

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6365/19
Applicant: Ashur Odisho
Respondent: Challenge Recruitment Limited
Date of Determination: 10 March 2020
Citation: [2020] NSWCC 69

The Commission determines:

1. I find that the applicant suffered a disease injury to his left shoulder on 22 March 2007.
2. I remit the matter to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the applicant's permanent impairment as a result of injury deemed to have been suffered on 22 March 2007 to his
 - (a) Lumbar spine;
 - (b) Right upper extremity (shoulder);
 - (c) Left upper extremity (shoulder), and
 - (d) Consequential condition in his upper digestive tract.
3. The following documents are to be sent to the AMS, together with their supporting documents:
 - (a) Application to Resolve a Dispute;
 - (b) Reply, and
 - (c) Application to Admit Late Documents dated 30 January 2020.
4. A copy of these reasons should also be provided to the AMS.

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

Catherine McDonald
Arbitrator

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

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ashur Odisho was employed by Challenge Recruitment Limited (Challenge) and worked as a storeman at the Coca Cola/Amatil Distribution Centre at Smithfield. He claims permanent impairment compensation in respect of injuries deemed to have been suffered on 22 March 2007 and s 60 expenses.
2. The only issue to be determined in these proceedings is whether he suffered an injury to his left shoulder in the nature of a disease or the aggravation of a disease.
3. Mr Odisho and Challenge agree that any entitlement to s 60 expenses will depend on the assessment made by the AMS because of the operation of s 59A of the *Workers Compensation Act 1987* (the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

4. The matter was listed for conciliation conference and arbitration hearing on 5 February 2020 when Mr Grant of counsel appeared for Mr Odisho and Mr Gaitanis of counsel appeared for Challenge.
5. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
6. Mr Odisho amended his Application to Resolve a Dispute (ARD) to delete the claim that he suffered a consequential condition in his left shoulder. The hearing proceeded on the basis that the condition in his left shoulder was a disease injury.
7. In previous proceedings between Mr Odisho and Challenge in 2018, Challenge had sought to amend its s 74 notice to rely on s 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to defend the claim in respect of the left shoulder, arguing that Mr Odisho had failed to make a claim for the compensation within the prescribed timeframes. Despite my referring the parties to s 261(3) during conciliation, Challenge maintained that dispute during the arbitration hearing. Mr Grant sought a short period to prepare further submissions on the issue.
8. At the conclusion of the arbitration hearing I directed the parties to prepare submissions within a tight time frame. On 7 February, Challenge's solicitor informed the Commission that she was no longer instructed to press the issue that a separate claim was required in respect of each injury. As a result, no further submissions were required and the only issue to be determined is whether Mr Odisho suffered a disease injury to his left shoulder.

EVIDENCE

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and supporting documents;
 - (b) Reply and supporting documents, and
 - (c) Mr Odisho's Application to Admit Late Documents dated 30 January 2020.
10. There was no oral evidence.

11. In 2008, Mr Odisho was compensated for 3% whole person impairment (WPI) in respect of injuries to his lumbar spine and right upper extremity. He did not make a claim in respect of his left shoulder in those proceedings and Dr J Beer, who prepared a Medical Assessment Certificate did not consider it.
12. On 26 July 2012, Mr Odisho and Challenge resolved another set of proceedings with an agreement that he be compensated for a further 11% WPI in respect of injuries to his lumbar spine and right upper extremity deemed to have been suffered on 22 March 2007. They also agreed that he would be compensated for 8% WPI as a result of an injury to his right lower extremity on 7 October 2006. He also resolved a claim for weekly compensation.
13. On 4 July 2017, in response to a claim dated 22 December 2016, Challenge's insurer disputed that Mr Odisho had suffered an injury to his left shoulder and upper digestive tract and declined his claim for permanent impairment compensation.
14. Mr Odisho commenced proceedings in 2018 which were discontinued.¹ In those proceedings, Challenge conceded that Mr Odisho suffered a consequential condition in his digestive system.
15. On 16 August 2018, Mr Odisho made a claim for 30% WPI in respect of injuries to his lumbar spine, right upper extremity (shoulder), left upper extremity (shoulder) and upper digestive system. The orthopaedic aspect of the claim was supported by reports of Dr M Guirgis, orthopaedic surgeon, dated 26 September 2016 and 16 July 2018.
16. Challenge's insurer issued a notice under the former s 74 of the 1998 Act dated 17 December 2018. It disputed that Mr Odisho suffered an injury to or consequential condition in his left shoulder on 22 March 2007 on the basis of a report by Dr K Edwards dated 17 October 2018.
17. Challenge's insurer also disputed the claim by a letter dated 3 June 2019 attaching a dispute notice issued under s 78 of the 1998 Act. That notice also responded to a letter of claim dated 10 January 2019 which does not appear in the file. The notice disputed the level of impairment with respect to the lumbar spine, right shoulder and upper digestive tract based on the opinion of Dr Edwards. It denied that Mr Odisho was entitled to any s 60 expenses because of the operation of s 59A of the 1987 Act. The last date in respect of which Mr Odisho was paid weekly compensation was 18 February 2010 as a result of the proceedings in 2012.
18. In his statement prepared on 19 October 2011, Mr Odisho described the gradual onset of the injuries to his lumbar spine and right shoulder as a result of moving and stacking at least 300 boxes per hour. He injured his right hip in October 2006. After a period in which he drove a forklift, Mr Odisho was "put back on boxes" in early 2007 and he "started to get a recurrence of my back and right arm problems and after a while some left arm symptoms for the first time. He ceased working at Coca Cola on 22 March 2007 when his back and right shoulder seized up" while lifting. He returned to work from 20 May 2007 on selected duties and continued until the end of August 2008.
19. In a supplementary statement dated 12 February 2018, Mr Odisho said that the pain on 22 March 2007 was so severe that it overshadowed his developing left shoulder pain. He complained about it, but the injury was never included in his previous claims.

¹ 807/18.

20. In a further statement dated 30 January 2020, Mr Odisho confirmed that he experienced left shoulder pain but despite treatment for it, his general practitioner did not suggest he make a claim or include it in certificates of capacity. He said that his relationship with his former solicitors was difficult and they did not include the left shoulder in previous claims. Mr Odisho set out his current restrictions in that statement.
21. Mr Grant took me to a report of Dr AJ Sanki dated 27 December 2006 which referred to both shoulders but the complaint was in respect of striae (stretch marks) as a result of losing weight and can be disregarded.
22. On 12 July 2007, Mr Odisho's general practitioner at Fairfield Chase Medical and Dental Centre recorded:

"w/c left Shoulders pain had some X-ray injury by picking Distribution Centre Coca Kola lifting box felt pain"

23. The first relevant medical report is that of Dr J Atto, general practitioner of Fairfield, who prepared a report dated 17 October 2008 setting out treatment to date. He said:

"On 20/09/2007 Mr. Ashur Odisho presented to tell me that on 23/03/2007 at 7.30 am he injured himself while he was lifting boxes of 600ml bottles of coke. He felt pain in the left periscapular area, which one month of physio and pain management in rehab only became worse and started to have right periscapular area pain as well and he also developed low back pain, radiating to the lower limbs and ankles both limbs with numbness."

24. Dr Atto referred Mr Odisho to Dr M Guirgis.

25. Dr L Rozario, rheumatologist, prepared a report dated 16 October 2007. Mr Odisho was referred to Dr Rozario by Dr Yousif of Hinchinbrook in respect of a two-year history of right hip pain and back pain. She said:

"About the same time, he injured his left shoulder and this was while lifting boxes. He felt again an uncomfortable feeling as though the left shoulder was dislocated. He continues to have pain although much less than at the time of the injury.

On physical examination, I note that he has discomfort on movements of his left shoulder and there is some crepitus on full abduction of the left shoulder. The movements are almost full range although associated with some discomfort.

...

I feel his symptoms are most likely mechanical relating to certain activities that may have caused these problems. I have recommended an MRJ of the left shoulder as well as the right hip joint and I shall review.

I note that Ashur has been doing workouts in the gym. He has stopped these activities since early this year. I have advised him to continue not training in the gym until I see the results of his tests."

26. An MRI of the left shoulder was undertaken on 17 December 2007. On 8 February 2008, Dr Rozario wrote to Dr Atto and said:

“An MRI of the left shoulder showed a type 2 acromion with inferior bony spurring. I have advised him about the nature of this condition and should he continue to have problems or recurrent problems with the shoulder, then an arthroscopy and acromioplasty will be necessary.”

27. On 26 September 2016, Dr M Guirgis, orthopaedic surgeon, prepared a report to Mr Odisho’s former solicitors providing details of all of his past consultations. He said that he had first seen Mr Odisho on 4 December 2007, with a history of performing duties as a storeman which were demanding on his back and shoulders. He said:

“In 2005 he suffered minor symptoms in his right shoulder for which he saw Dr Dawood who gave him some tablets and his symptoms settled down. In 2006 his symptoms in the right shoulder recurred and he also started suffering from pain in his other shoulder and in his back. These gradually worsened as time passed forcing him to consult with Dr Dawood again.”

28. Dr Guirgis listed the injuries assessed which included “Left Upper Extremity. 23-3-2007.” The symptoms described were:

“Painful stiffness clicking and heaviness of the left shoulder with increased symptoms in cold and wet weather. There was difficulty to lift the arm sideways or forewards at the shoulder level or above it and also to bring the arm backwards behind the back.”

29. Dr Guirgis set out his examination findings with respect to the left shoulder though did not say that this was at his first examination. He said that the injuries with a deemed date of 22 March 2007 included post-traumatic mechanical derangement of the left shoulder. Dr Guirgis’ assessment of permanent impairment in respect of the left upper extremity was 10%, greater than his assessment of the right.

30. A contemporaneous report by Dr Guirgis dated 31 January 2008 confirmed that Dr Guirgis had seen the MRI scan. He said that the “role, expectations, risks, etc of arthroscopic surgery for the right hip and left shoulder were discussed.”

31. Dr Guirgis, prepared a report dated 22 September 2008 apparently to support the release of superannuation due to financial hardship. He said that Mr Odisho came under his care on 7 November 2011, being treated in respect of the right shoulder, thoracic and lumbar spines and right hip. He noted, however, the signs of rotator cuff arthropathy in the left shoulder on MRI.

32. The history with respect to the left shoulder was repeated in Dr Guirgis’ reports dated 21 January 2010, 22 July 2010 and 24 March 2011 to Dr Atto. It was also repeated in a report to Mr Odisho’s former solicitors dated 5 October 2010 in respect of treatment following a motor vehicle accident on 14 October 2009.

33. Dr Guirgis’ final report is dated 16 July 2018. In brief responses to a series of questions, Dr Guirgis said that the conditions in Mr Odisho’s lumbar spine and left and right shoulders were strain injuries suffered as a result of the nature and conditions of employment. He assessed 19% WPI as a result of those conditions.

34. On 25 January 2012, Mr Odisho saw Dr P Holman, orthopaedic surgeon, at the request of Challenge's insurer. Dr Holman recorded that Mr Odisho told him that as well as thoracic and low back pain
- "he also developed pain in both shoulders, the right worse than the left. He said that he was referred for an MRI scan of his shoulder in late 2007. Mr Odisho said that the pain in his shoulders gradually subsided."
35. Dr Holman examined Mr Odisho, including his left shoulder. He found no abnormality or wasting and observed a full range of movement. He said:
- "Mr Odisho complained of pain in both shoulders, consistent with a mild musculoligamentous strain... Currently both shoulders are reported to be pain free and are normal to examination."
36. Dr Holman assessed Mr Odisho's right shoulder but not the left.
37. Dr R Abraszko, neurosurgeon, saw Mr Odisho and reported to Dr Atto on 27 March 2014 with respect to a work related low back injury said to have been suffered on 11 December 2013. She had a history of the injuries whilst working for Challenge but did not mention his shoulders in her first report.
38. On 7 July 2014, Mr Odisho underwent an ultrasound of both shoulders at the request of Dr Abraszko. The conclusion was bilateral supraspinatus tendinosis and subacromial bursitis with impingement. In her report to Dr Atto dated 14 August 2014 Dr Abraszko said that she had recommended exercises for Mr Odisho's shoulders.
39. Dr K Edwards, general surgeon, saw Mr Odisho on behalf of Challenge and prepared reports dated 13 March 2017 and 17 October 2018.
40. In his report dated 13 March 2017, Dr Edwards noted that Mr Odisho:
- "... said he gets intermittent discomfort in his left shoulder, which may wake him on occasions. Abducting his left arm causes discomfort. He said he uses Dencorub at night.
- He said his right shoulder is 'kind of sore', but the left shoulder is worse. His right shoulder symptoms are intermittent, but they may stay for some days."
41. Dr Edwards recorded an equal range of movement for both shoulders. He was unable to find any abnormality in either shoulder and considered "that any injury he may have suffered had settled."
42. On 17 October 2018, Dr Edwards obtained the history that Mr Odisho complained of left shoulder discomfort at the same time that he suffered back pain. The part of the report setting out Dr Edwards' opinion appears incomplete. Consistently with his previous report he said:
- "Mr Odisho continues to complain of low back pain, and pain in both shoulders. He related his shoulder pain to the 5 years of heavy lifting, carrying boxes and manual handling, 5 days a week.

He could not identify any specific incident. He noted the gradual onset of intermittent low back pain over a period of several years, as well as pain in his mid-back and some soreness around his left shoulder.

On examination today, he shows limitation of forward elevation in each shoulder at 90 degrees. He said he injured his left shoulder at work due to lifting over time

There is no epigastric tenderness.

Mr Odisho shows slight limitation of forward flexion on examination of his back, but no other abnormality.”

43. In response to a question about whether Mr Odisho suffered a left shoulder injury as a result of the nature and conditions of his employment, Dr Edwards said:

“On the information available, I do not consider Mr Odisho has sustained any significant injury to his left shoulder.

I note an MRI of his left shoulder on 29 April 2016 is reported as normal.”

44. Mr Odisho does not allege that the condition in his left shoulder was consequential on his right so that there is no need to consider Dr Edwards’ opinion in that regard.

SUSMISSIONS

45. The submissions of counsel were recorded.
46. Mr Grant took me through the medical evidence and argued that it showed a consistent history of complaint with respect to the left shoulder as a result of his work tasks leading up to 22 March 2007. He said that it was only necessary for Mr Odisho to establish that he had suffered an injury to his left shoulder and that the assessment as to whether he suffered any ongoing permanent impairment was a matter for an Approved Medical Specialist (AMS), referring to the decision of Roche DP in *Jaffarie v Quality Castings Pty Ltd.*² (*Jaffarie*)
47. Mr Gaitanis said that the histories given by Mr Odisho in respect of his left shoulder injury were vague and erratic and that he had not mentioned his left shoulder condition to many of the doctors he had seen. Mr Gaitanis said that Dr Guirgis had not explained the causal relationship between the other injuries and the condition in Mr Odisho’s left shoulder. He said that Dr Guirgis’ final report carried no weight because his opinion supported the contention that Mr Odisho suffered a consequential condition in his left shoulder, which he no longer alleged.
48. He noted that Dr Rozario said nothing about Mr Odisho’s right shoulder which Mr Odisho had said was his overwhelming problem and that her reference to his ceasing gym workouts early in 2007 was a possible explanation for the condition which had not been explored.
49. Mr Gaitanis said that the preponderance of the evidence dealt with the other body parts in respect of which Mr Odisho claimed. He had not mentioned his left shoulder in previous proceedings. Mr Gaitanis said that the explanation in Mr Odisho’s statement about his difficult relationship with his former solicitors was an inadequate explanation for his own failure to report the condition of his left shoulder to the doctors to whom he had been referred.
50. In reply, Mr Grant noted that there was no evidence of any causative event at the gym. He referred me to the complaint to Mr Odisho’s general practitioner on 12 July 2007.

² [2014] NSWCCPD 79.

FINDINGS AND REASONS

51. While Mr Odisho has not previously alleged that he suffered an injury to his left shoulder, that does not, of itself, prevent him from claiming compensation in respect of it. In *Warwick Hobart t/as Terry White Chemists v Pietrzak*³ Roche DP said:

“Once it is accepted that the injurious event occurred, the question of whether certain medical complaints have resulted from that event is one that depends on an assessment of all of the evidence in the case and whether the condition can be said to have resulted from the injurious event (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452).”

52. Mr Odisho made a claim for compensation in accordance with s 261 of the 1998 Act. In respect of the injury on 22 March 2007. He was not required to make a separate claim in respect of each head of compensation he sought or each body part. Section 261(3) says:

“For the purposes of this section, a person is considered to have made a claim for compensation when the person makes any claim for compensation in respect of the injury or death concerned, even if the person’s claim did not relate to the particular compensation in question.”⁴

53. Mr Odisho is not required by the section to explain why a specific claim was not previously made in respect of his left shoulder. He has, however, said that his relationship with his former solicitors was difficult. That explanation is not challenged, nor can it be on the evidence in the file.
54. Mr Gaitanis did not argue that Mr Odisho was precluded by legislation from making a claim in respect of his left shoulder. He argued that the evidence was vague and inconsistent with respect to his left shoulder complaints. He did not argue that any injury was anything other than a disease injury.
55. A review of the medical evidence shows that Mr Odisho complained to his treating doctors about his left shoulder in 2007, not long after he ceased work. His complaints are recorded in the notes of Fairfield Chase Medical and Dental Centre. He was referred to Dr Rozario who noted that the pain had subsided since the original injury. Nonetheless, she was sufficiently concerned about his history and symptoms to order an MRI scan which was carried out on 17 December 2007.
56. Mr Odisho complained about his left shoulder to Dr Atto and to Dr Guirgis to whom Dr Atto referred him. When he saw Dr Holman in January 2012, he gave a history of an injury to both shoulders.
57. Those records, read with Mr Odisho’s statements, support a finding that he suffered an injury to his left shoulder with a deemed date of 22 March 2007.
58. Dr Edwards reviewed medical records when he prepared his second report on 17 October 2018. The list of documents he referred to does not include all of the records in the file. Despite having had the notes of Fairfield Chase Medical and Dental Centre, he said that the first complaint of shoulder pain was to Dr Atto in 2009. That statement is not supported by the records. His conclusion that Mr Odisho did not suffer a significant injury to the left shoulder can be disregarded. In any event, the question to be determined is whether he suffered an injury. The significance of that injury is a matter for an AMS.

³ [2006] NSWCCPD 315.

⁴ See also *Shoalhaven City Council v Schutz* [2012] NSWCCPD 14.

59. Mr Odisho's complaints with respect to his left shoulder have waxed and waned. However, the question of whether he suffers permanent impairment as a result of the injury to his left shoulder is a matter for an AMS.
60. Mr Grant referred to the decision of Roche DP in *Jaffarie*, without taking me to the detail of the decision. The decision concerned whether a Commission arbitrator had the power to determine whether the effects of an injury had ceased. Roche DP summarised the applicable principles⁵:

- “(a) questions of causation are not foreign to medical disputes within the meaning of that term when used in the 1998 Act. Assessing the degree of permanent impairment ‘as a result of an injury’, and whether any proportion of permanent impairment is ‘due’ to any previous injury or pre-existing condition or abnormality, both call for a determination of a causal connection (*Bindah* at [110]);
- (b) it is for the Commission to determine whether a worker has received an injury within the meaning of s 4 of the 1987 Act and whether there are any disentitling provisions, such that compensation is not payable for that injury (*Bindah* at [111] and s 105 of the 1998 Act);
- (c) the Commission's jurisdiction is restricted by s 65(3) of the 1987 Act, which precludes the Commission (an Arbitrator or a Presidential member) from awarding permanent impairment compensation if there is a dispute about the degree of permanent impairment, unless the degree of impairment has been assessed by an AMS (*Bindah* at [111]);
- (d) the determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of the AMS or, on appeal, the Appeal Panel and is not a matter for determination by an Arbitrator (*Bindah* at [112]);
- (e) a finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction (*Haroun* at [16] and [19]–[21]), and
- (f) it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues (*Bindah* at [110]; *Tolevski* at [35]).

This means that, to the extent that it held that all matters of causation are exclusively within the jurisdiction of the Commission, *Peric* cannot stand with *Bindah*, *Tolevski* and *Austin*. ... in a claim for lump sum compensation, the physical consequences of the injury (in relation to the assessment of whole person impairment as a result of the injury) are not within the exclusive jurisdiction of the Commission. They are within the exclusive jurisdiction of the AMS. ...”

61. Section 65(3) of the 1987 Act has since been repealed. However, the extent of any permanent impairment suffered by Mr Odisho is disputed. It is necessary that the question of whether Mr Odisho suffers any permanent impairment as a result of the injury to his left shoulder be determined by an AMS, together with the impairment arising from the other injuries he suffered.

⁵ At [249].

62. I make the following orders:

- (a) I find that Mr Odisho suffered a disease injury to his left shoulder on 22 March 2007.
- (b) I remit the matter to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the applicant's permanent impairment as a result of injury deemed to have been suffered on 22 March 2007 to his
 - (i) Lumbar spine;
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