

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 2406/20  
**Applicant:** Canrui Chen  
**Respondent:** Skyscraper Interiors Pty Ltd  
**Date of Determination:** 28 July 2020  
**Citation:** [2020] NSWCC 255

The Commission determines:

1. Award for the respondent in relation to the alleged consequential condition to the applicant's left shoulder.

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

Josephine Bamber  
**Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. The Application to Resolve a Dispute (ARD) was amended, by consent, to add the words “on or about” to the date of injury and to add “scarring” to the claim for permanent impairment.
2. It is agreed that on or about 10 August 2018 Mr Canrui Chen, while in the course of employment with the respondent, sustained a laceration injury to his left wrist, hand and forearm when he was using an angle grinder.
3. In his ARD it is also alleged “As a result of his injuries, the Applicant was placed in a plaster sling. As a result of being placed in a plaster sling, the Applicant suffered consequential injury to his left shoulder.”
4. The respondent’s workers compensation insurer, Employers Mutual NSW Limited, issued a Notice under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) in which it denied “that the claimed consequential condition to your left shoulder resulted from your accepted injury as required by sections 4 and 9A of the *Workers Compensation Act 1987*.” However, the parties accept that the legal test to be applied is not that in sections 4 and 9A of the *Workers Compensation Act 1987* (the 1987 Act). It was acknowledged the legal test to be applied is one of causation as discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*<sup>1</sup>.
5. It is also accepted that if a finding is not made in Mr Chen’s favour in relation to the left shoulder condition, he otherwise does not pass the threshold in section 66 of the 1987 Act to have his lump sum claim referred for assessment of permanent impairment by an Approved Medical Specialist (AMS).

### PROCEDURE BEFORE THE COMMISSION

6. This matter was listed for conciliation conference/arbitration hearing on 25 June 2020 conducted by telephone. Mr Chen was in attendance as was Mr Lei Yang, Mandarin interpreter. Mr Ross Hanrahan, counsel, instructed by Mr Mahen Manokarathas, solicitor, appeared on behalf of Mr Chen. The respondent was represented by Mr Andrew Mulcahy, solicitor, and Caitlyn Malone from the insurer.
7. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

### EVIDENCE

#### Documentary Evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents;
  - (b) Reply and attached documents;

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<sup>1</sup> *Kooragang*

- (c) Application to Admit Late Documents filed on behalf of Mr Chen dated 17 June 2020 and the attached document; and
- (d) Application to Admit Late Documents filed on behalf of the respondent dated 18 June 2020 and the attached document.

### **Oral Evidence**

- 9. There was no oral evidence. The parties' legal representatives made oral submissions, which were sound recorded. A copy of the sound recording is available to the parties.

### **FINDINGS AND REASONS**

- 10. None of the treating medical, hospital or physiotherapy records refer to Mr Chen having symptoms in his left shoulder. The only diagnosis regarding the left shoulder is contained in the medico-legal report of Dr Bodel dated 21 August 2019, who was qualified to give an opinion on behalf of Mr Chen.
- 11. Mr Chen has provided two statements. In the first dated 1 May 2020, Mr Chen describes the accident at work. He says when he was using the handheld angle grinder the cutting disc grabbed and spun off at an angle cutting his left wrist and hand along the forearm. Mr Chen outlines his treatment by Dr Shi, his treating doctor, who cleaned up the cut and stitched it and referred him to have an MRI scan.
- 12. After the scan, Mr Chen attended Westmead Hospital on 14 August 2018, where he says he was seen in the Emergency Department and placed in a plaster sling. He says he was referred to Auburn Hospital, where on 16 August 2018, he underwent surgery. He then relates having physiotherapy and he describes the symptoms he had. At [14] and [15] he mentions having pain, swelling and tightness around the scar and mild numbness and intermittent pins and needles around his middle, ring and little fingers.
- 13. At [16]- [22] of his statement dated 1 May 2020, Mr Chen states that as a result of being put in a sling he began to experience symptoms in his left shoulder. He also says the symptoms in his left shoulder commenced not long after his surgery. He says treatments of his left shoulder were done at the same time when his physiotherapist treated his arm and when he moved on to the gym exercises for his arm he was also guided for shoulder exercises. He says he suffers from restriction in his left shoulder and he has difficulties lifting his left shoulder in a certain angle. He relates when taking a shower and driving for more than 30 minutes he experiences difficulties in his left shoulder and arm. He says he cannot carry anything heavy with his arm due to the pain and restrictions in his left arm and left shoulder. He also describes some ongoing restriction in his left wrist as well as some loss of feeling in his left arm.
- 14. In Mr Chen's further statement dated 17 June 2020, he says after being placed in a plaster sling at Westmead Hospital he remained in the sling for about four months. He says he began to develop pain symptoms in his left shoulder and left elbow in November 2018. He says the physiotherapist gave him exercises in relation to his left shoulder which he found beneficial, but her focus was on his left wrist. He says he did not complain to his doctor about his left shoulder symptoms as he assumed the symptoms would resolve in time and the focus was on his wrist. He says prior to the work injury he did not have any symptoms in his left shoulder or wrist<sup>2</sup>.

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<sup>2</sup> AALD 17 June 2020

## Physiotherapy records

15. The respondent has tendered an email exchange with Annie Leung from Handcare Physiotherapy with her advice that they have Mandarin speaking physiotherapists.
16. On 3 September 2018, Ms Leung reports to Dr Kubitsky and says she treated Mr Chen on 27 August 2018. She noted:
- “Treatment has consisted of dressing change, removal of sutures at week 2, scar massage, early active flexor tendon protocol exercises, education re. wound care, elevation, fulltime splint wear and gradual exercise progression as healing permits. I have instructed Canrui that he must not remove the splint to have a shower.<sup>3</sup>”
17. In report dated 2 October 2018 to Dr Kubitsky, Ms Leung states it is six weeks post-surgery and that Mr Chen reported intermittent pain along the volar forearm and middle/ring fingers and intermittent pins/needles in all fingers. He was also anxious regarding fluctuations in swelling, stiffness and pain<sup>4</sup>. Ms Leung says:
- “Treatment has consisted of scar massage, wear silicon at night, early active flexor tendon protocol exercises, passive wrist flexion and active extension to neutral, gentle gross grasp practice (in therapy only) and education re. fulltime splint wear and gradual exercise progression as healing permits. I have reassured him re. fluctuations in symptoms. Please advise re. splint wean.”
18. There is no mention of left shoulder problems or the wearing of a sling. Mention is made about wearing a splint.
19. Ms Leung reported to Dr Kubitsky on 30 October 2018, noting it was 10 weeks post-surgery. She records:
- “Left hand/wrist ROM and strength have improved. Canrui reports intermittent pain, fluctuations in swelling and tightness around his scar (ulnar/volar wrist) during wrist and finger motion. There is numbness and intermittent pins/needles (ulnar wrist to ring/little fingers). Canrui is anxious re. tendon rupture and needs lots of encouragement to persist with exercises and light functional use of the left hand despite pain. He tends to use the right hand with functional tasks because he feels the pain and fatigues too quickly.<sup>5</sup>”
20. There is no mention of the left shoulder.
21. Ms Leung completed an Allied Health Recovery Request No 3 dated 13 November 2018 in which she lists Mr Chen’s current signs and symptoms as follows:
1. Pain in left hand/wrist, especially when gripping and moving the wrist.
  2. Pins/needles and numbness in all of left hand and forearm
  3. Fluctuating swelling in left wrist and ring finger.
  4. Joint stiffness in left wrist and ring finger .. Left wrist AROM E/F 35/35.
  5. Scar firm, raised, somewhat adhered and tender on compression. Limits wrist/finger motion.
  6. Light functional use of left hand. Reliant on right hand for most functional activities.

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<sup>3</sup> ARD p 23.

<sup>4</sup> ARD p 22 and Reply p.14.

<sup>5</sup> ARD p 21.

7. Weakness. Grip strength (R)58kgF (L)2kgF. Can hold 1 /2 kg in left hand but fatigues quickly.<sup>6</sup>

22. On 23 November 2018, Ms Leung reported to Dr Kubitsky about Mr Chen's concerns, her examination findings and no mention is made of the left shoulder. Ms Leung records her treatment as follows:

"Treatment has consisted of warm soak, scar massage, wear silicon at night, fingers/wrist AROM exercises, wrist flexion stretches, functional grasp/pinch practice, wrist and hand strengthening exercises using exercise putty and 500g. I have encouraged Canrui to try to use the left hand in light functional tasks as much as tolerated."<sup>7</sup>

23. On 18 January 2019, Ms Leung reports to Dr Kubitsky:

"Treatment has consisted of warm soak, scar massage, wear silicon at night, fingers/wrist AROM exercises, wrist flexion stretches, functional grasp/pinch practice, hand/upper limb strengthening exercises using exercise putty, theraband and 1.5-2kg hand weights. I have encouraged Canrui to try to use the left hand in light functional tasks as much as tolerated.

Canrui's pre-injury duties require him to do frequent lifting of up to 50kg. He would probably benefit from seeing an exercise physiologist for a work hardening program. Canrui has been attending hand therapy once/fortnight."<sup>8</sup>

### Peak Conditioning

24. Peak Conditioning reported to the insurer on 30 August 2019<sup>9</sup>. They advised that Mr Chen attended a total of 16 Exercise Physiology sessions with Peak Conditioning and that he demonstrated high compliance, motivation and enthusiasm toward his rehabilitation and never missed appointments. It was noted that he presents "with ongoing pain in his left wrist, elbow and upper arm". He had a tremor like shake when performing lifting tasks and to a lesser degree at rest. There is no mention of the left shoulder.

### Dr Ho

25. Dr Ho is a pain specialist who reported to Dr Lei on 12 October 2019<sup>10</sup>. He makes no mention of left shoulder symptoms. On examination he found:

"Clinically

There is adequate bony alignment.

There is no sign of inflammation or synovitis.

Bilateral hand muscle bulk is symmetrical and no sign of muscle wasting

Neurological examination

- No significant negative sensory or motor sign
- Some mechanical allodynia
- Some spontaneous pain
- No superficial allodynia
- Some temporal summation"

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<sup>6</sup> Reply p 11.

<sup>7</sup> ARD p 20.

<sup>8</sup> ARD p 19 and Reply p 15.

<sup>9</sup> Reply p 16.

<sup>10</sup> Reply p 21.

## **Dr Bodel**

26. In Dr Bodel's report dated 21 August 2019, in his history, he records that Mr Chen was sent home from hospital in a splint. The doctor refers to the left shoulder under the heading "current complaints" wherein he states "[p]ain and stiffness in the region of the left shoulder as a consequence of being immobilised on a sling for such a long period of time".
27. In his examination findings, Dr Bodel records that Mr Chen has a full range of shoulder movement and rotation on the right side but a reduced range of shoulder movement on the left. He said there is impingement in the left shoulder but no instability.
28. In his diagnosis, Dr Bodel states that Mr Chen has rotator cuff pathology in the region of the left shoulder which is a consequential condition which occurred from the injury to the left wrist and hand. Unfortunately, Dr Bodel does not explain the basis of this diagnosis and in his report he does not indicate how long Mr Chen wore the sling for.

## **Dr Rimmer**

29. Dr Rimmer is an orthopaedic specialist engaged by the respondent who has provided a report dated 4 February 2020. He examined Mr Chen's left shoulder and found it was symmetrical in position with no evidence of periscapular muscle wasting. He stated that the examination of the left shoulder was normal. Dr Rimmer was asked for his opinion about Dr Bodel's opinion and he replied he had no opinion about it. He has provided a report dated 11 February 2020, which I do not need to summarise as it does not deal with the left shoulder.

## **Determination**

30. Mr Chen's counsel submits that Dr Bodel has used his expertise when diagnosing that the rotator cuff pathology in the region of the left shoulder has occurred from the injury to the left hand and wrist. Counsel then sought to "give more body to that opinion" by referring to the MRI scan of the forearm, however it does not deal with the shoulder. Counsel also read out the Hospital notes in detail, but these do not deal with the shoulder.
31. Counsel then referred to the physiotherapy records and submitted that because the physiotherapist recorded that Mr Chen needs lot of encouragement to persist with exercises and light functional use of the left hand despite pain, it can be inferred that Mr Chen was not using the left arm at all even for light functional use. Counsel then referred to the physiotherapist's report of 18 January 2019 and noted there was still moderate swelling of the volar wrist and mild swelling of the ring finger. It was submitted that this was five months post-injury and it should be concluded that there had been lengthy non-use of the injured limb in that period.
32. It was submitted by Mr Chen's counsel that because of such non-use the risk of abnormal consequences was real. However, the difficulty faced with this submission is that there is no medical opinion supporting it. Dr Bodel does not attribute pathology in the left shoulder to non-use.
33. Mr Chen's counsel discussed the evidence about the wearing of the sling, as described by Mr Chen in his statements. He conceded that the Hospital records only refer to a plaster cast, however, he submits that there is no doubt the arm was immobilised and after that and the surgery Mr Chen noticed symptoms in the shoulder. Counsel submitted that "the common-sense chain of circumstances that allow us to draw the conclusions that we may, that he continued to then have difficulties with lifting, using his shoulder, at a particular angle." It was submitted that he is stoic and did not complain to the doctor.

34. However, I find it implausible to accept that Mr Chen says the physiotherapist gave him exercises for his left shoulder and she would not have once recorded his symptoms with the shoulder. Her reports to the insurer and Dr Kubitsky are very detailed. Even if he is stoic, and thought his left shoulder would settle down and so he did not tell his doctor, one would expect he would have told the physiotherapist about his left shoulder.

35. A report from the physiotherapist would have been of assistance to clarify such an important matter and there is no report before the Commission from Dr Kubitsky. In the absence of such evidence, and the lack of reasoning in Dr Bodel's report, I am not persuaded that the applicant has discharged his onus of proof. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*<sup>11</sup> McDougall J stated at [44]:

“A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.”

36. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*<sup>12</sup> wherein Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that “[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate”. After referring to earlier English authorities, his Honour added (at 462E):

“Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act.”

37. His Honour said at 463–464:

“The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’, is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death ‘results from’ the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a *novus actus*. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death ‘resulted from’ the work injury which is impugned.”

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<sup>11</sup> [2008] NSWCA 246.

<sup>12</sup> (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*.

38. Deputy President Roche's decision in *Kumar v Royal Comfort Bedding Pty Ltd*<sup>13</sup> is authority for the proposition that *Kooragang* is the test to determine if a consequential condition arises from a work injury. Applying such principles to Mr Chen's case, I cannot find the requisite causal connection on the evidence before the Commission.
39. Mr Chen's counsel several times referred to using common-sense. However, while *Kooragang* referred to "common sense evaluation of the causal chain" it must also be borne in mind that Kirby P stated this in the context of the reference to "a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions". The problem in Mr Chen's case is three- fold. Firstly, the evidence about his wearing a sling is scant. He does not specify the type of sling he used, and the medical records do not refer to it. It is not even clear from the records how long he had a plaster cast in situ or a splint or a sling. This factual information surely could have been obtained from the physiotherapist who treated him post-surgery on many occasions. Secondly, a report could have been obtained from the physiotherapist confirming that shoulder exercises had been given to Mr Chen and the reason why they had been prescribed. Thirdly, armed with such information, a more detailed report could have been sought from Dr Bodel about the cause of the alleged left shoulder symptoms.
40. The situation facing the Commission is that a sound decision cannot be made because Dr Bodel offers no rationale in his report for his conclusion that there is a left shoulder consequential condition. Therefore, I find I cannot place weight on his conclusion.
41. Mr Chen's counsel's submissions progressed into discussing how "the parts which are injured are connected." He submitted:

"The origin of the flexor digitorum superficialis is at the medial epicondyle of the humerus, which is above, just above the elbow, and that whole section of his upper limb really, from the elbow to the wrist, is either immobilized or incapable of lifting any heavy weight. It makes sense, in my submission, on an ordinary common-sense basis, that the shoulder, being connected, intimately connected with those parts, most – and most proximate to those injured parts, is the first joint that would be affected, particularly in a man, we say, who would be vulnerable to that kind of complaint because of his history as a gyprock-plasterer.

Don't know whether you would have access to any SIRA information about this or whether it is notoriously well-known, but, certainly, it's not unusual, in my experience, to hear that workers in the constructions industry, particularly plasterers and painters, are those workers who are most affected by rotator-cuff injuries and pathology of that type.

And so in the fuller context we would say that the shoulder problems are a consequence of the events which have occurred following the injury, the severe injury to the left hand, and that there's been no interference with that causation, there's been no snapping of the chain, as President Kirby described in *Kooragang*, and that it makes sense, that these – this condition would occur from the occurrence of the hand injury, as Dr Bodel has confirmed with his expert observations in his clinical examination. Without having to spell it out in any mechanical or finer detail than that, it nevertheless discloses his reasoning in putting it in the context – putting the shoulder symptoms in the context of a hand injury."

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<sup>13</sup> [2012] NSWCCPD 8.



42. This type of submission, in my view, illustrates the problem with the evidence. It is for the medical expert, not counsel, to explain how the wearing of a sling could have caused left shoulder symptoms. Counsel at one point refers to the left arm having not been used and to Mr Chen being right hand dominant. These are not matters canvassed by Dr Bodel, let alone any anatomical connections discussed by counsel.
43. Mr Chen's counsel is critical of Dr Rimmer's opinion. However, it is not for the respondent to disprove Mr Chen's case. Mr Chen has the onus of proof. The respondent submitted that Mr Chen's counsel kept referring to the work of a gyprocker and inferred that Mr Chen had an underlying rotator cuff problem in the left shoulder which he had aggravated. It was submitted that is not the case that Mr Chen has brought in these proceedings.
44. The respondent referred to the list of payments and submitted there had been 25 consultations with the physiotherapist and yet in the material before the Commission there is not one mention of the left shoulder. The respondent also submitted that Mr Chen was able to tell bodies such as Peak Conditioning complaints he had in his arm and did not confine his history to just the laceration. It was submitted that he, therefore, could have communicated problems with his shoulder if he was suffering the same, and he did not.
45. In his submissions in reply Mr Chen's counsel sought to again elaborate on his anatomical argument stating:
- “the wrist bones connected to the elbow bone, and the elbow bones connected to the shoulder...I mean it just seems to be an ordinary observation of a connection between those body parts and that they will have ... a physical consequence in these circumstances.”
46. However, Dr Bodel does not assert that the laceration to the forearm has caused a rotator cuff injury to the left shoulder. Counsel then refers to Mr Chen having a “heavy plaster on his arm for three months”. There is absolutely no evidence that this was the case. In fact, the physiotherapist on 27 August 2018 stated that treatment consisted of dressing change, removal of sutures at week 2 and scar massage. This is not consistent with him wearing a plaster cast. This physiotherapy report refers to him needing to wear a splint and in the report of 2 October 2018, at six weeks after the surgery, Ms Leung was asking Dr Kubitsky to advise regarding the weaning of the splint. Therefore, it is unlikely Mr Chen wore a heavy plaster cast for three months as counsel submitted.
47. Mr Chen's counsel submitted that there has been no challenge to the truthfulness of Mr Chen's statements, so he does not understand why the respondent submits there is no corroborative evidence. However, as I have explained Mr Chen's statements do not clearly identify what type of sling he wore, at what time and for how long. These are important facts that need to be ascertained in a matter such as this given the way the case is framed in the ARD, based on the wearing of a sling.
48. I find the respondent's submissions to have force. For all of the reasons identified above, I find that Mr Chen has not discharged his onus of proof that he sustained a consequential left shoulder condition. Accordingly, I make an award for the respondent in relation to that allegation. Mr Chen's counsel conceded at the outset that the assessments of impairment, without the left shoulder, were not sufficient to pass the threshold in section 66 of the 1987 Act and so there cannot be a referral to an AMS.

