WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**3351/19**
Applicant:	**Anthony Mark Roche**
Respondent:	**The Trustee for V & C Hyland Trust & the Trustee for Lawrence Family Trust t/as Bettaframe & Truss**
Date of Determination:	**4 December 2019**
Citation:	**[2019] NSWWCC 389**

The Commission determines:

1. The applicant suffered injury to the left upper extremity (shoulder) on 20 January 2016 and a condition in the right upper extremity (shoulder) consequent upon injury to the left shoulder on 20 January 2016.

2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment as a result of injury to the left upper extremity (shoulder) on 20 January 2016 and condition in the right upper extremity (shoulder) consequent upon injury to the left shoulder on 20 January 2016.

3. The documents to be referred to the Approved Medical Specialist are:

    (a) Application to Resolve a Dispute and attachments, and

    (b) Reply and attachments.

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

Brett Batchelor
Arbitrator

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

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Anthony Roche (the applicant/Mr Roche) claims lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) arising out of or on the course of his employment with Bettaframe & Truss (the respondent) on 20 January 2016 and 1 November 2016.

2. The respondent does not dispute that on 20 January 2016, in the course of his employment, the applicant lost his footing in gravel and fell, injuring his left shoulder. The respondent similarly does not dispute that the applicant injured his right shoulder on 1 November 2016, when he almost tripped in the yard of the respondent's premises, put out his right arm to stop himself from falling and jarred his right arm.

3. Mr Roche was treated by orthopaedic surgeon, Dr Allan Young who operated on his left shoulder on 23 February 2016 and his right shoulder on 30 January 2017. The left shoulder surgery was an arthroscopic and open rotator cuff repair plus biceps tenodesis. The right shoulder surgery was an arthroscopic repair of the rotator cuff and open biceps tenodesis.

4. The applicant's claim for permanent impairment compensation is in respect of 13% whole person impairment (WPI) as a result of injury on 20 January 2016. This claim is based on an assessment of Dr Christopher Oates, consultant occupational physician, who carried out an independent medical examination of the applicant on 13 June 2018 at the request of his solicitors and supplied reports dated 16 June 2018[1] and 29 November 2018[2]. Dr Oates is of the opinion that the right shoulder injury is partly as a consequence of the left shoulder injury through enforced overuse of the right arm, and aggravation of the right shoulder condition in the separate slip and fall onto the outstretched right arm on 1 November 2016.

5. Dr John Bosanquet carried out an independent medical examination of the applicant on 22 August 2018 at the request of the respondent's solicitors and supplied reports dated 29 August 2019 (x2)[3] and 24 March 2019[4]. Dr Bosanquet's opinion is as follows:

> "I do not agree with Dr Oates' opinion that the right shoulder injury is consequential to the left shoulder injury due to the enforced overuse of the right arm after his left shoulder injury on 20 January 2016 and subsequent surgery.
>
> It is my opinion the right shoulder injury occurred on 1 November 2016 when he fell on a gravel road at work."[5]

He assesses WPI as a result of the two separate injuries at 4% for the right shoulder and 5% for the left. As these are each below the 10% threshold referred to in s 66(1) of the 1987 Act, the respondent submits that the applicant is therefore not entitled to lump sum compensation for permanent impairment.

ISSUES FOR DETERMINATION

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

   (a) Does the applicant suffer from a condition in the right shoulder consequent upon injury to the left shoulder on 20 January 2016?

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[1] Application to Resolve a Dispute (the Application) p 70.
[2] Application p 87.
[3] Application pp 30 and 33.
[4] Application p 56.
[5] Application p 57.

(b) Is the applicant entitled to compensation for permanent impairment pursuant to s 66 of the 1987 Act as a result of injury to the left shoulder on 20 January 2016 and a condition in the right shoulder consequent upon injury to the left shoulder on 20 January 2016?

PROCEDURE BEFORE THE COMMISSION

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

8. The parties attended a conciliation/arbitration hearing in Dubbo on 17 October 2019. Mr B McManamey of counsel appeared for the applicant briefed by Ms Marie Bollins. Mr A Parker of counsel appeared for the respondent. On that day the parties were directed to lodge and serve written submissions addressing the following issues:

    (a) whether the applicant suffers from a condition in the right shoulder consequent upon injury to the left shoulder on 20 January 2016;

    (b) whether the assessments of whole person impairment as a result of injury to the left shoulder on 20 January 2016 and to the right shoulder in 1 November 2016 can be aggregated for the purpose of determining the applicant's entitlement to lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987*, and

    (c) the terms of referral of the matter to an Approved Medical Specialist (AMS).

    There was a further direction that the dispute would be determined 'on the papers' at the conclusion of the time allowed for submissions.

9. Written submissions have been received and are summarised hereunder.

EVIDENCE

Documentary Evidence

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

    (a) the Application and attached documents;

    (b) Reply and attached documents.

Oral Evidence

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

SUBMISSIONS

Applicant

12. The applicant refers to the treatment he received initially from his general practitioner, Dr Begg [sic, Beg] and then from Dr Young, up to and following the surgery on the left shoulder on 23 February 2016. He says that following the surgery to his left shoulder, he was required to use his right arm more than he ordinarily would and noticed pain and weakness in the right arm due to the increased physical workload which would normally be shared equally

by both arms. He says that on 23 June 2016 he attended upon Dr Abdullah and reported ongoing right shoulder pain for the past couple of days. On 11 October 2016, the applicant says that he attended on Dr Beg and reported right shoulder pain.

13. The applicant refers to relevant entries in the clinical noted of Dr Beg and the records of Dr Young, and to the incident on 1 November 2016 when he jarred his right arm. He notes that he does not appear to have reported the incident on 1 November 2016 to Dr Young which suggests that he did not consider it to have been of particular importance.

14. The applicant submits that it is clear from the history that he had significant ongoing problems in his left shoulder following the initial incident on 20 January 2016 and that it is consistent that thereafter he would have been favouring his left shoulder, resulting in an increased use of his right shoulder.

15. The applicant notes that he did not mention the work incident on 1 November 2016 to Dr Beg until 8 December 2016, again emphasising that the incident was relatively minor and that he had not associated the incident with the onset of his right shoulder pain.

16. The applicant then refers to the relevant entries in the reports of Dr Oates and Dr Bosanquet. He submits that when all the evidence is considered, the only opinions which are based on a proper history contain the conclusion that his right shoulder condition is at least, in part, the result of the original injury to the left shoulder. This right shoulder condition is compensable so long as the left shoulder condition was a materially contributing factor to the development of the right shoulder condition, citing Roche DP in *Murphy v Allity Management Services Pty Ltd (Murphy v Allity)*[6].

17. The applicant addresses his entitlement to lump sum compensation pursuant to s 66 of the 1987 Act having regard to the opinion of Dr Oates, and the submission that the right shoulder condition "results from" injury to the left shoulder within the meaning of that term as explained by what Kirby P said in *Kooragang Cement Pty Ltd v Bates (Kooragang v Bates)*[7]. The applicant submits that provided there is an unbroken chain in a series of events from an injury to a later incapacity or death, it will be open to a court to award compensation for that incapacity or death. Each case must be determined on its own facts.

18. The applicant submits that in this case, on analysis of the facts and applying what is settled law, the injury to the left shoulder materially contributed to the right shoulder condition. Therefore the WPI assessed in respect of the right shoulder results from the injury to the left shoulder on 20 January 2016. There is only one impairment in respect of each of those body systems.

19. The applicant also relies on a number of authorities in respect of tortious common law liability where further injury is attributed to an earlier accident, because the further injury would not have occurred if the injured plaintiff had not been in the physical condition in which he or she found him or her self after the earlier accident.

20. The applicant notes that both Dr Oates and Dr Bosanquet assessed WPI as a result of the condition in the right shoulder based upon range of motion. The consequential condition in the right shoulder is a material contributing factor to that loss of range of motion, and accordingly the whole impairment of the right shoulder results from the left shoulder injury. The subsequent fall on 1 November 2016 was merely an "aggregating" [sic, aggravating?] factor and does not constitute a *novus actus interveniens*.

[6] [2015] NSWWCCPD 49.
[7] (1994) 35 NSWLR 10.

Respondent

21. The respondent disputes that the WPI of the applicant's left shoulder can be aggregated to the WPI in respect of the right shoulder.

22. The respondent submits that the highlight of the applicant's case is the evidence of Dr Oates where he says that the right shoulder injury is partly consequential to the left shoulder injury through enforced overuse of the right arm, as well as the right shoulder condition that was aggravated by a slip and fall onto the outstretched right arm on 1 November 2016. This, says the respondent, is inconsistent with the applicant's submission that the whole of the right shoulder impairment can be in effect added to the impairment of the left shoulder.

23. The respondent denies that the injury to the applicant's left shoulder on 20 January 2016 caused a consequential condition in the right shoulder.

24. The respondent refers to the clinical notes of the Dubbo Medical and Allied Health Group, and the first reference therein to the right shoulder on 23 June 2016 where there is a note of:

    "*Worsening pain in the right shoulder again*"[8]

    The respondent submits that the crucial point of this notation of "*again*" is that it infers that the applicant suffered such a symptom on a prior occasion, but there does not appear to be any history of such an occasion nor any evidence as to when that occasion took place and in what circumstances. This situation is exacerbated because the clinical notes are said to be extracts only. Accordingly it is not known whether the right shoulder symptoms pre-existed the left shoulder injury.

25. The respondent also notes that Dr Oates refers to a GP record "from December 2015 indicating a left shoulder problem"[9] which does not appear in evidence, and that the entry in the clinical notes dated 21 January 2016 contains a reference to an "initial injury before xmax last yr"[10] [sic].

26. The respondent highlights what it says is an inconsistency in the supplementary report of Dr Oates dated 29 November 2018 where he is asked to comment on the opinion of Dr Bosanquet. He refers to the right shoulder becoming symptomatic after the applicant's return to work in April 2016 because of an increased workload on that shoulder, and then deducts one tenth of his assessment of WPI for the right shoulder because of asymptomatic degenerative changes in that shoulder[11].

27. The respondent submits that the crucial elements of Dr Oates' report cannot be reconciled in themselves and certainly cannot be reconciled with the history which in itself is totally inadequate.

28. As the report of Dr Oates cannot be relied upon, the respondent submits that the only valid opinion is that of Dr Bosanquet that the injuries to the left and right shoulders on 20 January 2016 and 1 November 2016 are separate injuries, and that the WPI in respect of each cannot be aggregated.

29. The respondent also submits that Dr Oates does not explain how the applicant can suffer two separate "tears" as a result of a consequential injury. Applying the commonsense *Kooragang v Bates* test without other evidence would imply a requirement for trauma of at least a relatively severe nature.

[8] Application pp 114 and 122.
[9] Application p 82.
[10] Application p 118.
[11] Application pp 79 and 80.

FINDINGS AND REASONS

Right Shoulder Condition

30. Extracts of clinical notes of the Dubbo Medical and Allied Health Group are in evidence and contain notes of surgery consultations which the applicant had principally with Dr Chowdhury Beg, and also with Dr Haniff Abdullah. Dr Beg saw Mr Roche on 21 January 2016 and recorded the following:

> "works with steel company>manual worker
> nearly 3 years
> initial injury before xmax last yr
> where fell on left shoulder while lifting heavy steel
> didnt give much of pain
> yesterday 20/1/16 was lifting steel 20·30 kg
> the other bloke dropped the other end
> injured the shoulder with a thrush
> catches shoulder now
> worse in the morning
> can't move until had a shower
> other injury
> OE:
> tender acromion
> rom restricted in all direction
> severe tenderness on backward flexion
> can't do apprension
> ??rotator cuff tear
> advised MRI" [sic]

31. The mechanism of injury recorded in that clinical note is different from that relied upon in Part 4 of the Application. The "initial injury" before Christmas the previous year, to which the respondent drew attention, is not explained. Nevertheless, the respondent does not dispute the left shoulder injury on 20 January 2016, or the treatment required for that injury, including the surgery carried out by Dr Young on 23 February 2016.

32. Dr Young reported to Dr Beg on 23 February 2016 on the surgery. He expected that the applicant would return to full activities, all going well, at six months following surgery.

33. The applicant consulted Dr Abdullah on 23 June 2016. The history and examination recorded by that doctor are as follows:

> "- Dr Beg is away thus seeing me today 23/06/2016
> - history noted
> - ongoing bruising on the L shoulder.
> -for the past few days, been complaining of worsening pain and bruising on the L shoulder again.
> - headache back of the neck is back as well
> Examination:
> - bruising noted
> -limited range of movement of shoulder
> - lumpy deltoid"

34. Earlier in the clinical notes under the heading "**Investigation requests:**"[12] there are two references dated 23 June 2016 to "worsening pain in the R shoulder again" and "for the past few days, worsening pain in the R shoulder again?" against the name of Dr H Abdullah. The first reference included "MRI shoulder" and the second "MRI shoulder L".

[12] Application p 114.

35. There is a report of an MRI of the left shoulder dated 24 June 2016 addressed to Dr Abdullah in evidence[13] which records "**Clinical Details**" as:

> "Massive rotator cuff tear in January. Surgery in February. Ongoing bruising left shoulder.
> Worsening pain. No previous imaging available."

36. There is also a report of an MRI of the cervical spine dated 19 August 2018 addressed to Dr Young in evidence[14] which records: "**Clinical Indication**" as follows:

> "Increasing left shoulder pain and recurrent headaches. Previous rotator cuff repair."

37. The caution which decision makers should exercise when relying on clinical notes in evidence in proceedings is well known. In *Nominal Defendant v Clancy*[15] Santow JA observed:

> "54 While clinical notes, as McColl JA observes, may in common experience be the raw data on which diagnosis and opinions are based, it does not follow that they will be comprehensive. I do not consider that a detailed contemporaneous report should be treated as inaccurate because it does not find its counterpart in the notes. Because the report was so detailed and comprehensive it was open to the trial judge to accept, as his Honour did, that it dealt not only with the wrist injury, but the shoulder injury as well. If the appellant wished to submit otherwise, it could have called Mr Eisman who, as a responsible professional chiropractor, was again not so evidently in the respondent's 'camp' as to make it solely for the respondent to call him. This is so particularly given the evidentiary onus on the appellant."

38. This comment reflects the comments in the earlier decision of *Davis v Council of the City of Wagga Wagga*[16] that experience teaches that busy doctors sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable frank injury."

39. The applicant says at [23] of his statement dated 2 July 2019[17] that on 23 June 2016 he attended upon Dr Abdullah and reported that for the past couple of days he had ongoing right shoulder pain. Having regard to the matters referred to in [33]-[36] above, I do not think that this is the case. I think that Dr Abdullah misrecorded reference to the right shoulder in the Investigation requests referred to in [34] and meant to refer to the left shoulder. This is in accordance with the doctor's clinical note of 23 June 2016 and consistent with the subsequent MRI of the left shoulder, which was performed on 24 June 2016, and with the clinical indication for the MRI of the cervical spine requested by Dr Young.

40. Nevertheless there is no doubt that the applicant complained to Dr Beg about his right shoulder on 11 October 2016. The clinical not recorded that day is:

> "left shoulder pain – constant
> Worse after arthroscopy
> now aching right shoulder
> grinding and clunking"[18]

[13] Application p 67.
[14] Application p 70.
[15] [2007] NSWCA 349.
[16] [2004] NSWCA 34.
[17] Application p 12.
[18] Application p 123.

41. The applicant saw Dr Young again on 25 November 2016 and reported right shoulder pain[19]. He did not tell the doctor of the incident of 1 November 2016 involving the right shoulder. Dr Young ordered MRI scans of both the left and right shoulders which were performed on 28 November 2016[20]. Dr Young reported on the scans to Dr Beg on 30 November 2016[21]. He said that the MRI scan of the right shoulder demonstrated full thickness tear of the subscapularis and likely associated medially subluxation of the long head of the biceps tendon. There was also partial intrasubstance tear of the supraspinatus tendon. Dr Young recommended surgery on the right shoulder which was carried out on 30 January 2017. In the report the doctor noted "Tony reports having injured the right shoulder at work in the past and as such I will seek approval for surgery." Mr Roche may have been referring to the incident of 1 November 2016 when making this report, or perhaps to the fact that his shoulder became sore prior to that date as he reported to Dr Beg on 11 October 2016. It is not clear and no finding in this regard can be made.

42. The applicant did not mention the incident of 1 November 2016 involving the right shoulder to Dr Beg until 8 December 2016[22]. It is recorded as:

> "work injury 1/11/16
> slipped on gravel
> put arm out to stop him to from fall
> injured right shoulder."

43. The applicant submits that this was because Mr Roche regarded the incident as relatively minor and not associated with the onset of his right shoulder pain. A similar submission is put forward in respect of the failure of the applicant to mention the incident of 1 November 2016 to Dr Young. That may be the case, but I do not think that there is sufficient evidence to make a positive finding in this regard.

44. Dr Beg issued a series of WorkCover certificates of capacity which are in evidence[23]. These are not dated or signed by the doctor, but by reference to the certification therein as to the current work capacity of the applicant, it appears that the first certificate in which Dr Beg refers to the right shoulder is in respect of capacity for work for the period from 24 November 2016 to 23 January 2017[24]. The description of injury in that certificate is "left rotator cuff tear, right shoulder pain from favouring left", with a patient stated date of injury of 20 January 2016. There are however subsequent certificates certifying capacity for employment for the period from 8 December 2016 to 9 January 2017 and 10 January 2017 to 9 February 2017, in which the injury description is "Right shoulder tendinopathy", with a patient stated date of injury of 1 November 2016. Further WorkCover certificates of capacity cover the periods from 10 February 2017 to 24 March 2018 in which the injury description is "Right rotator cuff tear" and a patient stated date of injury of 1 November 2016. Separate certificates of capacity were issued by Dr Beg for the left shoulder injury covering the same periods of incapacity with a date of injury specified as 20 January 2016.

45. It appears from these certificates that Dr Beg initially found the right shoulder tendinopathy to have arisen as a result of favouring the left shoulder and attributed it to the injury of 20 January 2016. Later, he attributed the right shoulder tendinopathy to the injury of 1 November 2016 and later again certified the right rotator cuff tear to have arisen as a result of the injury on 1 November 2016. It appears that Dr Beg was relying on the findings of Dr Young when issuing these certifications.

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[19] Application p 97.
[20] Application p 72.
[21] Application p 98.
[22] Application p 124.
[23] Application p 145 onwards.
[24] Application p 191.

46. Dr Oates had access to the reports of the radiological investigations of the left and right shoulders and cervical spine over the period 27 January 2016 to 28 November 2016. His finding of injury is of a "Massive rotator cuff tear of the left shoulder and rotator cuff tear of right shoulder." On the question of causation, the doctor finds the left shoulder injury occurred on 20 January 2016 and "then through increased usage of the right arm after the left shoulder injury which was unsuccessfully operated on, he exacerbated the right shoulder on 01 November 2016."[25]

47. Dr Oates says that the right shoulder surgery was required as a result of a combination of both the incident of 1 November 2016 and as a result of overusing the right arm due to his left shoulder injury. The right shoulder had already become symptomatic prior to the accident of 1 November 2016 as an indirect injury following the left shoulder injury, but was exacerbated by the incident of 1 November 2016 which resulted in his having an MRI scan of the right shoulder and referral to the orthopaedic surgeon with the result of surgery to the right shoulder.

48. Dr Bosanquet saw the applicant on 22 August 2018 and reported on the consultation on 29 August 2018. He had the benefit of having the reports of Dr Oates dated 16 June 2018 and the reports of Dr Young from 8 February 2016 to 21 July 2017 sent to him. He recorded a history of both incidents on 20 January 2016 and 1 November 2016. Under "**INVESTIGATIONS**" he comments on the MRI of the left shoulder and an ultrasound guided left AC joint injection dated 21 June 2017. His diagnosis is "bilateral osteoarthritis acromioclavicular joints with rotator cuff tears requiring surgical repairs and biceps tenodesis." Later in the report Dr Bosanquet provides the diagnosis of the applicant's right shoulder injury as "…a rotator cuff tear on a background of pre-existing degenerative changes in the shoulder." He says that the main contributing factors to the applicant's right shoulder are the fall (of 1 November 2016) and the underlying degenerative changes. He says that the right shoulder condition has not resulted from the injury to the applicant's left shoulder on 20 January 2016 but from the fall on 1 November 2016.

49. In his supplementary report dated 24 March 2019 Dr Bosanquet takes issue with the assessments of Dr Oates of the left and right shoulders and the opinion of Dr Oates that the right shoulder condition is consequential to the left shoulder condition due to the enforced overuse of the right arm after his left shoulder injury on 20 January 2016 and subsequent surgery.

50. As noted by the applicant, both Dr Oates and Dr Bosanquet assessed WPI in respect of the applicant's left and right shoulders based on range of motion. The applicant submits that the consequential condition in the right shoulder is a material contributing factor to the loss of range of motion.

51. The applicant is correct in his submission, relying on *Murphy v Allity* (a case dealing with the need for surgery as a result of a work accident), that a condition can have multiple causes. What that case established is that, using the commonsense test of causation referred to in *Kooragang Cement v Bates*, if the injury materially contributed to the need for surgery, the injured worker was entitled to be compensated for the cost of that surgery.

52. The applicant submits that his fall onto the right shoulder on 1 November 2016 did not break the chain of causation between the injury to the left shoulder on 20 January 2016, the need for surgery on the right shoulder on 30 January 2017 and the permanent impairment from which he suffers in the right shoulder.

[25] Application p 84.

53. I think that there is sufficient evidence to accept this submission. Dr Young initially reported to Dr Beg on 23 February 2016 that he expected that, all being well, the applicant would return to full activities at six months following surgery. This did not occur. It is apparent from the consultation with Dr Abdullah on 23 June 2016, the MRI of the left shoulder on 24 June 2016 and MRI of the cervical spine on 19 August 2016 that the applicant was having ongoing significant problems with his left shoulder. It is reasonable that in this circumstance he would favour that shoulder. He complained to Dr Beg on 11 October 2016 of constant left shoulder pain, worse after surgery and of aching in the right shoulder with clunking and grinding. In the WorkCover certificate of capacity covering the period from 24 November 2016 to 23 January 2017 Dr Beg certified that the applicant was suffering from right shoulder pain from favouring his left. This was issued before the applicant informed Dr Beg on 8 December 2016 of the incident involving his right shoulder which occurred on 1 November 2016. From about that time Dr Beg appears to have been guided by the findings of the treating orthopaedic surgeon, Dr Young, when completing his certificates of capacity.

54. I accept the opinion of Dr Oates that the right shoulder surgery was required as a result of a combination of both the incident of 1 November 2016 and of the applicant overusing his right arm due to the left shoulder injury on 20 January 2016. The right shoulder had become symptomatic prior to the incident of 1 November 2016, but was then exacerbated by that incident, which resulted in his having an MRI scan of the right shoulder, referral back to Dr Young and surgery on the right shoulder.

55. When the applicant exacerbated the condition in his right shoulder on 1 November 2016, he was already vulnerable to that exacerbation because of the symptoms which arose in the right shoulder as a result of favouring his left shoulder (see *Government Insurance Office of NSW v Aboushadi*[26] at [23]).

56. I do not accept the respondent's submission referred to in [26] above that there is an inconsistency in the report of Dr Oates in his assessment of permanent impairment of the right shoulder, or that the doctor has obtained an inadequate history. Dr Oates explains his assessment of permanent impairment in respect of the right shoulder in his report of 29 November 2018[27]. He acknowledges that with respect to the right shoulder, apportionment is more complicated, and says that it is clear that there was no history given or any evidence of any pre-existing right shoulder problems, yet following the injury of 1 November 2016 an MRI scan of the right shoulder did show a small supraspinatus tear and a near-complete subscapularis tear along with a small glenohumeral joint effusion and moderate AC joint degenerative changes. He then says: "Following the same logic as for the left shoulder, asymptomatic degenerative changes would not warrant anything greater than the standard one-tenth deductible proportion." Dr Oates in my view is here referring to the right shoulder being asymptomatic before the complaint of right shoulder symptoms was recorded as a result of favouring the left shoulder.

57. Accordingly I find that any WPI from which the applicant suffers as a result of the condition in his right shoulder is as a result of injury to the left shoulder on 20 January 2016. There will be a referral to an AMS to reflect this finding.

The Terms of Referral to an AMS

58. The matter will be referred to the Registrar for referral to an AMS for assessment of permanent impairment as a result of injury to the left upper extremity (shoulder) on 20 January 2016 and condition in the right upper extremity (shoulder) consequent upon injury to the left shoulder on 20 January 2016.

[26] [1999] NSWCA 396.
[27] Application p 89.

SUMMARY

59. The applicant suffered injury to the left upper extremity (shoulder) on 20 January 2016 and a condition in the right upper extremity (shoulder) consequent upon injury to the left shoulder on 20 January 2016.

60. The matter is remitted to the Registrar for referral to an AMS for assessment of WPI as a result of injury to the left upper extremity (shoulder) on 20 January 2016 and condition in the right upper extremity (shoulder) consequent upon injury to the left upper extremity (shoulder) on 20 January 2016.

61. The documents to be referred to the AMS are:

    (a) the Application and attachments, and

    (b) Reply and attachments.