

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6057/20
Applicant: SISOJA KRSTANOSKI
Respondents: BLUESCOPE STEEL LIMITED
Citation No: [2021] NSWCC 60

The findings of the Commission are as follows:

1. The respondent's Application for Reconsideration fails.

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Disputes Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Bluescope Steel Limited (the respondent) for reasons outlined in a letter of 3 February 2021 seeks a Reconsideration of the Certificate of Determination issued by the Commission dated 14 January 2020 [sic 2021] (COD).
2. Sisoja Krstanoski (the applicant) by submissions dated 9 February 2021 advances a contrary submission, namely that the COD should not be reconsidered.

ISSUES FOR DETERMINATION

3. The issue for determination is whether or not the Commission should exercise its wide discretion under Section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998* to reconsider, alter or amend its earlier COD dated 14 January 2021.

SUBMISSIONS

4. The following submissions were made:
 - (a) By the respondent dated 3 February 2021, and
 - (b) By the applicant dated 9 February 2021.

REASONS

5. I have considered all of the submissions. Many of the respondent's submissions deal with matters which the applicant does not dispute and it is therefore not necessary to traverse them seriatim.
6. The parties do not dispute the width of the discretion referred to by Deputy President Roche in *Samuel v Sebel Furniture Ltd*¹. There is also no dispute that the COD satisfies the word "decision". The respondent does not seek to introduce any new evidence.
7. The respondent's request for reconsideration is limited to the Commission's finding that the consequential injury to the neck and scarring "results exclusively from the 2016 injury".² However, at paragraph 24 of the COD the following reason was outlined:

"It follows, in my view, that the cervical spine aggravation results from the 2016 injury because the surgery would at least to some material contributing extent not have been necessary if the 2016 injury was not a materially contributing factor to the 2018 shoulder pathology". (emphasis added)

¹ [2006] NSWCCPD 141 at 58.

² Respondent's submissions page 5 [14].

8. At paragraph 23 of the COD, I earlier concluded that the applicant's rotator cuff pathology as a result of the 2016 incident had not fully recovered so that the further rotator cuff pathology sustained in 2018 was greater because of aggravation of the existing pathology. I also concluded that the 2016 injury played a part in the need for surgery because (again):

"the surgery would at least to some material contributing extent not have been necessary if the 2016 injury was not a materially contributing factor to the 2018 shoulder pathology".
9. The matter is further clarified at paragraph 26 (c) where the need for the shoulder surgery occurred "partly because of" the consequential condition and partly because of the 2016 pathology. There was no suggestion that the 2016 injury was the sole cause of the need for surgery and consequential condition in respect of the cervical spine. The conclusion drawn I think is fairly clear, namely that the 2016 injury caused shoulder pathology, the shoulder pathology persisted³, some of the consequential pathology at the time of the 2018 incident was worsened in the 2018 incident because of the 2016 injury/pathology and a combination of both led to the shoulder surgery. The neck injury and scarring resulted from the surgery.
10. The respondent's reference to *Lagana v Australian Retirement Partners Realty Pty⁴* is a reference to a matter where the worker sustained two compensable injuries, which is not the present case. The finding made in the present matter was that the 2016 injury materially contributed to the pathology which occurred in 2018. It was the combination of those pathologies which gave rise for the need for surgery and hence the applicant's neck condition and complaints of neck symptoms following the shoulder surgery.
11. In its primary submissions⁵ the respondent acknowledged that if "aggregation is permissible in respect of the left shoulder...this would in turn incorporate any impairment said to flow from the neck injury/scarring". The respondent argued that the left shoulder pathology was not identical as required by *Edmed⁶*. This Commission held that in respect of the 2018 incident, part of the pathology was identical and part was not. Simply because both of the pathologies in 2018 concern the left shoulder does not to my mind mean that they cannot be untangled for the purposes of aggregation.
12. The anatomical proximity of the separate (2018) pathologies to each other does not remove the fact that the same rotator cuff was affected. To argue that part of the required and subsequent surgery concerned a non-compensable/non-pleaded pathology so that the results of the surgery (consequential neck condition and scarring) should be similarly removed from the whole person impairment referral is in my view erroneous. This is because to set the strictures in the referral advanced by the respondent would, in my view, be an intrusion by the arbitrator into the functions of the Approved Medical Specialist in the decision he or she is authorised to make.
13. In the circumstances I take the view that it is tolerably clear that the remittal referred to in paragraph 27 of the COD is appropriate.

³ See [20], [22] and [23] of the CD.

⁴ [2015] NSWCCPD 55 at [50-53].

⁵ Respondent's submissions 18 December 2020 at page 12 at [43].

⁶ *Department of Juvenile Justice v Edmed* [2008] NSWCCPD 6 at [26]-[27].

14. There being no new evidence offered and no clarification necessary of the existing COD, in my view the application for reconsideration must fail.