Workers Compensation Commission

Certificate of Determination

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

Matter number: **335/20**
Applicant: **Bassam Ghanem**
Respondent: **Dan Kitchen Australia Pty Limited**
Date of determination: **13 May 2020**
Citation: **[2020] NSWWCC 151**

The commission determines:

1. On and before 23 May 2018 the applicant suffered injury to his low back arising out of and in the course of his employment.

2. As a result of that injury the applicant suffered a consequential medical condition namely an aggravation of a pre-existing degenerative condition of his left shoulder on 16 December 2018.

3. As a result of that aggravation it is reasonably necessary that the applicant undergo the arthroscopic surgery to the left shoulder proposed by Dr Kuo.

4. Order the respondent to pay the costs of and incidental to that surgery in accordance with section 60 of the *Workers Compensation Act 1987*.

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

Paul Sweeney
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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

Statement of Reasons

1. For some time, Bassam Ghanem (the applicant) has experienced pain in his low back and left shoulder. His employer, Dan Kitchen Australia Pty Limited (the respondent), accepts that his back pain results from injury arising out of and in the course of his employment on and before 23 May 2018. It does not, however, accept liability in respect of the condition of the applicant's left shoulder.

2. Dr Kuo, an orthopaedic surgeon, who has treated the applicant, has recommended that he undergo an arthroscopic subacromial decompression of the left shoulder with a view to alleviating his pain. The respondent has denied liability for the cost of this surgery.

3. The applicant asserts that he suffered a fall onto his left arm at home on 16 December 2018, which was consequential on the condition of his back. He says that his leg gave way while he was ascending external stairs because of his accepted back injury. Thus, the need for shoulder surgery results from the back injury. The respondent disputes that the applicant's back injury caused or materially contributed to this fall or that he injured his left shoulder in the fall.

Procedure before the commission

4. By these proceedings, the applicant claims the cost of surgery proposed by Dr Kuo pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act). When the matter came on for conciliation and arbitration on 22 April 2020, Mr Horan, of counsel, appeared for the applicant and Ms Goodman, of counsel, appeared for the respondent. During the conciliation conference, Mr Horan amended the Application to Resolve a Dispute (ARD) to delete the allegation of injury to the left shoulder "from performing heavy repetitive physical work in the construction of kitchens" for the respondent. The only remaining allegation of injury is that of:

> "consequential injury to left shoulder when sciatic symptoms caused leg to give way and the applicant to fall on the concrete stairs."

5. I was informed by counsel that the parties were unable to resolve the threshold question of whether there was a sufficient causal nexus between the applicant's back injury and the need for surgery of his left shoulder. I am satisfied that the parties had ample opportunity to consider resolution but have been unable to formulate any mutually acceptable outcome of the dispute.

Evidence

Documentary evidence

6. The following documents were admitted into evidence in these proceedings:

    (a) The ARD and the documents attached;
    (b) The Reply and the documents attached;
    (c) An Application to Admit Late Documents dated 16 April 2020 save for the statements attached to the factual investigation report of AB Investigations bearing date 30 March 2020.

7. At the arbitration hearing, Ms Goodman sought to tender the entirety of the report of AB Investigations including the statements and annexures. Mr Horan objected to the tender. I rejected the tender of the statement evidence and any references to the statements in the investigation report. This evidence had not been foreshadowed by the respondent at the telephone conference in the matter. More importantly, on my cursory reading of the report, the statements had no relevance to the question of whether an accepted low back injury caused the applicant to fall and injure his left shoulder in December 2018.

8. Rather, the witnesses interviewed by the investigator gave evidence which was completely inconsistent with the applicant having sustained a back injury during the course of his employment. That is contrary to the issues in dispute raised in the s 78 notice in this matter and confirmed at the telephone conference. It is difficult, if not impossible, to give weight to evidence which asserts that a worker did not suffer an injury where it is conceded in the s 74 notice and the pleadings that he did.

9. It is true, as Ms Goodman submitted, that aspects of the investigation report may have gone to the reliability of the applicant. In my opinion, however, the lateness of the document seriously compromised the applicant's ability to obtain and tender evidence which might refute the evidence contained in the report or rehabilitate him from any adverse inference drawn from that evidence. Ultimately, the interest of justice weighed heavily against the receipt into evidence of the statements at this late stage in the matter.

10. It is the duty of an insurer to investigate liability issues prior to the payment of compensation or, at the latest, prior to the issue of a section 78 notice. Factual reports served unexpectedly two weeks prior to an arbitration hearing are likely to be rejected, both because they are prejudicial and because to admit new evidence is likely to result in an adjournment of the matter, undermining the capacity of the commission to fulfil its function of providing expeditious determinations of workers compensation disputes.

11. There was no application by either party to adduce oral evidence at the arbitration hearing and neither party sought to adduce further written evidence.

Submissions

12. The submissions of the parties are recorded, and I do not propose to reiterate each of the arguments of counsel in these short reasons. I will refer to the general thrust of these arguments in attempting to resolve the issues in dispute below. It is important to note, however, that Ms Goodman did attack the reliability of the applicant. She argued that the contemporaneous evidence following the applicant's fall on 16 December 2018 was inconsistent with him falling because his leg gave way and inconsistent with him injuring his left shoulder in the fall. She also relied upon the opinion of the respondent's IME, Dr Nair, who stated that it was not plausible that the applicant's back injury caused his leg to give way on 16 December 2018.

13. Mr Horan submitted that, contrary to Ms Goodman's submission, there was contemporaneous evidence which corroborated both the nature of the applicant's fall and that he injured his left shoulder on 16 December 2018. He submitted that it was not difficult to conclude that the applicant had fallen because of his back injury, when the circumstances surrounding the incident were properly understood. He also submitted that the opinion of Dr Kuo, the treating orthopaedic surgeon, that the applicant fell because of "instability" was preferable to the opinion expressed by Dr Nair.

14. Prior to attempting to resolve the issues in dispute, it is necessary to briefly consider the terse evidence of the applicant, the contemporaneous medical evidence from the Healthsmart medical centre at High Street, Penrith and the applicant's treating neurosurgeon. What follows is not intended to be a comprehensive survey of all this evidence. Rather, I set out the salient points so that the submissions of the parties and the way in which the commission has resolved the dispute can be understood.

The applicant

15. By a signed statement, dated 22 November 2019, the applicant says that he commenced work with the respondent in 2014, as a spray painter. He says that his work was arduous. He was required:

> "To sand back and smooth all the edges of the kitchen surfaces including cupboards, bench tops and the like. We would have to apply an undercoat using a spray gun. This is a very physical job. In regard to sanding, there has to be a lot of pressure applied with using the sander and smoothing out the corners and sharp edges as well as a lot of bending, twisting and squatting into awkward positions to properly sand".

16. The applicant says that spraying the undercoat was also "physically demanding" and required bending, squatting and twisting into awkward positions. It also necessitated the physical manipulation of doors surfaces and other components of the kitchens, which had to be "moved around and lifted". He says that this was "extremely heavy work on my whole body, particularly my lower back."

17. The applicant says that he ceased work on 23 May 2018. Prior to that time, he was complaining to his boss, Van Madson, "about my back and shoulder". He says that his boss took him to the medical centre at old Toongabbie, where a general practitioner organised scans. He says he was told:

> "I needed to have a couple of weeks off work to let my shoulder injury recover and also my lower back injury."

18. The applicant says that the respondent did not accede to the doctor's request and asked him to continue working. He did so up until 23 May 2018 "when I could no longer cope with the pain in my shoulder and back."

19. The applicant says that he came under the care of Dr Abbas, who certified him unfit for work, organised further scans and referred him to Dr Al Khawaja, a neurosurgeon. The applicant continues:

> "I saw Dr Al Khawaja about my back pain and shoulder pain and he was more concerned at that point in time, despite my significant back injury, he was of the view that my shoulder injury needed to be treated first"

20. The applicant says that by reason of restrictions caused by back and shoulder pain he has "gained at least 15kgs". Dr Abbas has sought approval for the applicant to undergo bariatric surgery from the respondent's insurer, but it has not been forthcoming.

21. The applicant records that he has seen Dr Kuo, who has advised surgery of his left shoulder. He says this:

> "My left shoulder has been sore as a result of the nature and conditions of my employment with dan kitchen. I complained about this with my very first consult with my general practitioner at old Toongabbie.
>
> This shoulder injury was made significantly worse on 16 December 2018 when I was climbing the outside stairs, which are made of concrete, my leg gave way and caused me to fall on my left side and also hitting my head. I still have a scar on the top of my head as a result of this fall and my left shoulder was significantly hurt."

Healthsmart medical centre

22. The applicant has attended the Healthsmart medical centre at Penrith since, at least, 24 November 2009 and has complained of a variety of medical conditions consistent with his age and habitus.

23. On 27 July 2010, he complained to Dr Younis of left shoulder pain. It was recorded that he had a restricted range of movement of the shoulder. There is no further relevant entry until 17 June 2013. On that day, the applicant complained to Dr Abdullah of left shoulder, arm elbow pain after four days of heavy lifting. On this occasion, the applicant was referred for an ultrasound of his left shoulder, arm and elbow. It appears that he was referred to physiotherapy and there was some improvement in his condition.

24. On 19 July 2013, Dr Abdullah recorded that the applicant "still get a residual pain on the LT shoulder".

25. On 28 January 2016, Dr Abbas recorded that the applicant had left shoulder "tendon strain and impingement, following injury at work". He was referred for an x-ray and an ultrasound of the left shoulder. On the same day, Mr Khairallah, a physiotherapist, recorded that the applicant had residual left shoulder pain "after lifting something above head height at work".

26. On 3 February 2016, Dr Al-Janabi recorded that the applicant's ultrasound demonstrated "tendonitis". The doctor also recorded that the patient "does not want to get steroid inj now".

27. On 9 February 2016, the physiotherapist, Mr Khairallah, recorded that the applicant had "felt good for three days" but then lifted a heavy panel at work and his shoulder pain "flared up".

28. On 27 May 2016, the applicant reported to Ms Joseph, a physiotherapist, that he had a return of left shoulder pain for one month aggravated by heavy lifting at work. On 3 June 2016, she recorded that the shoulder pain persists and that the applicant "has not been able to avoid lifting".

29. Thereafter, the applicant saw Mr Joseph on several occasions for physiotherapy of persisting left shoulder pain.

30. On 18 August 2016, Dr Abbas recorded that the applicant had "back and shoulder pain, getting better with physio".

31. On 7 August 2017, the applicant complained of left arm pain to Dr Rogerson, who tentatively suggested that the applicant may have left lateral epicondylitis.

32. On 21 August 2017, Dr Abbas recorded that the applicant had "shoulder pain left side". He also recorded this:

> "6 weeks now following injury, was reaching out and felt a pop".

The doctor diagnosed impingement syndrome with tear or tendonitis. He prescribed analgesia and considered that a further ultrasound may be necessary.

33. On 13 September 2017, a physiotherapist at the High Street practice, recorded that the applicant presented with "lower back pain with radiculopathy". On 20 September 2017, the same physiotherapist recorded that the applicant's low back pain had persisted and that he was:

> "doing repetitive strain job-lifting furniture, long hours".

34. On 23 May 2018, Dr Mansouri recorded that the applicant had ultrasound heat therapy for his lower back. On 28 May 2018, Dr Abbas recorded that the applicant had low back pain "going down the leg". His range of movement on clinical examination was "limited by pain". There follows several consultations at which Dr Abbas chartered the progression of the applicant's back pain.

35. On 17 December 2018, Dr Abbas saw the applicant in respect of his left wrist after he “fell”. He recorded that the applicant did not have an obvious fracture.

36. On 20 December 2018, Dr Abbas issued a certificate of capacity which includes the following relevant history:

> “Fell on 16/12/18 when back spasm after cutting grass injured left wrist and shoulder muscle and tendon, x-ray ok, referral for new us.”

37. That is the first reference to shoulder pain in the series of certificates of capacity issued by Dr Abbas. It is repeated in subsequent certificates issued by the doctor. In February, the doctor also recorded that the applicant needed to see Dr Kuo in respect of his shoulder pain.

38. On 12 February 2019, Dr Abbas recorded that the applicant had neck and shoulder pain on his left side. Once again, he recorded that:

> “6 weeks now following an injury, was reaching out and felt a pop”.

39. On 22 February 2019, Dr Abbas noted that 10 weeks following an injury, when he fell on left side, the patient had loss of movement and an inability to adduct his left shoulder.

Dr Khalid

40. On 16 December 2018, the applicant saw Dr Ferdous Khalid who recorded that he had tripped and fell on his left wrist and hand. He noted no deformity in the hand but tenderness at the wrist. He stated that the reason for the applicant's visit was “wrist pain”. He requested imaging of the applicant's wrist and left hand.

Dr Al Khawaja

41. Dr Al Khawaja, a neurosurgeon, first saw the applicant at the request of Dr Abbas on 8 December 2018. He records that the applicant experienced severe low back pain when lifting heavy objects during his work as a spray painter. He noted that the applicant was overweight and that there were “no major neurological deficits”. He expressed the opinion that an MRI of the lumbar spine showed a “disc injury at l3\4 level”. He recommended “weight loss, a gym program and a lumbar epidural block”. He said that he was happy to see the applicant “in six months’ time after he follows the instructions and I will update with you the outcome”.

42. On 13 February 2019, Dr Al Khawaja performed a lumbar epidural block. On 31 May 2019, Dr Al Khawaja noted that the applicant was depressed “because of his severe pains”. He recorded that the injection had not helped him a great deal. He referred him to the pain team as he thought that it was appropriate that the applicant be reviewed by a psychologist.

43. On 11 September 2019, Dr Al Khawaja saw the applicant again. He thought that he should start a gym program. He recommended a further epidural block.

Discussion and findings

44. As Ms Goodman argued, there are aspects of the evidence which give rise to doubt about the applicant’s reliability. By his statement, the applicant implies that he complained to Dr Abbas in respect of his shoulder after ceasing work on 23 May 2018. He says that Dr Abbas “organised for me to undergo further scans on my back and shoulder”. While the applicant has a long history of left shoulder problems dating back to well before his commencement of employment with the respondent, there is no record of a complaint of left shoulder pain to Dr Abbas between the cessation of the applicant's employment and the fall at home on 16 December 2018.

45. It should be noted, however, that the applicant asserts that he was taken by his employer to a medical practitioner at the Old Toongabbie medical centre, shortly before the cessation of his employment, who organised scans of his shoulder. The applicant may have mistaken which doctor organised his shoulder scan. This may explain the inconsistency between his account of what happened and the clinical record of Dr Abbas.

46. Similarly, the applicant says that when he came under the care of Dr Al Khawaja, he complained to him of left shoulder pain in addition to back pain. Dr Al Khawaja's short serial reports make no reference to a complaint of shoulder pain. This is unsurprising, as it is unlikely that Dr Abbas referred the applicant to a neurosurgeon for treatment of his shoulder pain. Thus, if the applicant mentioned shoulder pain to Dr Al Khawaja, it is unlikely to have been important in the doctor's consideration of the applicant's health and may not have been recorded for that reason.

47. At the arbitration hearing, I was struck by the fact that the medical histories recorded by the respective orthopaedic surgeons who provided reports to each of the parties had an inadequate history, or no history, of the long clinical record of shoulder pain. Dr New's history was fuller and, possibly, more accurate than that recorded by Dr Nair. On reflection, however, I concluded that it would be unfair to impugn the applicant's credit when it was unclear what questions he had been asked about his previous shoulder symptoms at the respective consultations.

48. Thus, while there is an evidentiary basis to criticise the inconsistencies between the applicant's evidence and the chronology of shoulder pain which appears in the clinical record, there is a plausible explanation of the alleged inconsistency in each case. In the circumstances, I am not inclined to the view that the applicant's evidence is unreliable particularly when he was not cross-examined at the arbitration hearing.

49. I note that many of the entries relating to left shoulder pain in the notes of the High Street practice attribute the applicant's left shoulder symptoms to the performance of his work duties. During much of that time, he was employed by the respondent. That is consistent with the applicant's statement evidence of having difficulties at work with his left shoulder before he ceased work in 2018.

50. The respondent's attack on the occurrence of a left shoulder injury on 16 December 2018, is predicated on the assumption that no complaint was made of shoulder pain to any medical practitioner until 20 February 2019. It is true that when the applicant saw Dr Khalid at his home on the evening of 16 December 2018, he apparently made no complaint of pain in his left shoulder. Perhaps, it is more accurate to state that the doctor made no reference to a complaint of shoulder pain in his note of the consultation. On the evidence, however, it is not possible to be satisfied that a complaint was made.

51. Further, the notes of the Health Smart medical practice do not record a history of left shoulder injury on 16 December 2018 at consultations on 17 December or 20 December 2018. While the applicant attended this practice on several occasions, following the consultation on 20 December 2018, there is no reference to a shoulder problem until the note of 12 February 2019. At that time, Dr Abbas requested an ultrasound of the applicant's left shoulder. As far as I can ascertain, this was the first investigation specifically directed to the left shoulder requested by a medical practitioner at that practice following the alleged injury of 16 December 2018.

52. Standing alone, the absence of a recorded complaint of injury in the clinical notes of the general practitioner would cast considerable doubt on the assertion that the applicant injured his left shoulder in the incident alleged on 16 December 2018. That doubt is largely extinguished, in my opinion, by the full account of the incident recorded by Dr Abbas in his medical certificate of 20 December 2018. To reiterate; in that certificate, which was prepared in the days following the incident, the doctor clearly records that the applicant injured his shoulder on 16 December 2018. I accept this as a reasonably accurate record of the incident.

53. Ms Goodman argued that the discrepancy between the doctor's clinical notes and the certificate was a significant forensic flaw in the applicant's case. She submitted that it was incumbent upon the applicant to explain the inconsistency by obtaining a comprehensive report from Dr Abbas or by leading additional evidence to cure the deficiency. I do not accept that argument. In accordance with the instruction of the Court of Appeal in *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 (26 February 2004), caution must be exercised when considering the clinical record of medical practitioners. They are not prepared for forensic purposes. It is to be expected that there will be inconsistencies and blemishes.

54. In my opinion, the history in the certificate of 20 December 2018, is clear corroboration of the applicant's evidence that he hurt his left shoulder when he fell on an external staircase at his home on the evening of 16 December 2018. To reject the evidence in the doctor's certificate would require a finding that the doctor made up the history contained in his medical certificate of 20 December 2018. There are many reasons why such a finding is not available. Not least, is the fact that if such an argument was to be made, it would be necessary to put it to the doctor. As far as I can recollect, however, I was referred to no evidence to suggest that this medical certificate was inaccurate, other than the absence of a similar history in the clinical notes.

55. Ms Goodman also submitted that Dr Khalid's recording of a trip in his note of 16 December 2018 is not consistent with the applicant falling because of pain in his back and leg. There is obviously some force in this argument and if not for the fuller and more detailed history recorded by Dr Abbas two days later it may be fatal to the applicant's case. In the context of the medical certificate of Dr Abbas, however, it can be explained as an inaccurate record by the doctor, possibly as a consequence of doctor and patient concentrating on treatment rather than the precise mechanism of injury.

56. The respondent's primary defence on the causation issue is based upon the opinion of Dr Nair, an orthopaedic surgeon, who saw the applicant at the request of the respondent's insurer on 9 July 2019 and provided a report on 16 July 2019. The following question and answer appear in the report:

> "**In your medical opinion, is Mr Ghanem's workplace injury reasonably connected to the latter left shoulder injury that occurred?**
>
> It is my opinion that there is no reasonable causal connection. A lumbar spine condition in itself should not cause an individual to spontaneously fall over. The findings of the MRI scan are not acute"

57. Subsequently, in the same report, the doctor said this of the applicant's left shoulder condition:

> "It is likely that the symptoms have been caused by a fall. What is unlikely is that the fall was caused by a degenerative lumbar condition."

58. As indicated above, the doctor took no history of previous symptoms in the applicant's left shoulder, although it is not entirely clear what questions he asked in respect of this. While he examined the applicant's left shoulder, it is not evident from the report that he examined the applicant's back. Moreover, he does not identify or otherwise discuss the MRI scan on which he based his opinion in respect of the applicant's back. He does not state whether he considered the films or disc or only the radiologist's report of the scan.

59. The applicant's medical evidence as to the cause of his fall is also not entirely satisfactory. Dr Al Khawaja, the applicant's treating neurosurgeon, does not address the issue of the causal connection between the applicant's back condition and his fall on 16 December 2018. Dr New, an orthopaedic surgeon, who saw the applicant at the request of his solicitors, said this in a report of 17 October 2019:

> "It is my opinion that the patient's employment as he described to me is the substantial contributing factor to his lumbar spine injury, and the consequential injury to his left shoulder through posture, compensation for his normal duties."

60. It is difficult to understand how compensating for a back injury by altering posture could cause a shoulder injury. But, as the applicant does not allege that this is so in these proceedings, it is unnecessary to address this aspect of Dr New's report. It is not clear what history, if any, Dr New was given of the applicant's fall on 16 December 2018. He does not specifically address it in the body of his report. However, in answer to a question posed by the applicant's solicitors, Dr New says this:

> "It is my opinion that the proposed surgery by Dr Warren Kuo is reasonably necessary. It is also my opinion that the need for this surgery is due to compensation following his lumbar spinal injury, and as a result of the fall when his leg gave way. He has a quite positive L5 radiculopathy and positive trendelenberg examination which is consistent with his history."

61. In his report, Dr New record the following complaints:

> "He has bilateral radicular pain into the S and Sl nerve root distribution. He describes the pain as an aching burning sensation with pins and needles and a stabbing sensation exacerbated by walking, changing positions, coughing, sneezing, prolonged sitting and recurrent lifting and bending."

He also records that, on physical examination, the applicant had hypoesthesia in the left lumbar 5 nerve root distribution and weakness of his extensor hallucis longus tendon, which he indicates is also suggestive of an L5 nerve root problem.

62. I was not specifically referred to Dr New's opinion by Mr Horan at the arbitration hearing. However, both the opinion, and the finding of radiculopathy of the left leg support his argument that the applicant fell because of "instability" as a result of the injury to his back. There is an implicit acceptance by the doctor that the applicant fell because his leg gave way and his finding of radiculopathy might provide a medical explanation for such a fall.

63. Admittedly, this evidence can be criticised. As stated, the doctor does not appear to have obtained a history of the fall from the applicant. There is also an absence of support for either proposition from the treating neurosurgeon, Dr Al Khawaja. As I understand Dr Al Khawaja's reports, he did not find neurological signs.

64. Mr Horan referred to Dr Abbas' references in his medical certificates of leading up to the fall on 16 December 2018 of "numbness and paraesthesia radiating down the legs" and also to references to back spasm. That evidence supports a conclusion that the applicant had symptoms in his lower limbs referred from his back around the time of his fall.

65. The focal point of the applicant's case at the arbitration hearing, however, was the opinion of Dr Kuo, the applicant's treating orthopaedic surgeon. Dr Kuo first saw the applicant on 29 March 2019. He recorded that he presented:

> "with left shoulder pain. Bassam states that he injured his back on 23 May 2018. As a result of this he has not been stable and in fact had a fall around Christmas last year".

66. In view of Dr Nair's opinion, the respondent's insurer queried Dr Kuo's acceptance of a relationship between the applicant's back injury and his fall on 16 December 2018. Unfortunately, the questions posed by the insurer are not in evidence. However, Dr Kuo addressed the question of causal nexus between the back injury and the fall as follows:

> "I do not agree with Dr Anil Nair's comments in that there is no way to prove one way or the other what the cause of the fall was. We can only base it on the patient's history. No one else was there to witness it. Anyone who can make a definitive conclusion is basing a lot of supposition and cannot be conclusively accurate.
>
> As I have really only discussed with Bassam his shoulder problems, I can only base my conclusions in that his history states that he developed back pain resulting in him falling. This resulted in a left shoulder injury. I cannot comment on the cause of the back pain.
>
> My clinical assessment is that of left shoulder injury with resultant impingement as a result of a fall. The causation of this fall is clearly what is in dispute. I can only base *my* comments on Bassam's version of events. I can only believe what is reported. Clearly Dr Anil Nair believes that Bassam is a liar and I do not feel this is a conclusion that can be made with certainty or morality."

67. There are difficulties with Dr Kuo's opinion. First, he appears to be uncertain where the applicant's fall took place, although this may relate in part to the question that was posed to him by the insurer. Secondly, he appears to reduce Dr Nair's opinion to an assessment of the applicant's reliability. But Dr Nair is not asserting that the applicant did not fall because his leg gave way. He is asserting that, on his reading of the MRI scan, the applicant's leg did not give way because of back pathology. Thus, there is no real bases for Dr Kuo's assertion that Dr Nair "believes Bassam is a liar".

68. Patently, there are many reasons why the applicant's leg might give way when he was ascending the staircase on 16 December 2018, apart from pathology in his back. Dr Kou says he cannot comment on the cause of the applicant's back pain. It is not evident that he has examined the applicant's back or considered the MRI scan that was the basis of Dr Nair's opinion. In my opinion, Dr Kuo's report does not refute the central point of Dr Nair's hypothesis that the applicant back condition did not spontaneously cause the applicant's leg to give away on 16 December 2018.

69. Although the medical evidence adduced by the parties is unsatisfactory, I have reached the conclusion that the balance of probabilities slightly favours the applicant in respect of both the cause of the fall and the injury to his left shoulder. As Mr Horan submitted, in the period leading up to 16 December 2018, there are consistent references to numbness and paraesthesia in the applicant's legs in the medical certificates. Dr Abbas patently accepted that these symptoms were explicable on the basis of the applicant's back condition.

70. Dr New also took a history of pain and paraesthesia in the applicant's legs, which he clearly attributed to his back pathology. Indeed, Dr New opines that the applicant has radiculopathy. He also records that these symptoms are worsened by walking and other physical activities. He appears to accept a relationship between these symptoms and the applicant's fall.

71. I was initially attracted to the opinion of Dr Nair. On reflection, however, it is difficult to accept an opinion in respect of the applicant's back condition, when it is not evident from the doctor's report that he examined the applicant's back or performed any tests to ascertain whether there were symptoms of radicular or referred pain in the applicant's legs. His opinion as to the likelihood of the applicant's leg "giving way" is based upon an MRI scan, but there is no argument in support of his contention.

72. The picture which Mr Horan portrayed in his submission has considerable force. The contemporaneous evidence suggests that the applicant had back spasms and lower limb paraesthesia at the time of the incident. The effort in ascending the stairway, after mowing the lawn, precipitated the onset of these symptoms causing him to feel unstable and to fall. It is unnecessary to determine whether he experienced radiculopathy at the time as the pleadings allege.

73. In those circumstances, I propose to find that the applicant suffered a medical condition of his left shoulder on 16 December 2018, namely an aggravation of a longstanding degenerative condition, as a result of an accepted injury to his back. By reason of the aggravation it is reasonably necessary that the applicant undergo the arthroscopic surgery proposed by Dr Kuo.

74. I order the respondent to pay the costs of and incidental to that surgery pursuant to section 60.