# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** **954/20**
**Applicant:** **Karen Segar**
**Respondent:** **Regis Aged Care Pty Limited**
**Date of Determination:** **15 April 2020**
**Citation:** **[2020] NSWWCC 119**

The Commission determines:

1. The applicant suffered a condition in her left shoulder consequent upon injury to the right shoulder on 24 May 2017.

2. The surgery to the left shoulder proposed by Clinical Associate Professor Mark Haber is reasonably necessary as a result of injury to the right shoulder on 24 May 2017.

3. Pursuant to s 60(1) of the *Workers Compensation Act 1987* the respondent is to pay for the cost of the left shoulder surgery proposed by Clinical Associate Professor Mark Haber and associated treatment and rehabilitation.

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

Brett Batchelor
**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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
**As delegate of the Registrar**

# STATEMENT OF REASONS

## BACKGROUND

1. Karen Segar (the applicant/Ms Segar) suffered injury on 24 May 2017 arising out of or in the course of her employment as an assistant in nursing with Regis Aged Care Pty Limited (the respondent). On that day she was attending to a large, heavy male patient. When the patient pushed back on her right arm during the process of changing an incontinence pad, Ms Segar sustained an injury to her right shoulder.

2. The applicant consulted a general practitioner who referred her for physiotherapy and an ultrasound. She returned to work on light duties until 27 July 2017 when she was placed off work. She has not returned to work since.

3. The applicant was referred to Dr Stuart Kennedy, orthopaedic surgeon, who she first saw on 31 August 2017. Dr Kennedy reviewed x-rays of the right shoulder and diagnosed a partial thickness rotator cuff tear of the of the right shoulder. An MRI scan was arranged.

4. On 14 September 2017, Dr Kennedy reviewed the MRI results and recommended surgery on the right shoulder. On 25 October 2017 he carried out an arthroscopic acromioplasty, rotator cuff repair and biceps tenodesis. The respondent's insurer, AAI Limited trading as GIO (GIO), accepted liability for the cost of this surgery.

5. Dr Kennedy continued to review the applicant up until 12 July 2018. At that stage his impression was that Ms Segar had recovered well from the surgery with some residual shoulder stiffness which was improving.

6. On 6 August 2018 the applicant asked her general practitioner, Dr Khin Myat Wai, for a referral to a specialist shoulder surgeon in Sydney for a second opinion. Dr Wai referred Ms Segar to Clinical Associate Professor Mark Haber (Dr Haber), shoulder surgeon, who she first saw on 3 September 2018. Dr Haber recorded presenting problem as right shoulder pain and made a provisional diagnosis of post-operative stiffness following rotator cuff repair surgery.

7. Dr Haber discussed with the applicant treatment options available for the right shoulder, and also post-operative stiffness following rotator cuff repair surgery. The options were ongoing conservative treatment and a wait and see approach, or arthroscopic surgery. Dr Haber recommended surgery, which was accepted by Ms Segar. It was carried out on 8 October 2018 and funded by GIO.

8. The applicant continued under the care of Dr Haber and complained to him in consultation on 28 May 2019 of gradual onset of pain in her left arm, which she related to then being the dominant arm because of right shoulder prolonged pain and stiffness following rotator cuff repair surgery. Dr Haber recommended surgery on the left shoulder and sought approval from GIO to meet the cost of this surgery.

9. GIO arranged for the applicant to be examined by Dr Richard Powell, orthopaedic surgeon, on 9 July 2019. Following receipt of Dr Powell's report dated 19 July 2019, GIO issued to Ms Segar a notice under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing liability for the left shoulder surgery recommended by Dr Haber.

## ISSUES FOR DETERMINATION

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

    (a) Did the applicant sustain a condition in her left shoulder as a consequence of the undisputed injury to the right shoulder she suffered on 24 May 2017?

    (b) Is the surgery to the left shoulder proposed by Dr Haber reasonably necessary as a result of injury to the right shoulder on 24 May 2017 (s 60(1) & (5) of the *Workers Compensation Act 1987* (the 1987 Act)?

## PROCEDURE BEFORE THE COMMISSION

11. The parties attended an arbitration hearing conducted by telephone conference on 6 April 2020. 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.

12. The applicant attended the telephone conference with her solicitor Mr J Smith. Mr P Perry of counsel attended on behalf of the applicant and Mr G Barter of counsel on behalf of the respondent.

## EVIDENCE

### Documentary evidence

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

    (a) Application to Resolve a Dispute and attached documents (the Application);

    (b) Reply and attached documents.

### Oral evidence

14. There was no application to adduce oral evidence or to cross-examine the applicant.

## SUBMISSIONS

15. The parties' submissions have been recorded and a Transcript (T) is available. I will not repeat the submissions in full, but in summary they are as follows.

### Applicant

16. The applicant notes the onus is on her to show on the balance of probabilities that, applying the commonsense test of causation accordance with what was said by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[1] (*Kooragang v Bates*) and having regard to what Deputy President Roche said at [57]-[58] in *Murphy v Allity Management Services Pty Ltd*[2], the injury to her right shoulder on 24 May 2017 materially contributed to the need for surgery on the left shoulder. As part of this process, Ms Segar must show that the condition in the left shoulder arose as a consequence of the injury to the right shoulder.

[1] (1994) 35 NSWLR 452.
[2] [2015] NSWWCCPD 49.

17. Addressing the last mentioned point first, the applicant relies upon the evidence in her statement dated 14 February 2020[3] at [12] where she records noticing left shoulder symptoms following surgery to her right shoulder in October 2018. She considered that these symptoms were due to overuse of that arm following her right shoulder operations, and gives detail of the pain, stiffness and restriction of movement in her left shoulder. This history of prolonged pain in the left shoulder is recorded by Dr Haber in his report to GIO dated 28 May 2019[4], where she relates to her left arm now being the dominant arm because of the right shoulder problems. The applicant is right hand dominant.

18. The applicant submits that she experienced continuous right shoulder pain for over two years from the date of the first surgery on her right shoulder. This led to prolonged non-use of her right arm and the left arm becoming, in effect, her dominant arm.

19. The applicant relies upon the opinion of Dr Haber expressed in his report dated 29 October 2019[5]. The applicant notes Dr Haber's finding that the ultrasound of the left shoulder (dated 30 April 2019[6]) demonstrated a small full thickness rotator cuff tear in the left shoulder, and his opinion that, at 49 years old, Ms Segar is quite unlikely to have developed a rotator cuff tear at that age without any significant contributing factor[7]. This opinion is in contrast with that of Dr Powell in his report dated 19 July 2019[8], which is that the development of degenerative pathology in the rotator cuff with advancing age is a well-documented occurrence, and that this is the most likely explanation for Ms Segar's current left shoulder symptoms. The applicant submits that the opinion of Dr Powell may be more acceptable if the applicant was of more advanced years, but not someone under 50 years of age.

20. The applicant notes her evidence that the left shoulder symptoms came on after her second right shoulder surgery in October 2018. This is contrasted with the history recorded by Dr Murray Hyde-Page in his report dated 29 October 2019[9] that by about January 2018, she was aware of left shoulder pain. It is noted the treating general practitioner, Dr K M Wai recorded left shoulder pain in a consultation note dated 4 April 2019[10].

21. The applicant notes that Dr Hyde-Page is of the same opinion as Dr Haber in respect of the consequential condition in the left shoulder as a result of injury to the right shoulder, and the reasonable necessity for surgery as a result of the right shoulder injury.

22. The applicant refers to the report of the ultrasound of the left shoulder dated 30 April 2019 and questions whether Dr Powell saw the ultrasound itself, or the report thereon only. The report reveals a suspected intrasubstance tear at the anterior/midportion of the supraspinatus tendon measuring 6 x 7 x 3 mm, which Dr Haber describes as "A small full thickness rotator cuff tear." Dr Powell describes it as "…a partial thickness tear of supraspinatus with some underlying rotator cuff tendinopathy and subacromial bursitis."[11] Dr Powell describes this pathology as minor, and fairly unremarkable in respect of clinical examination. The report itself does not state whether it is a partial or full thickness tear.

[3] Application p 16.
[4] Application p 27.
[5] Application p 48.
[6] Application p 93.
[7] Application p 51.
[8] Application p 35.
[9] Application p 53.
[10] Application p 213.
[11] Application p 39.

23. The applicant relies on what Deputy President Roche said (at [88]-[89]) in *Diab v NRMA Ltd* [12] (*Diab*) in respect of the appropriateness of the treatment proposed and the availability, and potential effectiveness, of alternative treatment. She submits that alternative treatment has been tried without success. Both Dr Haber and Dr Hyde-Page contemplated the question of delaying surgery. Both doctors however concluded that surgery was reasonable and necessary [sic], with Dr Haber stating that it was the most appropriate treatment for rotator cuff tears.

24. The applicant submits that there should be a finding that she suffered a condition in her left shoulder consequent upon the injury to the right shoulder on 24 May 2017 and that the surgery to the left shoulder proposed by Dr Haber is reasonably necessary as a result of such injury. The respondent should be ordered to pay the cost of such surgery pursuant to s 60(5) of the 1987 Act.

**Respondent**

25. The respondent submits that, whilst the applicant's credit is not in issue her evidence should nevertheless be treated with caution. This is because of the anxiety and depression from which she suffers, evident from the report of Dr Powell. In this regard the respondent notes that the left shoulder drop of which the applicant complains in her statement dated 14 February 2020 is not corroborated by any medical practitioner.

26. The respondent highlights the differences of opinion between Dr Powell on the one hand and Dr Haber on the other. It submits that Dr Powell is well aware of the applicant's age and considers that this is an age at which a tear of the rotator cuff can occur without injury. Dr Powell is noted to be a completely disinterested assessor, whereas Dr Haber is giving his opinion from the standpoint of a surgeon who has already operated successfully on the applicant's right shoulder and is keen to perform further surgery on the left shoulder. The respondent also submits that the apparent failure of the first surgery on the applicant's right shoulder (performed by Dr Kennedy) is also a factor to be taken into account when assessing the reasonable necessity of the proposed left shoulder surgery.

27. Counsel for the respondent made the rather surprising and colourful submission that Dr Haber, in recommending the surgery on the applicant's left shoulder, may be "a hammer in search of a nail". This is refuted by the applicant.

28. The respondent submits therefore that the conservative approach to future treatment should be adopted in preference to the surgical approach advocated by Dr Haber. It submits that the risks of failure of further surgery were not pointed out to the applicant by Dr Haber.

29. The respondent submits that it is open to infer from a reading of Dr Powell's report that he did see the actual left shoulder ultrasound carried out on 30 April 2019 as opposed to the report thereon only, and that he based his opinion as to the seriousness of the rotator cuff tear on his assessment of the ultrasound.

**Applicant in response**

30. The applicant refutes the submission that her evidence should be treated with caution because of her anxiety and depression. She points to what she said in [15] of her statement as to her current pain and disabilities in the left shoulder. This evidence should not be rejected, and the doctors who have seen Ms Segar have not called her evidence into question because of any anxiety and depression.

[12] [2014] NSWWCCPD 72.

31. The applicant submits that the successful (second) surgery carried out by Dr Haber on her right shoulder is a factor that should be taken into account when assessing the likelihood of a successful outcome for the proposed left shoulder surgery. She re-iterates that she has tried the "wait and see" approach canvassed by Dr Haber, and points to the period of almost 12 months that has elapsed since the date on which Dr Haber requested approval of GIO for the left shoulder surgery, and there has been no improvement in her condition.

32. The applicant also rejects any suggestion by the respondent that Dr Haber is deliberately trying to mislead on the question of the reasonable necessity for surgery, or that he is tendering his opinion from any other standpoint from that of an expert orthopaedic surgeon.

## FINDINGS AND REASONS

### Condition in the left shoulder

33. At [40] in *Taxis Combined Services (Victoria) Pty Ltd v Schokman*[13] Roche DP quoted what Kirby P (as he then was) said in the *Kooragang v Bates* at 463G:

> "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."

34. There is no issue that the applicant injured her right shoulder on 24 May 2017 arising out of or in the course of her employment with the respondent. It accepted liability for this injury and funded the surgery on that shoulder carried out by Dr Kennedy on 25 October 2017 and Dr Haber on 8 October 2018. The impression recorded by Dr Kennedy on the last occasion on which he reviewed the applicant, 12 July 2018[14], was that Ms Segar had recovered well from her right arthroscopic acromioplasty, rotator cuff repair and biceps tenodesis. He also noted that she had some residual shoulder stiffness which was improving.

35. This is at some contrast with what the applicant says at [9]-[10] in her statement dated 14 February 2020. She refers to her attendances on Dr Kennedy on 16 November 2017 and 16 January 2018. She was undergoing physiotherapy prior to the January attendance, and although her shoulder was showing some slight improvement, she was still very sore with limited movement. She felt that the physiotherapy treatment was aggravating her condition, especially when she was required to push overhead. Ms Segar then goes on to say in [9]:

> "I was also getting left arm pain from compensating due to the right arm injury. I was getting pain from the shoulder all the way down into the muscles of my forearm. Dr Kennedy suggested I undertake hydrotherapy and continue with physiotherapy."

[13] [2014] NSWWCCPD 18.
[14] Application p 80.

36. It appears that the applicant was referring to her left arm in the penultimate sentence of [9] quoted above, but the right shoulder in the last sentence where the suggestion of Dr Kennedy to undertake hydrotherapy and continue with physiotherapy appears. The complaint of pain from the left shoulder all the way down into the muscles of her forearm is corroborated to an extent by the clinical note of Dr Wai recorded on 8 January 2018[15] of "Left tennis elbow". He also refers to ongoing physio twice a week, "bicep muscle pain 8/10 in severity" after physio, and what appears to be a reduction in pain and inflammation a few days later, although this is not completely clear from the clinical note. The reason for visit is "Left Tennis elbow" and a NSW WorkCover certificate was apparently issued.

37. At [10] of her statement Ms Segar says that she returned to Dr Kennedy on 23 March 2018 when there was some improvement in her left shoulder pain, but restricted movement and strength in her right shoulder. She then says:

> "I still continue to have problems with my shoulder and I was referred by my general practitioner to Dr Haber, a shoulder surgeon in Sydney."

38. It appears from Dr Wai's clinical note dated 6 August 2018[16] that the applicant was referred to Dr Haber at her request. She wanted "…to go and see shodueir [sic] specialist surgeon in Sydney for second opinion" and a referral was given along with advice about pain killer. Ongoing physio under workcover was also noted.

39. The applicant first saw Dr Haber on 3 September 2018 who provided a report to GIO that day[17]. This consultation addressed the right shoulder following an ultrasound screening[18]. Ms Segar presented to Dr Haber with right shoulder pain and the provisional diagnosis was post-operative stiffness following rotator cuff repair surgery. Under "*Management Plan*" Dr Haber noted:

> "We discussed the nature of this condition and the treatment options available. We also discussed post-operative stiffness following rotator cuff repair surgery. This is a very different picture from a true adhesive capsulitis with its very prolonged natural history for recovery.
>
> Treatment options include ongoing physiotherapy, cortisone injections and a wait and see approach. We also discussed the role of arthroscopic capsular and bursal release. At the arthroscopic procedure if there is any definite residual tear this can be repaired this time.
>
> Due to the presence of a persistent symptoms [sic] of severe pain and stiffness with no evidence of resolution I have recommended arthroscopic capsular bursal release."

40. Approval to the further right shoulder surgery was sought by Dr Haber and given by GIO. This surgery was performed on 8 October 2018[19]. The follow up review with Dr Haber occurred on 20 November 2018[20], at which time the doctor did not arrange for any further review.

[15] Application p 111.
[16] Application p 117.
[17] Application p 62.
[18] Application p 61.
[19] Application p 66.
[20] Application p 68.

41. The applicant did however return to see Dr Haber on 28 May 2019[21], presenting with left shoulder pain. Shortly prior to that time she had undergone the ultrasound of the left shoulder dated 30 April 2019 on referral by Dr Wai. The report of this scan revealed "Suspected intrasubstance tear at the anterior/midpoint of the supraspinatus tendon measuring 5 x 7 x 3 mm." Dr Haber had this scan on 28 May 2018 which he said demonstrated a small full thickness rotator cuff tear. Again under "*Management Plan*" in that report Dr Haber discussed the nature of that condition and the treatment options available, which included rotator cuff repair surgery, physiotherapy, cortisone injections and a wait and see approach. Dr Haber noted the risk of tear progression which is associated with a poor prognosis with the development of an irreparable tear and cuff tear arthropathy. He said:

> "Deterioration of cuff tears is unpredictable and I have therefore recommended surveillance in the presence of a full thickness tear with a check ultrasound if surgery is delayed.
>
> Due to the presence of a full thickness tear and persistent symptoms I have recommended a rotator cuff repair."

42. Dr Haber said that the surgery was reasonable and necessary and the most appropriate treatment for rotator cuff tears as such tears have no ability to heal without surgical repair.

43. In the medico-legal report to the applicant's solicitors dated 29 October 2019, referred to above at [19], Dr Haber said, with reference to his examination of the applicant on 28 May 2019, that the applicant described a gradual onset of left arm pain which she related to it being the dominant arm because of right shoulder prolonged pain and stiffness following rotator cuff repair surgery. He said that from the history obtained he believed that the applicant's right shoulder injury, and as a consequence of it, favouring her left shoulder, "…is a substantial contributing factor to the current condition and need for surgery." While that is not the legal test, the doctor's meaning is clear. He relates the condition in the left shoulder to the right shoulder injury and surgery thereon.

44. This is confirmed by Dr Hyde-Page, orthopaedic surgeon, the independent medical examiner engaged by the applicant's solicitor to assess the applicant on 29 October 2019 and report thereon. He says that the applicant developed consequential injuries to her left shoulder, with pain and stiffness, as well as some left elbow lateral epicondylitis or tennis elbow. He notes that although the right shoulder settled down reasonably well, in 2019 the left shoulder condition persisted while the tennis elbow improved. He also says that the left shoulder condition would not have developed to the extent it has if Ms Segar had not been favouring her right shoulder and arm for such a long period of time.

45. Dr Powell in his report dated 19 July 2019 (following consultation on 9 July 2019) records a history of the occurrence of left elbow symptoms intermittently during 2018/19 with no specific precipitating incident, localising pain to the posteromedial aspect of the elbow. These were discussed with the applicant's local doctor, although there had been no formal treatment or investigations. In respect of the left shoulder, Dr Powell notes that these symptoms developed two to three months previously with no precipitating incident, attributed by the applicant to the use of the left upper limb while she recovered from a series of right shoulder operations. He notes the ultrasound investigation dated 2 May 2019 [sic, 30 April 2019] which "[R]eported a partial thickness tear of supraspinatus with some underlying rotator cuff tendinopathy and subacromial bursitis", and the recommendation for surgery. He says that the clinical examination on 9 July 2019 was unremarkable, with the applicant demonstrating a full range of motion in all planes with grade five power of the rotator cuff and negative impingement sign. Dr Powell says that the left shoulder symptoms most likely reflect the underlying rotator cuff pathology which he found.

[21] Application p 69.

46. There is no suggestion in Dr Powell's report that he does not accept the applicant's presentation as other than genuine, or that Ms Segar is exaggerating her symptoms. Similarly, none of the other doctors express any reservation about her presentation. For this reason I reject the respondent's submission that, whilst it does not question the applicant's credibility, nevertheless her evidence should be regarded with caution because of the anxiety and depression from which she suffers.

47. The early complaint to Dr Wai in January 2018 of left tennis elbow is some evidence, in my view, that even at that time the applicant was favouring her right arm. It is also corroborated by the clinical note of Dr Wai dated 5 November 2018[22], where the applicant is recorded as:

> "…been using on left hand compensentaing pain and tingling, undelying Tennis elbow before already said to Dr Mark in Sydney before artheroscopic surgery she said" [sic].

That left elbow condition seems to have resolved, at least, to some extent. The applicant at [12] in her statement dated 14 February 2020 refers to intermittent symptoms in her left elbow in 2018 and 2019, and that following surgery to her right shoulder in October 2018 she noticed left shoulder symptoms. This would put the period during which she says that she started to experience left shoulder symptoms a little longer than that recorded by Dr Powell.

48. Dr Powell notes that the applicant had not been working since her shoulder surgery and that there is no evidence that she sustained a significant injury in the course of her employment. That is not the case presented by the applicant. He goes on to say:

> "Although she has been using her left upper limb to a greater extent whilst she has been rehabilitating from her right shoulder surgery, this has only been to perform normal activities of daily living, this would be well within the normal physiological capabilities of an uninjured shoulder. The development of degenerative pathology in the rotator cuff with advancing age is a well-documented occurrence and this is the most likely explanation for the current left shoulder symptoms. I do not believe there is sufficient evidence to conclude that she has suffered a consequential injury of the left shoulder."[23]

49. This opinion is in contrast to that of Dr Haber, who says that the applicant's age, 49 years, is too young for a person to have developed a rotator cuff tear without any significant contributing factor. It is also in contrast to the opinions of Dr Hyde-Page and Dr Wai. The histories received by all doctors are consistent, apart from perhaps the period of time over which Dr Powell says the applicant first started to experience symptoms. Dr Haber does not place any significance of the fact the applicant has not worked since her first shoulder surgery on 27 July 2017, and that it is the activities of daily living and the need to undergo further surgery that caused Ms Segar to favour her right arm. He records the onset of pain and stiffness in the left shoulder as dating from the right shoulder surgery which he performed on 8 October 2018. This would date the onset of left shoulder pain at a date earlier than that recorded by Dr Powell. Dr Haber also notes the left tennis elbow of which the applicant complained prior to the onset of increasing left shoulder pain.

50. Dr Haber diagnoses a full thickness rotator cuff tear in the left shoulder. Dr Powell says that it is a partial thickness tear based on the ultrasound dated 2 May 2019 [sic, 30 April 2019]. It is not clear whether Dr Powell saw the ultrasound itself, or was simply relying on the written report thereon. I do not think that the apparent difference between the interpretation of the ultrasound between Dr Powell and Dr Haber is of consequence. It is the symptoms which the applicant is experiencing in the left shoulder as a result of the pathology therein which are important. No doctor has called into question the applicant's report of these symptoms.

[22] Application p 122.
[23] Application p 40.

51. I accept that the applicant was favouring her right shoulder as a result of the injury on 24 May 2017 and the subsequent surgery thereon carried out by Dr Kennedy and Dr Haber. The first surgery did not provide significant relief to the applicant, with her complaining of ongoing pain and restriction of movement. The second surgery on the right shoulder was more successful in providing relief. In that circumstance it is understandable that Ms Segar is keen to proceed with the left shoulder surgery recommended by Dr Haber to relieve her symptoms.

52. I accept the opinions of Dr Haber, Dr Hyde Page and Dr Wai in preference to the opinion of Dr Powell. On a commonsense appraisal of the evidence in this matter to which I have referred above, I find that the applicant suffered a condition in her left shoulder in consequence of injury to her right shoulder on 24 May 2017.

**Surgery**

53. Dr Haber fully explored with the applicant the various treatment options prior to the (further) surgery which he performed on the applicant's right shoulder on 8 October 2018. He also explored these options in respect of the surgery he proposes for the left shoulder. This is clear from his reports dated 3 September 2018 (to GIO) in respect of the right shoulder surgery and 28 May 2019 (also to GIO) in respect of the left shoulder surgery. It is confirmed in his medico-legal report to the applicant's solicitor dated 29 October 2019, in which he expresses the hope that the surgery will alleviate the applicant's symptoms and assist in her returning to pre-injury duties. Dr Hyde Page in his report dated 29 October 2019 refers to Dr Haber's treatment recommendations (conservative as opposed to surgery), and says that it may be reasonable to continue with further conservative treatment including cortisone injection, but that the surgery proposed by Dr Haber is reasonable *and* necessary (emphasis added; again the wrong but more demanding test) as a consequence of the injury to the left shoulder.

54. Dr Powell's gave his view as to the reasonable necessity of left shoulder surgery (correct test) in response to question [3] posed to him in his report dated 19 July 2019[24]. His answer is:

> "For the reasons outlined above I do not believe her left shoulder condition is related to her employment. Based on today's clinical examination I do not believe the proposed surgery would be reasonably necessary. The pathology identified on the ultrasound was minor an in respect of clinical examination it was fairly unremarkable."

55. His view that the pathology identified on the ultrasound was minor and clinical examination unremarkable is in contrast to the opinions of Dr Haber and Dr Hyde-Page.

56. At [88] in *Diab*, Deputy President Roche said:

> "In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:
>
> - (a) the appropriateness of the particular treatment;
> - (b) the availability of alternative treatment, and its potential effectiveness;
> - (c) the cost of the treatment;

[24] Application p 40.

- (d) the actual or potential effectiveness of the treatment, and

- (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective."

57. The reference by the Deputy President to *Rose* is to the often quoted authority of *Rose v Health Commission (NSW)*[25]. At point (5) in *Rose* Burke CCJ said:

> "In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."

58. At [89] in *Diab* the Deputy President stated that:

> "With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts."

59. The applicant's experience with conservative treatment following the first right shoulder surgery did not, according to her evidence, cause any great improvement in her condition. Dr Haber canvassed the options for treatment and came down firmly on the side of the surgical option. The applicant accepted his recommendation, and this is understandable having regard to what she experienced following the second surgery on the right shoulder.

60. I do not accept the submission that the respondent seemed to be making that Dr Haber was advocating surgery from his position as a surgeon (see [27] above). Dr Haber was giving his opinion from no other position than that of a suitably qualified orthopaedic expert when asked as to the various treatment options that the applicant could pursue. He fully explained these options to the applicant. Obviously, all treatment carries a risk of a less than ideal outcome.

61. Dr Haber and Dr Hyde Page accept that the surgery proposed for the applicant's left shoulder is appropriate and likely to be effective. Dr Powell rejects the surgical option because of a different view he takes as to the seriousness of the applicant's left shoulder condition. I accept the applicant's evidence as to the significant ongoing pain, restriction of movement and inability to carry out many of the normal day-to-day activities that she could do with an uninjured shoulder.

62. The respondent does not take issue with the cost of the proposed surgery as opposed to the cost of alternative treatment.

63. My finding is that the left shoulder surgery proposed by Dr Haber is reasonably necessary as a result of injury to the right shoulder on 24 May 2017.

**SUMMARY**

64. The applicant suffered a condition in her left shoulder consequent upon injury to the right shoulder on 24 May 2017.

[25] [1986] 2 NSWCCR 32.

65. The surgery to the left shoulder proposed by Dr Haber is reasonably necessary as a result of injury to the right shoulder on 24 May 2017.

66. Pursuant to s 60(1) of the 1987 Act the respondent is to pay for the cost of the left shoulder surgery proposed by Dr Haber and associated treatment and rehabilitation.