regard.

74. Mr Tanner referred me to Dr Giblin's first report and noted that the applicant had the benefit of an interpreter during the examination. Mr Tanner submitted that the history taken by Dr Giblin was consistent with the applicant's statement. Complaints of bilateral shoulder pain were noted at this first examination. Dr Giblin made a diagnosis of soft tissue injury to both shoulders. Mr Tanner submitted that this should be read as encompassing injury by way of overload to the right shoulder due to favouring the left shoulder as well as the nature and conditions of work. In his second report, Dr Giblin confirmed that there had been a consequential condition at the right shoulder.

75. Mr Tanner also referred me to the report prepared by Dr Popoff on 17 May 2019. Dr Popoff expressed the same opinion as Dr Giblin. Mr Tanner noted that Dr Popoff was a shoulder specialist and had described over-use of the non-affected right shoulder as a common, reasonable and probable explanation for the significant symptoms the applicant was now experiencing in that shoulder.

76. Mr Tanner noted that an interpreter had not been used at the examination with Dr Machart. Mr Tanner submitted that the use of inverted commas around the word, "overuse", indicated that Dr Machart did not subscribe to Dr Popoff and Dr Giblin's common view that this was a common consequence of injury to one shoulder. Although the applicant was not able to give specific details, Mr Tanner submitted that it was a matter of common sense that the applicant might rely more heavily on his right shoulder to protect his injured left shoulder.

77. Mr Tanner submitted that no logical basis had been put forward for Dr Machart's view that the applicant's work could cause aggravation of the left shoulder but not the right shoulder.

78. Mr Tanner submitted that the preponderance of medical opinion favoured the applicant.

Respondent's submissions

79. Mr Grimes noted that the applicant had not indicated in the present proceedings that he required an interpreter and submitted that Dr Machart's opinion should not be derailed due to the absence of an interpreter at his examination. The applicant had not identified any difficulties in the examination with Dr Machart in his more recent statement.

80. Mr Grimes noted that Dr Popoff last reviewed the applicant on 13 September 2013 and had provided a report six years later without any further examination or reference to treating medical evidence. Mr Grimes submitted that the Commission should be extremely cautious in accepting Dr Popoff's opinion in light of the lack of evidence to support it.

81. Mr Grimes noted that there was no reference in the applicant's submissions to any contemporaneous evidence of the onset of right shoulder symptoms during the period of employment. The only treating evidence referred to in the applicant's submissions was the February 2015 x-ray of the right shoulder. Mr Grimes took me to the clinical records of Dr Kumaran on 16 February 2015 which indicated that the x-rays on that date were performed at the request of the applicant's lawyers, presumably in relation to the lump sum claim.

82. With regard to the claim that the right shoulder condition was consequential to the applicant's left shoulder injury, Mr Grimes noted that there was an absence of reference to left shoulder difficulties in the clinical notes. Mr Grimes noted that after the applicant ceased work in May 2012, the first reference to the left upper arm in the clinical notes was dated 7 January 2013 when the applicant complained of a sore left arm after moving boxes the previous day. This prompted the referral for an x-ray of the left shoulder. Mr Grimes noted a reference to left shoulder pain in the cold months on 16 May 2014, then no further reference to left shoulder pain until February 2015.

83. Mr Grimes noted that Dr Joshua had taken a history on 11 March 2013 which included no complaints in relation to the right shoulder. A WorkCover certificate dated 13 May 2013 issued by Dr Popoff also referred only to overuse of the left arm without reference to the right arm. Mr Grimes noted that an initial physiotherapy examination dated 14 May 2013 referred to insidious onset of left shoulder pain with no reference to the right shoulder. The right shoulder was not referred to in the referral by Dr Kumaran to Dr Popoff or in any of Dr Popoff's 2013 reports. Mr Grimes said a reference to "shoulders" in the plural in the 10 May 2013 report by Dr Popoff must clearly be a typographical error and was inconsistent with the clinical notes and his final report which indicated that right shoulder problems had come on more recently.

84. Mr Grimes said that the reference in the physiotherapist's clinical notes on 18 July 2013 to restricted rotation on both sides did not constitute a diagnosis or even complaint of symptoms but was rather just a finding on examination. This clinical note was inconsistent with all of the other medical evidence from that period.

85. When the applicant returned to work, he was placed in light duties consistently with the restrictions on his WorkCover certificates. The applicant was not involved in any heavy duties which would have aggravated either shoulder after this time. Mr Grimes concluded that there was no contemporaneous reference in the medical evidence to right shoulder problems during the period of employment.

86. Mr Grimes submitted that Dr Machart was right to be sceptical about the applicant's claimed right shoulder injury due to the delay in the reported onset of symptoms.

87. Mr Grimes submitted that the x-ray of February 2015 showed only age-related changes that probably would not have come to light had it not been for the prompting of the applicant's lawyers.

88. Mr Grimes noted that the applicant's general practitioner, Dr Kumaran had not provided any opinion on causation of the applicant's right shoulder condition. Mr Grimes said this could be explained by the absence of regular complaints in relation to the left shoulder or any complaints in relation to the right shoulder until February 2015.

89. Mr Grimes submitted that an alternative explanation for the onset of right shoulder symptoms could be found in the clinical notes dealing with the right shoulder on 28 February 2017, which suggested a connection with diabetes. Mr Grimes submitted this clinical record was inconsistent with an overuse injury. Mr Grimes submitted that there was a glaring omission of any reference to contemporaneous clinical records in the applicant's submissions. Mr Grimes submitted that the claim of injury or consequential condition to the right shoulder was a subsequent construction.

90. Mr Grimes submitted that the respondent was not liable for any nature and conditions injury or consequential condition in the right shoulder.

Applicant's submissions in reply

91. Mr Tanner submitted that if the respondent had considered that the applicant's right shoulder condition was caused by diabetes this should have been put to its expert for an opinion. A single line from a general practitioner in clinical notes was insufficient to establish the proposition on which the respondent sought to rely.

92. Mr Tanner submitted that the applicant's most acute condition at the time of his consultations with Dr Popoff was the left shoulder condition. Mr Tanner suggested that no adverse inference should be drawn from the absence of reference to right shoulder symptoms in Dr Popoff's reports. Mr Tanner noted, however, that in the report of 10 May 2013, Dr Popoff referred to the applicant's shoulders (in the plural) continuing to be problematic. Mr Tanner submitted that this was not merely a typographical error.

93. Mr Tanner noted that handwritten clinical notes from the applicant's physiotherapist on 18 July 2013 also referred to rotation being limited on the left and right sides, suggesting right-sided pathology at that time. Mr Tanner also noted that a WorkCover certificate issued by Dr Popoff referred to restrictions at above shoulder heights. The use of the plural again suggested the restriction applied to both shoulders.

94. Mr Tanner submitted that Dr Joshua's comment on 11 March 2013 that the applicant had no pain in his right shoulder may have been a reference simply to the applicant's presentation on that particular day.

95. Mr Tanner noted that the applicant claimed his right shoulder condition arose due to the nature and conditions of employment and as a consequential condition to his left shoulder injury. In this regard, the respondent's focus on the absence of clinical notes in 2013 was not determinative. There was no dispute that the applicant had left shoulder injury.

96. Mr Tanner submitted that it did not matter that Dr Popoff had not seen the applicant for over six years at the time of his final report. What was important was that Dr Popoff accepted the thesis and the conclusion reached by Dr Giblin.

97. Mr Tanner submitted that Dr Machart did not consider the logical chain of events and consider whether the applicant could have overused his right shoulder as a result of his left shoulder injury, whereas Dr Giblin did.

98. Mr Tanner submitted that the matter should be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment of WPI.

FINDINGS AND REASONS

99. Section 9 of the 1987 Act provides that a worker who has received an "injury" shall receive compensation from the worker's employer. The term "injury" is defined in s 4 of the 1987 Act as follows:

"4 Definition of 'injury'

In this Act:
injury:

(a) means personal injury arising out of or in the course of employment,

(b) includes a disease injury, which means:

(i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

(ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and

(c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

100. In *Bouchmouni v Bakhos Matta t/as Western Red Services*[1], Roche DP noted the difference between an injury and a secondary or consequential condition:

> "The Commission has considered and explained the difference between an 'injury' and a condition that has resulted from an injury in several recent decisions (*Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [43], [45] and [50] (*Moon*); *Superior Formwork Pty Ltd v Livaja* [2009] NSWWCCPD 158 at [122]; *Cadbury Schweppes Pty Ltd v Davis* [2011] NSWWCCPD 4 at [28]–[32] and [39]–[42] (*Davis*); *North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 at [84]; *Australian Traineeship System v Turner* [2012] NSWWCCPD 4 at [28] and [29] (*Turner*); *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 at [35]–[49] and [61]).
> …
>
> The injury to Mr Bouchmouni's right knee caused him to seek treatment in the form of surgery and physiotherapy. The evidence suggests that it was in the course of receiving that treatment, and/or as a result of an altered gait because of his knee symptoms, Mr Bouchmouni developed back symptoms. If that is accepted, and no reason has been advanced why it should not be, it is clear beyond doubt that his back condition has resulted from the treatment he received for his accepted knee injury and his altered gait. That does not, however, make the back condition an 'injury'."

101. A common sense evaluation of the causal chain to determine whether any consequential condition has resulted from an injury is required. In *Kooragang*, Kirby P said,

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense

[1] *Bouchmouni v Bakhos Matta t/as Western Red Services* [2013] NSWWCCPD 4; (2013) 14 DDCR 223; BC201319259.

evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation."[2]

102. The onus of proof as to causation rests upon the applicant and depends examination of the evidence as a whole. The Court of Appeal in *Nguyen v Cosmopolitan Homes*[3] has found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

    (1) a finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;

    (2) where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;

    (3) where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found, and

    (4) a rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.

103. There is no dispute in this case that the applicant sustained injuries to his left shoulder and lumbar spine as a result of the nature and conditions of his employment with the respondent. The applicant seeks a determination that he also sustained injury to his right shoulder as a result of the nature and conditions of his employment. The applicant additionally claims that he sustained a consequential or secondary condition at his right shoulder as a result of the injury to his left shoulder.

104. The applicant has provided evidence with regard to the nature and conditions of his employment with the respondent. That evidence is not contradicted by the respondent. I accept that the tasks the applicant was required to perform over many years for the respondent were heavy and involved lifting and manoeuvring heavy objects including cables, digging and operating a jackhammer. The applicant has given evidence that these tasks placed a lot of stress on both of his shoulders and led to injury. There is no question that these duties were causative of injury to the applicant's left shoulder. As a matter of common sense, I accept that the duties were also capable of causing injury to the applicant's right shoulder. The difficulty for the applicant is that there is little contemporaneous medical evidence to support his claim that his right shoulder was injured as a result of these duties.

105. Whilst there is a documented history of the applicant experiencing pain and discomfort, on occasion sufficient to cause incapacity, in his left shoulder, over the course of his employment with the respondent, the first reference to right shoulder symptoms in the medical evidence appears after the applicant was incapacitated due to the injury to his left shoulder and lumbar spine.

106. Dr Joshua specifically recorded in his report of 11 March 2013 that the applicant did not describe any pain at his right shoulder. Mr Tanner has suggested this may have been a reflection of the applicant's presentation on that particular date and did not mean that the shoulder had not been intermittently symptomatic prior to Dr Joshua's examination. Whilst

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[2] (1994) 10 NSWCCR 796 at [810].

[3] [2008] NSWCA 246.

this interpretation of Dr Joshua's support is theoretically open, I find the apparent failure to report a history of right shoulder pain to Dr Joshua generally weighs against a finding of right shoulder injury.

107. There is brief mention of limitation of movement in the applicant's right shoulder in July 2013 in the physiotherapist's notes in evidence. Submissions were made at the hearing as to whether Dr Popoff's 2013 reports or his WorkCover certificate could be interpreted as also indicating that the applicant was experiencing difficulties at his right shoulder. Whilst I accept that Dr Popoff referred to "shoulders" in the plural in his 10 May 2013 report and WorkCover certificate, Dr Popoff's most recent report states that the right shoulder symptoms had developed "subsequently". Dr Popoff did not in his 2013 documents clearly state that he was treating the applicant for, or that the applicant had reported symptoms at, his right shoulder. I am not satisfied in these circumstances that the use of the plural in these documents constitutes reliable evidence of right shoulder symptoms in 2013.

108. The first clear record of any medical investigation of the applicant's right shoulder appears in Dr Kumaran's clinical notes on 16 February 2015. That is, almost two years after the first incapacity resulting from the present injury and at a time after the applicant had ceased work for the respondent altogether.

109. Mr Grimes observed that the x-rays requested by Dr Kumaran at this consultation were done at the behest of the applicant's lawyers. Mr Grimes suggested, as a result, that the injury to the applicant's right shoulder was subsequently constructed in the context of preparing the claim for lump sum compensation. This submission does not persuade me that there was no clinical basis for the referral for x-rays. The reason for contact identified in the clinical note was "pain". The delay in investigating any right shoulder pain until after a period of around one year off work, the resumption of light duties and then the cessation of work altogether does, however, raise questions as to whether the applicant's right shoulder was injured as a result of the nature and conditions of his employment.

110. Although Dr Giblin did express an opinion both in his 2016 report and in his supplementary report in December 2018 that the nature and conditions of the applicant's employment did cause injury to both shoulders, Dr Giblin did not engage with the absence of clear contemporaneous medical evidence of right shoulder symptoms until well after the applicant was incapacitated by the injury to his left shoulder and lumbar spine. The value of contemporaneous evidence has been repeatedly endorsed by the courts: *Watson v Foxman*[4] and *Onassis v Vergottis*[5].

111. Dr Machart did not consider there was evidence of injury to the right shoulder noting that pain did not develop until two or three months after the applicant stopped working due to injury. Dr Machart noted that the applicant never resumed full duties.

112. The fact that the applicant's duties were capable, as a matter of common sense, of causing injury to his right shoulder does not lead to an inevitable conclusion that they did. After careful consideration of the evidence as a whole, for the reasons given above, I am not satisfied the applicant did sustain an injury to his right shoulder as a result of the nature and conditions of his employment with the respondent.

113. I have considered next whether the applicant sustained a consequential or secondary condition at his right shoulder as a result of the injury to the applicant's left shoulder. The evidence before me establishes that the applicant experienced a progressive history of left shoulder pain over the course of his employment with the respondent. That pain became incapacitating in July 1998 leading to treatment with physiotherapy and time off work. Although the applicant was able to return to pre-injury duties, he continued to experience

[4] (1995) 49 NSWLR 315.
[5] (1968) 2 Lloyds Report 403.

worsening left shoulder pain and was incapacitated as a result of the present injury in May 2012.

114. Mr Grimes' submissions placed considerable weight on the minimal reference to left shoulder symptoms after the cessation of work in Dr Kumaran's clinical records. It is well-established that consideration of clinical notes must be approached with caution, consistently with the observations of Basten JA in *Mason v Demasi*[6]:

> "First, the trial judge was invited to discount the appellant's oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent either with each other, or with her oral testimony, or both. The difficulties attending this kind of exercise should be well-understood; as explained in the *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such apparent inconsistencies may, and often should, be approached with caution for the following reasons, amongst others:
>
> (a) the health professional who took the history has not been cross-examined about:
>
> (i) the circumstances of the consultation;
> (ii) the manner in which the history was obtained;
> (iii) the period of time devoted to that exercise, and
> (iv) the accuracy of the recording;
>
> (b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;
>
> (c) the record did not identify any questions which may have elucidated replies;
>
> (d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording, and
>
> (e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history."

115. Whilst I accept that Dr Kumaran's records do not reveal regular or frequent complaints of left shoulder symptoms, I am satisfied on the other medical evidence before me, that the applicant continued to experience symptoms in his left shoulder after the first period of incapacity. This is evident from the contemporaneous reports of Dr Popoff in 2013, investigations of the left shoulder in 2013 and the treatment by corticosteroid injection and physiotherapy. Dr Popoff had considered the applicant's left shoulder difficulties sufficient to warrant surgery although the applicant declined this. Dr Richards confirmed in his 2017 report that the injections gave the applicant symptomatic improvement at his left shoulder but he had ongoing issues.

116. Both Dr Kumaran's clinical notes and Dr Richards' report indicate that the applicant's right shoulder difficulties became more severe in early 2017. Dr Richards noted complaints of pain in the shoulder and a gradual loss of shoulder mobility. The applicant was noted to have been treating his pain with medication including Panadol and Mobic. Although Dr Kumaran's notes suggest a connection between the loss of mobility and the applicant's diabetes, this would not in itself preclude a causal connection between the condition in the applicant's right shoulder and his left shoulder injury

117. Dr Giblin has expressed the view in his most recent report that the condition in the applicant's right shoulder was due to favouring his left shoulder injury. Dr Giblin described

[6] [2009] NSWCCA 227 at [2].

this as a “common, reasonable and probable clinical explanation” for the applicant’s right shoulder condition.

118. Although Dr Popoff had not examined the applicant since September 2013, I do give weight to his opinion, as a qualified orthopaedic surgeon, that it is common after having a significant shoulder injury on one side that overuse of the non-affected side can result in significant problems.

119. It is not necessary in order for the applicant to establish a consequential condition at his right shoulder that any “overuse” occurred in the course of employment. Dr Machart does not appear to have entertained this possibility.

120. Having carefully weighed the evidence before me, I am satisfied that the applicant has sustained a condition in his right shoulder as a result of the injury to his left shoulder deemed to have occurred on 1 May 2012.

121. In the circumstances of this case, I consider it appropriate to remit the matter to the Registrar for referral to an AMS to assess the degree of permanent impairment resulting from the injury to the applicant’s lumbar spine and left shoulder deemed to have occurred on 1 May 2012 and the consequential right shoulder condition.

SUMMARY

122. The applicant has not discharged the onus of establishing that he sustained an injury to his right shoulder as a result of the nature and conditions of employment with the respondent.

123. The applicant has sustained a consequential condition in his right shoulder as a result of the injury to his left shoulder deemed to have occurred on 1 May 2012.

124. The matter is remitted to the Registrar for referral to an AMS for assessment as follows:

Date of injury:	1 May 2012 (deemed)
Body parts:	Lumbar spine Left upper extremity (shoulder) Right upper extremity (shoulder) (consequential condition)
Method:	Whole person impairment.

125. The materials to be referred to the AMS are to include the ARD and all attachments, the Reply and all attachments and this Certificate of Determination and statement of reasons.