WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3043/19**
Applicant: **Victoria Schembri**
Respondent: **Blacktown City Council**
Date of Determination: **6 November 2019**
Citation: **[2019] NSWWCC 358**

The Commission determines:

1. I note the agreement of the parties that Ms Schembri suffers 5% permanent impairment as a result of the injury to her cervical spine.

2. I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment as a result of:

    (a) Injury to the lumbar spine, and
    (b) Injury to the left upper extremity (shoulder).

3. The agreed impairment in respect of the cervical spine should be combined with any assessments made as a result of order 2.

4. All of the material in the Commission's file should be sent to the Approved Medical Specialist, including a copy of the direction dated 4 September 2019 and these reasons.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Victoria Schembri was employed by Blacktown Council as a cleaner. Her duties required her, among other things, to clean office spaces, vacuum large areas, clean windows, scrub toilets and empty rubbish bins. On 5 July 2005 she suffered injury to her left shoulder, neck and back while scrubbing the disabled access ramp in the Council's rates department.

2. The Council does not dispute that Ms Schembri claims for permanent impairment compensation in respect of injuries to her lumbar spine and left upper extremity (shoulder) should be referred to an Approved Medical Specialist and the parties agree that Ms Schembri suffers 5% permanent impairment in respect of her cervical spine.

3. The dispute in these proceedings is whether or not Ms Schembri has suffered a consequential condition in her right shoulder.

PROCEDURE BEFORE THE COMMISSION

4. The matter was fixed for conciliation conference and arbitration hearing on 4 September 2019 when Mr Tanner of counsel appeared for Ms Schembri and Mr Saul of counsel appeared for the Council.

5. 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.

6. The arbitration did not conclude on 4 September. I made a direction on that day giving effect to the following agreed amendments to the Application to Resolve a Dispute (ARD):

    (a) to delete the claim for weekly compensation;
    (b) to delete any claim in respect of injury to the left and right upper extremities (wrists) as a result of carpel tunnel syndrome suffered on 1 January 2002;
    (c) in respect of the description of injury on 5 July 2005, to add "As a result of the injury to her left shoulder, the applicant developed a consequential condition in her right shoulder";
    (d) in respect of the claim for permanent impairment compensation:
        (i) to add, in respect of the injury on 5 July 2007 after "lumbar spine" the words "cervical spine, left upper extremity (shoulder) and right upper extremity (shoulder), and
        (ii) to delete the claim in respect of injury on 1 January 2002.

7. The arbitration concluded on 10 October 2019.

8. Ms Schembri was compensated in 2010 in respect of 5% whole person impairment (WPI) in respect of the injury to her cervical spine. During the hearing on 10 October, the parties agreed that Ms Schembri has not suffered any additional impairment in respect of her cervical spine and request that assessment of 5% should be combined with the other assessments made by the AMS. It is therefore not necessary to consider the submissions made with respect to the cervical spine injury.

EVIDENCE

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

    (a) ARD and attached documents;

    (b) Reply;

    (c) Ms Schembri's Applications to Admit Late Documents dated 9 and 14 August 2019, and

    (d) The Council's Application to Admit Late Documents dated 28 August 2019.

10. There was no oral evidence.

11. Ms Schembri claimed that she suffered injury in the form of right carpal tunnel syndrome in 2002. The claim was accepted by a letter dated 22 August 2017 and later disputed by a notice under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 28 September 2018. She underwent a right carpal tunnel release in 2016 and continues to suffer symptoms in both arms.

12. Ms Schembri provided a series of statements. The first is dated 11 November 2009 and she did not describe pain in her right shoulder though she did set out some of the activities she found difficult as a result of her left shoulder injury.

13. The second statement is dated 10 April 2019 and a series of handwritten annotations made it difficult to read. Ms Schembri said that she has pain in her shoulders and she set out the activities with which she has difficulty but she did not specifically describe the pain in her right shoulder or its onset.

14. Ms Schembri's final statement is dated 4 June 2019. She set out the subsequent employment she had undertaken but she described the work she undertook in very general terms. The work is not set out in chronological order but, when the dates are placed in order, the following history appears:

Cleanevent Australia Pty Ltd	1 November 2010 to 30 June 2013	"as a general cleaner on a casual basis on very selective and light duties"
The Trustee for Sydney Cleaning Trust	29 August 2013 to 20 November 2013	as above
Blacktown Workers Club	11 March 2015 to 4 August 2015	"as a general cleaner picking up glasses and wiping tables"
Cool Current Electrical Services Pty Ltd	15 April to 30 June 2015	"as a general cleaner on a casual basis on very selective and light duties
Cleanevent Australia Pty Ltd	1 July 2015 to 30 June 2016	as above
Code Blue Recruitment Pty Ltd	25 August 2015 to 30 June 2016	Packing CDs into boxes, without picking up boxes

Peduba Cleaning Services	April to 30 June 2017	"as a general cleaner on a casual basis on very selective and light duties

15. Ms Schembri said that she has heavily relied on her right shoulder for day to day tasks as a result of her left shoulder injury. She said that she was lying primarily on her right shoulder in bed but now suffered increased pain. She said that she has trouble moving her neck when she drives and that her arms and shoulders are in pain from holding the steering wheel. In her days to day tasks, she relies on her right arm when washing and putting away dishes and repetitive scrubbing causes pain in her right shoulder which radiates to her elbow. She carries groceries in her right hand which has aggravated her right shoulder pain. She said that she had suffered pain in her right shoulder due to over reliance when sweeping, hanging our clothes and as a result of cooking tasks, including chopping and stirring. She has difficulty washing her hair because it involves lifting her arms above shoulder height.

16. In summarising the medical evidence, I have omitted that which refers to Ms Schembri's carpal tunnel syndrome and low back except where that evidence touches on the complaints with respect to her shoulders.

17. Ms Schembri's general practitioner is Dr S Martin of Blacktown. Counsel did not take me to his reports and notes in detail. A referral to Dr Watson, neurologist, in 2007 in the ARD notes "chronic neck and bilateral trapezial fold pain esp with extension of neck – work related."

18. For the purpose of history only, the Council relied on the reports of Dr M Ellis, who had seen Ms Schembri for her for her solicitors in previous proceedings. Dr Ellis reported on 24 February 2009. He noted that she suffered neck pain spreading to her left shoulder and said "Her right shoulder and arm are not affected otherwise. She is right handed."

19. Ms Schembri commenced proceedings for permanent impairment compensation and was referred to Dr J M Harrison, Approved Medical Specialist (AMS) who prepared a Medical Assessment Certificate dated 2 June 2010. The AMS was asked to assess her lumbar spine, cervical spine and left upper extremity as a result of the injury on 5 July 2005. The AMS obtained the history that , for a couple of years before the frank injury, she had burning ad discomfort radiating from the base of the neck into both shoulders, particularly on the left. He recorded that her principal complaints were neck pain, left shoulder pain and the noises she hears in her neck. She suffered low back pain. Ms Schembri told the AMS that she managed the household cleaning slowly with the assistance of her daughters when she needs it.

20. The AMS diagnosed an injury to the neck with referred pain, particularly into her left shoulder and around the scapula. He considered that she had aggravated underlying degenerative changes in her neck and imaging confirmed that she had exacerbated pre-existing and widespread degenerate changes in her neck. He noted the diagnosis of carpal tunnel syndrome.

21. The AMS considered that the left shoulder impairment was properly rated with the cervical spine impairment and did not assess any permanent impairment. He assessed 5% permanent impairment in respect of her cervical spine and added 1% for the impact on the activities of daily living. He deducted one tenth under s 323 of the 1998 Act. He assessed Ms Schembri in DRE Lumbar category I, resulting in 0% permanent impairment.

22. Ms Schembri saw Dr G Mendelsohn, general surgeon and musculoskeletal consultant, at the request of her solicitors and he prepared a report dated 3 April 2018. He obtained a history of the onset of carpal tunnel syndrome in about 2001 and of an injury to Ms Schembri's neck, left shoulder and low back in 2005. He also recorded that since leaving Blacktown Council, Ms Schembri had worked on only one occasion being a work trial at Blacktown Workers Club. She had trouble performing those duties which required her to lift stacks of plates and the pins and needles in her hands became worse.

23. Dr Mendelsohn recorded that Ms Schembri had trouble sleeping because of neck and back pain. She had pain over the left and right sides of her neck, with the right worse than the left. She had left shoulder problems but her right side is now sorer than the left. He set out the tasks she finds difficult but did not explain which part of her body was affected, other than to say that she gets stiff in her shoulders, neck and back after driving for 30 minutes.

24. Dr Mendelsohn recorded his findings on examination, including limitation of movement in both shoulders. He said:

> "I believe that as Mrs Schembri has failed to improve after several years off work that there is unlikely to be a significant further improvement in her neck, low back and shoulders. In fact, she is having worsening problems, especially in the right shoulder which I believe is consequential upon reliance on the use of her right shoulder rather than the left because of the ongoing problems with capsulitis and rotator cuff injury t the left side. I believe she has developed capsulitis of her right shoulder as consequential injury to the problems with her left shoulder. As regards her left shoulder, as mentioned, I believe she has both capsulitis and a minor rotator cuff injury. With her neck and her low back, I believe the injuries here are of a soft nature aggravating pre-existing degenerative changes. The aggravation is, I believe, ongoing."

25. When discussing the outcome of the right carpal tunnel decompression which Ms Schembri underwent in 2016, Dr Mendelsohn said:

> "'Failure to respond positively to surgical decompression of her right median nerve. As it is now a little over 12 months since that surgery, further improvement here is unlikely. As regards her left median nerve, I am sure that her symptoms here are not normally significant enough to require surgical decompression, but in view of the fact that she is relying more on the left side because of ongoing problems with her right hand, that consideration should be given to decompression of the left median nerve. She has failed to respond to cortisone injections at this stage."

26. Dr Mendelsohn assessed 5% WPI in respect of Ms Schembri's cervical spine. He did not add a component for impact on the activities of daily living because he considered that those activities were limited by her shoulders rather than her neck. He made a deduction of one-tenth under s 323 but noted that rounding "restores the level of 5%". He assessed 5% WPI in respect of her lumbar spine, added 2% for the impact on the activities of daily living and deducted one-tenth under s 323. After rounding, the assessment in respect of her lumbar spine was 7% WPI. He assessed 13% upper extremity impairment or 8% WPI in respect of her left shoulder and 15% upper extremity impairment or 9% WPI in respect of her right shoulder.

27. Dr Mendelsohn prepared a supplementary report dated 23 November 2018. He was specifically asked to outline the activities "which our client performed in using the right shoulder which materially resulted in the development of this condition." He said:

> "I obtained a history of a direct injury in the Incident in July 2005 but certainly the nature and conditions of her work have therefore aggravated the situation. As I have already stated, I believe that the favouring of her left shoulder leading to over reliance of use of her right shoulder has been a consequential injury to that right shoulder injury.
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> The activities she performed using her right shoulder being the normal course of her work and home duties but the over reliance on that side has been basically doubling wear and tear on her right shoulder as a consequence of favouring the left side."

28. Dr Mendelsohn prepared a further report on 27 May 2019 after re-examining Ms Schembri. He recorded that she continues to have pain in her neck, back and both shoulders, the right being worse than the left. He obtained a history of the household tasks which she finds difficult, including that she carries only light shopping in her right hand. He noted that she is right handed.

29. On this occasion, Dr Mendelsohn read Ms Schembri's further statement in which she outlined subsequent work. He said:

> "In all of these periods of employment, she worked as a cleaner but the work in each situation appears to have been of a quite light nature. I asked her about her specific duties at each of these areas of employment and it certainly appears that all the cleaning she carried out in these positions after she left Blacktown City Council were of a much lighter nature and in only one did she do some light dust mopping and that was the last employment with Trustee for Sydney Cleaning Trust. In the other employment she did not do any mopping and most of her work just involved light dusting, wiping down surfaces, cleaning glasses and similar activities."

30. His diagnosis was "rotator cuff injury and capsulitis of the left shoulder and because of over-reliance on the other shoulder has consequently developed problems with capsulitis in the right shoulder." He said that the injury suffered at the Council was the "substantial, if not sole, contributing factor to her ongoing symptoms." With respect to the subsequent employment, he said:

> "I believe that other than temporary increase in her symptoms while carrying out any cleaning activities concerned, none of the work that she carried out with any of these employers was likely to accelerate, exacerbate or deteriorate any of her injuries other than a temporary increase in her symptoms while carrying out such activities."

31. The Council obtained a series of reports from Dr R Powell, orthopaedic surgeon, the first of which was dated 18 May 2017. He recorded that Ms Schembri had been aware of a gradual onset of neck and left shoulder pain over a period of several months. In July 2005, she turned quickly, developing neck pain radiating down her left arm. She was off work for one week before returning to work on light duties. She continued to work until 2009. He was told that the only subsequent employment was with Blacktown Workers Club for six months in 2015.

32. In his first report, Dr Powell recorded symptoms in Ms Schembri's cervical spine with pain radiating down the superior aspect of the left shoulder, aggravated by repetitive use of the left arm. Dr Powell examined both of Ms Schembri's shoulders and reviewed radiology of her cervical spine. His diagnosis was:

> "Ms Schembri is a 58 year old right hand dominant lady who was employed by Blacktown City Council between 1998 and 2009. She reported the insidious onset of neck and radiating left shoulder symptoms in 2005. She was diagnosed with multi level changes of cervical spondylosis. Management has been conservative. She remains symptomatic. Examination was characterised by mild tenderness and generalised restriction in range of motion with radicular symptoms but no clinical features of a radiculopathy."

33. Dr Powell assessed 5% WPI in respect of Ms Schembri's cervical spine. He said:

> "Ms Schembri reports radiating left upper limb symptoms. Examination of the shoulders revealed a bilateral restriction in range of motion which was more significant on the contra lateral side. Consequently there is no net assessable impairment of the upper limbs.

In relation to the lumbar spine, Ms Schembri did not complain of lower back symptoms and indicated that her claim was in relation to the cervical spine and shoulders."

34. Dr Powell's second report is dated 23 July 2018, following a re-examination. After confirming the history obtained and describing her neck condition, Dr Powell noted that there was no history of an injury involving her shoulders and said that the upper limb symptoms were considered non-verifiable radiological symptoms from her cervical spine. He said:

> "The first investigation of the left shoulder I am aware of was an MRI scan performed in 2017, almost 10 years after Ms Schembri worked at the Council. This was dated 26 October 2017 and demonstrated some minor AC joint degeneration, subacromial bursitis and a low grade partial thickness bursal surface tear of supraspinatus.
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> In relation to the right shoulder, Ms Schembri indicated symptoms developed in a gradual fashion over the past few years without any specific precipitating incident and have slowly worsened. She indicated she has discussed this with her local doctor and had a recent investigation, though this was not available for review and no reports were provided."

35. Ms Schembri reported that her neck condition had deteriorated. She had pain in both shoulders in a generalised fashion accompanied by a restricted range of motion. She had difficulty with overhead activities though could sleep on both sides. Dr Powell recorded his examination findings:

> "Reduced spontaneous movements of the upper limbs were noted. There was no obvious swelling or wasting. There was no focal tenderness to palpation around the shoulders. There was a mild restriction in range of motion with forward flexion 120°, extension 20°, abduction 120°, adduction 30° with normal internal and external rotation. She had grade 5 power of the rotator cuffs bilaterally and impingement tests were negative bilaterally. The shoulders were stable."

36. Dr Powell diagnosed mild rotator cuff pathology. He considered that her complaints in relation to the pathology in her cervical spine, upper limbs and lower back were reasonable, though she appeared pain focused. In response to a specific question, Dr Powell said that he did not consider that Ms Schembri suffered an injury to her right upper extremity on 5 July 2005. He noted that her main complaints at that time related to her cervical spine and left shoulder. He said:

> "It is noted that subsequent investigations did demonstrate evidence of significant multilevel degenerative changes within the cervical spine with bilateral foramina! narrowing more marked on the right side than the left side and I believe it is more likely that her radiating bilateral upper limb and shoulder symptoms represent referred pain rather than intrinsic pathology relating to a specific incident.
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> Today's examination did reveal evidence of bilateral restriction in range of motion of the shoulders and it is likely she now has some degenerative pathology in the rotator cuffs which is common with advancing age. Such changes have been demonstrated on the left side though I did not have access to any possible investigations performed on the right shoulder."

37. Dr Powell provided a further report dated 18 September 2018 in response to specific questions, including whether he agreed with the opinion of Dr Mendelsohn that Ms Schembri suffered her right shoulder condition as a result of favouring her left arm. He said:

> "I do not agree that Ms Schembri has suffered a "consequential injury". The compensated left shoulder injury essentially represents referred pain from the cervical spine condition. There is no evidence that she suffered a specific injury to the left shoulder, nor that there is any significant structural pathology within the left shoulder.

> There is no history of any specific injury to the right shoulder and any increase in load placed on the right shoulder on account of left shoulder symptoms would have been well within the physiological capabilities of a normal shoulder. The presence of degeneration within the rotator cuff with advancing age is a well documented phenomenon and there is no evidence that any right shoulder symptoms fall outside the expected presentation of age related or constitutional degenerative changes."

38. Dr Powell prepared a further report dated11 December 2018 relating solely to carpal tunnel syndrome.

39. The Council issued a notice under the former s 74 of the 1998 Act on 28 September 2018. The Council disputed that Ms Schembri was entitled to further lump sum compensation in respect of her neck and denied that she suffered a compensable injury to her lumbar spine and left and right shoulders on 5 July 2005.

40. The Council disputed that she suffered a compensable injury in the form of carpal tunnel syndrome on 1 January 2002 and disputed that it was the last causative employer in respect of that injury.

41. With respect to the right shoulder, the Council noted the medical reports including that of Dr Ellis in which Ms Schembri had denied right shoulder pain. It noted that Dr Martin had recorded burning severe pain and burning in her neck and both shoulders in 2006 and that Dr Harrison, the AMS, had recorded a history of symptoms in the base of the neck and both shoulders a couple of years before the injury in 2005. It noted the reports of Dr Powell and the opinion of Dr Ramachandran that Ms Schembri suffered chronic axial cervical spinal pain with somatic referred bilateral shoulder pain and chronic rotator cuff injury.

SUBMISSIONS

42. The parties spent a long time in negotiation and conciliation on the first arbitration date. That served to narrow the issues so that the submissions were, in the end, quite short. Both counsel addressed on issues which were ultimately resolved so that it is not necessary to summarise those submissions.

43. Mr Tanner said that the dispute notice dated 28 September 2018 dealt with the consequences of the 2005 injury and the carpal tunnel syndrome in different ways. The Council alleged that the subsequent work which Ms Schembri undertook contributed to the carpal tunnel syndrome so that it was not the last relevant employer. It did not make the same argument with respect to the cervical spine, lumbar spine and left shoulder injuries.

44. Mr Tanner submitted that there was evidence that Ms Schembri suffered a consequential condition in her right shoulder. There were clear complaints documented by her general practitioner, Dr Martin, in respect of the injuries to her cervical and lumbar spines and left shoulder. The clear complaints were the subject of a report by Dr M Ellis and a referral to the AMS.

45. Mr Tanner said that Ms Schembri's 2019 statement showed that, in protecting her left shoulder, she placed additional strain on her right. The right shoulder condition arose because she lay on her right side in bed and because she was required to place more strain on it in the performance of her daily tasks. It was common sense, Mr Tanner said, that Ms Schembri would place an extra load on her right arm in performing tasks such as shopping, sweeping, hanging clothes and cooking. This was no different to countless similar applications in the Commission.

46. Mr Saul said that Ms Schembri was required to prove that the left shoulder injury materially contributed to her right shoulder condition. He said that, on the medical evidence (and in particular the report of Drs Mendelsohn and Dr Powell) I would not be persuaded that the right shoulder condition was a consequence of the left shoulder injury. He stressed Dr Powell's opinion that the pain in Ms Schembri's right shoulder was referred pain from her neck.

47. Mr Saul noted that Ms Schembri had undertaken some subsequent employment and said that it beggared belief that she would not have used both arms in that employment. The right shoulder capsulitis was likely to be the result of that subsequent employment. Dr Mendelsohn's opinion was that Ms Schembri's injury was a disease.

48. It appeared, he said, that the right shoulder condition did not arise for several years after the 2005 injury and there were no complaints to Dr Ellis in 2009, Dr Stephen in early 2010 or the AMS in mid 2010. He said that the question of time was relevant to determining whether the right shoulder condition was a consequence of the left and that even if there was some contribution, it was not a material contribution.

49. In reply, Mr Tanner said that Dr Powell's opinions were not persuasive because his opinions were all assertions - his opinion that the right shoulder pain was referred from the cervical spine was a bare ipse dixit. His opinion that there was no injury to Ms Schembri's left shoulder was irrelevant because the injury was not disputed and his findings with respect to her right shoulder had been made without reference to the facts in her statement. Mr Tanner said that I would prefer the evidence of Dr Mendelsohn and that Dr Powell's opinion was misconceived.

50. Mr Tanner submitted that Ms Schembri's subsequent employment was irrelevant because of the undisputed injuries in 2005. There was no medical evidence which showed that the increase in Ms Schembri's permanent impairment was related to her subsequent employment.

FINDINGS AND REASONS

51. The Council conceded on the second day of the arbitration hearing that Ms Schembri suffered injuries to her cervical and lumbar spines and left shoulder on 5 July 2007. The only issue is whether she suffered a consequential condition in her right shoulder. Her case is that the condition in her right shoulder is a result of the additional strain she placed on her right shoulder as a result of injury to her left shoulder.

52. In *Kooragang Cement Pty Limited v Bates*[1] Kirby P said:

> "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 death of 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 commonsense 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

[1] (1994) 35 NSWLR 452.

> 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."

53. Roche DP considered the principles in *Kumar v Royal Comfort Bedding Pty Ltd*[2] a case concerning the need for surgery as a result of a consequential condition. The Deputy President said:

> "Dr Wallace consistently focused (as did the Arbitrator) on whether Mr Kumar had "suffered any work-related injury" to his right shoulder and whether employment was a substantial contributing factor to that injury, rather than the correct question of whether the right shoulder symptoms had resulted from the back injury. When he briefly considered Dr Di Mascio's evidence that the right shoulder became symptomatic when he tried to mobilise himself after the back surgery, Dr Wallace dismissed that suggestion because such activities would not be consistent with the cause of 'significant right shoulder pathology'.
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> …
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> While Mr Kumar's evidence is less than ideal …, his evidence of experiencing a lot of pain in his right shoulder having to lift himself after his back surgery is unchallenged and not implausible. His symptoms were sufficient for him to seek medical treatment. Dr Di Mascio and Dr Ireland were satisfied that an aggravation had occurred in the manner alleged by Mr Kumar. In these circumstances, and given that Dr Wallace did not address the proper question, the compelling conclusion is that Mr Kumar's right shoulder symptoms in June 2010 resulted from his accepted back injury."

54. I do not doubt that Ms Schembri suffers considerable pain in her right shoulder. There are a number of possible causes disclosed by the evidence. Ms Schembri's statement and the evidence of Dr Mendelsohn does not allow me to draw the conclusion that her right shoulder condition is a result of her left shoulder injury.

55. Ms Schembri's evidence in her statement dated 4 June 2019 is generalised and was prepared to deal with the claim as originally formulated, before the amendment to delete the claim in respect of carpal tunnel syndrome. She did not identify when she first suffered problems in her right shoulder.

56. Paragraph 11 of the statement sets out the matters which she considers led to her right shoulder condition. It is noteworthy that Ms Schembri is right handed. The tasks on which Ms Schembri relies include sleeping on her right side, driving and "day to day tasks." Ms Schembri's evidence about driving refers to both of her arms and shoulders. In paragraph 11(iii) she said that she had to change to an automatic car but said that was because she found it difficult to change gears with her left hand.

57. Ms Schembri identified dishwashing and reaching to cupboards to put away dishes and sweeping but said that she avoided sweeping because of her chronic pain. She lowered the clothes line to avoid reaching above her shoulders and said that she used only her right arm, suffering pain as a result of reaching above shoulder height. She found that cooking, particularly chopping and stirring activates pain in her right shoulder. She has difficulty washing and dying her hair because she cannot lift her arms.

[2] [2012] NSWWCCPD 8.

58. Mr Tanner said that it was common sense that Ms Schembri would place greater reliance on her right shoulder as a result of her left shoulder injury and that the matter was similar to others in the Commission. This matter is different to many of those other matters in that Ms Schembri has bilateral carpal tunnel syndrome as well as a left shoulder injury. She is also right handed and might be expected to perform many household tasks with her right arm.

59. The relevant principles of onus of proof were discussed by the Court of Appeal in *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd*[3] (*Nguyen*) where McDougall J (McColl and Bell JJA agreeing) said 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.'"

60. While an injury or condition can have multiple causes[4], there is insufficient evidence to draw the conclusion (or feel an actual persuasion) that the tasks about which Ms Schembri complains are difficult because of a right shoulder condition and that she has suffered a right shoulder condition which was the result of the accepted left shoulder injury.

61. Mr Tanner said that the opinion of Dr Powell with respect to Ms Schembri's right shoulder condition was an ipse dixit. In *South Western Sydney Area Health Service v Edmonds*[5] McColl JA said:

> "In *Hevi Lift (PNG) Ltd v Etherington* at [84] I said (Mason P and Beazley JA agreeing) that "[a] court should not act upon an expert opinion the basis for which is not explained by the witness expressing it*".* In so saying, I referred with approval (inter alia) to Heydon JA's analysis of the admissibility of expert evidence in *Makita (Australia) Pty Limited v Sprowles* (at [59] – [82]). In that case (at [59]) Heydon JA cited with apparent approval Lord President Cooper's statement in *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh* (1953) SC 34 at 39-40 that:
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> > "… the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert."
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> This statement is apposite in the context of Commission hearings, and, indeed, is implicitly recognised in r 70. While it must be recognised that "[t]here is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission and decisions whether to allow cross-examination or to limit it are discretionary" (*Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng* [2006] NSWCA 34 at [37]), the fact that cross-examination of an expert witness may be permitted indicates the desirability of expert reports conforming as far as possible to common law standards of admissibility designed to ensure they have probative value. Even if that is too stringent an approach in the face of s 354, as the rules recognise, evidence must be "logical and probative" and "unqualified opinions are unacceptable".
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> In my view Dr Rivett's statement that "in general all the problems are work-related" which the Arbitrator accepted in concluding that the respondent's duties were sufficient to cause her injury (apparently within the meaning of s 16) amounted to a bare ipse dixit. It was not probative of the issue before the Arbitrator."

[3] [2008] NSWCA 246.
[4] *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 and the cases cites at [57].
[5] [2007] NSWCA 16 at [130]-[132]

62. Ms Schembri relied on the evidence of Dr Mendelsohn but his evidence with respect to the causation of the right shoulder condition is limited. He said that she had right shoulder problems as a result of reliance on the right shoulder rather than the left. Somewhat inconsistently, he said that Ms Schembri was relying on her right side because of ongoing problems with her left hand. His discussion of the impact of the injuries on Ms Schembri's activities of daily living was general.

63. When specifically asked to outline the relevant activities which contributed to the development of the right shoulder condition, Dr Mendelsohn's response was general and he did not outline any tasks other than to say that her work and home tasks had doubled the wear and tear on her right shoulder.

64. In his final report, Dr Mendelsohn said that the causation of capsulitis in the right shoulder was a result of over-reliance. Though he repeated that conclusion in later reports, he did not disclose his reasoning process and his opinion with respect to the causation of the right shoulder condition is a "bare ipse dixit."

65. Dr Powell, on the other hand, did disclose his reasoning process by reference to the radiological studies of Ms Schembri's cervical spine. His opinion that the pain in her shoulders is a result of degenerative changes observed on the investigations of her cervical spine. That opinion is consistent with that of the AMS, Dr Harrison in 2010. Dr Powell considered Ms Schembri suffered age related capsulitis in both shoulders. He considered that the tasks about which Ms Schembri complained would not have been within the physiological capacity of a normal shoulder.

66. I am not satisfied that the cause of the condition in Ms Schembri's right shoulder is a consequence of the accepted left shoulder injury.

67. As the injuries to the cervical spine, lumbar spine and left shoulder on 5 July 2005 are not disputed, it is not necessary to consider any role of subsequent employment in the causation of those injuries.

68. I make the following orders:

    (a) I note the agreement of the parties that Ms Schembri suffers 5% permanent impairment as a result of the injury to her cervical spine;

    (b) I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment as a result of:

        (i) Injury to the lumbar spine, and
        (ii) Injury to the left upper extremity (shoulder).

    (c) The agreed impairment in respect of the cervical spine should be combined with any assessments made as a result of the above paragraph.

    (d) All of the material in the Commission's file should be sent to the AMS, including a copy of the direction dated 4 September 2019 and these reasons.