

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4322/20
Applicant: Shane Paterson
First Respondent: JJL Transport Pty Ltd
Second Respondent: Toll Group Operational Services
Date of Determination: 19 February 2021
Citation No: [2021] NSWCC 54

The Commission determines:

1. The applicant suffered an injury to his left upper extremity (shoulder) in the course of his employment with the respondent on 2 December 2008.
2. As a result of the injury referred to in (1) above, the applicant required rotator cuff repair at the hands of Dr Kuo in 2009, which surgery was successful.
3. As a result of the nature and conditions of his employment with the second respondent, the applicant suffered an injury to his left shoulder by way of rotator cuff tear, such injury being an aggravation of a pre-existing condition with a deemed date of injury of 1 August 2018.
4. The applicant's employment with the second respondent is the main contributing factor to the aggravation referred to in (3) above.
5. The aggravation referred to in (3) above has brought about the requirement for further left rotator cuff repair surgery at the hands of Dr Kuo by way of left rotator cuff repair.
6. The second respondent is to pay the costs of and incidental to the proposed further left rotator cuff repair surgery.
7. Award for the first respondent.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Disputes Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. On 2 December 2008, Mr Shane Paterson (the applicant) tore his left rotator cuff in the course of his employment with JLL Transport Pty Ltd (the first respondent) when unloading a shipping container (the 2008 injury). He returned to the workforce shortly after a successful rotator cuff repair at the hand of Dr Kuo in or about 2009.
2. The applicant commenced work with Toll Group Operational Services (the second respondent/Toll) in or about September 2015. He alleges that on 17 January 2018, he suffered another injury to his left shoulder when a ladder he was using to climb into a truck snapped, causing him to re-tear his left rotator cuff and to suffer a left calf injury. In the alternative, he alleges the nature and conditions of his employment with the second respondent was the main contributing factor to an aggravation of his pre-existing left shoulder condition.
3. An interlocutory hearing was held on 14 September 2020 to deal with the first respondent's argument that the applicant was disqualified from bringing a claim in respect of the 2008 injury because of his failure to do so within the time limits set out in section 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).
4. On 6 October 2020, a Certificate of Determination was issued that found in favour of the applicant pursuant to section 261(4)(b) of the 1998 Act; namely that the failure to make a claim in time was occasioned by the applicant's ignorance and mistake, and that the claim related to an injury which has resulted in the serious and permanent disablement of the applicant.
5. The applicant brings proceedings seeking payment of the costs of a further left rotator cuff repair as proposed by his treating surgeon, Dr Kuo. Each respondent denies liability for the cost of that surgery. There is no question from a medical perspective that the applicant requires the proposed surgery. The matter in issue is whether one or both of the 2008 injury and/ or an alleged injury in 2018 have brought about the requirement for the surgery.

ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain for determination:
 - (a) whether the applicant suffered a workplace injury in the course of his employment with the second respondent (the 2018 injury), and
 - (b) if so, whether either the 2008 injury or the 2018 injury, or both brought about the requirement for the proposed surgery.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a hearing before me on 14 January 2021. 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.
8. At the hearing, Mr C Tanner of counsel appeared for the applicant instructed by Mr A Byrne, solicitor. Mr D Adhikary of counsel appeared for the first respondent instructed by Mr R Elder, solicitor, and Mr B Jones of counsel appeared for the second respondent instructed by Mr G Hill, solicitor.

EVIDENCE

Documentary evidence

9. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply of the first respondent and attached documents;
 - (c) Reply of the second respondent and attached documents, and
 - (d) The applicant's Application to Admit Late Documents (AALD) dated 14 January 2021.

Oral evidence

10. There was no oral evidence called at the hearing.

FINDINGS AND REASONS

Whether the applicant suffered an injury while working for the second respondent

11. The applicant's case is put on alternative bases, namely that either the January 2018 ladder incident is the major contributing factor to the aggravation of the left shoulder condition which in turn gives rise to the need for surgery, or the nature and conditions of the applicant's employment with the second respondent gave rise to the aggravation of the 2008 injury and in turn has caused the need for surgery.
12. The applicant also submits that if the Commission is not satisfied either of those aggravations were both work-related and causative of the need for surgery, then the need for surgery is brought about by the original 2008 injury.
13. The applicant described the 2008 injury in his statement in the following terms:
 - "3. On or about 2 December 2008, I was told to unload a shipping container. The container was full of different items including metal boxes. They may have been used to build a chicken farm, but I cannot be certain.
 4. A lot of the items in the container were very heavy. I spent approximately one hour unloading the container. My left shoulder began to ache, but I kept on working. The pain kept getting more severe. As I was driving the truck immediately after I found it difficult to change gears using the stick."
14. The applicant then set out a series of events, which are not the subject of challenge by the first respondent, that his supervisors at the time told him because he had not completed a claim form on the day of his injury, he was precluded from claiming workers compensation.
15. The applicant stated that in July 2009 he returned to pre-injury duties but was careful with his left shoulder, which would often ache when he worked but was bearable and did not require him to take time off. He did, however, take Panadol daily which would reduce his pain. The applicant stated that throughout his working life after the injury in 2008, his left shoulder continued to cause him pain. Notwithstanding that ongoing symptomology, the applicant maintained a long and consistent work history and commenced employment with the second respondent on 17 September 2015. At the time he commenced employment with Toll, he underwent a medical examination and disclosed the pre-existing left shoulder pain. The applicant made similar declarations in August 2016 and June 2017.

16. On 17 January 2018, the applicant was climbing a ladder on a truck and placed the full weight of his left leg to elevate himself, when the metal step on the ladder snapped off causing his left calf to stretch. That breaking of the step caused the applicant to take his full weight on both of his arms, causing a strain on his shoulders, which he said at the time he did not take much notice of. The applicant was conveyed to hospital for treatment of his calf. He remained away from work until 3 April 2018, when he was given a pre-injury clearance by his general practitioner for his calf tear.
17. At paragraph 52 and following of his statement, the applicant set out the circumstances in which his left shoulder first began to hurt more than usual. He stated this happened around August 2018 and at this time his left shoulder pain was getting worse the more he worked. The applicant noted the duties of a truck driver included a lot of manual work which placed strain on his shoulders, including but not limited to pulling himself up the steps of the truck, lifting curtain poles and gates of trailers together with pulling curtains back over the truck. He stated those duties strained his shoulders but previously never enough to stop him working.
18. The applicant states that on 22 August 2018 he informed his manager his shoulder pain was such that he could no longer continue to work. Mr Tanner took the Commission to the job role photographs taken by the second respondent found at page 221 and following of the Application. He submitted the duties set out in those photographs are consistent with those set out by the applicant and plainly demonstrate activities which placed strain on a driver's shoulders. The nature and conditions of the applicant's duties with the second respondent are largely uncontested.
19. The applicant's case is that whether the ladder incident or the nature and conditions of his employment caused the 2018 injury, the injury was in the nature of a work-related aggravation of the pre-existing condition in his left shoulder. In order for the applicant to succeed on this argument, he must demonstrate on the balance of probabilities that his employment with the second respondent was the main contributing factor to any aggravation.
20. The High Court considered the issue of aggravation and exacerbation of disease processes in *Federal Broom Co Pty Ltd v Semlitch* (1963) 110 CLR 626 (*Semlitch*). Kitto J said:

“There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism”.
21. Windeyer J said in the same matter, “[t]he question that each [aggravation; acceleration; exacerbation; deterioration] poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient” (at [639]). In relation to whether there was an aggravation, his Honour said “... the answer depends upon whether for the sufferer the consequences of his affliction have become more serious” (at [639]).
22. Burke CCJ, applied *Semlitch* in the matter of *Cant v Catholic Schools Office* [2000] NSWCC 37; (2000) 20 NSWCCR 88 (*Cant*) and said:

“The thrust of these comments is that irrespective of whether the pathology has been accelerated there is a relevant aggravation or exacerbation of the disease if the symptoms and restrictions emanating from it have increased and become more serious to the injured worker.” (at [17])

23. In *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd* (1998) 45 NSWLR 606 (*Mecha*) the Court of Appeal said the words “injury consists in the aggravation ...of a disease” in section 16(1) should be construed as not referring to something which is an injury independently of its aggravating effects on a previously existing disease, but as being confined to what are entirely injuries by aggravation (Sheller JA at [616]).
24. Snell DP dealt with the nature of the test for “main contributing factor” *AV v AW* [2020] NSWCCPD 9. At [66], the Deputy President said:
- “66. I have previously expressed the view that the test of ‘main contributing factor’, inserted into the definition of ‘injury’ in s 4(b) by the 2012 amendments, is more stringent than the test applicable pursuant to s 4(b) in its previous form, which was subject to s 9A of the 1987 Act. There may be more than one ‘substantial contributing factor’. ‘Section 9A requires that the employment concerned be a substantial contributing factor to the injury. That use of the indefinite article admits of the possibility of other, and possibly non-employment-related, substantial contributing factors.’ On the other hand, the requirement in s 4(b) inserted by the 2012 amendments, that employment be ‘the main contributing factor’ permits the existence of only one such factor. The requirement of ‘the main contributing factor’ involves a more stringent connection with the employment than the requirement of a ‘a substantial contributing factor’ that applied to ‘disease’ injuries prior to the 2012 amendments’...
70. In *Awder Pty Limited t/as Peninsular Nursing Home v Kernick*, I expressed the view that whether ‘substantial contributing factor’, for the purposes of s 9A of the 1987 Act, was satisfied was ‘a question to be decided on the evidence overall, including a consideration of the matters described in section 9A(2). It is not purely a medical question.’ That view was applied by Keating P in *Hogno v Fairfax Regional Printers Pty Limited* and by Roche DP in *Villar v Tubemakers of Australia Pty Ltd*. The test of ‘main contributing factor’, like that of ‘substantial contributing factor’, involves a broad evaluative consideration of potential competing causative factors. It should be decided on the evidence overall and is not purely a medical question.
71. In *El-Achi* Roche DP, considering the application of the test in s 4(b)(ii) in its current form, said:
- ‘That a doctor does not address the ultimate legal question to be decided is not fatal (*Guthrie v Spence* [2009] NSWCA 369; 78 NSWLR 225 at [194] to [199] and [203]). In the Commission, an Arbitrator must determine, having regard to *the whole of the evidence*, the issue of injury, and whether employment is the main contributing factor to the injury. That involves an evaluative process.’
72. I agree with the above passage from *El-Achi*. The Deputy President in *El-Achi* also referred, in my view correctly, to the ‘main contributing factor’ test as ‘one of causation’. This is consistent with the discussion of s 9A of the 1987 Act by the Court of Appeal in *Badawi v Nexon Asia Pacific Pty Limited*. Their Honours referred to the ‘causative element’ of the test in s 9A. It is consistent with the discussion in *State of New South Wales v Rattenbury* in which Roche DP, dealing with s 4(b) after the 2012 amendments, discussed whether ‘main contributing factor’ was satisfied, by reference to whether there were competing causal factors to the relevant ‘disease’ injury.

73. In *Bradley*, a case involving s 4(b)(ii) in its current form, King SC ADP referred to the question posed by an Arbitrator, 'whether or not ... the [worker's] work throughout his working life as a painter and decorator had been the main contributing factor to the aggravation of his shoulder disease'. The Acting Deputy President described this question as the correct one."

25. It is therefore apparent that the proper test is whether the aggravation impacted the individual concerned. It is not necessary for the particular disease or underlying condition to be made worse: *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond* [2006] NSWCCPD 132; (2006) 6 DDCR 79 (*Raymond*) applying *Semlitch and Cant*. In *Raymond*, Roche ADP (as he then was) was satisfied that, on the whole of the evidence, it was open to the Arbitrator to conclude that the worker suffered an aggravation of his occupational asthma, in the sense that the symptoms increased and became more serious while employed (at [45-47]). That approach to the question of injury by aggravation has also been followed in arbitral decisions such as *Ariton Mitic v Rail Corporation of NSW* (Matter number 8497 of 2013, 8 April 2014), *Mylonas v The Star Pty Ltd* [2014] NSWCC 174 at [151]-[166], *Egan v Woolworths Limited* [2014] NSWCC 281 at [60]-[82] and *Harrison v Central Coast Local Health District* [2015] NSWCC 86.

26. There is disparate medical opinion in this matter over the cause of the worsening left shoulder symptoms. Dr Bodel, Independent Medical Examiner (IME) for the applicant took a detailed history of various episodes which have caused the applicant injury. He attributed the aggravation in the applicant's left shoulder to the January 2018 ladder incident, and when specifically asked whether employment with the second respondent was the main contributing factor to the current aggravation, replied:

"Based on the medical evidence from his treating doctors and the history given by your client, it is my view that the episode of injury that occurred at Toll has probably caused additional structural damage in the left shoulder for which the surgical repair is required.

I am aware that Dr Burrow indicates that the left shoulder was not complained of until months later but that is not the history given here today. Accepting Mr Paterson's injury history, I therefore attribute the need to the further surgery to the episode of injury that occurred while working at Toll when the step collapsed on him while descending down those stairs to put out the dangerous goods signs. The MRI scan clearly shows that there is a retracted tear that needs surgical repair."

27. Dr Bodel provided a supplementary report dated 2 September 2020. The letter of instruction to that report included the history provided to the applicant concerning the nature and extent of his duties with the second respondent. When asked to take into account whether the nature and conditions of employment with the second respondent are the main contributing factors to the aggravation, Dr Bodel replied:

"I would indicate that the nature and conditions of work at Toll is a contributing factor by way of aggravation... of the disease process in the shoulder. Historically, the re-tear occurred with the event when the step that he was standing on broke away while he was hanging on with his left arm above his head. That is the main contributing factor to the injury and the nature and condition of work with Toll is also a contributing factor, but not the main contributing factor in that circumstance."

28. In his first report dated 25 September 2018, the respondent's IME Dr Burrow noted the applicant's previous rotator cuff tear and repair, and said the current presentation is "a recurrence of that condition. It has been aggravated by time since surgery, his age, and the nature and conditions of his employment with Toll." Dr Burrow went on to say that the employment with the third respondent was a contributing factor to the left shoulder, but the main contributing factor is time since the original cuff tear and the surgery to repair it.

29. In his second report dated 25 January 2019, which was commissioned to reply to the views of treating surgeon Dr Kuo, Dr Burrow said:

“I repeat this opinion numerous times in my report but I also clearly defined that Mr Paterson’s employment with Toll was not the ‘**main contributing factor**’. Mr Paterson has, after all, only been employed with Toll for about three years when he became re-symptomatic of the left shoulder rotator cuff tear, he had damaged his shoulder previously due to a lifetime of heavy labour, and it is the fact that he damaged his shoulder rotator cuff previously and required cuff repair that led to re-damage in 2018 and subsequent representation of symptoms.”

30. Dr Kuo, treating surgeon provided a report dated 26 September 2018 written to the applicant’s general practitioner Dr Sibanda. After referring to the injury with the first respondent and rotator cuff repair in 2009, Dr Kuo stated:

“However, Shane states that the nature of his job is quite physical with a lot of lifting, loading and pulling himself in and out of trucks and noticed in the past month or so there has been increasing pain in his left shoulder.”

31. Dr Kuo also wrote a report to the second respondent dated 20 November 2018, found at page 92 of the Application. In that report, Dr Kuo said:

“If you can see the bigger picture Shane has worked hard in his role as a truck driver over many years and there is no question that this physicality has been a contributing factor to his current shoulder problems. I agree with you that there is no way that it can be proved beyond a reasonable doubt that it is the “main” contributing factor but in the absence of any physical social pursuits and the fact that Shane has denied any injuries outside of work, I would come to the conclusion that his employment is the main contributing factor.”

32. The state of the medical evidence can therefore be summarised as Dr Burrow attributing the applicant’s worsening symptoms to the 2008 injury and his working life in general, Dr Bodel to the ladder incident and Dr Kuo to the nature and conditions of employment with the second respondent.

33. In my view, the opinion of Dr Burrow addresses the question of the cause of the applicant’s condition in his left shoulder, rather than the cause of the aggravation which has necessitated the surgery. Indeed, to the extent Dr Burrow addresses the onset of symptoms from 2018, he notes the applicant had been employed with Toll for about three years and in part attributed the damage to “a lifetime of heavy labour.”

34. Dr Burrow’s second report dated 25 January 2019 in my view illustrates the difficulty with his opinion. That report was commissioned to reply to the views of Dr Kuo; however, Dr Burrow addresses the incorrect question when dealing with the cause of the condition which has given rise to the need for surgery. Having addressed a number of Dr Kuo’s contentions, Dr Burrow replied in the terms set out at [29] above. That opinion by Dr Burrow addresses the question of the cause of the applicant’s *condition* in his left shoulder, rather than the cause of the *aggravation* which has necessitated the surgery. Indeed, to the extent Dr Burrow addresses the onset of symptoms from 2018, he notes the applicant had been employed with Toll for about three years and in part attributed the damage to “a lifetime of heavy labour.”

35. With respect to Dr Burrow, when he states further at page 80 “his employment with Toll for three years is a contributing factor, but that it is not the ‘main contributing factor’” he is addressing the applicant’s overall condition rather than any aggravation at issue. Later, Dr Burrow goes on to say:

"I just do not believe his relatively short period of employment with Toll has been the main contributing factor to the large retracted cuff tear we see on MRI scan, currently.

The current cuff tear is most significantly due to failure of the previous cuff tear repair, that previous tear was due to a lifetime of heavy lifting and labour throughout his work life."

36. With respect, Dr Burrow is again addressing the cause of the condition rather than the aggravation. I have little difficulty accepting that the current cuff tear is due to the failure of the previous repair, however, the question not addressed by Dr Burrow is whether the aggravation by way of re-tear was caused by the applicant's work at Toll.
37. In any event, if Dr Burrow is correct in asserting that a lifetime of heavy work has been the main contributing factor to the applicant's aggravation, the second respondent would still be liable by virtue of being the last employer whose employment was to the nature of which the injury by way of aggravation was caused.
38. Mr Tanner submitted that this was not a case where there are a multitude of factors which aggravated the applicant's underlying condition. He noted there is no history of any recreational activity which would account for the deterioration in the applicant's condition, and that the only factors which aggravated it were related to his work.
39. Mr Tanner submitted that if Dr Burrow wished to indicate non work-related factors were the cause of the aggravation, then it was open to him to indicate what those factors were. He criticized Dr Burrow who he said provided no indication as to how the applicant's left shoulder was "worn out" and to what extent non work-related factors were at play.
40. Mr Tanner submitted there was no basis to find that the re-tear of the applicant's left shoulder which necessitates the surgery was caused by anything other than employment. He submitted the view of Dr Kuo was supported by the applicant's treating physiotherapist, Ms Karafilis, who in her report dated 30 August 2018 noted the applicant's history and considered the injury to be due to the nature and conditions of employment. Likewise, Mr Tanner referred to the general practitioner notes on 23 August 2018 which noted the onset of left shoulder symptoms three weeks earlier, referable to the nature and conditions of employment.
41. Mr Tanner submitted that in these circumstances, if the Commission accepted that the nature and conditions of the applicant's employment were the cause of the aggravation then the second respondent would be liable as the last employer, the nature of whose employment has caused the aggravation.
42. In summary, Mr Tanner submitted the appropriate finding in relation to the second respondent would be that the applicant suffered an injury by way of aggravation to his pre-existing left shoulder condition as a result of the nature and conditions of his employment, and that the proposed surgery is reasonably necessary as a result of that injury. In the alternative, he submitted it was open to the Commission to also find the injury which took place whilst working for the first respondent is also responsible for the applicant's condition, but plainly the reason he requires surgery is due to the aggravation with the second respondent.
43. For the first respondent, Mr Adhikary agreed with a number of Mr Tanner's submissions, and added that pursuant to the line of authority commencing with *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49, the applicant must establish the surgery is reasonably necessary as a result of the 2008 injury for his client to be found liable for the cost of it.

44. The first respondent submitted the contemporaneous records of the applicant's general practitioner, Dr Sibanda, including a clinical record from 23 August 2018 demonstrate it is the nature and conditions of the applicant's employment with the second respondent which have given rise to the aggravation which has caused the need for surgery. Mr Adhikary noted that Dr Kuo, the treating surgeon with a long history with the applicant going back for more than a decade makes no mention at all of any causal relevance of the 2008 injury to the need for surgery.
45. For the second respondent, Mr Jones submitted it was impossible to say the 2008 injury had resolved in light of the Commission's finding in its earlier decision that the 2008 injury continued to cause the applicant lingering problem.
46. I accept Mr Jones' submission that it is not sufficient for the applicant to hypothesize in his statement about what might have caused his worsening problems. The applicant put them down to the January 2018 incident with the ladder breaking, however, as Mr Jones pointed out, the contemporaneous records make no mention between February 2018 and August 2018 of any left shoulder problems. Rather, those entries are concerned with the left calf and leg injury suffered by the applicant owing to the ladder breaking as he was climbing into the truck.
47. Mr Jones submitted the applicant's problems are essentially a continuation of those caused by the 2008 injury, and accordingly his client, the second respondent, was not responsible for any aggravation which has caused the need for surgery.
48. With respect, I disagree with that submission. There is no question the applicant had ongoing problems with his left shoulder from time to time, which he readily admitted to in his statement. Nevertheless, the applicant was able to continue working in a physically demanding role for many years following the rotator cuff tear repair in 2009. The uncontested evidence is that it was only after approximately three years of working with the second respondent with clearly identified heavy duties that the applicant's condition worsened to the point where he requires surgery.
49. Whilst it is true that correlation does not equal causation, in this instance I am satisfied on the balance of probabilities that the applicant's nature and conditions of employment with the second respondent have aggravated his pre-existing problems with the left shoulder to the point where he now requires surgery.
50. In so finding, I have taken into account all of the IME evidence and do not prefer the views of Dr Burrow for the reasons already advanced, namely that he addresses the cause of the applicant's underlying condition rather than any aggravation. Likewise, I do not prefer the view of Dr Bodel, who indicated the fall from the ladder was the cause of the aggravation of the applicant's left shoulder, as in my view the contemporaneous evidence does not support such a finding. There is an absence of contemporaneous evidence to support any complaint of pain increasing in the left shoulder between the ladder incident in January 2018 and approximately August 2018. Rather, I prefer the view of Dr Kuo, treating orthopaedic surgeon, who has the benefit of a long history of treatment of the applicant's condition, including carrying out the first shoulder repair.
51. As a treator, Dr Kuo's opinion carries substantial weight as he does not approach the matter as a retained expert of either party, and has the benefit of treating the applicant over many years. Rather, he takes into account the nature and extent of the applicant's duties over the course of his working life, and notes, in my view correctly, that it is the nature and extent of those duties which have led to the aggravation.

52. I find the January 2018 step incident was not causative of the applicant's aggravation to his left shoulder. There is no contemporaneous evidence to support such a finding. Nevertheless, having found the nature and conditions of the applicant's employment with the second respondent were the main contributing factors to the aggravation, it follows there will be a finding to the effect the applicant suffered an injury in the course of that employment, with a deemed date of injury of 1 August 2018.

The cause of the requirement for the proposed surgery

53. The applicant bears the onus of proving the medical treatment claimed is reasonably necessary as a result of a work injury. There is no issue between the parties that the surgery is a medical necessity, so the ultimate question for determination is whether the initial 2008 injury has caused the requirement for the proposed surgery, or whether that need has been brought about by the aggravation brought about by the nature and conditions of the applicant's employment with the second respondent.
54. Mr Adhikary submitted that when one examined the causal relationship on a common-sense basis, the totality of the evidence demonstrated the 2008 injury has not contributed to the need for surgery.
55. Mr Tanner submitted that pursuant to section 4 (b)(ii), the applicant's work with the second respondent was the main contributing factor to the aggravation of his left shoulder condition and that it was this aggravation which in turn gave rise to the need for the proposed surgery.
56. The second respondent's submission at [45] above as to the ramifications of the Commission's previous finding regarding the 2008 injury not having resolved does not address the central question, namely what has caused the need for surgery? The fact the 2008 injury was found to have caused the applicant serious and permanent disablement is a separate question to whether that injury brought about the need for the surgery.
57. The applicant does not resile from having been left with residual problems following the 2008 injury, however, he was able to tally a lengthy and impressive history of work after that incident and to do so with the residual symptoms of the 2008 injury.
58. In examining the cause of the requirement for the surgery, I have had regard to the various medical opinions in the matter, and once again prefer the views of Dr Kuo to those of both Dr Bodel and Dr Burrow. I do not prefer Dr Bodel's view, as it is not supported by contemporaneous records.
59. Likewise, I do not prefer the opinion of Dr Burrows, who has been largely preoccupied with the cause of the underlying condition rather than the aggravation. Dr Burrow's findings are also inconsistent with those of Dr Kuo, who has carefully had regard to the applicant's duties with the respondent. Dr Burrow's view that the cause of the need for surgery is the failure of the initial repair does not address what the cause of that failure might be. To the extent he says time and non-work-related factors, Dr Burrow has not set out why the effluxion of time would give rise to the repair failing, or provided any examples of what non-work activities may have caused the failure of the initial repair.
60. Dr Kuo has the benefit of a long history treating the applicant, and his opinion that the nature and conditions of employment have given rise to the aggravation and need for surgery is consistent with the opinion of the treating physiotherapist, and also with the contemporaneous records of the GP, which do not disclose any complaint regarding the left shoulder after the ladder incident.

61. Although due caution must be taken in dealing with the contemporaneous histories taken by treating doctors, in this instance the GP has recorded worsening left shoulder symptoms but has done so later in 2018 against a background of the applicant's duties being heavy and repetitive. Although the applicant attributes his worsening problems to the ladder incident, it is apparent from the medical records that he has, understandably, reconstructed that incident as being the cause of his shoulder problems, absent any other obvious incident having caused them.
62. That is not said as a criticism of the applicant, who I believe to be a witness of truth. Rather, he has in my opinion undertaken the common human mistake of seeking to find causation from examining any memorable events which might in his own mind have caused the aggravation, and drawing a link between the ladder incident and his shoulder symptoms which worsened later in the year.
63. For these reasons, I am satisfied on the balance of probabilities that it is the 2018 aggravation brought about by the nature and conditions of the applicant's employment with the second respondent which has necessitated the surgery.

The reasonable necessity of the proposed treatment

64. There is no issue between the parties that the surgery is a medical necessity. As noted, the only matter in dispute was whether injuries sustained by the applicant whilst in the employ of either or both of the first and second respondents were causative of the need for that surgery.
65. In light of the findings on causation, it follows that the Commission will order the second respondent to pay the costs of and incidental to the proposed surgery by Dr Kuo, which is reasonably necessary as a result of the workplace accident suffered by the applicant in the employ of the second respondent with a deemed date of injury of 1 August 2018.

