WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2121/20**
Applicant: **Vaoatea Wright**
Respondent: **Wellen Pty Ltd t/as Austcor Packaging**
Date of Determination: **7 July 2020**
Citation: **[2020] NSWWCC 225**

The Commission determines:

1. The Application to Resolve a Dispute is amended by deleting the claim for $15,000 by way of compensation for medical and the like expenses and instead claiming a general order or award under s 60 of the *Workers Compensation Act 1987*.

2. The Application to Resolve a Dispute is amended by deleting the allegation of injury to the applicant's lumbar spine, cervical spine and left shoulder.

3. A finding that the applicant has suffered an injury to his right shoulder, in the nature of adhesive capsulitis, as a result of the incident involving the collision between two forklifts when he was in the course of his employment with the respondent on 5 March 2019.

4. A finding that the proposed arthroscopic capsular release surgery to the applicant's right shoulder is reasonably necessary as a result of the injury to the applicant's right shoulder referred to in (3) above.

5. The respondent is to pay the reasonable costs of the proposed arthroscopic capsular release surgery to the applicant's right shoulder, pursuant to s 60 of the *Workers Compensation Act 1987*.

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

Michael Perry
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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 5 March 2019, Vaoatea Wright (the applicant) was driving a forklift in the course of his employment with the respondent when it collided with another forklift driven by a co-worker. By an Application to Resolve a Dispute (ARD), the applicant alleged he sustained injuries to his lumbar and cervical spines and both shoulders as a result of that collision (the incident).

2. The ARD claimed $15,000 for medical and related expenses under s 60 *Workers Compensation Act 1987* (the 1987 act) for the cost of future surgery to the applicant's right shoulder proposed by his treating orthopaedic surgeon Prof Mark Haber (Dr Haber).

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and arbitration hearing on 12 June 2020. Andrew Parker of counsel, instructed by Philip Ferraro, solicitor, appeared for the applicant. Lachlan Robison of counsel, instructed by Ron Galea, solicitor, appeared for the respondent. Rana Issa from iCare also attended.

4. I used my best endeavours in attempting to bring the parties to a settlement, acceptable to each, during the conciliation phase. I am satisfied they had sufficient opportunity to explore settlement and were unable to reach one. I am also satisfied they understand the nature of the application and legal implications of any assertion made in the evidence.

5. During the arbitral phase, Mr Parker sought leave to amend the application in two respects. Firstly, to delete reference to the amount of $15,000 claimed for the surgery, and to instead claim a general order or award pursuant to s 60 of the 1987 Act; and secondly, to delete reference in the ARD to reliance upon injuries to the applicants lumbar spine, cervical spine and left shoulder. There was no objection to any of those amendments. It was also noted and recorded that the first of those amendments was on the basis that both parties agreed or undertook not to take issue about whether the monetary threshold will have been satisfied in the event of any appeal from this decision.

6. On 12 June 2020, Mr Robison applied to cross-examine the applicant. This was opposed by Mr Parker. I refused the application. The application was late. At no time before the hearing 12 June 2020 did either party give notice of intention to cross-examine any person.

7. Also, though the applicant was attending by telephone and sitting in a room with his solicitor, his counsel was attending by telephone in a different location. This created potential for unfairness to be visited on the applicant. As submitted by Mr Parker, the lateness of the application would have limited his capacity to effectively confer with, and properly inform and prepare, the applicant about and for the cross examination.

8. Also, granting the application would have delayed the case by the need to order written submissions. I enquired about the nature and scope of the proposed cross examination. Mr Robison stated, then out of the applicant's earshot, that he wished to question the applicant about his shoulder symptoms before and after the incident together with the details of the mechanism of the alleged injury to his right shoulder on 5 March 2019.

9. Mr Robison did not point to any particular matter proposed to be put to the applicant that was not already part of the evidentiary material lodged in accordance with the rules and my 18 May 2020 direction. He said he was putting the applicants credit in issue for various reasons, including because the mechanism of injury referred to in the history taken by Dr Herald was inconsistent with the applicants other statements, and should be seen as a recent invention.

10. I told Mr Robison that the refusal of the application did not prevent him making submissions about the applicant's credit on the documentary evidence. This was not a case where it could be said that there was a lack of forensic diligence on the part of the solicitors in the preparation. On the contrary, each had exercised forensic diligence to assist the furtherance of the case for both his client and the Commission. This included Dr Richard Powell, the expert orthopaedic surgeon engaged by the respondent (Dr Powell), having prepared a supplementary report. The pre-trial preparation by each party was sufficient to give notice to the other of submissions ultimately intended to be put to the court (*Baines v Hany* [2018] NSWCCPD 14 at [212-219]). It has been clear, at all times since this dispute arose, that there was an issue about whether the applicant sustained an injury to his right shoulder as a result of the incident. For all those reasons, I refused the application.

11. Another issue arose in the course of identifying the evidence. Mr Parker objected to a report dated 3 June 2020 from an exercise physiologist, Mr McIlwain. It stated Mr McIlwain was happy for the applicant to return to pre-injury duties and be discharged to self-manage. Mr Parker said this opened up a new issue: whether the proposed surgery was reasonably necessary for the purposes of alleviating the consequences of the injury, rather than the question of whether the incident was causative of injury. Mr Robison agreed this was the basis of his reliance on this report, but that the s 78 notice included reliance upon such issue. I agreed with Mr Robison's submission and admitted the document into evidence.

ISSUES FOR DETERMINATION

12. There then are two issues. Firstly, whether the proposed right shoulder surgery is reasonably necessary "as a result of an injury received" (the causation issue); secondly, whether that surgery is reasonably necessary for the purposes of alleviating the consequences of any injury that may be found to have been so caused (the alleviation issue).

EVIDENCE

Documentary Evidence

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

    (a) The ARD;

    (b) Applicants Application to Admit Late Documents of 12 May 2020 (May ALD);

    (c) Applicants Application to Admit Late Documents of 4 June 2020 (June ALD);

    (d) Reply, and

    (e) Respondents Application to Admit Late Documents dated 5 June 2020 (RLD).

Applicant's statements

14. There are three statements from the applicant, 9 April, 12 May and 30 June 2020. He is a 50 year old man, born on 4 June 1969 in Samoa, and migrated to Australia on 6 November 1998. He outlines a consistent work history in Samoa and Australia until commencing with the respondent in 2017. He notes that about five years before the incident, he was diagnosed with diabetes which he manages with medication. He states he also had right shoulder pain and restricted movement before the incident; but that:

> "the problem would come and go ... my memory is that just before my accident on 5 March 2019, my right shoulder was feeling better. I understand that I visited my GP … in February 2019 about my right shoulder, but I cannot remember the details of this consultation. After the accident I can clearly remember that I began to experience right shoulder pain which became constant and much worse than I had before…"

15. The applicant was reversing a forklift and notes his colleague was "…driving his forklift towards me". The applicant then stopped his forklift, beeped his horn, but his colleague could not see him as the colleague "had two pallets on his forklift which blocked his vision and he collided with me". He stated he "... injured my neck, back and shoulders".

16. He then left work early, consulted his GP on 5 March 2019, was referred for an x-ray and physiotherapy – and states "although I had pain in my right shoulder at the time, my main focus when I saw Dr Ng was my neck and back pain…".

17. He was referred to a neurosurgeon, Dr Damodaran, who he saw on 14 May 2019. He was provided with some cortisone injections "but they did not help my symptoms". He says Dr Damodaran then recommended back surgery. This was carried out on 27 June 2019.

18. He stated that since the incident, his right shoulder pain and stiffness became much worse, and once he had surgery for his back injury, his focus turned to fixing his "right shoulder problem". He saw Dr Haber in September 2019. He thereafter saw Dr J Davé in November 2019. This was after Dr Haber recommended right shoulder surgery, but, the insurer, Employers Mutual Limited (EML) denied liability for that. He understood Dr Davé would treat him through the public system. Dr Davé recommended arthroscopic decompression surgery. He stated that he prefers to have the surgery recommended by Dr Haber.

19. He says "at the moment …condition of … right shoulder is very bad … very stiff … can barely move it … in a lot of pain … hard ... to get comfortable at night … keeps me awake …".

20. The supplementary statement of 12 May 2020 notes that "as best I can remember, the shoulder problems I was having before the accident were not long standing, but had only been for a period of some weeks. He also states that he understood Dr Powell "says that my shoulder started while I was doing my rehab" and says "…This is wrong … felt shoulder pain on the day of the accident and I confirmed this when I completed … report on the same day …however my neck and back were distracting me and that was my main focus".

21. The supplementary statement of 3 June 2020 (June ALD 1) again notes that Dr Powell "says that my shoulder problem started in rehabilitation … also says I denied having any prior shoulder pain", and states that he "had pain in my right shoulder for …around 2 weeks prior to the accident which, by the time of the accident, had settled … when I had the accident, I was immediately aware of pain in my right shoulder … from there … pain and restricted movement … did gradually get worse … my focus at first was on my back and neck pain".

Accident/Injury Report Form dated 5 March 2019 (the incident report)

22. This document is signed by the applicant, a supervisor, Victore William, and a "first aider", whose name appears to be "Almaraz". Each signed the document on 5 March 2019 at or about 10:25 am. Beside "area of body injured (e.g. leg, hand, head)", there is written "Neck, back, *shoulder*" (my emphasis). There is *also* a *diagram* which *circles t*he *right shoulder* area. There is writing inviting further information "Other – please state". Beside that is written "BODY SHAKING". Also, beside an invitation to "Describe how the accident happened" there is written "My forklift hit by another forklift".

SIRA Motor Accident Claim Form

23. This was completed by the applicant on 17 June 2019 in the form of a statutory declaration. His description of the incident is reasonably consistent with that given in his statements and he describes his injuries as "back, neck, shoulders".

Dr Hilver Ng, GP

24. The clinical notes of Dr Ng show this entry on 11 February 2019: "has right shoulder pain last two weeks … restricted shoulder joint movement … pain around scapula blade … denies recent trauma … for x-ray and US shoulder and back … to take short course … Mobic …" On 21 February 2019, the notes show a similar entry including that the applicant had tried Mobic, that there was abduction to 90 degrees on examination and it was "painful to go beyond … lateral rotation, slight pain, but good range … discussed x-rays awaiting u/s … consistent with rotator cuff syndrome …".

25. The next time the applicant saw Dr Ng was the date of the incident, 5 March 2019. An entry is made of "whiplash injury … forklift, reversing … another forklift driving forward hitting pt on the back … spine … rom with slight stiffness with neck/upper/lower back … ddx whiplash type injury". The applicant visited Dr Ng then on at least five occasions between 7 March and 29 April 2019, during which time there is no record of any injury to or symptoms in his right shoulder. Those attendances essentially noted complaints about lumbar spine and related problems. On 15 May 2019, the applicant saw Dr Ng who recorded "recurrent shoulder pain *still* … right shoulder … ddx? Rotator cuff … previously had x-rays in Feb not use/s at the time …" (emphasis added).

26. The June ALD attaches a more extensive set of clinical records than either the ARD or Reply. These go back to July 2006. Many entries of attendances by the applicant on that practice appear between July 2006 and 11 February 2019 with no, or no specific, reference to the right shoulder; with the possible exception of an entry on 31 May 2007 noting "shoulder pain revolved [sic]". It appears "revolved" should be read as "resolved". Otherwise, during the whole of that period, there appear many references to, relevantly, neck and/or back problems as well as other general medical problems – in particular, diabetes.

27. On 29 July 2019, EML wrote to Dr Ng with a questionnaire. This post-dated the 27 June 2019 surgery. In answer to a question inviting him to "Confirm the clinical diagnosis of the work related injury", Dr Ng did refer to back pain, but not the right shoulder. Otherwise, the questions to him related essentially to the timing and detail of the applicant's return to pre-injury duties. He was asked to advise as to "Prognosis to pre-injury duties" and Dr Ng relied "His prognosis is good post-operation".

28. On 4 October 2019, EML wrote to Dr Ng asking him to report on whether the applicant's "new symptoms of right shoulder pain (were) caused by the original injury … on 5/3/2019". Dr Ng reported that while the applicant did have a previous history of rotator cuff syndrome in the right shoulder, the main focus after the accident was "considered more to do with his back … and neck issue … he in fact does have on and off symptoms with his right shoulder throughout … noted … physiotherapist report … April … he did already have … right shoulder … pain …" Dr Ng also reported to EML that "in time", the applicant was showing symptoms also of frozen shoulder "with more and more reduction to his range of movement".

29. Dr Ng opined that frozen shoulder was a condition which at the early stage of the disease could look very similar to other conditions like rotator cuff syndrome, has been known to be caused by trauma, and the applicant "could certainly have suffered the initial trauma to his neck/shoulder and upper back area when he had … accident which triggered the onset of his frozen shoulder … however the full symptoms/signs of the condition have only revealed themselves in time…".

30. Dr Ng was also asked about whether the applicant would have required the same type of surgery as proposed by Dr Haber at this time "irrespective of the work injury on 5/3/19". Dr Ng stated that "the surgical treatment for frozen shoulder … is arthroscopic capsular release which is a specific treatment only for frozen shoulder and is **not for rotator cuff treatment"**. This comment was made immediately after Dr Ng had clarified that while there was a pre-existing condition in the applicant's shoulder, in the nature of rotator cuff syndrome, the applicant "did **not** have pre-existing history of frozen shoulder".

31. EML also asked Dr Ng to advise why the shoulder injury had not been placed as a diagnosis on his earlier report to EML. Dr Ng answered:

> "it was very difficult at the time to see if he has injured his shoulder as he already had shoulder pain present prior to his accident … subsequently noted when he started to show symptoms and signs consistent more with frozen shoulder … on retrospect, he has in fact suffered initial injury to his shoulder also, and his pre-existing condition of rotator cuff syndrome … has improved … though his symptoms have continued to worsen".

32. Dr Ng also supported, in response to a question from EML, the proposal for the arthroscopic capsular release as being "certainly … the treatment option to be considered for Mr Wright". This was immediately after he had noted that the applicant had been through physiotherapy and cortisone injection without significant improvement.

Report of Vincent Hoang, physiotherapist, dated 30 April 2019

33. Dr Ng referred the applicant to Mr Hoang. The report refers to "physio … progress for his right shoulder, neck and lower back pain …" At that stage, the right shoulder range of movement was limited by "end range pain" and Mr Hoang's impression was "right sub acromial bursitis, rotator cuff tendinopathy".

34. Mr Hoang had earlier reported to Dr Ng on 11 March 2019. This is his first report after Dr Ng had referred the applicant to him. There is reference to complaints in and about the upper and lower back and neck – but not for the right shoulder.

Dr Haber

35. The applicant first saw Dr Haber, referred by Dr Ng on or about 26 September 2019. Dr Haber reported on the applicant's right shoulder pain to EML. His provisional diagnosis was "secondary capsulitis". He took a history of the applicant having a sudden onset of pain in the right shoulder after the incident, and noted the injury to the back as well. He noted the back surgery had given the applicant "some relief". He noted the past medical history, including non-insulin dependent diabetes mellitus, and saw the x-ray and ultrasound investigations. He recommended the applicant undergo arthroscopic capsular release surgery. He notes he discussed the treatment options available with the applicant, including ongoing physiotherapy, repeat cortisone injections and a wait and see approach. He then discussed the role of the arthroscopic capsular release and the natural history of a frozen shoulder, and then notes that "due to the presence of persistent symptoms of severe pain and stiffness with no evidence of resolution, I have recommended arthroscopic capsular release … treatment options and risks and benefits of the procedure were discussed …".

36. Dr Haber then opines on causation and states "from the history obtained I do believe … employment is a substantial contributing factor to the current condition and need for surgery … hoped surgery will alleviate the patient's symptoms and assist … returning to pre-injury duties … this … is reasonable and necessary and …the most appropriate treatment…".

37. Dr Haber hoped that the applicant may commence manual duties using the operated arm and may progress with a return to work program as comfort allowed six weeks after surgery.

Dr Jay Davé (Dr Davé)

38. Dr Davé reported to Dr Ng on 11 November 2019 after assessing the applicant with respect to "pain affecting his right shoulder …". He noted the applicant's shoulder problems "have been going on since September 2019 when he had increasing stiffness and pain … cause has been diagnosed as adhesive capsulitis … does not have any problems affecting his opposite shoulder". Dr Davé noted the applicant's background of non-insulin dependent diabetes and thought "this could be one of the causative factors for adhesive capsulitis … has had no injuries that he can recall though he thinks it may be related to his work".

39. Dr Davé reviewed the applicant in December 2019 and reported again to Dr Ng. He then had the benefit of an MRI scan and a history that "Vaoatea had an injury at work on 5 March 2019 when he was hit by a forklift…" He noted the applicant's claim for right shoulder injury was not accepted and he now wished to proceed to surgery in the public hospital system.

Mai Nguyen, physiotherapist

40. Dr Damodaran referred the applicant to Mr Nguyen and saw him on 11 July 2019, about two weeks after the back surgery. There is no reference to the right shoulder. Mr Nguyen's report only deals with the post-operative treatment of the applicant's spinal problems.

Dr Laurent Wallace, orthopaedic surgeon

41. The applicant saw Dr Wallace on 25 October 2019, referred by Dr Ng, presenting with low back and right shoulder pain. Dr Wallace noted the applicant had back surgery in June 2019. As well as assessing the applicant's back condition, he examined the right shoulder noticing significant reduction in range of motion. He did note that the applicant's "consult with me was not really about the right shoulder, but I do feel that this warrants investigation and treatment ... seems to me to be fairly clearly related to the accident … unsure why you mentioned … it is not being covered by the insurer…".

Mr Luke McIllwain, exercise physiologist 4 June 2020

42. Mr McIlwain reported that,

> "given Vaoatea's progress, I am happy for him to return to pre-injury duties and finish working with Rehab Services … will still complete final 8 exercise physiology sessions … ensuring he can manage his duties … at the end of these 8 sessions it is anticipated that Vaoatea will be discharged with a home program to self-manage …".

Dr Jonathan Herald, orthopaedic surgeon

43. The applicant saw Dr Herald at the request of his own solicitor for forensic purposes on 25 March 2020. Dr Herald reported that day. He took the same, or similar, history otherwise appearing in the case, but with this added feature;

> "… colleague … behind him had a double stacked forklift … with two pallets of ice … two pallets blocked his colleague's … vision … as a result of … collision … pallets fell heavily onto …back, neck and shoulders".

44. Dr Herald noted that the applicant saw Dr Ng on the day of the incident but that "his main problem at that stage was his neck and back" and that following the back surgery on 27 June 2019, "his initial right shoulder pain which began following the accident on 5th March 2019 gradually increased and progressed with more and more reduction in range of motion". The applicant told Dr Herald that several weeks prior to the accident "he was complaining of right shoulder pain but there was no restriction of movement and the pain was only temporary in nature and resolved by the time of the accident". He examined the applicant's right shoulder and considered an x-ray and ultrasound (21 May 2019 and 26 October 2019) and an MRI of the right shoulder (4 December 2019). In terms of causation, he stated:

> "… ultrasound does confirm … he did have a partial thickness tear as a result of the stated accident which occurred in March 2019. Although that tear has healed, it has left him with a secondary frozen shoulder … agree … he does have a history of diabetes and diabetes does increase … risk of frozen shoulder but … has had diabetes and treatment for diabetes for … vicinity of 5 years and the frozen shoulder would not have occurred had it not been for the trauma and the resultant rotator cuff tear which triggered the frozen shoulder …"

45. In terms of the alleviation issue, Dr Herald stated:

> "… adhesive capsulitis does tend to slowly improve over time, however given the lengthy time period which can sometimes be in the vicinity of 2 to 3 years for recovery, it is not unreasonable to consider an arthroscopic capsular release to allow early return to work and normal function … the procedure which both myself, Dr Haber and Dr Dave thinks is reasonable and necessary is an arthroscopic capsular release …"

46. Dr Herald prepared a further report dated 9 May 2020, after seeing Dr Powell's 4 May 2020 report and the records of Dr Ng, Mai Nguyen and Dr Haber. He then opined that he "would still consider his frozen shoulder to be secondary to trauma or his workplace injury rather than attributed to his pre-existing history of diabetes". Dr Herald noted that the report of Dr Ng, and the other medical records, confirmed his original findings. In doing so, he carefully considered the history of the symptoms on presenting to Dr Ng on 11 February 2019, also noted the clinical findings and x-ray results, and that the applicant had returned to see Dr Ng on 21 February 2019 when he was started on anti-inflammatory tablets (Mobic).

47. Dr Herald also noted Dr Ng's findings for range of movement on 21 February 2019 being "consistent with rotator cuff syndrome" and noted that "with active not equal to passive range of motion I would consider him to have had rotator cuff syndrome at that point and not a frozen shoulder … Dr Ng also … confirms this in response to his question that his previous history was of rotator cuff and range of motion was limited only by pain with an active range of motion restriction, not a passive range of motion restriction …".

48. In relation to Dr Powell's report, Dr Herald agreed it was difficult to obtain a clear cause of adhesive capsulitis as "our understanding of the disease is not complete". But he adds :

> "there are however risk factors such as diabetes and trauma which can induce a frozen shoulder … he has had a long standing history of diabetes and the frozen shoulder occurred after his workplace accident … I would still consider his frozen shoulder to be secondary to trauma or his workplace injury rather than attributed to his pre-existing history of diabetes …"

49. He noted that Dr Powell's report "seems quite reasonable" and it is not clear cut as to how to identify the exact cause of frozen shoulder in this case, but goes on to add "but I think on the balance of probabilities there is a more than 50% chance that his workplace injury is the cause of his shoulder pain and secondary frozen shoulder".

50. Dr Herald provided a further supplementary report on 29 May 2020, replying to Dr Powell's reports of 25 May and 18 May 2020. He confirms that "I believe that the injury on 5 March 2019 is the main contributing factor to Vaoatea Wright developing adhesive capsulitis of his shoulder …" .Then, in answer to a question posed by the applicant's solicitor as to whether he considered adhesive capsulitis to be a disease contracted by gradual onset, he stated:

> "… the adhesive capsulitis developed immediately after the trauma of his injury at work on 05 March 2019 and gradually progressed over time from that point. The three distinctive phases of freezing, frozen and thawing usually go over a prolonged 12 to 18 month period and can be traced back have begun after 05 March 2019 …"

Dr Powell

51. There are four forensic reports from Dr Powell. In the first, dated 30 December 2019, he took a history of the incident involving the applicant reversing his forklift while looking over his right shoulder when a colleague, driving a double stacked forklift coming towards him, collided with the back of his forklift, and that he sustained injury to his neck and lower back. Dr Powell notes that "he subsequently claimed the incident also resulted in an injury to the right shoulder". Dr Powell also noted a history of persisting lower back symptoms, referral to a specialist and subsequent discectomy in June 2019, and that the applicant was off work for six to seven weeks following the surgery before returning to light duties. Then he notes the cervical spine symptoms largely settled "though Mr Wright complained of the subsequent development of right shoulder symptoms". Dr Powell noted "Mr Wright denied having suffered any previous injuries involving the right shoulder … however your letter … indicated … history of previous problems with the right shoulder and consulted his …doctor on 11 February 2019…". Dr Powell also noted the five year history of non-insulin diabetes.

52. On examination, Dr Powell found the applicant "a compliant and cooperative patient throughout the taking of the history and examination …no suggestion of overreaction or exaggeration …". Dr Powell's examination of the applicant included the right shoulder and he also examined plain x-ray and a right shoulder ultrasound dated 21 May 2019.

53. After finding a diagnosis of adhesive capsulitis, Dr Powell notes, in relation to causation:

> "… in the majority of cases adhesive capsulitis represents an idiopathic condition … more common in those who suffer from diabetes. Noting the mechanism of injury, the history provided and my comments above, I do not believe there is sufficient evidence to conclude that Mr Wright's current right shoulder condition is the result of injury sustained in the course of his employment … more likely to be idiopathic…"

54. In response to a request to comment on whether the proposed right shoulder surgery was reasonably necessary, Dr Powell relevantly answered "… options for … management of adhesive capsulitis include …conservative approach with supportive measures … MUA or arthroscopic release…". When asked to comment on the prognosis, Dr Powell thought it was favourable, and that while surgical intervention may improve the level of function in the short to medium term, it did not tend to affect the overall time frame to recovery.

55. Dr Powell gave a second report on 4 May 2020. He was given further material, including the incident form, the applicant's statement of 9 April 2020, and other medical reports, including from Dr Herald of 25 March 2020. Asked whether he agreed with the diagnosis of rotator cuff syndrome or whether there was pre-existing adhesive capsulitis, he answered:

> "… situation is complex … was suffering from … right shoulder problem prior to … incident … during the rehabilitation, attention was again directed towards the presence of right shoulder symptoms … MRI scan … reported sub-acromial bursitis, no rotator cuff tear but advanced adhesive capsulitis … was consistent with his clinical presentation at the time of my assessment … current diagnosis … adhesive capsulitis … right shoulder ultrasound on 21 May 2019 reported evidence of rotator cuff tear and underlying tendinopathy, though … subsequent MRI scan in December 2019 did not report a rotator cuff tear … although … reference has been made … to the rotator cuff tear healing, these tears have very limited capacity to heal and …more likely … ultrasound has over reported … extent of a rotator cuff pathology …. this does not alter the fact that the right shoulder was symptomatic prior to the workplace incident …two things …then happened … first … the … incident in which … reported … development of … right shoulder symptoms … second … development of adhesive capsulitis … by far the majority of these cases are idiopathic … sometimes they can be secondary to a traumatic incident though the role of the traumatic incident in precipitating the subsequent development of adhesive capsulitis is not well understood and in many cases it may be that simply the incident has drawn attention to the shoulder which would have become symptomatic regardless … of relevance in this … case is the presence of diabetes … patients who suffer from diabetes are at increased risk of the subsequent development of adhesive capsulitis with or without a specific precipitating incident, though the causal link is unclear and it is considered more of an association … in consideration of all … factors, there is a history of pre-existing condition and documented symptoms and relevant clinical findings in the period immediately prior to the … incident … is a predisposition to the development of adhesive capsulitis on the basis of a longstanding history of diabetes … there is a workplace incident in which the primary injury was to the lower back … *with no documented injury to the shoulder at the time … although the subsequent development of symptoms during the rehabilitation period* … finally there is the development of adhesive capsulitis … I do not believe there is sufficient evidence to conclude that the workplace incident represents the main contributing factor in the subsequent development of adhesive capsulitis … maintain … is more likely to be idiopathic in nature …(emphasis added)".

56. Dr Powell was also asked to address a suggestion that the applicant alleged his pre-existing symptoms in the right shoulder were "on and off", and *noting that the accident injury report form records the injury to the right shoulder*, whether it may be said that there was an aggravation etc of a pre-existing disease in the right shoulder and if so, whether the employment was the main contributing factor to that. He responded by saying he understood the applicant did not give a history of right shoulder symptoms that are "on and off", rather that he had not experienced prior problems with the right shoulder, then stated:

> "… nevertheless, noting the circumstances surrounding the workplace incident … it is possible … Mr Wright did suffer a minor soft tissue injury to the right shoulder in the workplace incident, though for the reasons I have outlined in response to question 1, I do not believe there is sufficient evidence to conclude that this incident represents the main contributing factor in either the aggravation of a pre-existing condition or the subsequent development of the adhesive capsulitis …".

57. Dr Powell was also asked to address the question of the reasonableness of the proposed surgery from the point of view of whether it was to address the adhesive capsulitis and not the pre-existing rotator cuff syndrome. He agreed with Dr Ng that the surgery proposed was to address the adhesive capsulitis, and not the rotator cuff pathology.

58. Dr Powell's 18 May 2020 report addresses further specific questions in the context of further documentation, including the statement of the applicant of 12 May 2020, Dr Herald's report of 9 May 2020, and further clinical records of Dr Ng. He states that contrary to what Mr Wright had stated, his earlier report acknowledged the presence of symptoms in the right shoulder several weeks before the incident – and which was at odds with the history provided to both Dr Herald and him, and "where he denied having suffered any prior injuries involving the right shoulder". As to the supplementary report of Dr Herald, Dr Powell stated that "Dr … Herald … reiterates his previous opinion in relation to causation of a frozen shoulder. I continue to hold a different opinion. In most other aspects, Dr Herald and I are in agreement…".

59. Dr Powell's last report, dated 25 May 2020, answers a further question from the respondent's solicitor about whether he considers adhesive capsulitis to be a disease contacted by gradual onset. Dr Powell stated that "the physiology of adhesive capsulitis is not definitively understood … majority of cases … idiopathic and symptoms develop in a gradual fashion … process has several distinct phases and can continue over a prolonged period of up to … 18 months …I believe it would be reasonable to consider the adhesive capsulitis to represent a disease process of gradual onset …". He otherwise adhered to his earlier opinions.

Submissions for the Applicant

60. Mr Parker's oral submissions have been recorded. It is unnecessary to recite them in full here. They may be summarised as follows. The claim for injury to the right shoulder is put on the basis of personal injury under s 4 (a) of the 1987 Act, in other word, a "frank injury". In the alternative, the claim is put under s 4(b)(ii) of the 1987 Act on the basis of a "disease injury" – on the basis of aggravation, acceleration, exacerbation or deterioration of a pre-existing disease in the right shoulder. The injury is adhesive capsulitis or "frozen shoulder".

61. While there was evidence of the applicant having some problems with his right shoulder before 5 March 2019, there was no evidence of frozen shoulder before that time. As such, the claim should be treated as a personal injury rather than a disease. The applicant only needs to show the employment was a substantial, rather than the main, contributing factor to the injury.

62. However, even in the event of being found a disease, the evidence, both lay and expert evidence was in favour of the employment being the main contributing factor to the aggravation of any such disease. In this regard, reliance was placed on the decisions in *Rail Services Australia v Dimovski* [2004] NSWCA 267; 1 DDCR 648, and *Galluzzo v Commonwealth Bank of Australia* [2014] NSWWCCPD 82.

63. The basic causal question is whether the frozen shoulder was caused by trauma on 5 March 2019, or whether it was due to the applicants pre-existing diabetic condition. The respondent's argument that the right shoulder condition was pre-existing is a "red herring". The problems with the applicant's right shoulder prior to 5 March 2019 were not in the nature of frozen shoulder. Also, the pre-existing problems had resolved by the time of the collision on 5 March 2019. Thirdly, if it be necessary to go this far, the "egg shell skull" rule should apply. Even if the applicant did have a "weakened" shoulder, the respondent had to take him as it found him.

64. The opinion of Dr Powell should not be preferred, at least because his is the only evidence not supporting the applicant's case – contrary to five other doctors who do support it. His opinion is also weakened as he assumes there was no injury to the right shoulder caused by incident, focusing on his understanding that there was a lack of any contemporaneous report of it.

65. Dr Powell's opinion is also rendered less persuasive than Dr Herald's opinion given his concession that it was possible that a minor strain to the right shoulder may have been sustained by the applicant in the incident.

66. Otherwise, Mr Parker essentially went through what was submitted to be the important pieces of evidence in the documentary material. It is unnecessary to trace through that again because it has been dealt with in the above summary of that evidentiary material.

Submissions for the Respondent

67. In nearly all cases involving adhesive capsulitis /frozen shoulder, the cause is not traumatic. The employment in this case is neither the main or a substantial contributing factor to the alleged injury. If the commission finds there was already in place a pathological a process in the right shoulder before the incident, it follows that the applicant's case should fail.

68. There are inconsistencies in the applicant's accounts of how the injury came about. The history given to Dr Herald that the incident involved two pallets of ice falling heavily on to his neck, back and shoulders was inconsistent with the other histories regarding the circumstances of the incident – and should be regarded as a recent invention. The applicant should not be regarded as a witness of credit in relation to how the accident happened and the history of his right shoulder symptoms generally. In any event, it is important to properly understand the relevant principle in *Briginshaw v Briginshaw* [1938] HCA34; 60 CLR 336. For the purpose of the present case, there needs to be actually persuasion about what has been alleged.

69. There was a frozen shoulder before the incident. Paragraph 11 of the applicant's 9 April 2020 statement should be seen as a concession by him that he did have problems with his right shoulder before 5 March 2019. He states he believes those problems would come and go at that stage. But this is implausible both generally and including because he also states in para 11 that his memory is not good about the detail of the consultation in February 2019. The applicant says he then has a clear memory of right shoulder pain which became constant and much worse than he had before the accident is implausible.

70. In the same statement, at paras 12 -13, the applicant purports to set out the detail of the accident, but fails to give any real detail about the accident insofar as how it could be likely to have caused his alleged injury; e.g. by going into his biomechanics at the time of or immediately after the accident. There should be significant doubt about any impact to his right shoulder in that accident. His statements about injuring his shoulder in para 13 are not helpful and merely conclusions. Although he states in para 14 that he did have pain in the right shoulder when he saw Dr Ng on 5 March 2019, he fails to mention any reason why he did not then mention this to the doctor.

71. The accident/injury report form does mention *a* shoulder injury. But it does not refer to the right shoulder. One would have expected the injury to be more likely in the nature of bruising or fracture if the applicant's evidence is to be accepted about how it happened. The accident on 5 March 2019 did not cause any injury to the applicant right shoulder.

72. As to the submission from Mr Parker about Dr Powell conceding the possibility of a minor strain in the accident, this was only possible if it be found that there was sufficient and necessary force upon the shoulder. The evidence does not allow for such a finding.

73. The right shoulder ultrasound of 21 May 2019 may show "a tear", but this only shows there may have been such a tear by the time of the ultrasound, it does not prove the tear occurred in the 5 March 2019 accident.

74. Dr Herald concedes it is difficult to obtain a clear cause of adhesive capsulitis as our understanding of that disease is not complete, and risk factors such as diabetes can induce a frozen shoulder. This shows it is difficult to find a cause in the present case and employment is not the main contributing factor - which should be the proper test given all the evidence.

75. Dr Powell stated that the majority of cases of this nature have idiopathic causes and 90% of cases will resolve. This evidence also points towards a conclusion that the accident on 5 March 2019 did not cause any injury to the right shoulder.

76. Dr Powell points out (ARD 25) that while surgical intervention may improve the level of function in the short term, it does not tend to affect the overall timeframe to recovery. This evidence, linked up with the evidence of the exercise physiologist, Mr McIlwain (RLD 8), supports the respondent's case that the surgery is not reasonably necessary within the meaning of s 60 in regard to the principles in cases such as *NRMA v Diab* NSWWCCPD (*Diab*).

77. The evidence of Dr Wallace does not assist the applicant's case. He was not seeing the applicant for a right shoulder condition. His comments regarding that shoulder are gratuitous.

78. Otherwise, Mr Robison referred to various pieces of the evidentiary material. It is unnecessary to trace through these again. They are dealt with in the summary of the evidence above.

Submissions in Reply for Applicant

79. This case is not really, and should not be, about credit. Not even Dr Powell raises questions about the applicant's credit. To the extent that there may be difficulties with the history, the applicant is a forklift driver not a lawyer. It is not fair to say the real issue in the case is a credit or reliability point. It is really about causation in the medical sense and that is how the doctors treat it.

80. There is no evidence, at least of any specificity, that the applicant suffered a frozen shoulder before 5 March 2019. Dr Powell does not say that. If he had thought so, he would have said it.

FINDINGS AND REASONS

The causation issue

81. I have carefully considered the submissions of the respondent in relation to the lack of credit in the applicant's evidence. I do not agree with those submissions. I think Dr Powell best captured this aspect of the case when he wrote, "It should be noted that although Mr Wright was a complaint and cooperative patient, he was not a good historian" (ARD 21). Dr Powell did later note that "Mr Wright denied having suffered any previous juries involving the right shoulder … however your letter of introduction indicated that Mr Wright did have a history of previous problems …" (Reply 37).

82. In his 18 May 2020 report, Dr Powell also noted the applicant :

> "indicated … I reported his shoulder symptoms started whilst he was in rehab … quite clear … I acknowledged the presence of symptoms … in the period several weeks prior to the subject workplace incident … this was at odds with the history provided to
> Dr Herald and myself where he denied having suffered any prior injuries involving his right shoulder…".

83. This comment is not to the point of what the applicant was saying. He stated "Dr Powell, I understand, says my shoulder started while I was doing my rehab ... this is wrong. I felt shoulder pain on the day of the accident …I confirmed this when I completed a … report on the same day …". Dr Powell's reference to his acknowledgement of the presence of right shoulder symptoms did not extend, at least in this context, to an acknowledgement that the applicant reported symptoms in his right shoulder on the day of the incident. He has rather acknowledged the presence of symptoms *before* that incident. It appears Dr Powell may have misunderstood the proper context. It is unclear if Dr Powell is attempting to point out that the applicant was being deliberately deceptive. I doubt he is. But if he is, I would not find the applicants evidence so impeached in this respect.

84. Also, if Dr Powell is saying that the applicant denied, to Dr Herald, having suffered any injuries to his right shoulder before the incident, I would not be persuaded this was correct. Dr Herald's report relevantly reads:

> "Past medical history of diabetes … gout … high cholesterol … I am told that prior to his accident on *11 February 2019* [sic; I read this as 5 March 2019], or several weeks prior, he was complaining of right shoulder pain but there was no restriction of movement and the pain was only temporary in nature and resolved by the time of the accident … says that just prior to the accident he had no pain in his shoulder".

85. Even if the relevant information, that the applicant did have right shoulder pain before the incident, and such information came from Dr Herald being learning it by some other means (such as letter from the applicants solicitor) , it is clear enough that the applicant has not sought to hide such prior symptoms, at least deliberately, including by denying them.

86. I also disagree with the submission for the respondent that the versions of the circumstances of the incident given by the applicant are inconsistent – particularly the aspect recorded by Dr Herald regarding the pallets of ice falling heavily onto his back, neck and shoulders. It is true that this aspect does not appear in the evidence elsewhere. But, in all the circumstances, I think this is not, at least necessarily, an inconsistent feature of the history of the incident. The history taken by Dr Ng notes "another forklift driving forward hit pt on the back … spine …". While that still does not involve any impact on the right shoulder, I think that feature is more likely to be a reflection of the applicant not being a good historian.

87. This is not a case where there was, say, an alternative history given which was substantially different to that appearing in the histories that do appear. Again, when the applicant was "out of the room", and Mr Robison was asked to indicate the content of the proposed cross-examination, he did not point to any particular matter or information he had to confront the applicant with. In any event, there is a reference to "shoulder" on the incident report on the same day as the incident – with an illustration showing the right shoulder.

88. Any inconsistencies in the applicant's evidence regard these as relatively minor and do not impeach the applicant's credit in my mind. That I accept the applicant as not being a good historian does not, in all the circumstances of this case, mean that I do not accept his evidence. It does mean I treat it with care by testing it, where necessary, against other evidence. I find him to be a witness who is doing his best to tell the truth. I agree with the submission from Mr Parker in this respect. To the extent that there may be said to be difficulties with the history, the applicant is a forklift driver, not a lawyer.

89. The assessment of the applicant's credit feeds directly into the causation issue, partly because his evidence about the history of his right shoulder symptoms is relevant to the identification of receipt of a right shoulder injury as alleged, as well as its genesis and nature. His memory is that while he did have pain and restriction of movement before his accident on 5 March 2019, that pain would "come and go" and that just before the incident his right shoulder was feeling better. He also clarified that as best as he can remember, any such shoulder problems he was having before the accident were not long-standing, and had only been with him for a period of some weeks; and by the time of the incident, they had settled.

90. When I test this evidence by reference to the records, I find it likely that his evidence is essentially correct. He attended Dr Ng's practice many times between July 2006 and 11 February 2019, with no specific reference to any right shoulder problem; except for the entry on 31 May 2007, nearly 12 years before 11 February 2019. This is consistent with the applicant's evidence in this respect. Dr Ng's notes of the 11 and 21 February 2019 attendances are not, at least necessarily, inconsistent with the applicant's evidence that his right shoulder problems had settled by the time of the incident on 5 March 2019. There is no evidence of him seeking any further treatment for his right shoulder after 21 February 2019.

91. It is also important to consider the nature of the pathology. Both Drs Herald and Powell agree it is adhesive capsulitis. They disagree on the cause. Dr Herald believes the "frozen shoulder to be secondary to trauma or his workplace injury rather than … diabetes … more than 50% chance that his workplace injury is the cause of his shoulder pain and secondary frozen shoulder". Dr Powell believes that there is not sufficient evidence to conclude that the applicant's right shoulder condition is the result of injury sustained in the course of his employment, and it was more likely to be idiopathic in nature; and also that there was not sufficient evidence to conclude that the employment represents the main contributing factor in the development of "the disease process involving the right shoulder".

92. In my opinion, the incident report is an important piece of evidence in the resolution of the dispute. This makes it clear, contrary to the submission for the respondent, that the applicant sustained significant symptoms in, and believed that one of the areas of his "body injured" in the incident was his right shoulder. He reported that, in a formal fashion. His supervisor and a first aid officer also signed the incident report soon after the incident.

93. In his first report, Dr Powell does not appear to be aware that the applicant did report an injury to his right shoulder on the day of the incident. He opines that in the majority of cases adhesive capsulitis represents an idiopathic condition, and is more common in those who suffer from diabetes. He then stated that "noting the mechanism of injury, the history provided and my comments above, I do not believe there is sufficient evidence to conclude … current right shoulder condition is the result of injury sustained in the course of his employment … more likely to be idiopathic …". It is not clear what aspect of the "mechanism of injury" and the "history provided" leads him to this view.

94. In his second report, part of the documentation sent, which did not appear in the earlier material, was the incident report. He also had the benefit of the report of Dr Herald of 25 March 2020. He again argues that "the right shoulder was symptomatic prior to the workplace incident". That may be so, but such comment does not engage with the deeper analysis in the applicant's case – that the prior symptoms in the right shoulder were limited to attending Dr Ng on two occasions in February, after which the applicant said his right shoulder was feeling better and or had settled.

95. Dr Powell also mentions in his second report that:

> "two things have then happened … the first being the workplace incident in which Mr Wright sustained primarily an injury to the lower back, though also subsequently reported the development of cervical spine and right shoulder symptoms … the second being the development of adhesive capsulitis … sometimes … can be secondary to a traumatic incident, though the role of the traumatic incident in precipitating the subsequent development of adhesive capsulitis is not well understood and in many cases it may be that simply the incident has drawn attention to the shoulder which would have become symptomatic regardless … of relevance … is the presence of diabetes … increased risk of subsequent development of adhesive capsulitis with or without a precipitating incident … in consideration of all these factors … history of pre-existing condition and documented symptoms and relevant

> clinical findings in the period immediately prior to the … incident … predisposition to the development of adhesive capsulitis on the basis of … long-standing … diabetes … workplace incident in which the primary injury was to the lower back … **with no documented injury to the shoulder at the time** though the subsequent development of symptoms during the rehabilitation period … finally … development of adhesive capsulitis … do not believe there is sufficient evidence to conclude that the workplace incident represents the main contributing factor in the subsequent development of the adhesive capsulitis (emphasis added)".

96. I note that this analysis was given in answer to a question about whether there was a *diagnosis* of a rotator cuff syndrome or whether the applicant had a pre-existing adhesive capsulitis. The following question specifically asked Dr Powell to note that the applicant alleged pre-existing symptoms which were "on and of [sic]", that there was an x-ray on 21 February 2019 which was consistent with rotator cuff syndrome *and that the incident report did record an injury to the right shoulder* – and asked him to consider whether there had been aggravation etc of a pre-existing disease in the right shoulder. Nevertheless, Dr Powell began by again arguing:

> "rather than a history of right shoulder symptoms that are '*on and off*', Mr Wright indicated to both Dr Herald and myself that he had not experienced prior problems with the right shoulder, despite having presented to his local doctor only a few weeks earlier … nevertheless, noting the circumstances surrounding the … incident … it is possible that Mr Wright did suffer a minor soft tissue injury to the right shoulder in the … incident, though for the reasons I have outlined … I do not believe there is sufficient evidence to conclude … this incident represents the main contributing factor in either the aggravation of a pre-existing condition or the subsequent development of the adhesive capsulitis …".

97. There is no further analysis by Dr Powell in relation to the mechanism of injury. I appreciate it is not the onus of the respondent to prove injury. The applicant carries that onus. But I mention this in the context of my assessment of the persuasiveness of Dr Powell's opinion.

98. In my opinion, the applicant has proved that he sustained an injury. This is partly for the reasons I have given above in accepting his evidence. But even more importantly, I am more persuaded by the opinion of Dr Herald than the opinion of Dr Powell. I believe both doctors have provided a thoughtful analysis of what both agree to be a complex issue. I think Dr Herald's opinion is more persuasive partly because he does assume, and has taken into account *at all times* when he has turned his mind to the causation issue, that the applicant did report an injury to his right shoulder on the day of the incident, 5 March 2019. This is consistent with what I have found to be the case. Dr Herald has then also engaged carefully with the complex question of the extent to which the applicant's pre-existing diabetes condition could be responsible for his right shoulder symptoms. He says that:

> "ultrasound does confirm … he did have a partial thickness tear as a result of the stated incident which occurred in March 2019. Although that tear has healed it has left him with a secondary frozen shoulder … agree that he does have a history of diabetes and diabetes does increase your risk of frozen shoulder but … has had diabetes and treatment for diabetes for something in the vicinity of 5 years and the frozen shoulder would not have occurred had it not been for the trauma and the resultant rotator cuff tear which triggered the frozen shoulder …".

99. The above opinion from Dr Herald makes common-sense to me in terms of causation of injury. The matter is complicated by the visits by the applicant to Dr Ng on 11 and 21 February 2019. But again, I accept the applicant's evidence that his symptoms had settled by the time of the incident on 5 March 2019 – and that at the time of the incident he "was immediately aware of pain in my right shoulder … from there … pain and restricted movement … did gradually get worse … my focus at first was on my back and neck pain …".

100. I also bear in mind the respondent's submission that the 21 May 2019 ultrasound does not prove the partial thickness tear did occur on 5 March 2019, but rather that it was there at that time. However, I need to decide what is more likely, and I believe it more likely that the assessment of Dr Herald is correct when he states that the ultrasound does confirm that the tear was as a result of the incident. This is not only by simple acceptance of his opinion. It is also because that opinion is consistent with the evidence of the applicant about the nature and history of his right shoulder symptoms. And I accept the evidence of the applicant.

101. I also prefer Dr Herald's evidence to Dr Powell's evidence because I believe his analysis of the main competing causal theory – the applicant's diabetes condition – makes more common sense context of the particular evidence in the case. While Dr Powell has referred to patients suffering from diabetes being at increased risk of the development of adhesive capsulitis, with or without a specific precipitating incident, he does not engage with the particular point made by Dr Herald in this regard that I find persuasive: that the applicant's history of diabetes, and treatment for it, runs from about five years before the incident, and the frozen shoulder condition only occurred after his workplace accident. The opinion of Dr Herald on causation also has more symmetry with the evidence of the applicant than Dr Powell's opinion. And I accept the evidence of the applicant.

102. Dr Herald's 9 May 2020 report considers the report of Dr Ng of 4 October 2019. He then carefully considers the history before the incident, including the attendance on Dr Ng by the applicant on 21 February 2019 when he had started anti-inflammatory tablets, was shown to have abduction to 90˚ without pain, but had lateral rotation with slight pain but a good range was described, and the x-rays were "consistent with rotator cuff syndrome". Dr Herald then says that "with active not equal to passive range of motion, I would consider him to have had rotator cuff syndrome at that point and not a frozen shoulder … Dr Ng … confirms this … history was of rotator cuff syndrome …".

103. Dr Herald has agreed that it is difficult to obtain a clear cause of adhesive capsulitis and the understanding of the disease is not complete, and that diabetes and trauma can induce a frozen shoulder – however, he takes all information into account by looking at the "long standing history of diabetes and the frozen shoulder occurred after his workplace accident, I would still consider his frozen shoulder to be secondary to trauma or his workplace injury rather than attributed to his pre-existing history of diabetes …".

104. Asked as to whether he considers adhesive capsulitis to be a disease contracted by gradual onset, Dr Herald answered "I believe the adhesive capsulitis developed *immediately* after the trauma of his injury … the three distinct phases of freezing, frozen and thawing usually go over a prolonged 12-18 month period and can be traced back have begun after 05 March 2019 … (emphasis added)". Dr Herald believes that the applicant has sustained an injury in the nature of adhesive capsulitis and that the employment, through the incident, was both a substantial, and the main, contributing factor to that injury.

105. When Dr Powell ultimately acknowledged "the circumstances surrounding the workplace incident on 5 March 2019 (presumably referring to the incident report)" he did soften his opinion to say that it was "possible" that the applicant did suffer a minor soft tissue injury to the right shoulder in that incident – but still adhered to his opinion that there was not sufficient evidence to conclude that the incident represented the main contributing factor to either the aggravation of a pre-existing condition or the subsequent development of the adhesive capsulitis. Dr Powell is not here changing his earlier opinion. He only refers to a "possibility" that a "minor" soft tissue injury occurred. And I also recognise he does so in

the context of assuming the incident did occur. Nevertheless, I believe the opinion of Dr Herald to be more persuasive. Dr Powell's opinion does not still engage with a full acceptance that the applicant did, as I find to be the case, have worsening symptoms in his right shoulder from and after the incident.

106. It is curious there is no record of the right shoulder symptoms made by Dr Ng when he saw the applicant on 5 March 2019 – the same day as the incident – and the same day the applicant clearly reported an injury at or about his right shoulder at work. As noted by Mason P, with whom Beazley JA and Tobias JA agreed, in *Davis v Council of the City of Wagga Wagga* [2004] NSWCA34 at [35]:

> "Experience teaches that busy doctors sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury …" (see also *Gulic v O'Neil* [2011] NSWCA361 at [24]).

107. However, it is unnecessary I make a determination about whether Dr Ng did misunderstand or overlook recording any complaint about the right shoulder made by the applicant on 5 March 2019 and up to May 2019, although it also curious that Dr Ng did not refer to the right shoulder when he responded to EML's request for a report on 29 July 2019 – when he has referred the applicant for right shoulder physiotherapy in April 2019, and his notes had clearly recorded such injury since 15 May 2019 (see paras 27 and 31 above). The applicant himself does not assert there was any such misunderstanding or overlooking on the part of Dr Ng. He appears to take responsibility and simply states that his neck and back were distracting him and that was his main focus at the time. I think it is sufficient to find that this is the most likely explanation, and also in concert with my view that the applicant is not a good historian (but again in the sense as submitted by Mr Parker). I do not believe there is anything guileful in the evidence of the applicant.

108. Contrary to the submission for the respondent, I do not believe it is implausible that the applicant said his problems in the right shoulder would come and go before 5 March 2019, in circumstances when he says he has a clear memory of right shoulder pain which became constant and much worse than he had before the accident. For the reasons given above (paras 81-90), I accept his evidence in this regard. I also disagree with the submission that there is insufficient detail as to the circumstances surrounding the biomechanics of the accident to allow for any finding about any impact to the right shoulder in the accident. The incident report and claim form do refer to him reversing his forklift, noticing his colleague driving another forklift towards him, then stopping and beeping his horn when the collision occurred. That Dr Herald has a greater level of detail in his history does not make a difference to my assessment. That extra detail was known to Dr Powell before he wrote his supplementary reports. He does not specifically mention it.

109. Mr Robison also submits that the comment by Dr Powell conceding the possibility of a minor strain was only possible if it be found that there was sufficient and necessary force upon the shoulder, and that the evidence does not allow for such a finding. I reject that submission. Not even Dr Powell makes that point – at least with any specificity or clarity. The evidence allows for a finding that the applicant's colleague was driving a forklift behind him, and for some reason, whether by obscured vision or otherwise, did not appear to see the applicant's forklift ahead, and the two forklifts collided. That collision caused a dislodging of pallets of ice to come forward and come into contact with the applicant. The applicant made a report of an injury not only to the right shoulder but neck and back as well. His body was "shaking". He left work and saw his local GP the same day. I also reject the submission for the respondent that one would have expected the injury to be more likely in the nature of bruising or fracture if the applicant's evidence is to be accepted about how it happened. Again, I accept the evidence of Dr Herald in relation to the circumstances he was appraised of as being sufficient to cause the adhesive capsulitis injury he has found.

110. I also note Dr Ng's report to EML of 4 October 2019, in terms of the analysis of causation of the right shoulder adhesive capsulitis injury, is reasonably consistent with the analysis of Dr Herald (see paras 30-33 above). Dr Ng makes it clear that the surgical treatment for the frozen shoulder is the arthroscopic capsular release which is the specific treatment only for frozen shoulder and "*not for rotator cuff treatment*". He then clarifies that the applicant did not have a pre-existing history of frozen shoulder. I believe that the analysis on causation by Drs Herald and Ng, particularly as summarised in paras 28 – 31 and 44 and 46 – 50 above is more persuasive than the opinion of Dr Powell.

111. Mr Parker submits that there is other evidence in support of the necessary causal link from Dr Haber and Dr Wallace. As to the latter, I do not think that I can give much, if any, weight to the conclusion that it "seems to me to be fairly clearly related to the accident". I also think Dr Haber has not had the opportunity to analyse the relatively complex causation issues and therefore, any support he gives to the applicant's case – on the causation question – is again to be given little or weight. Of course, those comments are not made with any criticism at all of their reports. They were concerned with medical treatment for the applicant. However, the opinion of Dr Haber on the alleviation issue below falls into a different category.

112. In *Felstead*, Deputy President Bill Roche noted at [80-81] the following:

> "… in *Petkoska* … after referring to *Zickar* and the need to consider the precise evidence in each case that … if this evidence amounts … to something that can be described as a sudden or ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an "injury" in the primary sense of that word … it follows that the description of a personal injury as a … sudden identifiable pathological change … is consistent with the authorities. It suggests no more than that, to qualify as a personal injury, there must be some sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state … if the personal injury also aggravates a pre-existing disease, that does not mean it is no longer a personal injury …"

113. After considering all the evidence in this case it is my opinion that the incident on 5 March 2019 did cause such a physiological change or disturbance in the applicant's right shoulder. This is identified in the opinions of Dr Herald and Dr Ng – particularly as noted in paras 28 -31 and 44 and 46-50 above. The nature of the injury is adhesive capsulitis. I am at least actually persuaded of all that. I also accept the submissions of Mr Parker that the claim should be treated as a personal injury rather than a disease and I find it is such an injury within the meaning of s 4(a) of the 1987 Act. I am actually persuaded, and I find, that the applicant's employment was a substantial contributing factor to the adhesive capsulitis injury. In my opinion, the weight of the evidence is not in favour of there being any pre-existing condition in the nature of adhesive capsulitis. This is the condition for which the surgery is proposed. Accordingly, I also find that the proposed treatment is reasonably necessary as a result of the injury within the meaning of s 60 of the 1987 Act.

Is the proposed surgery reasonably necessary (the alleviation issue)?

114. I also disagree with the submission for the respondent that the evidence is in favour of a finding that the proposed surgery is not reasonably necessary within the meaning of s 60 of the 1987 Act having regard to the principles in cases such as *Diab*. I do not find the evidence of the exercise physiologist, Mr McIlwain, persuasive on this issue. All he says is that he was happy for the applicant to return to pre-injury duties and could eventually be discharged with a home program to self-manage. That does not necessarily mean that surgery would not be reasonably necessary within the meaning of s 60 of the 1987 Act. An exercise physiologist would have limited capacity to opine on that issue anyway.

115. As to Dr Powell, the submission for the respondent, noted in paras 76 above, is not persuasive. Dr Powell (at ARD 25) was making a general comment. The paragraph should be read as a whole:

> "…prognosis for the right shoulder is favourable. Over 90% of cases of adhesive capsulitis will resolve spontaneously over time with restoration of function. Surgical intervention *may* improve the level of function in the short to medium time, though it does not *tend* to affect the overall time frame to recovery … (emphasis added)".

116. This answer is given in relation to a question about the prognosis in the applicant's right shoulder "with or without surgical intervention". To the extent that it may be said that the answer does refer specifically to the applicant's case, the submission refers to a selective part of the evidence. It does not appear to take into account Dr Powell's response (also ARD 25) to the specific question addressed to him about what treatment was reasonably necessary, whether the proposed right shoulder arthroscopic capsular release is reasonably necessary, and to provide details of any other treatment considered reasonably necessary. Dr Powell relevantly answered that question this way: "… options for the management of adhesive capsulitis *includes* a conservative approach with supportive measures, an MUA, or arthroscopic release …" I read this as Dr Powell agreeing that the proposed capsular release surgery is *one of* the options – in response to a question about what is reasonably necessary treatment.

117. Even if I read that wrongly, and assume that Dr Powell is of the opinion that the proposed capsular release is not reasonably necessary because "it does not tend to affect the overall timeframe to recovery", at the very least, the evidence in the applicant's case in this regard far outweighs the respondent's evidence. It is unnecessary to trace through that evidence again. It is sufficient that I simply note that I have had regard to, and accept, the evidence summarised in paragraphs 32 and 35 – 37 and 45 above.

118. In *Diab*, Deputy President Bill Roche noted (at [86]):

> "… [d]epending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish that the treatment claimed is one of those treatments."

119. At the very least, the applicant has established that the proposed surgery is "one of those treatments". I find the proposed surgery to the applicant's right shoulder is reasonably necessary having regard to all of the relevant factors set out in *Rose v Health Commission (NSW)* [1986] NSWCC2; (1986) 2NSWCCR32.

120. Dr Haber has considered, and discussed with the applicant, the various treatment options and the risks and benefits of each, and has recommended the arthroscopic capsular release. Dr Herald agrees and provides his reasons as referred to in para 45 above.

SUMMARY

121. I find the applicant has sustained an injury to his right shoulder, in the nature of adhesive capsulitis, as a result of the incident on 5 March 2019.

122. I find that the proposed arthroscopic capsular release surgery to the applicant's right shoulder is reasonably necessary as a result of the injury to the applicant's right shoulder referred to in paragraph 118 above.

123. The respondent is to pay the reasonable costs of the applicant's proposed arthroscopic capsular release surgery on his right shoulder pursuant to s 60 of the 1987 Act.