

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 5615/19  
**Applicant:** Maria Ivone Figueira  
**Respondent:** IPN Medical Centres Pty Limited  
**Date of Determination:** 30 January 2020  
**Citation:** [2020] NSWCC 29

The Commission determines:

1. The applicant sustained injury to the right shoulder arising out of or in the course of her employment with the respondent, a condition in the left shoulder consequent upon injury to the right shoulder and a condition in the cervical spine consequent upon injury to the right shoulder and condition in the left shoulder.
2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of:
  - (a) injury to the right upper extremity (shoulder) deemed to have occurred on 6 August 2019;
  - (b) the condition in the left upper extremity (shoulder) consequent upon injury to the right upper extremity (shoulder), and
  - (c) the condition in the cervical spine consequent upon injury to the right upper extremity (shoulder) and the condition in the left upper extremity (shoulder).
3. The documents to be referred to the Approved Medical Specialist are:
  - (a) Application to Resolve a Dispute and attached documents.
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents dated 5 December 2019 lodged on behalf of the applicant with the following attachments:
    - (i) supplementary statement of the applicant dated 28 November 2019;
    - (ii) report on CT cervical spine by Dr Alasdair Robertson dated 1 March 2017;
    - (iii) report of Dr Matthew Crawford. pain management specialist, dated 17 June 2017 and
    - (iv) reports/referrals of Dr Eva Berman, the applicant's treating general practitioner, dated 27 March 2017, 24 April 2017 and 8 May 2017.
  - (d) this Certificate of Determination and Statement of Reasons.

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. Maria Ivone Figueira (the applicant/Ms Figueira) claims compensation for permanent impairment pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of injury to her right shoulder deemed to have occurred on 6 August 2019, a condition in the left shoulder consequent upon injury to the right shoulder and a condition in the cervical spine consequent upon injury to the right shoulder and the condition in the left shoulder.
2. Ms Figueira worked for IPN Medical Centres Pty Limited (the respondent) as a medical receptionist from 2008 until July 2016. According to the injury description in the Application to Resolve a Dispute dated 29 October 2019 (the Application), she placed stress and strain upon her right shoulder in repetitive actions from a seated position, reaching to a counter above in the course of her work. Ms Figueira claims that she suffered consequential/secondary injury to her neck and left shoulder as a result of overuse her left arm because of the primary injury to her right shoulder.
3. The applicant underwent surgery on her right shoulder on 8 September 2015 and on her left shoulder on 29 May 2018. The respondent accepts liability for the injury to the right shoulder and the consequential condition in the left shoulder. It does not accept liability for the condition in the cervical spine, claimed to be as a consequence of the right shoulder injury and the left shoulder condition.

### ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:
  - (a) does the applicant suffer a condition in her cervical spine as a consequence of:
    - (i) injury to her right shoulder arising out of or in the course of her employment with the respondent, and
    - (ii) a consequential condition in her left shoulder?
5. The applicant's claim for permanent loss compensation was made on GIO General Limited (GIO), the respondent's insurer, on 6 August 2019. The parties agree that this is the correct date of injury for the purpose of referral of the matter to an Approved Medical Specialist (AMS) for assessment of whole person impairment (WPI).

### PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation conference/arbitration hearing on 13 January 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
7. Mr C Tanner of counsel appeared for the applicant instructed by Mr Ryan. The applicant was present with her daughter. Mr G Young of counsel appeared for the respondent instructed by Ms M McDonald.

## **EVIDENCE**

### **Documentary evidence**

8. 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;
  - (c) Application to Admit Late Documents dated 5 December 2019 lodged on behalf of the applicant with the following attachments:
    - (i) supplementary statement of the applicant dated 28 November 2019;
    - (ii) report on CT cervical spine by Dr Alasdair Robertson dated 1 March 2017;
    - (iii) report of Dr Matthew Crawford, pain management specialist dated 17 June 2017, and
    - (iv) reports/referrals of Dr Eva Berman, the applicant's treating general practitioner, dated 27 March 2017, 24 April 2017 and 8 May 2017.

### **Oral evidence**

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

## **SUBMISSIONS**

10. The submissions of the parties have been recorded and a transcript (T) of the arbitration hearing on 13 January 2020 is available. I will not repeat the submissions in full. In summary they are as follows (noting that by agreement between counsel, the respondent presented its submissions first).

### **Respondent**

11. The respondent draws attention to the CT scan of the cervical spine dated 1 March 2017 reported on by Dr Robertson, submitting that the pathology revealed by the scan is left sided, whereas the applicant complains of symptoms in her neck on the right side. Further, the degenerative change and pathology play no part in what the applicant says are her symptoms.
12. The respondent submits that Dr Matthew Crawford, who saw the applicant on 25 May 2017 and reported on his findings to Dr Berman on 17 June 2017, makes no reference to any complaint of neck symptoms. This is important because the respondent submits that Dr Oates, the independent medical examiner who first saw the applicant on 28 February 2018, recorded a history that the reason Ms Figueira was referred to Dr Crawford for neck pain. Dr Crawford focussed on examination of the right shoulder only.
13. The respondent submits that Dr Oates in his report dated 5 March 2018<sup>1</sup> (following the examination on 28 February 2018) noted the development of chronic neck pain, and he obtained a wrong history from the applicant when he refers to the applicant being sent to Dr Crawford for neck pain.

---

<sup>1</sup> Application p 2.

14. This mistake on the part of Dr Oates is repeated by him in his second report dated 15 July 2019<sup>2</sup>. The mistake is that that Dr Oates placed greater significance on the neck problem when he notes the referral to Dr Crawford, whereas the reason for the referral was right shoulder problems.
15. The respondent submits that Dr Oates diagnosed the applicant as suffering from postural musculoligamentous strain but does not give any explanation of this condition and why it is caused as a result of the right shoulder injury.
16. The respondent submits that the answer supplied by Dr Oates to question [7] on p 13 of the report<sup>3</sup> does not make sense in that there is an internal inconsistency therein. The respondent questions how the avoidance of movement of the right shoulder can be consistent with the opinion expressed earlier in the answer that the applicant is doubtless affected by degenerative disease to which employment is the main contributing factor to aggravation, exacerbation and acceleration of degenerative disease in the neck. How can avoiding movement aggravate degenerative disease?
17. The respondent submits that labelling the applicant's neck condition as postural musculoligamentous strain is not enough. Dr Oates has to explain how it is that what the applicant says has caused the problem<sup>4</sup>.
18. The respondent notes that Dr Harper, the surgeon who treated the applicant's shoulder problems, does not refer to any postural problems in respect of the neck, but does record pain.
19. The first mention of the term "postural issues" according to the respondent appears in the report of the physiotherapist, Domonique Honore, dated 22 February 2016<sup>5</sup>. What is missing from this report is what it is that the applicant is doing that makes it "postural", with reference to the right shoulder.
20. The respondent submits that it is not surprising that the applicant has degenerative change in her cervical spine given her age, but that is a "red herring"<sup>6</sup> because that is not where the applicant feels the pain and it is not the diagnosis of Dr Oates or Dominique Honore.
21. The respondent draws attention to the Patient Progress Notes of Dr Elizabeth Heks, the applicant's treating general practitioner attached to the Reply<sup>7</sup>. These notes record a consultation the applicant had with Dr Heks on 12 December 2011 recording a motor vehicle accident in which the applicant was involved on 11 December 2011 in a shopping centre. The vehicle in which Ms Figueira was travelling in a shopping centre was struck from behind causing aggravation of neck pain. The respondent submits that Dr Oates took no history of this accident, and the record in Dr Oates' report of no previous neck problems is simply incorrect. Further the respondent submits that there is no evidence from the applicant as to the effect this motor vehicle accident had on her neck pain.
22. The respondent refers to entries in the notes of the general practitioner of right sided neck pain and shoulder pain on 5 December 2011, that is prior to the motor vehicle accident, and earlier complaints of neck pain recorded. The respondent submits that the applicant's case is not assisted by these references to neck pain, because that is not her case. That case is a condition in the neck as a consequence of shoulder problems because of postural issues.

---

<sup>2</sup> Application p 9.

<sup>3</sup> Application p 14.

<sup>4</sup> T p 10.25.

<sup>5</sup> Application p 43.

<sup>6</sup> T 12.10.

<sup>7</sup> From p 42.

23. The respondent submits that, accepting the test of causation that she must satisfy is in accordance with that referred to in *Kooragang Cement Pty Ltd v Bates*<sup>8</sup> (*Kooragang v Bates*), the applicant has failed to discharge the onus on her to show that she has suffered a condition in her cervical spine consequent upon injury to the right shoulder injury, or the condition in the left shoulder.

## Applicant

24. The applicant opened her submissions with the observation that the respondent in submissions had not put forward a medico-legal case in answer to that put forward by her, based on the opinion of Dr Oates. This was a “gaping hole” in the respondent’s case. The applicant does not accept the respondent’s criticism of the opinion of Dr Oates and submits that there is no countervailing medico-legal case put forward by the respondent which would cause the opinion of Dr Oates to be rejected<sup>9</sup>.
25. The applicant submits that the first report of Dr Oates dated 5 March 2018<sup>10</sup> must be looked at in the context of the applicant subsequently undergoing surgery on her left shoulder on 29 May 2018. The report was focussing on the left shoulder problem, and the opinion was proffered by the doctor that the left shoulder problem was a consequence of the right shoulder injury. It was not relevant that Dr Oates did not offer an opinion in relation to the neck. Dr Oates did nevertheless in that report record the development of chronic neck pain.
26. The applicant relies on the second report of Dr Oates dated 15 July 2019<sup>11</sup> in support of her case in respect of the cervical spine condition. The development of chronic neck pain is again noted in the report with the history of Ms Figueira feels she is leaning to her right side unconsciously to protect the right shoulder. The “Poked-neck contour” of the neck is noted on examination, with restriction of movement and tightness in the left upper trapezius and adjacent lower paracentral muscle<sup>12</sup>.
27. The applicant submits that that examination establishes that the condition of the neck was not normal and invited the question as to the circumstances in which her neck had deteriorated to the level that was considered when examined by Dr Oates in July 2019.
28. The applicant disputes the respondent’s submission that Dr Oates’ opinion given in answer to the question posed to him at [7] on p 13 of his report dated 15 July 2019 contains contradictory elements (see [16] above).
29. The applicant refers to [3] in the report of Dr Oates dated 15 July 2019 which contains a diagnosis of:
- “Rotator cuff tear to right and left shoulders with aggravation of degenerative changes and postural musculoligamentous strain of cervical spine.”
- The applicant submits that as a matter of common sense and approaching the matter with reference to the test referred to in *Kooragang v Bates*, if she has significant shoulder difficulties, she is likely to have difficulties which impose on her cervical spine. That is the conclusion of Dr Oates and it is the conclusion in respect of which the respondent has provided no countervailing expert evidence.
30. The applicant submits that the respondent is left with having to resort to its own arguments in order to deconstruct the effect of the expert opinion on which she relies. She submits that there is no expert opinion put forward by the respondent that comments upon or rejects the expert opinion of Dr Oates.

---

<sup>8</sup> (1995) 35 NSWLR 452.

<sup>9</sup> T p 18.20.

<sup>10</sup> Application p 2.

<sup>11</sup> Application p 9.

<sup>12</sup> Application p 13.

31. The applicant confirms that her case is that there has been a material contribution to the condition in the cervical spine by reason of the posture she has had to adopt because of the shoulder difficulties. The applicant submits that there is no dispute that the applicant did exert abnormal strain on her neck by reason of the left and right shoulder condition. The applicant also submits that the degenerative condition that was revealed on the CT scan dated 1 March 2017 is an element of the condition in the cervical spine<sup>13</sup>.
32. The applicant submits that, based on the opinion of Dr Oates, the severity of the stiffness in the shoulders particularly post-operatively on the right side, led to stiffness in the neck. A complicating factor is the diabetes myelitis from which the applicant suffers, which resulted in the applicant obtaining a less than optimal outcome from physiotherapy on the shoulders to reactivate the muscles.
33. The applicant submits that the respondent has put forward no medico-legal case to show that avoiding movement can aggravate degenerative disease. All that has occurred in the present case is that the respondent has submitted that this is the case without any medical opinion to support it.
34. The applicant does not accept that what happened in 2011 in respect of the right shoulder (as mentioned in the s 78 notice issued by the GIO on 18 November 2019<sup>14</sup>) is irrelevant. The date of injury specified in that notice is 13 January 2011, a date that the applicant submits was adopted as the date of injury for the right shoulder. This is a deemed date, given that such injury is a condition of gradual onset.
35. The applicant then refers to the Full Record of the Patient Progress Notes of the applicant's treating general practitioners attached to the Reply<sup>15</sup>. It appears from these notes that the applicant consulted Drs Elizabeth Heks and David Bennett from 25 January 2011<sup>16</sup> in respect of complaints of pain and some numbness in both hands, shoulders and neck. Counsel for the applicant refers in detail to entries in the Progress Notes to demonstrate ongoing complaints to the doctors of pain and restriction of movement in the cervical spine leading up to the entry of 5 December 2011, immediately before the entry of 12 December 2011 where the motor vehicle accident in which the applicant was involved on 11 December 2011 is recorded<sup>17</sup>.
36. The applicant's case is that she had a well entrenched neck problem prior to the motor vehicle accident, which was an aggravation of the problem. The applicant says that if the omission of reference to the motor vehicle accident by Dr Oates in his reports was pivotal, the respondent would have asked Dr R Breit, who provided a report to the respondent's solicitors on 24 September 2019<sup>18</sup>, to comment on this. There was no comment from Dr Breit.
37. The applicant submits nevertheless that even if the whiplash suffered by the applicant in the motor vehicle accident is a feature of her current condition, these are mutually exclusive contributing factors. All the applicant needs to point to is a material contribution to the condition in the neck as a result of the right shoulder injury and left shoulder condition, and Dr Oates has provided an explanation for this link. The abnormal posture that is established by the evidence is not related to the whiplash injury. The applicant submits that the fact that she had a whiplash injury in 2011 is no answer to whether, after 2011 she was adopting an abnormal posture in relation to her shoulders which placed strain on her neck.

---

<sup>13</sup> T p 23.25.

<sup>14</sup> Rely p 7.

<sup>15</sup> From p 42.

<sup>16</sup> Reply p 67.

<sup>17</sup> Reply p 60.

<sup>18</sup> Reply p 20.

38. The applicant submits that an examination of the reports of the treating surgeon, Dr Wade Harper, which commence with a report dated 10 September 2012<sup>19</sup> reveal ongoing complaints in respect of the cervical spine and deterioration of the condition therein. The initial report refers to a cervical spine x-ray showing mild degeneration. A report of that x-ray, dated 26 May 2011, is in evidence<sup>20</sup>.
39. The applicant also examines the reports of the treating physiotherapists, Domonique Honore and Justine Trethewey to demonstrate the treatment they rendered to her cervical spine following surgery and the need to address that condition.

## FINDINGS AND REASONS

40. For the applicant to succeed in respect of the condition in the cervical spine she must show, in accordance with *Kooragang v Bates*, that the cervical spinal condition resulted from the right shoulder injury and left shoulder condition. What is required is “a commonsense appraisal of the causal chain” between the injury to the right shoulder and left shoulder condition, and the emergence of the condition in the cervical spine.
41. The respondent’s case is built upon an attack on the opinion of Dr Oates that the postural musculoligamentous strain of the cervical spine and aggravation of degenerative changes in the cervical spine were caused by prolonged stiffness and marked restriction in range of movement in both shoulders. The respondent submits at [16] above that the opinion of Dr Oates at [7] in his report dated 15 July 2019 is internally inconsistent and makes no sense. The applicant rejects this submission.
42. In my view, while Dr Oates could have perhaps expressed himself more clearly, what he conveys supports the applicant’s case. It must be borne in mind that the answer was given in response to the legal question posed to him by the applicant’s solicitor in respect of aggravation, exacerbation or acceleration of disease in the neck. That would constitute an injury in accordance with the meaning of that term in s 4(b)(ii) of the 1987 Act and is not the case now put forward by the applicant. Earlier in the report at [3] Dr Oates diagnoses “postural musculoligamentous strain of cervical spine.” That diagnosis is consistent with his answer in [7]. Dr Oates also notes that the applicant’s diabetes reduced the effectiveness of physiotherapy to reactivate muscles, improve range of movement and rid her of the muscle stiffness in the shoulders. It is logical in my view that this restriction of movement in the shoulders would place strain on the cervical spine.
43. I do not place any weight on the fact that Dr Oates in his earlier report dated 5 March 2018 did not deal with the cervical spine apart from noting the development of chronic neck pain. That report was focussed on the problem with the left shoulder in respect of which the applicant underwent surgery on 29 May 2018.
44. Similarly I do not place great significance on the failure of the applicant to mention to Dr Oates the motor vehicle accident in which she was involved on 11 December 2011 when the applicant was a passenger in a vehicle struck from behind in a shopping centre. This accident aggravated the undisputed neck pain from which the applicant was suffering at the time. The existing neck problem is evident from the earlier complaints of neck pain recorded in the clinical notes dating back to 25 January 2011. The x-ray dated 26 May 2011 revealed degenerative change in the cervical spine in response to the clinical history in the report on the x-ray of neck and right upper limb pain.

---

<sup>19</sup> Application p 21.

<sup>20</sup> Reply p 114



45. The respondent submits that doubt should be cast on the applicant's claim in respect of the cervical spine because the CT scan dated 1 March 2017 reveals pathology on the left side, whereas the applicant complains of symptoms on the right side of her neck. Further, the respondent submits that the degenerative change and pathology revealed in the scan play no part in what the applicant says are her symptoms. I have not been taken to the report of any doctor who comments on the CT scan dated 1 March 2017, nor have I been able to find any such report in the evidence. The only reference to the left side of the cervical spine that I can find in the report is to "Moderate left facet joint hypertrophy." The conclusion in the report refers to multilevel degenerative disc change, most prominent at the C5/6 level which demonstrated a broad based protrusion and other radiological changes. Based on this report I do not place any significance on the apparent divergence between the applicant's complaint of right sided neck pain and what is reported on this CT scan.
46. The applicant's case is that certainly from 2015 she was minimising neck movement because of developing shoulder problems. The increase in symptoms in the neck is consistent with what she was doing in order to minimise shoulder movement and hold her neck stiffly<sup>21</sup>.
47. The respondent's expert medical evidence is from Dr Breit in his report dated 24 September 2019. Dr Breit deals with the injury to the right shoulder and the secondary issue with the left shoulder. He notes the applicant's complaint of pain in the neck and tenderness in the neck on examination. He does not comment on Dr Oates' report of 15 July 2019.
48. In my view the applicant has discharged the onus on her to show that the condition in her cervical spine is consequent upon the accepted injury she suffered in her right shoulder arising out of or in the course of her employment with the respondent and the undisputed condition in her left shoulder. Using a commonsense appraisal of the evidence summarised herein, it is logical that such a condition has arisen because of the restriction of movement in both the applicant's shoulders and the postural musculoligamentous strain thereby caused to the cervical spine. I accept the diagnosis of Dr Oates of this condition, and do not agree that he has failed to explain the causal link between the applicant's shoulder problems and the condition in her cervical spine. The respondent has not put on any expert evidence to gainsay this opinion.
49. In his report dated 15 July 2019, Dr Oates has provided assessments of WPI in respect of the right shoulder, left shoulder and cervical spine totalling 26%WPI.
50. The matter will be referred to an AMS for assessment of WPI as a result of injury to the right shoulder deemed to have occurred on 6 August 2019 (the date agreed by the parties on which the claim for permanent impairment compensation was made), and conditions in the left shoulder and cervical spine consequent upon the right shoulder injury.

## **SUMMARY**

51. The applicant sustained injury to the right shoulder arising out of or in the course of her employment with the respondent, condition in the left shoulder consequent upon injury to the right shoulder and condition in the cervical spine consequent upon injury to the right shoulder and condition in the left shoulder.
52. The matter is remitted to the Registrar for referral to an AMS for assessment of:
  - (a) injury to the right upper extremity (shoulder) deemed to have occurred on 6 August 2019;
  - (b) a condition in the left upper extremity (shoulder) consequent upon injury to the right upper extremity (shoulder), and

---

<sup>21</sup> T p 44.25.

- (c) a condition in the cervical spine consequent upon injury to the right upper extremity (shoulder) and the condition in the left upper extremity (shoulder).

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

- (a) the Application and attached documents;
- (b) Reply and attached documents;
- (c) Application to Admit Late Documents dated 5 December 2019 lodged on behalf of the applicant with the following attachments:
  - (i) supplementary statement of the applicant dated 28 November 2019;
  - (ii) report on CT cervical spine by Dr Alasdair Robertson dated 1 March 2017;
  - (iii) report of Dr Matthew Crawford, pain management specialist dated 17 June 2017, and
  - (iv) reports/referrals of Dr Eva Berman, the applicant's treating general practitioner, dated 27 March 2017, 24 April 2017 and 8 May 2017.
- (d) this Certificate of Determination and Statement of Reasons.

