WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5430/19**
Applicant: **Maree Gonzalez**
Respondent: **Lockomotion Pty Ltd t/as Michel's Patisserie**
Date of Determination: **7 January 2020**
Citation: **[2020] NSWWCC 12**

The Commission determines:

1. The applicant sustained a consequential condition affecting her right shoulder as a result of the injury to her left shoulder on 20 August 2015.

2. The right reverse total shoulder replacement surgery performed by Dr Mark Haber on 4 June 2018 was reasonably necessary as a result of the injury on 20 August 2015.

The Commission orders:

3. The respondent to pay the costs of and incidental to the right reverse total shoulder replacement surgery performed by Dr Haber on 4 June 2018 pursuant to s 60 of the *Workers Compensation Act 1987.*

4. The matter is remitted to the Registrar to be referred to an Approved Medical Specialist for assessment as follows:

    Date of injury: 20 August 2015

    Body parts: Left upper extremity (shoulder)
    Right upper extremity (shoulder) (consequential condition)
    Skin (scarring)

    Method: Whole person impairment.

5. The materials to be referred are to include the Application to Resolve a Dispute and all attachments; the Reply and all attachments other than the report of Dr Thomas A. Silva dated 16 July 2018; and this Certificate of Determination and accompanying statement of reasons.

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

Rachel Homan
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Maree Gonzalez (the applicant) was employed by Lockomotion Pty Ltd t/as Michel's Patisserie (the respondent) as an owner/operator. On 20 August 2015, the applicant injured her left shoulder when she fell whilst pulling a trolley stacked with crates of milk at work. The applicant made a claim for compensation for the injury which was accepted and, on 7 January 2016, she underwent left shoulder surgery.

2. The applicant claims that she sustained a consequential condition at her right shoulder, in the nature of an aggravation of a pre-existing condition, as a result of the injury to her left shoulder. On 4 June 2018, the applicant underwent a right reverse total shoulder replacement, paid for privately. A claim for compensation in respect of the right shoulder surgery was declined by dispute notice issued pursuant to former s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 24 May 2018.

3. On 18 April 2019, the applicant made a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of permanent impairment of both shoulders and scarring and medical expenses including the costs of and associated with the right shoulder surgery pursuant to s 60 of the 1987 Act. Liability was declined in a notice issued pursuant to s 78 of the 1998 Act on 2 July 2019.

4. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 17 October 2019.

ISSUES FOR DETERMINATION

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

    (a) whether the applicant sustained a consequential condition at her right shoulder as a result of the injury to her left shoulder on 20 August 2015;

    (b) whether the right shoulder replacement surgery and associated costs were reasonably necessary as a result of the injury on 20 August 2015; and

    (c) the degree of permanent impairment resulting from the injury on 20 August 2015 and entitlement to s 66 compensation.

PROCEDURE BEFORE THE COMMISSION

6. The parties appeared for conciliation conference and arbitration hearing on 10 December 2019. The applicant was represented by Mr Bill Carney of counsel instructed by Mr Peter Naddaf. The respondent was represented by Mr John Gaitanis of counsel.

7. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
    (a) ARD and attached documents, and

    (b) Reply and attached documents, apart from the report of Dr Thomas A Silva, dated 16 July 2018[1].

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

Applicant's evidence

10. The applicant's evidence is set out in a written statement made by her on 17 September 2019.

11. The applicant gave evidence that she had previously injured her right shoulder when she slipped in the shower. The applicant consulted her general practitioner but the shoulder got better and had no effect on her capacity for work.

12. In around 2010, the applicant suffered a right shoulder injury at work as a result of repetitive pushing, pulling and heavy lifting. The applicant underwent a surgical procedure to repair her right rotator cuff on 4 December 2010. On 30 July 2011, the applicant required further surgery to the shoulder. Following this, the applicant returned to work on full-time unrestricted duties.

13. Prior to the injury on 20 August 2015, the applicant said she would still get pain from time to time but her symptoms had begun to settle. The applicant was regularly working long hours performing physical duties at work without restriction. The applicant's duties involved providing customer service, supervising staff, operating cash registers, answering phones and completing banking. The applicant would wipe benches, sweep floors, move and lift heavy objects to clean. The applicant also performed stock-take, took deliveries and replenished stock, cooked and prepared food and beverages, decorated cakes and prepared customer orders.

14. On 20 August 2015 the applicant was pulling a hand trolley stacked with approximately four crates of milk. As she walked into the cool room, the trolley began to over balance and tip. The applicant reached out with her left arm to try to stop the crates which then fell on top of her. The applicant lost her balance and fell, striking the concrete flooring with her left shoulder.

15. The applicant initially hoped that the pain in her left shoulder would get better with ice and Panadol. The pain persisted so the applicant consulted her general practitioner the following day. The applicant's general practitioner, Dr Balakrishnan referred the applicant for an MRI scan and to orthopaedic surgeon, Dr Doron Sher.

16. The applicant consulted Dr Sher on 28 September 2015 and was referred for an x-ray. On 26 October 2015, Dr Sher referred the applicant for a further MRI scan of her shoulder. On 13 November 2015, Dr Sher recommended surgery.

[1] The respondent elected not to rely on Dr Silva's report at conciliation conference pursuant to cl 44 of the Workers Compensation Regulation 2016.

17. On 7 January 2016, the applicant underwent left shoulder surgery. The pain in the applicant's left shoulder only improved somewhat. The applicant continued to apply ice daily. The applicant was unable to take pain medication prescribed to her due to an allergy. The applicant was certified as unfit for work for approximately six to eight weeks.

18. The applicant commenced physiotherapy in February 2016 but did not feel as though she was making any progress. The applicant tried to return to work but noticed the pain in her left shoulder was particularly bad when she attempted to lift even light objects. The applicant could not raise her left arm above shoulder height. Sometimes, the applicant would be supervising the store by herself and was required to lift larger, heavier orders. The applicant found she had to rely greatly on her right arm to protect her left shoulder. Because of this, she began to experience pain in her right shoulder.

19. On 1 April 2016, Dr Sher recommended a thera-band program. The applicant stopped attending the program as she was not making any progress in her range of movement or pain.

20. On 19 July 2016, the applicant met with Dr Balakrishnan regarding her increasing right shoulder pain. The applicant was sent for an ultrasound of her right shoulder and referred back to Dr Sher. Dr Sher administered a cortisone injection but it did nothing to relieve the applicant's symptoms.

21. The applicant tried to get back to work and felt she needed to continue to be involved in her business. The applicant was using her right arm constantly because she was fearful of aggravating the pain in her left arm.

22. On 6 January 2017, the applicant consulted Dr Sher reporting pain in both the left and right shoulders. This had been particularly bad as the applicant had to use her arms for an extended period decorating cakes at work. Dr Sher advised that it was only a matter of time until she required a joint replacement but suggested that she delay surgery for as long as possible.

23. On 31 August 2017, the applicant returned to Dr Balakrishnan and was referred for x-rays and ultrasounds of both shoulders. Dr Balakrishnan also referred the applicant to orthopaedic surgeon, Dr Mark Haber for a second opinion. An MRI of the right shoulder was also performed around this time.

24. The applicant consulted Dr Haber on 9 October 2017. Dr Haber recommended the applicant continue with physiotherapy but noted that she would need surgery in the near future.

25. On 20 November 2017, the applicant consulted Dr Haber again. By this time, the pain in the applicant's right shoulder had become unbearable. Dr Haber advised the applicant to undergo a right shoulder replacement. The applicant was in so much pain she did not think she could bear another delay, so paid for the surgery to her right shoulder from her own pocket.

26. At this time, the applicant was working approximately two hours per day, three days per week. Despite the pain in her right shoulder, the applicant was still dependent on her right arm for most of her work due to the severity of her left shoulder pain.

27. On 3 April 2018, the applicant reported to Dr Balakrishnan that the pain in both shoulders had started to affect her sleep. The applicant was prescribed Panadeine Forte.

28. The applicant underwent a right reverse total shoulder replacement on 4 June 2018. The applicant has not returned to work since the surgery.

Evidence from the applicant's treating practitioners

29. A letter of referral from the applicant's general practitioner, Dr S Balakrishnan to Knee, Elbow and Shoulder Surgeon, Dr Doron Sher, dated 25 October 2010, requests an opinion and management regarding "rt shoulder pain and limited movement following a fall in the spa bath a few weeks ago."

30. A report dated 26 November 2010 from Dr Sher addressed to Dr Balakrishnan, gives a history of the applicant having slipped in a spa three weeks earlier and having pain and loss of motion in her right shoulder since then. An MRI showed extensive supra and infraspinatus tearing with muscle atrophy and retraction. There was probable subluxation of the biceps tendon.

31. An operation report from 4 December 2010 indicates that Dr Sher performed an "arthroscopic rotator cuff repair, biceps tenodesis and acromioplasty" for a rotator cuff tear of the applicant's right shoulder.

32. An operation report dated 6 June 2011 indicates that Dr Sher performed a "revision arthroscopic rotator cuff repair right shoulder" on that date.

33. On 4 November 2011, Dr Sher reported that the applicant was,

> "…far better than her pre-operative state. She has very little pain and is achieving moderately good forward elevation. She will now commence a thera-band strengthening program."

34. On 26 October 2015, Dr Sher reported that the applicant had injured her left shoulder on 20 August 2015 with immediate pain and loss of motion. Dr Sher noted in this report that the applicant was "satisfied with her right shoulder".

35. On 17 February 2016, Dr Sher, reported to Dr Balakrishnan that the applicant was six weeks post-surgery to her left shoulder. The applicant was to lift less than 1 kg with her operated arm. Dr Sher noted,

> "She also needs to do some physiotherapy for her right side which is a bit sore after having been 'overused' for the last six weeks."

36. On 6 January 2017, Dr Sher prepared a report for the applicant's general practitioner in which it was recorded that the applicant was complaining of pain in the lateral aspect of both of her upper arms with activities such as decorating cakes. Clinical examination showed loss of external rotation with glenohumeral irritability and rotator cuff weakness. X-rays showed a high riding humeral head and the development of arthrosis within the glenohumeral joint. Dr Sher said it was now "a question of time until she has a joint replacement but we will delay this for as long as we possibly can".

37. On 24 March 2017, Dr Sher said the applicant had reported her shoulder was becoming increasingly painful over the last few weeks. A right-sided subacromial injection was administered. On 31 March 2017, Dr Sher reported that the injection had not really helped the applicant.

38. On 18 September 2017, orthopaedic surgeon, Dr Mark Haber reported that the applicant presented with bilateral shoulder pain. The applicant developed pain after a fall in 2015 and underwent left rotator cuff repair surgery in January 2018. The applicant had previously undergone right rotator cuff repair surgery "in December 2010 or March 2011". The applicant "obtained a good result from this procedure up until her more recent work-related injury."

39. On 9 October 2017, Dr Haber prepared a report for the insurer. Dr Haber assessed the applicant's ultrasound and MRI results. The MRI of the applicant's right shoulder was said to demonstrate "significant degenerative changes of the glenohumeral joint as well as a massive rotator cuff tear with 3.7 cm of tendon retraction". The applicant's right shoulder was causing "severe pain". Dr Haber said he discussed the condition and non-operative treatment options available but recommended a right shoulder reverse total shoulder replacement. Dr Haber said,

> "From the history obtained I do believe the patient's employment is a substantial contributing factor to the current condition and need for surgery. It is hoped surgery will alleviate the patient's symptoms and assist in them returning to pre-injury duties."

40. In a further report for the insurer dated 20 November 2017, Dr Haber reported:

> "Regarding the right shoulder I understand she did undergo repair in 2011/12. This has remained asymptomatic until the injury of the left shoulder.
>
> It appears that her right shoulder developed symptoms while having to perform all tasks while her left shoulder was undergoing rehabilitation following rotator cuff repair surgery.
>
> It does appear the right shoulder current condition is a consequence of her left shoulder injury."

41. An operation report prepared by Dr Haber dated 4 June 2018 indicates that he performed a right Exatech Equinoxe reverse total shoulder replacement. Indications of surgery were osteoarthritis and cuff tear arthropathy.

Dr Bodel

42. The applicant relies on a medicolegal report prepared by orthopaedic surgeon, Dr James G Bodel, dated 12 February 2019.

43. Dr Bodel took a history of the injury on 20 August 2015 and the treatment that followed that was consistent with the applicant's evidence. Dr Bodel noted that there had been a previous injury to the right shoulder in about 2011. The applicant could not recall any specific event but the shoulder became increasingly painful over time. Dr Bodel noted that Dr Sher had performed two arthroscopies in the right shoulder as private matters and not work-related. The applicant returned to work, however, with continuing right shoulder girdle pain. X-ray showed that the rotator cuff had ruptured completely and she was developing severe post-traumatic osteoarthritis. This led to the reverse total shoulder replacement done on 4 July 2018.

44. Dr Bodel performed an examination but said he did not have any investigations available for review before him.

45. Dr Bodel noted that the applicant and her husband had worked in their business since 2001 and the work had always been "very heavy and repetitive work." Dr Bodel said.

> "In my view the pathology now present in both shoulders has arisen as a consequence of the nature and conditions of her work in general, particularly in regard to the right shoulder.
>
> The injury on 20 August 2015 caused a tear of the rotator cuff on the left shoulder for which she has had an arthroscopic subacromial decompression and repair with a reasonable outcome.

> The right shoulder has become increasingly troublesome however, while she was recovering from that left shoulder surgery. The right shoulder was not normal at the time of injury to the left shoulder, but it has rapidly deteriorated. Subsequently as a consequence to the aggravation, acceleration, exacerbation and deterioration to that right shoulder caused by work."

46. Dr Bodel said the reverse total shoulder replacement on the right-hand side was the only treatment alternative for the applicant. The treatment was appropriate for the injury and "reasonably necessary for the management of an arthritic shoulder which had been aggravated, accelerated, exacerbated deteriorated by work."

47. Dr Bodel clarified that there were two discrete injuries:

> "One is the frank injury in the form of the rotator cuff tear to the left shoulder on 20 August 2015, and for the right-hand side there has been the aggravation, acceleration, exacerbation and deterioration of a disease process which has developed gradually in the region of the right shoulder dating back to the beginning of the work at this workplace. The right shoulder had originally been symptomatic in about 2011 and has had two surgical procedure since that time, but the continuing nature and conditions of work has caused further aggravation, acceleration, exacerbation and deterioration of that right shoulder, leading to the need for the total shoulder replacement. This occurred particularly after the injury to the left shoulder."

48. Dr Bodel assessed the applicant as having 25% Whole Person Impairment (WPI) of her upper extremities and skin.

Dr Breit

49. The respondent relies on a medicolegal report prepared by Dr Robert Breit, orthopaedic surgeon, dated 29 May 2019.

50. Dr Breit indicated that he attempted to commence with a history of the right shoulder problem from 2010, stating,

> "This lady tried to claim that she had pain in the right shoulder before that and that was due to lifting and carrying *et cetera* at work. I referred her to the opening lines of the letter by Dr Sher which said she slipped in a spa, I was told it was a bath while she was shaving her legs."

51. Dr Breit took a history of the surgery performed by Dr Sher on 4 December 2010 and later re-repair. Dr Breit said,

> "I am told post operatively things did not go well at all and she continued to have pain and swelling and continued taking Panadeine Forte although she returned to work. She stated the only time the pain would settle is when she took analgesia and that Dr Sher had given her Endone but she found it too strong… The range of movement in the right shoulder remained restricted, she could not reach overhead or rely on the affected side, 'the swelling was terrible'."

52. Dr Breit noted some variance between this history and the correspondence from Dr Sher and Dr Haber. Dr Breit noted that upon specific questioning about the incident on 20 August 2015, the applicant felt her right shoulder was worse after that fall.

53. Dr Breit performed an examination and said he had reviewed original investigation reports from the 2010 injury and arthroscopy report, as well as ultrasounds and MRIs performed in 2017 as well as x-rays and a CT scan of the right shoulder performed on 17 July 2018.

54. Dr Breit assessed the applicant as having 22% WPI of the bilateral upper extremities but considered 9/10 to be due to pre-existing disease leaving a 4% WPI including 2% for scarring.

55. Dr Breit was asked to comment upon Dr Bodel's diagnosis. Dr Breit noted that Dr Bodel maintained that the applicant's problems related to the nature and conditions of her employment on the basis that there were problems in both shoulders, the right much worse than the left, dating back to 2011.

56. Dr Breit said there was a very clear history of early cuff arthropathy changes in 2010. The initial rotator cuff repair failed as did the second repair. They were totally unrelated to the work fall. Dr Breit said,

> "The fall and subsequent events did lead to an aggravation of that cuff arthropathy. However, the overwhelming impairment was due to the pre-existing cuff arthropathy and it was only a matter of time, and a very short time, before the reverse replacement would have been required anyway and it is hard to state that the aggravation from the fall and subsequent events was anything other than minor in the overall scheme of things. I therefore would indicate that 9/10 is due to pre-existing disease, the 1/10 Rule is patently inadequate."

Applicant's submissions

57. Mr Carney said it was not in dispute that the applicant had a previous injury to her right shoulder and there had been two previous surgeries.

58. Mr Carney referred to the description of the 20 August 2015 injury set out in the applicant's statement. Mr Carney noted the surgery to the left shoulder performed by Dr Sher, and said it was not as successful as it might have been. The applicant returned to work but experienced increasing pain in her right shoulder.

59. The applicant reported the pain in her right shoulder to Dr Balakrishnan and was referred for investigations and back to Dr Sher. A shoulder replacement was eventually performed by Dr Haber on 4 June 2018.

60. Mr Carney submitted that it appeared that liability for the right shoulder had not been accepted by the insurer based on reports by and injury management consultant, Dr Con Kafataris.

61. Mr Carney said the strongest support for the applicant's case appeared in the reports of Dr Haber. Dr Haber took the view that the duties or work conditions after the injury to the applicant's left shoulder gave rise to the need for the surgery he performed. Dr Haber had noted that the right shoulder was asymptomatic until the left shoulder surgery

62. Mr Carney submitted that Dr Sher's reports also indicated that the applicant's right shoulder had become problematic after over relying on her right arm following the left shoulder injury.

63. Mr Carney conceded that Dr Bodel referred to the nature and conditions of employment as causing an injury to the right shoulder, but said it was clear from reading the totality of his report that he was referring to the conditions of employment after the left shoulder injury, in particular. Mr Carney noted Dr Bodel's reference to a "rapid deterioration" following that surgery. Mr Carney submitted that the only inference available was that the acceleration of symptoms in the right shoulder was due to favouring the injured left shoulder. Mr Carney said Dr Bodel's report should be considered through the prism of the treating evidence.

64. Mr Carney submitted that Dr Bodel considered the right shoulder replacement surgery was the only appropriate treatment for the applicant. It was clear that Dr Bodel thought that the need for the surgery was caused by the exacerbation after the left shoulder injury.

65. Mr Carney submitted that Dr Breit clearly accepted that there was an aggravation of the right shoulder consequential to the left shoulder injury although he considered it was a minor episode. On that basis, Mr Carney submitted that I should refer both shoulders to an Approved Medical Specialist (AMS) and it would be for the AMS to determine the appropriate deduction.

66. With regard to the claim for s 60 expenses, Mr Carney referred me to the authorities in *Diab v NRMA Ltd*[2], *Rose v Health Commission (NSW)*[3] and *Bartolo v Western Sydney Area Health Service*[4]. Mr Carney said it was clear that the applicant had reached a stage where the operation was a last resort. There was no dispute that the surgery was necessary. There was a material contribution to the need for the surgery by the aggravation. The need for surgery was brought forward by the rapid increase in symptoms in the right shoulder following the left shoulder injury.

Respondent's submissions

67. Mr Gaitanis submitted that there was consensus that the applicant sustained a quite traumatic injury to her right shoulder in 2010. The applicant underwent repeat surgeries to the rotator cuff but there was never a complete correction of the right shoulder.

68. Mr Gaitanis conceded that Dr Haber had referred to the applicant's right shoulder as being asymptomatic prior to the left shoulder injury but said Dr Bodel had taken a different history. Dr Bodel took a history of the right shoulder being "not normal" at the time of the left shoulder injury.

69. On the background of repeat surgeries and repeat tears of the rotator cuff in the past, Mr Gaitanis submitted that I should approach the applicant's claim cautiously.

70. Mr Gaitanis noted that Dr Bodel considered the nature and conditions of the applicant's employment had caused injury to the right shoulder. Mr Gaitanis submitted that the applicant's duties were not, however, heavy or onerous. Mr Gaitanis observed that a vocational assessment report in the Reply identified the applicant's duties as involving making coffee and other drinks, restocking milk bar and fridge, cleaning, stock-take and ordering, banking, answering the phone, customer service and operating the till, making and toasting sandwiches and decorating cakes. Mr Gaitanis said these duties were not particularly heavy or onerous.

71. Mr Gaitanis noted that the description of injury in the ARD was of a consequential condition to the right shoulder as a result of favouring the left shoulder after injury. The applicant's statement also identified a condition in her right shoulder as a result of favouring her left shoulder following injury. The initial notification of injury, however, referred to a gradual injury to the right shoulder after the return to work following the left shoulder injury due to making food and drinks and cleaning.

72. Mr Gaitanis accepted that the opinions of Dr Haber and Dr Sher were consistent with the description of injury in the current proceedings but submitted that Dr Bodel's history was not consistent with the pleading. Dr Bodel's report was suggestive of a "nature and conditions" injury, however, Dr Bodel's history was not consistent with the evidence as to the applicant's work duties. Dr Bodel did not consider what was occurring at home or whether the applicant's domestic duties may have contributed to the applicant's condition. Dr Bodel did not take any history from the applicant of favouring the left shoulder injury. Dr Bodel's report was at odds with Dr Haber, Dr Sher and the applicant's evidence.

[2] [2014] NSWWCCPD 72.
[3] [1986] NSWCC 2; (1986) 2 NSWCCR 32.
[4] (1997) 14 NSWCCR 233; [1997] NSWCC 1.

73. Mr Gaitanis noted that the applicant bore the onus of establishing causation. Mr Gaitanis submitted that I was being asked to have a guess as to the nature of the applicant's injury. The state of the evidence was unsatisfactory and it would be difficult for the Commission to find one way or another. Mr Gaitanis submitted that if Dr Bodel's report were to be accepted, the applicant's own evidence would have to be dismissed.

74. Mr Gaitanis submitted that the evidence did establish that there was a non-work-related problem with the right shoulder which had never corrected itself. There were two previous tears and two previous surgeries of the same shoulder. Dr Breit considered there was an aggravation of the previous condition by the fall in 2015 but the overwhelming impairment was due to the previous condition. It was only a matter of time and a very short time before the surgery performed by Dr Haber would be required. Mr Gaitanis said Dr Breit considered that the need for surgery would have arisen independently whether there was an aggravation or not. The aggravation was only minor and had not materially contributed to the need for surgery.

FINDINGS AND REASONS

Did the applicant sustain a consequential condition at her right shoulder as a result of the injury to her left shoulder on 20 August 2015?

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

> **"4 Definition of 'injury'**
>
> In this Act:
> **injury:**
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

76. In *Bouchmouni v Bakhos Matta t/as Western Red Services*[5], Roche DP noted the difference between an injury and a secondary or consequential condition:

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

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

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

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense 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."[6]

78. The onus of proof as to causation rests upon the applicant and depends examination of the evidence as a whole. The Court of Appeal in *Nguyen v Cosmopolitan Homes*[7] has found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

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

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

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

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

[6] (1994) 10 NSWCCR 796 at [810].
[7] [2008] NSWCA 246.

79. There is a real difficulty for the applicant in this case in discharging the onus of proof as to causation arising from the inconsistent histories provided to the independent medical examiners.

80. There is no dispute that the applicant sustained an injury to her right shoulder which was not related to work in 2010 when she slipped and fell in a spa bath.

81. There is, however, some inconsistency as to whether there was also an injury to the applicant's right shoulder brought on by the nature and conditions of her work around this time. The applicant's statement asserts that there was a right shoulder injury at work as a result of repetitive pushing, pulling and heavy lifting at work in 2010. The applicant suggests that it was this injury rather than the slip in the shower or bath which led to the repair to her right rotator cuff on 4 December 2010. This is broadly consistent with the history taken by Dr Bodel, who reported that the applicant could not recall any specific event but her right shoulder became increasingly painful over time. It is also consistent with what the applicant told Dr Breit although Dr Breit noted that this was not consistent with the history taken by Dr Sher at the time.

82. The contemporaneous medical evidence suggests that it was the fall in the spa bath that was what precipitated the original right shoulder surgery on 4 December 2010. The letter of referral to Dr Sher prepared by the applicant's general practitioner dated 25 October 2010 indicated that the applicant had experienced right shoulder pain and limited movement following a fall in a spa bath a few weeks earlier. Dr Sher's initial history as reported on 26 November 2010 was also of pain and loss of motion since having slipped in a spa.

83. With regard to this inconsistency, I prefer the contemporaneous medical evidence, finding it more reliable than what was reported some eight years later in the context of the current claim. I am not satisfied that the initial injury to the applicant's shoulder and the two surgeries performed by Dr Sher, first on 4 December 2010 and the repair on 6 June 2011 were work-related.

84. The contemporaneous medical evidence indicates that the applicant's right shoulder improved significantly following the second surgery performed by Dr Sher. Five months after the second procedure, Dr Sher reported that the applicant was far better than her pre-operative state. The applicant had little pain and was achieving good forward elevation. The applicant appears to have returned to her pre-injury duties following the surgery until the time of the August 2015 fall. That the applicant's right shoulder had been relatively symptom-free during this time is confirmed by Dr Sher's report on 26 October 2015 which noted that the applicant was at that time "satisfied with her right shoulder". Dr Haber also took a history of the applicant having obtained a good result from the 2011 surgery and her right shoulder being asymptomatic up until the 2015 injury.

85. Once again, the contemporaneous medical evidence is inconsistent with the histories provided to the independent medical examiners with regard to the applicant's right shoulder condition in the period after the 2011 surgery up until the 2015 injury. The applicant told both Dr Bodel and Dr Breit that she continued to suffer pain at her right shoulder after the 2011 surgery. Dr Bodel took a history that the shoulder was not normal at the time of the 2015 injury. Dr Breit was told that post operatively things did not go well and the applicant continued to have pain and swelling and required the use of analgesia. The applicant's range of movement remained restricted.

86. The discrepancy between the histories provided to the independent medical examiners and the treating doctors casts doubt over the reliability of the applicant's evidence. It does appear, particularly from Dr Bodel's history and opinion that the applicant may have initially been attempting to establish a nature and conditions type injury to the right shoulder. Mr Gaitanis submitted that the inconsistencies between the treating medical evidence and the expert medical evidence would leave me unsatisfied that the applicant had discharged the onus of proving causation. This submission has given me pause in considering the applicant's claim. Ultimately, however, I find the evidence from Dr Sher and Dr Haber clear and persuasive.

87. Both Dr Sher and Dr Haber have taken a history of the applicant's right shoulder becoming symptomatic once again in the period after the injury to her left shoulder in August 2015. As indicated above, on 26 October 2015 Dr Sher noted that the applicant's right shoulder was at that time satisfactory. Following the left shoulder surgery and by the time of his 17 February 2016 report, however, Dr Sher was recommending that the applicant have some physiotherapy for her right shoulder as it was "a bit sore after having been overused for the last six weeks." This contemporaneous record of the applicant's symptoms is consistent with the history provided to Dr Haber. Dr Haber expressed the view that the right shoulder developed symptoms while having to perform all tasks in the period when her left shoulder was undergoing rehabilitation following rotator cuff repair surgery. Dr Haber concluded that the right shoulder condition arose as a consequence of the left shoulder injury.

88. The histories and opinions given by Dr Haber and Dr Sher are consistent with the description of injury now relied upon by the applicant in these proceedings. On the basis of the contemporaneous evidence as to the onset of right shoulder symptoms in the period following the left shoulder surgery, I am satisfied that the applicant developed a condition at her right shoulder as a result of the injury to her left shoulder. I make this finding notwithstanding the clearly contradictory history and opinion provided by the applicant's own expert. I note that this conclusion is consistent with the opinion given by the respondent's expert Dr Breit.

Whether the right shoulder replacement surgery and associated costs were reasonably necessary as a result of the injury on 20 August 2015?

89. Section 60 of the 1987 Act relevantly provides:

> "(1) If, as a result of an injury received by a worker, it is reasonably necessary that:
>
> (a) any medical or related treatment (other than domestic assistance) be given, or
> (b) any hospital treatment be given, or
> (c) any ambulance service be provided, or
> (d) any workplace rehabilitation service be provided,
>
> the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)."

90. It is apparent from the material before me that a significant cause for the applicant's need for the surgery performed by Dr Haber on 4 June 2018 was her pre-existing condition. The need for surgery can, however, arise from multiple causes for the purposes of s 60 of the 1987 Act. In *Murphy v Allity Management Services Pty Ltd* Roche DP stated[8]:

> "…That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
>
> Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

91. Similarly, in *Taxis Combined Services (Victoria) Pty Ltd v Schokman*[9] Roche DP held that the injury need not be the only, or even a substantial, cause of the need for treatment:

> "It is trite law that a condition can have multiple causes (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). More importantly, the injury does not have to be the only, or even a substantial, cause of the need for the proposed treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act. As the section states, and the Arbitrator acknowledged (at [55] and other places), Mr Schokman only has to establish that the proposed treatment is reasonably necessary 'as a result of' the injury."

92. There are differing views in the medical evidence before me as to the contribution made by the consequential condition in the applicant's right shoulder to the need for surgery performed by Dr Haber on 4 June 2018.

93. Dr Breit for the respondent has given an opinion that the contribution was minimal and that the need for surgery arose predominantly due to the pre-existing pathology. Dr Breit's opinion is, however, based upon the history given to him by the applicant that her right shoulder remained symptomatic throughout the period following Dr Sher's 2011 surgery. For the reasons given above, I am not satisfied that this was a reliable or credible history having regard to the contemporaneous medical evidence. On this basis, I am not satisfied that Dr Breit's opinion, that the applicant would have independently come to the surgery regardless of the 2015 fall, within a very short period of time, is itself reliable.

94. I find the opinion given by Dr Haber more persuasive. Dr Haber said that from the history he obtained, he did believe that the applicant's employment was a substantial contributing factor to the current condition and the need for the surgery performed by him. Dr Haber clarified in his 20 November 2017 report that this was due to the right shoulder developing symptoms while having to perform all tasks whilst her left shoulder was undergoing rehabilitation.

[8] At [57].
[9] 2014] NSWWCCPD 18 at [54].

95. Although it is possible that the applicant may have required a total shoulder replacement at some time in the future, I am satisfied on the treating medical evidence that the need for such surgery was significantly accelerated or brought forward by the consequential condition resulting from the applicant's left shoulder injury. I am satisfied that the need for the reverse total shoulder replacement surgery performed by Dr Haber on 4 June 2018 arose as a result of the injury to the applicant's left shoulder on 20 August 2015.

96. There is no dispute on the medical evidence before me that the surgery was reasonably necessary.

97. The applicant is entitled to compensation for the costs of and incidental to the surgery performed by Dr Haber pursuant to s 60 of the 1987 Act.

Degree of permanent impairment and entitlement to lump sum compensation

98. In view of the findings above, I am satisfied that it is appropriate for a referral to be made to an AMS for an independent assessment of the degree of permanent impairment resulting from the injury on 20 August 2015 to the applicant's left shoulder, right shoulder and skin. It will be for the AMS to determine the appropriate deduction, if any, for the non-work-related injury to the applicant's right shoulder in 2010.

SUMMARY

99. The applicant sustained a consequential condition affecting her right shoulder as a result of the injury to her left shoulder on 20 August 2015.

100. The right reverse total shoulder replacement surgery performed by Dr Mark Haber on 4 June 2018 was reasonably necessary as a result of the injury on 20 August 2015.

101. The Commission orders:

(a) The respondent to pay the costs of and incidental to the right reverse total shoulder replacement surgery performed by Dr Haber on 4 June 2018 pursuant to s 60 of the 1987 Act.

(b) The matter is remitted to the Registrar to be referred to an AMS for assessment as follows:

Date of injury:	20 August 2015
Body parts:	Left upper extremity (shoulder) Right upper extremity (shoulder) (consequential condition) Skin (scarring)
Method:	Whole person impairment.

(c) The materials to be referred are to include the ARD and all attachments; the Reply and all attachments other than the report of Dr Thomas A. Silva dated 16 July 2018; and this Certificate of Determination and accompanying statement of reasons.