

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5081/20
Applicant: Derek Moore
Respondent: Food Boss Transport Pty Ltd
Date of Determination: 17 December 2020
Citation No: [2020] NSWCC 415

The Commission finds:

1. The applicant has suffered and continues to suffer symptoms and restrictions on his left shoulder as a consequence and result of an injury to his right shoulder on 20 May 2015 after excessively using his left shoulder to protect his right shoulder following that right shoulder injury on 20 May 2015.
2. The applicant has suffered an injury to his left shoulder, in the nature of left rotator cuff tear with subacromial bursitis on a background of tendinosis, as a consequence and result of an injury to his right shoulder on 20 May 2015 after excessively using his left shoulder to protect his right shoulder following that right shoulder injury on 20 May 2015

The Commission orders:

3. The claim with respect to permanent impairment pursuant to section 66 of the *Workers Compensation Act 1987 (NSW)* is remitted to the Registrar for referral to an Approved Medical Specialist (AMS).
4. The said referral is for the purpose of an assessment by the AMS of the applicant's whole person impairment (WPI) as a result of the injury to his right shoulder on 20 May 2015.
5. The assessment by the AMS of the applicant's WPI is to be with respect to the following body parts or systems:
 - (a) right upper extremity, and
 - (b) left upper extremity.
6. The following documents are admitted by consent and are to be forwarded to the AMS:
 - (a) Application to Resolve a Dispute including attached documents, and
 - (b) Reply including attached documents.

The Commission directs

1. If either party wishes to make any submission about the terms of the above orders, they are to lodge written submissions within 7 days.

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

Michael Perry
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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (ARD) lodged 8 September 2020, Derek Moore (the applicant) claims a lump sum reflecting 17% whole person impairment (WPI) with respect to his right and left shoulders, under s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The left shoulder aspect of the WPI is alleged to be a consequence of an injury to the applicant's right shoulder in the course of his employment with Food Boss Transport Limited (the respondent) on 20 May 2015. The respondent admits its liability to pay compensation with respect to the right shoulder injury.

PROCEDURE BEFORE THE COMMISSION

2. The parties attended a conciliation conference and arbitration hearing on 11 November 2020. Mr Ross Stanton of Counsel, instructed by Ms Sarah Bell-Bagguley, solicitor, appeared for the applicant. Mr Stephen Harris, solicitor, appeared for the respondent.
3. I did my best in trying to bring the parties to a settlement, acceptable to each, during the conciliation phase. I am satisfied they had sufficient opportunity to explore settlement and were unable to reach a resolution. I am also satisfied they understand the nature of the application and legal implications of any assertion made in the evidence.
4. During the arbitral phase, Mr Stanton made an application that Regulation 44 of the Workers Compensation Regulation 2016 (Reg 44) would be offended if the respondent were allowed to rely upon the opinion of Dr Frank Machart, orthopaedic surgeon, in his 8 September 2017 report. This is because Dr Machart was not a treating doctor and Reg 44 restricts a party to only one forensic medical report. Mr Stanton submitted there was authority for, and he did not object to, the admission of this report into evidence – but only as to the history recorded.
5. Mr Stanton also agreed that Reg 44(4)(c) would allow for the admission of Dr Machart's opinion into evidence as well – but only if it had been attained for the purpose of proving or disproving an entitlement, or the extent of an entitlement, in respect of another claim or dispute. However, he submitted Dr Machart's report had not been obtained for that purpose. There were two other forensic medical reports obtained by and in support of the respondent and its case from Dr David Millons dated 21 February and 23 September 2020. Dr Millons had the same, or similar, qualifications as Dr Machart.
6. Mr Stanton also submitted that the qualifications of the two doctors are different: Dr Machart is an orthopaedic surgeon and Dr Millons is a surgeon; and that Reg 44(3), in any event, only allows an additional forensic medical report "where injury has involved treatment by more than one specialist medical practitioner", in which case that additional report "may be admitted from a medical practitioner with qualifications in that specialty". Here, there is no treatment from any specialist medical practitioner other than Dr Gothelf. Otherwise, the reports of both Dr Machart and Dr Millons were obtained for *the* claim or dispute: the claim was in respect of injury to the right shoulder, and the dispute related only to whether or not there was an injury, within the meaning of the 1987 Act, to the applicant's left shoulder.
7. Mr Harris submitted that the respondent ought be allowed to have admitted reports from both Drs Machart and Millons because Dr Machart's report was obtained with respect to "another claim". The letter from the applicant's solicitor to QBE Insurance dated 26 July 2017 (ARD 15) represents the first claim and the letter of 22 November 2019 from the applicant's solicitors to GIO Insurance is the second claim. The particulars were different: the "first claim" referred to the consequential injury to the left shoulder being particularised as due to "favouring the right shoulder"; whereas the "second claim" not only included such particular but also included reliance upon an incident in November 2016 when the applicant was

moving a pallet and pulling a product on the pallet and injuring his left shoulder – and that that left shoulder injury was a consequence of the right shoulder injury as the applicant was protecting that shoulder and applying more force with his left shoulder during that incident.

8. Mr Stanton responded to submit that the reference to “claim” in Reg 44(4)(c) is to the lump sum compensation claim with respect to the left shoulder – and that it does not become “another” claim simply because there are different particulars. Neither party provided any authority for their submissions. I have turned to the definitions in Part 9 of the Workers Compensation Regulation 2016. That section defines “claim” as meaning a “claim for compensation payable or claimed to be payable under the 1987 Act”. This accords with the submission by Mr Stanton. Each of the claims, the first by letter of 26 July 2017, and the second by letter of 22 November 2019, were essentially the same. Each claimed a lump sum reflecting a particular WPI – the first was particularised as 18%, the second was particularised as 17%. Each was also underpinned by the same essential basis: the original injury to the right shoulder on 20 May 2015, and then a consequential injury to the left shoulder.
9. Mr Harris is correct in submitting that the particulars were different; because there was an added dimension in the second letter also relying upon the November 2016 incident being said to be consequential upon the 20 May 2015 right shoulder injury because the applicant was protecting his right shoulder at that time. But Regulation 43 defines “claim” as meaning a claim for compensation payable or claimed to be payable under the 1987 Act. On this basis, I find that there was not “another claim” within the meaning of Reg 44(4)(c).

ISSUES FOR DETERMINATION

10. The only issue is whether the applicant did sustain a consequential injury to his left shoulder as a result of the accepted injury to the right shoulder on 20 May 2015.

EVIDENCE

Documentary evidence

11. The ARD and Reply were in evidence before the Commission and taken into account in making this determination.

Applicant’s statements

12. The applicant signed and completed a *Worker’s Injury Claim Form* (Reply 18-20) on 20 April 2017. It notes the applicant injured his left shoulder while “moving pallets of product ... with manual jack ... unloading trailer”. The applicant has also indicated, by ticking a box on the form, that the injury occurred while he was “working away from ... usual workplace”. He also stated, in response to a form question as to why he did not report the injury/condition or there was a delay, that “having been threw shoulder injuries before I was reluctant to report it as I know is to come ...” [sic]. He then also stated, in response to a question about the detail of any previous injury/condition, that he had a right shoulder injury in May 2015.
13. The applicant’s next statement is dated 10 or 26 July 2017 (Reply 22A-22C). While the date of 10 July 2017 appears in the chapeau of the statement it does appear that at the bottom of each page, the signature of the applicant and two witnesses were more likely made on 26 July 2017. The applicant stated his duties required him to load and unload food products and this requirement varied day to day, depending upon whether the customer at the site had electric pallet jacks or only manual pallet jacks available. He and his colleagues were “not always able to load electric pallet jacks onto our trailers for several reasons ... do not always have the same trailer ... secondly ... there are only 24 spaces ... (on the trailer) ... and the trailers are mostly filled with stock before we leave the depot”.

14. The 2015 right shoulder injury occurred when he was unloading a pallet with a manual pallet jack and was close to the back of the trailer. The pallet contained frozen goods and as he was pulling the pallet jack it skidded on the wet floor and he had to let go of the jack and jump out of the way and off the trailer. He then initially had an ultrasound “which revealed a shoulder tear and was administered ... a cortisone injection”. This relieved his pain “for a time, and I continued working. However, several months later while grabbing a bar to secure the load in the trailer, the shoulder tear worsened requiring surgery”.

15. It took approximately one year from the time of the surgery (July 2015) until he was able to return to work. The applicant then states:

“... continued to experience intermittent right shoulder pain, and have been very aware and cautious in order to avoid re-injury ... some time in late 2016 ... do not recall the date ... working at ... OPT ... two pallets that had either been loaded with sugar or rice ... were loaded in the trailer very tightly ... the products were overlapping ... was pulling on the manual pallet jack with force but they were not moving ... was working alone in the back of the trailer ... had been pulling on the jack, felt a pull and pain in my right shoulder but it was not too bad at the time ... consulted my long standing GP of 26 years ... Dr Cameron at the time ... was referred for an ultrasound which revealed that my shoulder was torn in two places ... he told me that it was likely to have occurred as I have been favouring my left arm in order to prevent further injury to my right. I am right hand dominant ... Do not recall if I told my GP ... I had sustained my injury at work ... did not report it to my employer as I hoped ...injury would resolve ... procrastinated ... as I know how long it took me to heal following surgery to my right shoulder ... several months ago I advised the human resources administrator, Karen Burton ... I was struggling with an injury to my right shoulder as a result of over-compensation with my left arm following right shoulder surgery ... told her that I had consulted my GP.”

16. The next statement is dated 24 October 2018 (Reply 23A - 23D). The applicant states he returned to work about six months following his right shoulder surgery performed by Dr Todd Gothelf, orthopaedic surgeon, on 23 July 2015. He then resumed full time work. Upon such resumption and:

“as a result of the injury and ... surgery... I favoured ...right shoulder ... was not able to utilise my right shoulder in the manner I had done prior to ... 20 May 2015 ... around my home and work ... had to rely a lot more on my left shoulder to do a wide range of things ... lived by myself and responsible for my own ... domestic tasks such as washing, cleaning, washing my car, washing windows, scrubbing the shower, have had to use my left shoulder mainly to do these tasks ... after returning to work ... resumed truck driving ... when I get to the destination ... have to unload the truck about $\frac{3}{4}$ of the time ... majority of the unloading, I have to do this manually using a pallet jack ... would rely and use ... left shoulder ... often the pallets ... weigh about a tonne or more and I have to move them with a manual pallet jack ... requires a lot of physical exertion and most of this was done with my left arm and left shoulder ... would often do unloading of the truck at 7 or 8 different locations ... typical daily shift for me is about 10 to 14 hours and I typically spend a few hours a day unloading ... over time this increased use and stress upon my left shoulder ... notice pain developing at my left shoulder ... went to see Dr Cameron about my left shoulder ... then in November 2017 (sic) I suffered a further injury to my left shoulder when I was working at the...(OPT)... unloading pallets full of rice ... relying predominantly on ... left shoulder to do the heavier work in this ... task ... were 6 pallets to unload ...average ...500kg ... completed the task and drove back to the yard at Penrith ... the next Monday I went and saw ... Dr Cameron and he arranged a scan of the left shoulder and was referred back to Dr Gothelf ...”

17. The last statement from the applicant is dated 7 September 2020 (ARD 1-5). The applicant states the same or at least similar matters going to how he over-used his left shoulder and arm as a result of the injury to the right shoulder as he did in his penultimate statement of 24 June 2020 (Reply 24A-24E). He noted the “further injury to my left shoulder” in November 2016 at the Overseas Passenger Terminal at Circular Quay (OPT) when he:

“...was unloading pallets full of rice. I was again relying predominantly on my left shoulder to do the heavier work in this unloading task ... were 6 pallets to unload and they were average in weight of 500kg ... had to manoeuvre these ... pallets around but of course by mainly exerting and relying on my left shoulder and arm ...believe if my right shoulder wasn't injured I would have been able to share the work in pushing and pulling the pallet jacks between each shoulder equally and not have to rely and put pressure on one shoulder more than the other ...”

Dr Denise Tong, Musculoskeletal Consultant, forensic reports requested by applicant's solicitors

18. Dr Tong has prepared four reports. The first, of 23 January 2017, followed an examination of the applicant that same day. Dr Tong noted the history of the 20 May 2015 right shoulder injury, the applicant returning to work after the surgery in July 2016 (A23), and then noted:

“... as a result of the reduced ability ... to use his right arm he had to use his left arm to perform his usual vocational and avocational activities ... used the left shoulder to push and pull the pallet jacks as his right shoulder was not allowed to bear weight ... states...as a result his left shoulder started to be sore around end of 2016. This has not been investigated or treated to date ...”

19. Dr Tong noted that the applicant was still doing his permanent full time pre-injury duties with the use of an electric pallet jack. In relation to diagnosis, she stated:

“... sustained a right shoulder ... tear ... 20 May 2015 ... as a consequence ... constant discomfort in the right shoulder ... limits ... ability to engage in any repetitive or sustained upper limb activities ... complicated by adhesive capsulitis. As a result, he has had to use the left shoulder to compensate for the daily activities he could no longer perform, causing injury to the left shoulder ... cause of this has not been investigated or treated ... likely to be a form of rotator cuff disease +/- subacromial bursitis ... condition is consistent with the mechanism of injury described ... is a frank injury caused by Mr Moore's employment on 20 May 2015 ... prognosis for ... left shoulder cannot be determined at this stage.”

20. Dr Tong's second report is dated 24 July 2017. She examined the applicant for a second time that day. Dr Tong again summarised that as a result of the injury to the applicant's right shoulder, he has had to use the left shoulder to compensate for the daily activities he could no longer perform, causing injury to the left shoulder (A29). She then found a 9% WPI with respect to both the right and left upper extremities.
21. Dr Tong's third report was made 24 September 2018, with the benefit of a third examination on that day. Again Dr Tong recorded the history of the applicant having a reduced ability to use his right arm after he returned to work as a truck driver in July 2016, and then had to use his left arm to perform his usual vocational and avocational activities. In particular, using the left shoulder to push and pull the pallet jacks as his right shoulder was not allowed to bear weight, and that Mr Moore had stated that “as a result, his left shoulder started to be sore around the end of 2016”.

22. On the occasion of this third examination, Dr Tong had the benefit of an ultrasound (8 February 2017) and MRI (16 August 2017) of the left shoulder. She then notes:
- “... then, in November 2017 [sic], Mr Moore had another injury to the left shoulder whilst at work ... was unloading bags of rice (25kg per bag) from a truck using a pallet jack and this jerked his left shoulder ... on 27 March 2018 ... underwent surgery by Dr Gothelf ... left shoulder arthroscopic rotator cuff repair and biceps tendinosis ...”
23. Dr Tong also had the benefit of up-to-date ultrasound (10 August 2018) and MRI (27 August 2018) reports of the applicant’s left shoulder.
24. Under “Diagnosis and Opinion”, Dr Tong again notes the applicant:
- “has constant discomfort in the right shoulder ... limited ... ability to engage in any repetitive or sustained upper limb activities ... associated restriction in shoulder movement ... had consequential left sided shoulder injury ... symptoms have been present for more than 3 years ... likely to persist in the foreseeable future ... left shoulder rotator cuff tear with subacromial bursitis on a background of tendinosis (degenerative).”
25. Dr Tong found an 8% WPI with respect to the right upper extremity and a 9% WPI with respect to the left upper extremity.
26. Dr Tong’s fourth and last report is dated 14 November 2019 and is titled “Supplementary medical report”. There was no further examination. She noted that:

“in your referral dated 14 November 2019, and also as noted in my report dated 24 September 2018, in November 2016, Mr Moore had another injury to the left shoulder whilst at work ... unloading bags of rice from a truck using a pallet jack ... jerked his left shoulder returned to work as a truck driver in July 2016 ... as a result of the reduced ability ... to use ... right arm ... had to use his left arm to perform his usual vocational and avocational activities ... had to use the left shoulder to push and pull the pallet jacks as his right shoulder was not allowed to bear weight ... sustained a frank left injury in November 2016 ... my opinion ... has had ...strain to the left shoulder as a result of over-reliance from the right shoulder injury and ... likely he would not have had to use the left shoulder to push and pull the pallet jack quite as forcefully if he has the full use of the right shoulder during the frank injury dated November 2016. Therefore, I would consider ... the frank left shoulder injury of November 2016 as a consequential injury that occurred due to the original right shoulder injury dated 20 May 2015”.

Dr Greg Cameron, general practitioner (GP)

27. There are two reports dealing with the essential issues in this case from Dr Cameron. The first is of 20 November 2017. Dr Cameron notes he had been treating the applicant since 1994, including for the right shoulder injury in 2015. He then wrote that “... I saw him on 9/11/2016. He complained of increasing pain in both shoulders with restriction in the left ...” Dr Cameron also noted, in apparent response to a question from the applicant’s solicitor, that “Yes, I believe ... Mr Moore was favouring his left shoulder whilst he was recovering from his right shoulder surgery in 2015” (ARD 97 and 99).

28. Dr Cameron's report of 11 November 2019 to the applicant's solicitors (ARD 112) notes that "I saw him on 9.11.16 and arranged an ultrasound ... did not see him again until 13.2.17 and reviewed his ultrasound which showed some subacromial bursitis and partial thickness supraspinatus tear". Dr Cameron also states, in answer to a question put to him as to whether the applicant injured his left shoulder on 26 May 2017 [sic] as a result of the injury to the right shoulder and "whether you agree with the proposition that Derek was likely to be protecting his right shoulder when he was moving the pallet jack at work on 26 May 2017 [sic]", Dr Cameron answered that "He injured [sic] in the course of his work ... believe it is likely he was using his left arm in an attempt to protect his right shoulder..."

Dr Todd Gothelf, orthopaedic surgeon

29. On 10 February 2016, Dr Gothelf reviewed the applicant, about seven months after he performed the right shoulder surgery on the applicant. Dr Gothelf described the applicant as "slowly improving ... still has a bit of stiffness in the (right) shoulder ..." He thought that suitable duties were still necessary for the applicant at this stage, but he also believed that returning to full duties was a realistic goal and he would expect that "over the next 3 months provided he has increased improvement and function". Dr Gothelf reviewed the applicant again on 6 April 2016 and noted the applicant was "gradually increasing his work ... currently he is at his regular full duties ... does have problems with overhead lifting, heavy weights or reaching high ... otherwise ... very happy with his results ... much better than ... prior to surgery ..."

30. On 7 June 2016, Dr Gothelf reviewed the applicant again:

"with regards to his right shoulder after ... repair almost 11 months ago ... currently doing well ... no significant problems ... he is back to work ... involves some lifting and this is going fine ... having no trouble at all doing the tasks ... slight restriction of movement ... slightly improved from previously ... back at work ... tolerating this well ... believe he can continue his current job ... no plans at this stage or any further follow up ..." (Reply 128).

31. It appears Dr Gothelf did not see the applicant again until 8 November 2017, in the context of Dr Cameron referring him "with regards to his left shoulder". Dr Gothelf took this history:

"... In November 2016, there were two pallets in the trailer ... was trying to pull out pallets and felt the shoulder pain then ... never had problem prior to this ... ever since then he has had niggling pains in the left shoulder and the arm is sore ... currently Derek is working full duties and tolerating this okay ... impression ... left shoulder rotator cuff tear after an injury in November ... currently is symptomatic ... has a full thickness tear on MR arthrogram ..."

32. On 27 March 2018, Dr Gothelf performed a left shoulder arthroscopic rotator cuff repair at Nepean Private Hospital. He did continue to see the applicant from time to time in relation to the applicant's left shoulder problems at least up until the end of 2018.

Dr David Millons, surgeon, engaged by respondent, forensic reports 21 February and 23 September 2020 (Reply 226-244)

33. Dr Millons noted the applicant's history of right shoulder injury and that the applicant "proceeded to surgery on 23 July 2015". He also noted that the applicant returned to work on graded hours and duties starting out in the office "after a couple of months" (following surgery). In relation to the left shoulder, Dr Millons noted this history:

“... problems with the left shoulder seemed to have come about following an incident at work in November 2016 ... states ... he may have had some aching in his left shoulder along the way as he used that arm more to protect his right shoulder ... Dr Tong ... report ... 23/01/17 ... notes ... his left shoulder was starting to be sore around 2015 because he was using ... left shoulder to push and pull pallet jacks ... that would be open to some question ... appears that it was some time in November 2016 ... was delivering a load to a cruise ship at the ... (OPT) ... states ... pulling an electrical pallet jack in the rear of the container ... floor was icy ... tried to swing the pallet jack around ... started to come out of the back of the trailer ... tried to hold onto the pallet jack, and in that same moment, he seems to have pulled his left shoulder ... some discomfort in the shoulder...”

34. Dr Millons then opines:

“... while I accept ... he was using his left arm more to protect his right shoulder, the work does appear to have been fairly two handed ... appear to have been two specific injuries recorded ... to the left shoulder, one in November 2016, when he was shifting a pallet jack from the back of the trailer and pulled his left shoulder ... a few months later ... possibly ... May 2017 ... was trying to remove pallets of rice that had settled and it was hard to move them out of the back of the container ... pulling on the pallet jack with two hands ... more pain in the left shoulder again and was found to have sustained a further tear ... Dr Gothelf ... 08/11/17 ... notes problems pulling pallets out of the truck ... records ... November 2016 but ... appears may have been May 2017 and that he had never had any problems prior to that time ... Dr Tong ... 14/11/19 notes that because of a reduced ability to use his right arm, Mr Moore ... had to use his left arm to perform the usual vocational and avocational activities and that he had sustained a frank left shoulder injury in November 2016 ... felt ... there had been a repetitive strain to the left shoulder as a result of over-reliance from the right shoulder ... likely he would not have had to use the left shoulder to push and pull the pallet jack quite as forcibly if he had the full use of his right shoulder during ... injury dated November 2016 ... felt that the frank injury was a consequential injury ... *That comment would be open to some question ...*” (emphasis is from Dr Millons).

35. Dr Millons then further considers the causation issue regarding the left shoulder, and notes “with interest” that when the applicant went back to driving, he did have difficulty with the restrainer bars, and;

“...there could be up to 3 bars at the back of the load. Because he is short, he could not reach the top one and would often be forklifted up to free up the restrainer bar. That suggests that there were ongoing issues with the right shoulder ...”

36. Dr Millons then notes that the applicant “makes no particular comment about his *left shoulder* until the incident ... he told me occurred in November 2016 at the ... (OPT)... when the pallet jack slipped on the icy floor and he held onto the pallet jack and seems to have wrenched his left shoulder”. Dr Millons then notes that it appears it was possibly in May 2017 that the applicant experienced the episode of trying to clear jammed pallets stacked with rice, was yanking at a pallet jack with both hands when there was more pain in the left shoulder and he was found to have sustained a torn rotator cuff. The doctor notes that “it appears ... there may have been some further tearing of a degenerative rotator cuff in that incident”.

37. Dr Millons finds the applicant “almost certainly ...had some constitutionally based degenerative changes in the left rotator cuff which would reflect in part his age and perhaps in part his 30 years as a glazier ...” He finds that the left shoulder problems “seem to flow from the incident in November 2016 and possibly May 2017” and accepts “that if he was using his left arm more to protect his right shoulder along the way ... there could have been some day to day aggravation of the degenerative changes in the left shoulder but that does not appear to have been the case here” (Reply 238). Ultimately, Dr Millons expresses a view that “the incident in November 2016 can be considered to be an injury de novo with a further incident occurring apparently in May 2017 ... those incidents are not consequential on the right shoulder injury of 20 May 2015 but are standalone injuries ...”
38. Dr Millons provided a supplementary report, without a further examination of the applicant, on 23 September 2020. He was asked by the respondent’s solicitor to comment again on the left shoulder causation question, this time also in the context of the applicant’s statement of 7 September 2020. Dr Millons summarises the history again and, relevantly, notes:

“...turning to the *left shoulder*, Mr Moore indicates to me that problems at the left shoulder seemed to come about following an incident at work in November 2016 ... at point 22 of his statement ... notes ... while manually using a pallet jack he would rely on and use his left shoulder to do those tasks and at ... 24 ... notes ... there was pain developing at the left shoulder ... then records the incident in November 2016 and states that if his right shoulder had not been injured ... would have been able to share the work in pushing and pulling the pallet jacks and not have to rely and put pressure on one shoulder ... Mr Moore indicated to me that he may have had some aching in the left shoulder along the way as he used that arm more to protect the right shoulder ... a definite incident in November 2016 ... appears to have been a further incident on 26 May 2017 ... in conclusion I noted ... Moore made no particular comment about his *left shoulder* until the incident which appears to have occurred in November 2016 ... aggravation ... more pain in the left shoulder while yanking ... in May 2017 ... felt that those recorded *left shoulder* injuries had brought about the issues within the left rotator cuff and that the incident that had occurred in May 2015 did not appear to have been the cause of the rotator cuff tear that was found at surgery in March 2018 ... Dr Gothelf ... treating ... surgeon from mid-2015 ... would be in the best position to comment ... records that Mr Moore ... never had any problems with the left shoulder prior to the incident in November 2016 (or May 2017) ...”

***Dr Frank Machart, engaged by respondent, forensic report of 8 September 2017
(Reply 144 – 149)***

39. Dr Machart saw and examined the applicant on 7 September 2017. He took a history of the applicant’s right shoulder injury, and noted the surgery performed by Dr Gothelf on that shoulder in June 2017. Dr Machart then noted:

“... he was better after that ... shoulder was not perfect ... found it difficult to reach overhead ... managed to continue driving trucks, for most parts using mechanical pallet jacks rather than manual ... also used equipment or steps to be able to reach up, rather than trying to reach up with both arm from ground level ... suffered a separate injury to the left shoulder in November 2016 ... was pulling pallets trying to separate them ... using both hands ... experienced pain in the left shoulder ... pain failed to settle ... I took a careful history ... he was pulling on pallets with both arms at chest level and felt pain in the left shoulder ... was quite clear about the injury to the left shoulder ... was not using pallet jacks ... was pulling on pallets at torso level and injured the left shoulder on one specific occasion ...” (Reply 149).

Submissions for the applicant

40. There are various authorities in support of a proposition that incapacity and impairment can result from multiple sources (*Calman v Commissioner of Police* [1999] HCA60 at [38]). Although this passage refers to “incapacity is also the product of other ... causes”, the Commission is able to substitute the word “impairment” for “incapacity” for the purposes of the present case. Reference was also made to the decision of Deputy President Bill Roche in *Australian Traineeship System v Turner* [2012] NSWWCPCD 4 (at [65]) (*Turner*). Here, the Commission used the term “impairment” as a substitute for “incapacity”. This passage shows there is no relevant distinction between “incapacity” and “impairment” for the purposes of the submission. Also, in *Salisbury v Australian Iron & Steel Ltd* [1943] NSW StRp 50; (1943) 44 SR (NSW) 157, Jordon CJ stated that it is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause. Reference is also made to *Cluff v Dorahy* (1972) 2 NSWLR (at [435]). The same, or similar, principle was stated in this case. This was picked up by Deputy President Bill Roche in *Turner* (at [64]).
41. Dr Gothelf wrote on 7 June 2016 (ARD 90) that the applicant was then doing well, having no significant problems. However, the applicant was then favouring his right arm.
42. The report of Dr Tong of 23 January 2017 is reasonably contemporaneous to the November 2016 incident and her note as to the history she took (particularly ARD 24 par 1) is important in the overall determination. Dr Tong noted wasting of the applicant’s right shoulder when she examined the applicant at that time (ARD 25). Dr Tong also noted at such stage that the problem with the left shoulder had not been investigated or treated so far. Otherwise, Dr Tong’s evidence provided strong support for the applicant’s case.
43. Dr Cameron noted an increase in pain in both shoulders of the applicant when he saw the applicant on 9 November 2016. Care should be taken with the applicant’s statement of 10 July 2017 (Reply 22B pars 11-12). The reference in that passage to the applicant feeling pain in his right shoulder clearly, in context, means his left shoulder and that is what he intended to report. This statement was taken by a loss assessor.
44. The history taken by Dr Rastogi, psychiatrist (Reply 212-213) notes a wrong date of injury to the left shoulder – 26 May 2017. There appears no issue about this. Otherwise, the substance of the history this doctor took is consistent with the applicant’s version and case on causation.
45. Another authority in support of the applicant’s case is the decision of Deputy President Bill Roche in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWWCPCD 35.

Submissions for the respondent

46. The applicant’s submission that he is able to present the claim as he sees fit on the basis that an impairment can result from multiple causes overlooks one important point – the applicant made a claim – a separate claim – with respect to his left shoulder in November 2006; and he was paid by the insurer accordingly, and he has accepted such payment, and he is still accepting such payment of compensation. As a result, the applicant is estopped from presenting his claim in the way he has in the current application.
47. None of the authorities relied upon for the applicant have relevance to the present case. Those authorities relate to principles relevant to incapacity resulting from injury. Here the issue is what injury results from what particular event or events at work. The only role of the Commission is to determine what injury results from what particular event or events, not what the impairment is.

48. Without being critical of the applicant, the allegations have developed and varied over time. For example, his first statement of 26 July 2017, par 11 reveals a frank incident injuring the applicant's left shoulder at the OPC on 9 November 2016. This is consistent with "the better medical evidence" that such incident resulted in a separate discrete injury to the left shoulder.
49. There is no dispute that as a result of the right shoulder injury in 2015, the applicant was favouring his right shoulder; and that may have led to pain. But pain is one thing and "resulting in injury is another thing". The better evidence is that there was a separate frank injury to the left shoulder as a result of that episode in November 2016.
50. The "better evidence" includes from Dr Gothelf. His report of 7 June 2016 (ARD 90) is consistent with the applicant's left shoulder at that stage being in a fairly quiet state. The first contemporaneous evidence of any left shoulder symptoms is the entry in Dr Cameron's notes (at Reply 53): an entry on 9 November 2016 referring to pain in both shoulders. This is the first reference to anything other than the right shoulder. Of greater significance is Dr Gothelf's 8 November 2017 report. At that time he recorded a specific injury to the left shoulder in November 2016 – and noted that the applicant never had any problems prior to this.
51. Of further relevance is the history provided by Dr Tong in her first report (Reply 129) on page 4 of that report (ARD 132). At this stage, January 2017, Dr Tong records a history "started to be sore", without taking a history of any incident. Also, as with her later report, she does not really diagnose any injury to the left shoulder. While the respondent accepts that the applicant by this time was back at work with the respondent, and while he may well have been, and it is accepted he likely was, experiencing symptoms in his left shoulder as a result of favouring his right shoulder, there was no relevant injury to the left injury as a result of that – and the only relevant injury to the left shoulder resulted from the frank incident at the OPT at 9 November 2016, and this was consistent with the applicant's "original version". The "symptoms" he experienced in his left shoulder did not constitute injury except insofar as they resulted from the incident on 9 November 2016.
52. In Dr Tong's last report (ARD 37), she does not specifically state that the left shoulder injury was as a result of the right shoulder injury and therefore her opinion is deficient. To the extent that she does later provide an opinion (ARD 38) - that there was a left shoulder injury as a result of favouring the right shoulder, such opinion should be viewed with caution.
53. The opinion and analysis of Dr David Millons should be accepted over the other opinions in the applicant's case, because Dr Millons undertakes a much more extensive analysis of the history and circumstances. He was of the firm and clear view that there were two injuries: firstly, the right shoulder injury in 2015 and the separate frank left shoulder injury in November 2016.
54. Also, the analysis and opinion of Dr Millons is more consistent with the contemporaneous evidence and is more logical than the opinion of Dr Tong. Dr Millons has stated that there was no evidence relating the left shoulder symptoms to the incident of 20 May 2015. In Dr Millons' supplementary report, he confirms his earlier opinion and does so in the context of also taking into account the reports of Dr Gothelf and expressing agreement with the opinions in them.

55. The submissions in relation to Dr Machart's report depend on whether the ruling on the Reg 44 issue allows that report into evidence wholly, or only as to the history. The submission proceeded on a provisional basis in that respect. Dr Machart also opined that the applicant had sustained a separate and distinct injury to his left shoulder on 9 November 2016. Also, the history in Dr Machart's report as to that incident and injury is relied upon. Dr Machart was clear about the left shoulder not being a consequential injury but rather a separate and frank injury, and this again was consistent with the applicant making a claim for, and receiving, compensation in respect of the incident and injury to the left shoulder on 9 November 2016.
56. The clear balance of evidence is in favour of the case for the respondent. Also, given that the applicant had made the claim in respect of the left shoulder injury as a result of the incident on 9 November 2016 and was receiving compensation in respect of that claim, he was estopped from asserting to the contrary in the present claim. Reliance is put on the decision of Arbitrator Burge in *Maier v Duncan Foster* 7 October 2020 (2020) NSWCC 353 (*Maier*). There should be an award for the respondent. The assessment of Dr Tong does not otherwise allow for the s 66 claim to overcome the necessary threshold.
57. There was no dispute that the applicant suffered an injury to his right shoulder on 20 May 2015, this resulted in him overusing his left shoulder, and he did have some symptoms in his left shoulder. But whatever those symptoms were did not constitute injury and the only injury to the left shoulder was on 9 November 2016 at the OPT as a result of the frank incident. And when one applies the "results from" test in *Kooragang v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 at 463 – 464 (*Kooragang*), this would be the appropriate finding.

Submissions in Reply for the applicant

58. Contrary to the submission for the respondent, there cannot be any estoppel in these circumstances; such could only arise if there was some prior determination or certificate setting out a state of affairs, and there was no such certificate or determination.
59. If one analysed that submission from the "lower base of some sort of admission", all the applicant has done is to put in a claim for compensation. That claim goes to the employer. If the employer commences to pay the applicant on a certain basis, there is no need for the applicant to take it any further. In any event, in the relevant claim form, the applicant did in fact say that he thought his left shoulder injury resulted from the right shoulder injury. Therefore, there is not even an admission made by the applicant that would be sufficient to persuade the Commission that the evidence was otherwise as has been presented in the present case. As to the decision of Arbitrator Burge, it appears from the description from Mr Harris that the applicant had settled a s 66 case; therefore, presumably there was a Certificate of Determination, or at least a formal s 66A agreement which would usually identify particular dates of injury. None of this has happened in the present case.

FINDINGS AND REASONS

60. I have considered the decision of Arbitrator Burge in *Maier* and disagree with the submissions for the respondent in relation to the estoppel point. There are some factual similarities between *Maier* and the present case. Mr Maier injured his right shoulder in May 2001, then suffered a consequential condition to his left shoulder in May 2003.
61. But the similarities essentially stop there. Mr Maier brought proceedings in respect of a threshold dispute for work injury damages, having already been paid his entitlements under s 66 of the 1987 Act for both upper extremities. The respondent raised the estoppel point and denied liability on the basis that the parties had previously entered into multiple settlements which dealt with each upper extremity as separate injuries. They had also conducted previous proceedings on that basis. In this case there have been no prior determinations of the Commission, any other Court, or relevant tribunal, in relation to the issue – whether the left shoulder injury is a consequence, or has come about as a result of, the applicant's right

shoulder injury. Also, the circumstances in the present case do not, in my opinion, warrant the application of the principles set out in *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589, nor do the facts attract similar considerations in the nature of abuse of process (e.g. *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; (2015) 256 CLR 507).

62. The submission for the respondent that the applicant should be estopped from asserting that the left shoulder injury was a consequence of the right shoulder injury is also incorrect because the underpinning basis for that submission is inadequate. The “claim” relied upon by the respondent in this respect is, presumably, the claim of 20 April 2017 signed by the applicant. He did no more in this claim than report he injured his left shoulder as a result of “moving pallets with manual jack” whilst “unloading trailer”. The respondent submits it then commenced payments of compensation by reference to a date of injury of 9 November 2016. There was no adequate delineation of the assertion by the applicant about how, or when, he injured himself when he was “moving pallets with manual jack” whilst “unloading trailer”. The question of whether the left shoulder injury was consequential to the right shoulder injury, even assuming a frank incident did occur in or about November 2016, was left neutral.
63. For those reasons, I reject the submissions for the respondent that an estoppel arises. I also agree with the submission for the applicant that the evidence does not even disclose a relevant admission – that the applicant sustained a separate and distinct injury to his left shoulder; at least in the sense that the alleged injurious event was the *only* factor that significantly or materially contributed to the injury to the left shoulder (or even the left shoulder symptoms).
64. I agree with the submissions for the applicant in relation to the propositions that flow from the various authorities (see par 40) above. The respondent submits that none of those authorities are relevant – because they relate to principles relevant to incapacity resulting from injury, rather than impairment. No authority was provided in support of such submission. I have considered the authorities provided by the applicant and agree the same, or similar, principle applies in relation to impairment. So much seems clear enough at least from *Turner* (at [64]). Therefore, in all the circumstances here it is sufficient if it be found that the case theory for the applicant – that he favoured his right shoulder when he returned to work in 2016 and relied more on his left shoulder – is only one of the material factors resulting in the subsequent left shoulder symptoms and or injury (*Kooragang*).
65. It has been accepted by both Dr Millons, and in the submissions for the respondent, that the injury to the applicant’s right shoulder on 20 May 2015 has resulted in him overusing his left shoulder, and that he did have some symptoms in his left shoulder. This is both a proper and necessary concession to make given the whole of the evidence which overwhelmingly shows the applicant was overusing his right shoulder particularly following the surgery in or about July 2015 and the return to work in about early 2016. That overuse was clearly, as Dr Tong noted, both vocational and avocational. There is also a note by Dr Cameron on 9 November 2016 that the applicant presented to him and complained of “increase in pain in both shoulders ... left restricted” (ARD 53). There is no suggestion this note is incorrect. Dr Cameron also stated in his report of 20 November 2017 that he believed the applicant was favouring his left shoulder while he was recovering from his right shoulder surgery in 2015. Dr Cameron did not then record a history of an incident on or about that day at the OPT.
66. The next reasonably contemporaneous record with respect to the history of symptoms in or injury to his left shoulder is the report of Dr Tong of 23 January 2017. She also examined and took a history from the applicant at that time. She did not take a history from the applicant about any incident at the OPT in November 2016. Dr Tong reviewed the applicant again on 24 July 2017 and even then, she did not take a history of any frank injurious event. To the contrary, the history taken is consistent with the applicant’s case – that “as a consequence of the work injury (on 20 May 2015) ... has had to use the left shoulder to compensate for the daily activities he could no longer perform, causing injury to the left shoulder ...” (ARD 29).

67. The first clear history of any incident in or about November 2016 is in the applicant's statement of 26 July 2017. This refers to "some time in late 2016 ... I do not recall the date ... was working at" the OPT. There is then reference to "two pallets that had either been loaded with sugar or rice and were loaded very tightly and were overlapping". There is then reference to "a pull and pain in my right shoulder". It has been submitted that the reference to "right" shoulder is a mistake, and is intended to refer to "left" shoulder. I think that is unclear. But I do not think this makes a significant difference – except to say that I am not of the opinion, contrary to the submission for the respondent, that the "better evidence" is that there was a separate and distinct injurious event involving the left shoulder (or, as Dr Millons opines, two such events) which was not materially contributed to by the right shoulder injury. I am not saying this piece of evidence in the applicant's July 2017 statement is solely dispositive. But I am carefully tracing through the contemporaneous evidence and this statement is not clear about an injurious event involving the *left* shoulder in November, or even late, 2016, including in the context of there being a lack of any such history in the records of Dr Cameron and Dr Tong.
68. The applicant's July 2017 statement is also consistent with his position that he was overcompensating for the right shoulder injury and arm by using his left arm more after the right shoulder surgery: e.g. he stated "I advised the human resources administrator, Karen Burton, that I was struggling with an injury to my right shoulder as a result of overcompensating with my left arm following right shoulder surgery" (Reply 22C).
69. I do accept the applicant has, on one or more occasions, suffered pain or symptoms while moving pallets during his work, whether they were manual or electric pallet jacks. However, my opinion is that the evidence is clearly in favour of it being more likely than not that the left shoulder pain and symptoms, and the injury, arose as a result of him overcompensating for his right shoulder and using his left shoulder and arm, both at work and in home activities, because he was trying to spare his right shoulder. The terms of his 20 April 2017 claim form are not inconsistent with such opinion. With respect, the unsophisticated language he has used on that form shows that his failure to include reference to the left shoulder injury then not being a consequence of the right shoulder injury does not exclude that in fact being the case.
70. I take into account the history taken by Dr Machart, including his reference to "a separate injury to the left shoulder in November 2016 (emphasis is from Dr Machart)". I do not find this history as reliable as those histories taken by Dr Tong on 23 January 2017 and 24 July 2017. At the very least, the histories taken by Dr Tong are more contemporaneous to late 2016.
71. In any event, I do not find the further history from Dr Machart, about the applicant "pulling pallets ... using both hands ... experienced pain in the left shoulder ... took a careful history ... both arms at chest level ... was quite clear about the injury to the left shoulder ... on one specific occasion" as either helpful or persuasive. It does not properly engage with the more important question of the extent to which force was being applied by each shoulder and arm during this exercise. As Dr Tong explained in her last report;
- "sustained a frank left injury in November 2016 ...had ... strain to the left shoulder as a result of over-reliance from the right shoulder injury ... likely he would not have had to use the left shoulder to push and pull the pallet jack quite as forcefully if he has the full use of the right shoulder during the frank injury dated November 2016 ... frank left shoulder injury of November 216 as a consequential injury that occurred due to the original right shoulder injury..."

72. I accept that opinion from Dr Tong. It makes common sense to me. For example, it seems more likely that there would be certain tasks, such as unloading material from a truck using a pallet jack, where it would not make common sense to use only one arm. Rather, the injured arm could be used to some extent, at least for stability purposes, with most of the force coming from the other arm or shoulder.
73. With respect to Dr Gothelf and Dr Millons, I do not agree with the submission for the respondent that the “better evidence” is found in their reports. I accept that when Dr Gothelf reviewed the applicant on 7 June 2016, the applicant gave the doctor the impression that he was “going fine ... having no trouble at all doing the tasks ... slight restriction of movement”. It is submitted for the applicant that he was then favouring his right arm. That may explain why the applicant reported that he was not having trouble, at least at that stage. This is not clear though. It may also be that the applicant’s left shoulder symptoms did not become problematic until at or soon after June 2016. This is not inconsistent with the applicant’s statement, in July 2017, that he advised Karen Burton “several months ago” that he was struggling with the injury to the right shoulder as a result of overcompensation with his left arm.
74. Dr Gothelf did not then see the applicant until 8 November 2017. He then takes a history of the incident in November 2016, noting that the applicant felt shoulder pain then (presumably the left shoulder) and “never had problem prior to this”. This is a history taken about 12 months after the event. Also, caution should be exercised in playing reliability in histories recorded by busy medical practitioners. The prevailing circumstances are relevant in this respect (*Container Terminals Australia Ltd v Huseyin* [2008] NSWCA320 at [8]; *Gulic v O’Neill* [2011] NSWCA361 at [24]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35],[40] and [41]). I think the relevant and prevailing circumstances here are that the applicant, again with respect to him, does not present to me as a particularly sophisticated communicator, and the communication is about an event that occurred 12 months before. I think it more likely that the more contemporaneous histories from Dr Tong and Dr Cameron should be preferred, and clearly so. As another example or reason, while Dr Cameron referred to a November 2016 left rotator cuff tear injury on a medical certificate of 30 October 2017 (ARD 46-47), he also notes “repetitive use of left shoulder” in response to the form question “how is the injury/disease related to work”. This was nine days before the applicant saw Dr Gothelf. It appears this history was not provided by Dr Cameron to Dr Gothelf. Nevertheless, it did exist and is consistent with the case the applicant is putting to the Commission. It is also telling that there is no clear mention on that certificate about any relevant frank injurious event involving the left shoulder.
75. Dr Millons states in his 21 February 2020 report that “while I accept ... he was using his left arm more to protect his right shoulder, the work does appear to have been fairly two handed ... appear to have been two specific injuries recorded ... to the left shoulder ...” Again, that the work involving pushing and pulling with pallet jacks involves two hands is only one dimension of the facts: the further dimension to the applicant’s case is the extent to which he was applying force to each arm and/or shoulder. Dr Millons does not adequately engage with this dimension in my respectful opinion. He does note that Dr Tong felt there had been a repetitive strain to the left shoulder as a result of over-reliance from the right shoulder and that it was likely that the applicant would not have had to use the left shoulder to push and pull the pallet jack *quite as forcibly* if he had the full use of his right shoulder during the injury dated November 2016 - and “... felt that the frank injury was a consequential injury”. Dr Millons then states “that comment would be open to some question”. It’s not totally clear whether Dr Millons is disagreeing with Dr Tong. Clearly enough, he is raising a question as to whether Dr Tong is correct in this respect. But he does not then engage with the particular argument or point that Dr Tong has made. If he does, it is not clear enough to me.

76. Dr Millons then notes that the applicant “makes no particular comment about his *left shoulder* until the incident ... told me occurred in November 2016” at the OPT. In his second report, Dr Millons notes that “Dr Gothelf ... treating ... surgeon from mid-2015 ... would be in the best position to comment ... records that Mr Moore ... never had any problems with the left shoulder prior to the incident in November 2016 (or May 2017) ...” Dr Millons also noted, from his own history, that the applicant “made no particular comment about his *left shoulder* until the incident which appears to have occurred in mid-November 2016 ... aggravation ... more pain in the left shoulder while yanking ... in May 2017 ...”. Dr Millons assumes the correctness of the history taken by Dr Gothelf on 8 November 2017, and also notes that the applicant “made no particular comment” about his left shoulder to him (Dr Millons) before the November 2016 incident. This premise that Dr Millons assumes is not consistent with my findings. For reasons given earlier in dealing with Dr Gothelf’s evidence, I prefer the more contemporaneous histories, in particular from Dr Tong and Dr Cameron and the applicant. I also believe that his relatively early statement of 10 or 26 July 2017 is consistent with the case he is now positing.
77. The respondent accepts not only that the applicant suffered an injury to his right shoulder on 20 May 2015 but that this injury also resulted in him overusing his left shoulder; and that he did have some symptoms in his left shoulder; but that whatever those symptoms did not constitute an injury, with the only relevant injury to the left shoulder occurring during the incident on 9 November 2016 at the OPT. Therefore when one applies the results from test in case such as *Kooragang*, the award should be for the respondent. But it is not necessary for the applicant to establish that he suffered an “injury” to his left shoulder within the meaning of that term in s 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury (*Moon v Conmah Pty Ltd* [2009] NSWCCPD134; *Seif v Secretary, Department of Family & Community Services* [2020] NSWCCPD6 at [118]). I find that the symptoms and restrictions in the applicant’s left shoulder have resulted from his right shoulder injury of 20 May 2015.
78. I also accept Dr Tong’s evidence that the symptoms and restrictions in the applicant’s left shoulder do also result in an injury within the meaning of s 4 of the 1987 Act and such injury is in the nature of left shoulder rotator cuff tear with sub acromial bursitis on a background of tendinosis. I find such injury has resulted from the applicant’s right shoulder injury of 20 May 2015 for the reasons given above. I do accept there was an event in or about November 2016 at the OPT when the applicant suffered significant symptoms in his left shoulder. However I find this was the result of the right shoulder injury as the applicant was applying more force with his left arm and shoulder because he was sparing his tight arm and shoulder. I also find that the symptoms, restrictions and injury to the applicant’s left shoulder have more generally resulted from the applicant excessively using his left shoulder to protect his right shoulder, in both his vocational and avocational activities, following the injury to his right shoulder on 20 May 2015, and as a consequence and result of that injury to that right shoulder injury.
79. I understand it is the position of each party that they agree for the matter to be sent to the Registrar for the purposes of a referral to an Approved Medical Specialist (AMS) – subject to the result of the decision. However, there were no direct submissions made in that respect, although it was implicit this would be the course. In these circumstances, I propose to order that the matter be remitted to the registrar for approval to an AMS, unless there be submissions lodged as to reasons why that should not be the appropriate course.

