WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **4969/19**
Applicant: **Robin Frank Briggs**
Respondent: **Leslie T & Michelle M Hanlon**
Date of Determination: **7 January 2020**
Citation: **[2020] NSWWCC 9**

The Commission determines:

1. The applicant did not suffer injuries to his cervical spine and right shoulder arising out of or in the course of his employment with the respondents on 16 August 2012 within the meaning of section 4(a) of the *Workers Compensation Act 1987*.

2. The applicant did not suffer consequential injuries to his cervical spine and right shoulder as a result of the accepted injury to the left shoulder on 16 August 2012.

The Commission orders:

3. Award for the respondents in relation to the applicant's claimed injuries to his cervical spine and right shoulder on 16 August 2012.

4. Award for the respondents in relation to the applicant's claimed consequential injuries to his cervical spine and right shoulder as a result of the accepted injury to the left shoulder on 16 August 2012.

5. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment pursuant to the *Workplace Injury Management and Workers Compensation Act 1998* as follows:

    Date of injury: 16 August 2012

    Body System: Left upper extremity (left shoulder)

    Method of Assessment: Whole Person Impairment

6. The following documents are to be provided to the Approved Medical Specialist:

    (a) Application to Resolve a Dispute dated 25 September 2019 and attached documents;

    (b) Reply dated 9 October 2019 and attached documents, and

    (c) Applicant's Application to Admit Late Documents dated 4 December 2019 and attached document.

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

Anthony Scarcella
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 OFANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Robin Frank Briggs, is a 64-year-old man who was employed by Leslie T & Michele M Hanlon (the respondents) as a sheep shearer.

2. On or about 5 April 2006, Mr Briggs tripped over a sheep and fell heavily to the ground on his right shoulder at Boononga Station whilst working for another employer. In about July 2008, he underwent a right rotator cuff repair by Dr Prue Keith, Orthopaedic Surgeon. On 22 June 2009, he underwent a right shoulder arthrogram/MRI scan because of ongoing pain. The right shoulder injury was accepted by the relevant insurer and Mr Briggs was assessed and compensated on the basis of an 8% whole person impairment of the right upper extremity on 30 July 2009.

3. Mr Briggs commenced employment with the respondents in or about October 2009 as a sheep shearer.

4. In or about February 2010, Mr Briggs injured his lower back whilst employed by the respondents as a shearer. Mr Briggs lodged a workers compensation claim with the respondents' relevant insurer. That claim does not form part of these proceedings.

5. On 16 August 2012, on a property in Oaklands, New South Wales, Mr Briggs alleged that, whilst he grabbed a sheep by the chin from a pen to pull it towards him for shearing at his stand, it reared up and he suffered injuries to his left shoulder, neck and right shoulder. This event is the subject of these proceedings.

6. On 28 May 2013, Mr Briggs underwent arthroscopic surgery to his left shoulder by Dr Keith in the form of an arthroscopic debridement; biceps tenotomy; and supraspinatus-infraspinatus medialised repair.

7. On 6 June 2018, the respondents issued a Dispute Notice pursuant to section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing the alleged injuries to the cervical spine and right shoulder.[1]

8. On 26 March 2019, Mr Briggs submitted a permanent impairment claim pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of the left upper extremity (left shoulder), spine (cervical spine) and right upper extremity (right shoulder).[2]

9. On 3 July 2019, the respondents issued a Dispute Notice pursuant to section 78 of the 1998 Act disputing the alleged injuries to the cervical spine and right shoulder.[3]

ISSUES FOR DETERMINATION

10. The parties agreed that the following issues remained for determination:

    (a) Did Mr Briggs suffer an injury to his cervical spine and right shoulder on 16 August 2012 within the meaning of section 4(a) of the 1987 Act?

    (b) In the alternative, did Mr Briggs suffer a consequential injury to his cervical spine and right shoulder as a result of the accepted left shoulder injury on 16 August 2012?

[1] Reply at pages 19-23
[2] Application to Resolve a Dispute at page 71
[3] Application to Resolve a Dispute at pages 72-74

Matters previously notified as disputed

11. The issues in dispute were notified in the Dispute Notices referred to above.

Matters not previously notified

12. No other issues were raised.

PROCEDURE BEFORE THE COMMISSION

13. The parties attended a conciliation conference/arbitration in Albury on 4 December 2019. Mr Ty Hickey of counsel appeared for Mr Briggs and Mr Paul Stockley of counsel appeared for the respondent.

14. During the conciliation phase, the respondent called for a copy Mr Briggs' statement dated 19 September 2014, which was provided to Dr James Rowe and was referred to in his report dated 20 September 2017, [4] but which was not in evidence in these proceedings. The statement was produced and admitted into evidence without objection and referred to as the Applicant's Application to Admit Late Documents dated 4 December 2019.

15. During the conciliation phase the following interlocutory dispute arose, was discussed and could not be resolved:

> The respondent objected to the first and third sentences in [27] of Mr Briggs statement dated 9 September 2019.

16. The interlocutory issue was determined by me during the arbitration phase after hearing the oral submissions of the parties and was determined as follows:

> The respondent's objection was overruled on the basis that the evidence contained in the two sentences went to a matter of weight.

17. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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) Application to Resolve a Dispute (ARD) dated 25 September 2019 and attached documents;

    (b) Reply dated 9 October 2019 and attached documents, and

    (c) Applicant's Application to Admit Late Documents dated 4 December 2019 and attached document.

[4] Application to Resolve a Dispute at page 6

Oral evidence

19. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

FINDINGS AND REASONS

Did Mr Briggs suffer an injury to his cervical spine and right shoulder on 16 August 2012 within the meaning of section 4(a) of the 1987 Act?

20. Section 4(a) of the 1987 Act defines "injury" as a personal injury arising out of or in the course of employment.

21. The onus of establishing injury falls on Mr Briggs and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*[5] (*Ireland*) and *Nguyen v Cosmopolitan Homes*[6] (*Nguyen*).

22. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*[7] (*Kooragang*). As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*[8] (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.

23. In order to establish that a "personal injury" has been suffered within the meaning of section 4(a) of the 1987 Act, Mr Briggs must establish, on the balance of probabilities, that there has been a definite or distinct "physiological change" or "physiological disturbance" in his cervical spine and right shoulder for the worse which, if not sudden, is at least, identifiable: *Kennedy Cleaning Services Pty Ltd v Petkoska*[9] (*Kennedy*) and *Military Rehabilitation and Compensation Commission v May*[10] (*May*). The word "injury" refers to both the event and the pathology arising from it: *Lyons v Master Builders Association of NSW Pty Ltd*[11] (*Lyons*). While pain may be indicative of such physiological change, it is not itself a "personal injury".

24. *Castro v State Transit Authority*[12] (*Castro*) provides a useful review of the authorities and makes it clear that 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.

25. I now turn to the application of the relevant legislation and the legal principles referred to above and to the available evidence in this matter.

26. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties.

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[5] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134
[6] *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246
[7] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796
[8] *Kirunda v State of New South Wales (No 4)* [2018] NSWWCCPD 45 at [136]
[9] *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45
[10] *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19
[11] *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25NSWCCR 496
[12] *Castro v State Transit Authority* [2000] NSWCC 12; (2000) 19 NSWCCR 496

27. The respondents' principal submissions may be summarised as follows:

    (a) The respondents accepted that Mr Briggs sustained an injury to his left shoulder in the course of his employment within the meaning of section 4(a) of the 1987 Act on 16 August 2012. However, they submitted that the evidence failed to establish that Mr Briggs had sustained frank injuries to his cervical spine and right shoulder on 16 August 2012.

    (b) There was a lack of contemporaneous medical and lay evidence in relation to the disputed injuries. Mr Briggs' statement dated 19 September 2014 only referred to sustaining an injury to his left shoulder on 16 August 2012. Mr Briggs' statement dated 9 September 2019 augmented the description of the circumstances of the injury by referring to experiencing a whiplash effect on his neck and suffering an increase in pain in his right shoulder.

    (c) The respondent relied on the expert evidence of Dr Graeme Doig, Orthopaedic Surgeon.[13] Mr Briggs' expert, Dr James Rowe, Specialist Occupational Physician, failed to disclose a reasoned causal link between the symptoms in the cervical spine and right shoulder and the incident on 16 August 2012 and his conclusions did not support the case as presented by Mr Briggs in these proceedings. Dr Doig's expert evidence ought to be preferred over that of Dr Rowe.

28. Mr Briggs' principal submissions may be summarised as follows:

    (a) Mr Briggs' evidence is that he injured his left shoulder and neck and aggravated the injury to his right shoulder on 16 August 2012 and that such evidence ought to be accepted.

    (b) Despite the lack of contemporaneous evidence relating to cervical spine and right shoulder symptoms, Mr Briggs' evidence and the evidence of Dr Rowe discharged the onus of proof borne by him.

    (c) Mr Briggs submitted that care should be taken not to place too much weight on the clinical notes of treating doctors, given their primary concern and focus is with the treatment or the impact of a significant injury, in this case, the left shoulder. Mr Briggs had a complicated medical history. The absence of contemporaneous evidence is not determinative on the issue of causation where there is other evidence.

    (d) Mr Briggs' statement dated 19 September 2014 was prepared in relation to his lumbar spine injury and focussed on that injury. The references in the latter mentioned statement to the incident on 16 August 2012 were secondary. Mr Briggs' statement dated 9 September 2019 provided a proper description of the mechanism of his injury and confirmed that he had made complaints to his general practitioner and treating specialist about his condition in its entirety. Mr Briggs' evidence must be weighed against the clinical records in evidence.

    (e) Dr Rowe's expert evidence ought to be preferred over that of Dr Doig, as the latter based his opinion on the lack of a contemporaneous account of neck and right shoulder symptoms. The clinical records should be viewed in the light of Mr Briggs' evidence and a finding be made in favour of Mr Briggs in relation to his cervical spine and right shoulder.

[13] Reply at pages 5-8; 9-15; and 24-28

29. In evidence, there is a statement by Mr Briggs dated 19 September 2014.[14] The statement was taken by an insurance investigator and related to a worker's compensation claim Mr Briggs made against the respondents for an injury to his lower back as a shearer in February 2010. In the statement, Mr Briggs described his duties and responsibilities as a shearer during the time he was employed by the respondents. The unchallenged evidence is that the nature of the duties of a shearer are arduous. In the statement, Mr Briggs referred to the incident on 16 August 2012, which was the subject of these proceedings and described it in the following terms:

> "On Thursday 16 August 2012, I sustained a left shoulder injury whilst working on a property at Oaklands whilst shearing sheep for Day's. On this occasion I went to grab a sheep and injured my shoulder. I continued working for the remainder of the day and managed to book an appointment with Dr Kay for 24 August 2012. As a result of Ultra [sic] sounds and x-rays following that appointment it was determined that I had torn tendons in my shoulder."[15]

30. In his statement dated 19 September 2014, Mr Briggs went on to provide particulars of the medical treatment he received, including left shoulder surgery on 28 May 2013, after the incident at work on 16 August 2012. He made no reference to having injured or suffered symptoms his cervical spine and right shoulder. Mr Briggs submitted that this was understandable as the focus of the statement was on the circumstances of his lower back injury. The respondents submitted that Mr Briggs went into some detail in relation to the incident on 16 August 2012 and events which followed it, and one would have expected him to refer to any symptoms in his cervical spine and right shoulder. The failure of Mr Briggs to refer to any symptoms or injury in his cervical spine or refer to any symptoms or aggravation of his prior right shoulder injury in this statement, on its own, is not determinative on the issue of causation. However, I have taken it into account when considering the whole of the evidence.

31. In evidence, there is a statement by Mr Briggs dated 9 September 2019 relating to these proceedings.[16] In this evidentiary statement, Mr Briggs described the circumstances of the incident on 16 August 2012 in the following terms:

> "On 16 August 2012, I was working on a property in Oaklands, New South Wales. At about 2.00 p.m. I was grabbing a sheep from the pen. I grabbed the sheep by the chin and brought it to the ground so I could drag it to my stand. In this process the sheep reared up. I felt a tearing sensation in my left shoulder and there was a whiplash-like effect on my neck. I pulled the sheep back to the ground and dragged it to my stand where I continued shearing.
>
> I continued to work through the pain but at the end of the day my left shoulder was really hurting, and my neck had a dull ache. Additionally, I had increased pain in my right shoulder."[17]

32. Mr Briggs did not describe the nature and precise location of the pain in his cervical spine at the time of injury. Mr Briggs did not describe the nature and precise location of the increased right shoulder pain at the time of injury. Mr Briggs' evidence in relation to his cervical and right shoulder symptoms were limited to his present symptoms of pain and weakness in the neck and shoulders, with pain radiating down both arms and an occasional tingling sensation in his left hand.

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[14] Applicant's Application to Admit Late Documents dated 4 December 2019 at pages 1-4
[15] Applicant's Application to Admit Late Documents dated 4 December 2019 at page 5 at [27]
[16] ARD at pages 1-4
[17] ARD at pages 2-3 at [22]-[23]

33. Mr Briggs stated that he "mentioned"[18] to his general practitioner, Dr Adrian Kay of the Gardens Medical Group, that he had pain in his neck following the incident on 16 August 2012. Mr Briggs also stated that he "did mention"[19] to Dr Keith that he was experiencing pain in his neck. Notably, Mr Briggs did not state that he mentioned right shoulder pain to either Dr Kay or Dr Keith. Again, such an omission, on its own, is not determinative on the issue of causation. However, I have taken it into account when considering the whole of the evidence.

34. Mr Briggs stated that Dr Keith operated on his left shoulder on 28 May 2013 but that she was unable to properly repair the tendon tear and recommended further surgery. Mr Briggs was disinclined to go down the path of further surgery to his left shoulder.

35. In evidence, is the Initial Notification of Injury Form dated 4 September 2012.[20] The document referred to an attachment which was not in evidence. However, the single page Initial Notification of Injury Form only referred to a left shoulder injury on 16 August 2012.

36. In evidence, there is the Gardens Medical Group clinical records relating to Mr Briggs.[21] In an entry on 13 April 2006,[22] Dr Kay recorded Mr Briggs complaining of pain in the anterior aspect of his right shoulder and made arrangements for diagnostic imaging. On 2 May 2006,[23] Dr Kay noted a right supraspinatus tendon tear and referred Mr Briggs for physiotherapy. On 18 July 2006,[24] Dr Kay referred Mr Briggs to Dr Keith for the management of his right supraspinatus tendon tear. On 25 January 2007,[25] Dr Kay noted that Mr Briggs underwent a steroid injection into his right shoulder. On 23 May 2008,[26] Dr Kay recorded that Mr Briggs' right shoulder pain had become quite severe, rendered him unable to work and required surgery (a right rotator cuff repair in or about July 2008). On 14 January 2011,[27] Dr Kay recorded that Mr Briggs' right shoulder was still painful and that he was still shearing but his numbers were down. On 15 March 2011, there appeared a record of a telephone call from the relevant workers compensation insurer noting that it had been advised by the employer that Mr Briggs was "at better than pre injury duties, shearing".[28] However, on 15 July 2011,[29] Dr Kay recorded that Mr Briggs' right shoulder was no better and recommended that he continue with current treatment and on light duties. On 27 June 2012, Dr Kay recorded that Mr Briggs' right shoulder was "isq"[30] (in status quo) and recommended that he continue with his current treatment and on light duties. It is clear that, whilst Mr Briggs' 2006 right shoulder injury had stabilised, it continued to cause him restrictions and required treatment immediately preceding the incident on 16 August 2012.

37. In the Gardens Medical Group clinical records on 24 August 2012,[31] Dr Kay recorded that Mr Briggs had a left rotator cuff syndrome with clinical supraspinatus tendon injury. Dr Kay referred Mr Briggs for diagnostic imaging and an ultrasound demonstrated a "massive"[32] tear of the left supraspinatus tendon and subscapularis. On 31 August 2012, Dr Kay referred

[18] ARD at page 3 at [27]
[19] ARD at page 3 at [28]
[20] ARD at page 70 and Reply at page 1
[21] ARD at pages 19-53
[22] ARD at page 20
[23] ARD at page 20
[24] ARD at page 20
[25] ARD at page 21
[26] ARD at page 22
[27] ARD at page 25
[28] ARD at page 25
[29] ARD at page 25
[30] ARD at page 26
[31] ARD at page 27
[32] ARD at page 27

Mr Briggs to Dr Keith.[33] On 22 October 2012, Dr Kay recorded that Mr Briggs attended in relation to his left supraspinatus tendon tear and advised that he was told to leave by his employer. Dr Kay issued a workers compensation progress medical certificate and prescribed Panadeine Forte. The next entry in the clinical records occurred on 24 January 2013,[34] when Dr Kay recorded that Mr Briggs' right shoulder was in status quo. He issued Mr Briggs with a worker's compensation medical certificate, but it was not clear whether the certificate related to the 5 April 2006 injury or the 16 August 2012 incident. No medical certificates were in evidence. On 16 May 2013, Dr Kay recorded that he had a discussion in relation to changes to the Workers Compensation Commission certificate and noted that he had "done certificates of both shoulders today".[35] Thereafter, there were a number of references by Dr Kay relating to the issue of medical certificates for the right shoulder, the left shoulder and both shoulders. Mr Briggs submitted that this supported his complaint of post-16 August 2012 right shoulder pain to Dr Kay. However, the medical certificate referred to was not in evidence. Then, there are no references to the right shoulder until 28 July 2014 and 25 August 2014,[36] where both shoulders are referred to as being in status quo. Thereafter and to the last entry in the clinical records on 10 May 2019, there are no further references to the right shoulder.

38. The first and only entry relating to complaints by Mr Briggs of neck pain appeared in the Gardens Medical Group clinical records on 27 July 2018, where Dr Kay noted "pain and catching in the neck"[37] and queried osteoarthritis. He referred Mr Briggs for an x-ray of the cervical spine. Later in the same entry Dr Kay recorded "x ray confirms Osteoarthritis". Dr Kay prescribed Mr Briggs Voltaren and Panadeine Forte tablets. On 26 February 2019,[38] Dr Kay again prescribed Voltaren and Panadeine Forte tablets.

39. In evidence, there are the clinical records of Dr Keith relating to Mr Briggs.[39] The records included, amongst other documents, Dr Keith's reports to Dr Kay, diagnostic imaging reports, an operation report, referral letters and a physiotherapist's report.

40. On 13 September 2012, Mr Briggs consulted Dr Keith, who reported back to Dr Kay.[40] Dr Keith reported that Mr Briggs was shearing and felt a snap in his left shoulder on 16 August 2012. He had experienced ongoing soreness, night pain and generalised discomfort about the left shoulder since then. Dr Keith observed that a recent ultrasound was consistent with her findings that Mr Briggs had a massive tear of the left supraspinatus and an issue in relation to the subscapularis, which she thought may have been more severely injured than the ultrasound suggested. She recommended a left shoulder MRI scan followed by an arthroscopy. Dr Keith made no reference to Mr Briggs complaining of neck pain and/or right shoulder pain.

41. On 17 October 2012, Mr Briggs underwent a left shoulder MRI scan by Dr Whitley, who reported a complete rupture of the supraspinatus tendon with about 2.8 cm of tendon retraction; partial tears of the long head of the biceps, subscapularis and infraspinatus tendons; mild fatty atrophy of the supraspinatus, infraspinatus and teres minor tendons; tendinopathic change of the infraspinatus and subscapularis tendon.[41]

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[33] ARD at page 43
[34] ARD at page 27
[35] ARD at page 27
[36] ARD at page 30
[37] ARD at page 41
[38] ARD at page 42
[39] ARD pages 54-69
[40] ARD at pages 54-55 and Reply at pages 2-3
[41] ARD at page 65

42. On 24 October 2012, Dr Keith reported to Mr Briggs and copied in Dr Kay explaining the findings in the left shoulder MRI scan performed by Dr Whitley.[42] Dr Keith opined that she thought it worthwhile to investigate the left shoulder by arthroscope and carry out some clean-up work. She was concerned that the head of the humerus was already beginning to migrate upwards in the socket. Understandably, there was no reference to cervical spine or right shoulder symptoms.

43. On 28 May 2013, Mr Briggs underwent arthroscopic surgery to his left shoulder by Dr Keith in the form of an arthroscopic debridement; biceps tenotomy; and supraspinatus-infraspinatus medialised repair.[43]

44. On 13 June 2013, Dr Keith reported to Dr Kay on Mr Briggs' post-surgery progress. Whilst Dr Keith recommended that Mr Briggs could "do his usual neck, shoulder shrugs and retractions and start some gentle pendular in the sling in two directions",[44] she did not refer to any complaints of cervical spine or right shoulder symptoms. However, she did refer to Mr Briggs being able to return to administrative duties "using his right normal shoulder in the not too distant future …"[45]

45. On 11 July 2013, Dr Keith reported to Dr Kay her concern that rehabilitation had been pushed a little too far. She cautioned that Mr Briggs had sustained a massive tear, resulting in greater than 5 cm of humeral head being exposed. It needed to be kept reattached. Despite the quality of the tendon repair, some of this repair will re-tear and not heal. Hence, the importance of rehabilitation respecting that fact.[46] Dr Keith did not refer to any complaints of cervical spine or right shoulder symptoms.

46. On 1 October 2013, Mr Briggs consulted Ms Louise Forrest, Physiotherapist, who reported back to Dr Keith that Mr Briggs was still complaining of anterior and superior left shoulder pain. Ms Forrest made no reference to complaints of cervical spine or right shoulder symptoms.[47]

47. On 10 October 2013, Dr Keith reported to Dr Kay and noted Ms Forrest's report. She again expressed her concern about Mr Briggs being pushed too hard in rehabilitation and risking a re-tear. She also expressed her concern about Mr Briggs' intention of returning to sheep shearing.[48] Dr Keith did not refer to any complaints of cervical spine or right shoulder symptoms.

48. On 16 June 2014, Dr Keith reported to Dr Kay that since the last consultation, Mr Briggs had made some improvement but still had a very significant active passive lag due to the medialisation of the tendon. She again expressed her concern about Mr Briggs' intention to return to sheep shearing, as she did not believe that his left shoulder would take the load of shearing and farm work.[49] Dr Keith did not refer to any complaints of cervical spine or right shoulder symptoms.

[42] ARD at pages 55-56
[43] ARD at page 66
[44] ARD at pages 57-58
[45] ARD at page 57
[46] ARD at page 58
[47] ARD at page 68
[48] ARD at page 59
[49] ARD at pages 59-60

49. On 25 May 2015, Dr Keith reported to Dr Kay that Mr Briggs continued to experience issues with his left shoulder. She did not feel that the left shoulder was bad. She felt that some of the repair was working well but because the subscapularis was tendinopathic and weak, the left shoulder was not firing in elevation and there was a degree of anterior escape of the shoulder. She opined that the only potential solution would be for Mr Briggs to undergo a pectoralis major tendon transfer. She described the procedure as "big" and that Mr Briggs would have to think very carefully about whether or not to proceed.[50] This was consistent with Mr Briggs' evidence, where he stated that he was disinclined to undergo further surgery. Again, Dr Keith did not refer to any complaints of cervical spine or right shoulder symptoms.

50. On 7 April 2017, Mr Briggs consulted Dr Doig at the request of the respondents' insurer. In evidence there is a report by Dr Doig dated 12 April 2017.[51] I will now refer to the relevant parts of that report.

51. Dr Doig took a history of the presenting complaint from Mr Briggs, which included that whilst working as a full-time shearer, he sustained an injury to his left shoulder on 16 August 2012. He was shearing sheep when he felt a snapping sensation in the left shoulder area with immediate pain and weakness. He noted that Mr Briggs had no past history of left shoulder problems but did undergo a successful rotator cuff repair in 2008 in the right shoulder. He underwent an MRI scan on 17 October 2012, which revealed a significant rotator cuff tear in the left shoulder. Mr Briggs was referred to the treating surgeon who had treated his right shoulder (Dr Keith). Dr Keith undertook a left rotator cuff repair with arthroscopic decompression and biceps tenotomy, followed by routine immobilisation and physiotherapy. Dr Doig reported that Mr Briggs had experienced a less than ideal result from his surgery compared to his right shoulder surgery. Dr Doig recorded Mr Briggs' current complaints as weakness and difficulty using the left arm overhead. No complaints of cervical spine or right shoulder symptoms were recorded by Dr Doig.

52. On examination, Dr Doig observed a 6 cm fine anterior scar with arthroscopic portal scars that were not causing Mr Briggs any concerns. He observed that Mr Briggs had reduced active range of motion arcs at the left shoulder and that there were no neck restrictions or neurological deficit of the left upper limb. Dr Doig then went on to assess Mr Briggs' whole person impairment in relation to his left upper extremity.

53. On 20 September 2017, Mr Briggs consulted Dr Rowe at the request of his lawyers. In evidence, there is a report by Dr Rowe dated 20 September 2017.[52] I will now refer to the relevant parts of that report.

54. Dr Rowe referred to the documents enclosed with his letter of instructions and stated that they included Mr Briggs' Gardens Medical Centre clinical records, the left shoulder ultrasound of 2012, the left shoulder MRI scan of 2012, the operation report of 2013 and Mr Briggs' statement dated 19 September 2014.

55. Dr Rowe took a history from Mr Briggs, which was somewhat contradictory. Initially, he reported that Mr Briggs had experienced trouble with both shoulders, "first in about August 2012".[53] Then, towards the end of the history section in his report, he noted that Mr Briggs had experienced problems with his right shoulder prior to the incident with the left shoulder. Dr Rowe reported that the incident occurred when Mr Briggs grabbed hold of a sheep awkwardly and suffered pain in his left shoulder. Dr Rowe then took a history of the post-August 2012 treatment and investigations undergone by Mr Briggs, which was consistent with the evidence.

[50] ARD at pages 60-61
[51] Reply at pages 5-8
[52] ARD at pages 5-13
[53] ARD at page 6

56. In relation to Mr Briggs' current symptoms, Dr Rowe noted that Mr Briggs continued to have pain and weakness in both shoulders; had a lack of mobility in both shoulders; pain was located at the front of both shoulders and radiated into the upper arms; the left shoulder was worse than the right shoulder; on occasions he experienced tingling about the left hand; and both hands felt weak. Dr Rowe did not record any complaints of symptoms in the cervical spine.

57. In relation to Mr Briggs' employment, Dr Rowe noted that he had been a shearer for upwards of 35 years; that at times he would shear in excess of 200 sheep per day; that sheep were getting bigger; and that he was able to go back to shearing after his right shoulder surgery (although, Dr Rowe referred to the left shoulder, it was clearly a typographical error) but not after his left shoulder surgery.

58. On examination, Dr Rowe observed that Mr Briggs had wasting of the right upper arm with a 3 cm difference in size when comparing the right and left side; had a loss of range of movements in both shoulders, more so the left than the right; no impaired sensation in the hands; grip weakness in the hands; and a loss of range of movements of his cervical spine.

59. On the issue of causation, Dr Rowe opined that the cause of Mr Briggs' bilateral shoulder conditions was the nature of his work over a period of years, firstly affecting the right shoulder and then the other shoulder as he favoured it. Dr Rowe also opined that Mr Briggs had frozen shoulders or bilateral capsulitis in both shoulders. He opined that the degenerative condition was, in a sense, related to his work over a period of years; that is, a gradual onset, and aggravated by the nature of his work. I found Dr Rowe's opinion in relation to the issue of causation difficult to follow. The first part of his opinion seemed to express the view that it was the nature and conditions of Mr Briggs' duties over the years that caused him to develop painful shoulders and that the left shoulder condition was consequential to the right shoulder condition because he favoured it. The second part of Dr Rowe's opinion seems to refer to a gradual onset of a disease process, presumably in the shoulders, related to his work over a period of years and aggravated by the nature of his work.

60. Apart from observing on examination that Mr Briggs had a loss of range of movements in his cervical spine, there was no reference to complaints of symptoms in the cervical spine. In fact, the only other reference to the cervical spine was when he assessed its whole person impairment at 5%. Dr Rowe did not explain the causal connection between the incident on 16 August 2012 and Mr Briggs' cervical spine. Dr Rowe was clearly unaware that Mr Briggs had already been assessed in relation to the injury to his right shoulder in the course of employment with another employer on 5 April 2006. He did not apportion the impairment assessment in the right shoulder between the 5 April 2006 injury and the 16 August 2012 incident.

61. On 26 April 2018, Mr Briggs consulted Dr Doig at the request of the respondents' insurer. In evidence there is a report by Dr Doig dated 1 May 2018.[54] I will now refer to the relevant parts of that report.

62. Dr Doig reported under the heading "History of Presenting Complaint" as follows:

> "The reason for this referral was to clarify the injuries to the right shoulder, which was a separate work incident many years previously, ultimately requiring a rotator cuff repair at the right shoulder in 2008. Mr Briggs stated that he has been having problems with the right shoulder since the surgery, although overall he was reasonably happy with the result. He was additionally having problems with the right shoulder prior to the incident of August 2012.

[54] Reply at pages 9-15

> In addition, I believe Mr Briggs received a financial award as a result of his impairment for the right shoulder in the past.
>
> With respect to his neck pain, Mr Briggs informed me that this has developed over the last 4 to 5 years, which appears to have become symptomatic after the left shoulder injury of 2012. There was no history of any neck injury at the time of the incident, as far as I am aware."[55]

63. Dr Doig opined that as a result of the incident on 16 August 2012, Mr Briggs suffered a rotator cuff tear at the left shoulder requiring operative repair. He further opined that there was no evidence to support an injury to the cervical spine on 16 August 2012.

64. On 12 December 2018, Dr Rowe provided a supplementary report at the request of Mr Briggs' lawyers in response to two questions posed.[56] I will now refer to the relevant parts of that report.

65. Dr Rowe referred to having reviewed his previous report and Mr Briggs' statement dated 6 March 2018. Mr Briggs' statement dated 6 March 2018 is not in evidence and the respondents raised no objection.

66. In view of the opinions expressed in Dr Rowe's report dated 20 September 2017, Mr Briggs' lawyers quite properly sought clarification of his reasoning. The first question posed by his lawyers related to the absence of a record of complaints by Mr Briggs of a cervical spine injury, and the lawyers requested Dr Rowe to explain the relationship between the cervical spine injury and his employment with the respondents; whether a frank injury was sustained on 16 August 2012; or whether it was a consequence of the symptomatology and pathology following the incident; or a combination of such causal factors. Dr Rowe responded as follows:

> "The condition of this man's cervical spine is related to the injury of 16 August 2012 and to the general nature of his work as a shearer, that is, it is a combination of these.
>
> It is impossible to apportion liability between the incident and the work that he has performed subsequently over the ensuing years. Any attempt to do so would be a guess and not reliable."[57]

67. Again, I find Dr Rowe's opinion difficult to follow. He appears to be saying that the condition of Mr Briggs' cervical spine is related to both a frank injury on 16 August 2012 and the general nature of his work as a shearer thereafter. The latter is not the case presented by Mr Briggs. Further, Dr Rowe has not provided any reasoning behind his conclusion that Mr Briggs sustained a frank injury to his cervical spine on 16 August 2012. Dr Rowe did not identify any frank injury to Mr Briggs' cervical spine. He did not refer to the cervical spine x-ray on 27 July 2018 that is said to have demonstrated osteoarthritis. I do not find Dr Rowe's opinion persuasive in this regard.

68. The second question posed to Dr Rowe included a hypothesis in relation to the right shoulder injury. Mr Briggs' lawyers drew Dr Rowe's attention to the fact that an injury had been sustained to the right shoulder on 5 April 2015 (this was clearly a typographical error and should have read 5 April 2006) and that Mr Briggs had been assessed and compensated for an 8% whole person impairment on 30 July 2009. The lawyers sought an apportionment of Mr Briggs' whole person impairment between the two dates of injury. Dr Rowe responded as follows:

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[55] Reply at page 10
[56] ARD at pages 14-16
[57] ARD at page 15 at [1]

> "The further 2% for the condition of his right shoulder and inded [sic] the condition of his left shoulder are related to overuse or the nature of his work over time; that is, subsequent to the incident of 2012. That additional 2% for the right upper extremity is due to the nature of his work."[58]

69. Dr Rowe opined that Mr Briggs' right shoulder condition was caused either by overuse or the nature of his work since 16 August 2012. Again, the latter possibility is not the case presented by Mr Briggs in these proceedings. Dr Rowe did not explain the reasoning behind concluding that the right shoulder condition was caused by overuse, nor did he explain the reasoning behind his alternative conclusion that the condition was caused by the nature of the work since 16 August 2012. He did not describe the nature of Mr Briggs' work following the 16 August 2012 incident that caused him to reach his conclusions. Dr Rowe did not identify any frank injury to Mr Briggs' right shoulder. He did not identify any change in Mr Briggs' right shoulder condition after 16 August 2012. Dr Rowe's opinion seemed to focus on a disease of gradual onset or the nature and conditions of his employment rather than the case of frank injuries presented by Mr Briggs. I do not find Dr Rowe's opinion persuasive in this regard.

70. Rule 15.2(3) of the Workers Compensation Commission Rules 2011 provides that "evidence based on speculation or unsubstantiated assumptions is unacceptable." Further, it is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd*[59] (*Paric*); *Makita (Australia) Pty Ltd v Sprowles*[60] (*Makita*); *South Western Sydney Area Health Service v Edmonds*[61] (*Edmonds*); and *Hancock v East Coast Timbers Products Pty Ltd*[62] (*Hancock*); that there must be a "fair climate" upon which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, more than a mere "ipse dixit" (an assertion without proof) is required and the latter seems to be precisely what Dr Rowe has done in this matter in relation to both the cervical spine and the right shoulder.

71. On 14 May 2019, Mr Briggs again consulted Dr Doig at the request of the respondents' lawyers. In evidence there is a report by Dr Doig dated 24 May 2019.[63] I will now refer to the relevant parts of that report.

72. Dr Doig acknowledged that, based on his letter of instructions, Mr Briggs now appeared to be claiming neck and right shoulder injuries as a result of the incident on 16 August 2012. He stated that at the time of his previous consultations with Mr Briggs, there was no mention of any neck or right shoulder injuries on 16 August 2012. On direct questioning at this consultation, Mr Briggs stated that he felt he had further aggravated his right shoulder condition in the incident of 16 August 2012 and that his neck pain had been of long-standing and simply slowly worsened over the years. There was no acute injury to the cervical spine.

73. Dr Doig reported Mr Briggs' current complaints as being stiffness in the cervical spine with reduced strength and difficulty using his right arm overhead. Dr Doig noted that no imaging had been performed of the cervical spine and there was no recent imaging of the right shoulder. Of course, Mr Briggs did undergo an x-ray of the cervical spine on 27 July 2018 which concluded that he was suffering from osteoarthritis. Dr Doig made no reference to that x-ray and seemed to be unaware of it. There was no post-16 August 2012 imaging of the right shoulder in evidence.

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[58] ARD at page 15 at [2]
[59] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA
[60] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705
[61] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421
[62] *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43
[63] Reply at pages 24-28

74. On examination, Dr Doig observed that there was no acute right shoulder or cervical spine tenderness; there was a reduced active range of motion at the right shoulder; restricted lateral flexion and rotation to the right in the neck with guarding and dysmetria; good retention of forward flexion; and no neurological deficit of the upper limbs.

75. Dr Doig opined that there did not appear to be any medical evidence that Mr Briggs re-injured his right shoulder or that he injured his cervical spine in the incident of 16 August 2012. He further opined that there was a pre-existing right shoulder injury and that clinically Mr Briggs suffered from primary, idiopathic osteoarthritis of his cervical spine, which most likely was pre-existing at the time of the accident on 16 August 2012.

76. I prefer the expert opinions of Dr Doig over those of Dr Rowe for the reasons referred to above.

77. Histories in medical records are often used to attack the credit of a worker. Reference is made either to a failure to mention relevant matters, or a description in a medical record which is different to what the worker now says in evidence. Care should be taken when considering such evidence, not to place too much weight on the clinical notes of treating doctors, given their primary concern with treatment. Experience demonstrates that busy doctors sometimes misunderstand, omit or incorrectly record histories of accidents or complaints by a patient, particularly in circumstances where their concern is with the treatment or impact of an obvious frank injury: *Davis v Council of the City of Wagga Wagga*[64]; and applied in *King v Collins*[65] and *Mastronardi v State of New South Wales*[66].

78. The caution referred to above was confirmed by Roche DP in *Winter v NSW Police Force*[67] as follows:

> "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34; *King v Collins* [2007] NSWCA 122 at [34-36])."[68]

79. The value of contemporaneous evidence has been repeatedly endorsed by the courts. However, the absence of contemporaneous evidence is not determinative on the issue of causation where there is other evidence: *Owen v Motor Accidents Authority of NSW*[69]and *Bugat v Fox*.[70]

80. I acknowledge that caution must be taken when relying upon clinical records. I have exercised caution in this regard and considered all the evidence, including the evidence in Mr Briggs' two evidentiary statements.

81. Whilst I have no reason to doubt Mr Briggs' credibility, I have concerns about the reliability of his evidence. Mr Briggs' primary evidentiary statement was completed with the assistance of his lawyer on 9 September 2019, some seven years after the work-related incident.

82. In *Onassis and Calogeropoulos v Vergottis*[71], Lord Pearce said of documentary evidence:

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[64] *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34
[65] *King v Collins* [2007] NSWCA 122
[66] *Mastronardi v State of New South Wales* [2009] NSWCA 270
[67] *Winter v NSW Police Force* [2010] NSWCCPD 12
[68] *Winter v NSW Police Force* [2010] NSWCCPD at [183]
[69] *Owen v. Motor Accidents Authority of NSW* [2012] NSWSC 650 at [52]
[70] *Bugat v Fox* [2014] NSWSC 888 at [31], [32] and [34]
[71] *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at 431

> "It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."

83. More recently, in *Watson v Foxman*,[72] McLelland CJ in Equity said:

> " … Human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which the plausible details are then, again often subconsciously, constructed. All of this is a matter of human experience."[73]

84. I have formed the view that the observations of McLelland CJ referred to above can be applied to Mr Briggs' primary evidentiary statement that, through the passage of time, became an impression from which the plausible details were then, more probably than not, subconsciously reconstructed.

85. Having regard to the whole of the evidence, I am not satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Mr Briggs has established that there was a definite or distinct physiological change or disturbance in his cervical spine and right shoulder arising out of or in the course of his employment with the respondent on 16 August 2012 and I find accordingly.

In the alternative, did Mr Briggs suffer a consequential injury to his cervical spine and right shoulder as a result of the accepted left shoulder injury on 16 August 2012?

86. In this alternative argument, it is unnecessary for me to determine whether Mr Briggs' cervical spine and right shoulder symptoms are in themselves 'injuries' pursuant to section 4 of the 1987 Act: *Moon v Conmah Pty Ltd* (*Moon*),[74] *Kumar v Royal Comfort Bedding Pty Ltd*[75] (*Kumar*) and *Bouchmouni v Bakos Matta t/as Western Red Services*[76].

87. Further, section 9A of the 1987 Act does not apply to a condition that has resulted from an injury: *Tiritabua v Bartter Enterprises Pty Ltd*[77].

88. I am required to conduct a common sense evaluation of the causal chain to determine whether the cervical spine and right shoulder symptoms complained of by Mr Briggs have resulted from the accepted injury to his left shoulder on 16 August 2012: *Kooragang*, through a careful analysis of the evidence and a careful analysis of the expert evidence: *Kirunda*.

89. I now turn to the specific issue left for determination and apply the principles referred to above to the available evidence in this matter.

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[72] *Watson v Foxman* (1995) 49 NSWLR 315
[73] *Watson v Foxman* (1995) 49 NSWLR 315 at 319
[74] *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 at [43], [45] and [50]
[75] *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 at [35]–[49] and [61])
[76] *Bouchmouni v Bakos Matta t/as Western Red Services* [2013] NSWWCCPD 4
[77] *Tiritabua v Bartter Enterprises Pty Ltd* [2008] NSWWCCPD 145 at [47]

90. The respondents submitted that, the case as presented in these proceedings by Mr Briggs, did not support a finding that he suffered a consequential injury to his cervical spine and right shoulder as a result of the accepted left shoulder injury on 16 August 2012.

91. Mr Briggs submitted that he relied on Dr Rowe's expert evidence in support of the issue of whether he had sustained consequential injuries to his cervical spine and right shoulder as a result of the accepted left shoulder injury on 16 August 2012.

92. Neither of Mr Briggs' statements provide the evidence to assist me in conducting a common sense evaluation of the causal chain that would lead to a determination that the cervical spine and right shoulder symptoms complained of have resulted from the accepted injury to the left shoulder on 16 August 2012. There is no evidence from Mr Briggs, for example, as to how or whether he favoured using one arm over the other. His evidentiary statements are silent in this regard. Nor is there any evidence from him supporting a consequential injury to the cervical spine. Mr Briggs' evidence that Dr Kay advised that his neck pain was coming from his shoulder injuries and that he had probably sustained some minor damage to his neck in the incident on 16 August 2012 was not borne out in the Gardens Medical Group clinical records. Mr Briggs' evidence that Dr Keith advised him that the pain in his neck was probably coming from his left shoulder injury was not borne out in Dr Keith's clinical records.

93. Neither the clinical records produced by the Gardens Medical Group nor Dr Keith provide the evidence to assist me in conducting a common sense evaluation of the causal chain that would lead to a determination that the cervical spine and right shoulder symptoms complained of have resulted from the accepted injury to the left shoulder on 16 August 2012.

94. In response to a question as to whether Mr Briggs' cervical spine condition and symptoms (if any) were secondary or consequential to the work-related injury on 16 August 2012, Dr Doig opined that he expected that Mr Briggs suffered from primary, idiopathic osteoarthritis of the neck. Without knowing it at the time, Dr Doig's expectation was correct as corroborated by Mr Briggs' cervical spine x-ray on 27 July 2018.

95. On the issue of causation, Dr Rowe opined that the cause of Mr Briggs' bilateral shoulder conditions was the nature of his work over a period of years, firstly affecting the right shoulder and then the other shoulder as he favoured it. The only interpretation of this opinion is that the left shoulder condition was consequential to the right shoulder injury on 5 April 2006. It does not assist Mr Briggs in his alternative argument that the cervical spine and right shoulder symptoms complained of have resulted from the accepted injury to his left shoulder on 16 August 2012.

96. In his supplementary report, Dr Rowe opined that Mr Briggs' right shoulder condition was caused either by overuse or the nature of his work since 16 August 2012. Dr Rowe did not explain the reasoning behind concluding that the right shoulder condition was caused by overuse, nor did he explain the reasoning behind his alternative conclusion that the condition was caused by the nature of the work since 16 August 2012.

97. I prefer the expert opinions of Dr Doig over those of Dr Rowe for the reasons referred to above.

98. Having regard to the whole of the evidence, applying a common sense test and for the reasons referred to above, I am not satisfied that Mr Briggs has discharged the onus of proving on the balance of probabilities that there is a sufficient causal chain connecting the condition of his cervical spine and right shoulder to the accepted injury to the left shoulder on 16 August 2012 and I find accordingly.

CONCLUSION

99. Mr Briggs did not suffer injuries to his cervical spine and right shoulder arising out of or in the course of his employment with the respondents on 16 August 2012 within the meaning of section 4(a) of the 1987 Act. Accordingly, I enter an award for the respondents in this regard.

100. Mr Briggs did not suffer consequential injuries to his cervical spine and right shoulder as a result of the accepted injury to the left shoulder on 16 August 2012. Accordingly, I enter an award for the respondents in this regard.

101. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment pursuant to the 1998 Act as follows:

Date of injury:	16 August 2012
Body System:	Left upper extremity (left shoulder)
Method of Assessment:	Whole Person Impairment

102. The following documents are to be provided to the Approved Medical Specialist:

    (a) ARD dated 25 September 2019 and attached documents;

    (b) Reply dated 9 October 2019 and attached documents;

    (c) Applicant's Application to Admit Late Documents dated 4 December 2019 and attached document.