WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1167/20**
Applicant: **Christopher Payne**
Respondent: **Mitronics Corporation Pty Ltd**
Date of Determination: **5 May 2020**
Citation: **[2020] NSWWCC 139**

The Commission determines:

1. The nature of the injury that the applicant sustained to his right shoulder on 11 November 2016 is adhesive capsulitis or frozen shoulder.

2. The surgery proposed by Dr Stuart Kennedy namely, arthroscopic paralabral cyst excision, labral debridement or repair and/or biceps tenodesis of the right shoulder, is not reasonably necessary as a result of the injury sustained by the applicant to his right shoulder on 11 November 2016.

3. Award for the respondent.

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Christopher Payne (the applicant/Mr Payne) suffered injury to his right shoulder on 11 November 2016 arising out of or in the course of his employment as a field technician with Mitronics Corporation Pty Ltd (the respondent). On that day, he claims he was lifting and pulling a heavy scanner out of the rear of his vehicle when it jerked forward and hit him on the left thigh. He then says that he lost his footing, fell forwards onto the scanner and fell heavily to the ground, landing on his outstretched right hand and shoulder. He says that he felt immediate pain in the right side of his neck, right shoulder and lower back.

2. In addition to his shoulder injury, Mr Payne suffered injury to his cervical and lumbar spine. These injuries are not relevant to the current proceedings.

3. The applicant consulted his general practitioner, Dr Chesterfield-Evans who prescribed analgesia, and referred him for physiotherapy and to Dr Peter Bentivoglio, neurosurgeon. Dr Bentivoglio treated Mr Payne from November 2016 until April 2017; he arranged an ultrasound of the right shoulder, an MRI of the cervical spine and the lumbar spine on 15 December 2016, and diagnosed the applicant as suffering from mechanical neck and back pain as a consequence of his fall, and a capsulitis of the right shoulder.

4. The applicant received treatment in March 2017 from Dr James Yu, pain management specialist.

5. Dr Chesterfield-Evans referred the applicant to see Dr Doron Sher, orthopaedic surgeon, on 3 November 2017. Dr Sher reviewed an MRI scan of the right shoulder which he said showed some AC joint degeneration as well as some posterior/superior labral degeneration. Dr Sher thought it highly unlikely at that stage that surgical intervention would benefit the applicant.

6. On 30 August 2017, the applicant saw Dr Teychenne, neurologist, on referral by his general practitioner. Dr Teychenne carried out an EMG Nerve Conduction Study within the upper limbs and found clinical evidence of an incomplete cervical cord lesion. He wished to review the MRI scans of the spinal cord.

7. Mr Payne subsequently moved to Port Macquarie and on 10 April 2018 came under the care of Dr Stuart Kennedy, orthopaedic surgeon, who has continued to treat him. Dr Kennedy found evidence on an MRI scan of a labral tear and a small paralabral cyst in the right shoulder. He said that the applicant's shoulder pain may or may not be related to the labral cyst. The rotator cuff was found to be normal. Treatment options were discussed and conservative measures of management of the right shoulder with physiotherapy recommended. Dr Kennedy also recommended:

    (a) that the applicant should see his pain specialist and try to wean off the pain medication,

    and requested

    (b) a follow up MRI scan of the right shoulder so that he could make sure that the paralabral cyst had not changed or enlarged.

    This scan was carried out on 27 April 2018.

8. The applicant consulted Dr Kennedy on 17 September 2018, complaining of pins and needles in his left and right hands. He was diagnosed as suffering from bilateral carpal tunnel syndrome. Dr Kennedy carried a right carpal tunnel release on 7 November 2018.

9. A further MRI of the right shoulder was carried out on 13 July 2019 at the request of Dr Kennedy and reviewed by him on 20 August 2019; surgery was discussed and the applicant consented to the procedure suggested by Dr Kennedy. A request for surgery was made to the respondent's insurer, GIO, on 21 August 2019.

10. The applicant was independent medically examined by Dr Murray Hyde-Page on 29 October 2019 at the request of GIO. The doctor diagnosed mild traumatic frozen right shoulder or adhesive capsulitis of the shoulder but did not agree with the diagnosis of Dr Kennedy that Mr Payne's right shoulder symptoms were related to his degenerative labral tear and paralabral cyst. He said that these were long standing changes unrelated to the acute injury in November 2016 and that the condition would not be improved by arthroscopic surgery. As Dr Hyde-Page did not consider that the labral tear and paralabral cyst related to his injury, it was unlikely that arthroscopy would help.

11. On 13 January 2020, GIO issued the applicant a notice under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) declining liability for the surgery proposed by Dr Kennedy. It disputed that the applicant had sustained a posterior superior labral tear with a paralabral cyst when Mr Payne injured his shoulder on 11 November 2016, but conceded that he appeared to have developed some stiffness in the shoulder as a result of the subject incident due to adhesive capsulitis or frozen shoulder.

12. On 17 January 2020, the applicant was independently medically examined by Dr J G Bodel, orthopaedic surgeon, at the request of his solicitor. Dr Bodel opined that the treatment the applicant had been offered in the form of a subacromial decompression in the region of the right shoulder was reasonably necessary for the management of the injury caused by the accident at work.

13. When this report of Dr Bodel was referred to Dr Hyde-Page, he did not change his opinion that the proposed surgery was not reasonably necessary as a result of the injury that the applicant sustained to his right shoulder on 11 November 2016. He said that such surgery is only related to the pre-existent degenerative or long standing condition. He also said that the surgery may in fact worsen the right shoulder condition.

ISSUES FOR DETERMINATION

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

    (a) what is the nature of the injury that the applicant sustained to his right shoulder on 11 November 2016?

    (b) is the surgery proposed by Dr Kennedy namely, arthroscopic paralabral cyst excision, labral debridement or repair and/or biceps tenodesis of the right shoulder, reasonably necessary as a result of the injury sustained by the applicant to his right shoulder on 11 November 2016 (s 60 of the *Workers Compensation Act 1987* (the 1987 Act)?

PROCEDURE BEFORE THE COMMISSION

15. The parties attended a conciliation conference/arbitration hearing on 28 April 2020 conducted by telephone conference. 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.

16. Mr W Carney of counsel attended the telephone conference on behalf of the applicant briefed by Ms Reichelle Jackson (on a separate line). The applicant attended on a separate line. Mr P Barnes of counsel attended on behalf on the respondent.

EVIDENCE

Documentary evidence

17. 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) Application to Admit Late Documents (AALD) dated 25 March 2020 lodged by the respondent and attachments;

    (c) AALD dated 31 March 2020 lodged by the respondent with the following supporting documents:

        (i) section 287A notice issued by GIO dated 4 March 2020, and
        (ii) supplementary report Dr Murray Hyde-Page dated 28 February 2020;

    (d) AALD dated 15 April 2020 lodged by the respondent with supplementary report of Dr Murray Hyde-Page dated 8 April 2020 attached.

Oral evidence

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

SUBMISSIONS

19. The submissions of counsel are recorded and a transcript can be obtained on request; they will not be repeated in full but, in summary, are as follows.

Applicant

20. The applicant notes that there is no dispute in relation to the occurrence of the event on 11 November 2016 when he was trying to move a large scanning machine in the rear of his vehicle, fell and relevantly, injured his right shoulder. He consulted his local doctor, Dr Chesterfield-Evans, and was referred to Dr P Bentivoglio, neurosurgeon, who he saw on 29 November 2016[1]. The ultrasound that Dr Bentivoglio arranged on 15 December 2016[2] revealed a normal study.

21. The applicant notes the first MRI scan dated 31 July 2017[3] as revealing degenerative labral tear with some small paralabral cysts. The two further MRI scans of the right shoulder dated 27 April 2018[4] and 13 July 2019[5] are also noted.

[1] Application p 34.
[2] Application pp 36 & 75.
[3] Application p 78.
[4] Application p 70.
[5] Application p 73.

22. The applicant acknowledges that the opinion of both Dr Doron Sher (report dated 3 November 2017[6]) and Dr Kennedy (report dated 13 April 2018[7]) originally recommended conservative treatment of the applicant's right shoulder. He undertook this treatment in the form of physiotherapy, hydrotherapy and a cortisone injection into his shoulder. It was later, when such treatment did not provide any relief, that Dr Kennedy recommended the surgical treatment and requested approval from GIO.

23. The applicant stresses that Dr Sher has a history that he landed heavily on his right shoulder in the fall of 11 November 2016, and also noted that the report of the doctor is not a medico-legal report, but that of a treating specialist, and therefore not a comprehensive report. His opinion is superseded by that of Dr Kennedy who took over treatment when the applicant moved to Port Macquarie.

24. The applicant submits that Dr Hyde-Page, on whose evidence the respondent relies, only examined him on the one occasion and long after the initial injury. The applicant takes issue with what Dr Hyde-Page says in his initial report dated 29 October 2019[8], at the foot of the second page thereof, that Dr Kennedy did not consider that an MRI scan, which showed a labral cyst and tear in the shoulder joint, was relevant when not recommending any surgery at that stage. The applicant submits that Dr Hyde-Page in that report bases his opinion of the MRI scan dated 31 July 2017 and not the later MRI scans.

25. The applicant submits that Dr Hyde-Page's opinion that the applicant appears to have had a normal right shoulder before the injury is not consistent with his opinion that the condition for which Dr Kennedy wishes to operate is a long standing degenerative condition. The applicant notes that his case is not presented as an aggravation of a pre-existing condition, but that the labral tear and paralabral cysts shown on the MRI scans were as a result of the traumatic injury that the applicant suffered to his right shoulder on 11 November 2016.

Respondent

26. The respondent draws attention to the ultrasound carried our shortly after the date of injury and the treatment and opinion of Dr Bentivoglio. The ultrasound revealed no shoulder abnormality.

27. The respondent notes that Dr Bodel in his report dated 17 January 2020[9] has not considered that latest MRI scan dated 13 July 2019, and also notes the different treatment recommendations of Dr Kennedy from conservative care within the region of the right shoulder to more recently block injections and/or surgery as a treatment option. The respondent also submits that Dr Bodel has provided an incorrect answer at [3] of his report under "*Causation*" when he considers that employment is "…the main substantial contributing factor to ongoing complaints." Similarly the respondent submits that Dr Bodel is wrong at [1] in his report under "*Treatment*" when he notes that the applicant:

> "…has been offered treatment in the form of subacromial decompression in the region of the right shoulder and that is reasonably necessary for the management of the injury caused by the accident at work."

This surgery is not that proposed by Dr Kennedy.

[6] Application p 79.
[7] Application p 68.
[8] AALD 25 March 2020 p 7.
[9] Application p 26.

28. The respondent submits that Dr Bodel is wrong when he states that the pathology seen on the MRI scan is causally related to the applicant's injury at work. The respondent also notes Dr Bodel's opinion that resolution of symptoms is likely to be incomplete even with the most successful outcome of surgery. The respondent submits that, based on what the Court of Appeal said in *Hancock v East Coast Timber Products Pty Ltd*[10] little weight should be given to the opinion of Dr Bodel in his report.

29. The respondent relies on the opinion of Dr Bentivoglio and the opinion originally expressed by Dr Kennedy that conservative treatment was appropriate for the applicant's condition and that surgery was not recommended. The respondent also submits that the impression expressed by Dr Kennedy in his report dated 27 August 2019 following a consultation with the applicant on 20 August 2019[11] in respect of the applicant's condition is consistent with the opinion of Dr Hyde-Page, that the condition for which Dr Kennedy wishes to operate, is degenerative. There is no causal link between that condition and the injury the applicant suffered to his right shoulder on 11 November 2016.

30. The respondent says that this submission is fortified by there being no history of the applicant "lifting boxes" when he injured his shoulder. The respondent points to:

    (a) handwritten answer [6] provided by Dr Kennedy in report dated 29 August 2019 in response to the "GIO SURGERY QUESTIONNAIRE" faxed to the doctor[12], and

    (b) the respondent's "INCIDENT REPORT FORM" completed by the applicant, signed by him and dated 15 November 2011[13].

    The respondent submits that Dr Kennedy is proceeding on a wrong history as to how the applicant says he injured his right shoulder.

31. The respondent submits that Dr Kennedy has not given an opinion as to the causal link between the injury suffered by the applicant on 11 November 2016 and the right shoulder condition diagnosed by him and for which he has recommended surgery. When considered along with the report of Dr Bodel, which the respondent submits should be given little weight, the opinions of Dr Bentivoglio and Dr Sher are consistent with the opinion of Dr Hyde-Page in respect of the injury which the applicant suffered to his right shoulder on 11 November 2016, and the consequent reasonable necessity for surgery claimed by him.

32. The respondent relies upon what Deputy President Bill Roche discussed in *Diab v NRMA Ltd*[14] at [76], [88]-[89] and [116] in respect of the reasonable necessity for treatment in the context of s 60 of the 1987 Act.

FINDINGS AND REASONS

Injury

33. The applicant's case is that the incident in which he was involved was the cause of the labral tear and paralabral cysts shown on the MRI scans in evidence. The respondent says that these are evidence of a long standing degenerative condition in the applicant's right shoulder unrelated to the incident, and that therefore the surgery proposed by Dr Kennedy is not reasonably necessary as a result of injury sustained on 11 November 2016. The respondent does concede that the applicant has suffered mild traumatic frozen right shoulder, or adhesive capsulitis, as a result of injury on 11 November 2016.

---

[10] [2011] NSWCA 11.
[11] Application p 59.
[12] Application p 87.
[13] Application p 7.
[14] [2014] NSWWCCPD 72 (*Diab*).

34. The applicant's statement dated 26 February 2020 sets out at [9] thereof the mechanism of the incident on 11 November 2016 as follows:

> "On 11 November 2016, at approximately 4.20 pm, I was working at the Sans Souci Leisure Centre swimming pool. I had left my last job for the day and was driving home. While on the way home the tailgate open icon displayed on the dash display. I pulled over at the first available opportunity onto a grassy/dirt covered area at the side of the road. I opened the tailgate and was lifting and pulling a heavy bulky scanner out of the vehicle which I estimate to weigh about 35 kilograms. As I was bending forward to lift the scanner, the scanner jerked forward and hit me on the left thigh. I lost my footing and fell forwards onto the scanner cutting the bridge of my nose. I then fell heavily to the ground landing on my outstretched right hand and my right shoulder. I felt immediate pain in the right side of my neck, right shoulder and my lower back."

35. At [10] - [13] of his statement the applicant says that he managed to get himself up and back into the car quickly as he was not stopped in a good position and was able to drive himself home. He spent the entire weekend at home resting. The incident occurred on a Friday afternoon, and on Monday morning he was experiencing pain in in his neck and lower back, and arranged an appointment with his general practitioner, Dr Chesterfield-Evans, on whom he attended on 14 November 2016. Dr Chesterfield-Evans referred Mr Payne to see Dr P Bentivoglio on 29 November 2016.

36. The applicant completed the Incident Report Form referred to above at [30] on 15 November 2016. His description of the incident on 11 November 2016 in that form is as follows:

> "I was tidying the car & trying to access vacuum cleaner. Parking area was dirt (unsealed) I was lifting & pulling bulky heavy scanner out of vehicle. Boxes were wedged at edges where I couldnt access. As I pulled & lifted scanner it lunged towards me. I lost my footing & felt pain in my back. I dropped the scanner on my feet & lost my balance falling forward onto the scanner cutting my nose. Blood went all over the car bumper & the scanner box and my neck twisted painfully Location Sans Souci Leisure Centre 521 Rocky Pt Rd Sans Souci" [sic].

37. The type of injury recorded in the Incident Report Form is "cut nose, twisted neck, damaged back".

38. The clinical notes of Dr Chesterfield-Evans are not in evidence. The first history of the incident recorded by a doctor is that of Dr Bentivoglio in his report dated 29 November 2016 as follows:

> "Thank you very much for asking me to see Christopher Payne, a gentleman who on November 11 2016 fell forward over a box, injuring his neck and lower back and also his nose. Since then he has been complaining right neck pain going into his shoulder blade and down into his right arm. He has never had pain like this before."

39. Dr Bentivoglio made a working diagnosis of mechanical neck and back pain as a consequence of this fall and also a capsulitis of the right shoulder. He said Mr Payne needed to have an MRI scan of his cervical and lumbar region and an ultrasound of his right shoulder.

40. The report of the ultrasound dated 15 December 2016 addressed to Dr Bentivoglio revealed "…no joint effusion or paralabral cyst" and the comment "Normal study". This was reviewed by Dr Bentivoglio on 21 December 2016, who reported to Dr Chesterfield-Evans the following day[15] on the ultrasound and MRI scans of the neck and lumbar spine "[N]one of which require any operative intervention."

[15] Application p 35.

41. On 22 February 2017 Dr Bentivoglio reviewed the applicant and reported to Dr Chesterfield-Evans that the applicant did have "…a capsulitis of his right shoulder which needs to be mobilised slowly but surely with physiotherapy."[16] The last time the applicant saw Dr Bentivoglio was on 26 April 2017. In his report dated 28 April 2017[17] he said that the applicant continued to have physiotherapy but was still quite restricted with his right shoulder movement. He noted that Mr Payne was getting in touch with a pain clinic, which he thought was appropriate, and that he needed to see an orthopaedic surgeon about his right shoulder to see if a steroid into that shoulder would be of benefit to him to help with pain and mobilisation of the shoulder. Dr Bentivoglio did not think that he could do anything more to help the applicant.

42. The applicant saw Dr James Yu, pain management specialist, on 27 March 2017. In his report to Dr Chesterfield-Evans of that date[18] Dr Yu recorded a history of lower back pain and neck pain since a work-related injury in December 2016 [sic]. He said:

> "His neck pain is worse on the right side with referred pain to his right shoulder. Intermittently he also complains of pain shooting down his right arm into his hand."

Dr Yu noted the unremarkable ultrasound of the right shoulder and work-related right shoulder pain as frozen shoulder with restricted movement.

43. The applicant underwent an MRI scan of his right shoulder on 31 July 2017[19] at the request of Dr Don Costa. The findings were reported as moderate acromioclavicular joint degeneration with some spurring of the articular margins and subchondral cyst formation. There was a focal degenerative tear of the glenoid labrum posterosuperiorly at the 10 o'clock position. Some tiny paralabral cysts were noted to have developed along the posterior glenoid margin at that level. There was also a small anterosuperior sublabral foramen. The conclusion was "[D]egenerative labral tear with some small paralabral cysts" and "[P]ossible subacromial bursitis."

44. The applicant saw Dr Doron Sher, orthopaedic surgeon, on one occasion only on 3 November 2017. The doctor recorded a history of Mr Payne falling over when he was lifting a heavy box out of the boot of his car on 11 November 2016. He was struck by the box on his nose and cheek, and landed heavily on his right shoulder, neck and head. Dr Sher recorded that the applicant was treated for neck and back pain initially then subsequently noticed some shoulder issues, and that the applicant had not worked since the accident. The doctor noted that a non-contrast MRI showed some AC joint degeneration as well as some posterior/superior labral degeneration. He said that at that stage he thought it highly unlikely that surgical intervention would benefit the applicant.

45. The applicant first saw Dr Kennedy on 10 April 2018. Dr Kennedy's clinical notes are in evidence in which the consultation of that date is recorded[20]. Details of injury are recorded as:

> "Lifting a heavy box which fell. Placed Rt arm out for support, pain in shoulder & back immediately."

In his report dated 13 April 2018 to Dr Khin Myat Wai,[21] Dr Kennedy records that the applicant:

[16] Application p 39.
[17] Application p 40.
[18] Application p 41.
[19] Application p 78.
[20] Application p 57.
[21] Application p 68.

> "…was lifting a 35kg box out of the back of a ute when he lost control of the box and fell to the ground, landing on his left side. Since that injury he has been experiencing pain in his neck, his right shoulder and pain radiating down his arm. He has had conservative measures of management only, he has not had any surgery."

46. Dr Kennedy reviewed the MRI report of the shoulder and said that it was relatively normal with a small area of degeneration of the labrum at the ten o'clock position. He agreed generally with the report. He said that there was a very small paralabral cyst, no more than 1-2 mm. Rotator cuff was normal. Under "**IMPRESSION**" Dr Kennedy said:

> "Patient has evidence of a labral tear and a small paralabral cyst on an MRI scan. His shoulder pain may or may not be related to the labral cyst."

The doctor discussed with Mr Payne various options of treatment for his shoulder and did not think that an arthroscopic procedure would be fruitful. He recommended conservative measures with physiotherapy. He asked the applicant to get a follow up MRI scan of the right shoulder to make sure that the paralabral cyst had not changed or enlarged. Further review was forecast after the follow up MRI scan. Quite clearly Dr Kennedy was referring to the MRI scan dated 31 July 2017 in that report.

47. Two further MRI scans were carried out, one on 27 April 2018 and one on 13 July 2019, both ordered by Dr Kennedy. On 20 August 2019 Dr Kennedy consulted with the applicant and reported to Dr Chesterfield-Evans on 27 August 2019[22]. He referred to the most recent MRI from July 2019, which showed a posterosuperior full thickness complex labral tear associated with a paralabral cyst that measured 5.8 mm x 3.6mm. When Dr Kennedy compared that scan with the July 2017 scan, he said that the labral cyst did look a lot bigger on the July 2019 MRI compared with the MRI two years previously. Later in the report he said under "**IMPRESSION**" that the applicant "…has a painful posterior superior labral tear with a paralabral cyst, that is slightly larger today than it was two years ago." He also said that physical examination was consistent with the superior labral tear as posterior directed force on the right shoulder reproduced the symptoms. He noted failed conservative measures of management.

48. Dr Kennedy spoke to the applicant about surgery to which the applicant consented. A request was then forwarded to GIO on 21 August 2019[23] requesting approval to surgery in the form of arthroscopic paralabral cyst excision plus labral debridement or repair plus biceps tenodesis of the right shoulder. GIO then faxed to Dr Kennedy the surgery questionnaire referred to in [30(a)] above. At [6] in answer to the question:

> "Could you please provide an explanation for how your patient's employment with MITRONICS CORPORATION PTY LTD is related to the labral tear and paralabral cyst right shoulder? Please provide reasons for your opinion."

Dr Kennedy wrote:

> "Injured Shoulder lifting 35 kg box & fall
> 11/11/16
> History, physical exam, and MRI are consistent
> With his injury."

49. This report of Dr Kennedy is the only one in which he gives an opinion on the causal connection between the injury of 11 November 2016 and the condition in the right shoulder in respect of which he proposes surgery.

[22] Application p 59.
[23] Application p 21.

50. The applicant was independently medically examined by Dr Hyde-Page at the request of GIO on 29 October 2019. His report of that date is in evidence[24]. Dr Hyde-Page summarised the applicant's treatment following injury on 11 November 2016, including the most recent review of Dr Kennedy in 2019 following the MRI scan dated 13 July 2019. Dr Hyde-Page noted under Investigations that:

    (a) an MRI scan of the right shoulder in April 2018 shows capsular thickening, in keeping with mild adhesive capsulitis or frozen shoulder, and

    (b) an MRI scan of the right shoulder in July 2017 shows the degenerative labral tear and associated with this, more paralabral cysts. The rotator cuff was normal.

51. Dr Hyde-Page diagnosed the applicant as suffering from mild traumatic frozen right shoulder or adhesive capsulitis of the right shoulder. He said that after the injury, the applicant developed some stiffness in the right shoulder which he found on examination. That was confirmed in the MRI scan in May 2018. The doctor found it reasonable to conclude that the type of injury suffered by the applicant would cause some stiffness in the right shoulder due to adhesive capsulitis or frozen shoulder. Dr Hyde-Page said that the applicant's condition would not be improved by arthroscopic surgery, and as he did not consider the labral tear and paralabral cyst related to his injury, it is unlikely that arthroscopy would help. In fact, it could actually make the adhesive capsulitis worse. Although Dr Hyde-Page refers to the MRI of May 2018, it is evident that he is in fact referring to the MRI of 27 April 2018.

52. Dr Hyde-Page is of the opinion that the degenerative labral tear and paralabral cyst are long standing changes unrelated to the applicant's acute injury in November 2016.

53. A report of Dr Bodel dated 17 January 2020 following an independent medical examination of Mr Payne is in evidence[25]. Dr Bodel took a history of the applicant attempting to move the scanner in the back of his car to another area so that he could see out of the back of his car. As he did so he slipped and fell, hit his nose and grazed his nose but also jarred his neck and his right shoulder and arm and also his lower back. Dr Bodel had access to all of the investigations of the applicant's right shoulder with the exception of the MRI scan of the right shoulder dated 13 July 2019. He noted the MRI scan showing the labral tear and some tendinopathy and also that there was mention of some capsular thickening in the axillary recess suspicious of adhesive capsulitis, of which he found minimal sign on testing.

54. Dr Bodel noted Dr Sher's opinion that conservative care of the shoulder should be tried and that he did not think that surgical intervention would be required. He also noted Dr Kennedy's initial recommendation of conservative care with the region of the right shoulder but the more recent suggestion of block injections and/or surgery as a treatment option. He also noted the surgery proposed by Dr Kennedy, liability for which was denied in the GIO's s 78 notice issued in September 2019.

55. On the question of causation Dr Bodel said that the applicant had suffered an injury to the neck, the right shoulder, the right arm including the carpal tunnel syndrome and the lower part of the back as a result of the incident that occurred during the course of his day's work on 11 November 2016. In response to a question posed to him as to whether he considered that the applicant's employment was "…the main substantial contributing factor to his injury", and if so, "…what is the mechanism by which he sustained his injury?", Dr Bodel said that he considered the employment was the main substantial contributing factor to ongoing complaints.

[24] AALD 25 March 2020 p 7.
[25] Application p 26.

56. Under *"Treatment* "on page 7 of the report at [1], Dr Bodel said:

> "He has been offered treatment in the form of a subacromial decompression in the region of the right shoulder and that is reasonably necessary for the management of the injury caused by the accident at work. He has also been offered block injections to the back and they are also reasonably necessary."

At [3] Dr Bodel said:

> "The pathology seen on the MRI scan is causally related to the injury at work The surgical procedure proposed by Dr Stuart Kennedy is appropriate… Resolution of symptoms is likely to be incomplete even with the most successful outcome of surgery."

57. In a supplementary report dated 8 April 2020[26] Dr Hyde-Page commented upon the report of Dr Bodel dated 17 January 2020. He referred to what Dr Bodel, said at [3] under "*Treatment*", quoted immediately above, to suggest that Dr Bodel is unconvincing in his support for the surgery proposed by Dr Kennedy. He also referred to the opinion of Dr Sher that surgery is unlikely to be beneficial, and that the labral change is degenerative in nature and not related to the applicant's injury. He repeated his contention that the proposed surgery is not related to the injury suffered to the right shoulder but related only to the pre-existent degenerative or long standing condition.

58. The mechanism of injury to the right shoulder described by the applicant at [9] in his statement dated 26 February 2020 differs significantly from the fall of 11 November 2016 described by the applicant in the Incident Report Form dated 15 November 2011. The evidence of the applicant in this regard is referred to above at [34] (statement of 26 February 2020) and [36] (Incident Report Form). There is no reference to the applicant falling on his right shoulder in the description of the incident in the Incident Report Form completed and signed by the applicant four days after the incident. When Mr Payne saw Dr Bentivoglio on 29 November 2016 the history recorded is of the applicant falling forward over a box, injuring his neck and lower back and also his nose. Dr Bentivoglio recorded that since then Mr Payne had been complaining of right neck pain going into his shoulder blade and down into his right arm.

59. The location of the incident differs in these two accounts; in the Incident Report Form the applicant says that it occurred in the unsealed parking area of the Sans Souci Leisure Centre, whereas in the statement Mr Payne says that it occurred after he had left his last job of the day at that Centre and was driving home. Whilst not much may turn on the location of the incident, this difference does illustrate that a person's recall of an event may, and often does, become less reliable with the passage of time.

60. By the time that the applicant saw Dr Sher on 3 November 2017 (see [44] above) the history recorded is that he was struck by the box he was lifting out of the boot of his car on his nose and cheek, and landed heavily on his right shoulder, neck and head.

61. Dr Kennedy's record of the mechanism of injury recorded in his clinical note dated 10 April 2018 and report dated 13 April 2018 is set out at [45] above. In the clinical note he records the applicant as lifting a heavy box which fell, placing his right arm out for support and experiencing pain in shoulder and back immediately. In the report he records the applicant falling to the ground landing on his left side. This last entry may have been a mistake on the part of the doctor, but this is not apparent.

[26] AALD 15 April 2020 p 2.

62. In his report to GIO dated 29 August 2019 referred to above at [30(a)], Dr Kennedy records the applicant as having injured his shoulder lifting a 35 kg box and falling, and that the history, physical examination and MRI are consistent with the applicant's injury. The injury that Dr Kennedy is referring to is the labral rear and paralabral cyst in the right shoulder on which he proposes to operate.

63. In making these observations I am aware of the care which must be exercised in reading clinical notes of busy doctors when they are recording histories of accidents (see *Davis v Council of the City of Wagga Wagga*[27]), but when the doctor's clinical note is considered along with the other evidence of Dr Kennedy, I think that he is proceeding on an incorrect history as to how the applicant injured his right shoulder on 11 November 2017.

64. As to the mechanism of injury, I accept what the applicant says in the Incident Report form. It is confirmed by what is recorded by Dr Bentivoglio when he first saw Mr Payne on 29 November 2011, as are the injuries of which he complained he suffered in the fall, to the back (lower back recorded by Dr Bentivoglio), nose and neck. Dr Bentivoglio made a working diagnosis of a capsulitis of the right shoulder and arranged an ultrasound which revealed no joint effusion or paralabral cyst and was a normal study. The diagnosis of capsulitis was confirmed by Dr Bentivoglio on 22 February 2017. The pain management specialist, Dr Yu, noted work-related right shoulder pain and frozen shoulder with restricted movement on 27 March 2017. Dr Sher, on 3 November 2017 did not refer to capsulitis, but noted that the MRI (which was carried out on 31 July 2017) showed some AC joint degeneration as well as some posterior/superior labral degeneration. He thought that at that stage, surgical intervention would not benefit the applicant.

65. In the notice issued to the applicant on 13 January 2020 pursuant to s 78 of the 1998 Act GIO disputed that the applicant had suffered an injury to the right shoulder in the form of posterior superior labral tear with a paralabral cyst, and also a cervical cord lesion and bilateral carpal tunnel syndrome. It accepted that he had suffered a muscle strain injury to the neck and an injury to the lower back. This notice was issued on the basis of the findings of Dr Hyde-Page in his report dated 29 October 2019, who found that it appeared that Mr Payne developed some stiffness in the right shoulder as a result of the subject incident due to adhesive capsulitis or frozen shoulder.

66. I do not accept the opinion of Dr Bodel. His report and findings are summarised above at [53-56] Dr Bodel reviewed the reports of the various investigations, although I note that the treatment records of Dr Costa to which he refers are not in evidence. The surgery that Dr Bodel notes the applicant has been offered is in the form of "subacromial decompression in the region of the right shoulder", which appears to be less extensive than the surgery proposed by Dr Kennedy. Nevertheless he says later in the report that "[T]he pathology seen on the MRI scan is causally related to the injury at work" and that "[T]he surgical procedure proposed by Dr Stuart Kennedy is appropriate." This apparent difference is not explained, although I note that Dr Kennedy does refer to "…decompression of the paralabral cyst…" in his "**PLANS & RECOMMENDATIONS**" in the report dated 20 August 2019.

67. My finding is that "[T]he pathology seen on the MRI scan", and in this regard Dr Bodel can only have been referring to the two earlier scans dated 31 July 2017 and 27 April 2018, is not causally related to the injury at work on 11 November 2016.

[27] [2004] NSWCA 34

68. Among the applicant's submissions is one that it is only the first scan dated 31 July 2017 that contains a reference to a degenerative labral tear of the glenoid labram. The reports of the two later MRI scans, whilst confirming the labral tear, do not refer to a degenerative condition. I do not think that this is significant. The MRI scans are, in accordance with the finding of Dr Hyde-Page, consistent with his finding that what is shown on the scans is a long standing degenerative condition. It is apparent from the report of Dr Hyde-Page dated 29 October 2019 that he had access to the report of Dr Kennedy following his review of the applicant in the middle of that year, when Dr Kennedy reviewed the new and old scans.

69. I accept that the applicant sustained an injury to his right shoulder on 11 November 2016 in the form of adhesive capsulitis or frozen shoulder. He did not sustain injury in the form of a posterior superior labral tear with a paralabral cyst.

SUMMARY

70. The applicant's only claim in the Application is for future treatment expenses pursuant to s 60 of the 1987 Act for the right shoulder surgery proposed by Dr Kennedy. There is no other claim, and that is the case that was presented at the arbitration hearing.

71. The nature of the injury that the applicant sustained to his right shoulder on 11 November 2016 is adhesive capsulitis or frozen shoulder.

72. The surgery proposed by Dr Kennedy namely, arthroscopic paralabral cyst excision, labral debridement or repair and/or biceps tenodesis of the right shoulder, is not reasonably necessary as a result of the injury sustained by the applicant to his right shoulder on 11 November 2016.

73. Award for the respondent.