

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5885/19
Applicant: Glenn Bruce Wilkshire
Respondent: Woolworths Group Limited
Date of Determination: 11 February 2020
Citation: [2020] NSWCC 42

The Commission determines:

1. The applicant sustained injury to his left ankle, right ankle and right shoulder arising out of or in the course of his employment with the respondent on 12 June 2018.
2. The applicant's employment with the respondent was a substantial contributing factor to such injury.
3. As a result of injury, the applicant was either totally or partially incapacitated for work from 13 June 2018 to 30 December 2018.
4. The respondent is to pay the applicant for the period from 13 June 2018 to 30 December 2018 the amounts specified as "Weekly amount in dispute" set out in Part 5.1 of the Application to Resolve a Dispute pursuant to ss 36 and 37 of the *Workers Compensation Act 1987*.
5. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987*.
6. The surgery proposed by Dr Matthew Broadhead, namely lateral ligament reconstruction in the left ankle, is reasonably necessary as a result of injury on 12 June 2018. Pursuant to s 60 of the *Workers Compensation Act 1987* the respondent is to pay for the cost of such surgery and associated treatment and rehabilitation expenses.

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

Brett Batchelor

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Glenn Bruce Wilkshire (the applicant/Mr Wilkshire) claims weekly benefits compensation and medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) arising out of or in the course of his employment with the respondent as a retail assistant. He commenced that employment on 1 May 2010 and in 2013 moved to the respondent's BWS store in Toormina.
2. Mr Wilkshire's usual duties included:
 - (a) serving customers;
 - (b) moving, loading and unloading alcohol such as beer, wine and spirits and other stock;
 - (c) packing shelves with alcohol stock, and
 - (d) planning stock rotation.
3. In June 2018, the applicant's direct manager was on leave and Mr Wilkshire was acting in his role. As part of his duties he was required to move roll cages and pallets of alcohol stock from delivery trucks to the cool room and storage area, and to move stock out of those areas and place them on the shop floor either in stacks or onto the shelves. It was heavy work, with each pallet weighing 1000-1500 kg and the roll cages weighing around 300-400 kg.
4. The applicant says that over several weeks he experienced a gradual build-up of pain in his right shoulder and in both ankles in doing this work. He dates this from about 3 June 2018, with worsening pain over several weeks. He reported these problems to his manager on 5 June 2018 and took sick leave from 5 to 9 June 2018.
5. On 12 June 2018, the applicant says that he was pulling a heavy pallet, estimated to weigh 1500 kg, when he felt a severe increase in the pain in his right shoulder and both ankles. He saw his general practitioner and took further sick leave from 12 to 16 June 2018.
6. The applicant took further time off work as sick leave up until 6 September 2018 and received treatment from his general practitioner. He lodged a worker's compensation claim on 6 September 2018.
7. On 12 October 2018, Employers Mutual Limited (EML), as the Claims Agent for the respondent, issued the applicant a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) declining liability for the claim. EML asserted that there was insufficient medical information to make a liability decision on the claim and that the applicant had not attended an independent medical examination arranged for 27 September 2018.
8. The applicant did attend on Dr Alan Hopcroft for an independent medical examination on 29 October 2018. Dr Hopcroft produced a report on that date. On the basis of that report the respondent, in a further s 74 notice dated 28 November 2018, disputed liability for the applicant's claim. It asserted that the medical evidence on file for the workplace injury that occurred on 12 June 2018 supported the following:
 - (a) the applicant's employment with the employer was not a substantial contributing factor to any injury that he may have sustained (s 9A of the 1987 Act);

- (b) the applicant did not present with symptoms or medical condition that rendered him with any total or partial incapacity as a result of a workplace injury, and that he therefore have any entitlement to weekly compensation (s 33 of the 1987 Act), and
 - (c) any ongoing or further medical or related treatment add/or rehabilitation services as defined in s 59 of the 1987 Act was not reasonably necessary (s 60 of the 1987 Act).
- 9. On 22 July 2019, EML issued to the applicant an internal review decision pursuant to s 287A of the 1987 Act, again nominating date of injury as 12 June 2018, declining liability for the claim on the same grounds as specified in the s 74 noticed dated 28 November 2018.
- 10. The applicant returned to his full time hours with lifting, pulling, pushing, standing, bending, twisting and squatting restrictions from on or about 2 January 2019. By that time Mr Wilkshire had used up all of his sick leave and annual leave.
- 11. In the Application to Resolve a Dispute registered 12 November 2019, (the Application) Mr Wilkshire claims weekly benefits compensation for the period 5 June 2018 to 30 December 2018, treatment and related expenses for past treatment and care, and the cost of future treatment including the cost of surgery on his left ankle proposed by Dr Matthew Broadhead, the applicant's treating orthopaedic surgeon.
- 12. The Injury Details in Part 4 of the Application specify three injuries, namely:
 - (a) Injury 1: between 1 May 2010 and 4 November 2019 and continuing (deemed 5 June 2018 or 6 September 2018); injury to right shoulder, right ankle and left ankle as a result of nature and conditions of employment and further and/or in the alternative aggravation, acceleration or exacerbation of degenerative diseases in these regions;
 - (b) Injury 2: on or about 3 June 2018; injury to right shoulder, right ankle and left ankle when required to move heavy cages and pallets of alcohol; and to carry out repetitive heavy lifting and carrying to restock the cool room and floor with alcohol and further and/or in the alternative aggravation, acceleration or exacerbation of degenerative diseases in these regions;
 - (c) Injury 3: on or about 12 June 2018; injury to right shoulder, right ankle and left ankle when the applicant was pulling a heavy beer pallet and further and/or in the alternative aggravation, acceleration or exacerbation of degenerative diseases in these regions.
- 13. At the arbitration hearing referred to hereunder, counsel for the respondent stated issues as:
 - (a) whether the applicant sustained injuries as a result of the nature and conditions of his employment to the right shoulder, right ankle and left ankle;
 - (b) whether the applicant suffered a frank injury on 12 June 2018 to the left ankle and/or a nature and conditions injury, and
 - (c) incapacity as a result of all of those injuries, noting however that the workers compensation medical certificates contain certifications as to the degree to which the applicant was incapacitated.¹

¹ Transcript of hearing 20 January 2020 (T) p 3.05-p 3.20.

ISSUES FOR DETERMINATION

14. The parties agree that the following issues remain in dispute:
- (a) Did the applicant suffer a frank injury to his right shoulder, right ankle or left ankle on 12 June 2018?
 - (b) Did the applicant suffer injury to his right shoulder, right ankle and left ankle in the form of aggravation of some underlying pathology on 12 June 2018?
 - (c) Did the applicant suffer injury in the form of aggravation of a pre-existing condition in the right shoulder, right ankle and left ankle?
 - (d) Was employment a substantial contributing factor to any injury sustained by the applicant?
 - (e) Was the applicant incapacitated as a result of injury?
 - (f) Is the applicant entitled to weekly benefits during the period of his incapacity?
 - (g) Is the applicant entitled to an award pursuant to s 60 of the 1987 Act for treatment and related expenses?
 - (h) Is surgery on the applicant's left ankle reasonably necessary as a result of injury to the left ankle?

PROCEDURE BEFORE THE COMMISSION

15. The parties attended a conciliation conference and arbitration hearing on 20 January 2020 in Coffs Harbour. 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.
16. Mr M Inglis of counsel appeared for the applicant briefed by Mr W Langler. The applicant was present. Ms N Compton of counsel appeared for the respondent.

EVIDENCE

Documentary evidence

17. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) the Application and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents dated 10 January 2020 lodged on behalf of the respondent with the following attached documents:
 - (i) supplementary report of Dr Alan Hopcroft dated 19 December 2019;
 - (ii) Employee Training Checklist, undated, and
 - (iii) Task Analysis Report dated 2 June 2011.

- (d) Application to Admit Late Documents dated 10 January 2020 lodged on behalf of the applicant with the following attachments:
- (i) Pay Records – various, and
 - (ii) WorkCover certificates of capacity issued by Dr Prasanth Fernando – various.

Oral evidence

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

SUBMISSIONS

19. The submissions of the parties have been recorded and will not be repeated in full. In summary, they are as follows.

Applicant

20. The applicant notes that he was not required to be questioned in relation to his statement, and this, coupled with the fact that to his credit he has been able to stay at work or return to work at every available opportunity and perform suitable duties, means that the Commission would have no trouble in accepting his evidence in the statement he made. The matters in that statement have been largely, but not totally, corroborated in the histories contained in the medical reports. Having submitted this, the applicant acknowledges that he has difficulty in recalling every incident that occurred in the period when his employer (immediate boss) was away, when he had to perform abnormal additional physical activities which gave rise to the commencement of symptoms in his right shoulder and both ankles. This led to him eventually having to seek medical treatment².
21. The applicant notes that there is evidence of a specific incident referable in particular to the left ankle which is the subject of a claim for surgery. In this regard the applicant relies on the history contained in the referral of Dr P Fernando to Dr Peter Wong dated 28 November 2018³, recording an incident when he was pulling a heavy 1500 kg pallet and experienced sudden pain in bilateral ankles, left worse than right, and right shoulder.
22. The applicant notes that there is evidence of specific pathology particularly in the right ankle, as opposed to the left ankle where the symptoms were originally more severe. Mr Wilshire also submits that the Commission would be satisfied that he did suffer injury in the form of aggravation of some underlying pathology in the right shoulder, which is demonstrated on MRI.
23. The applicant submits that the evidence shows that on 12 June 2018 he suffered a tearing injury to the ligament in the right ankle.
24. In terms of incapacity, the applicant submits that, subject to a finding on injury, there has largely been agreement between the parties, and that there should be an award in his favour for the closed period claimed.
25. In respect of the claim for treatment expenses pursuant to s 60 of the 1987 Act, the applicant submits that he has undergone a considerable amount of treatment, involving in particular physiotherapy and all other alternative treatment modalities, in order to alleviate his symptoms while at work. This history of treatment, together with the advice that he has received from Dr Broadhead of the likely improvement in stability, alleviation of pain in the left ankle and increase in ability to perform work activities as a result of surgery, would lead to a

² T p 4.30-5.15.

³ Application p 64.

finding that the surgery is reasonably necessary as a result of injury. The need for surgery is also supported by Dr Wong, the treating rheumatologist, in his report dated 4 May 2019⁴.

26. In summary, the applicant submits that:

- (a) underlying conditions were aggravated by the work he was required to perform while his superior was absent and/or aggravated by that work, and
- (b) there was a frank injury on 12 June 2018 which gave rise to further injury to all areas claimed, that is the right shoulder and both ankles and more importantly,
- (c) the need for surgery on the left ankle.

27. The applicant takes issue with the evidence from Dr Hopcroft in the respondent's case. Dr Hopcroft's opinion is essentially that Mr Wilkshire has gout, and that is the reason for his incapacity. The doctor refers to urate acid levels in the applicant's blood shown in tests⁵. The applicant submits that Dr Hopcroft "entered the forum" when he requested test results directly from Messrs Sullivan, Nicolaidis in Coffs Harbour (and also, I note, from Lavery Pathology in Coffs Harbour), and made reference to these test results dated January 2004, March 2006, December 2008 November 2011, June 2012 and October 2018⁶. The applicant also notes that Dr Hopcroft was somewhat critical of him for not disclosing the test results, and in this sense calls into question the applicant's credibility.

28. The applicant notes that, according to Dr Wong, he does not have gout but that the gout-like symptoms he experienced are probably more the result of a family history of psoriatic arthritis, which has now been identified and is being managed by the medication prescribed by Dr Wong.

29. The applicant notes that the significance of this evidence is that negative urate level revealed on 12 December 2018 and noted in the report of Dr Wong dated 4 May 2019 post-dates the report of Dr Hopcroft.

30. The applicant therefore submits that the Commission would not be persuaded by the opinions expressed by Dr Hopcroft, and that more likely, or almost certainly, the applicant's current symptoms are a result of the work-related injuries supported by the doctors in his own medical case.

Respondent

31. The respondent relies on the opinion of Dr Wong in his report dated 4 May 2019 to submit that, while the doctor finds that the applicant's employment was a substantial contributing factor to the ligamentous injury to the left ankle injury, he does not find that employment is responsible for the psoriatic arthritis or previous gout. No opinion has been proffered by the applicant's doctors that the nature of the applicant's work aggravated conditions in the right shoulder and both ankles. Dr Wong treated the applicant for arthritis which improved with such treatment, and also dealt with the previous history of possible gout, in respect of which he says that a diagnosis has never been made.

32. In short, the respondent submits that the cause of the conditions other than the left ankle injury on 12 June 2018 has nothing to do with the applicant's employment with the respondent, and there is no evidence that they were aggravated by that employment.

⁴ Application p 58 at p 61.

⁵ Reply pp 21 and 23.

⁶ T p 9.09-9.20.

33. The respondent relies upon the report of Dr Hopcroft, noting the submissions of the applicant. Apart from also noting the pathology in the left ankle and the history reported by the general practitioner, the respondent makes no further submissions in respect of injury.⁷
34. On the question of the surgery on the left ankle proposed by Dr Broadhurst, the respondent submits that there is no medicolegal opinion in evidence to demonstrate that it is reasonably necessary. It is a recommendation for surgery only.
35. The respondent conceded that Dr Hopcroft does not deal with the issue of surgery on the left ankle. The respondent submits that the high point of the applicant's case for surgery is the opinion of the general practitioner, Dr Fernando, in his report dated 21 June 2019 where he says that the left ankle injury has a good prognosis following successful surgical repair. The respondent submits that this is not the test of "reasonably necessary" as a result of injury.

Applicant in response

36. The applicant makes the point that the absence of a medicolegal opinion is not disadvantageous to the applicant's case where he can rely entirely upon the evidence of treating doctors, including the general practitioner and orthopaedic surgeon. The applicant draws attention to the report of Dr Fernando dated 21 June 2019 as giving support to his case that the applicant injured himself on 12 June 2018 while pulling a heavy beer pallet by himself, and that his other injuries were substantially contributed to by his employment. Relying on the opinion of Dr Wong, Dr Fernando does not believe that gout or psoriatic arthritis are responsible for the left ankle injury.
37. Finally, the applicant submits that, in the absence of any symptoms in any of the affected areas prior to this work incident, the applicant's employment with the respondent must be the main contributing factor to aggravation of conditions in the right shoulder, left ankle and right ankle. The applicant draws attention to the WorkCover certificate of capacity dated 16 August 2018⁸ which nominates the patient stated date of injury as 12 June 2018 and contains a diagnosis of work related injury/disease of bilateral ankle pain and shoulder pain, mainly in the right shoulder.

FINDINGS AND REASONS

Injury

38. A problem in this case is determining what injury, if any, the applicant suffered arising out of or in the course of his employment with the respondent and the date, or deemed date, thereof.
39. The three injuries claimed by the applicant in Part 4 of the Application are referred to above at [12]. It appears that the pleader has attempted to "cover the field" of possible work related injuries suffered by the applicant. Injury 1 pleads either personal injury or aggravation, acceleration or exacerbation of a degenerative disease as a result of the "nature and conditions" of the applicant's employment over the whole period of that employment from when he commenced on 1 May 2010 until the day before he signed his statement on 5 November 2019⁹. I have not been taken to any medical evidence to support such a claim, and I think that this pleading of injury can be disregarded.

⁷ T p 15.10 15.15.

⁸ Application p 121.

⁹ Application p 18.

40. In making this observation I appreciate that the Commission is not bound by strict pleadings¹⁰ and proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits¹¹. The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms¹². However, it appears that the pleadings reflect the evidence in support of the applicant's claim, and the acknowledgement by counsel for the applicant in submissions that:

“...the applicant has difficulty recalling every incident that occurred, but we would submit that there was a period of time whilst the employer was away, where he had to perform unusual an [sic, and] abnormal additional physical activities which gave rise to the commencement of symptoms in his right shoulder and bilaterally to his ankles. He stayed at work but eventually had to seek medical treatment.”¹³

41. Injury 2 in Part 4 of the Application pleads personal injury and aggravation, acceleration or exacerbation of a degenerative disease on or about 3 June 2018 as a result of duties when the applicant was acting as relieving manager and engaged in heavy work. Injury 3 pleads the same on or about 12 June 2018 when the applicant was pulling a heavy beer pallet at work.

42. In each case, injury is claimed to the right shoulder, right ankle and left ankle.

43. The applicant says at [16] in his statement dated 5 November 2019 that he does not:

“...recall any specific incident or event where my right shoulder or my ankles were injured. There was a gradual build up over time of pain in my right shoulder and both ankles doing these work tasks over several weeks I began to notice pain in these areas on or about 3 June 2018 and that pain became increasingly worse during my work over the subsequent weeks.”

44. At [17] and [18] of his statement, Mr Wilkshire says that he reported the problems he was having to the respondent's manager Daniel Nuttal on 5 June 2018 and took sick leave for these problems from 5 June to 9 June 2018.

45. Mr Wilkshire says at [19] and [20] of his statement:

“19. On 12 June 2018, I was pulling a heavy beer pallet at work which I estimate weighed 1,500 kg when I felt a severe increase in the pain in my right shoulder and both my ankles undertaking this task.

20. I saw a GP Dr Tan Parades at Coastal Medical Clinic for my right shoulder on 3 June 2018. I had an x-ray and ultrasound steroid injection on my right shoulder that day.”

46. He then says at [24]-[25] that by 30 June 2018 he went on sick leave again because the pain in his right shoulder and both ankles was so bad that he could not continue working. He saw Dr Prasanth Fernando (“my GP”) for these problems on 30 June 2018. This last evidence is confirmed by Dr Fernando in his report to the applicant's solicitor dated 21 June 2019 where he says that the applicant presented to him and Coffs Harbour GP Super Clinic as a new patient on 30 June 2018¹⁴. In that report Dr Fernando records a history that Mr Wilkshire injured his bilateral ankle joints and right shoulder at work while he was pulling a heavy beer pallet by himself on 12 June 2018.

¹⁰ *Far West Area Health Service v Radford* [2003] NSWCCPD 10.

¹¹ s 354(1) of the 1998 Act.

¹² s 354(3) of the 1998 Act.

¹³ T p 5.05 - 5.15.

¹⁴ Application p 68.

47. There is in evidence a **"Patient Health Summary"** of CMC Coastal Medical Clinics printed 18 July 2018¹⁵. I cannot find therein a clinical note of the consultation the applicant said he had with Dr Tan Parades [sic, Paredes] on 13 June 2018. However, there are reports of an x-ray and ultrasound of the right shoulder taken on that day at the request of Dr Mary Tan-Paredes. The Clinical Notes on the reports of those investigations read: "Pain on right shoulder last 2 weeks. Fasciitis."
48. There may be a gap in the Patient Health Summary, as next clinical note appearing in the "Progress notes for Glenn Wilkshire" commences with a consultation with Dr Prasanth Fernando on 6 September 2018 when the applicant's blood sugar control is discussed. Relevantly, there is a history of "...having multiple joint pain". There is reference to "X ray degenerative changes" and the applicant was advised to "...get the rheumatologist help".¹⁶ Alternatively the clinical notes of the "Coffs Harbour Super Clinic" (cf. "CMC Coastal Medical Clinics" - see [47] above) are not in evidence. Reference was not made to these clinical notes or the Patient Health Summary by counsel in submissions.
49. There is reference to the treatment the applicant received from Dr Tan-Paredes on 13 June 2018, and to the x-rays of the right shoulder, ultrasound right shoulder and ultrasound left foot on that day in the report of Dr Alan Hopcroft dated 29 October 2018 referred to at [53]-[56] hereunder. Dr Hopcroft also refers to an ultrasound guided injection to the right shoulder bursa on 14 June 2018 and later radiological investigations ordered by Dr Fernando on 26 July 2018.
50. The next evidence chronologically appears to be x-rays of the right and left foot and ultrasounds of the right and left ankles performed on 26 July 2018 on referral by Dr Suri Manak¹⁷. The "CLINICAL NOTES:" in the report on those investigations read:
- "Pain both feet (both ankles) and balls of both feet. OA in right shoulder."
- In the summary in respect of the right ankle there appears "Focally thickened hypoechoic intact anterior talofibular ligament consistent with a strain/partial tear." The summary in respect of the left ankle includes "Chronic complete tear of the anterior talofibular ligament."
51. Dr Fernando issued a WorkCover certificate of capacity on 16 August 2018¹⁸ which specifies a patient stated date of injury of 12 June 2018 and a diagnosis of work related injury/disease of "B/L ankle pain, Shoulder pain manly in Rt shoulder" [sic]. The relation of injury/disease to work is specified as "pulling 1500kg (pallet of beer) and prolong standing" [sic]. No previous injury before that event is also recorded. The same entries are recorded in subsequent WorkCover certificates of capacity issued by Dr Fernando.
52. There is in evidence a claim form dated 6 September 2018¹⁹. Some of the handwritten entries are difficult to decipher, but it appears that the injury/condition recorded therein is to right shoulder, right wrist and left and right ankles. The legible portion of the description as to how the injury happened is "Too much workload during manager's holidays..." (illegible thereafter). The date of occurrence of the injury/condition is recorded in the morning of 29 June 2018 and the date on which it was first noticed as 3 June 2018. The report of the injury/condition to Daniel Nuttal on 5 June 2018 is also recorded.
53. The applicant saw Dr Hopcroft for an independent medical examination at the request of the respondent on 29 October 2018²⁰. Dr Hopcroft records a history of heavy work during the three weeks that the applicant's manager was away without a history of trauma and that:

¹⁵ Application p 97.

¹⁶ Application p 98.

¹⁷ Application p 74.

¹⁸ Application p 121.

¹⁹ Application p 19.

²⁰ Reply p 17.

“After three weeks he noticed that the pain was significant at both sites, with the pain in his right shoulder becoming particularly bad on 11th and 12th June 2018.”

54. Dr Hopcroft said in his report:

“I bring to your attention serum biochemistry studies undertaken on 27 January 2004, 21 March 2006, 28 April 2011, 14 June 2012, and 12 October 2018 with all but one of those investigations showing a gouty level significantly above the upper limit of normal.

His wife was able to confirm that the blood analysis of 27 January 2004 came on after the patient suffered significant gout on a trip to Sydney.”²¹

These are the test results that Dr Hopcroft obtained directly from Messrs Sullivan Nicolaides and Lavery Pathology in Coffs Harbour, referred to by the applicant at [27] above.

55. Dr Hopcroft diagnosed the applicant as suffering from resolving gouty changes of his right shoulder and both ankles and believes that it is highly likely that the problem with his left shoulder (which the doctor had earlier recorded under “**Past Medical History**”) was also a manifestation of an underlying gouty arthropathy. Dr Hopcroft said that on detailed questioning Mr Wilkshire did not admit to having had biochemistry studies done from 2004, all of which showed abnormal gout levels, and that those facts were only discovered when he pushed to investigate and received by fax copies of previous pathologies performed at Sullivan Nicolaides Pathology and Lavery Pathology in Coffs Harbour. The doctor said that he did not believe that the applicant’s ongoing right shoulder and bilateral ankle pain and pain in his right wrist had anything to do with his work-related activities, but rather as a direct result of his gouty arthropathy, untreated. He also said that Dr Peter Wong had yet to see the results of the recently requested blood analysis.

56. Dr Hopcroft appears to be critical of the applicant when he says:

“His gout was a pre-existing condition of which he was aware, and which only came to the fore when I was finally told that following the visit to his rheumatologist recently he was placed on Methotrexate, which prompted me to persistently seek a printout of his in the previously undertaken pathologies Coffs Harbour district.”²²

57. As recorded in [8] and [9] above, on the basis of Dr Hopcroft’s report dated 29 October 2018, EML declined liability for the applicant’s claim.

58. On 28 November 2018 Dr Fernando referred the applicant to see rheumatologist, Dr Peter Wong²³. The referral was in respect of “a work injury” on 12 June 2018 while Mr Wilkshire was pulling a heavy 1500 kg pallet of beer and developed sudden pain in his ankles and right shoulder. Dr Fernando refers to the radiological investigations and the opinion of Dr Hopcroft that the applicant’s symptoms are related to his long standing gout. He sought the opinion of Dr Wong on whether the left and right ankle injury was due to gout or due to work. He included with that referral the report of Dr Hopcroft dated 29 October 2018 (“I have sent this letter with independent specialist report for your reference”).

59. Dr Wong reported to the applicant’s solicitors on 4 May 2019²⁴. He recorded that Mr Wilkshire first presented to him on 21 September 2018 on referral from Dr Fernando with inflammatory arthritis affecting the right hand, right wrist, right shoulder, both ankles and both feet which had commenced four months earlier. Dr Wong took a history of the applicant’s work, medical history and treatment. Given the family history of psoriasis (father) and clinical presentation with polyarticular inflammatory arthritis/tenosynovitis, the doctor felt that the applicant probably had psoriatic arthritis, for which he commenced treatment.

²¹ Reply p 21.

²² Reply p 23.

²³ Application p 64.

²⁴ Application p 58.

60. Dr Wong reviewed the applicant on 7 November 2018, and 9 January 2019 when he noted that the medication Arava prescribed had markedly reduced the joint pain/swelling with no side effects. While the arthritis had improved, the left ankle continued to be painful, but not swollen, despite improvement in the right ankle. On closer questioning Dr Wong noted that the applicant had developed left ankle pain while pulling four pallets per day (each of 1000-1500 kg) and pulling multiple roll cages (each weighing 300-400 kg) several times per day in June 2018. The past history of possible gout which had previously affected the right knee four years previously and the right ankle and right big toe in his thirties was noted, as was the fact that the diagnosis of gout had never been confirmed on synovial fluid analysis. The serum urate was in the normal range on 12 December 2018. Mr Wilkshire was on no specific treatment for gout.

61. As the applicant's psoriatic arthritis was responding well to treatment, Dr Wong wondered about a mechanical/traumatic cause for the persistent left ankle pain and sent him for an MRI of the left ankle. The doctor also wanted to exclude residual synovitis from psoriatic arthritis. The MRI of the left ankle was carried out on 17 January 2019²⁵ and reviewed by Dr Wong on 23 January 2019. It showed:

“... an anterior talo-fibular ligamentous (ATFL) tear and calcaneofibular ligamentous injury (report dated Jan 17, 2019). There was no evidence of residual inflammatory arthritis/tenosynovitis.”

Dr Wong:

“...felt that the L ATFL injury was probably due to work-related activity when he was pulling lots of pallets and roll cages in June 2018. I noted that he had been thought to have gout at some stage. However, the improvement with Arava and clinical presentation of a polyarticular inflammatory arthritis/tenosynovitis argued against this being gout and probably due to psoriatic arthritis.”

62. Dr Wong noted that while the serum urate had been elevated at 0.58 in November 2018, gout should never be diagnosed on the strength merely of an elevated serum uric acid, as asymptomatic hyperuricaemia is very common and does not necessarily mean gouty arthritis. He said that the lack of ongoing inflammation/tenosynovitis in the ankle on MRI indicated that Arava was working well for psoriatic arthritis, but that given the ATFL tear and ongoing left ankle symptoms, the applicant needed more proprioceptive/balance work for the left ankle to avoid further injury and improve ankle stability. Mr Wilkshire was referred back for physiotherapy.

63. Dr Wong said that the applicant's employment was the substantial contributing factor to the ligamentous injury to the left ankle demonstrated on MRI and responsible for the persisting left ankle symptoms. He did not believe it was responsible for the psoriatic arthritis or previous gout. The doctor concluded his report with the observation that if the left ankle worsened despite the physiotherapy treatment, the applicant would need to see an ankle surgeon for ligamentous repair/replacement. He said when last seen, the psoriatic arthritis was well-controlled, and he anticipated an excellent prognosis with the Arava treatment.

64. Dr Matthew Broadhead, orthopaedic surgeon, saw the applicant on 13 March 2019 and reported to Dr Fernando on that day²⁶. He took a history of the applicant rolling his ankle 12 months previously at his work while pushing a pallet and of multiple episodes while working since then of instability in the ankle. The background of psoriatic arthritis, for which he was receiving treatment from Dr Wong, was noted. Dr Broadhead examined the applicant and reviewed the imaging, noting that the x-rays were unremarkable but that the MRI

²⁵ Application p 78.

²⁶ Application p 54.

showed tibialis posterior tendon inflammation without tear, and evidence of ATFL and CFL injury; Dr Broadhead said:

“Glenn has chronic pain and instability in the ankle that is affecting his ability to function. Tibialis posterior dysfunction is a secondary issue. He would benefit from a lateral ligament reconstruction to improve the stability of the ankle.”²⁷

A request for admission and surgery was completed by the doctor.

65. In the medico-legal report to the applicant’s solicitor on 21 June 2019 Dr Fernando provided a comprehensive history of his treatment of the applicant from when he first saw him on 30 June 2018. He referred to the opinion of Dr Wong and the surgery proposed by Dr Broadhead. He expressed the belief that with the support of clinical and radiological evidence, the applicant’s injuries were substantially contributed to by his employment. He said that the opinion of the rheumatologist and the fact that Mr Wilkshire was awaiting surgery favours this opinion. He did not believe that gout or psoriatic arthritis were responsible for the left ankle injury.
66. Dr Hopcroft supplied a supplementary report dated 19 December 2019. He was supplied with the report of Dr Broadhead dated 13 March 2019 and the report of the “highly respected rheumatologist, Dr Peter Wong,” dated 4 May 2019. Dr Hopcroft reviewed his report dated 29 October 2018 and the history of the onset of symptoms in both ankles when, while working one Saturday morning at his worksite, both ankles became quite grossly swollen and tender over the succeeding 24 hours. That history indicated to Dr Hopcroft developing pathology in both ankles without particular injury to them, and that taken in association with the ultrasound of both ankles of 26 July 2018 describing chronic complete tear of the anterior talofibular ligament of the left ankle, the applicant was without doubt suffering from an insidious arthropathy and not from a work-induced traumatic event.
67. Dr Hopcroft referred to the fact that no mention was made to Dr Broadhead of the synonymous developing pain and swelling in both ankles which would lead to a medical diagnosis for the applicant’s problems rather than a surgical diagnosis, namely chronic ankle ligament tear. Being chronic, Dr Hopcroft opined that it was not related to the applicant’s work at the respondent’s store.
68. In respect of Dr Wong, Dr Hopcroft said that he had not addressed the serial elevation of the applicant’s serum uric acid over many tests from 27 July 2004 to 12 October 2018 and his “...long history of spontaneous onset swelling and pain in joints previously diagnosed as gout.” He then says:

“So, while I agree with Dr Wong that gout should not be diagnosed in the presence merely of hyperuricemia, in the presence of hyperuricemia and associated spontaneously arising swelling and pain in joints, gout is far more probably than not the correct diagnosis, as is the case with this patient.”

Therefore Dr Hopcroft:

“... can state categorically that it is my opinion that the proposed left ankle surgery is not required as a result of any work-related injury, and that the proposed left ankle surgery is NOT reasonably necessary to treat the employee’s injury.”

²⁷ Application p 55.

69. In respect of the claimed injury to the left ankle, Dr Wong noted the history of possible gout which had previously affected the right knee four years previously and the right ankle and right big toe when Mr Wilkshire was in his thirties. The doctor said that the diagnosis of gout had never been confirmed on synovial fluid analysis and noted that the serum urate was in the normal range at 0.39 on 12 December 2018. This is after Dr Hopcroft examined the applicant on 29 October 2018. In the report of that date Dr Hopcroft noted that the applicant was yet to be reviewed by Dr Wong with his most recent blood analysis which shows a very long history of gouty arthritis along with an elevation in cholesterol and tryglycerides and an elevation of his serum blood sugars.
70. Dr Wong did not diagnose the applicant as suffering from gout; he diagnosed psoriatic arthritis which responded to treatment prescribed by him. He does not in his report refer to the reports of serial elevation of the applicant's serum uric acid over many tests from 27 July 2002 to 12 October 2018, access to which was obtained by Dr Hopcroft in response to his own enquiries to the two pathology laboratories in Coffs Harbour. He does however refer to the elevated level of serum urate in November 2018 at 0.58, and to the serum being in the normal range (0.39) on 12 December 2018.
71. The diagnosis of gout appears to have been made on 29 October 2018 when Dr Hopcroft was examining Mr Wilkshire accompanied by his wife. He says in that report that the applicant's "...very longstanding gouty arthropathy for which he has never taken regular medication, but *the diagnosis of which was made in this consultation by his wife* when his gout level from January 2004 was discovered." (emphasis added). This diagnosis appears to have come from the record of the wife's confirmation earlier in the report that her husband "...suffered significant gout on a trip to Sydney."
72. In his report dated 19 December 2019, Dr Hopcroft referred to the "...long history of spontaneous swelling and pain in joints previously diagnosed as gout." I cannot find in the medical evidence a previous diagnosis of gout, nor a record of a long history of spontaneous swelling.
73. Dr Wong's speciality is that of rheumatology, and he treated the applicant over the period from September 2018 to May 2019. Having regard to this and my summary of the relevant evidence abovementioned, I accept his opinion in preference to that of Dr Hopcroft. My view is that the applicant injured his left ankle on 12 June 2018 when he rolled it whilst engaged in heavy work for the respondent in the absence of his superior. He also felt a severe increase in pain in the right shoulder and right ankle which continued as he remained at work due to the constant straining of these joints. This finding in respect of the left ankle, and straining of the right shoulder and right ankle, accords with history recorded by his treating general practitioner, Dr Fernando in his report to the applicant's solicitor dated 21 June 2019, in the WorkCover certificate of capacity issued by him on 16 August 2018 and in subsequent certificates. It is consistent with the applicant being referred for radiological investigation of both feet and ankles on 26 July 2018, and the reference in the Clinical Notes in that referral for investigation of "OA in right shoulder" (see [50] above). It is also consistent with the applicant's evidence at [19]-[20] in his statement. Although the applicant gives evidence of pain increasing in his right shoulder and both of his ankles from about 3 June 2018, it appears that it was the incident of 12 June 2018 that caused him to first consult a doctor on 13 June 2018 and be sent for an x-ray and ultrasound of the right shoulder.
74. Dr Fernando subsequently referred the applicant to Dr Wong on 28 November for an opinion on injuries to the left and right ankles. As noted above at [58], Dr Fernando sent Dr Hopcroft's report dated 29 October 2018 to Dr Wong.
75. There will therefore be a finding that the applicant injured his right shoulder, left ankle and right ankle arising out of or in the course of his employment on 12 June 2018.

76. In his statement the applicant gives a history of psoriasis and gout. Dr Wong is of the view that the applicant's employment with the respondent is the substantial contributing factor to the ligamentous injury to the left ankle demonstrated on MRI and responsible for the persistent left ankle symptoms. He does not believe that it is responsible for the psoriatic arthritis or previous gout. Mr Wilkshire says in his statement that, to the best of his knowledge and recollection, he did not have any physical injuries relating to his right shoulder, wrist, or his ankles before commencing work with the respondent. In view of the opinion of Dr Wong and this evidence of the applicant, a finding is clearly available that the applicant's employment with the respondent was a substantial contributing factor the left ankle injury suffered by him, and to the injury to the right shoulder and right ankle.

Surgery

77. Dr Hopcroft rejects the reasonable necessity for surgery as he finds that the applicant's left ankle condition is due to gout and not the result of any work-related injury.

78. Dr Broadhead recommends surgery to address the chronic pain and instability in the left ankle. The pain and instability is confirmed by Mr Wilkshire in his statement evidence. The applicant had undergone physiotherapy treatment between August and October 2018 which he found beneficial, but this did not resolve his pain and instability.

79. In May 2019 Dr Wong recommended referral to an ankle surgeon for ligamentous repair/replacement if the applicant's condition in the left ankle worsened. This appears to have occurred, or at least the condition has not improved to the extent that Mr Wilkshire can engage in walking other than on flat surfaces, or fully engage in home maintenance. He continues to experience daily pain. Dr Fernando believes the applicant has a good prognosis following successful surgical repair of the ATFL and lateral ligament stabilisation, coupled with good post-operative rehabilitation with physiotherapy and exercise physiologist involvement.

80. In *Diab v NRMA Ltd*²⁸ Deputy President Roche set out at [88] relevant matters in the context of s 60 of the 1987 Act, according to the criteria of reasonableness, which include:

- (a) the appropriateness of the particular treatment;
- (b) the availability of alternative treatment, and its potential effectiveness;
- (c) the cost of the treatment;
- (d) the actual or potential effectiveness of the treatment, and
- (e) the acceptance by medical experts of the treatment being appropriate and likely to be effective.

81. In respect of (d), at [89] the Deputy President noted that while the effectiveness of the treatment is relevant as to whether the treatment was reasonably necessary, it certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. Each case will depend on its own facts.

²⁸ [2014] NSWCCPD 72.

82. I do not accept the respondent's submission that there needs to be a medico-legal opinion in support of the reasonable necessity of surgery for a party to succeed in a claim for the cost of such surgery, or that evidence of a likely successful outcome is required. There is no evidence to suggest that the surgery proposed by Dr Broadhead for the injury diagnosed by him (as opposed to the diagnosis of Dr Hopcroft) is inappropriate, and the cost has not been put in issue. The applicant has tried alternative treatment, but it has not given ongoing relief from pain and instability. Dr Broadhead thinks that the applicant would benefit from the surgery and Dr Fernando gives a good prognosis after surgery. In my view, having regard to the evidence of the applicant's treating practitioners, the surgery proposed by Dr Broadhead is reasonably necessary as a result of injury to the left ankle on 12 June 2018.

Incapacity

83. The applicant's claim for weekly benefits has been particularised in Part 5.1 of the Application. At the arbitration hearing the respondent did not take issue with this or suggest that the degree of the applicant's incapacity was other than as referred to in the WorkCover certificates of capacity attached to the Application²⁹. There is no dispute that the applicant's pre-injury average weekly earnings are \$854.48.

Award for weekly benefits

84. There will be an award in favour of the applicant, commencing from the date of injury of 13 June 2018 until 30 December 2018, at the amounts specified in Part 5.1 of the Application.

SUMMARY

85. The applicant sustained injury to his left ankle, right ankle and right shoulder arising out of or in the course of his employment with the respondent on 12 June 2012.
86. The applicant's employment with the respondent was a substantial contributing factor to such injury
87. As a result of injury, the applicant was either totally or partially incapacitated for work from 13 June 2018 to 30 December 2018.
88. The respondent is to pay the applicant for the period from 13 June 2018 to 30 December 2018 the amounts specified as "Weekly amount in dispute" set out in Part 5.1 of the Application pursuant to ss 36 and 37 of the 1987 Act.
89. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act.
90. The surgery proposed by Dr Matthew Broadhead, namely lateral ligament reconstruction in the left ankle, is reasonably necessary as a result of injury on 12 June 2018. Pursuant to s 60 of the 1987 Act the respondent is to pay for the cost of such surgery and associated treatment and rehabilitation expenses.



²⁹ T p 3.15.