WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **579/20**
Applicant: **Bradley Young**
Respondent: **Woolworths Group Limited**
Date of Determination: **15 April 2020**
Citation: **[2020] NSWWCC 120**

The Commission determines:

1. The applicant suffered injuries to the cervical spine and the left shoulder arising out of or in the course of his employment with the respondent on 23 January 2018 within the meaning of sections 4(a) and 9A of the *Workers Compensation Act 1987*.

2. The applicant has had a current work capacity from 25 November 2019 within the meaning of section 32A of the *Workers Compensation Act 1987* in suitable employment as an Administrative Assistant for 20 hours per week at $20.73 per hour, being $414.60 per week.

The Commission orders:

3. The respondent is to pay the applicant weekly compensation in respect of the injuries to the cervical spine and left shoulder on 23 January 2018 as follows:

    (a) $361.62 per week from 25 November 2019 under section 37(3) of the *Workers Compensation Act 1987*.

    (b) Such weekly payments to continue in accordance with the provisions of the *Workers Compensation Act 1987*.

    (c) Liberty to apply within 14 days in relation to the calculation of weekly benefits.

4. The respondent is to pay the applicant's reasonably necessary medical and related expenses as a result of injury on 23 January 2018 under section 60 of the *Workers Compensation Act 1987*.

5. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment pursuant to the *Workplace Injury Management and Workers Compensation Act 1998* as follows:

    Date of injury: 23 January 2018

    Body System: The spine (cervical spine) and the left upper extremity (left shoulder)

    Method of Assessment: Whole Person Impairment.

6. The following documents are to be provided to the Approved Medical Specialist:

   (a) Application to Resolve a Dispute dated 5 February 2020 and attached documents (but omitting the reports of Dr Graeme Doig dated 28 May 2018; Dr Anthony Smith dated 8 February 2019 and 28 March 2019; and Dr Frank Machart dated 19 September 2019 – pages 37 to 59 inclusive);

   (b) Reply dated 17 February 2020 and attached documents;

   (c) Respondent's Application to Admit Late Documents dated 5 March 2020 and attached documents (but omitting the document on page 19);

   (d) Applicant's Application to Admit Late Documents dated 19 March 2020 and attached documents;

   (e) This Certificate of Determination and Statement of Reasons.

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

Anthony Scarcella
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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Bradley Young, is a 27-year-old man who was employed by Woolworths Group Limited (the respondent) as a full-time assistant manager in its Corowa BWS store.

2. On 23 January 2018, at the respondent's Corowa BWS premises, Mr Young alleged that, whilst unloading pallets of cases of beer in the cool room, he sustained injuries to his left shoulder and neck.

3. Mr Young lodged a claim for weekly benefits and medical expenses under the *Workers Compensation Act 1987* (the 1987 Act) with the respondent.

4. On 2 August 2019, Mr Young claimed permanent impairment compensation under section 66 of the 1987 Act in respect of the spine (cervical spine) and left upper extremity (left shoulder).

5. On 4 October 2019, the respondent issued a Dispute Notice under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying injury within the meaning of sections 4 and 9A of the 1987 Act; denying an entitlement to weekly benefits compensation under section 33 of the 1987 Act; denying an entitlement to reasonably necessary medical and related treatment expenses as a result of injury within the meaning of sections 59 and 60 of the 1987 Act; and denying an entitlement to lump sum compensation under section 66 of the 1987 Act.

6. On 14 February 2020, the respondent issued an amended Dispute Notice under section 78 of the 1998 Act denying injury to the left shoulder within the meaning of sections 4 and 9A of the 1987 Act; denying an entitlement to weekly benefits compensation under section 33 of the 1987 Act; denying an entitlement to reasonably necessary medical and related treatment expenses as a result of injury within the meaning of sections 59 and 60 of the 1987 Act; and denying an entitlement to lump sum compensation under section 66 of the 1987 Act.

7. Mr Young lodged an Application to Resolve a Dispute (ARD) dated 5 February 2020 in the Workers Compensation Commission (the Commission) claiming weekly benefits compensation from 24 November 2019 to date and continuing under sections 36 and 37 of the 1987 Act, medical and related expenses under section 60 of the 1987 Act and lump sum compensation under section 66 of the 1987 Act, as a result of the injury sustained in the course of his employment with the respondent on 23 January 2018.

ISSUES FOR DETERMINATION

8. The parties agreed that the following issues remained for determination:

    (a) Did Mr Young suffer an injury to his left shoulder on 23 January 2018 within the meaning of sections 4(a) and 9A of the 1987 Act?

    (b) Is Mr Young entitled to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 Act arising from the accepted cervical spine injury and the alleged left shoulder injury? If so, did he have a current work capacity to work in suitable employment within the meaning of section 32A of the 1987 Act during the periods claimed? What is the extent and quantification of his entitlement to weekly compensation within the meaning of sections 35, 36 and 37 of the 1987 Act?

    (c) Are Mr Young's medical and related treatment expenses reasonably necessary as a result of injury within the meaning of sections 59 and 60 of the 1987 Act?

(d) Is Mr Young entitled to lump sum compensation within the meaning of section 66 of the 1987 Act?

Matters previously notified as disputed

9. The issues in dispute were notified in the Dispute Notices referred to above.

Matters not previously notified

10. No other issues were raised.

PROCEDURE BEFORE THE COMMISSION

11. The parties attended a telephone conciliation conference/arbitration on 26 March 2020. Mr Allen Parker of counsel appeared for Mr Young and Ms Kayt Hogan of counsel appeared for the respondent.

12. During the conciliation phase the parties agreed as follows:

(a) Due to an oversight, medical expenses and related treatment expenses, which are in dispute, were not listed as being in dispute in the ARD. If there is an award in Mr Young's favour, the making of a general order under section 60 of the 1987 Act is appropriate.

(b) Mr Young no longer maintains the nature and conditions of employment claim pleaded in the ARD.

(c) The commencement date of Mr Young's claim for weekly benefits compensation is 25 November 2019.

(d) Mr Young's pre-injury average weekly earnings (PIAWE) is agreed at $970.28.

(e) The reports of Dr Graeme Doig dated 28 May 2018; Dr Anthony Smith dated 8 February 2019 and 28 March 2019; and Dr Frank Machart dated 19 September 2019 are withdrawn from the ARD's supporting documents.

(f) The document which mistakenly appears at page 19 of the Respondent's Application to Admit Late Documents dated 5 March 2020 is withdrawn by the respondent.

13. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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

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

(a) ARD dated 5 February 2020 and attached documents (but omitting the reports of Dr Graeme Doig dated 28 May 2018; Dr Anthony Smith dated 8 February 2019 and 28 March 2019; and Dr Frank Machart dated 19 September 2019);

(b) Reply dated 17 February 2020 and attached document;

(c) Respondent's Application to Admit Late Documents dated 5 March 2020 and attached documents (but omitting the document on page 19);

(d) Applicant's Application to Admit Late Documents dated 19 March 2020 and attached documents.

Oral Evidence

15. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

SUBMISSIONS

16. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties. I will refer to the parties' submissions under each relevant issue for determination set out below.

FINDINGS AND REASONS

Did Mr Young suffer an injury to his left shoulder on 23 January 2018 within the meaning of sections 4(a) and 9A of the 1987 Act?

17. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act.

18. Section 4(a) of the 1987 Act defines "injury" as a personal injury arising out of or in the course of employment.

19. The onus of establishing injury falls on Mr Young and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*[1] (*Ireland*) and *Nguyen v Cosmopolitan Homes*[2] (*Nguyen*).

20. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*[3] (*Kooragang*). As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*[4] (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.

21. In order to establish that a "personal injury" has been suffered within the meaning of section 4(a) of the 1987 Act, Mr Young must establish, on the balance of probabilities, that there has been a definite or distinct "physiological change" or "physiological disturbance" in his left shoulder for the worse which, if not sudden, is at least, identifiable: *Kennedy Cleaning Services Pty Ltd v Petkoska*[5] (*Kennedy*) and *Military Rehabilitation and Compensation Commission v May*[6] (*May*). The word "injury" refers to both the event and the pathology

[1] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134
[2] *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246
[3] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796
[4] *Kirunda v State of New South Wales (No 4)* [2018] NSWWCCPD 45 at [136]
[5] *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45
[6] *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19

arising from it: *Lyons v Master Builders Association of NSW Pty Ltd*[7] (*Lyons*). While pain may be indicative of such physiological change, it is not itself a "personal injury".

22. *Castro v State Transit Authority*[8] (*Castro*) provides a useful review of the authorities and makes it clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro*, a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

23. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

24. The respondents' principal submissions may be summarised as follows:

    (a) The alleged injury to the left shoulder is in dispute. There is an accepted injury to the cervical spine.

    (b) Mr Young's evidence was that he complained of pain in his neck and left shoulder to his treatment providers following the incident at work on 23 January 2018. This was not borne out in Mr Young's Corowa Mediclinic clinical records. Mr Young did not complain about his left shoulder until about one year after the alleged injury following an MRI scan.

    (c) Mr Young relies on the reports of Dr Eugene Gehr, Orthopaedic Surgeon. Dr Gehr is the only doctor who found that Mr Young had sustained a work-related injury to his left shoulder. The history taken by Dr Gehr is not made out in the other evidence. Dr Gehr placed some weight on the left shoulder MRI scan indicating a left labral tear, which Mr Young's treating doctors (Dr Michael Ow-Yang, Neurosurgeon and Dr Shailendra Dass, Orthopaedic Surgeon) thought nothing of.

    (d) The respondent relied on the report of Dr Frank Machart, Orthopaedic Surgeon. Mr Young provided a history to Dr Machart of the development of pain on the top of the left shoulder when lifting cartons of beer on 23 January 2018. Mr Young pointed to his trapezius muscle. Dr Machart diagnosed a minor soft tissue injury to the trapezius muscle. An injury to the trapezius muscle is consistent with the medical evidence and consistent with an injury to the cervical spine. Dr Gehr was the only doctor who had a different opinion. Dr Machart found no explanation for Mr Young's symptoms. Mr Young's treating orthopaedic surgeon, Dr Dass supported Dr Machart's latter opinion.

    (e) There was no reference to left shoulder pain in the clinical notes section of the cervical spine MRI scan report dated 21 February 2018. There was only reference to neck pain. This was confirmed by Dr Neetu Shokeen, General Practitioner, in his referral letter to Dr John McMahon dated 22 February 2018, where no mention was made of any shoulder complaint.

[7] *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25NSWCCR 496
[8] *Castro v State Transit Authority* [2000] NSWCC 12; (2000) 19 NSWCCR 496

(f) On 5 October 2018, Dr Ow-Yang took a history from Mr Young of the development of pain in the left trapezius region and a large lump in the left trapezius muscle. Dr Ow-Yang did not refer to Mr Young's shoulder but did refer him for scans. On 15 January 2019, Mr Young underwent a left brachial plexus and shoulder MRI that demonstrated tendinosis of the supraspinatus and small interstitial tear of the posterior infraspinatus and mild subacromial / subdeltoid bursitis. Dr Ow-Yang reviewed the MRI scan and opined that there was minimal structural abnormality in the left shoulder. He noted that Mr Young's pain was radiating from the neck to the shoulder.

(g) On 15 April 2019, Mr Young sought a further opinion from Dr Dass, who took a history of injury to the left shoulder on 23 January 2018. Dr Dass noted that the MRI scan did not offer much in the way of a diagnosis and referred Mr Young for an MRI arthrogram for further evaluation of the shoulder.

(h) On 3 June 2019, Dr Dass reviewed the MRI arthrogram and reported that the findings were not consistent with Mr Young's symptoms. On 12 July 2019, Dr Dass reported to the respondent's insurer that he did not have a diagnosis for Mr Young and that the MRI scan did not demonstrate any pathology that correlated with the clinical findings. Importantly, Dr Dass opined that the workplace incident was not a substantial contributing factor to Mr Young's current symptoms and injury. He did not believe that the workplace injury was responsible for Mr Young's shoulder joint pathology.

(i) The Certificates of Capacity issued to Mr Young only referred to neck pain with radiculopathy until 17 January 2019, being the time of the left shoulder MRI scan.

(j) There is no support for a left shoulder injury from Mr Young's own treating doctors. Two opinions have been sought and neither are supportive.

(k) The entry dated 24 January 2018 in the Corowa Mediclinic clinical records is curious and goes to Mr Young's credit. He was said to be injured on 23 January 2018, yet on 24 January 2018, his doctor recorded that he woke up with neck pain yesterday morning and noted "nil injury". The entry in the clinical records on 16 February 2018, referred to Mr Young being injured at work whilst receiving a delivery of boxes of beer, but there was no report of any shoulder complaints. The entry in the clinical records on 17 January 2019 referred to the brachial plexus and left shoulder MRI scan. The first complaint of left shoulder pain appeared in the entry on 31 January 2019. Significantly, the complaint only occurred after the MRI scan in January 2019.

(l) There was nothing at all by way of contemporaneous complaints of left shoulder symptoms in the clinical records, despite Mr Young attempting to make it so in his evidentiary statement. There was nothing in the clinical records until the entry of 31 January 2019. One could not be satisfied that there was an injury to Mr Young's left shoulder on 23 January 2018 and this submission is supported by the evidence of the treating doctors and the lack of contemporaneous evidence. No explanation was provided in this regard except for the assertion in Mr Young's evidentiary statement that there was contemporaneous evidence.

(m) All the evidence leads to the conclusion that there was no injury to Mr Young's left shoulder. There were no complaints about the left shoulder until almost a year after the work-related incident. Dr Gehr is at odds with the other evidence and his opinion ought not be accepted.

25. Mr Young's principal submissions may be summarised as follows:

(a) When considering injuries to the cervical spine and left shoulder, one should take a common sense approach. These parts of the body are located close together, and there can be pain radiating through one part or the other.

(b) Dr Machart does not deny injury to the left shoulder. He seems to be saying that he cannot find a reason for it now. Dr Machart's report is rather confusing.

(c) The importance of Dr Gehr's report is that he explained, what appeared to be, a subtle interpretation of the clinical signs and the findings on the MRI scan. Therefore, he reaches a well-reasoned opinion as to the occasioning of an injury, not only to the cervical spine, but to the left shoulder. It is his reasoning that ought to be preferred.

(d) In relation to the Corowa Mediclinic clinical records, caution should be exercised as to their reliability. The entry on 24 January 2018 noted pain, redness and swelling on the left side of the neck. Although there is reference to "nil injury", injury has been conceded by the respondent to the cervical spine. The entry on 16 February 2018 noted moderate to severe neck pain associated with headache and paraesthesia in the left arm. It referred to an injury at work and neck pain with radiculopathy. Accordingly, there can be no issue that Mr Young sustained an injury causing symptoms in his neck, left shoulder and left arm region. As such, if that submission is accepted, the issue is not whether Mr Young has continuing symptoms in those areas of the body, that is a matter that should be determined by an Approved Medical Specialist (AMS).

(e) On 12 July 2019, Dr Dass reported that he had investigated Mr Young with a left shoulder MRI arthrogram, which showed a subtle superficial tear of the anterior chondro-labral junction. He did not have a diagnosis for Mr Young. There has been a difficulty in establishing what the clinical findings and diagnostic imaging mean. Whilst that has been an issue, it does not prevent a finding that the injury involved the cervical spine and the left shoulder region.

26. The respondent's submissions in reply may be summarised as follows:

(a) Referred pain from the cervical spine and/or radiculopathy does not mean that there is injury to the left shoulder.

(b) In terms of the pathology (a tear) in the left shoulder, Mr Young's treating doctors say that it is not related to work.

27. Mr Young's submissions in reply may be summarised as follows:

    (a) Dr Gehr opined in his supplementary report that, he also diagnosed Mr Young as having a left shoulder labral tear producing pain and stiffness. The diagnosis was based on the history of pain and stiffness of the left shoulder on examination, where he found a marked reduction of range of motion of the left shoulder along with a positive impingement sign. The history and examination of the left shoulder was supported by the MRI arthrogram of the left shoulder dated 28 May 2019. Dr Gehr provided a well-reasoned opinion.

    (b) One would have to take the common sense approach, that Mr Young has been unable to return to employment since about the time of his injury. There is no other injury that could explain the later MRI arthrogram finding on 28 May 2019. There has always been the pain that has been described as radiculopathy, that makes it very difficult for a lay person to come to a conclusion as to the nature of the injury. Therefore, the injuries as pleaded ought to be accepted.

28. In evidence, there are statements by Mr Young dated 27 January 2020[9] and 18 March 2020.[10] Mr Young stated that at about 12:30 pm on 23 January 2018, at the respondent's Corowa premises, he was required to unload pallets on which there were cases of beer in the cool room. His task was to remove the cases of beer from the pallets and place them behind the older stock in the cool room. He performed this task of repetitively lifting and moving cases for about one hour, when he noticed pain, stiffness and tightness in the back of his left shoulder area and his neck. In his supplementary statement, Mr Young stated that 2,500 cartons of beer and wine had been delivered for him to unload. He added that he was working with another employee carrying out the task described above. Mr Young's evidence in relation to the lifting and moving of cases of beer and wine at the respondent's Corowa premises on 23 January 2018 was unchallenged.

29. Mr Young stated that he reported the injury to the store manager, who responded unsympathetically because the store was busy. Mr Young was instructed to continue working. He did so in great pain until the end of his shift on 23 January 2018, at which time he noticed that he had developed a lump on his left shoulder.

30. Mr Young stated that on 24 January 2018, he consulted Dr Kanagarasa Regi Jegadeesh, General Practitioner of the Corowa Mediclinic, who issued him with a medical certificate and prescribed Cephalex 500 mg capsules. Mr Young provided no further details of this consultation in his first statement. However, in his supplementary statement, Mr Young referred to the entry in the Corowa Mediclinic clinical records on 24 January 2018 and explained that he believed that the reference in the records to a "superficial wound, inflamed skin, tenderness on palpation" and the reference to "cellulitis" related to the lump on his left trapezius. He stated that he complained to Dr Jegadeesh of neck pain. Mr Young did not explain the reference to a "superficial wound". He stated that when he consulted Dr Jegadeesh, there was a definite lump on his left trapezius, and it felt as if he had pinched his neck.

31. The entry in the Corowa Mediclinic clinical records on 24 January 2018,[11] confirmed that Mr Young had consulted Dr Jegadeesh, who recorded that Mr Young complained of pain, redness and swelling on the left side of the neck; had woken up with it yesterday morning; and that there was "nil injury". On examination, the doctor observed a superficial wound, inflamed skin and tenderness on palpation. Dr Jegadeesh diagnosed cellulitis and issued Mr Young with a standard medical certificate certifying him unfit for his usual occupation on

[9] ARD at pages 1-12
[10] Applicant's Application to Admit Late Documents dated 19 March 2020 at pages 1-2
[11] ARD at page 91

25 January 2018 because he was receiving medical treatment.[12] Dr Jegadeesh provided Mr Young with a prescription for Cephalex 500 mg capsules. Cephalex is an antibiotic. Dr Jegadeesh made no reference to left shoulder symptoms.

32. Mr Young stated that he returned to work and carried out duties as best as he could. His left shoulder was extremely painful and spasming. He experienced severe pain in his neck. By 29 January 2018, he could barely turn his neck or lift anything. He struggled at work. At the end of his shift, he consulted Dr Wen at the Corowa Medical Centre because he could not get in to see his usual general practitioner. He stated that Dr Wen diagnosed a cyst on his shoulder, and she certified him unfit for work for a week. The clinical records of the Corowa Medical Centre are not in evidence and neither is the certificate issued by Dr Wen.

33. Mr Young stated that he was not receiving much support from the store manager and that, by 12 February 2018, his injury was reported to a higher level within the respondent's organisation. As a result, he was finally able to undergo some physiotherapy and work on light duties. The nature of physiotherapy and the identity of the physiotherapist at that point in time was not disclosed. In his supplementary statement, Mr Young stated that he received physiotherapy to his left shoulder from Back on Track Physio. However, he did not indicate when such physiotherapy took place. The consultation notes in evidence from Back on Track Physio disclosed that Mr Young's first consultation took place on 30 January 2019.[13]

34. Mr Young stated that, as the pain and restrictions in his neck and left shoulder did not improve, he consulted Dr Shokeen at the Corowa Mediclinic on 16 February 2018. The entry in the Corowa Mediclinic clinical records on 16 February 2018[14] confirmed that Mr Young had consulted Dr Shokeen, who recorded complaints of moderate to severe neck pain associated with headache and paraesthesia in the left arm. The doctor noted that Mr Young was injured at work when involved in the delivery of boxes of beer and that he was gradually getting worse. On examination, she observed tenderness in the cervical spine and a limited range of movement. The diagnosis was neck pain with radiculopathy. Dr Shokeen requested a cervical spine MRI; prescribed Panadeine Forte and Lyrica; and issued a standard medical certificate certifying Mr Young unfit to continue his usual occupation from 19 February 2018 to 23 February 2018 inclusive. No complaints of left shoulder symptoms were recorded.

35. On 20 February 2018, Mr Young underwent a cervical spine MRI scan by Dr Brian Litherland, Radiologist. On 21 February 2018, Dr Litherland reported[15] a severe right foraminal stenosis and resultant right C4 nerve root compression at the C3/4 level and a mild to moderate right foraminal stenosis and perhaps, mild impingement on the right C3 nerve root at the C2/3 level. The clinical notes in the report referred to an injury at work; neck pain since the previous month; moderate to severe pain associated with headache and paraesthesia; and cervical spine tenderness. There was no reference to left shoulder symptoms in the clinical notes part of the report.

36. On 22 February 2018, Mr Young consulted Dr Shokeen to review the cervical spine MRI scan results.[16] Mr Young complained of headache associated with vertigo and pins and needles in the arms. On examination, Dr Shokeen observed cervical spine tenderness and a limited range of movement. There was no reference to complaints of symptoms in the left shoulder. Dr Shokeen referred Mr Young to Dr John McMahon, Neurosurgeon for opinion and management.

[12] ARD at page 109
[13] Applicant's Application to Admit Late Documents dated 19 March 2028 pages 48-49
[14] ARD at pages 91-92
[15] ARD at pages 60-61
[16] ARD at page 92

37. Dr Shokeen's referral letter to Dr McMahon dated 22 February 2018,[17] provided a history that Mr Young suffered moderate to severe neck pain after lifting heavy boxes at work and noted complaints of paraesthesia and moderate to severe headaches, constant in nature, and vertigo. The doctor referred to the findings in the cervical spine MRI scan. No reference was made to complaints of left shoulder symptoms by Mr Young.

38. There is no report in evidence by Dr McMahon. There is no evidence of Mr Young having consulted Dr McMahon. In his evidentiary statements, Mr Young made no reference to having consulted Dr McMahon. There were numerous entries in the Corowa Mediclinic clinical records between 22 February 2018 and 20 August 2018 referring to Mr Young awaiting specialist review.

39. On 20 August 2018, Mr Young consulted Dr Shokeen, who referred him to Dr Ow-Yang.[18] Dr Shokeen's referral letter to Dr Ow-Yang dated 20 August 2018[19] provided a history that Mr Young suffered moderate to severe neck pain after lifting heavy boxes at work and noted complaints of paraesthesia and moderate to severe headaches, constant in nature, and vertigo. The doctor referred to the findings in the cervical spine MRI scan. No reference was made to complaints of left shoulder symptoms by Mr Young.

40. On 5 October 2018, Mr Young consulted Dr Ow-Yang,[20] who took a history that Mr Young injured himself at work whilst unloading pallets of cases of beer weighing around 20 kg each. Pain developed in the left trapezius region and he developed a large lump in the left trapezius muscle. Mr Young described paraesthesia radiating through the arm and forearm into the left-hand, mostly affecting the ring and little finger. On examination, Dr Ow-Yang observed mild wasting in the left trapezius and left triceps muscle; moderate weakness in left shoulder abduction; mild weakness in the left little finger abduction; positive Tinel's sign with loss of the radial pulse on the left and the development of paraesthesia, when the arm was raised above the head. Dr Ow-Yang provided a working diagnosis of a left trapezius muscular injury that may have involved a tear in the left trapezius muscle. He noted, however, that this did not explain the paraesthesia in the left hand. He proposed a differential diagnosis of a left thoracic outlet syndrome. He observed that any significant cervical spine injury had been excluded by a recent MRI scan. Dr Ow-Yang recommended steroid injection treatments to the left C5/6, C6/7 and C7/T1 facet and muscular region. He arranged for Mr Young to undergo a left brachial plexus and left shoulder MRI scan to look for a trapezius muscular injury and any evidence of thoracic outlet syndrome. He referred Mr Young for upper limb nerve conduction studies with Dr Ron Brooder, Neurologist, to investigate the potential thoracic outlet syndrome.

41. On 21 December 2018, Dr Ow-Yang carried out left C5/6, C6/7, C7/T1 facet steroid injections on Mr Young.[21] In Dr Ow-Yang's operation report, the principal diagnosis or indication for surgery was described as neck pain and facetogenic pain source.

42. On 11 January 2019, Mr Young underwent a left brachial plexus and left shoulder MRI scan by Dr Jae Cho, Radiologist.[22] The clinical notes to Dr Cho's report dated 15 January 2019, referred to a work injury and queried left thoracic outlet syndrome and injury to the left trapezius muscle. Dr Cho commented that there was no brachial plexus pathology seen. He reported tendinosis of the supraspinatus and small interstitial tear of the posterior infraspinatus and mild sub acromion/subdeltoid bursitis.

[17] ARD at pages 62-64
[18] ARD at page 99
[19] ARD at pages 65-66
[20] ARD at pages 69-70
[21] ARD at pages 72-73
[22] ARD at pages 75-76

43. On 14 February 2019, Mr Young consulted Dr Ow-Yang, who reported that Mr Young had gained significant benefit from the recent cervical steroid injections and made some gains in range of motion in his neck. He noted that Mr Young still had some pain radiating from the neck to the tip of the left shoulder. However, Mr Young's evidence was that he had not experienced any improvement from the steroid injections and continued to suffer from pain in the neck, shoulder and pins and needles in his hands.[23] Dr Ow-Yang opined that the left brachial plexus MRI scan did not demonstrate any structural abnormality to explain Mr Young's pain. The left shoulder MRI scan demonstrated some mild tendinosis in the supraspinatus and infraspinatus muscles. Otherwise, there was minimal structural abnormality in the left shoulder. He again confirmed that the cervical spine MRI scan did not demonstrate any structural abnormality to explain Mr Young's pain. He reported that Mr Young's upper limb conduction studies, presumably carried out by Dr Brooder, were normal. Finally, he opined that Mr Young's pain was likely to have arisen from musculo-ligamentous structures. Mr Young was advised to manage his symptoms with physiotherapy, with the option of further steroid injections if the pain became severe.

44. On 25 March 2019, Mr Young consulted Dr Shokeen, who noted Mr Young's complaints of ongoing intermittent moderate left shoulder pain. On examination, Dr Shokeen observed that the left shoulder was tender, and that the range of movement was limited on internal rotation and adduction. He referred Mr Young to Dr Dass.[24] Dr Shokeen's referral letter to Dr Dass dated 25 March 2019[25] provided a history that Mr Young was suffering moderate to severe intermittent left shoulder pain of a throbbing nature since lifting heavy boxes of spirits at work. She referred to Mr Young having been assessed by a specialist in Wagga Wagga (Dr Ow-Yang) for ongoing shoulder and neck pain. Dr Shokeen attached the cervical spine and left shoulder MRI scans and referred to the facet joint injections.

45. On 15 April 2019, Mr Young consulted Dr Dass, who took a history that Mr Young was repeatedly lifting slabs of beer at work on 23 January 2018 when he felt pain in his neck and left shoulder. Dr Dass noted that Mr Young had been extensively followed up by a neurosurgeon and brachial plexus involvement, including thoracic outlet syndrome, had been ruled out. On examination, Dr Dass observed that Mr Young's cervical spine had a global decreased range of motion and loss of lordosis; there was normal sensation in the upper limb; tenderness over the left shoulder and interior glenohumeral joint intertubercular groove; rotator cuff muscle power was normal; there was pain and tenderness in the rhomboids and supraspinatus tendon and in the long head of biceps on provocation. He noted that the MRI scan did not offer much in the way of a diagnosis and recommended an MRI arthrogram for further evaluation of Mr Young's left shoulder.

46. On 28 May 2019, Mr Young underwent an MRI arthrogram of the left shoulder by Dr Cheng Lin Ting, Radiologist. Dr Ting reported that the supraspinatus, infraspinatus and subscapularis tendons were intact; the long head of biceps tendon was intact; the biceps–labral complex was intact; the AC joint was intact; and there was a subtle linear high T2 signal within the anterior chondro-labral junction, not extending through the labrum, suggestive of a subtle, superficial tear involving the chondro-labral junction.

47. On 3 June 2019, Dr Dass reported to Dr Shokeen that the MRI arthrogram of Mr Young's left shoulder demonstrated a subtle chondral labral tear. Dr Dass opined that the findings were not consistent with Mr Young's symptoms, unless there was some dynamic internal impingement causing the symptoms. Dr Dass discharged Mr Young from his care and management.[26]

[23] ARD at page 8 at [47]
[24] ARD at page 105
[25] ARD pages 78-79
[26] ARD at page 82

48. On 12 July 2019, Dr Dass reported to the respondent's insurer in response to a request for an opinion in relation to Mr Young.[27] Dr Dass reported that on clinical examination, Mr Young had pain in the supraspinatus on testing; pain in the long head of biceps on provocation; and pain on testing his rhomboids. The MRI arthrogram did not demonstrate any pathology that correlated with the clinical findings. The MRI arthrogram demonstrated a subtle superficial tear of the anterior chondro-labral junction. Dr Dass did not have a diagnosis for Mr Young. Dr Dass opined that, based on his clinical findings and the MRI scan of the left shoulder, Mr Young's workplace incident was not a substantial contributing factor to his current symptoms and injury. Then, rather curiously, in response to a question as to whether the workplace incident aggravated a pre-existing condition, Dr Dass stated:

> " … I do not believe that the shoulder joint pathology is responsible for Mr Young's current injury/workplace injury."[28]

He then went on to suggest that a report ought to be obtained from Mr Young's previous treating neurosurgeon for an opinion. I can make no sense of that response.

49. In response to a question assuming that Mr Young had sustained an aggravation of a non-work-related condition, and whether such aggravation had ceased, Dr Dass reported:

> "Please note that Mr Young was first reviewed by me on 15 April 2019, and the injury was on 5 February 2018, significant time has passed since the injury. It is my opinion that any aggravation of his shoulder should have ceased in the 14 months that has elapsed from the injury to seeing me."[29]

50. In response to a question seeking Dr Dass' treatment recommendations, Dr Dass reported that he did not have any treatment recommendations for Mr Young. He then appeared to contradict his earlier opinion when he stated:

> "After the MR arthrogram and correlating them to the clinical findings, it was my opinion that the symptoms displayed by Mr Young was [sic] in keeping with the MR arthrogram findings. It was possible that he had other periscapular pain (neurosurgical opinion should be sought)."[30]

51. In response to a question as to whether further investigations were required, Dr Dass did not advocate any further investigations. However, he recommended a second opinion from another shoulder surgeon.

52. I found Dr Dass' report to the insurer dated 12 July 2019 difficult to follow.

53. On 9 July 2019, Mr Young consulted Dr Gehr at the request of his lawyers. In evidence, there is a report by Dr Gehr dated 9 July 2019.[31] Mr Young's lawyers provided Dr Gehr with copies of the cervical spine MRI scan report dated 20 February 2018; the C5/6, C6/7, C7/T1 facet steroid injections images and theatre report dated 21 December 2018; the left brachial plexus and left shoulder MRI scan report dated 11 January 2019; the left shoulder MRI arthrogram report dated 28 May 2019; the reports of Dr Ow-Yang; the reports of Dr Dass dated 15 April 2019 and 3 June 2019. Dr Dass' report to the insurer dated 12 July 2019 had not yet been issued. Dr Gehr reviewed the reports and diagnostic imaging referred to above in detail within the body of his report.

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[27] ARD at pages 83-85
[28] ARD at page 84 at [3]
[29] ARD at page 84 at [4]
[30] ARD at page 85 at [7]
[31] ARD at pages 18-27

54. Dr Gehr took a history from Mr Young that prior to 23 January 2018, he had not experienced problems with his cervical spine, thoracic spine, lumbar spine, upper extremities or lower extremities. Further, that since 23 January 2018 there had been no further injuries or new conditions, apart from flare-ups of the reported work-related symptoms.

55. Dr Gehr took a detailed history from Mr Young of the work-related incident on 23 January 2018. He reported that Mr Young was required to unload pallets of cases of beer into the cool room. He was required to remove the beer from the pallets, bring forward the older stock and then, put the new stock behind the older stock in the cool room. He performed this task for about one hour, when he began to feel pain and stiffness in the back of his left shoulder and neck. He developed a large lump in the left trapezial area/muscle.

56. Dr Gehr reported Mr Young's current symptoms as pain over the lateral left side of the neck; posterior aspect of the left shoulder; and over the anterior aspect of the left shoulder. The pain is persistent and made worse with activities. He experiences pins and needles down the left arm to the dorsal aspect of the left hand to the fingers. The left hand always feels colder. He experiences stiffness of his neck and left shoulder. Symptoms were slowly improving.

57. On examination of Mr Young's cervical spine, Dr Gehr observed, amongst other things, an indication of tenderness of the left lateral cervical spine; the presence of spasm; positive axial compression test; brachial plexus stretch test caused trapezial pain but no radicular pain; hand grip strength grade 4/5 on the left and 5/5 on the right; decreased sensation in C6-7 on the left side confirmed by two point sensory discrimination.

58. On examination of Mr Young's left shoulder, Dr Gehr observed, amongst other things, positive left shoulder impingement; stable left shoulder; and decreased power C5-C6 in the left arm.

59. Dr Gehr diagnosed an injury to Mr Young's cervical spine on 23 January 2018 with the development of cervical spine soft tissue injury with left radiculopathy. He also diagnosed the development of an injury to the left shoulder with pain and decreased range of motion with a labral tear confirmed by MRI scan.

60. On 29 August 2019, Mr Young consulted Dr Machart at the request of the respondent's lawyers. In evidence, there is a report by Dr Machart dated 19 September 2019.[32] The respondent's lawyers provided Dr Machart with copies of the clinical records from Corowa Mediclinic; the cervical spine MRI scan report dated 20 February 2018; the left brachial plexus and left shoulder MRI scan report dated 11 January 2019; the left shoulder MRI arthrogram report dated 28 May 2019; Dr Ow-Yang's reports including the operation report dated 21 December 2018; Dr Dass' reports; Dr Gehr's report; and two forensic medico-legal reports that have not been admitted into evidence.

61. Dr Machart took a history from Mr Young of the work-related incident. He reported that Mr Young developed pain on the top of his left shoulder, pointing to the trapezius muscle, when lifting cartons of beer on 23 January 2018. The pain started suddenly and increased during the day.

62. Dr Machart reported Mr Young's current symptoms as pain at the base of the neck, pain in the left pectoral area and pain at the top of the shoulder. There was limited movement in the left shoulder. Additional symptoms included, feeling off-balance, dizziness, headaches and a cold feeling in the left hand.

[32] Respondent's Application to Admit Late Documents dated 5 March 2020 at pages 13-18

63. On examination of Mr Young's cervical spine, Dr Machart observed reported tenderness over the lower cervical segments; symmetrically diminished movement by one third of the expected normal flexion, extension, lateral flexion and rotation; reflexes were present and symmetrical; strength examination could not be conducted because of concurrent report of pain; and diminished sensation reported on dorsal aspects of the index, middle and ring fingers.

64. On examination of Mr Young's left shoulder, Dr Machart observed hypersensitivity when testing for tenderness; tenderness reported in several areas, predominantly, the trapezius muscle of the left shoulder; no muscle wasting in the dominant left arm; and movements were reported to be painful passively and actively.

65. Dr Machart noted a report of pain in the trapezius muscle lifting cartons of beer on 23 January 2018. However, he opined that there was no evidence of a structural injury. He further opined that, the mechanism of injury could not explain Mr Young's current symptoms. In his opinion, the physical injury to Mr Young had healed and an injury related condition was not evident. Dr Machart acknowledged that Mr Young's treating doctors had diagnosed a soft tissue injury. In such circumstances, he expected a resolution of symptoms and not virtual total incapacity for what appeared to be a minor soft tissue injury to the trapezius muscle.

66. Dr Machart did not agree with Dr Gehr on the subject of pathology of injury. He opined that the mechanism of injury was not in keeping with the structural injury. Further, the suggestion of radiculopathy was not supported by the cervical spine MRI scan, where the pathology was right-sided, and Mr Young's symptoms are left side. Dr Machart could find no evidence of radiculopathy.

67. At the request of Mr Young's lawyers, Dr Gehr provided a supplementary report dated 7 December 2019.[33] In relation to Mr Young's cervical spine, Dr Gehr confirmed his diagnosis of a soft tissue injury with left radiculopathy and that the diagnosis of radiculopathy was based on his clinical examination.

68. In relation to Mr Young's left shoulder, Dr Gehr confirmed his diagnosis of a left shoulder labral tear producing pain and stiffness. The diagnosis was based on the history of pain and stiffness of the left shoulder and on examination where he found a marked reduction of range of motion of the left shoulder together with a positive impingement sign. The history provided and the examination of the left shoulder was supported by the left shoulder MRI arthrogram dated 28 May 2019. Dr Gehr added:

> "I also point out the mechanism of injury from the accident 23/1/2018 strongly supports such an injury."[34]

69. In response to a question from Mr Young's lawyers as to whether the workplace incident was a substantial contributing factor to the injuries diagnosed by him, Dr Gehr responded in the affirmative and added that his opinion was based on an absence of any prior history of problems in the cervical spine or shoulders prior to 23 January 2018 and no other injuries thereafter.

70. I accept Mr Young as a witness of truth, who did his best to provide a history of his injuries, his treatment and his complaints to his various treating doctors and the forensic medical specialists. The histories he provided of injury, treatment and complaints of symptoms were, in the main, consistent. I have referred to some of the inconsistencies above, but they have not affected my overall view of his evidence. I accept Mr Young's unchallenged evidence

[33] ARD pages 28-31
[34] ARD at page 29 at [1]

that, prior to 23 January 2018, he had not experienced any problems with his cervical spine or left shoulder. I also accept Mr Young's evidence, as provided in his history to Dr Gehr, that he had not sustained any other injuries or any further injuries or incidents involving his left shoulder or cervical spine, apart from flare-ups of his reported symptoms, after 23 January 2018.

71. Mr Young's evidence was that he suffered left shoulder symptoms from the time of the lifting and moving incidents in the course of his employment with the respondent on 23 January 2018. This was not explicitly borne out in the Corowa Mediclinic clinical records, the Certificates of Capacity issued by the Corowa Mediclinic and the medical evidence referred to above between 23 January 2018 and 17 January 2019. During the latter mentioned period, I am satisfied that the focus of attention of the treatment providers was on Mr Young's cervical spine, in no small part due to his complaints of left upper limb paraesthesia and the references to radiculopathy. I have taken into account that the affected body parts, namely, the cervical spine and left shoulder are in close proximity to each other and acknowledge that symptoms can overlap. Particularly so in this case, where Mr Young experienced left sided cervical spine symptoms. It was only after the January 2019 left brachial plexus and left shoulder MRI scan, which reported tendinosis of the supraspinatus and small interstitial tear of the posterior infraspinatus and mild sub acromion/subdeltoid bursitis, that attention turned to Mr Young's left shoulder. Not long afterwards (23 January 2019), treatment by way of physiotherapy was commenced.

72. I have also taken into account that histories in medical records are often used to attack the credit of a worker. Reference is made either to a failure to mention relevant matters, or a description in a medical record which is different to what the worker now says in evidence, as the respondent has done in its submissions. However, care should be taken when considering such evidence, not to place too much weight on the clinical notes of treating doctors, given their primary concern with treatment. Experience demonstrates that busy doctors sometimes misunderstand, omit or incorrectly record histories of accidents or complaints by a patient, particularly in circumstances where their concern is with the treatment or impact of an obvious frank injury: *Davis v Council of the City of Wagga Wagga*[35]; and applied in *King v Collins*[36] and *Mastronardi v State of New South Wales*[37]. I have exercised caution in this regard in relation to the treating medical records and reports in evidence and considered all the evidence, including the evidence in Mr Young's evidentiary statements and the expert evidence.

73. The value of contemporaneous evidence has been repeatedly endorsed by the courts. In *Onassis and Calogeropoulos v Vergottis*[38], Lord Pearce said of documentary evidence:

> "It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."

74. However, the absence of contemporaneous evidence is not determinative on the issue of causation where there is other evidence: *Owen v Motor Accidents Authority of NSW*[39]and *Bugat v Fox*.[40] While independent corroboration of complaints of pain will often be helpful and relevant in assessing the probative value of the evidence overall, such evidence is not a "requirement" that must be satisfied before an arbitrator can feel actual persuasion about the

[35] *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34
[36] *King v Collins* [2007] NSWCA 122
[37] *Mastronardi v State of New South Wales* [2009] NSWCA 270
[38] *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at 431
[39] *Owen v. Motor Accidents Authority of NSW* [2012] NSWSC 650 at [52]
[40] *Bugat v Fox* [2014] NSWSC 888 at [31], [32] and [34]

existence of a fact in issue: *Department of Aging, Disability and Home Care v Findlay*[41]. I have weighed the evidence of Mr Young together with other objective evidence and/or the absence of it: *Department of Education and Training v Ireland*.[42]

75. Dr Ow-Yang provided an initial working diagnosis of a left trapezius muscular injury that may have involved a tear in the left trapezius muscle. He confirmed that the left shoulder MRI scan of 11 January 2019 demonstrated pathology in Mr Young's left shoulder, being some mild tendinosis in the supraspinatus and infraspinatus muscles. I disagree with the respondent's submission that Dr Ow-Yang did not think much of the findings in the MRI scan or that his opinion did not support an injury to the left shoulder. Although he did not deal with the issue of causation, Dr Ow-Yang opined that Mr Young's pain was likely to have arisen from musculo-ligamentous structures. Dr Ow-Yang's most recent report pre-dated the MRI arthrogram of the left shoulder dated 28 May 2019, which was suggestive of a subtle superficial tear involving the chondro-labral junction.

76. I found the opinions expressed by Dr Dass in his report to the insurer dated 12 July 2019 unpersuasive. The reasoning behind the opinions were difficult to follow and contradictory for the reasons already stated above. Accordingly, I have given Dr Dass' evidence little weight.

77. The MRI arthrogram of the left shoulder on 28 May 2019 demonstrated a subtle linear high T2 signal within the anterior chondro-labral junction, not extending through the labrum, suggestive of a subtle, superficial tear involving the chondro-labral junction.

78. Dr Machart diagnosed what appeared to him to be a minor soft tissue injury to the trapezius muscle from which Mr Young ought to have recovered by the time of his consultation. I found Dr Machart's report unpersuasive and have given it little weight. He was unable to diagnose a structurally based condition responsible for Mr Young's ongoing symptoms. He did not provide any reasoning in support of his opinion that the mechanism of injury was not in keeping with a structural injury. Although the reports were made available to him, he failed to sufficiently engage with the findings in the left shoulder MRI scan report dated 15 January 2019 and the left shoulder MRI arthrogram report dated 28 May 2019.

79. Rule 15.2(3) of the Workers Compensation Commission Rules 2011 provides that "evidence based on speculation or unsubstantiated assumptions is unacceptable." Further, it is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd*[43] (*Paric*); *Makita (Australia) Pty Ltd v Sprowles*[44] (*Makita*); *South Western Sydney Area Health Service v Edmonds*[45] (*Edmonds*); and *Hancock v East Coast Timbers Products Pty Ltd*[46] (*Hancock*); that there must be a "fair climate" upon which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, more than a mere "ipse dixit" (an assertion without proof) is required and I find that the latter seems to be precisely what Dr Machart has done in this matter in relation to the Mr Young's left shoulder.

80. I prefer the evidence of Dr Gehr, who took a detailed history from Mr Young and thoroughly examined the medical evidence made available to him. Dr Gehr diagnosed the development of a work-related injury on 23 January 2018 to the left shoulder with pain and decreased range of motion with a labral tear confirmed by MRI scan. He provided the reasoning to support the diagnosis. Dr Gehr's reasoning took into account the history of pain and stiffness of the left shoulder and his findings on examination, where he found a marked reduction of range of motion of the left shoulder together with a positive impingement sign. Another factor

[41] *Department of Aging, Disability and Home Care v Findlay*
[42] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134
[43] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA
[44] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705
[45] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421
[46] *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43

in his reasoning was that the history provided and his findings on examination of the left shoulder were supported by the left shoulder MRI arthrogram dated 28 May 2019. Further, the mechanism of injury on 23 January 2018, as described in detail to him by Mr Young, strongly supported such an injury. The final factor in his reasoning was the absence of any prior history of problems with the left shoulder prior to 23 January 2018 and no other injuries thereafter.

81. I am satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Mr Young has established that there was a definite or distinct physiological change or disturbance in his left shoulder of a musculo-ligamentous nature arising out of or in the course of his employment with the respondent on 23 January 2018.

82. Accordingly, I find that Mr Young sustained a personal injury to his left shoulder arising out of or in the course of his employment with the respondent on 23 January 2018 within the meaning of section 4(a) of the 1987 Act.

83. The parties made no submissions in relation to section 9A of the 1987 Act but for completeness, I have considered the factors set out in section 9A(2) of the 1987 Act. I am satisfied and find that there was a causal relationship between the injury and Mr Young's employment on 23 January 2018, that is, there was a connection with his employment which was real and of substance. Accordingly, I am satisfied that Mr Young's employment was a substantial contributing factor to his injury within the meaning of section 9A of the 1987 Act.

Is Mr Young entitled to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 Act arising from his work-related injuries?

84. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer under the Act to the injured worker shall include weekly payments during the period of incapacity.

85. An assessment of Mr Young's capacity involves a consideration of whether he has no current work capacity or a current work capacity as defined in section 32A of the 1987 Act.

86. Section 32A of the 1987 Act defines the relevant terms as follows:

> "**current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.
>
> **no current work capacity**, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.
>
> **suitable employment**, in relation to a worker, means employment in work for which the worker is currently suited:
>
> a. having regard to:
>
> (i) The nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
> (ii) the worker's age, education, skills and work experience, and
> (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
> (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and

(v) such other matters as the WorkCover Guidelines may specify, and

b. regardless of:

(i) whether the work or the employment is available, and
(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
(iii) the nature of the worker's pre-injury employment, and
(iv) the worker's place of residence."

87. Section 43 of the 1987 Act in existence prior to the 2012 amending Act and the authorities suggested that regard was to be had to "the realities of the labour market in which the employee was working or might reasonably be expected to work".[47]

88. Since the 2012 amending Act, it is clear that "total incapacity" differs from "no current work capacity". "No current work capacity" requires a consideration of the worker's capacity to undertake not only his or her pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Roche DP in *Mid North Coast Local Health District v De Boer*[48]and in *Wollongong Nursing Home Pty Ltd v Dewar*[49] (*Dewar*).

89. I must assess whether Mr Young was able to return to both his pre-injury duties and suitable employment since 23 January 2018.

90. The respondents' principal submissions may be summarised as follows:

(a) Global incapacity is in dispute. Mr Young's evidentiary statement dated 27 January 2020 detailed various qualifications. Such qualifications are relevant to his capacity to work and would be within the range of capacity that Mr Young says he has and that the doctors say he has.

(b) Mr Young's evidence was that he had been looking for work but was unable to secure any suitable alternative duties. Mr Young referred to his restrictions in his evidentiary statement. In terms of those restrictions, it seems that there is nothing preventing him from performing the work he stated he was qualified to do and had experience doing. He could perform the work of the nature referred to under the heading of education and employment history in his evidentiary statement.

(c) Dr Machart found no evidence of structural injury and that any physical injury had healed.

(d) Dr Dass opined that any aggravation of Mr Young's left shoulder condition should have ceased by the time of his first consultation with him on 15 April 2019.

(e) The entry dated 5 June 2019 in the Corowa Mediclinic clinical records stated that Mr Young was applying for a new job. One would not apply for work, if one did not have a capacity to work. Mr Young's evidentiary statement was somewhat silent on any attempts he had made to find work in accordance with his restrictions.

[47] *Arnott's Snack Products Pty Ltd v Yacob* [1985] HCA 2; 155 CLR 171
[48] *Mid North Coast Local Health District v De Boer* [2013] NSWWCCPD 41
[49] *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55

(f) The Certificate of Capacity issued to Mr Young dated 26 August 2019 certified him as having capacity for some type of work from 27 August 2019 for four hours per day, five days per week, being 20 hours per week. The last Certificate of Capacity in evidence dated 24 September 2019, provided the same opinion in relation to work capacity. These Certificates of Capacity, Mr Young's evidence and the evidence in the clinical notes that Mr Young was looking for work supported a finding of capacity to work for, at least, 20 hours per week in alternative employment. Given the period of time that has elapsed since the last Certificate of Capacity and the fact that there was no evidence of ongoing incapacity, a finding of more than 20 hours capacity for work would be open.

(g) In his supplementary evidentiary statement dated 18 March 2020, Mr Young conceded that he had been assessed in August/October 2019 with a work capacity of 20 hours per week. All of the doctors accepted that Mr Young could not return to his pre-injury duties as an assistant manager.

(h) In the Back on Track Physio consultation notes, there was an entry on 8 April 2019 referring to Mr Young having loaded his shoulder a lot with driving lately. There was no reference to the workplace injury. The consultation notes entry on 7 August 2019, referred to Mr Young being sore from moving and cleaning on Monday and experiencing stiffness through the cervical spine and shoulder. The fact that Mr Young had been driving excessively, moving and cleaning was inconsistent with his stated level of incapacity.

(i) Ms Ashley Joseph, Physiotherapist of Back on Track Physio provided an opinion in relation to work capacity and identified a work capacity for office/administrative duties. This was consistent with the rehabilitation report of Pinnacle Rehab dated 27 August 2019. The gravamen of the Pinnacle Rehab report was that Mr Young had demonstrated, at that time, a capacity for light work 12 hours per week as an Administration Assistant, HR Officer or IT Support Technician. Consistent with Mr Young's activities reported in the Back on Track Physio consultation notes, Pinnacle Rehab noted that Mr Young had demonstrated capacity during his functional capacity evaluation, greater than his current certified capacity. On 2 September 2019, Pinnacle Rehab certified Mr Young's current capacity as being 20 hours per week, five days per week with restrictions. The restrictions referred to would not preclude Mr Young from performing roles consistent with his stated education and employment history.

(j) Mr Young has been certified as having a work capacity of 20 hours per week. Suitable roles have been identified. Mr Young's evidence is somewhat silent as to what attempts he has made to find suitable work. However, it is apparent from the Corowa Mediclinic clinical records that he was looking for work. Due to the passage of time since Mr Young was certified as having a work capacity for 20 hours per week, a finding of a work capacity greater than 20 hours per week is now open.

91. Mr Young's principal submissions may be summarised as follows:

(a) It may be that, in order to have a better understanding of the claim for weekly compensation, the cervical spine and left shoulder ought to be referred to an AMS for an assessment of whole person impairment prior to the determination of the weekly benefits claim.

(b) Mr Young conceded that his general practitioner had certified him as having a work capacity for 20 hours per week from 27 August 2019 but with restrictions. Such restrictions would prevent him from returning to his pre-injury employment, which on any view, was physically demanding at times in a busy bottle shop.

(c) Whilst there may be a finding that Mr Young has an ability to perform some employment. It would be light work for 20 hours per week on the balance of the medical evidence. There would be a residual earning capacity of $300 to $400 per week on a part time basis.

92. The respondents' submissions in reply may be summarised as follows:

(a) The PIAWE figure has been agreed for a 38 hour week. Mr Young's residual earning capacity would be a little more than $300 to $400 per week.

(b) Deferring a determination of the weekly payments claim until after an AMS has assessed Mr Young's whole person impairment is of no utility. The respondent accepts that Mr Young cannot return to his pre-injury duties because such duties would be inconsistent with the restrictions placed on him. There is an abundance of evidence as to the roles Mr Young would be suited to with his restrictions.

93. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

94. I agree with the respondent's submission that deferring a determination of the claim for weekly benefits compensation until after an AMS has assessed Mr Young's whole person impairment would be of no utility and, accordingly, I do not intend to do so.

95. Mr Young described his pre-injury duties with the respondent in its Corowa bottle shop as an assistant manager to include customer service; handling products for sale; operating a trigger scanner and cash register; answering telephones; lifting and carrying slabs and cartons of drinks to customers' vehicles; stacking and packing shelves, fridges and cool rooms with slabs and cartons of drinks; pushing and pulling manual and electric forklift trolleys; lifting and carrying ladders and pallet trolleys; pushing and pulling trolleys into confined spaces in the cool room; lifting slabs and cartons of drinks up to 18 kg; unloading stock from delivery trucks; operating a standing forklift to unload pallets from delivery trucks and then transporting pallets into various storerooms in the bottle shop; cleaning tasks including mopping, sweeping, dusting and rubbish removal; setting up displays for specials within the bottle shop involving pushing of stock to displays from the rear of the shop into the store and lifting, stacking and arranging stock on display. Mr Young stated that the duties described above involved constant standing, a lot of walking, flexing and rotation of the neck, constant use of both hands and wrists, elbows and arms, gripping to operate barcode scanners, handling products and boxes, squatting and bending and frequent manual handling.[50]

96. The Pinnacle Rehab reports corroborated Mr Young's description of his preinjury duties and referred to each task, its frequency and key physical requirements.[51]

97. The preponderance of the medical evidence referred to above concluded that Mr Young would have had no capacity for his pre-injury duties for the period claimed and beyond, and the respondent conceded the same. Accordingly, I find that Mr Young has had no capacity for his preinjury duties for the period claimed and beyond.

[50] ARD at pages 2-3 at [4]

[51] Applicant's Application to Admit Late Documents dated 19 March 2020 at pages 52-54 and at pages 90-96

98. The next matter for consideration is whether Mr Young was fit for suitable employment as defined in section 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in medical information, the worker's age, education, skills and work experience, any return to work plan and any occupational rehabilitation services that have been provided, irrespective of whether the work is available to him or of a type or nature that is generally available in the employment market.

99. Mr Young is 27 years of age. He stated that his education and training included the following qualifications: attainment of the NSW Higher School Certificate; Dual Diploma Human Resources Management/Business Administration at the College for Adult Learning Australia; Certificate III in Business with McDonald's Australia; Certificate II in Hospitality; Certificate in preparing and service of espresso coffee; Responsible Service of Alcohol Certificate; Responsible Conduct of Gaming Certificate; and Applied First Aid Certificate.[52]

100. Mr Young stated that his employment history included that of serving food and drinks, preparing coffee, kitchen hand duties and cleaning duties at Roxy's Café; an assistant in the fermentation room, maintenance and cleaning at a winery; front of house and back of house trainee manager at McDonald's; and assistant store manager/relief store manager with the respondent since 2012.[53]

101. Mr Young described his ongoing restrictions as including pain at the base and on the left side of his neck with stiffness and restrictions in movement; pain around the left pectoral area; pain at the top of the left shoulder; pain radiating into the left shoulder and left arm; limited movement and stiffness in the left shoulder; loss of balance and dizziness; headaches; numbness in the left hand and fingers; difficulty gripping objects; increase in neck and left upper limb pains on physical activity; limited capacity to sit and stand; and disturbed sleep. Mr Young is left-hand dominant.[54]

102. As to fitness for work, Mr Young expressed the view that he would only be able to work in a situation where there was limited kneeling, squatting and the use of ladders; no lifting of weights above 5 kg with the left arm; no left hand or arm movements above shoulder height; no bending and twisting of the neck; and regular breaks from prolonged sitting and driving.[55]

103. Dr Gehr opined that Mr Young was not totally unfit for work. He also opined that Mr Young would be fit for work with limited kneeling, squatting and the use of ladders; restricted lifting of weights with the left arm to 5 kg or less; and no hand above shoulder activities for the left arm.[56]

104. The Certificate of Capacity issued by Dr Shokeen dated 26 August 2019 certified Mr Young as having capacity for some type of work from 27 August 2019 to 24 September 2019 for four hours per day, five days per week, being 20 hours per week. The certified restrictions included lifting/carrying capacity of 3 kg in the left hand and 5 kg in the right hand; sitting as tolerated; standing as tolerated; pushing/pulling up to 15 kg; bending and twisting as tolerated with non-repetitive squatting; and driving as tolerated.[57]

105. The Certificate of Capacity issued by Dr Shokeen dated 24 September 2019 certified Mr Young as having capacity for some type of work from 25 September 2019 to 23 October 2019 for four hours per day, five days per week, being 20 hours per week. However, the section of the Certificate of Capacity relating to the worker's restrictions was left blank.[58]

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[52] ARD at page 1 at [2]
[53] ARD at pages 1-2 at [2]
[54] ARD at pages 10-11 at [71]-[86]
[55] ARD at page 11 at [87]-[89]
[56] ARD at pages 29-30 at [6]
[57] ARD at pages 176-178
[58] ARD at pages 179-181

106. The Certificate of Capacity issued by Dr Shokeen dated 22 October 2019 certified Mr Young as having capacity for some type of work from 25 October 2019 to 21 November 2019 for four hours per day, five days per week, being 20 hours per week. However, the section of the Certificate of Capacity relating to the worker's restrictions was again left blank.[59] This was the last Certificate of Capacity in evidence, Mr Young's explanation being that, Dr Shokeen had received a letter from the respondent's insurer declining further liability and she took the view that she could not issue any further Certificates of Capacity.[60]

107. There is evidence in the Corowa Mediclinic clinical records that Mr Young had been looking for suitable work. No details of such attempts to find suitable work appeared in Mr Young's evidentiary statements.

108. Mr Young underwent a functional capacity evaluation and assessment by Pinnacle Rehab on 23 August 2019 and a detailed report was produced.[61] The assessment report identified Mr Young as having the following restrictions: kneeling repetitively; squatting repetitively; repetitive forward reaching tasks requiring strong grip; bilateral lifting no greater than 6 kg; unilateral lifting no greater than 3 kg with the left hand and 5 kg with right hand; bilateral lifting from the floor no greater than 6 kg; and pushing and pulling force of no greater than 15 kg. The assessment report identified that Mr Young should completely avoid crawling; bilateral lifting overhead; and unilateral lifting overhead with the left arm greater than 1 kg to 2 kg.[62] The assessment report identified that Mr Young had the capacity to perform the roles of an Administration Assistant, HR Officer or IT Support Technician, as vocational options.

109. On 8 October 2019, Pinnacle Rehab produced a Comprehensive Closure Report.[63] The report reviewed in detail Mr Young's pre-injury duties with the respondent and summarised the outcomes of its workplace review, medical case conferences, labour market analysis and functional capacity evaluation. In relation to its labour market analysis, Pinnacle Rehab reported that such analysis was supportive of an Administration Assistant role at Mr Young's current capacity (20 hours per week) and that he would be competitive for the role of HR/Payroll Officer, once he completed his studies and outlined the necessary retraining for the role of IT Support Technician. The report did not identify a weekly or hourly rate of earnings in each of the vocational options proposed for Mr Young.

110. As the roles of HR/Payroll Officer and IT Support Technician require Mr Young to undergo further studies and retraining, I find that the role of an Administration Assistant is a vocational option that was open to him as and from 25 November 2019.

111. The current (1 July 2019 to date) Fair Work Commission National Minimum Wage Order is dated 20 June 2019. The Order sets the national minimum wage at $748.80 per week calculated on the basis of a week of 38 ordinary hours, or $19.49 per hour. However, I find that the relevant award for the role of an Administration Assistant is the Clerks – Private Sector Award 2010 (the Award). The Award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature. The current (1 July 2019 to date) Award rate is $787.60 per 38 hour week for a Level I – Year 1, being $20.73 per hour.

112. Having regard to Mr Young's evidentiary statements, the medical evidence as to his capacity and physical restrictions, his age, skills, work experience and the other relevant factors to be considered in accordance with section 32A of the 1987 Act, I am satisfied on the balance of probabilities that he had a current work capacity in suitable employment as an Administrative

[59] Applicant's Application to Admit Late Documents dated 19 March 2020 at pages 99-100
[60] Applicant's Application to Admit Late Documents at page 2 at [10]
[61] Applicant's Application to Admit Late Documents at pages 70-83
[62] Applicant's Application to Admit Late Documents at page 81
[63] Applicant's Application to Admit Late Documents at pages 88-99

Assistant during the period claimed, that is, 25 November 2019 to date and continuing for 20 hours per week at $20.73 per hour, being $414.60 per week.

113. The PIAWE was agreed at $970.28. This amount does not exceed the statutory maximum referred to in section 34 of the 1987 Act. The PIAWE is indexed every six months in accordance with section 82A of the 1987 Act.

114. The parties did not make any submissions in relation to any adjustment to be made in relation to pecuniary benefits (overtime and shift allowance) after 52 weeks in accordance with section 44C(1)(b) of the 1987 Act. There is no evidence before me of any non-pecuniary benefits.

115. Mr Young's weekly benefits compensation was terminated by the respondent on 24 November 2019, during the second entitlement period. The second entitlement period is that of 117 weeks, postdating the initial 13 weeks. Weekly payments during the second entitlement period are governed by section 37 of the 1987 Act.

116. As I have found that Mr Young has a current work capacity and has not returned to work, section 37(3) of the 1987 Act provides the relevant formula to calculate his entitlement to weekly compensation. In accordance with section 37(3) of the 1987 Act, Mr Young's entitlement to weekly compensation during the second entitlement period from 25 November 2019 to date and continuing in accordance with the provisions of the 1987 Act is calculated as follows:

    $970.28 (the agreed PIAWE) x 80% = $776.22
    less the amount I have found Mr Young is able to earn in suitable employment = $414.60
    plus, any deductible amount (pecuniary benefits) = $0
    = $361.62 per week.

117. Mr Young will be entitled to an award in accordance with the above calculations and the respondent will need to make the appropriate adjustments pursuant to sections 82A and 44C(1)(b) of the 1987 Act. I grant the parties liberty to apply within 14 days in relation to the calculation of weekly benefits.

Are Mr Young's medical and related treatment expenses reasonably necessary as a result of injury within the meaning of sections 59 and 60 of the 1987 Act?

118. Section 59 of the 1987 Act provides definitions of certain medical and related treatment, services and rehabilitation.

119. Section 60(1) of the 1987 Act relevantly provides that, if as a result of an injury received by a worker, it is reasonably necessary that any medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service be provided, then a worker's employer is liable to pay the cost of such treatment or service. In addition, the employer is liable to pay the related travel expenses specified in section 60(2) of the 1987 Act.

120. On the evidence and having received an award in his favour, Mr Young is entitled to recover the cost of reasonably necessary medical, hospital and related expenses pursuant to section 60 of the 1987 Act in relation to the injuries to his cervical spine and his left shoulder. Accordingly, I make a general order in this regard.

Is Mr Young entitled to lump sum compensation within the meaning of section 66 of the 1987 Act?

121. Section 65(3) of the 1987 Act formerly provided that:

> "If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist".

122. Section 65(3) of the 1987 Act was repealed by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) in schedule 2, clause 2. This schedule commenced on the date of proclamation which was 1 January 2019. Savings and transitional provisions were added by the 2018 amending act and appear in the 1987 Act in Schedule 6, Part 19L and clause 2 provides that an amendment made by the 2018 amending Act extends to an injury received before the commencement of the amendment, and a claim for compensation made before the commencement of the amendment. The repeal of s 65(3) applies to the present case.

123. The repeal of section 65(3) of the 1987 Act, allows arbitrators to make determinations of permanent impairment. Neither party submitted that this was an appropriate case for me to determine Mr Young's entitlement to lump sum compensation without referral to an AMS. The difference in the assessments between Dr Gehr and Dr Machart is sufficient for me to consider a referral to an AMS appropriate. As a result, I will remit the matter to the Registrar for referral to an AMS to assess the degree of permanent impairment of Mr Young's spine (cervical spine) and left upper extremity (left shoulder) as a result of injury on 23 January 2018.

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CONCLUSION

124. Mr Young suffered injuries to the cervical spine and the left shoulder arising out of or in the course of his employment with the respondent on 23 January 2018 within the meaning of sections 4(a) and 9A of the 1987 Act.

125. Mr Young has had a current work capacity from 25 November 2019 within the meaning of section 32A of the 1987 Act in suitable employment for 20 hours per week at $20.73 per hour, being $414.60 per week.

126. The respondent is to pay the applicant weekly compensation in respect of the injuries to the cervical spine and left shoulder on 23 January 2018 under section 37(3) of the 1987 Act in accordance with order 3 in the Certificate of Determination attached to this Statement of Reasons.

127. The respondent is to pay the applicant's reasonably necessary medical and related expenses as a result of injury on 23 January 2018 under section 60 of the 1987 Act.

128. The matter is remitted to the Registrar for referral to an AMS for assessment pursuant to the 1998 Act in accordance with orders 5 and 6 in the Certificate of Determination attached to this Statement of Reasons.