

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2202/19
Applicant: Lamine Bundu
Respondent: Lemhay Pty Ltd
Date of Determination: 9 September 2019
Citation: [2019] NSWCC 294

The Commission determines:

1. The proposed surgery is reasonably necessary arising from the nature and conditions of employment with the respondent.
2. The applicant is not estopped from bringing his claim against the respondent.
3. Section 59A of the *Workers Compensation Act 1987* applies. The respondent is not directed to pay for the proposed surgery.

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

E BEILBY
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 E BEILBY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Lamine Bundu (the applicant) completed his schooling in Guinea and immigrated to Australia.
2. He commenced work with Lamhay Pty Ltd trading as Rossmore (the respondent) at their mushroom farm in June 2013.
3. In the first few months of employment the applicant worked with a team performing composting duties. The applicant explains in his statement that the work was physically demanding because the compost would be wet when it was being laid out.
4. The applicant then commenced on general duties which was mainly cleaning and folding boxes. The applicant says he would work up to 12 hours a day cleaning down the mushroom shed interiors which would take about 40 hours a week. In addition, he would do about 20 hours consisting of folding boxes for the mushrooms.
5. In his first statement¹ the applicant explains that he was required to use a high-pressure hose which exerted pressure on his arm when using it. The high-pressure hose would be used to apply chlorine and other chemicals to the walls of the sheds. The applicant says that he would also have to then use a scrubber predominantly with his right arm whilst scrubbing the walls down by hand for about six hours, these walls being quite high. The applicant would then use a high-pressure hose to rinse out the shed. He observed that his left shoulder became sore from carrying the high-pressure hose and he then switched the hose to his right shoulder.
6. The applicant explains that he started to feel pain in his left shoulder in about December 2013. The pain progressively got worse and he saw Dr Ly (General Practitioner) on 17 March 2014. Dr Ly suggested the applicant have a week off work (which he did).
7. When the applicant returned to work, he says that the pain in his left shoulder was getting worse and he was developing pain in his right shoulder as he relied more on it to carry the hose.
8. Dr Ly referred the applicant to Dr John Ireland, orthopaedic surgeon, in October 2014. The applicant then underwent an MRI scan on 25 October 2014.
9. Dr Ireland reviewed the MRI scan and suggested surgery was appropriate. He referred the applicant to see Dr Ray Chin, shoulder specialist, who worked in the public system.
10. The applicant attempted to take time off work, by providing his employer with a medical certificate however this was refused. The applicant's employment was terminated.
11. The applicant consulted again with Dr Chin on 5 January 2015 and physiotherapy was recommended.
12. Unfortunately the applicant was unable to pay for the physiotherapy and there was a lengthy wait on the public system to pursue that form of treatment.
13. The applicant consulted Dr Chin again on 3 March 2015 and it was then recommended that the applicant have surgery on his shoulders, the left being the worst to be done first.

¹ Application page 10

14. The applicant has provided a claim form which was signed on 1 May 2015². The claim form indicates the applicant has suffered an injury to his left shoulder and neck pain after using a high-pressure hose over many months in 2014.
15. The applicant obtained work at Excel Window³ at Regents Park which the applicant says was quite light. His duties involved applying a protective strip to the edge of glass windows and the work did not involve any heavy lifting.
16. Unfortunately for the applicant, in November 2015 the applicant was asked to assist with some heavier work which he was unable to do. The applicant was then not provided with any further work.
17. In 2016 the applicant commenced a course at Miller TAFE in bricklaying, one day a week. Unfortunately he was unable to afford the course fees and only attended three days as a consequence.
18. The applicant was able to obtain work in January 2016⁴ for two days a week as a bricklayer's assistant over three weeks. He earned \$160 a day for that work on a cash basis. The applicant says he was able to cope with the work because he could lift the bricks as long as he did not have to lift them above shoulder height.
19. From 22 April 2016 the applicant was working with another bricklayer five days a week earning \$160 a day. The applicant explains at paragraph 38 of his statement⁵ that the work was basically cleaning and using a broom which he could manage as it did not involve using his arms above shoulder height. The applicant was unemployed from June 2016 until October 2016 because there was a downturn in the work available. He was then able to obtain work as a site cleaner using a broom from 12 October 2016 to 10 June 2017.
20. In June 2017 the applicant experienced some legal difficulties surrounding breaching an apprehended violence order which resulted in him being incarcerated from 10 June 2017 to 17 August 2017.
21. The applicant was then able to obtain employment on 11 January 2018 working as an adult apprentice chef as a kitchen hand/cook. He was also attending at TAFE one day a week doing a cooking course.
22. The applicant says the work was generally busy but light and below shoulder height and he could perform the duties. He did have some difficulty however, once a week he was required to take a large sack of potatoes, approximately 35kg to the cool room and he found this difficult. He also had difficulty doing repetitive jobs such as peeling potatoes which required him to use his hands in the same position for a lengthy period.
23. The applicant's employment was terminated on 11 March 2018 in circumstances where he says he was 10 minutes late for work.
24. The applicant remained unemployed until about mid-2018 when he found work at an electroplating factory. He worked there for less than two weeks and he was asked to assist with heavy lifting which he could not do. The applicant says he was not offered any more work after that time.

² Page 7 of the Reply

³ Page 12 of the Application

⁴ Page 12 of the Application

⁵ Page 12 of the Application

25. In October 2018, the applicant obtained work for a period of three weeks at a joinery in Pendle Hill, the work was light. The applicant says he was only required to use a power drill which he could cope with. Unfortunately that work ran out for the applicant.
26. In November 2018 the applicant applied for work as a packer at Woolworths and commenced that work at Woolworths at Strathfield for five hours a day, three days a week.
27. The applicant then went on a contract in February 2019 with Woolworths and worked between 20 to 30 hours per week. The work required the applicant to fill shelves. The applicant described the work as light and under shoulder height and for the upper shelves a stepladder was used.
28. The applicant explains that he has constant pain and restriction in both shoulders with the left being worse than the right. The applicant feels that his shoulders are steadily getting worse and he wishes to have the surgery as recommended by Dr Chin.⁶ The applicant explains that his shoulder condition has deteriorated as when he was working as a bricklayer's assistant he could lift bundles of bricks below shoulder height, now he cannot even lift up one brick in his left hand because it had come so weak.

ISSUES FOR DETERMINATION

29. The parties agree that the following issues remain in dispute:
 - (a) Did the applicant suffer an injury arising out of or in the course of employment within the meaning of s 4 of the *Workers Compensation Act 1987* (the 1987 Act).
 - (b) Whether the proposed surgery is reasonably necessary as a result of the work-related injury pursuant to s 60 of the 1987 Act.
 - (c) Is there an estoppel?
 - (d) Does s 59A of the 1987 Act apply, so to restrict the claim being made at this time?

PROCEDURE BEFORE THE COMMISSION

30. The parties attended an Arbitration on 23 July 2019. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

31. 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;
 - (b) Reply to the Application and attached documents;
 - (c) Late documents from the respondent.

⁶ Application page 13

Medical Evidence

32. I will not turn to the medical evidence relied upon in these proceedings.
33. The applicant was referred to Dr Guirgis by his solicitor for the purpose of a medico-legal report. Dr Guirgis examined the applicant on 9 May 2018.⁷
34. Dr Guirgis took a history of the applicant performing duties with the respondent that was demanding. Dr Guirgis also understood that the applicant developed pain in the shoulders from using the high-pressure hose and carrying the hoses around and cleaning the walls of the mushroom sheds. Dr Guirgis history as to the development of pain is consistent with the applicant's statement in that it occurred in the latter part of 2013.
35. Dr Guirgis opined that the proposed surgery, that is arthroscopic surgery recommended by Dr Chin, was 'reasonable and necessary'. Whilst the correct test is "reasonably necessary", it is quite clear that for the doctor to opine that it is reasonable and necessary is a much harsher test than what is required under the 1987 Act.
36. The symptomology the applicant reported to Dr Guirgis is of some significance including painful stiffness, clicking and heaviness in the left shoulder with increased symptoms in the cold and wet weather. There was also pain, tightness and loss of strength in the right shoulder which was less significant than the left shoulder. Dr Guirgis observed a scar as a result of a stab wound sustained in 2012 in the left side of the applicant's upper back and formed the view that this was unrelated to the applicant's present condition and impairment in his shoulder.
37. Dr Guirgis has opined that there were symptoms and signs and MRI evidence of overuse injuries in both shoulders as a result of the nature and conditions of his employment in the mushroom farm which included heavy lifting, overhead repetitive activities, repetitive reaching, over-reaching and fast repetitive pushing and pulling. He agreed with Dr Chin's conclusion that there was degenerative changes through overuse rather than an actual type 9 circumferential tear, however a diagnostic arthroscopy would establish the nature of the labral changes.
38. The applicant consulted with Dr Ireland in October 2014. Dr Ireland, in a report back to his referring general practitioner Dr Ly, reported a history that the applicant started to get pain in both shoulders when he was doing concreting work⁸. The applicant had explained that he found that lifting the crates caused pain in both shoulders although the left one was worse after being stabbed in a violent crime in 2012.
39. Dr Ireland reviewed the applicant on 14 November 2014⁹ and observed there had been a moderate improvement following subacromial injections in both shoulders. Dr Ireland had the benefit of the MRI recent report which showed bilateral subacromial bursitis, plus type 2 acromia, further, there were extensive slap tears in both shoulders. Dr Ireland opined an arthroscopy would be beneficial in due course probably to both shoulders. Dr Ireland referred the applicant to Dr Chin who worked in the public hospital system.
40. Dr Chin has prepared a report dated 5 February 2015¹⁰ to the treating general practitioner Dr Ly¹¹. Dr Chin had a history of the stab wound in 2012 which he thought was unrelated to the applicant's current condition. He did take a history of the work with the respondent where the applicant reported he had trouble lifting and with overhead activities.

⁷ Page 23 of the Application

⁸ Page 37 of the Application

⁹ Page 38 of the Application

¹⁰ Page 40 of the Application

¹¹ Page 40 of the Application

41. Dr Chin had the MRI scan which was reported as a type 9 slap lesion. However, Dr Chin thought that the labrum condition might be degenerative through use rather than real tear. Dr Chin recommended the applicant undergo physiotherapy.
42. After a consultation on 3 March 2015, Dr Chin wrote again to the applicant's treating general practitioner and suggested that the applicant had labral pathology and suggested a shoulder arthroscopy and slap repair¹². At that time Dr Lee examined the applicant and found stable pathology with a positive O'Brien's test and modified slap test. Dr Ly confirmed that the current symptomology was not related to the stabbing event.
43. The applicant then consulted again with Dr Chin on 4 May 2017, after a hiatus of some two years¹³. After considering the latest MRI Dr Chin opined that the applicant had a significant injury to the labrum. This was essentially a bucket handle tear of the labrum in the shoulder leading to grinding and locking as the loose labrum is displaced into the shoulder joint itself.
44. Dr Chin opined the original injury was dating back to March 2015 when he was working in a mushroom farm and was building a scaffold. The applicant now had difficulty with overhead activity and with lifting. Dr Chin clearly explained that the applicant would benefit from a general arthroscopy debridement or labral repair depending on the state of the labrum.
45. Dr Chin prepared a report for the applicant's solicitor dated 17 April 2019.¹⁴ Dr Chin had a history that the applicant developed bilateral shoulder pain whilst working at a mushroom farm.
46. Dr Chin had examined MRI scans of both shoulders which showed a significant labral tear in each shoulder. Dr Chin was of the view that the injury may have started off as a simple tear which extended to become a larger tear over time due to repeated use. Dr Chin confirmed that the MRI finding of a labral tear was directly related to the work the applicant had done on the mushroom farm. Dr Chin once again recommended surgery.
47. The applicant was examined by Dr John Watson in April 2016¹⁵ at the request of the respondent's solicitors. Dr Watson took a history of the applicant being employed as a casual picker and general labourer commencing in June 2013. He understood the applicant had been involved in washing large sheds where mushrooms were grown and of lifting frames and taking hoses he developed pain in his left shoulder and also subsequently in the right shoulder. Dr Watson examined the right shoulder and found slight restriction in abduction and rotation. Dr Watson was of the opinion that the right shoulder had a tear at the biceps anchor along the base of the supra labrum. He formed the view that there was a type 9 slap appearance. He also observed previous ultrasound examinations which confirmed the presence of mild subacromial bursitis and impingement.
48. Dr Watson understood that the applicant linked the onset of his pain to when he was working with the respondent and carrying a hose however Dr Watson understood that it was a normal hose and not a high pressure hose. This does not appear to be consistent with the applicant's evidence. Dr Watson formed the view, based on the history that had been presented to him, that the nature of the employment with the respondent as a casual picker, general labourer did not cause the applicant's current symptomology. Indeed, it was Dr Watson's opinion that if the applicant did have any symptomology arising from his employment it would have been a temporary aggravation. That is, the applicant had a pre-existing degenerative condition involving the labrum which was not related to his employment.

¹² Page 42 of the Application

¹³ Page 43 of the Application

¹⁴ Page 44 of the Application.

¹⁵ Page 73 of the Reply

49. Dr Watson prepared a second report dated 13 May 2016.¹⁶ In this report Dr Watson now understood that the applicant was indeed using a high-pressure hose whilst employed by the respondent. Dr Watson does not change his opinion regardless of whether the applicant was using a high-pressure hose or a normal hose. Dr Watson did not believe that any treatment was reasonably necessary.
50. Dr Watson has prepared a further report dated 13 December 2017.¹⁷ The applicant at that time reported that he still had pain in his left shoulder. On examination, Dr Watson found the applicant had a full range of motion of the left shoulder with no clinical signs of impingement. It was on this basis that there was no further treatment required.
51. In a further report dated 14 March 2018¹⁸ Dr Watson reviewed further reports that had been provided by the respondent's solicitor, and in respect of a question of whether the proposed left shoulder arthroscopy, labral repair and biceps tendinosis recommended by Dr Chin was reasonably necessary, Dr Watson opined that the applicant may indeed need a left shoulder arthroscopy labral repair and biceps tenodesis as suggested by Dr Chin but did not believe there was any relationship to the injury as pleaded against the respondent.
52. In a final report dated 20 August 2018 Dr Watson now has the opinions of Dr Guirgis and an MRI report. Dr Watson did not believe that the applicant's present symptoms were related to the employment with the respondent. He was of the view that the applicant's condition was degenerative as explained on the MRI especially on the right side and he did have evidence of subacromial bursitis. Dr Watson does not agree with the opinion presented by Dr Guirgis and disavows that the applicant's condition could be as a result of an overuse syndrome.

Is the surgery reasonably necessary?

53. Section 60 of the 1987 Act requires that it is "reasonably necessary" as a result of an injury that medical or related treatment or hospital treatment or ambulance or workplace rehabilitation service be provided. In *Bartolo*¹⁹ Burke CCJ described the test of reasonably necessary as follows:

"The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."

54. Deputy President Roche in *Diab v NRMA*²⁰ considered the concept of being reasonably necessary. The Deputy President noted that²¹

"It is not simply a matter of asking, as was suggested in *Bartolo*, it is better that the worker have the treatment or not".

The Deputy President observed that the applicant does not need to establish that the treatment is reasonable and necessary but must be a reasonable necessity having regard to all the matters set out in *Rose*²².

55. There appears to be a general consensus that the surgery is reasonably necessary. Indeed even

¹⁶ Page 81 of the Reply

¹⁷ Page 84 of the Reply

¹⁸ Page 88 of the Reply

¹⁹ *Bartolo v Western Sydney Area Health Service* [1997] NSWCC1,

²⁰ *Diab v NRMA Ltd* [2014] NSWCCPD 72

²¹ At para 90

²² *Rose v Health Commission* [1986] NSWCC2

Dr Watson in his report dated 13 December 2017 concedes that the applicant may indeed need the surgery. This is consistent with the evidence of Dr Chin, Dr Ireland and Dr Guirgis.

56. I find that the surgery is reasonably necessary.

Where does the need for surgery arise?

57. The respondent's primary submission was to the effect that the need for surgery arose from events and/or employment after its period of employment ceased. The submission seemed to be based upon an argument that the employment with the respondent was not a substantial contributing factor or main contributing factor to the bilateral shoulder condition.
58. What is evident from the applicant's evidence is that the nature of the work that he performed with the respondent was extremely heavy. What is of some significance is that before the commenced work with any other employer, we have the recommendation from Dr Chin in March 2015 that the applicant had a need for surgery.
59. Dr Chin's opinion is of some significance. I find particularly persuasive his opinion as contained in the report dated 17 April 2019 in response to a request for a report from the applicant's solicitors. Dr Chin makes it clear in that report that he first saw the applicant in early 2015 and at that stage the applicant had bipolar shoulder pain for approximately one year. Dr Chin describes the initial event as being a small tear which had extended to become larger over time due to repeated use. This to my mind is consistent with the applicant's statement, that is that his shoulder pain became worse after completing the heavy work that he was required to do at Rossmore Mushroom Farms. Dr Chin confirms that he offered the applicant surgery at that time however the applicant elected not to pursue this.
60. Dr Chin relates the applicant's condition directly to the employment at Rossmore Mushroom Farms. It does not appear that Dr Chin clearly addresses the applicant's employment after Rossmore Mushroom Farms, however I find it of significance that he was able to diagnose the applicant as having a work-related injury when he first saw him in 2015 which was before he commenced in the subsequent employment that the respondent refers to.
61. Dr Chin's understanding of the applicant's condition is also consistent with the evidence of Dr Li, general practitioner. The applicant first sees the general practitioner on 17 March 2015²³ and Dr Li takes a history of "soreness, left supraspinatus". Dr Li organised the ultrasound of the left shoulder which disclosed "mild sub-deltoid bursitis and mild bursal impingement affecting abduction movement". Whilst there is nothing about a tear at that stage, what is consistent is the applicant is having significant symptomology and there is evidence and radiology of some type of change in pathology.
62. I place greater weight on the opinion of Dr Chin, who has seen the applicant over time, over other experts in this claim. It was his opinion that the applicant required the surgery in 2015, this opinion has not changed with the differing employment over time. I observe that the opinion of Dr Chin is also consistent the opinion of Dr Ireland, another treating surgeon and Dr Guirgis.
63. The respondent made submissions in relation to the gap in the opinion from Dr Chin which is of some 2 years. This is the time when Dr Chin recommends physiotherapy and the applicant is unable to do that for fiscal reasons. In between that time the respondent points to the applicant's other employment being bricklaying, which was submitted to be very intense with both arms and shoulders. The respondent points out that even if the applicant was not indeed lifting above shoulder, it would have involved lifting either brick by brick or bundles of bricks.

²³ Page 50 of the Application

64. In order for the respondent to ground a persuasive submission that it was other employment that has caused the need for surgery, then the appropriate expert evidence would be required. That is medical evidence that addresses the applicant's condition in light of the duties that he was required to perform with other respondents. In the absence of such expert evidence, the submission to my mind has little force.
65. It was submitted by the respondent's counsel that the applicant was also break-dancing, which is an event that would involve such shoulders. I have no persuasive medical evidence to this effect and I reject this submission.
66. It is quite clear that what Dr Watson says in his opinion is that if there was indeed an aggravation of an underlying condition, it was a temporary aggravation of a pre-existing pathology. This however is against the applicant's evidence of ongoing pain and symptomology in his shoulders. There is no reason for me not to accept the applicant's evidence that he has had ongoing pain over the time.
67. The respondent also points out an entry on 29 April 2017 which is from Dr Hassam where the general practitioner refers to the applicant having a "has heavy man job". The respondent says that this is quite clearly evidence that the applicant is doing heavy work and was probably still doing work as a bricklayer at that time. So essentially the respondent's submission is that the applicant has done a great deal of work after his work for the respondent that has involved the use of his arm and probably shoulders.
68. I think there is a danger in relying on the entry with Dr Hassam to ground a conclusion that the applicant was involved with heavy work at that time. There is no explanation by Dr Hassam as to what was his understanding as to the applicant's job at that stage or whether it is merely an assumption by the doctor that he had had heavy work in the past. This to my mind identifies the danger in relying on treating notes to the extent as sought by the respondent.²⁴
69. I observe that Dr Watson has conceded that there could have been a temporary aggravation to the applicant's condition in his employment with the respondent. No submissions were made in respect of a finding that there had indeed been no injury or that work had not been a substantial contributing factor to the applicant's injury. This is appropriate in the circumstances. Nevertheless I have addressed this in my decision.
70. I am aware that in order for the applicant to be successful in his claim, the work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.²⁵ The applicant need only show that the injury materially contributed to the need for surgery. To my mind, the applicant has clearly established a material contribution to the need for surgery arising from the nature and conditions of employment with the respondent.

Estoppel

71. The applicant has previously commenced proceedings in the Workers Compensation Commission, matter no. 2279/2016 against the presently named respondent. The matter was resolved on the basis of weekly benefits being paid, with an award for the respondent in respect of a claim for weekly compensation from 4 May 2015 and continuing. There is also a notation which is as follows:

²⁴ Nominal Defendant v Clancy [2007] NSWCA 349 per Santow JA at [54]-[55]

²⁵ Murphy v Allity Management Services Pty Ltd [2015] NSWCCPD 49 (24 August 2015)

“The applicant agrees and admits that subject to payment of the above, the applicant will have been paid his complete entitlement to here under the Act and that any persisting incapacity for work or need for medical treatment arising from the pleaded injuries is unrelated to his employment with the respondent.”

The Certificate of Determination is dated 20 July 2016. The Certificate was amended on 10 August 2016.²⁶

72. In *Seaib v Hayes Personnel Services (Australia) Pty Ltd* (2008) NSWCCPD 36, Acting Deputy President Snell reviewed the authorities that are relevant to the consequences of consent awards. Acting President Snell, helpfully provided the following guidance;
- i. A consent award can create res judicata estoppels, and also will involve admissions of facts inherent to the award, for example the occurrence of injury, or the existence of economic incapacity resulting from injury, at a certain point in time (*Dimovski*);
 - ii. When an issue is the subject of res judicata estoppel, it is not justiciable in a further action, it is not open to consideration at de novo (*Almario*);
 - iii. A res judicata estoppel, created by a consent award for an employer, on a weekly claim, or claim for Sec. 60 expenses, operates up to the date it is made. It does not eliminate future rights (*Almario, Kaibau, Coggins*).
 - iv. A consent award does not create an issue estoppel (*Anderson*);
 - v. Where a worker executes admissions and agreed facts as part of a settlement, these speak at the time they were made. They are evidentiary of the facts stated, but not conclusive (*Almario*);
 - vi. Agreed facts which purport to impose a blanket bar upon recovery of further compensation, for example a worker ‘is not entitled to any further weekly payment or compensation’, or ‘has no entitlement to compensation against the respondent’, must be read subject to Sec. 234 of the 1998 Act, which prevents contracting out for 1987 and 1998 Acts.”
73. Deputy President Roche in *Bouchmouni v Bakhos Matta t/as Western Red Services* [2013] NSWCCPD 4 observed that consent orders can create res judicata estoppels but only to the extent of what is necessarily decided. The Deputy President observed that consent orders should be construed by reference to what a reasonable person would understand by the language the parties have used in the orders, having regard to the context when the words appear and the purpose and objective of the transaction.
74. It is clear to my mind that the applicant was aware at the time that he signed the consent orders that there was a possibility of surgery. This is because the consent orders are dated 20 July 2016 and Dr Chin in March 2015 was suggesting shoulder surgery.
75. Whilst this is of some consequence, I accept the applicant’s evidence that there has been a deterioration in his shoulder condition over time. This means that what was decided at that time, has no bearing on the present time, where the applicant’s condition has deteriorated.
76. I also observe that no submissions were made by the respondent as to this issue, I have included a discussion in this decision in order to obviate a determination on this issue at a later time.

²⁶ Page 57 of the Application

What is the effect of s 59A?

77. Section 59A was inserted into the 1987 Act by the 2012 amending Act. Section 59A limits the payment of medical, hospital and rehabilitation expenses. Section 59A of the Act provides:

“59A Limit on payment of compensation

- (1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker.
- (2) The compensation period in respect of an injured worker is:
 - (a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, or the degree of permanent impairment has not been assessed as provided by that section, the period of 2 years commencing on:
 - (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
 - (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker), or
 - (b) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be more than 10% but not more than 20%, the period of 5 years commencing on:
 - (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
 - (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker).”

78. No submissions were made by the applicant in respect of the limitation now provided by s 59A of the Act.²⁷

79. It is clear to my mind that the dispute that the respondent maintains in relation to the entitlement to medical or treatment services, being made on 19 May 2017, is a date more than two years after the date on which weekly payments of compensation ceased to be payable to the worker, being 3 May 2015.

80. I agree with the respondent’s denial that the applicant has no entitlement to costs associated with medical treatment and services for a work-related injury to the left and/or right shoulders under s 59A of the 1987 Act.

SUMMARY

81. The proposed surgery is reasonably necessary arising from the nature and conditions of employment with the respondent.

²⁷ Workers Compensation Amended (Transitional) Regulation 2012 amended the 2014 Regulation by inserting Clause 5 into Schedule 8, Part 1.

82. The applicant is not estopped from bringing his claim against the respondent.
83. Section 59A of the 1987 Act applies. The respondent is not directed to pay for the proposed surgery.

