

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2306/19
Applicant: Danielle Fabien
Respondent: Heedman Enterprises Pty Limited
Date of Determination: 18 July 2019
Citation: [2019] NSWCC 244

The Commission determines:

1. The name of the respondent is amended to read "Heedman Enterprises Pty Limited."
2. I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment as a result of:
 - (a) injury to her right upper extremity (shoulder) on 20 December 2002;
 - (b) consequential condition in her left upper extremity (shoulder), and
 - (c) consequential condition in her gastrointestinal tract.
3. All of the material in the Commission's file should be sent to the Approved Medical Specialist.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Danielle Fabien was employed by Heedman Enterprises Pty Limited (Heedman) as an Assistant in Nursing when she suffered an injury to her right shoulder on 20 December 2002. She has been paid lump sum compensation for that injury. There is no dispute that she should be examined by an Approved Medical Specialist (AMS) in respect of her claim for further compensation in respect of her right shoulder and for scarring.
2. Heedman disputes that Ms Fabien has suffered consequential conditions in her lower gastrointestinal tract and left shoulder as a result of her right shoulder injury.

PROCEDURE BEFORE THE COMMISSION

3. The matter was fixed for conciliation conference and arbitration hearing on 21 June 2019. Mr R Stanton of Counsel appeared for Ms Fabien and Mr Stockley of counsel appeared for Heedman.
4. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

5. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Reply.
6. There was no oral evidence.
7. Ms Fabien described the injury in her statement and said that when she lifted a patient with dementia she felt immediate pain in her right shoulder. She was referred to Dr D Bokor who performed arthroscopic surgery in mid 2003. Her pain did not improve. Prof G Murrell performed an arthroscopy in 2004 and open surgery to the right shoulder in 2008. Following that surgery, she underwent four months of physiotherapy. She took a great deal of medication for pain and was referred to a detoxification program at Concord Hospital.
8. Ms Fabien said that she began to develop pain and stiffness in her left shoulder because of over use of her left arm which she was required to use for all overhead activities. She suffered abdominal pain, constipation and bleeding which she attributed to the effects of medication taken for pain relief.
9. In a supplementary statement, Ms Fabien said that she suffered septic arthritis in her left shoulder whilst on holidays in Mauritius in 2006. She returned early and was admitted to Royal Prince Alfred Hospital where she underwent surgery to treat the infection. For a couple of months after she recovered, she was able to use her left arm freely. As her arm recovered, she started to use it more than her right. She said her arm has been constantly painful since 2007. She said she believed she recovered from the infection after the operation and strongly believed that the ongoing symptoms were due to overcompensating for the right shoulder.

Medical evidence

10. In addition to her left shoulder condition, Ms Fabien suffered pin in her left wrist. In 2008, she saw Dr G Richards, rheumatologist, who diagnosed De Quervain's tenosynovitis. He said it was likely that the condition in her wrist was a result of constant repetitive use of her left arm since the problem with her right shoulder because she had relied on her left arm for domestic work.
11. In 2009, Prof Murrell, who was treating Ms Fabien's right shoulder, referred her to Dr M Nabarro, hand and microsurgeon. Dr Nabarro noted that Heedman's insurer had not accepted liability for the "left wrist injury". He noted Dr Richards' opinion as to the cause of the tenosynovitis and asked the insurer to review its decision. He recommended a wrist splint and a steroid injection. He undertook surgical release of the first dorsal compartment and extensor tenosynovectomy on 1 October 2009. In 2010, Dr Nabarro recommended nerve conduction studies for bilateral carpal tunnel syndrome.
12. Prof Murrell began treating Ms Fabien in June 2004 for her right shoulder injury. He recommended arthroscopic treatment for a right rotator cuff tear but his report dated 1 September 2004 said that he undertook an open acromioplasty and rotator cuff repair. On 7 March 2005, Prof Murrell said that Ms Fabien was not progressing as well as he would like. After reviewing an ultrasound on 4 April 2005, Prof Murrell recommended review in six months. However, a further review was undertaken one month later when he again recommended review in six months.
13. Prof Murrell's notes include a pain diagram, apparently completed by Ms Fabien, for each consultation. The diagram for 16 May 2005 shows only pain in the right shoulder.
14. Prof Murrell did not see Ms Fabien again until after she had undergone treatment for the infection in her left shoulder. There is nothing in the file to explain exactly what that treatment was though Dr T Silva said in his Medical Assessment Certificate dated 4 January 2010 that the infection had been treated arthroscopically and with antibiotics. Dr W Cumming (whose report Heedman relied on for only history and context) found no scarring so determined that Ms Fabien had been treated without surgical drainage but with intensive antibiotics.
15. Prof Murrell saw Ms Fabien again on 5 November 2007 when Ms Fabien recorded on the pain diagram that she had pain in her left shoulder. Prof Murrell obtained a history of the infection and that it was surgically treated. He found that the pain and range of movement in the left shoulder was similar to the right, with pain, positive impingement signs and slight weakness on supraspinatus testing, which he attributed to the infection.
16. On 19 November 2007, Prof Murrell noted that Ms Fabien had undergone a "washout" as treatment for the left shoulder infection and said it was "relative" that she had mature onset diabetes. He considered that the irritation was secondary to the infection but recommended no intervention.
17. On 7 April 2008, Ms Fabien recorded pain in her right shoulder only on the pain diagram. Prof Murrell did not record any complaint with respect to the left shoulder but noted that Ms Fabien had to do more overhead activities since her husband left her.
18. On 12 June 2008, Ms Fabien recorded on the pain diagram "start to get pain during activities" with an arrow pointing to her left shoulder. Prof Murrell's report dealt only with her right shoulder.

19. On 28 July 2008, the pain diagram noted left shoulder pain. Prof Murrell reviewed a bone scan report and reported on ultrasounds he had undertaken. On the right side the repair of the rotator cuff was intact and the left showed some evidence of impingement but no cuff tear. He recommended injecting the subacromial spaces with depo-medrol and lignocaine but the report is not clear as to whether that injection was for one or both shoulders.
20. Ms Fabien saw Prof Murrell again on 13 October 2008 when there was no indication of left shoulder pain on the pain diagram. In his report, Prof Murrell noted Ms Fabien “has had” ongoing problems with her right and left shoulders. He noted that she had also had pain in her right and left wrists. With respect to the left shoulder, Prof Murrell noted that her left shoulder motion was quite good and there were “negative impingement signs.” He said that her left wrist was very sore and that she had an infection in that wrist in the past.
21. Prof Murrell’s report dated 3 November 2008 does not mention Ms Fabien’s left shoulder. He noted that “she had some wrist pain and I gather they have identified a fracture there, and she’s got a cast on that left wrist.” Prof Murrell had sought permission to operate on her right shoulder.
22. Prof Murrell’s reports dated 19 January 2009, 12 February 2009, 14 September 2009, 12 October 2009, 9 November 2009 and 4 May 2010 do not mention Ms Fabien’s left shoulder. The report dated 4 May 2010 described the surgery undertaken to her right shoulder on that day.
23. Ms Fabien saw Prof Murrell on 31 May 2010 and noted that she had made an unremarkable recovery. He recorded that “[s]he says she is getting some discomfort in her left shoulder because she has had to use that arm a lot since the surgery.”
24. On 30 August 2010, Prof Murrell recorded that Ms Fabien had problems with her left shoulder which she said began just prior to the surgery to her right shoulder. She had pain with overhead activities and pain at night. He diagnosed “possible impingement versus rotator cuff tear, left shoulder, probably related to overuse secondary to the right shoulder problem.” He referred Ms Fabien for an ultrasound and x-ray of her left shoulder.
25. On 13 September 2010, Prof Murrell said that the ultrasound was “negative for a rotator cuff tear.” He diagnosed impingement and recommended an injection which was done on the same day.
26. On 21 November 2010, Heedman’s insurer wrote to Prof Murrell and said that it had disputed the connection between Ms Fabien’s left shoulder condition and the work injury to her right shoulder and neck.
27. Ms Fabien was referred back to Prof Murrell in 2013 and he reported on 30 September with respect to her right arm only. He diagnosed impingement and reassured her that the repair was intact. His final report is dated 11 December 2013 and deals only with her right shoulder.
28. An ultrasound of Ms Fabien’s left shoulder on 26 June 2017 showed rotator cuff tendinosis with no evidence of a tear. There was subdeltoid/subacromial bursitis. The report is addressed to Dr Chow from whom there is no report.
29. An ultrasound of Ms Fabien’s left shoulder was undertaken on 3 April 2018 and showed supraspinatus, subscapularis and infraspinatus tendinopathy. There was no evidence of a rotator cuff tear.

30. In 2016 Ms Fabien was treated for opioid dependence and her medication was changed to suboxone and mirtazapine. An endoscopy was undertaken on 16 June 2017 and Dr Rahme noted that Ms Fabien had a long history of constipation which had worsened since commencing suboxone.

Medico-legal reports

31. A/Prof SKC Wong prepared a report for Ms Fabien's solicitors dated 27 April 2018. He obtained a history of the injury to Ms Fabien's right shoulder in 2002 and the three operations. He recorded that "for the last four months, Ms Danielle developed pain and stiffness in the left shoulder." He diagnosed consequential left shoulder symptoms but did not explain his reasoning for that diagnosis. He assessed 11% whole person impairment (WPI) in respect of the right shoulder, 7% WPI in respect of the left and 1% for scarring under the TEMSKI.
32. A/Prof Wong was asked to provide a supplementary report with respect to Ms Fabien's left shoulder. He said in his report dated 3 May 2019 that he had reviewed her supplementary statement. Though he had not been told about the previous left shoulder condition, A/Prof Wong said that his assessment of impairment was consistent with the statement and he did not make any deduction for the pre-existing condition.
33. Prof T Bolin, gastrointestinal and liver specialist, assessed Ms Fabien on 13 March 2018. He recorded that gastrointestinal tract symptoms began shortly after the original injury. Based on the results of a colonoscopy in 2007 and his examination, Prof Bolin diagnosed constipation. dominant irritable bowel syndrome with rectal mucosal prolapse. He considered that was a result of the medication taken for pain relief and assessed 8% WPI in respect of impairment of the lower gastrointestinal tract.
34. At a telephone conference on 11 June 2010, I noted that the Reply contained reports from a number of orthopaedic surgeons and that an election under clause 44 of the Workers Compensation Regulation 2016 was necessary. Mr C Michael, Heedman's solicitor, said that Heedman relied on the report of Dr Panjratana and that the reports of other orthopaedic surgeons should remain in the Reply for the purpose of "history and context."
35. Dr V Panjratana reported on 5 June 2018. He obtained the history that Ms Fabien's shoulder was now worse because she lives by herself and does all of the household work. He recorded that Ms Fabien had an operation on her left shoulder in 2012 because she developed an infection when she was in her country on holidays. Dr Panjratana said that the infection was not related to work and the surgery was not work related. He had a history of two operations only on Ms Fabien's right shoulder.
36. When recording present complaints, Dr Panjratana said Ms Fabien claimed that she developed pain in the left shoulder when she was overusing it in preference to the right one. He noted that the claim with respect to the left shoulder was disputed in 2010 on the basis of Prof Cumming's report. His diagnosis is failed shoulder surgery on the right. He said that the left shoulder problem developed in Mauritius and is not connected to work.
37. Dr N Talley provided a report dated 28 May 2018. With some difficulty, he obtained the history that Ms Fabien had problems with pain and depression for years and was treated in 2016 for a Panadeine overdose. He disagreed with Dr Bolin's diagnosis of irritable bowel syndrome and considered that Ms Fabien has constipation due to depression and opiate side effects, noting an opiate addiction. He accepted that she had abnormal physical signs assessable as medication caused impairment of the gastrointestinal tract being constipation with mucosal prolapse. He assessed 2% permanent impairment as a result.

Dispute notices

38. Heedman's insurer issued a s 74 notice on 21 October 2010 in which it disputed liability for Ms Fabien's left shoulder condition on the basis of the report of Prof W Cumming dated 8 October 2010 who did not consider that her left arm condition was a result of employment or a result of treatment undertaken for the right shoulder condition. He considered that the left shoulder condition related to the non-work related conditions of De Quervain's syndrome and carpal tunnel syndrome.
39. A further s 74 notice was issued on 16 July 2018. Liability was denied on the basis that Ms Fabien had not suffered an injury or alternatively that employment was not a substantial contributing factor to any injury to her left shoulder. The degree of whole person impairment was also disputed. With respect to the condition in Ms Fabien's upper gastrointestinal tract, the insurer said that Dr Talley noted a long history of "opiate use related to psychiatric and other health problems." It said that Dr Talley disagreed with Prof Bolin with respect to the diagnosis of irritable bowel syndrome, considered that any impairment was related to opiate use for other conditions and assessed no impairment of the upper gastrointestinal tract. It said that in any event, his report supported a substantial deduction under s 323 of the *Workplace Injury Management and Workers Compensation Act 1998*. The latter statement is not a proper basis for disputing the condition.

Previous claim

40. Ms Fabien has previously been compensated in respect of 7% whole person impairment as a result of the right shoulder injury. This is was noted in the Certificate of Determination dated 16 November 2009. Heedman does not oppose a referral to an AMS with respect to the further impairment as a result of the right shoulder condition.

SUBMISSIONS

41. Mr Stanton took me through the reports and notes from Prof Murrell in detail to argue that the consequences of the infection in Ms Fabien's left shoulder resolved, evidenced by the lack of reference to left shoulder pain after about 2008 until 2010. The problems recurred when she used her shoulder a lot after the third operation in 2010. The investigations taken after 2010 showed pathology in her left shoulder.
42. Mr Stanton conceded that I might have difficulty reaching the conclusion that Ms Fabien suffered a consequential condition based only on her statement and the report of A/Prof Wong. However, the reports of Prof Murrell, in particular that of 31 May 2010 would persuade me that the left shoulder condition was a consequence of the right shoulder injury and that the left shoulder condition should also be referred to the AMS.
43. Mr Stockley acknowledged that Dr Talley agreed that there was a connection between the gastro intestinal symptoms suffered by Ms Fabien.
44. Mr Stockley said that the question of the nexus between Ms Fabien's left shoulder symptoms and the right shoulder injury in 2002 was more vexed. He noted the detail and care that Mr Stanton was obliged to take to establish the theory that, because of limited movement of the right shoulder, Ms Fabien was required to rely on her left shoulder to an extent that she would not have done to an extent which was productive of symptoms. He said that "overuse" was an unhelpful epithet which provided no insight into the underlying medical problem. He suggested that a credulous observer might accept the connection but said that Ms Fabien had not done more than that.

45. Mr Stockley said that the starting point was Ms Fabien's shoulder activities before 2002. She was employed by Heedman as an assistant in nursing which involved heavy use of both arms. Since the injury, she had not worked and she lived alone. Her description of her activities is confined to that in paragraph 22 of her statement – "I had to use my left arm to do all overhead activities such as domestic duties..." – and does not describe the duties she undertook. There is no description of what Ms Fabien did that she would otherwise not do and therefore no basis to determine what constitutes overuse.
46. He said that the precise consequences of the left shoulder infection in 2006 were not described and the medical evidence suggested that Ms Fabien had undergone some invasive treatment, the consequences of which were not clear. By 2010, Prof Murrell found positive impingement. It would be expected that the infection may have caused symptoms but neither Prof Murrell nor A/Prof Wong comment.
47. Mr Stockley said that the short period in which there was an absence of left shoulder complaint was an insufficient basis to draw the inference that Ms Fabien suffered a consequential condition in her left shoulder as a result of the right shoulder injury in 2002.

FINDINGS AND REASONS

Gastrointestinal tract

48. Mr Stockley properly conceded that the opinion of Dr Talley would permit referral of the claim with respect to the consequential gastrointestinal condition to an AMS.
49. The s 74 notice dated 16 July 2018 somewhat misrepresents Dr Talley's opinion. The history he obtained was that Ms Fabien had taken painkillers including opiates for her shoulder conditions. She suffered intercurrent psychiatric issues. He did not say, as the s 74 notice says, that she had used opiates for other psychiatric issues but rather that the use of those drugs for her shoulder pain had resulted in treatment for opiate addiction. He considered that depression contributed to constipation. He did not agree that Ms Fabien suffered irritable bowel syndrome but did consider that she suffered medication-caused impairment of the gastrointestinal tract, namely constipation with mucosal prolapse.
50. Ms Fabien clearly suffers a consequential condition as a result of the ingestion of medication. The condition will be referred for assessment by an AMS in the alternative.

Left shoulder

51. There is no dispute that Ms Fabien suffered a significant injury to her right shoulder, that she underwent surgery on three occasions and that she suffers permanent impairment as a result. She claims further permanent impairment compensation and it is agreed that claim should be referred to an AMS.
52. It is also clear that Ms Fabien suffered an infection in her left shoulder in 2006 and that the treatment she underwent is not well described in the ARD. The evidence shows that, even if the condition in Ms Fabien's left shoulder is a consequence of the injury to her right shoulder, the injury is probably not the only causative factor in the development of the left shoulder condition.

53. The test for determining whether a condition is consequential on an injury is set out in *Kooragang Cement Pty Ltd v Bates*¹, where Kirby P said:

“The result of the cases is that each case where causation is in issue in a workers’ compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’, is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent 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 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.”

54. An injury can have more than one cause. In *Lagana v Australian Retirement Partners Realty Pty Ltd*², the worker experienced numbness in her heel as a result of an injury in 2010. In 2012 she slipped on stairs at work as a result of that numbness and the Commission was required to determine if that event was an injury or a consequence of the 2010 injury. Roche DP said:

“On any view of the evidence, Ms Lagana suffered a personal injury in the course of her employment with the respondent in the 2012 fall and the Arbitrator erred in not making that finding. It does not matter that the numbness in Ms Lagana’s right heel played a role, even a substantial role, in causing Ms Lagana to fall. Nor does it matter that she had fallen in January 2012 because of the numbness in her right heel. It is trite law that an injury can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pymont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *Calman v Commissioner of Police* [1999] HCA 60, 19 NSWCCR 40; *ACQ Pty Ltd v Cook* [2009] HCA 28; 237 CLR 656 at [25] and [27]).”

55. In *Calman v Commissioner for Police*, the High Court said:

“It has long been settled that incapacity may result from an injury for the purposes of workers’ compensation legislation even though the incapacity is also the product of other - even later - causes. Indeed, death or incapacity may result from a work injury even though the death or incapacity also results from a later, non-employment cause.” (footnotes omitted)

¹ (1994) 35 NSWLR 452 at 453-4.

² [2015] NSWWCPCD 55.

56. Snell DP referred to these decisions in *Wyllie-Gray v Fitness First Australia Pty Ltd*³, in which the Commission was required to determine whether the worker's back symptoms were a consequence of a hip injury. The worker had suffered a back injury some years before. Snell DP said⁴:
- “The question posed ... was framed on the basis that if the back symptoms resulted “from some other factor or factors”, this was inconsistent with the proposition that the symptoms were also “a consequence” (or result) of the left hip injury. To the contrary, there was no legal impediment to the symptoms resulting from “some other factor or factors”, and also from the left hip injury. The question requiring an answer was whether the accepted left hip injury was a material contributing factor to the back symptoms. If it was, the back symptoms would result in the relevant sense from the left hip injury. It would not matter that the back symptoms resulted also “from some other factor or factors”. The question posed in the reasons at [57] was inconsistent with the accepted test of causation, and the fact that the symptoms could result from multiple causes.”
57. Ms Fabien underwent treatment for the infection in her left shoulder. The recovery process is documented in Prof Murrell's reports. There was a period, albeit short, when Ms Fabien did not complain to Prof Murrell about her left shoulder. In May 2010, Ms Fabien underwent surgery to her right shoulder. On 31 May 2010 Prof Murrell recorded that Ms Fabien had discomfort in her left shoulder “because she has had to use that arm a lot since the surgery.” On 30 August, he recorded that Ms Fabien began having problems in her left shoulder just before the 2010 surgery to her right shoulder and that she had pain with overhead activities and at night. Prof Murrell investigated the left shoulder pain with an ultrasound and did not find a rotator cuff tear. He diagnosed impingement pain.
58. Mr Stockley is correct to note the deficiencies in Ms Fabien's statement and A/Prof Wong's report.
59. Ms Fabien's statement contains a conclusion rather than a description of the activities she cannot perform but she provided the essential reason why she has relied on her left arm – she has used it for overhead domestic duties because she has no one at home to help her. In her supplementary statement she said that her left shoulder recovered from the infection in 2006 and after that recovery she used her left arm for overhead activities. Because she is right hand dominant, it can be presumed that she would have performed those tasks with her right arm or both arms if not for the extensive surgery and that she would not have done them at all if she had someone to help her perform domestic tasks.
60. Mr Stockley noted that “overuse” does not provide any guidance as to what Ms Fabien actually did with her left shoulder. However, that word is used in the context of her belief as to the cause of the left shoulder symptoms rather than the medical evidence.
61. A/Prof Wong's report does not provide any assistance in the determination of whether Ms Fabien suffered a consequential condition in her left shoulder. His history that she had developed pain in the four months before his report dated 2 November 2017 and conclusion that she suffered a consequential condition in her left shoulder does not provide a satisfactory basis on which the Commission can make findings⁵.

³ [2019] NSWCCPD 32.

⁴ At [41].

⁵ See *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11.

62. However, the brief but contemporaneous reports of Prof Murrell support the conclusion that Ms Fabien's use of her left shoulder as a result of her right shoulder surgery led to the development of a consequential condition. He noted that she suffered pain on overhead activities performed with her left arm, which is consistent with her statement that she had no one to assist her with those tasks.
63. Ms Fabien's left shoulder condition may result from more than one cause but I am satisfied that the right shoulder injury is one of the causes of Ms Fabien's left shoulder condition.
64. I remit the matter to the Registrar for referral to an AMS to assess the applicant's permanent impairment as a result of:
- (a) injury to her right upper extremity (shoulder) on 20 December 2002;
 - (b) consequential condition in her left upper extremity (shoulder), and
 - (c) consequential condition in her gastrointestinal tract.

