WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6797/19**
Applicant: **Jaclyn Seles**
Respondent: **State Transit Authority**
Date of Determination: **7 April 2020**
Citation: **[2020] NSWWCC 110**

The Commission determines:

1. Award for the respondent.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Jaclyn Seles commenced employment with the respondent, State Transit Authority, as a personal assistant in May 2007. On 22 May 2012, she was preparing to leave work for the day when she tripped and fell down two steps and fell on her outstretched right arm. She sustained injury to her right arm and elbow. The respondent accepted liability for this injury.

2. In these proceedings, in her Application to Resolve a Dispute (ARD), Ms Seles alleges on 1 March 2018 her condition deteriorated causing her to sustain injury to her right arm and elbow. This was clarified at the outset of the Arbitration Hearing, with the parties agreeing that the issue in dispute relates to a question of causation in relation to the symptoms that Ms Seles has developed from March 2018, and whether those symptoms are causally related to the injury on 22 May 2012.

3. The claims for compensation made by Ms Seles are as follows:

    (a) Weekly compensation:
    Parts 5.1 and 5.2(b) of the ARD were amended to delete the date "27 August 2021". The claim is from 1 March 2018 to date and continuing. The pre-injury average weekly earnings figure (PIAWE) was amended from that appearing in the ARD to an agreed figure of $1,166.88. It was also agreed 95% of the PIAWE is $1,108.50 and 80% is $968.80.
    The parties agreed there was no deductible amount for non-pecuniary benefits.

    (b) Section 60 expenses:
    These are claimed at Part 5.3 of the ARD and in the schedule at page 181 of the ARD. However, the parties agree that if Ms Seles succeeds on the liability issue, they seek that the Commission makes a 'general order' for the respondent to pay section 60 expenses.

4. In addition to the causation issue, the respondent has placed in issue Ms Seles' capacity for employment. The respondent's counsel stated that if Ms Seles obtains an award for weekly compensation on an ongoing basis, then section 59A of the *Workers Compensation Act 1987* would not be an issue that would require determination.

PROCEDURE BEFORE THE COMMISSION

5. 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.

6. Ms Seles attended the conciliation conference/ arbitration hearing on 6 March 2020. She was represented by Mr Howard Halligan, counsel, instructed by Mr Tim Driscoll, solicitor. The respondent was represented by Mr Ross Hanrahan, counsel.

EVIDENCE

Documentary Evidence

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

    (a) ARD and attached documents;

    (b) Reply and attached documents; and

    (c) Application to Admit Late Documents filed by the respondent dated 3 March 2020.

Oral Evidence

8. There was no oral evidence. Both counsel made oral submissions which were sound recorded. A copy of the recording is available to the parties. A written transcript (T) has been made from the sound recording.

FINDINGS AND REASONS

9. It is helpful to summarise the relevant evidence before considering counsels' submissions.

Ms Seles' statement

10. In her statement dated 21 June 2019, Ms Seles describes her duties for the respondent and the circumstances surrounding her injury on 22 May 2012. She states that she returned to work on 12 June 2012, performing light duties for two or three weeks, and then she was cleared for normal duties. However, she says that symptoms of pain persisted in her elbow ever since. She says that her right arm would occasionally lock and unlock if she was carrying too much weight, such as a bag of groceries. She says she is right-handed. Ms Seles states she kept "soldering on".

11. Ms Seles recounts that on 1 March 2018 she was placing her two-year-old daughter into her low-chair for lunch when she felt her arm lock and it felt necessary to let go of her daughter. She says at the same time her arm unlocked. She adds,

> "Like when I fractured my elbow the pain was instantaneous, and I felt that I had re-fractured my elbow. As well as the pain my arm was strangely numb which I had felt previously but just felt it was due to one of my children falling asleep on me.[1]"

12. At [25] of her statement Ms Seles lists symptoms she says she has suffered since 22 May 2012 such as pain, discomfort and restriction of motion in her right elbow, upper arm and into her shoulder, inability to lift more than 3kgs with her arm without feeling pain and discomfort, constant pins and needles of varying degrees, no feeling in her right little finger and half of her right ring finger, and inability to perform tasks without pain; such as typing, driving, holding a phone handset, wiping/cleaning.

13. Ms Seles has included in her ARD a curriculum vitae[2].

[1] ARD p12.
[2] ARD p14.

14. On 20 July 2018, Ms Seles emailed Brendan Rabbitt who was the Depot Director, Port Botany Depot.[3] She says that she is unable to say when she will be returning to work as she has been having pain and numbness in her arm since March. She adds "In 2012, I fractured my right elbow at Port Botany & have had issues since but just little niggles, nothing like what I've been experiencing everyday. Since March, I've had an x-ray, ultrasound & a CT scan but nothing showed up on these."

15. On 17 May 2019, the respondent forwarded Ms Seles a letter to advise that a fitness for duty report had been obtained from Dr Doumit Saad dated 11 April 2019 advising them that Ms Seles was not fit to return to all of her inherent duties and that she would be at a higher risk of aggravations due to a non-work related pre-existing condition if she were to return to her inherent duties. The respondent then medically retired Ms Seles.[4] The report from Dr Saad is not before the Commission.

Dr Neale Gunning

16. Dr Gunning has provided a report dated 25 June 2019[5]. He is Ms Seles' general practitioner. He advises that that fall on 22 May 2012 sustained by Ms Seles was onto her outstretched right arm and that she presented to hospital with right elbow pain and decreased range of movement. He noted at the Prince of Wales fracture clinic on 6 June 2012 it was noted that there was a "displaced right radial head fracture" with haemarthrosis on x-ray. The Prince of Wales Hospital records are contained in the ARD and Dr Gunning's summary is incorrect because the record of the fracture clinic says the fracture is "undisplaced"[6].

17. Dr Gunning states that Ms Seles attended his practice on 7 June 2012 complaining of continuing pain. He noted that Ms Seles returned to work in a full-time capacity on 13 July 2012.

18. Dr Gunning states that Ms Seles returned to the practice in March 2018, that she had injured her arm while lifting her baby. He says she felt pain, a click, and the elbow locked. He records that Ms Seles complained of paraesthesia in the distribution of the ulnar nerve. He excluded that this was coming from the neck as Dr Gunning states that a CT scan of the cervical spine showed no significant degenerative changes and no nerve root exit foraminal narrowing was seen. He says Ms Seles was referred to Dr Craig Presgrave, neurologist, and to Dr Loretta Reiter, rheumatologist.

19. Dr Gunning did not express an opinion about causation as he said he was waiting the outcome of specialist opinion. He notes that Ms Seles had attended South Eastern Local Health District pain management clinic and because of her severe pain she was started on THC/CBD medication. Dr Gunning says because of severe pain she is unable to work, and he was to see Ms Seles again on 20 July 2019.

20. Dr Gunning's clinical notes are in the ARD. After June 2012 none of the entries for attendances refer to her right arm, they relate to gynaecological issues; until 24 February 2016 which refers to a request for ultrasound lump right elbow[7]. On 4 November 2016 there is an entry referring to "pain tight bas of thumb and wrist. Intermittent". Diagnostic imaging was requested being an x-ray of the right hand and right wrist[8].

[3] ARD p149 and 151
[4] ARD p57.
[5] ARD p19.
[6] ARD p35.
[7] ARD p39.
[8] ARD p40.

21. The next entry after this is 6 March 2018. It is recorded that Ms Seles had "pain suddenly over the medial condyle recently with paraesthesia ulnar region and pain above the elbow too. Click with pronation and supination". Dr Gunning notes he requested an x-ray of the right elbow that was normal and an ultrasound. A CT cervical scan was requested on 6 April 2018 due to pain and tingling in the right forearm in the ulnar nerve distribution and some tingling above the elbow.

22. On 18 April 2018, the referral was issued to Dr Presgrave. On 9 July 2018, Ms Seles presented with elbow pain and it was noted that it may be work related. On 12 July 2018, Dr Gunning issued the referral to Dr Reiter. On 16 August 2018 Dr Gunning requested diagnostic imaging of the right shoulder in the form of an ultrasound and x-ray. He noted Ms Seles had pain in the right shoulder with pain with abduction and "impingement sign ? rotator cuff lesion.[9]"

23. On 3 September 2018, Dr Gunning recorded that Ms Seles had pain in the right upper arm and now in the neck, with paraesthesia down the upper right arm. He requested the MRI scan of the cervical spine. On 19 September 2018 Dr Gunning issued a referral to Professor Raymond Schwartz.

24. On 15 November 2018, Dr Gunning recorded that Ms Seles had seen a neurosurgeon who thought she might have a complex regional pain. He noted her nerve was normal and she has spasm in the arms.[10] On 10 December 2018 Dr Gunning records that Ms Seles has been diagnosed with CRPS. Throughout 2019 there are further attendances. Generally, Dr Gunning's typed clinical notes are very brief.

25. Various medical certificates are in the ARD. The Certificate of Capacity from Dr Gunning include one dated 10 December 2018 certifying Ms Seles as having no current work capacity from 27 August 2018 with a diagnosis of Chronic Regional Pain Syndrome and date of injury May 2012[11]. This certification has been continued in certificates dated 2 January 2019 (covering the period 20/12/2018 to 20/1/2019), 21 January 2019 (covering the period 20/1/2019 to 20/2/2019), 21 February 2019 (covering the period 20/2/2019 to 20/3/2019), 30 May 2019 (covering the period 17/5/2019 to 21/6/2019), 24 June 2019 (covering the period 22/6/2019 to 20/7/2019), 22 July 2019 (covering the period 20/7/2019 to 17/8/2019), 28 August 2019 (covering the period 17/8/2019 to 16/9/2019), 18 September 2019 (covering the period 16/9/2019 to 14/10/2019), 11 November 2019 (covering the period 11/11/2019 to 9/12/2019), and13 December 2019 (covering the period 10/12/2019 to 7/1/2019 [sic,2020]).

Dr Presgrave

26. The referral to Dr Presgrave from Dr Gunning dated 18 April 2018 states that Ms Seles has been troubled by paraesthesia in the right forearm in an ulnar distribution. It was noted that Ms Seles initially put this down to lifting or holding children who were asleep, but it has been fairly constant for six weeks. Dr Gunning recorded that she also has pain intermittently in her right shoulder. Dr Gunning mentioned that Ms Seles fractured her right elbow in a fall at work in 2012[12].

27. The initial report of Dr Presgrave is not before the Commission. In his report dated 22 May 2018 he says Ms Seles has returned for review. Dr Presgrave is a neurologist and neurophysiologist. He says the right upper limb nerve conduction studies showed borderline slowing of the ulnar motor conduction across the right elbow and there were chronic changes in the right FDI, but not to the other C8 innervated muscles. Dr Presgrave was arranging for an MRI of the right elbow to visualise the ulnar nerve at and distal to the elbow[13].

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[9] ARD p40.
[10] ARD p41.
[1111] ARD p89.
[12] ARD p66.
[13] ARD p 67.

28. The MRI scan of the right elbow dated 6 June 2018 revealed mild common extensor origin tendinosis and there was a significant increased signal in the ulnar nerve particularly at the cubit tunnel[14].

29. On 7 June 2018, Dr Presgrave reported again to Dr Gunning[15]. Dr Presgrave reported that Ms Seles main concern was pain which Dr Presgrave related to the extensor tendonitis rather than ulnar neuropathy. He noted the MRI scan showed no definite compression and so he does not recommend surgery. Dr Presgrave arranged for her to have ultrasound guided steroid injection to the right ulnar nerve at the elbow and the right common extensor tendon origin.

30. On 12 July 2018, Dr Presgrave reported to Dr Gunning[16]. He stated that the injection to the right common extensor origin produced complete pain relief in that area. However, the injection at the cubit tunnel did not ameliorate any sensory symptoms. Also, there was more pain along the lateral border of the biceps extending to the shoulder with some limitation of shoulder movement. Dr Presgrave opined that ulnar neuropathy of the right elbow was only a small component of her symptoms. He suspected that the original elbow fracture might have set off other musculoskeletal issues. He does not explain what these issues are. He recommended referral to a rheumatologist.

Dr Ron Gronot

31. Dr Gronot is a neurologist and neurophysiologist who has been treating Ms Seles. His report dated 24 September 2018 addressed to Dr Gunning is contained in Dr Gronot's clinical notes in the ARD[17]. He had a history that since the 2012 injury Ms Seles noted occasional elbow locking with load bearing but settled with offloading. She also had rare hand numbness. Dr Gronot also records the history since March 2018. He says she felt the elbow lock, she felt a snap and she had increasing and now constant pain and numbness down the forearm to the medial 1 ½ digits. Dr Gronot said the pain localised to the medial elbow and radiated proximally to the shoulder, with neuropathic sensations (burning, coldness, paraesthesia) in an area of numbness. He said she also noted fasciculations in the proximal arm.

32. Dr Gronot recorded that Ms Seles had a right ulnar perineural and right extensor injection with no benefit. Dr Gronot sets out all of the investigations including the MRI cervical spine dated 4 September 2018, MRI right elbow dated 1 June 2018, and right elbow and arm ultrasound 13 September 2018. Dr Gronot records his examination finding, which were all normal apart from weakness of 5- in right finger abduction and right ulnar sensory loss extending proximally to the forearm. Dr Gronot sets out his management plan for brachalgia and syrinx. In relation to the brachalgia the doctor refers to diagnostic features of ulnar neuropathy, thickening of the ulnar nerve at the cubit tunnel, ulnar territory sensory impairment, intrinsic hand weakness, worsening elbow pressure and medial hand numbness. He said he has suggested review by Dr Ralph Mobbs, neurosurgeon. In relation to the syrinx he believed it was unrelated to Ms Seles presentation and suggested a review by Professor Marcus Stoodley.

33. On 30 November 201,8 Dr Gronot reported again to Dr Gunning[18]. He stated that Ms Seles had seen Professor Stoodley who felt that the enlarged cervical canal was asymptomatic. Dr Gronot says that Professor Stoodley did not find any ulnar issues and raised the question of CRPS. No report from Professor Stoodley is before the Commission.

[14] ARD p70.
[15] ARD p71.
[16] ARD p74.
[17] ARD p44.
[18] ARD p48.

34. Dr Gronot records that Ms Seles describes her pain as variable. Sometimes at the right shoulder and other times at the medial elbow, which she said was the same sensation as when she fractured her elbow. She also reported at times pain in the right wrist and neck. She advised Dr Gronot that she has persistent numbness over her medial right digits. Dr Gronot referred to the uncertainty as to diagnosis and advised he would treat Ms Seles along a provisional diagnosis of CRPS at that stage.

35. On 29 March 2019, Dr Gronot reported again to Dr Gunning[19]. He advised since his last report Ms Seles has deteriorated somewhat in terms of brachalgia. He noted she had a feeling of sunburn over her right neck and a burning and flowing sensation on the right shoulder, which was the most significant. The numbness in her digit V was worse, with ongoing fasciculations. He noted she was unable to drive and was due to attend the Prince of Wales Hospital Pain Clinic. On his examination Dr Gronot found ulnar power was normal and the ulnar nerve was minimally indurated on the right. He found numbness in the medial 1 ½ right digits. In addition to the investigations to which he previously referred, he also now lists further investigations such as, NCS/EMG 27 September 2018, injection 21 June 2018 and right elbow MRI dated 5 October 2018. Dr Gronot concluded that Ms Seles is likely to have CRPS, but he said he would consider treating the ulnar nerve one more time. He ordered an ultrasound guided right ulnar perineural injection. He refers to medication changes.

36. On 29 April 2019, the Pain Management Clinic, Prince of Wales Hospital, reported to Dr Gronot[20]. It was recorded that Ms Seles had near complete resolution of her pain in 2012. In relation to the 2018 incident it is recorded that she suffered a sudden onset of initially, numbness over the right upper limb ulnar distribution, which then gradually progressed to circumferential right upper limb pain and sensitivity, and painful cold sensations. It was noted there was no relief with two diagnostic nerve blocks. It was further noted that Ms Seles has not noticed any skin colour change, swelling or asymmetrical sweating or trophic changes. The investigations that had been previously undertaken were noted, as was her medication history. On examination, skin temperature was slightly cooler on the right upper limb and pinprick hypoalgesia was generalised over the right upper limb to the shoulder. All other testing was normal. Dr Teo, author of the report, says that Ms Seles symptoms were more generalised than Dr Gronot reported in November 2018. He gave a diagnosis “presumably still ulnar neuropathic pain”. Dr Teo stated that Ms Seles did not quite fit the formal diagnostic criteria of CRPS but said that was likely to evolve with time. They were going to commence medical cannabinoid therapy as Ms Seles had found smoking cannabis to be effective.

37. In this report, Dr Teo also noted that Ms Seles was no longer working, that she “had initially returned to work for 2 years under Workers Compensation but then decided to stop work, though this was in part due to the birth of her children.”

38. Dr Gronot provided a report for Ms Seles’ solicitors who requested the same on 8 May 2019[21]. Dr Gronot’s report is incorrectly dated 24 September 2018. Dr Gronot states considering all of those investigation he considers it is most likely that Ms Seles’ pain is due to Complex Regional Pain Syndrome (CRPS). He says there may be an underlying component of a mild neuropathy, although he said this is not supported by the neurophysiology but that the symptoms and the MRI were suggestive.

39. In terms of causation, Dr Gronot states that the original injury caused some trauma to the ulnar nerve, as evidenced by symptoms of intermittent hand numbness and persisting medial elbow pain between the time of the injury and 2018. He adds that this was exacerbated during her injury of March 2018, which worsened symptoms causing her current presentation.

[19] ARD p50.
[20] ARD p52.
[21] ARD p21.

40. Dr Gronot expresses the opinion that due to her CRPS Ms Seles is unable to work. He says the link between the original injury is complicated and he says the work related 2012 injury is partly responsible for her 2018 symptoms because it predisposed her to the second injury in March 2018 injury. Dr Gronot believes Ms Seles' treatment has been reasonable.

41. On 2 August 2019, Dr Gronot reported again to Dr Gunning[22]. Dr Gronot advised that the local anaesthetic improved matters around the elbow but did not improve the more distal radiating pain. He said this suggested that there is no definite indication for ulnar nerve decompression at all. So, he was going to leave the Pain Clinic to treat Ms Seles.

42. There are no further reports from the Pain Clinic before the Commission.

Dr Dudley O'Sullivan

43. Dr O'Sullivan is a neurologist retained by the respondent's solicitor to provide a medico-legal report, which is dated 23 August 2019[23]. Dr O'Sullivan has a detailed history of the 2012 injury including that from the Emergency Department of Prince of Wales Hospital. He notes x-rays were taken and initially no fracture was evident. However, he relates at the fracture clinic on 6 June 2012 Dr Harper reviewed the radiology of her right elbow and diagnosed Ms Seles as having an undisplaced right radial head fracture and haemarthrosis was seen on x-ray. This is consistent with the clinical notes from the Hospital[24]. Dr O'Sullivan also has the history that Ms Seles was told to remove the sling and commence physiotherapy and it was felt she could return to work on 12 June 2012. He notes that the physiotherapy helped the situation and she was able to go back to work on light duties for two weeks and then went back to full duties.

44. Dr O'Sullivan also recorded that towards the end of 2012 Ms Seles took further time off work as she had a miscarriage. She returned to work and had a further miscarriage in March 2013. She returned to work until she became pregnant in September 2013 and she was advised to take three months off work, which she did until December 2013. Dr O'Sullivan records that Ms Seles at that time would have an occasional "niggling" pain in her right elbow, but she was able to do her normal duties. Her baby was born in June 2014 and she took 12 months maternity leave. She fell pregnant again during this time and her daughter was born in August 2015. Her maternity leave was extended to August 2016. She then took long service and paid leave until August 2018. Ms Seles told Dr O'Sullivan that all through this time she experienced the niggling pain in her right elbow.

45. Dr O'Sullivan has the history that in March 2018 Ms Seles was lifting her daughter and putting her into a low chair. Her daughter was two and a half. In doing so she felt her right elbow lock and noticed quite severe pain, and she was aware of a cracking sound in her right elbow. Dr O'Sullivan also records that she said she felt the pain go up her right arm to the shoulder, as well as numbness on the medial side of the right arm to the ulnar two fingers of the right hand. He records that she had no feeling in the right 5th finger.

46. Dr O'Sullivan then refers to the various tests and treatment by Drs Presgrave and Gronot, and the Pain Clinic. Dr O'Sullivan sets out in detail his examination findings, including that the upper limbs revealed no muscle wasting with normal tone. There was slight weakness of the ulnar nerve supplied lumbricals, that is for the 4th and 5th fingers. He also found a positive Tingel's of the right elbow and explained that this meant that percussion of the ulnar nerve sent tingling down to the fingers. Other testing was normal. Dr O'Sullivan commented:

> "she had diminished pinprick sensation, two- point discrimination and joint position sense as well as light touch and vibration sense in the right 4th and 5th finger i.e. the

[22] ARD p55.
[23] ARD p175 and Reply p16.
[24] ARD p35.

area supplied by the ulnar nerve. This is most unusual in my opinion since her sensory action potentials recorded from the right ulnar nerve were normal."

47. Dr O'Sullivan considered the report of Dr Gronot dated 24 September 2018, where he considered the pain described is due to complex regional pain syndrome. Dr O'Sullivan says his opinion is that there was no evidence to indicate that she has complex regional pain syndrome and he said there is mild right ulnar nerve neuropathy. He states that the cause of this is unknown. At point 7 of his report he states that he does not believe that the right elbow condition is related to her employment as Ms Seles only sustained an undisplaced fracture of the right radial head. Dr O'Sullivan says this is in the opposite side of the elbow to where the right ulnar nerve passes and therefore she would not have injured the right ulnar nerve in 2012.

48. In relation to her work capacity, Dr O'Sullivan expressed the view that she could return to her previous employment because her right ulnar nerve neuropathy is only mild. He said there are unusual features as far as the neuropathy is concerned because she has normal nerve conduction studies, even though on clinical examination she has lost sensation in the right ulnar nerve territory in the right hand. Dr O'Sullivan adds that this would be most unusual in the presence of normal sensory and motor conduction in the right ulnar nerve. He suspected there could be non-organic factors contributing to her ongoing symptomatology.

49. Dr O'Sullivan stated that Ms Seles was able to return to full duties. He considered she had recovered from the effects of the 2012 injury and the episode when she lifted her daughter in March 2018 is not related to the 2012 injury.

Causation issue

50. Determining the causation issue is not straightforward.

51. Dr Gunning specifically advises that he was waiting the outcome of specialist opinion. Also, Dr Gunning errs in his report referring to the 2012 injury as involving a displaced fracture, whereas the evidence from the clinical notes at the Prince of Wales fracture clinic is that it was undisplaced.

52. Furthermore, Dr Gunning's referral to Dr Presgrave dated 18 April 2018 did not refer to the incident in March 2018, lifting Ms Seles daughter into the low chair. Dr Gunning states in this referral that she was troubled by paraesthesia in the right forearm in the ulnar distribution and he states to Dr Presgrave "Ms Seles initially put this down to lifting or holding children who were asleep but it has been fairly constant for 6 weeks."

53. Dr Presgrave's first report to Dr Gunning is not before the Commission. The first available report is dated 22 May 2018 and it says Ms Seles "returned for review today". I infer from this Dr Presgrave saw Ms Seles earlier. This is confirmed as there is an account from Dr Presgrave for attendance on 3 May 2018[25]. This absence of his initial report is unfortunate because there is no history recorded in his reports which are before the Commission. His history would be relevant because it seems he was the first specialist to examine Ms Seles.

54. The only comment made by Dr Presgrave regarding causation is in the report dated 12 July 2018, "I suspect that her original elbow fracture might have set off other musculoskeletal issues". However, he does not explain what these are or how this could have occurred. Nor is it clear if Dr Presgrave knew the 2012 injury involved an undisplaced fracture. I find that because of these factors I cannot place weight upon Dr Presgrave's opinion, such as it is, in relation to a causal connection between the work injury in 2012 and the symptoms Ms Seles has experienced from March 2018.

[25] ARD p18

55. Dr Gronot in his report to Dr Gunning dated 24 September 2018 does refer to the March 2018 incident, which he describes as lowering her daughter into the chair and said she felt the elbow lock and hearing a snap and noticing increasing numbness down the forearm to the medial 11/2 digits. He does not mention Ms Seles initially feeling that her problems were due to lifting or holding children who were asleep.

56. In order to provide assistance to the Commission in relation to the causation issue, I consider that the doctors need to have an understanding of the precise injury sustained by Ms Seles in 2012. Dr Gronot in this report does note that Ms Seles in 2012 fell onto her outstretched hand but he then states, "with a fracture diagnosed involving the joint (unclear exactly which)." The fracture clinic note of 6 June 2012 diagnosed an undisplaced fracture of the radial head. Dr O'Sullivan was aware of the nature of this fracture and he states that the right radial head is in the opposite side of the elbow to where the right ulnar nerve passes. This led Dr O'Sullivan to form the opinion that Ms Seles would not have injured the right ulnar nerve in the 2012 accident.

57. Ms Seles has no medical opinion commenting on this opinion of Dr O'Sullivan. Dr Gronot in his report to Dr Gunning dated 24 September 2018 sought a review by Dr Ralph Mobbs, neurosurgeon, and Professor Stoodley. In the accounts there is a statement of claim and benefit payment for Professor Stoodley's consultation with Ms Seles on 8 November 2018[26]. However, no report from Professor Stoodley is before the Commission. Dr Gronot states in his report dated 30 November 2018 that Professor Stoodley seemingly did not find any ulnar issues either and raised the question of CRPS. Given that the diagnosis of Ms Seles symptoms have proved difficult, the failure to provide a copy of the report from Professor Stoodley is not helpful. It cannot be gleaned from Dr Gronot's report whether Professor Stoodley believed there was causal link with the 2012 injury and the development of any CRPS.

58. Dr Gronot, in his report to Ms Seles' solicitors dated 24 September 2018 [sic, 2019], states that the original injury caused some trauma to the ulnar nerve as evidenced by symptoms of intermittent hand numbness and persisting medial elbow pain between the time of the 2012 injury and 2018. He opines that this was then exacerbated during her injury of March 2018, which worsened her symptoms causing her current presentation with CRPS. However, in his first report to Dr Gunning, Dr Gronot only referred to rare hand numbness and occasional elbow locking after the 2012 injury. There was no reference then to Ms Seles having experienced persisting medial elbow pain from 2012. The Pain Clinic characterised the situation after the 2012 injury as near complete resolution of her pain. Both the history to Dr Gronot in the first consultation and to the Pain Clinic differ markedly with Ms Seles statement at [25]. I find I cannot place weight on Ms Seles statement that her doctors told her that the March 2018 injury would not have happened had she not had the injury on 22 May 2012. No doctor has actually expressed that opinion in the reports which are before the Commission.

59. Also, it should be noted that in Ms Seles' email of 20 July 2018 to Mr Rabbitt she described her symptoms after the 2012 injury as "just littles niggles". She contrasted this to after March 2018, describing pain and numbness. This is consistent with her informing Dr O'Sullivan that when she returned to work in December 2013, at that time, she would have the occasional "niggling" pain in her right elbow, but she was able to do her normal duties, very quickly.

60. In his report dated 29 March 2019 Dr Gronot says, "She likely has CRPS" and he was waiting a review by the Pain Clinic. He did not express a view about the relationship between any CRPS and the 2012 injury. In his last report of 2 August 2019, he said he would leave her management to the Pain Clinic.

[26] ARD p192

61. The Pain Management Clinic report dated 29 April 2019 by Dr Teo deals with treatment. A history is taken of the 2012 injury including that it was a non-displaced fracture. The precise site of the elbow fracture is not mentioned. It is noted there was near complete resolution of her pain following the 2012 injury. Then a history is recounted about the March 2018 event. No mention is made that Ms Seles initially felt her symptoms were due to lifting or holding children who were asleep. Dr Teo does not express a view about whether there is a causal link between the 2018 symptoms and the 2012 injury.

62. I find the opinion of Dr O'Sullivan should be accepted and be preferred to that of Dr Gronot in relation to the causation issue. He is the one doctor who has actually considered the causal issue in detail, having correctly described the nature of the 2012 fracture. Dr O'Sullivan opines that the 2012 injury involved Ms Seles only sustaining an undisplaced fracture of the right radial head which he says is on the opposite side of the elbow to where the ulnar nerve passes and he is of the view that Ms Seles would not have injured her ulnar nerve in the 2012 injury. This report was served on Ms Seles, care of her solicitors, with the dispute notice of 9 September 2019. Ms Seles' ARD was registered in the Commission on 24 December 2019 and so there was opportunity for Dr O'Sullivan's opinion to be considered before the ARD was filed.

63. Ms Seles' counsel in his submissions referred to the Commission having the status of a specialist tribunal enabling medical issues to be determined outside direct evidence. He referred to his researches about the relationship between pathology and pain in the elbow. However, I do not accept any such submission. As I have found this is a difficult matter requiring expert medical opinion and it is not appropriate for counsel to refer to his "researches".

64. In *Strinic v Singh,*[27] at [58] the Court of Appeal referred to the principles and practices of a specialist jurisdiction and cited *JLT Scaffolding International Pty Ltd (In Liq) v Silva* (New South Wales Court of Appeal, 30 March 1994, unreported), where Kirby P stated, at 12:

> "The appeal comes to this Court from a specialised Tribunal which is dealing with compensation cases and conflicting lay and medical evidence every day. The flavour of the expertise of the Compensation Court can be found in the judgment under appeal. Medical conditions, unfamiliar to a lay body are stated in the judgment without definition simply because those practising in the Compensation Court are, or are taken to be, familiar with the medical terms used and the ordinary and oft repeated conflicts of medical opinions expressed. It can be inferred from the establishment of a specialised Compensation Court (one might say especially given the abolition of such bodies elsewhere in Australia) that the Parliament of this State has entrusted the decision making in (relevantly) questions of medical causation and the aetiology of incapacity to a specialist tribunal comprised of specialist members whose expertise is refined by the repeated performance of their tasks."

65. However, being part of specialised tribunal does not mean the determination can be made in the absence of evidence, particularly in a case such as Ms Seles, where even the question of diagnosis has proved difficult. Dr O'Sullivan has expressed an opinion based upon the physiology of the elbow region. There is no other doctor who comments on the position of the ulnar nerve compared to the radial head. I find had Ms Seles wished to challenge that opinion she should have done so by direct medical evidence.

[27] [2009] NSWCA 15

66. Ms Seles' counsel also relies on Dr Presgrave's opinion, but I have explained why I do not accept the same. Counsel then focused on Dr Teo's report which he submitted showed a strong temporal connection, which counsel described as a continuum of a condition from 2012 and the event in March 2018 "has set her back on the timeline to the situation she experienced earlier." However, I do not accept this characterisation of Dr Teo's report. Dr Teo relates the history of the 2012 injury. He says there was near complete resolution of her pain and then he relates the event in March 2018. He describes this as a "sudden onset" of initially, numbness over the right upper limb medial distribution then he notes the gradual increase in her symptoms. Dr Teo does not actually express an opinion about the causal relationship between the 2012 injury and March 2018 event and sequelae.

67. Ms Seles' counsel also submitted that Dr O'Sullivan had only seen Ms Seles once whereas Dr Gronot had seen her several times. This is true. However, in terms of providing an opinion about the causation issue I consider that Dr O'Sullivan has provided the more detailed and reasoned view. As I have stated, Dr O'Sullivan, unlike Dr Gronot, carefully considered the nature of the original fracture, that it was undisplaced and its location. Therefore, I prefer the opinion of Dr O'Sullivan to that of Dr Gronot in relation to the causation issue.

68. I asked both counsel about the entries in Dr Gunning's notes on 24 February 2016 where he requested diagnostic imaging in the form of an ultrasound for "Lump right elbow", 4 November 2016 referring to intermittent pain right wrist and base of thumb and an x-ray was requested and on 9 December 2016 a bone scan was requested for pain in the base of the right thumb for two months[28]. There is no other entry then until 6 March 2018. Dr Gunning does not address these 2016 entries in his report nor does Ms Seles. No doctor has referred to the same. These entries may or may not be relevant, but without a copy of the actual radiology results I cannot make a finding one way or the other. Dr Gunning's notes are so brief they do not provide any insight into the relevance of the same.

69. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[29] wherein Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at 462E):

> "Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

70. His Honour said at 463–464:

> "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 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 commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined

[28] ARD p40.
[29] (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*

> on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a *novus actus*. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

71. Applying the principles in *Kooragang* to Ms Seles' case, I find that when considering all of the evidence, it has not been established on the balance of probabilities that there is a causal connection between the symptoms from March 2018 and the work injury of 22 May 2012.

72. It needs to be borne in mind that Ms Seles has the onus of proof. An expert has not been qualified on her behalf to provide an opinion about causation. I have carefully considered the medical evidence from her treating doctors and found it does not provide the required reasoned opinion relating to the causation issue. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*[30] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712."

73. I find on the state of the evidence and the issues with the same, discussed above, applying *Nguyen*, Ms Seles has not discharged her onus of proof. I am not satisfied on the balance of probabilities that she has established that the symptoms she complains of from March 2018 are causally related to the injury of 22 May 2012.

74. Therefore, I find an award for the respondent.

[30] [2008] NSWCA 246