WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2954/20**
Applicant: **Robert Tucker**
Respondent: **Southern Meats Pty Ltd**
Date of Determination: **8 September 2020**
Citation: **[2020] NSWWCC 312**

The Commission determines:

1. Pursuant to section 4(b)(ii) of the *Workers Compensation Act 1987* the applicant sustained injury to his right shoulder as a result of his employment with the respondent concerning which his employment was the main contributing factor to the aggravation and deterioration of the underlying disease process.

2. The applicant has also sustained a consequential condition in his right shoulder as a result of the injury to the left shoulder sustained in the course of his employment with the respondent.

3. The proposed right reverse shoulder replacement is reasonably necessary treatment as a result of both the consequential condition and injury to the right shoulder.

4. The respondent is to pay for the proposed right reverse shoulder replacement surgery and ancillary treatment pursuant to the applicable workers compensation gazetted rates.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Robert Tucker commenced working for Southern Meats Pty Ltd, the respondent, in January 2006 at their abattoir. His job was a labourer and involved manual handling and lifting of sheep, which he says were heavy. On 5 February 2015 when grabbing a sheep to lift it onto hooks he injured his left shoulder. He also states on his return to work on light duties he was hosing out the stick hole and pulled on the hose re-injuring the biceps tendon of his left arm. He underwent a left shoulder rotator cuff repair performed by Dr Vera Kinzel on 4 March 2016 and the doctor also performed a left shoulder reconstruction on 28 March 2017.

2. Mr Tucker is left hand dominant and he says that after these surgical procedures he still had left shoulder pain. He also states that overtime he noticed his right shoulder "started to play up".

3. The claim for compensation in these proceedings is confined to a claim for the cost of proposed reverse total shoulder replacement on the right, anaesthetist services and post-surgery physiotherapy.

4. Mr Tucker advances his case on the basis that he sustained injury to his right shoulder as a result of the nature and conditions of his employment with the respondent from January 2006 to 15 February 2015 and /or in the alternative he has sustained a right shoulder condition as a consequence of the left shoulder injury.

5. The respondent accepts that the surgery proposed is for a procedure that involves the insertion of an artificial aid and section 59A(6) of the *Workers Compensation Act 1987* (the 1987 Act) applies, resulting in section 59A being not applicable to Mr Tucker's claim.

6. However, the respondent disputes that an order should be made by the Commission in Mr Tucker's favour because in its notice issued under section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) it disputes both injury to the right shoulder due to the nature and conditions of Mr Tucker's work with the respondent or in relation to the allegation of a consequential condition developing in the right shoulder due to the left shoulder injury.

7. The respondent's counsel also notes Dr Miniter contends that a right shoulder replacement is not necessary at this stage. Mr Tucker's counsel confirmed, while he did not agree with the submission, he did not oppose the respondent also disputing the claim on this basis. Accordingly, to the extent it is necessary, leave is given under section 289A(4) of the 1998 Act for the respondent to dispute that the proposed surgical treatment is reasonably necessary pursuant to section 60 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

8. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

9. The matter proceeded in Arbitration hearing on 22 July 2020 by telephone due to the COVID19 situation. Mr Wilson, counsel, appeared for Mr Tucker instructed by Ms Scarlett Abernethy, solicitor. The respondent was represented by Mr Stockley, counsel, instructed by Mr Kemp, solicitor. Representatives of the respondent were also present, being Ms Claire Graham and Ms Brooke Dyson. Mr Chris Douglas from the HIMS Group was also present.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute (ARD) and attached documents;
    (b) Application to Admit Late Documents (AALD) filed by Mr Tucker dated 2 June 2020 and attached document;
    (c) Reply and attached documents; and
    (d) Application to Admit Late Documents (AALD-R) filed by the respondent dated 17 July 2020 and attached documents.

Oral Evidence

11. There was no oral evidence. Both counsel made oral submissions which were sound recorded, and a copy of the recording is available to the parties.

FINDINGS AND REASONS

Mr Tucker's statement

12. Mr Tucker has been a manual worker since he left school when he was 16. He is now aged 65. He commenced working for the respondent in 2006. I accept his evidence that his job at the respondent's abattoir involved a great deal of manual handling and heavy lifting, including overhead lifting. He has provided considerable detail about the slaughter and processing of sheep in his statement dated 8 April 2019[1].

13. He also refers to an injury on 6 August 2012 at work when he fell backwards onto a steel crate and injured his back, left shoulder and neck. He says he did not make a claim about this, although he did report it to his manager. He had x-rays performed but on 28 August 2012 Dr Mahfoud, his general practitioner, certified him fit for pre-injury duties. He said he did not suffer from any residual pain or disability regarding his left shoulder.

14. Mr Tucker also mentions when he was 16 or 17 he fell from a horse and fractured his collarbone. He says he understands that an x-ray of his left shoulder shows an old fracture to his left shoulder which had fully healed. He says he did not have any ongoing symptoms from that injury.

15. He refers to the incident on 5 February 2015 when he was in the process of grabbing the sheep by the front legs and hanging them up on the hooks. He says he was lifting a particularly heavy one. He says the legs are hanging right down near the ground and you have to lift their legs up to shoulder height to hook them. He says as he grabbed the sheep with his left arm he felt a pull in his left shoulder. He continued to work for a week until he could not move his left arm and the injury was reported and he was asked to see a doctor. He says he saw Dr Mahfoud.

16. At [78] and following of his statement, he said he returned to work on light duties such as cleaning, but they ended up being heavy manual tasks that aggravated his left shoulder. He says at the end of May 2015 he was instructed to pull a large heavy yellow hose to hose down the stick hole. He says it was caught and he tried to free it by pulling and re-injured his left bicep tendon. He reported this and was sent to Dr Ihsheish.

[1] ARD pp 301 to 311.

17. At [48], he says on 4 June 2015 he attended on Dr Ihsheish, orthopaedic surgeon, and told him he had re-injured his left shoulder while attending to light duties using a large yellow hose to clean out the stick hole the previous week. At [81] he says he was asked to use a saw to cut the sheep hocks off and that sometimes when performing this action, the hock would fly out and on one instance the hock struck his left shoulder.

18. Mr Tucker says on 21 July 2016, his employment was terminated as the respondent could not provide him with suitable duties and he had refused to return to light duties because the work he was given was not light in nature and was physical and aggravated his symptoms. Mr Tucker notes he has dyslexia which limits the jobs he can perform, and he has always performed hard manual labour. However, a letter dated 21 July 2016 from his employer said his employment was terminated because he had made threats to staff about his return to work[2].

19. Mr Tucker details in his statement his attendances on Dr Mahfoud for his left shoulder and at [67] he says overtime he noticed that his right shoulder started to play up. He says he is left hand dominant, but he uses both arms to perform manual labour. He says the left arm would be used by him to pick up the sheep and grab the first leg into the hook and then his right arm would be used to put the other leg into the hook. He said Dr Kinzel wanted to treat his left shoulder first and on 20 November 2018 he underwent an MRI on his right shoulder as he was still experiencing severe pain.

Wagga Wagga Base Hospital

20. The Wagga Wagga Base Hospital records contain an emergency department clinical record of an attendance on 1 March 1999 referring to Mr Tucker having a painful right shoulder for a few months for which he was using Deep Heat. No treatment or assessment is recorded, it is noted that Mr Tucker was angry regarding the wait[3].

Southern Meats Health Centre records

21. The employer's health centre records include an attendance on 5 February 2015 in relation to the left shoulder/arm from lifting red tubs[4]. A partially completed and unsigned claim form refers to an injury on 10 February 2015, when Mr Tucker was lifting heavy sheep and felt pain and click on his left shoulder[5].

22. A MRI scan dated 10 March 2015 of the left shoulder is addressed to Dr Ihsheish and reveals prominent AC joint degenerative changes and subacromial spur, full thickness full width chronic distal supraspinatus tendon tear with proximal migration of the humeral head, advanced tendinopathy subscapularis with various associated tears, ruptured biceps tendon and distal retraction to the level of the proximal humeral shaft, joint synovitis and generalised cartilage wear at the glenohumeral joint[6].

23. On 17 June 2015, the employer's heath centre treatment register records that Mr Tucker had some soreness after hosing and that "dr report state torn biceps mechanism but Tucker think he is fine DOI 26/5 or 2/6"[7].

24. On 17 September 2015, the employer's heath centre treatment register records Mr Tucker had a "sore arm hit by hock on Tuesday 15.9.15- left arm bruising." There is a corresponding Emergency Department record referring to this incident and on examination Mr Tucker had bruising and an avulsed bicep tendon with balled up bicep muscle[8].

[2] Reply p 16.
[3] Reply p 1.
[4] Reply p 4.
[5] Reply p 9.
[6] Reply p 12.
[7] Reply p 14.
[8] Reply p 130.

Clinton Medical Centre

25. Clinical records are available from the Clinton Medical Centre in Goulburn[9]. On 10 February 2015, Mr Tucker saw Dr Imtiaz Ahmad who noted that he had come in with a letter from a chiropractor about his left shoulder injury sustained at the abattoir. The doctor found left biceps wasting and queried the presence of a torn ligament and noted the shoulder range of motion was limited. He was to do suitable duties and avoid left hand lifting. A referral was given to Dr Wisam Ihsheish and a WorkCover certificate of capacity was issued.

26. On 29 April 2015, Mr Tucker saw Dr Ahmad again noting he had been seen by the orthopaedic surgeon and had a cortisone injection. On 26 June 2015, Dr Ahmad recorded that Mr Tucker had ongoing left shoulder pain and limited range of motion. It is noted that Mr Tucker felt frustrated that his muscle was wasting, and he was not getting any better. He notes the physiotherapist advised him to get a second specialist's opinion about management of his shoulder[10].

Dr Wisam Ihsheish

27. Dr Ihsheish is the orthopaedic surgeon who saw Mr Tucker and reported to his employer on 24 February 2015[11]. He says Mr Tucker is right hand dominant. He has a brief history of the work duties and that three weeks earlier Mr Tucker experienced a sharp sudden pain in the left anterior shoulder, followed by swelling and a retraction of the biceps muscle. It was noted that Mr Tucker had been unable to do his normal work of lifting weights. The doctor considered that Mr Tucker required a repair of the biceps but recommended an MRI be undertaken first.

28. Dr Ihsheish reported again to the employer on 12 March 2015[12]. He noted the left shoulder MRI scan confirmed degenerative changes in his shoulder consisting of a chronic rotator cuff tear and retracted supraspinatus tendon and muscle atrophy and migration of the humeral head, amongst other findings. The doctor said he did not think this was a new problem "but his work activities may have exacerbated the pre-existing degenerative changes." The doctor felt in light of this pathology it would be difficult to perform a rotator cuff repair, so he suggested anti-inflammatories, an injection of Celestone and local anaesthetic into the shoulder joint and physiotherapy. Dr Ihsheish stated that "he will probably require a shoulder replacement surgery down the line".

Dr Fadi Mahfoud

29. Clinical notes from Dr Fadi Mahfoud deal predominantly with the left shoulder injury and treatment. While I have read all the notes I have not summarised below every entry where the left shoulder is mentioned. It is clear that after the surgical procedures Mr Tucker still had many attendances on Dr Mahfoud complaining of pain and symptoms in the left shoulder. For instance, on 18 November 2015, it is noted that Mr Tucker had constant pain in his left shoulder and restricted range of motion[13]. On 22 January 2016 the doctor noted the left shoulder was deteriorating[14]. On 18 March 2016 the left shoulder was in a sling[15]. On 18 April 2016, the left shoulder still had restricted range of motion and moderate tenderness.

[9] Reply p 71.
[10] Reply p 80.
[11] Reply p 82.
[12] Reply p 83.
[13] ARD p 129.
[14] ARD p 128.
[15] ARD pp 85 and 127.

30. On 30 April 2017 in the Southern Highland Private Hospital discharge summary, after the left reverse total shoulder procedure, it was noted he would need to keep his shoulder in a sling for six weeks[16].

31. On 15 January 2018, the doctor noted that the right shoulder has been compensating.[17]

Dr Kinzel

32. Dr Kinzel reported to Dr Mahfoud on 4 September 2015 regarding the left shoulder injury at work seven months earlier. She noted he still had to handle heavy weights at work and since then his shoulder has given him considerable grief. On examination Mr Tucker was extremely painful and had reduced range of motion in the left shoulder. She said he most certainly had pre-existing rotator cuff pathology which was exacerbated by the incident. Dr Kinzel discussed treatment options, including surgery.[18]

33. On 4 March 2016, Dr Kinzel performed the rotator cuff repair of Mr Tucker's left shoulder and the discharge summary from the Southern Highlands Private Hospital states he needs to keep his sling on for six weeks[19].

34. On 11 April 2016, it was six weeks after the rotator cuff surgery and Dr Kinzel told Dr Mahfoud that Mr Tucker had a massive tearing and they had to be very cautious with the repair. Mr Tucker was to come out of the sling the following week and start active range of motion exercises[20].

35. On 29 June 2016, Dr Kinzel advised Dr Mahfoud about the progress of the left shoulder and stated that Mr Tucker was not to do any heavy lifting especially no overhead lifting and repetitive work for another six months[21].

36. Dr Kinzel reported to Dr Mahfoud on 6 October 2016 that Mr Tucker has regained more range of motion but needs to do physiotherapy[22].

37. Dr Kinzel reported to Dr Mahfoud on 25 January 2017[23]. She noted it was a year after the rotator cuff reconstruction and advised she had found a massive tear and partial coverage was achieved. She states that Mr Tucker has not recovered a good function of his shoulder, he is unable to abduct and elevate further than 90º without experiencing any pain. He was unable to sleep at night. She said he was showing signs of superior migration of the humeral head and starting to develop cuff arthropathy. She said the only solution is a reverse total shoulder replacement. In report of 11 May 2017 Dr Kinzel notes it is two weeks after the surgery and in a week Mr Tucker will start gentle range of motion exercises.

38. Dr Kinzel reported to Dr Mahfoud on 22 June 2017 advising it was six weeks post the left total shoulder replacement surgery and that Mr Tucker has kept his shoulder in a sling. He was having physiotherapy[24]. On 22 June 2017 she reported to the respondent's claims administrator that he required a further six months of physiotherapy and he could do office work and no manual work.

[16] ARD p 186.
[17] ARD pp 97 and 119.
[18] ARD p 299,
[19] ARD p 298.
[20] ARD p 297.
[21] ARD p 296.
[22] ARD p 295.
[23] ARD p 288.
[24] ARD p 283.

39. She reported his further progress to Dr Mahfoud on 3 August 2017[25] and on 14 September 2017 she discusses the progress of the left shoulder and recommends he re-start physiotherapy. She also notes that Mr Tucker told her that his right shoulder is now playing up as it has to compensate. Dr Kinzel states that he has worked in the meat industry for a long time and definitely has evidence of long time manual work injuries to his shoulder[26].

40. Dr Kinzel reported to Dr Mahfoud on 29 March 2018, she said Mr Tucker was not doing sufficient physiotherapy but did not recommend further treatment. She added that nevertheless he had a good range of motion[27]. This was in relation to the left shoulder.

41. Dr Kinzel reported to Dr Mahfoud on 27 September 2018 she noted that Mr Tucker did not undergo a formal rehabilitation process after his left shoulder replacement and the physiotherapy was cut off fairly early. She says he has a poor range of motion in the left shoulder and recommended some further physiotherapy to help his pain[28].

42. Dr Kinzel reported to Dr Mahfoud on 22 November 2018 after an MRI scan of the right shoulder[29]. She said the scan confirmed a full thickness tear with 3cm retraction. She said it was a significant injury and he would require a rotator cuff reconstruction plus possible biceps tendesis. Dr Kinzel advised that the work in the meat industry was the sole contributing factor for him developing the right rotator cuff tear and his recent left shoulder surgery also contributed to his symptoms as this is now an over compensatory injury[30]. Dr Kinzel sent a request for the surgery to be approved and booked the surgery for 7 December 2018.

43. On 12 March 2020, Dr Kinzel reported to Dr Gottipati, general practitioner at Argyle Medical Centre. She noted that Mr Tucker was still battling with his right shoulder. She said his rotator cuff tears are solely due to the manual work he had to perform over the years. She explains that "heavy lifting especially in the overhead position strains the rotator cuff and eventually leads to tearing." Dr Kinzel advised that Mr Tucker had a 3cm tear on the right side over 18 months earlier and she was concerned there had been further progression of the same. She requested a new MRI be undertaken and she said that Mr Tucker now would require a reverse total shoulder replacement instead of a rotator cuff reconstruction. Dr Kinzel opines that his shoulder complaints are most certainly due to his work as a manual labourer[31].

44. On 9 April 2020, Dr Kinzel reported to Mr Tucker's solicitors she advises:

> "He underwent a reverse total shoulder replacement for cuff arthropathy on the left side with a good result. In the course of his treatment, as he had a rather prolonged recovery, his right shoulder deteriorated and he is now suffering from an over- compensation injury which is directly related to the incident he initially sustained to his left shoulder.[32]"

45. Dr Kinzel's reply to the following question about causation is reproduced below:

> **"3. Whether the above treatment including any operative treatment proposed is reasonably necessary as a result of the nature and conditions of Mr Tucker's employment as a worker if no improvement**

[25] ARD p 282.
[26] ARD p 280.
[27] ARD p 278.
[28] ARD p 274.
[29] Copy of MRI scan is at ARD p 272.
[30] ARD p 263.
[31] ARD p 313.
[32] ARD p 315.

the meat processing industry or as a result of him overcompensating for the injury he sustained to the left shoulder, or both.

Mr Tucker has worked in the meat processing industry for over 10 years. This is physically very exhausting employment. His shoulder complaints are directly related to his employment within the meat processing industry."

46. Dr Kinzel advises that Mr Tucker requires a reverse total shoulder replacement of the right side and gives the costing for the surgery and notes added to this is the anaesthetist fee and assistant surgeon. She adds that physiotherapy will be required for three months. She explains why a rotator cuff reconstruction is no longer viable because the rotator cuff has retracted beyond the point of being able to place it back in its footprint. She says the reverse shoulder replacement is the only option[33].

McNamara Physiotherapy Clinic

47. Mr Tucker attended the McNamara Physiotherapy Centre for treatment. The progress notes are handwritten and hard to decipher because of the abbreviations used. There possibly is a reference to the right shoulder on 24 September 2015 "… post cuffs in ® s/h…"[34]. On 25 July 2016 it is stated "Also c/o onset pn ® sh.", this appears to be a clear reference to the right shoulder pain.[35]

48. Reports from Trish McNamara dated 6 June 2016, 17 June 2016 and 14 July 2016 to Dr Fadi Mahfoud relates her concerns about Mr Tucker's mental health[36].

Radiological reports of the right shoulder

49. On 11 May 2017, an x-ray of the right shoulder was taken addressed to Dr Andrew Leicester, Bong Bong Orthopaedics[37]. The clinical history is "? Osteoarthritis? Cuff arthropathy". It was reported that there was slight superior migration of the humeral head with mild reduction of the subacromial space. An acromial spur was noted.

50. An MRI of the right shoulder dated 20 November 2018 revealed a full thickness tear of the supraspinatus tendon involving the entire AP width and 30mm retraction and muscle atrophy. There was also a full thickness tear of the subscapularis with 12mm retraction and mild atrophy. Mild subluxation of the tendon of the long head of the biceps was noted. Also revealed was mild glenohumeral synovitis with moderate subdeltoid bursitis and developing changes of glenohumeral osteoarthritis with partial thickness chondral loss of the anterior aspect of the femoral head. There was also prominent osteoarthritis in the AC joint.

Dr Pillemer

51. Dr Pillemer has provided reports dated 15 March 2018, 5 February 2019 and 26 May 2020. Dr Pillemer has a history about the left shoulder injury on 15 February 2015 and says that Mr Tucker told him that his right shoulder also started worrying him about the same time[38]. The doctor also noted that Mr Tucker felt the symptoms in his right shoulder were getting worse with time. In his first report Dr Pillemer noted restricted range of motion in the right shoulder and said it could be due to the nature and conditions of his work and also as a consequential injury after the restriction of left shoulder function[39]. At that stage he anticipated Mr Tucker would need investigations of the right shoulder as he felt he had rotator cuff pathology.

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[33] ARD p 316.
[34] ARD p 18.
[35] ARD p 23.
[36] ARD pp 29, 27 and 24 respectively.
[37] Reply p 22.
[38] ARD p 1.
[39] ARD p 4.

52. In his second report, Dr Pillemer referred to the 2018 MRI scan of the right shoulder which he said showed a full thickness tear of the rotator cuff with 3cm retraction.

53. Dr Pillemer noted that Mr Tucker had no symptoms in either shoulder before 2012 when he first hurt his left shoulder. He noted the work at the abattoir was very heavy and rotator cuff injuries to both shoulders was consistent with the work performed there[40]. The doctor elaborates on the causation opinion at point 6 of this report stating that it is certainly possible that Mr Tucker had constitutional problems with both rotator cuffs, but he has worked in the abattoir for 10 years on a full time basis doing heavy work. At that stage, Dr Kinzel was proposing a rotator cuff repair and Dr Pillemer found it was medically necessary and as a result of the nature and conditions of Mr Tucker's work.

54. In Dr Pillemer's third report dated 26 May 2020 he reviewed Dr Kinzel's report dated 9 April 2020 in which she recommends Mr Tucker undergo a right reverse shoulder replacement, noting that the rotator cuff has degenerated to a point where a reconstruction would not be viable. Dr Pillemer said this surgical procedure would be the correct decision. He estimates the cost in the region of $25,000 to $30,000 inclusive. In terms of causation Dr Pillemer says that the nature and conditions of Mr Tucker's work would be regarded as substantial contributing factors to the need for surgery. Again, he states that while certainly accepting that Mr Tucker had some degenerative problems with both rotator cuffs, the nature and conditions of his work and injuries would of necessity be significant contributing factors to his need for surgery[41].

Dr Miniter

55. Dr Miniter, orthopaedic surgeon, provided a medico-legal report for the respondent dated 4 April 2018[42]. Dr Miniter found no evidence of consequential injury to the right shoulder as a result of the left shoulder. He noted that Mr Tucker had a full range of motion of the right shoulder and apparently the rotator cuff appearance appeared to be well maintained on clinical appearance. Dr Minter has provided various other reports dated 3 and 4 April 2018 mainly dealing with the assessment of impairment of the left shoulder and Mr Tucker's capacity for employment.

56. Dr Miniter provided a further report on 30 August 2018 without further examination of Mr Tucker[43]. In that report he refers to unnamed orthopaedic literature "whereby involvement of the contra-lateral extremity is unable to be associated with the initial extremity". Dr Miniter says this is widely accepted in the orthopaedic literature. In answer to questions, Dr Miniter says he regards the left shoulder as being a degenerative issue and Mr Tucker is right hand dominant and his right shoulder has not troubled him he adds "but one would suspect that the rotator cuff disease evident on the left hand side would also be seen on the right by way of investigation".

57. Dr Miniter also opines that he believes the injury to the left shoulder is a combination of degenerative disease which is constitutional in nature, a frank injury and perhaps some degenerative process ascribed to the nature and conditions of his employment. He notes that Mr Tucker has worked as a labourer all his life and it would be difficult to argue that there has not been some effect on his employment relating to the degeneration of the rotator cuff and the subsequent rupture of the long head of the biceps. He says,

> "You will note that the onset of pathology has been slow, which is consistent with a degenerative nature of the rotator cuff, but it is likely to have been exacerbated, or at least contributed to by the nature of his employment."[44]

[40] ARD p 8.
[41] AALD 2 June 2020 p1.
[42] Reply p 25.
[43] Reply p 55.
[44] Reply p 57.

58. It is clear from the context that Dr Miniter is speaking in the above passage of the left shoulder. He adds that the employment with the respondent "was a substantial contributing factor to the acceleration and deterioration of an underlying disease process in the left shoulder."

59. In relation to the right shoulder, Dr Miniter advised the respondent not to accept liability for it as there had been no complaint of issues in relation to the right shoulder until very recent times during which time he has not been employed, and he has not had a frank injury to the right shoulder. He says he does not believe that employment with the respondent is a substantial contributing factor to the alleged consequential right shoulder injury, referring again to unnamed medical literature.

60. Dr Miniter re-examined Mr Tucker and provided a report dated 20 March 2019. Dr Miniter refers to the MRI scan dated 19 November 2018. He says he has not seen the scan itself, but the report suggests a markedly retracted rotator cuff at the right shoulder involving the entire portion of the supraspinatus and a proportion of the infraspinatus. He says that a primary rotator cuff repair is unlikely to be successful, but the solution would be a reverse shoulder replacement[45]. However, later when expressing his opinion Dr Miniter says the matter as it currently presents is of developing osteoarthritic change and rotator cuff arthropathy. He says it is relatively mild and his impression is that Mr Tucker would be better managed without surgery. He says the proposed treatment is not reasonably necessary as the overall disability is relatively mild and surgery would be "meddlesome" and if unsuccessful with serious complication he would possibly be much more troubled by the shoulder than he is now. Dr Miniter says if his shoulder declines with the passage of time and the osteoarthritis becomes significant then a reverse shoulder replacement is a reasonable undertaking.

61. Dr Miniter repeats his view that Mr Tucker does not have a consequential condition in his right shoulder because of the left shoulder injury and he says there is no evidence for a right shoulder injury being as a result of the nature and conditions of his employment.

62. Dr Miniter provided a further report dated 19 July 2019[46]. Dr Miniter says Dr Pillemer found a restricted range of motion in Mr Tucker's right shoulder, but Dr Miniter says when he examined Mr Tucker there was a full range of motion. He then notes that Dr Pillemer in his February 2019 report attributes the development of right shoulder pathology as being due to his work as a labourer in the abattoirs which could be very heavy at times. Dr Miniter does not give an opinion regarding this finding. Dr Miniter says Mr Tucker has a similar presentation on the right side as he did to the left, has not had an injury in the workplace and has age related changes relating to the rotator cuff which has resulted in a rotator cuff arthropathy. Dr Miniter describes the matter as being very complex.

63. Dr Miniter in this report answers questions put to him and states "I do not believe that there were suggestions that Mr Tucker has had an injury to the right shoulder as a result of the nature and conditions of his employment." But he does not actually consider the proposition, or the nature of the work performed by Mr Tucker for 10 years. At point 6 he then states that the right shoulder has only become symptomatic "of late" and thus he could see little support for the argument that the workplace has been the most significant contributing factor to the development of the right shoulder pathology. Although in the next paragraph Dr Miniter says "He simply has severe RC disease and whilst the workplace may have been an aggravating factor, it has not been the dominant factor. He has not worked for some time and has only very recently complained of right shoulder pain." Dr Miniter does not acknowledge the fact that Mr Tucker had an x-ray of the right shoulder on 11 May 2017, or Mr Tucker's statement that he had right shoulder pain in 2015 that increased over time. At point 7 Dr Minter does

[45] Reply p 67.
[46] Reply p 146.

concede that the age related change affecting both shoulders is “unusually advanced” yet he adds “but is nonetheless a degenerative phenomenon.” The doctor does not really consider if the prolonged heavy work involving overhead lifting could have been responsible for the unusually advanced degenerative changes. Dr Miniter says if Mr Tucker requires any surgery at all then a reverse shoulder replacement is the appropriate treatment, but it is due to his age related rotator cuff disease. He describes Mr Tucker as having very adequate function in the right shoulder at this stage best managed by non-operative means[47].

64. Dr Miniter provided a supplementary report dated 28 April 2020[48] he dismisses the concept of a consequential condition developing in the right shoulder because of the injury to the left shoulder. He says the original investigations found the retracted rotator cuff tears are present on both sides and are simply a demonstration of constitutional degenerative change. However, the doctor does not deal in this report about the effect of 10 years of heavy work in the respondent’s employ.

65. Dr Miniter provided a further report dated 22 May 2020[49]. Dr Minter makes the point in this report that Mr Tucker did not complain of his right shoulder at the original presentation. Dr Miniter first saw him and reported on 4 April 2018. But clearly by then Mr Tucker had complained to others of his right shoulder. Putting to one side the physiotherapy records which are not entirely clear, there is the right shoulder x-ray on 11 May 2017. Also, the Trinitas Group undertook a functional and vocational assessment for the respondent on 14 August 2017 and issued a report dated 6 September 2017. In the vocational assessment, the history taken from Mr Tucker included that Dr Kinzel had advised him that she was waiting for a reasonable recovery of the left shoulder before she considers further surgery to the right shoulder[50]. Furthermore, Dr Kinzel notes in the report dated 14 September 2017 that Mr Tucker advised his right shoulder was playing up “due to compensating” and Dr Mahfoud records a similar complaint on 15 January 2018. Therefore, there are many references before Dr Miniter saw Mr Tucker for the first time of the right shoulder being symptomatic.

66. Dr Miniter then answer questions posed to him and he states:

> “Preface to the initial investigations in relation to both shoulders indicate clear evidence of longstanding retracted rotator cuff tears with the coexistence of early rotator cuff arthropathy. The features are very clear.
>
> They are almost identical right to left and indicate that the matter has been ongoing for many years, that the failure of the rotator cuff is a longstanding problem and that the upward migration of the humeral head and the subsequent development of osteoarthritic change is the normal sequence of events in issues such as this.”

67. Dr Miniter answers the final question about causation as follows:

> “I note that he did not present to his treating practitioner with right shoulder symptoms until well after he had ceased his employment. In regard to this, on the balance of probabilities, there is no evidence of aggravation or injury, exacerbation or other features that relate themselves to the workplace. You will note that many patients feel that aggravation has occurred, but the evidence supports the concept that whilst the patient is being treated for the contralateral shoulder, in this case the left, the matter develops with a decreased activity level rather than an increased activity level. By this, it has been demonstrated that the patients themselves are not using the right shoulder more than the left. Au contraire,

[47] Reply p 149.
[48] ARD p 326 and at Reply p158.
[49] Reply p 167.
[50] Reply p 240.

they are in fact using both shoulders less than they were prior to the surgery in question."

Determination

68. The respondent submitted that Mr Tucker's statement is obviously not in his own language, noting his literacy issues. It was submitted that in the statement he does not record symptoms in the right shoulder before February 2015. It was also noted that his statement is very brief in terms of the right shoulder as he does not point to the onset of his right shoulder symptoms. These criticisms are well founded as it would have been helpful had more detail been given. The respondent submits that, therefore, one has to rely on the clinical material, which is scant.

69. The earliest documented complaints about Mr Tucker's right shoulder are as follows:

    (a) On 24 September 2015, the McNamara physiotherapy records possibly refer to the right shoulder. But I do not place weight on this entry as I cannot be sure it is a reference to the right shoulder.

    (b) On 25 July 2016, the McNamara physiotherapy refers to "also c/o onset pn ® sh". This entry is written clearly and to my mind is a reference to right shoulder pain. This is about a year after Mr Tucker ceased physically working. As counsel has not addressed on this entry I have not based my decision on the same.

    (c) On 11 May 2017, right shoulder x-ray was undertaken for Dr Leicester from Bong orthopaedics. It is unlikely that Mr Tucker saw Dr Leicester as I note Dr Kinzel is in the same practice and she actually saw Mr Tucker on 11 May 2017, but her report of that date does not mention the right shoulder or to ordering the x-ray[51]. I find it is a reasonable inference to draw that this x-ray was performed due to complaints about the right shoulder being made to Dr Kinzel as the clinical history recorded on the scan is "? Osteoarthritis? Cuff arthropathy".

    (d) On 14 August 2017, the Trinitas Group records in the vocational assessment the history taken from Mr Tucker included that Dr Kinzel had advised him that she was waiting for a reasonable recovery of the left shoulder before she considers further surgery to the right shoulder[52]. I find this is significant because it is before Dr Kinzel records a reference to the right shoulder and is consistent with Mr Tucker complaining of his right arm to this doctor and her focusing on the left shoulder. Also, as Mr Tucker's counsel mentioned, Ms Lam also took a history from Mr Tucker of him having symptoms in his right shoulder due to compensation[53].

    (e) On 14 September 2017, Dr Kinzel refers to Mr Tucker's right shoulder is now playing up as it is compensating.

    (f) On 15 January 2018, Dr Mahfoud refers to Mr Tucker reporting his right shoulder had been compensating.

    (g) On 15 March 2018, Dr Pillemer has the history that Mr Tucker's right shoulder started to worry him about the same time as the injury on 15 February 2015.

        Mr Tucker in his statement says, overtime he noticed that his right shoulder started to play up.

[51] ARD p 28
[52] Reply p 240.
[53] Reply p 229.

70. Counsel also relied on Dr Miniter's report of 19 July 2019, wherein he refers to full range of right shoulder motion on his first examination. However, under his examination findings in his report dated 4 April 2018 he does not mention examining the right shoulder. It is only when he answers the question about whether there was a consequential injury to the right shoulder that Dr Miniter states that Mr Tucker had a full range of motion of the right shoulder and "apparently the rotator cuff appeared to be well maintained on clinical examination".

71. Dr Pillemer examined Mr Tucker on 15 March 2018, so 20 days before Dr Miniter's examination. At that examination Dr Pillemer took the history that Mr Tucker's right shoulder started to worry him about the time of the 15 February 2015 incident, but his doctors have concentrated on his left shoulder. Dr Pillemer noted that Mr Tucker felt very restricted and he cannot do much above the shoulder with his left arm. He told Dr Pillemer he tries to do everything now with his right hand such as carrying shopping. It was noted he manages with his self-care but with difficulty. Dr Pillemer measured both shoulder movements and records them precisely in a table. He found 10% upper extremity impairment in the right shoulder, with 4% in flexion, 4% abduction, 1% adduction and 1% internal rotation. The left shoulder upper extremity impairment was 16% and the doctor sets out the precise measurements for each plane of motion.

72. It is difficult to reconcile the examination findings of Dr Pillemer and Dr Miniter 20 days apart. I consider that preference should be given to Dr Pillemer's findings because he has set them out in detail whereas Dr Miniter does not record details of the same. Also, it was submitted that in the 2020 reports, Dr Miniter refers to no complaint at all about the right shoulder in April 2018 and that he first complained many months later. But it is not correct that the first complaints were months after Dr Miniter's first examination, as the above list of documented complaints establishes, complaints were documented about the right shoulder before Mr Tucker saw Dr Miniter. No doubt this was why the respondent asked Dr Miniter at his first examination about the possibility of a consequential condition in the right shoulder.

73. The respondent's counsel also relied on Dr Miniter's suggestion that the symptoms should have been evident during his working life. Counsel was critical of Dr Kinzel and Dr Pillemer in not explaining why heavy work would have affected Mr Tucker's right shoulder and that they do not deal with Dr Miniter's opinion.

74. The respondent's counsel submitted that when one looks at the Trinitas functional assessment report there is nothing in particular that would establish that Mr Tucker was using his right arm more because of the left shoulder disability. Counsel says it is noted he uses this right arm for washing dishes and for sweeping the floor[54] but he says this usage would have been less than when he was working. However, the author of this report did not evaluate what tasks Mr Tucker did at work after he injured his left shoulder and what tasks he used his right arm to perform in the period from February 2015 to July 2015, when he stopped working. Also, the author of the report did not consider the situation regarding usage of the right arm after Mr Tucker's two surgical procedures when he had his left shoulder in a sling for six weeks each time and its state as the shoulder was recovering from each of the surgeries.

75. It is submitted the thesis offered by Dr Miniter is dealt with in a series of reports. The respondent's counsel noted that Dr Miniter was correct when early on he speculated there would have been rotator cuff pathology in the right shoulder, and this was born out by the subsequent MRI scan. Counsel submits that this should give the Commission confidence to accept Dr Miniter's opinions. However, I do not have confidence in Dr Miniter's opinion when he did not detail the findings about the right shoulder in April 2018 when Dr Pillemer 20 days earlier found restriction of movement.

[54] Reply p 230.

76. The point was also made that Dr Miniter did not recommend a repair of the right shoulder, rather a reverse shoulder replacement, and that is what Dr Kinzel and Dr Pillemer ultimately have recommended. So, it is argued, it gives added potency to Dr Miniter's opinions that his views in this regard have been supported. There is no suggestion that Dr Miniter's opinion changed that of Dr Kinzel or Dr Pillemer. To my mind the fact that they veered away from a repair to a replacement shows they have approached the issue with caution and adopted another approach when the radiology indicated this type of surgery was preferable.

77. Attention was drawn by the respondent's counsel to the report of Dr Miniter of 29 March 2019 where he stated that literature does not support the concept of consequential condition to a contralateral shoulder. The respondent referred to Dr Miniter's final opinion that Mr Tucker had decreased activity after July 2015, and that decreased activity is one of the point's referred to in the attached article. It is noted that there is no analysis of the articles referenced by Dr Miniter by Dr Kinzel or Dr Pillemer.

78. Dr Miniter supplies articles to support his opinion that one does not suffer a consequential condition in a contralateral shoulder. The first article is by Dr J. Mark Melhorn, titled *AMA Guides on the Evaluation of Disease and Injury Causation*, (AMA, Second Edition, 1 July 2013) Chapter 33, Evaluating Causation of Favouring for the Opposite Limb. One of the three key factors referred to is, "Most people alleging this mechanism of injury are already on major work restrictions and, thus, either doing a different and easier job or off work, alleging they do very little at home." As the respondent's counsel submits this is a point referred to by Dr Miniter, however in Mr Tucker's case he went back to work in 2015 on suitable duties but he complained that they were still heavy duties and there is evidence that his left shoulder was such that he could not lift with it. What Dr Miniter has not done is examine exactly what Mr Tucker did with his right arm at a time when he could not use his left arm, both when he had returned to work and after each surgical procedure when for six weeks it was in a sling and thereafter when the left shoulder was recovering.

79. Also, Dr Miniter has not factored into his consideration the effects of 10 years heavy work on his right shoulder. This article in point 3 refers to literature suggesting that the asymptomatic limb at the time of the initial shoulder injury is usually not normal but has already developed some disease[55]. This is clearly so in Mr Tucker's case, but then the author of the article says the development of the condition in the uninvolved contralateral side is more probably related to individual risk factors such as genetics, age and sex rather than overuse. But, the author does not consider if work duties have contributed to the development of disease in the contralateral shoulder.

80. Furthermore, it is mentioned in the article dealing with the shoulder various statistics and the conclusion that the articles reviewed do not support favouring, but nowhere is there mentioned the type of work being performed. Mr Tucker's case is not of a white collar worker who had a frank injury to one shoulder and alleges favouring has caused the other shoulder to be symptomatic. He has spent a lifetime working in manual labour and the 10 years at the respondent's abattoir could not be described as anything other than heavy, repetitive and constant manual work and, significantly, he had to lift dead or partly dead sheep onto hooks. He also had to cut their heads off with large scissors while the sheep was hanging from the hooks. Also as Mr Tucker describes at [23] of his statement sometimes the sheep fell off the conveyor belt and into a dip and he had to pull them out with his hands by himself and some of the rams weighed a couple of hundred kilograms and sometimes he had to pull out 20-30 per day. He says sometimes the sheep are still half alive so there is a lot of physical strain to keep them contained. Mr Tucker said this would put strain in his chest and arms. It is clear from Mr Tucker's statement he used both arms to perform his work for the respondent.

[55] Reply p 173.

81. In the summary for the article it is acknowledged that causation is a complex issue and although epidemiological studies can provide general information regarding risk "this must be filtered by taking specific steps for assessing causal association for a disorder, determining if the injury is work related, and *then applying this to a specific individual*"[56] (my emphasis). To my mind this is what Dr Miniter has not done adequately. All he has done is quoted a general proposition, but he has not considered its application to the specific facts of Mr Tucker's case. For these reasons, I do not place weight on Dr Miniter's opinions, and I reject the respondent's submissions in this regard.

82. The second article "Evaluating Causation for the Opposite Lower Limb" does not assist me as it is dealing with the lower not upper limbs. The case study it deals with, is a male longshore man aged 40 with an injury to one knee[57]. But even the opening paragraph of the article refers to the need to pay heed to the current scientific evidence *and the facts of a specific case*.

83. Mr Tucker's counsel relies upon the opinions of Dr Kinzel and Dr Pillemer and submits they should be preferred to that of Dr Miniter. I accept that submission. I have explained why I do not place weight on Dr Miniter's opinions. Mr Tucker's counsel submits that Dr Kinzel's opinion should be preferred because she has examined Mr Tucker on many occasions. I accept this submission because I feel, having seen Mr Tucker often, she is the best placed to consider the causal connection of the right shoulder symptoms to Mr Tucker's work and/or to his left shoulder injury.

84. The respondent's counsel relied on Dr Miniter's comment that there were no complaints of pain during the course of his employment with the respondent and one would expect that if he had sustained an injury due to the nature and conditions of his work.

85. However, Dr Kinzel has expressed the view that his rotator cuff tears are solely due to the manual work he had to perform over the years. She explains that "heavy lifting especially in the overhead position strains the rotator cuff and eventually leads to tearing." Dr Kinzel advised that Mr Tucker had a 3cm tear on the right side over 18 months earlier and she was concerned there had been further progression of the same. She also states "in the course of his treatment, as he had a rather prolonged recovery, his right shoulder deteriorated and he is now suffering from an over- compensation injury which is directly related to the incident he initially sustained to his left shoulder".[58] I do not regard these propositions as inconsistent and provide an explanation as to why there may not have been complaints before 2015, but that nonetheless the development of the pathology in the right shoulder has been aggravated by his employment.

86. This opinion is supported by Dr Pillemer who opined in his first report:

> "Obviously then, Mr Tucker's problems with his left shoulder are of longstanding, and it would be my opinion noting that he was asymptomatic prior to starting work with Goulburn Abattoirs, that the nature and conditions of his work which was very heavy at times as well as his injury in February 2015, would need to be regarded as substantial contributing factors to the rotator cuff tear either by way of causation or aggravation of an asymptomatic underlying degenerative condition.
>
> In my opinion, the same would apply to his right shoulder noting that this could also be regarded as a consequential injury after the restriction of left shoulder function."

[56] Reply p 180.
[57] Reply p 181
[58] ARD p 315.

87. In his second report, Dr Pillemer attributes the right shoulder symptoms to the heavy work performed at the respondent as well as to a consequential condition resulting from the restriction of the left shoulder. He says in the second report the ongoing restriction of shoulder movements were very similar to the ranges reported in his first report. I find it is telling that Dr Pillemer in this report of 5 February 2019 opines that:

> "It is certainly possible that Mr Tucker had constitutional problems with both rotator cuffs, but as noted he has worked in the abattoirs doing heavy work for some 10 years on a full time basis, and while I do feel it is likely that he has pre-existing rotator cuff problems, this would not account for more than one-tenth of his impairment."

88. The legal test of causation is that discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates*[59] wherein Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at 462E):

> "Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

89. His Honour said at 463–464:

> "The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a *novus actus*. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

90. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*[60] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712."

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[59] (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang*
[60] [2008] NSWCA 246

91. Applying the principles in *Kooragang* and *Nguyen* I am satisfied, on the balance of probabilities, that Mr Tucker has established that the symptoms he has complained of in the right shoulder are causally related to the work-related left shoulder injury due to compensating for that injury.

92. I am also satisfied that based on Dr Pillemer's opinion and that of Dr Kinzel that Mr Tucker has established an injury from the nature and conditions of his employment over 10 years with the respondent and that he has suffered an aggravation and deterioration of disease in the right shoulder with the employment being the main contributing factor to such aggravation. It is noteworthy, in my view, that Dr Miniter did comment that the changes in Mr Tucker's right shoulder were more advanced than usual when he considered he had a constitutional condition. Dr Miniter did not give any reason for such advanced changes and I find he did not turn his mind adequately to the possibility of injury from the lengthy heavy employment accounting for such advanced changes. So, I do not give his opinion weight in relation to both bases that Mr Tucker frames his case, as a 'nature and conditions' injury and consequential condition.

93. The physical nature of the work with the respondent, coupled with the length of time he worked in that job and Dr Kinzel's familiarity with the work leads me to conclude and find that I am persuaded to the standard required in *Nguyen* on the balance of probabilities that the employment did cause an injury to Mr Tucker's right shoulder in accordance with section 4(b)(ii) of the 1987 Act.

94. Accordingly, I find that:

    (a) Mr Tucker sustained injury to his right shoulder as a result of his employment with the respondent concerning which his employment was the main contributing factor to the aggravation and deterioration of the underlying disease process.

    (b) Mr Tucker has also sustained a consequential condition in his right shoulder as a result of the injury to the left shoulder sustained in the course of his employment with the respondent.

Reasonably necessary

95. The case of *Murphy v Allity Management Services Pty Ltd*[61] is authority for the proposition that a condition can have multiple causes and the work injury does not have to be the only, or even a substantial cause, before the treatment is recoverable under section 60 of the 1987 Act. Deputy President Roche stated in *Murphy* that a worker only has to establish that the treatment is reasonably necessary as a result of the injury; that is, did the work-injury materially contribute to the need for surgery. I find that both work injuries have materially contributed to the need for surgery and accept the opinions of Dr Kinzel and Pillemer in that regard.

96. The legal test to be applied when determining whether proposed treatment is *reasonably necessary* as a result of a work place injury as required by section 60 of the 1987 Act was considered in *Diab v NRMA Ltd* (*Diab*)[62] wherein Deputy President Roche cited the decision of Judge Burke in *Rose* with approval and stated:

    "[88] In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:

        (a) the appropriateness of the particular treatment;
        (b) the availability of alternative treatment, and its potential effectiveness;

[61] [2015] NSWWCCPD 49, *Murphy*
[62] [2014] NSWWCCPD 72, *Diab*

(c) the cost of the treatment;
(d) the actual or potential effectiveness of the treatment, and
(e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

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

97. The respondent also relies on Dr Miniter's opinion to argue that the treatment proposed is not reasonably necessary and that an order shoulder not be made in accordance with section 60 of the 1987 Act. Even though Dr Miniter advised this type of surgery, a reverse total shoulder replacement, is the appropriate surgical treatment he does not recommend it be performed now. Dr Miniter cites concerns that the left shoulder replacement was not a success and also that Mr Tucker's symptoms in the right shoulder are not severe enough to warrant the same. In relation to this issue, I prefer the opinion of Dr Kinzel, supported by Dr Pillemer. I find the potential for effectiveness of the treatment cannot be dismissed because Mr Tucker did not have a totally successful outcome on the left shoulder, and I refer to the point made by Roche DP in *Diab* at [89] quoted above. Alternate treatment really is just medication and Dr Miniter expressed concern in his report about the medication being taken by Mr Tucker. The cost has not been raised as a particular concern.

98. I find that the proposed right reverse shoulder replacement is reasonably necessary treatment as a result of both the consequential condition and injury to the right shoulder.

SUMMARY

99. The Commission determines:

(a) Mr Tucker sustained injury to his right shoulder as a result of his employment with the respondent concerning which his employment was the main contributing factor to the aggravation and deterioration of the underlying disease process.

(b) Mr Tucker has also sustained a consequential condition in his right shoulder as a result of the injury to the left shoulder sustained in the course of his employment with the respondent.

(c) The proposed right reverse shoulder replacement is reasonably necessary treatment as a result of both the consequential condition and injury to the right shoulder.

(d) The respondent is to pay for the proposed right reverse shoulder replacement surgery and ancillary treatment pursuant to the applicable workers compensation gazetted rates.