

CITATION: *Bradford v Bawinanga Aboriginal Corporation* [2023] NTWHC 9

PARTIES: Todd BRADFORD

v

BAWINANGA ABORIGINAL CORPORATION  
(ABN: 58 572 3985 053)

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 21939341

DELIVERED ON: Friday 14 July 2023

DELIVERED AT: Darwin

HEARING DATE(s): 24, 25 & 26 May 2021

DECISION OF: Judge Austin

**CATCHWORDS:**

Validity of Notice - Self-reporting of Worker - Expert evidence

*Return to Work Act* (the Act)

*Newton v Masonic Homes Inc*

*Ju Ju Nominees Pty Ltd v Carmichael* [1999] NTSC 20 per Martin CJ (BF) at paragraph 15.

*Laminex Group Pty Ltd v CATFORD, Joanne* [2021] NTSC 92

*Lee v McMahon* [2018] NTCA 7 at [33].

*Disability Services of Central Australia v Regan*

*Northern Cement v Iosa (Iosa)* [1994] NTSC 58 per Martin CJ

*MacMahon Contractors Pty Ltd v Lee*

*Alagic v Callbar Pty Ltd* [1999] NTSC 90

*Jason Bannister Green v Porous Pty Ltd* [2013] NTMC 005 at [90].

*Laminex Group Pty Ltd v Catford* [2021] NTSC 921

**REPRESENTATION:**

*Counsel:*

Worker: J Nottle

Employer: Wade Roper SC

*Solicitors:*

Worker: Jessica Hodge  
Hall Payne Lawyers

Employer: Julian Van Lingen  
Roussos Legal

Decision category classification: B

Decision ID number: [2023] NTWHC 9

Number of paragraphs: 298

IN THE WORK HEALTH COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 21939341

BETWEEN:

TODD BRADFORD

Worker

AND:

BAWINANGA ABORIGINAL CORPORATION  
(ABN: 58 572 3985 053)

Employer

REASONS FOR DECISION

(Delivered: Friday 14 July 2023)

JUDGE AUSTIN

**Background:**

1. Todd Bradford (the Worker) was born on 20 June 1973 and was 45 years old at the time of the workplace incident.
2. On and about 17 November 2017, the Worker was employed by the Bawinanga Aboriginal Corporation, BAC, (the Employer) as a Retail Assistant within the Barlmark Supermarket and other locations within Maningrida, in the Northern Territory.<sup>1</sup>
3. During the early afternoon of 11 April 2017, the Worker suffered injury in the course of his employment.
4. The Worker was relocating a gun safe from an out store to an area within the supermarket.<sup>2</sup> While completing the task the Worker was required to lift a shelf and whilst using his right shoulder to do so he suffered an injury. The Worker's evidence was that his body buckled and he heard crunching and popping sounds emanating from the right side of his body from the shoulder or under the shoulder blade area. It caused him a brief explosion of pain, and discomfort. He described experiencing a burning sensation which shot up his neck, moving up the trapezium towards the back of his neck.<sup>3</sup>
5. The Worker continued with the task and approximately 30 minutes later he was required to undertake the task of driving the Supermarket Courtesy Bus.<sup>4</sup> While climbing into the bus the Worker felt sharp "electricity-type pain" across his mid to lower back. On completion of his driving duties, the Worker was observed, by a supervisor, to be in pain and was directed to see a General Practitioner at Maningrida Health Clinic. The Worker

---

<sup>1</sup> Joint Hearing Book (JHB) p226.

<sup>2</sup> T14-17: 24 May 2021.

<sup>3</sup> T15 & 17.4-7.

<sup>4</sup> T15 & 18.1-3.

attended on the same day at the Health Clinic and was administered some pain medication and was certified two weeks sick leave.<sup>5</sup>

6. The Worker made a claim pursuant to the *Return to Work Act* (the Act) on 13 April 2018 for injuries sustained on 11 April 2018<sup>6</sup>, namely "*cervical musculoskeletal sprain and lumbar facet joint sprain*" (Claim)<sup>7</sup>.
7. The Claim was accepted on 17 April 2018<sup>8</sup> and the Worker was paid weekly compensation.

#### **The Cancellation of Weekly Benefits and the Appeal:**

8. The Worker's *Statement of Claim* (SOC) dated 16 January 2020 and *Reply and Defence to the Counter Claim* (Reply) of 12 May sets out his pleadings.
9. The Worker asserts he made a claim under the Act that he had suffered an injury which consisted of "*multiple physical injuries, specifically to the spine and right shoulder whilst lifting shelving with his right shoulder to get access to a safe*", and that it arose out of or in the course of his employment.<sup>9</sup>
10. By a Notice of Decision and Rights of Appeal issued pursuant to section 69(1) of the Act and dated 21 September 2018 the Employer advised the Worker that it was cancelling payments of weekly benefits to him from 14 days after the Notice.
11. On or about 16 August 2019, the Employer issued a further Notice of Decision (Notice of Decision) and Rights of Appeal issued pursuant to section 69(1) of the Act cancelling payments of the Worker's weekly benefits on the basis that any incapacity of the Worker was no longer a result of the work-related injury/disease.
12. Both parties agree that the earlier Notice is of no moment in these proceedings and it is the Notice of Decision of 16 August 2019 which is challenged by the Worker.
13. The Worker appeals the Notice of Decision of 16 August. The Worker asserts that as a consequence of the injury the Worker was totally incapacitated for work from about May 2018 to about September 2019.
14. The Worker asserts from about September 2019 to date and continuing the Worker has been partially incapacitated for work as a consequence of the injury and the Worker has and continues to require medical and related treatment as a consequence of the injury.

#### **The Hearing:**

15. The Worker has appealed the Notice of Decision of 16 August 2019. This was not a 'mere appeal' because the Worker chose to prepare his pleading to include issues going beyond the mere background and the cancellation of weekly benefits and a challenge to the validity of the Notice of Decision. As a consequence the Worker was *Dux Litis* at a hearing that proceeded before me on 24 to 26 May 2021.

---

<sup>5</sup> T19.9-20.6.

<sup>6</sup> JHB p229-235.

<sup>7</sup> Joint Hearing Book (JHB) p226 - See Claim Form at Court Book (CB), pp. 229 – 235.

<sup>8</sup> JHB p236 at paragraph 2.

<sup>9</sup> SOC para [5].

16. By agreement and on request of the Court the parties filed written submissions in support of their arguments which contributed to the delay in the preparation of these Reasons for Decision.
17. Closing submissions were received from the Employer on 16 July 2021, closing submissions from the Worker on 6 August 2021 and a Reply by the Employer on 27 August 2021. A request by the parties to file further submissions as a result of a Northern Territory Supreme Court decision was consented to by the parties and acceded to by the court. Those further submissions were filed by the parties on 17 and 24 December 2021 in response to the appeal decision of *Laminex Group Pty Ltd v Catford* [2021] NTSC 92.

### **The Cancellation of Weekly Benefits**

18. On or about 16 August 2019, the Employer issued the Notice of Decision (Notice of Decision) and Rights of Appeal pursuant to section 69(1) of the Act cancelling payments of the Worker's weekly benefits. The reasons for the decision stated that any ongoing incapacity<sup>10</sup> suffered by the worker was no longer a result of the work related injury/disease.
19. Paragraph 7 stated:
  - “7. Accordingly:
    - (a) *your ongoing incapacity is no longer a result of the injury of 11 April 2018.*
    - (b) *your employment with the employer is not the real, proximate or effective cause of the injury of 11 April 2018.*
    - (c) *alternatively, the injury of 11 April 2018 does not result in or materially contribute to your impairment or incapacity.*
    - (d) *your weekly benefits are cancelled and there is no compensation payable by the Employer to you.”*

### **The Employers Case**

20. The Employer says this issue falls to be determined by this Court's assessment of the medical evidence. It is the Employer's submission, the evidence of Dr Reza Sabetghadam (Dr Reza) relied on by the Employer is to be preferred to that of Dr Ba Nyunt (Dr Nyunt) relied on by the Worker.
21. The Employer asserts that as 14 June 2019 (Dr Reza's first examination), the worker was no longer incapacitated as a result of the work related injury/disease and was fit to return to his pre-injury duties. The Employer pleads that any ongoing incapacity of the Worker is not the result of a compensable work related injury.
22. The Employer says the weight of the evidence is that Dr Reza's opinion should be accepted, that at best the Worker may have suffered *exacerbations* of pre-existing conditions (which were diagnosable and evident on an MRI from 30 April 2019) to his neck, back and right shoulder, but that any such injury was temporary. Dr Reza's evidence

---

<sup>10</sup> See definition of 'incapacity' s3 *Return to Work Act 1986 (NT)* **Incapacity** means an inability or limited ability to undertake paid work because of an injury.

is that at the time of examining the Worker on 14 June 2019 any incapacity the Worker may have had was not attributable to the workplace incident.

23. The Employer says that if the Court is against them on the primary contention the issue becomes what is the extent of the Worker's earning capacity? The Employer's submission is that the Worker's earning capacity has eclipsed his Normal Weekly Earnings (**NWE**). Alternatively the Employer seeks a declaration by the Court of the Worker's earning capacity.

### **Loss of Earning Capacity**

24. The Employer relies on s69(3) of the Act and asserts that as the Worker has ceased to be incapacitated for work as a result of the compensable work related injury, as at the date of the Decision and the date of cancellation, the Worker has no loss of earning capacity as a consequence of the injury.<sup>11</sup>
25. For the purposes of s69 (3), the words "*incapacitated for work*" require a demonstrable loss of earning capacity. This, for the obvious reason (as remarked upon by Mildren J in *Newton v Masonic Homes Inc.*<sup>12</sup>), means that a Worker may suffer from a physical or mental incapacity at the time of a cancellation under 69(3), yet still have capacity for work and no resulting loss of earning capacity.
26. The Employer asserts that the Worker was capable of undertaking work in various roles and was reasonably capable of earning a certain amount per week depending upon the role in which he was employed. In the alternative the Employer asserts that the worker was capable of carrying out that employment on a part-time basis.
27. In essence what the Employer seeks is a declaration of whether the Worker has ceased to be totally incapacitated and a determination of whether if any and if so what, compensation in the form of weekly benefits is payable; and costs.

### **The Counterclaim Pleaded**

28. The Employer brings a 'counterclaim to the Worker's appeal to maintain its assertion that any ongoing incapacity of the Worker is not the result of a compensable work related injury and that the injury does not result in or materially contribute to incapacity.
29. In the alternative, it asserts that since September 2019 the Worker has been capable of working in specified categories of employment and capable of earning a specified weekly amount.
30. The secondary issue on the Counterclaim becomes what is the extent of the Worker's earning capacity. It is the Employer's submission that the Worker's earning capacity has eclipsed his Normal Weekly Earnings (**NWE**).
31. Alternatively, it is the Employer's submission that the Worker has an earning capacity to be determined by the Court.

---

<sup>11</sup> See the Decision at CB p.237, subparagraphs 7(a) and (c).

<sup>12</sup> (2009) 235 FLR 30 at [14].

### The Appeal by the Worker:

32. The Worker asserts that the Employer's Notice of decision is invalid and there had been no change in circumstances warranting the cancellation of the weekly compensation as of the date of the Notice 16 August 2018.
33. The Worker asserts he was totally incapacitated for work from about May 2018 to about September 2019. The Worker also asserts that from about September 2019 to date and continuing he has been partially incapacitated for work as a consequence of the injury. The Worker has required and continues to require medical and related treatment as a consequence of the injury.
34. As such as of the date of the Notice, 16 August 2019, the Worker's case is he was still incapacitated for work as a result of the workplace injury and the Employer has failed to discharge their onera to prove one of the grounds set out in the Notice of Decision.
35. The Worker's case is the medical evidence of Dr Ba Nyunt (Dr Nyunt) should be preferred to that of Dr Reza Sabetghadam (Dr Reza). Dr Nyunt states that on his examination of the Worker on 26 May 2020 his opinion is the Worker was suffering from pre-existing conditions and injuries and concurs with Dr Reza to some extent. However and significantly he does not agree with Dr Reza that the Worker's signs and symptoms were not at all related to the workplace incident.
36. Dr Nyunt's opinion as of 26 May 2020 was the Worker sustained injury as a result of the workplace incident on 11 April 2018 with specific diagnosis and was still incapacitated at the time of his examination due to:
  - i) subacromial subdeltoid bursitis of the right shoulder as a result of an injury *directly attributable* to the workplace incident (an acute injury); and
  - ii) an *aggravation* of the pre-existing degenerative disc disease to the neck and lower back as a result of the workplace incident.
37. The Worker relies on Dr Nyunt's Expert Evidence and the evidence of the Worker and submits the Employer has failed to prove a change in circumstances warranting the cancellation of weekly benefits.
38. The Worker submits that if the Court finds that the Employer has failed to discharge its onera the Worker has established that from about September 2019 to date and continuing the Worker has been partially incapacitated for work as a consequence of the injury and is entitled to compensation from the Employer.

### The Law:

39. The Employer bears both the legal and evidentiary onus of establishing the change in circumstances warranting the cancellation of the amount of weekly compensation by the Notice of Decision as per *Ju Ju Nominees Pty Ltd v Carmichael* [1999] NTSC 20 per Martin CJ (BF) at paragraph 15.

*"If the employer succeeds in proving an assertion that total incapacity for work has ceased, demonstrating a change in loss of earning capacity, the onus of proving any partial incapacity for work passes generally to the worker..." Ju Ju Nominees Pty Ltd v Carmichael<sup>13</sup>*

---

<sup>13</sup> (1999) 9 NTLR 1.

40. In this case the Worker's appeal to the Work Health Court against the decision to cancel weekly benefits did widen the scope of the issues beyond an appeal against cancellation. However in circumstances where there is a challenge to the validity of the notice:

*'...the employer bears the onus of establishing the change of circumstances warranting the cancellation of the weekly benefits. Where the reason for cancellation given in the Notice is an assertion that the worker has ceased to be incapacitated for work, the employer assumes the burden of proving the cessation of total incapacity. If the employer fails to establish that change in circumstances, it will be required to continue the payment of weekly benefits until those payments are lawfully cancelled or reduced. On the other hand, if the employer is successful in discharging those onera, the onus of proving any partial incapacity passes sot the worker.'* Per Grant CJ at [26] in *Laminex Group Pty Ltd v Catford, Joanne* [2021] NTSC 92

41. If a Decision relies on a number of grounds, it does not follow that the Notice of Decision will be invalid if every ground is not made out. In this regard the question for the court is whether the grounds that are made out establish "...the change of circumstances warranting the cancellation or reduction of the amount of weekly compensation pursuant to s69."<sup>14</sup> See *Ju Ju Nominees Pty Ltd v Carmichael per Martin CJ* at para 8.
42. If an employer can satisfactorily demonstrate that one, or more, grounds relied on justify its cancellation/reduction, then to the extent the Worker asserts some incapacity continued to subsist as at the date of cancellation/reduction (referable to any work related injury for which compensation had previously been paid) the onus of proof of the same reverts to the Worker - see *Lee v McMahon* [2018] NTCA 7 at [33].
43. In each case, the Court must look to the relevant notice under s69 to ascertain on what grounds the particular employer has cancelled or reduced the payment of weekly compensation, as it is those grounds for which it carries the onus of proof. So much is clear from His Honour Justice Mildren's comments in *Disability Services of Central Australia v Regan*<sup>15</sup> to the effect:

*"In dealing with an appeal under s69, the Court is not called upon to decide whether or not the employer was justified in the action it took because there was evidence to support the action. The question which has to be decided is whether, upon a consideration of all of the evidence in the case, the employer has proved the facts set out in the certificate, and if so, whether as a matter of law those facts support the conclusion that the worker's weekly compensation payments should be cancelled or reduced, as the case may be..."*<sup>16</sup>

44. The validity of the Notice is to be adjudged as at the date of the same. In this regard and in *Disability Services (Supra)*, Mildren J relevantly opines:

*"An appeal under s69 calls into question **only** whether there has been a change in circumstances justifying the action unilaterally taken by the employer **at the time the notice was given.**"*<sup>17</sup> (Emphasis Added)

45. The Employer and the Worker agreed that the Worker was Dux Litis for the reasons set out above. The Employer bears both the legal and evidentiary onus of establishing the

---

<sup>14</sup> *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1 per Martin CJ at 8(2).

<sup>15</sup> (1988) 8 NTLR 73.

<sup>16</sup> *Ibid* at 77.

<sup>17</sup> *Disability Services of Central Australia v Regan* *Supra* at 76.



change in circumstances warranting the cancellation of the amount of weekly compensation by the Notice.

46. The onus then shifts to the Worker to establish that some incapacity continued to subsist as at the date of cancellation which was referable to any work related injury for which compensation had previously been paid.
47. The Employer bears both the Legal and Evidentiary onus on the balance of probabilities of quantifying the value of the Workers remaining capacity to earn – see *Northern Cement v Iosa (Iosa)* [1994] NTSC 58 per Martin CJ (BF) paragraph [15] at p. 6.2.

#### Questions for the Court

48. Accordingly the Questions to be resolved are: Summary of findings -

- a) **Q) As the Employer accepted that on 18 April 2018 the Worker suffered a compensable work injury, what was the nature of that injury?**

**A) NECK and BACK temporary injury – exacerbation of pre-existing condition:**

*Exacerbation of a pre-existing condition in his neck and back – sore neck and sore back;  
Seen on MRI of 30 April 2019:*

*Degenerative Cervical Disc Disease C4/5 & C5/6 (opinion of Dr Reza - exacerbated by workplace incident)*

*Degenerative Disc Disease Broad Base Disc Bulge to L5/S1 (opinion of Dr Reza - exacerbated by workplace incident)*

**A) SHOULDER temporary injury:**

*At best the Medical Evidence may establish that the Worker did suffer an exacerbation of a pre-existing condition to his right shoulder – sore shoulder;*

*Seen on MRI of 30 April 2019:*

*Bursitis (the evidence has not established this to be directly attributable to the workplace incident – Dr Reza opinion is it may be an exacerbation of a pre-existing condition or due to degeneration);*

*Tendonitis (Pre-existing Condition not attributable to the workplace incident - Dr Reza opinion the evidence established caused by degeneration).*

- b) **Q) The Worker pleaded he suffered the injuries in paragraph 5 of the SOC, “multiple physical injuries, specifically to the spine and right shoulder”. Has the worker established that the shoulder injury arose out of or in the course of employment;**

**No**

The Court does not accept the evidence of Dr Nyunt as to the shoulder injury, bursitis, being directly attributable to the workplace incident. Further as a result the Court does not accept that the evidence establishes that the shoulder injury arose in the course of employment.

An inaccurate and incomplete history was given to the Expert Dr Nyunt by the Worker resulting in the opinion of the Expert being flawed. As such the Court does not rely on that Expert’s evidence to be satisfied on the BOP that the shoulder injury, the bursitis is *directly attributable* to the workplace incident as opined by Dr Nyunt. Further his opinion that the workplace incident resulted in an *aggravation* of a pre-existing

condition to the shoulder as opposed to an exacerbation (Dr Reza) is also not accepted for the same reason.

In the absence of the reliance of the Expert Evidence of Dr Nyunt the Court prefers the Expert evidence of Dr Reza. The effect of not accepting the Expert Dr Nyunt's evidence, is that the remaining evidence is that any shoulder injury is either an exacerbation of a pre-existing condition or due to degeneration.

The evidence of Dr Reza does not attribute the shoulder injury to the workplace incident to the standard required for me to be so satisfied on the Balance of Probabilities. At best Dr Reza's evidence is there **may** have been an exacerbation (temporary) of pre-existing conditions to the shoulder but that they had resolved at the time of his examination on 14 June 2019 and any ongoing incapacity is not attributable to the workplace incident. Dr Reza's evidence fell short of an actual diagnosis. Dr Reza attributed any bursitis to be likely to be attributable to pre-existing conditions to the shoulder and further found that the Worker was no longer incapacitated for work as a result of the workplace injury. He also did not rule out that the shoulder injury could have been caused by degeneration as opposed to an acute injury. As such I find there is insufficient evidence to be satisfied that the shoulder injury did arise out of or in the course of employment.

- c) **Q) Has the worker established that the shoulder AND neck AND back injury was productive of an incapacity for work and a loss of earning capacity as of the date of cancellation of weekly payments?**

*No to the back injury  
No to the neck injury  
No to the shoulder injury*

Significantly, I find that I accept Dr Reza's evidence and that it is sufficient to satisfy me on the Balance of Probabilities that there has been a change in circumstances in relation to the workplace injury as Dr Reza's expert evidence is that of the date of his examination the Worker was no longer incapacitated as a result of the workplace injury and was fit for his pre-injury duties.

- d) **Q) Has the Employer established a change in circumstances, namely, that the worker had fully recovered from any the compensable work related injury; or was no longer incapacitated as a result of any compensable work related injury, as of the Notice of Decision on 16 August 2019?**

*Yes as at the date of the Notice the Employer has satisfied the Court on the BOP that the Worker was no longer incapacitated for work as a result of the workplace incident.*

The Court has rejected the evidence of Dr Nyunt as unreliable and prefers the evidence of Dr Reza and accepts it on the Balance of Probabilities. The Court therefore finds that the Employer has discharged its onus in establishing a change in circumstances as of the Notice of decision that the Worker was no longer incapacitated as a result of any compensable work related injury.

- e) **Q) If so, has the Worker established partial incapacity due to any compensable work injury?**

No

- f) Q) If so, has the Employer discharged its onus in proving that the Worker has not suffered a loss of earning capacity;

Yes

- g) Q) If the Employer has not discharged its onus and the Worker has suffered a loss of earning capacity, has the Employer discharged its onus in proving what the Worker can earn over and above the otherwise agreed earning capacity NWE as at 11 April 2018 of \$1052.13 per week?

NA

As the Employer accepted that on 18 April 2018 the Worker suffered a compensable work injury, what was the nature of that injury?

49. As the Employer accepted that on 18 April 2018 the Worker suffered a compensable work injury, the court must determine what was the nature of that injury? In order to do so I have considered the evidence presented in the case.

#### Expert Evidence:

50. The Worker saw many Doctors after the workplace incident, at Maningrida, Darwin, Orbst and Melbourne, however only 2 Expert Medical Reports were tendered in evidence and those were the only medical Experts called to give evidence in the proceedings, Dr Reza for the Employer and Dr Nyunt for the Worker. Whilst there was some common ground between the Experts their opinions differed on the cause of any incapacity of the Worker and whether any incapacity was ongoing at the time of their examinations. They examined the Worker at different times after the workplace incident.
51. Both the Employer and the Worker in their openings urged the Court to determine the issues by resolving the competing evidence of the Medical Experts. The Employer stated that the evidence of Dr Reza is to be preferred and the Worker stated that the evidence of the Worker and Dr Nyunt should be preferred.
52. The evidence relating to the alleged injury presents real difficulties for the Court in terms of discharging its fact finding function. This is because the Court has been presented with two diametrically opposed expert opinions as to whether the worker continues to suffer incapacity as a result of injury caused by the workplace incident or whether any incapacity the worker may still suffer is not as a result of the workplace incident as that has resolved.
53. I find in this case that the expert medical evidence diagnosing the nature of any injury caused by the workplace incident and any ongoing incapacity of the Worker as a result of the workplace incident was reliant to a large extent on self-reporting of the matters that pertain to the injury by the person who claims to suffer from the ongoing incapacity, that is the Worker.
54. In *Jason Bannister Green v Porosus Pty Ltd*<sup>18</sup> Chief Judge Lowndes discussed how the evidence should be approached by the court:

*This necessitates not only a painstaking and rigorous examination by the court of the accuracy, completeness and reliability of the self-reports to the Expert Doctors by the*

---

<sup>18</sup> *Jason Bannister Green v Porosus Pty Ltd* [2013] NTMC 005 at [90] per Chief Judge Lowndes.

*Worker, but an equally thorough scrutiny of the ability of the expert witnesses (who have proffered conflicting opinions) to make clinical judgments based on the history (self-reports) they have received, including their ability to assess the genuineness and, therefore, reliability of the self-reporting process. As pointed out by Freckleton and Selby:*

*Much depends in terms of accuracy of diagnosis upon the reliability of patient self-report. If this is flawed, any diagnosis consequent upon it will be flawed – for instance, see *Alagic v Callvar*<sup>19</sup>.*

55. However, it is clear that disagreement between expert witnesses in a civil case does not preclude proof of a party's case<sup>20</sup>; and it is the function of the tribunal of fact to resolve conflicts of expert evidence, and as a general rule that entails the Court preferring the evidence of one expert over another.

56. The subject of resolving conflicts of expert evidence was touched upon by Lord Bingham in *Eckersley v Binnie*<sup>21</sup>.

*In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate<sup>22</sup> attempt to mislead (as happens only very rarely) a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other reasons.*

57. The court has the task of carefully examining the nature and quality of the expert evidence adduced during the course of a civil trial and to do so in a broad and commonsense manner: see *Taylor v The Queen*; *R V Weise*<sup>23</sup>. In discharging that function, the tribunal of fact is entitled to decide an issue in accordance with evidence which conflicts with expert opinion and which outweighs it<sup>24</sup>.

58. A fundamental difficulty in the present case is that neither Dr Reza nor Dr Nyunt saw Mr Bradford until well over a year after the workplace incident. Dr Reza on 14 June 2019, 14 months after the incident, and Dr Nyunt on 26 May 2020, more than 2 years after the incident. Between the time of the workplace incident and the examinations conducted by the Experts the worker had received treatment from Doctors and physiotherapists and had participated in return to work programs.

59. In those circumstances, both Experts have come to diagnoses and opinions based on a retrospective reconstruction, primarily based on the history provided by Mr Green and his self-reported symptoms. The existence of an MRI report from April 2019 of the Worker's pathology provided significant evidence in the proffering of both opinions however, the self-reporting of history of prior injury, symptoms and pain arising as a result of the workplace incident and subsequent treatment by the Worker was still a crucial and fundamental basis for the formation of any expert opinion.

60. Subject to the exceptions in the following paragraph, there is no contemporaneous medical evidence, in particular from a treating general medical practitioner, health

---

<sup>19</sup> *Alagic v Callvar*<sup>19</sup> [1999] NTSC 90.

<sup>20</sup> See Selby and Freckleton n 29 p 213.

<sup>21</sup> *Eckersley v Binnie* (1988) 18 Con LR 1 at 77-78.

<sup>22</sup> See Freckleton and Selby n 35 at [13A-200]; See Selby and Freckleton n 29 p 213. 28.

<sup>23</sup> *Taylor v The Queen* (1978) 45 FLR 343; *R V Weise* [1969] VR 953 - See Selby and Freckleton n 29 p 213.

<sup>24</sup> See Selby and Freckleton n 29 p 213.

professional or Expert during the intervening period, capable of providing an opinion or diagnosis of the physical profile of the worker, which traces and tracks the initial injury presentation and subsequent improvement or deterioration of his physical health due to any workplace injury following the workplace incident on 11 April 2018.

61. The exceptions are in the form of the medical notes from: Dr Samuel Iwang 23 August 2019; the Worker's historical medical notes from the Rosewood Surgery from 30 April 2005 to 30 January 2008; the Orbest Medical Centre from 4 April 2008 to 18 September 2020; NT Department of Health records from 25 January 2018 to 13 August 2018; the Cavanagh Medical Clinic between 6 June 2018 and 12 December 2018; and the Physiotherapy Notes of his 6 attendances between 11 October 2018 and 7 December 2018 with Mr Nicholas Kontzisionis. There is also an MRI from 30 April 2019. However none of his treating Doctors or his physiotherapist were called to give evidence to clarify the medical notes and records<sup>25</sup>.
62. None of the treating Doctors or health professionals the subject of these medical notes and documents were called to give evidence or clarify their notes in the proceedings.

#### Medical Evidence:

63. The medical evidence in the form of medical notes of the Worker prior to the Workplace incident on 11 April 2018 details a lengthy history of pre-existing lumbar, cervical and right shoulder injuries.
  - a) dislocated his right shoulder/clavicle in a motor cycle accident when he was approximately 25 years old, medical notes 30 April 2005 records dislocated right shoulder;<sup>26</sup>
  - b) sustained a right shoulder injury whilst in the employ of Australian Meat Holdings sometime in the early 2000s;<sup>27</sup>
  - c) sought treatment for a dislocated right shoulder on 30 June 2005;<sup>28</sup>
  - d) suffered a lower back injury as a result of an altercation in prison in October 2007;<sup>29</sup>
  - e) sought treatment for lower back pain on 25 October 2007;<sup>30</sup>
  - f) sought treatment for back pain 10 December 2007;<sup>31</sup>
  - g) sought treatment for lower back pain on 10 October 2008 – tenderness L S1 join diagnosis of sacro-ileitis;<sup>32</sup>

---

<sup>25</sup> Exhibit P2 Certificate of Capacity for pre-injury employment from 16 August 2019 of Dr Samuel Inwang of dated 23 September 2019; CB 51; 165; 171; 192; 202; 220.

<sup>26</sup> Transcript at p.11; CB 167.

<sup>27</sup> Transcript at pp. 9 and 59.

<sup>28</sup> CB at p.167.

<sup>29</sup> Transcript at p.90.

<sup>30</sup> CB at p.168.

<sup>31</sup> CB at 170.

<sup>32</sup> Ibid at p.187.

- h) suffered an injury to his neck and right trapezius in picking up a child and sought medical treatment in respect of the same on 13 January 2010;<sup>33</sup> and
  - i) suffered a fall onto his right shoulder whilst working on a fishing trawler and sought medical treatment for the same on 16 August 2011.<sup>34</sup>
64. The medical evidence in the form of medical notes of the Worker prior to 11 April 2018 also details a lengthy history of pre-existing left shoulder injuries and other injuries noted by Dr Reza during his clinical examination of the Worker on 14 June 2019<sup>35</sup>;
- a) suffered a snapped achilles tendon, medical treatment on Friday April 4 2008;
  - b) pain in achilles tendon and L elbow – tennis elbow, medical treatment on 20 August 2008;
  - c) diagnosed with bipolar 2007 whilst in gaol;
  - d) reduced rotation to L and lateral flexion to L, reduced extension sought medical treatment 13 January 2010;
  - e) pain over biceps L arm treatment sought 7 February 2011;
  - f) pain in L shoulder radiates to arm and neck, at times loss of strength in hand can't lift heavy weight and diagnostic imaging requested of L shoulder 4 January 2017;
  - g) painful swollen right ankle history of Achilles tendon 13 February 2017;
  - h) heart attack in 2017.

### **The MRI Report of 30 April 2019:**

65. On 30 April 2019, the Worker underwent an MRI of his lumbar and cervical spine and of the right shoulder.<sup>36</sup>
66. The MRI Report is largely unremarkable and records, *inter alia*:
- a) as to the lumbar spine generally:  
“The lumbar spine demonstrates straightening of normal alignment. The conus terminates at the L1/2 level.”
  - b) as to L5/S1:  
“Broad based disc bulge leads to mild central spinal canal narrowing and slightly flattens the thecal sac and minimally contacts the traversing left S1 nerve root.”
  - c) as to the cervical spine generally:  
“The cervical spine demonstrates straightening of normal alignment. No spinal canal mass.”

---

<sup>33</sup> Ibid at p.183.

<sup>34</sup> Ibid at p.181.

<sup>35</sup> CB 51; 165; 171; 192; 202; 220.

<sup>36</sup> A copy of the MRI Report appears at CB pp.24-25.

- d) as to C4/5:  
“Disc is mildly degenerative with no significant spinal or neuroforaminal canal narrowing.”
- e) as to C5/6:  
“Disc is degenerative. No significant spinal or neuroforaminal canal narrowing detected. The visual neck viscera appears normal.”
- f) as to the whole of the spine generally, concludes:  
“No significant spinal or neuroforaminal canal narrowing detected in the spine.”
- g) as to the right shoulder:  
“The acromioclavicular joint is normal.  
The supraspinatus tendon demonstrates mild tendinopathy. No evidence of a tear detected.  
The infraspinatus and teres minor are normal.  
Subscapularis normal.  
Biceps tendon normal.  
No evidence of a SLAP tear.  
No evidence of a labral tear.  
No muscle belly fatty atrophy.  
There is a thickening of the subacromial/sub deltoid bursa suggesting bursitis.”

67. The significance of the MRI is that it discloses pre-existing conditions to the right shoulder, neck and back of the Worker that are not attributable to the workplace injury, in the form of degenerative changes to his right shoulder and degenerative disc disease to his neck and back. Both Experts agreed with this diagnosis in their evidence given the pathology visible on the MRI. Both Experts had access to this MRI report and commented on it in their Expert reports.

68. The Experts evidence differed markedly, however, as to whether the Worker suffered an exacerbation of his pre-existing conditions due to the workplace incident on 18 April 2018, or an aggravation of those conditions and whether any shoulder injury was directly attributable to the workplace incident. Significantly whether any incapacity as a result of the workplace incident had resolved at the time of the Notice was a live issue at the hearing.

69. An *exacerbation* results when a pre-existing condition is made worse temporarily by a new injury but will eventually return to the same physical condition as before the injury. On the other hand, an *aggravation* occurs when a pre-existing condition is made worse permanently by the new injury.

#### **The Expert Evidence:**

##### **Dr. Reza for the Employer:**

70. The Worker attended upon Dr. Reza for an independent medical examination (**IME**) on 14 June 2019.

71. That attendance was conducted in person and (depending on whether one believes the Worker<sup>37</sup> or the Doctor<sup>38</sup>) was either less than an hour or more than an hour in duration.

---

<sup>37</sup> Transcript at p.89.

<sup>38</sup> Ibid at p.163.

72. Dr Reza is an occupational physician and is, inter alia, “a Certified Review Medical Officer for drug and alcohol matters, Certified Medical Examiner for Civil Aviation Safety Authority and Certified Medical Examiner for Rail and Transport Industry.”<sup>39</sup>
73. Dr. Reza’s June Report discloses:
- a) that the Worker appeared “*anxious and stressed*”<sup>40</sup> at the time of the examination;
  - b) that the Worker was under the impression the Doctor was a TIO Doctor and had reservations as a result;<sup>41</sup>
  - c) that the Worker became angry and uncooperative when queried about his pain symptomology;<sup>42</sup>
  - d) that the Worker “*exhibited grimacing, sighing, crying, weeping and an abnormal pain behaviour during the examination;*”<sup>43</sup> and
  - e) that it was difficult to extract an occupational history from the Worker and the Worker in fact did not provide a detailed past history in this regard.<sup>44</sup>
74. At the time of the IME, Dr. Reza conducted a formal and informal examination.
75. The formal examination largely comprised measurements of the Worker,<sup>45</sup> a range of motion examination,<sup>46</sup> palpitation of the injury sites<sup>47</sup> and observation of general ambulation.<sup>48</sup>
76. The informal examination comprised the Doctor’s clinical observations of the Worker’s demeanour, presentation and movement during the balance of the examination. The example the Doctor gives in this regard is noting the marked contrast between the limited performance of the Worker’s shoulder in the range of movement exercise, when contrasted with his normal range of movement in undressing and dressing at the commencement and conclusion of the same.<sup>49</sup>
77. With the benefit of his consideration of the various medical records identified at CB pp.30- 31 and with knowledge of the Worker’s past medical history, at least in respect of the right shoulder,<sup>50</sup> (that the worker had suffered 2 significant past injuries to his right shoulder that presented as a discrepancy between the right AC joint and left AC joint and also the position of the right shoulder) including relevantly the MRI, the Doctor then opines that:

---

<sup>39</sup> CB at p.32.

<sup>40</sup> Ibid at pp.30 and 36.

<sup>41</sup> Ibid. It was not put to the Doctor, under cross, that his June Report was in error in this regard – see Transcript at pp.166-200.

<sup>42</sup> CB at p.33.

<sup>43</sup> Ibid at p.36.

<sup>44</sup> Ibid at p.34.

<sup>45</sup> Ibid at p.36. See also the Transcript at p.163.

<sup>46</sup> Ibid. See also the Transcript at pp.163-164.

<sup>47</sup> Ibid. See also the Transcript at p.165.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid and Transcript at pp.163-164.

<sup>50</sup> CB at p.34.



*"In my clinical opinion, Mr. Bradford's condition is constitutional, will wax and wane in nature, and is related to the underlying pathophysiology of his shoulder and cervical, thoracic and lumbar spine. I did not reach any specific diagnosis."<sup>51</sup>*

*"...Mr. Bradford suffers from non-specific pain in his cervical, thoracic and lumbar spine, related to a probable underlying degenerative condition and he suffers from non-specific pain in his right shoulder related to pre-existing injuries and also degenerative changes. His pain symptoms are varied on a day-to-day basis. Mr. Bradford's heightened pain and disability perception is reinforced by psychosocial reinforces."<sup>52</sup>*

*"In my clinical opinion, on 11.04.2018, Mr Bradford did not sustain a significant injury based on what he presented in my examination room. It appears he had a pre-existing medical condition of the right shoulder, and at that time he probably had temporary exacerbation of symptoms in his right shoulder, however due to existence of psychosocial reinforces, he has continued to experience heightened pain and disability perception."<sup>53</sup>*

*"Mr Bradford is fit for his pre-injury duties as a sales representative."<sup>54</sup>*

*"The provided MRI report of the lumbar spine, cervical spine and right shoulder is in line with degenerative change and does not require further testing."<sup>55</sup>*

78. The Expert's opinion of the Worker's presentation is *'that the Worker's reported signs, symptoms and complaints were not consistent with the elapsed time since the date of injury, are not consistent with the treatment to date; **they could be consistent with the identified underlying pathology**; they are not consistent with the Worker's presentation and are consistent with ongoing psychosocial reinforces'*.<sup>56</sup>
79. The psychosocial reinforces are enumerated in the body of Dr. Reza's Report.<sup>57</sup> They include a poor employment history; poor social infrastructure and support; a poor education and skill background; job loss; loss of accommodation in the NT; relocation to multiple places etc.... A great deal of the Worker's cross-examination of Dr. Reza was focused on the role of these reinforces in his diagnosis and conclusions.<sup>58</sup>
80. I accept after considering the evidence of both the Worker and the Expert that the psychosocial reinforces identified exist. I do not find that the Expert was challenged as to his findings of psychosocial reinforces or the basis for posturing their existence but rather the weight he gave them in reaching his conclusions.
81. While, with respect to the Expert, I found some of his evidence difficult to follow at times, on careful consideration of his reports and his evidence as a whole, I accept his evidence that the psychosocial reinforces had an appropriate role to play in his opinion and conclusions that the Worker's presentation and pain perception was influenced to some degree by these factors.
82. I agree with the Employer's submission that the focus by the Worker on these factors misconceives their importance in these proceedings. In the Employer's submission, the

---

<sup>51</sup> Ibid at p.38.

<sup>52</sup> Ibid at p.37.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid at p.39.

<sup>55</sup> Ibid.

<sup>56</sup> CB 037 Dr Reza's report 27 June 2019 p. 8

<sup>57</sup> Ibid at p.38.

<sup>58</sup> Transcript at pp.172-179, 192-195 and 201-202.

question of whether the Worker's pain is exacerbated by non-physiological matters is not the issue. The issue for the Court is "what was the root cause of that pain?"

83. The effect of Dr. Reza's evidence is that any pain symptomology the Worker was suffering is related to and entirely consequent upon his pre-existing conditions and underlying pathology and not the work related injuries.<sup>59</sup> Significantly after examining the Worker Dr Reza's opinion was that the Worker was exhibiting signs of non-organic pain symptoms. As such he did not agree with Dr Nyunt opinion's given one year later in June 2020 when Dr Nyunt stated he did not observe any non-organic pain symptoms.
84. In this regard, Doctor Reza quite freely and properly conceded that there may be other factors, including the pre-existing conditions that prevent a return to work<sup>60</sup> and/or are causative of any ongoing pain symptomology,<sup>61</sup> however, was and remained adamant in his evidence in Court of his view that the work related injuries were not causative of any ongoing pain or incapacity for work.<sup>62</sup>
85. In a supplementary report of 19 July 2019,<sup>63</sup> the Doctor affirmed his views that the Worker's symptomology was, at least by the time he saw the Worker on 14 June 2019, no longer related to any work related injury, relevantly opining, *inter alia*:

*"Based on the provided history, investigation results and my examination, I conclude that the symptoms could be correlated with underlying pathology. People with non-specific lower back pain, or non-specific neck pain dislike physical activities. This does not directly imply that the physical activity will aggravate or deteriorate the underlying pathology. As soon as they cease the activity, their symptoms subside to the residual level. In my clinical opinion, Mr. Bradford's symptoms developed in the background of underlying pathology and then reinforced with existing psychosocial reinforcers."*

86. Dr Reza again saw the Worker, this time by AVL, on 25 September 2020.<sup>64</sup>
87. Dr Reza provided a supplementary report in this regard on 2 October 2020.<sup>65</sup> In that report the Doctor relevantly states:

*"Scientifically and objectively speaking, degenerative changes in the cervical and lumbar spine, and the pain related to these changes, does not require any passive treatment such as physiotherapy. Moreover, in my clinical opinion, none of his pain symptoms are correlated with or contributed to by the subject incident."*<sup>66</sup>

AND:

*"Regarding the right shoulder, sub acromial/sub deltoid bursitis and supraspinatus tendinosis are chronic degenerative conditions which develop over a period of time. Mr Bradford may have had a temporary exacerbation of symptoms related to the right shoulder. However, I would anticipate this temporary exacerbation to settle within a short period of time with a*

---

<sup>59</sup> Transcript at pp. 195 and 198-199.

<sup>60</sup> Ibid at pp.197-199.

<sup>61</sup> Ibid at p.195.

<sup>62</sup> Ibid at pp.195 and 198-199.

<sup>63</sup> CB at pp.48-49.

<sup>64</sup> Ibid at p.76.

<sup>65</sup> Ibid at pp.76-92.

<sup>66</sup> Ibid at p.86.

*certain level of physiotherapy and exercises, which Mr Bradford attended. The maximum period of time provided by the Official Disability Guidelines is eight to twelve weeks.”<sup>67</sup>*

88. The effect of Dr. Reza’s evidence, simply distilled, is:
- a) the Worker may have suffered an exacerbation of the pre-existing conditions in his neck, back and/or right shoulder as a result of the events of 11 April 2018;
  - b) the Worker’s symptomology as at 14 June 2019 (heightened by psychosocial reinforces or otherwise), some 6 weeks after the MRI and 1 year and 2 months after the workplace incident, was no longer explicable by reference to any such exacerbation and instead related to the pre-existing conditions and underlying pathology; and
  - c) that as at 14 June 2019 (or at the latest 15 July 2019 when Dr. Reza provided a final medical certificate),<sup>68</sup> the Worker was no longer incapacitated for his pre-injury employment as a result of anything that may have occurred at work on 11 April 2018.

#### **Dr. Samuel Inwang**

89. Dr. Inwang was a GP with the Orbost Medical Clinic, who saw and treated the Worker on a number of occasions in the period 16 January 2017 to 23 September 2019.<sup>69</sup>
90. The medical records sourced from the Orbost Medical Clinic record an attendance on Dr. Inwang on 23 September 2019. The notes relevant to that attendance relevantly disclose:<sup>70</sup>

*“Also ready to get back to work”  
“VIC WC certify given for return to pre-injury employment.”*

91. The certificate referenced in the preceding paragraph was tendered as “Exhibit E2”.
92. This Court has before it evidence that following the issue of this certificate the Worker took up employment with Food Works Orbost, commencing on 10 October 2019.<sup>71</sup>
93. In that position the Worker frequently worked in excess of his minimum pre-injury hours of 32 hours per week and often in excess of his maximum pre-injury 38 hours per week.<sup>72</sup>
94. The Worker did not seek to call Dr. Inwang or any of the Worker’s other treating GPs.

#### **The Expert Evidence:**

##### **Dr. Nyunt for the Worker:**

95. Dr. Nyunt attended upon the worker for the purposes of an Independent Medical Examination on 26 May 2020.<sup>73</sup>

---

<sup>67</sup> Ibid at p.89.

<sup>68</sup> Ibid at p.47.

<sup>69</sup> As for the specific attendances, see CB at pp.175, 176, 178 and 179.

<sup>70</sup> Ibid at p.175.

<sup>71</sup> CB at p.242 and Transcript at p.84.

<sup>72</sup> See CB at pp. 256-266, particularly the pay slips issued 18/12 (P.25908/01/ (p.150); 15/01/20 (p.260) and 05/02/20 (p.261).

<sup>73</sup> CB at p.57.

96. Relevantly, that attendance was by AVL and the Doctor was reliant on a range of motion examination carried out by a third party, a physiotherapist.<sup>74</sup>
97. After taking a history from the Worker which significantly, included denials of any previous injuries to the back, neck and shoulder,<sup>75</sup> Dr. Nyunt relevantly diagnosed:
- a) a degenerative disc disease at C4/C5 and C5/C6, *aggravated* by the events of 11 April 2018;<sup>76</sup>
  - b) a degenerative disc disease at L5/S1, again *aggravated* by the events of 11 April 2018;<sup>77</sup> and
  - c) subacromial sub deltoid bursitis plus supraspinatus tendon, tendinosis, the former said to be directly due to the injury.<sup>78</sup>

98. Dr. Nyunt relevantly goes on to state:

*"My opinion is that the subacromial sub deltoid bursitis in the right shoulder was most probably due to injury on 11 April 2018. The tendinosis of supraspinatus tendon is most probably a pre-existing condition. The degenerative diseases in lumbar spine and cervical spine are not attributable to the accident."*<sup>79</sup>

AND:

*"The degenerative changes in the cervical spine and lumbar spine are age related and age appropriate."*<sup>80</sup>

99. Both Dr. Reza and Dr. Nyunt are largely *ad idem* as to the fact that:

- a) there were pre-existing conditions in the spine and shoulder; and
- b) that those pre-existing conditions were *exacerbated/aggravated* by the events of 11 April 2018.

100. Where Dr. Nyunt differs from Dr. Reza is in the former's opinion that:

- a) there was a discreet 'acute' injury to the shoulder resulting in sub deltoid bursitis on 11 April 2018; and
- b) whether the pre-existing injuries were *exacerbated* (temporary) or *aggravated* (permanent) by the workplace incident; and
- c) whether the workplace injuries and sub deltoid bursitis continued to actuate incapacity as at the date of Dr. Nyunt's report.<sup>81</sup>

101. The Employer properly conceded that Dr. Nyunt is an experienced and credible expert in his field. However, the Employer submitted that his report and therefore his opinion and

---

<sup>74</sup> Ibid at p.58.

<sup>75</sup> Ibid at pp.59 paragraph 18, 62 paragraph 45 and 65 paragraph 68.

<sup>76</sup> Ibid at pp.63-64.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid at p.66.

<sup>80</sup> Ibid at p.68.

<sup>81</sup> Ibid at pp.66-67, see paragraph 5.

evidence is fundamentally misconceived. Dr Nyunt was led by the Worker to believe that the Worker did not have any prior injuries to his lower back, neck and right shoulder. The Worker denied any previous history of injuries.

102. In this regard, Dr. Nyunt readily and properly conceded under cross examination that the reason he remarked in his report on the fact that the Worker denied prior injuries and pain symptomology in his neck, back and shoulder, was because had such previous history existed it might have affected his diagnosis.<sup>82</sup>
103. I find that the effect of the denial of the Worker as documented in Dr. Nyunt's report, is that he was led by the Worker to believe that any prior injury or any pre-existing conditions were allegedly asymptomatic prior to the events of 11 April 2018 and only symptomatic thereafter.
104. I find the Worker's explanation to this court in his evidence about why he did not give an accurate history to Dr Nyunt was not convincing and I do not accept the Worker's explanation.
105. I find that this flawed history had a role in informing the Expert's diagnosis of the resulting symptomology as referable to the work incident.<sup>83</sup> The Expert necessarily relied on the workers account in forming his diagnosis.
106. In fact, the very basis for his disagreement with Dr. Reza as to the cervical and lumbar spine are predicated directly on the Worker's denial.<sup>84</sup>
107. The Worker denied in evidence any pre-existing symptoms immediately preceding the workplace incident. However, the progress notes appearing at pp.165-225 of the CB make it clear that the Worker's pre-existing injuries to the lumbar spine, cervical spine and right shoulder were symptomatic on numerous occasions prior to the events of 11 April 2018, if not immediately preceding the workplace incident.
108. It is impossible to say what impact a proper understanding of the Worker's prior medical history might have had on Dr. Nyunt's ultimate diagnosis. Regardless I cannot reconcile the Expert's opinion in light of the inherent deficiencies in history of injury, symptoms and treatment and absence of independent medical history to corroborate or support the Worker's account.
109. The dangers inherent in opinions dependent upon a patient's self-reporting were discussed in *Alagic v Callbar Pty Ltd*,<sup>85</sup> by Martin CJ:

*"Diagnosis is largely influenced by the history given by the patient. If it is inaccurate or incomplete, then important factors may not be taken into account which may have a bearing upon the opinion of the psychiatrist."*<sup>86</sup>
110. Where expert opinion is predicated upon self-reporting, a "*painstaking and rigorous examination by the court of the accuracy, completeness and reliability of the self-reports*" is required.<sup>87</sup>

---

<sup>82</sup> Transcript at p.134.

<sup>83</sup> CB at pp.62-63 and 65.

<sup>84</sup> *Ibid* at p.62 see paragraphs 44 and 45.

<sup>85</sup> [1999] NTSC 90.

<sup>86</sup> *Ibid* at [30].

<sup>87</sup> *Jason Bannister Green v Porous Pty Ltd* [2013] NTMC 005 at [90].

111. If the self-reporting is flawed, so too is the expert's opinion.<sup>88</sup>
112. In the case the self-reporting was obviously and fundamentally flawed, in a centrally relevant and pivotal respect. With all due respect to Dr. Nyunt and given his obvious reliance on that self-reporting in the formulation of his diagnosis, his report cannot found the basis for any findings in the Worker's favour.
113. The Doctor was also informed by the Worker that the latter had not had any medical treatment for his injuries for some two years prior to the report.<sup>89</sup>
114. The Doctor relied on that understanding in formulating his views as to the genesis of the sub deltoid bursitis and as to why the same had not resolved in line with what one would ordinarily expect of such an injury.<sup>90</sup>
115. The evidence demonstrates that the assumption Dr. Nyunt relied on in this regard, was simply wrong.<sup>91</sup> Not only had the Worker undergone physiotherapy in that period, the same was, according to the physiotherapist himself, improving the Worker's range of motion and reducing the pain associated with rotation.<sup>92</sup>

#### **The Worker's Evidence:**

116. I have considered the effect of the evidence of the Worker himself. The Worker's submission to the court is that the Worker's evidence is the most important evidence and that the Worker was an honest, credible and reliable witness. The effect of his evidence being that at the time of the Notice of decision of 16 August 2019, he was still incapacitated as a consequence of the workplace injury and the Employer has failed to prove a change in circumstance.
117. The Employer submits the Worker was an unreliable historian and was far from an honest and credible witness. The Employer urges the Court to consider the whole of the medical evidence in light of the Worker's evidence to find that the Worker cannot be relied on to support any contention that at the time of the Notice he was still incapacitated as a result of the workplace injury.
118. The Employer contends the reliable Expert medical evidence of Dr Reza should be accepted by the Court and proves any incapacity as a consequence of the workplace incident had resolved at the time of the Notice.
119. The Worker's evidence effectively was that although he had relevant injuries to his neck, back and right shoulder, those injuries had resolved as of 11 April 2018<sup>93</sup>. Prior to moving the gun safe the Worker claims he was not suffering from any injury, pain or discomfort to his back, shoulder or neck which affected him in the performance of his work duties or which prevented him from carrying out his work.<sup>94</sup>

---

<sup>88</sup> Ibid.

<sup>89</sup> CB at p.67 and Transcript at p.135.

<sup>90</sup> CB at p.63 – see paragraph 53.

<sup>91</sup> See the records of Mr. Kontzionis relevant to the Worker's physiotherapy in the period 11 October to 7 December 2018.

<sup>92</sup> Ibid at CB pp.222 to 225.

<sup>93</sup> Transcript 9.2-12.

<sup>94</sup> Transcript 12, 14.

120. After the incident he suffered injury to his right shoulder, neck and back which resulted in him being incapacitated for work and from September 2019 he remains partially incapacitated for work.
121. During the early afternoon of 11 April 2017, the Worker stated he suffered injury in the course of his employment when he was relocating a gun safe from an out store to an area within the supermarket.<sup>95</sup> While completing the task the Worker was required to lift a shelf and whilst using his right shoulder to do so he suffered an injury. The Worker's evidence was that his body buckled and he heard crunching and popping sounds emanating from the right side of his body from the shoulder or under the shoulder blade area. It caused him a brief explosion of pain, and discomfort. He described experiencing a burning sensation which shot up his neck, moving up the trapezium towards the back of his neck.<sup>96</sup>
122. The worker continued with the task and approximately 30 minutes later he was required to undertake the task of driving the Supermarket Courtesy Bus.<sup>97</sup> While climbing into the bus the Worker felt sharp "electricity-type pain" across his mid to lower back. On completion of his driving duties, the Worker was observed, by a supervisor, to be in pain and was directed to see a General Practitioner at Maningrida Health Clinic. The Worker attended on the same day at the Health Clinic and was administered some pain medication and was certified two weeks sick leave.<sup>98</sup>
123. The Worker made a claim pursuant to the *Return to Work Act* (the Act) on 13 April 2018 for injuries sustained on 11 April 2018<sup>99</sup>, namely "*cervical musculoskeletal sprain and lumbar facet joint sprain*" (Claim)<sup>100</sup>.
124. In the immediate period following the injury when the Worker was at Maningrida the Worker stated he was still experiencing pain. He described neck pain and headaches on the right side of his neck up and over his head and over his right eye.<sup>101</sup>
125. The Worker said the pain in his back was in the same location where he originally felt it but varied in intensity. He said once he got up and was walking the pain would peak but after taking the pain medication/anti-inflammatory medication, the pain in his back was reducing.<sup>102</sup> He said sometimes he would wake up in the night and it felt like he had been hit with a cattle prod and it was hard to get back to sleep due to the pain and discomfort.<sup>103</sup>
126. The Worker stated that he experienced shoulder pain for the first week and it was very uncomfortable, then it subsided a little but was still there with a high degree of discomfort. He would wake up if he rolled on to his right side and the pain affected his ability to move his arm and do daily tasks.<sup>104</sup> He said he had difficulty maintaining his personal hygiene, including showering and toileting and made arrangements for his

---

<sup>95</sup> T17.

<sup>96</sup> T15 & 17.4-7.

<sup>97</sup> T15 & 18.1-3.

<sup>98</sup> T19.9-20.6.

<sup>99</sup> JHB p229-235.

<sup>100</sup> Joint Hearing Book (JHB) p226 - See Claim Form at Court Book (CB), pp. 229 – 235.

<sup>101</sup> Transcript at p.21.

<sup>102</sup> Transcript at pp 22,23.

<sup>103</sup> Transcript p.24.

<sup>104</sup> Transcript at pp.23,24.

cousin to cook for him. The Worker said he had to make adjustments for other tasks such as putting on his shoes and getting dressed.<sup>105</sup>

127. After 2 weeks convalescing at home at Maningrida the Worker went back to the Doctor and was told he could go back to work on restricted duties of 4 hours a day with restrictions on lifting items above shoulder level and weight restrictions on items he could lift.<sup>106</sup> He described his back pain as about 7 out of 10 after the end of the 2 week period on restricted duties and being variable depending on the type of day he had.<sup>107</sup>
128. The Worker worked on restricted duties for about a 5 day block and a 3-4 day block with a break in between and then returned to the Doctor as he was still in pain. He believed he was given more time off work and then went to Darwin for scans of his injuries.<sup>108</sup>
129. The Worker returned to Maningrida but did not return to work. He was told that he had no accommodation at Maningrida by the HR Manager. Ultimately he left Maningrida and returned to Darwin in May or June 2018 as he was still not on a return to work instruction from his GP and he had no accommodation. He stayed on a temporary basis in some accommodation provided by the mental health section of the medical center before leaving Maningrida.<sup>109</sup>
130. In Darwin the Worker was being paid compensation by his Employer as his claim had been accepted. He undertook some physiotherapy and engaged in a return to work program (with similar restrictions to those at Maningrida) under a host employer regime with Foodbank and the Salvation Army. He stated that his pain remained largely unchanged despite physiotherapy.<sup>110</sup>
131. In December 2018 he moved to Orbost Victoria for financial and emotional support citing financial insecurity from the Insurance Company as one reason. He stated he had no support in Darwin. He had friends and family in Orbost.<sup>111</sup>
132. In October 2019, after the Insurer cancelled his benefits, the Worker secured employment at Orbost Foodworks in the bottle-shop section of the Supermarket however he also assisted in other areas when the shop was busy. The Worker's evidence was that initially he complied with the restrictions of 4 hours a day and weight lifting restrictions.
133. However after Dr Reza's first report in June 2019 the Worker's stated the restrictions and hours dropped away as he was coping with a certain amount of work and the hourly restrictions were removed.<sup>112</sup> He went on to say that his hours increased at Foodworks after he saw his GP and that he had an understanding with his employer of his capacity and when he needed to stop and rest then continue working.<sup>113</sup> His evidence was that the rest he required depended on the day and the discomfort or slight pain he was experiencing.<sup>114</sup>

---

<sup>105</sup> Transcript at p.23.

<sup>106</sup> Transcript p.26.

<sup>107</sup> Transcript p.26.

<sup>108</sup> Transcript p.27.

<sup>109</sup> Transcript p.28.

<sup>110</sup> Transcript p.30.

<sup>111</sup> Transcript pp.3, 31.

<sup>112</sup> Transcript pp. 34,35.

<sup>113</sup> Transcript p.39.

<sup>114</sup> Transcript p.40.



134. The Worker stated that when he was working at Foodworks he still had difficulty undertaking routine tasks at home including:

- a) hanging clothes on the washing line because it required his arm to be raised above vertical;
- b) maintaining hygiene after toileting and while showering; and
- c) driving a car.<sup>115</sup>

135. In describing the effects of his employment at Foodworks, he said:

*Even complying to the restrictions that I had, when my hours started to increase, whilst I was working I didn't have as much problems as I did after my body had cooled down. It was when it cooled I had started, I guess, seizing up. I don't know if that's the right word but I'd get a lot more stiffer in my muscle type of stuff which restricted my movement.<sup>42</sup>*

136. When asked: "Was there any correlation between the workload and the pain?", he answered: "Yes, yeah."<sup>43</sup>

137. He also described a situation with his incapacity in the following terms:<sup>44</sup>

*... To a certain point when the - I guess, when I had put in a couple of big weeks, I was finding it more and more difficult to keep complying with my physical requirements of doing those duties.*

*What do you mean by that? You were finding it more difficult?---Well, I had a - we had a particular big day. I was supposed to work the next day, but I couldn't even get out of bed. I couldn't walk.*

*So, what happened?---I had to ring Ashley the next day to let him know that I didn't come to work because I was basically physically incapable of even getting up and walking.*

*And you were - what was it prevented you from being able to get out bed? ---My pain.*

138. He described the pain as being so incapacitating that he was unable to make it to the toilet on one occasion and he soiled himself.<sup>41</sup>

139. He then said that he explained what had happened to Mr Price (his Manager) at home and from there his hours reduced at Foodworks by mutual agreement.<sup>116</sup>

140. He also described his subsequent employment with Gippsland Seed Services and Get Laid Concreting in similar terms, namely that he continued to experience difficulty related to his physical incapacity, particularly with his recovery after a day of hard physical exertion.<sup>117</sup>

---

<sup>115</sup> Transcript pp.37,38,39.

<sup>116</sup> Transcript p.44.

<sup>117</sup> Transcript pp.45-48.

141. Finally, he gave evidence to the effect that he had not “had any other accidents since then that would exacerbate [his] neck, shoulder or back.”<sup>118</sup>

#### **Cross Examination:**

142. The Worker was cross-examined at length. He was asked about his medical history including his heart attack in 2017 and previous shoulder and lower back pain.<sup>119</sup> He conceded these previous conditions but maintained that they had resolved prior to 11 April 2018.

143. The tenor of the cross examination was to focus on the extent and history of the Worker’s prior injuries, at work and elsewhere, especially to his back, right neck and right shoulder and he was challenged about his failure to give an accurate and reliable history to Dr Nyunt of these injuries. He was also challenged as to the history he gave Dr Reza and the symptoms he described as a consequence of the workplace incident.

144. The Worker was challenged that his evidence that prior injuries to his back from 2007 were not symptomatic before 11 April 2018 was untrue. The worker denied this was the case. The worker’s evidence does not accord with the medical records which reveal repeated medical attendances complaining of back pain <sup>120</sup>.

#### **The Worker’s Evidence - Attendance on Dr Reza:**

145. The Worker agreed he had attended on Dr Reza in person on 14 June 2019 for an examination and via video in September 2020. He stated he took great issue with much of Dr Reza’s report of 27 June 2019 regarding the examination on 14 June 2019.<sup>121</sup>

146. The Worker stated he had read Dr Reza’s June report and marked up a hard copy with what he took issue with and he discussed this with his solicitors. He stated that he did not know he could raise any issues he had with Dr Reza himself when Dr Reza saw him again on 25 September 2020<sup>122</sup>.

147. The Worker denied that he told Dr Reza what was attributed to him in Dr Reza’s report dated 2 October 2020 at p. 82, insisting the Doctor was incorrect about whether the Worker had reported to the Doctor he had multiple previous dislocations and whether the injuries were to his right shoulder:

*‘Mr Bradford stated he had multiple previous right shoulder dislocations between 2008 and 2018’ <sup>123</sup>*

148. The Worker denied telling Dr Reza he was experiencing some of the symptoms documented in Dr Reza’s first report of 27 June 2019 as being attributed to self-reports by the Worker at p.33. Specifically the Worker denied he had told Dr Reza that he had headaches and had flashing lights in his field of vision, that when he coughed he passed

---

<sup>118</sup> Transcript p.50.

<sup>119</sup> Transcript pp.63,64,65.

<sup>120</sup> Transcript pp. 90,91.

<sup>121</sup> Transcript pp 97-99.

<sup>122</sup> Transcript p.97.

<sup>123</sup> CB p. 76 (Dr Reza Report 2 October 2020).

out or that when he stands up for a long time he passed out and sometimes he had pins and needles.<sup>124</sup>

149. The Worker agreed he did tell Dr Reza some of the other symptoms documented at p. 33 of the first report of 27 June 2019 namely, that he had near constant neck pain, shoulder pain and back and upper back pain and variable pain that could not be documented on the chart provided so he made his own chart.

150. However regarding the other symptoms documented by Dr Reza in his report which he denied as being attributable to him he said:

*"Once again I believe what I said and what is written have been varied."*<sup>125</sup>

151. When asked about his bipolar diagnosis documented in the medical notes, the Worker stated that he could not recall being diagnosed with bipolar disorder but knows he had previously been diagnosed with depression. He said he had stopped taking his medication about 5 years ago and despite having been given a diagnosis of bipolar he now queried that diagnosis.<sup>126</sup> He accepted that Seroquel was the medication previously prescribed for bipolar and that he was given a prescription for Seroquel in June 2018 at Darwin by Dr Eamus, but did not necessarily accept it was for bipolar.

152. The medical records show that Dr Eamus prescribed the Worker Seroquel and Sertraline on 15 June 2018, 2 months after the workplace incident, where the Doctor notes:

*'There is a past history of bipolar disorder diagnosed about 15 years ago.....start medication for depressive episode'*.<sup>127</sup>

153. The Worker's evidence was that he was emotionally distraught the day he attended on Dr Reza on 14 June 2019 for the examination. It was not an appropriate date for him due to missing a family member's birthday, he had spent a long time in the car from Orbost to Melbourne, was in pain and he had a number of other emotional matters going on which contributed to his emotional decline that day.<sup>128</sup>

154. The Worker said that he did not agree that he told Dr Reza a number of other matters documented in Dr Reza's report and he took issue during his evidence with how the Doctor had recorded his answers. However I find that on prompting in cross examination the Worker appeared to agree with the Employer that he may have told the Doctor similar things or then went on to say he could not recall if he did say them.

155. The Worker said he could not recall discussions with his GP in late 2018 about his physiotherapist wanting him to talk to her about his health because he became tired and fatigued when doing the exercises. He also would not agree that he stopped doing physiotherapy exercise after November 2018 because he no longer needed to do them. He said he still continued to do the exercises shown him by the physiotherapist 'Nick' in Darwin as of the Court date as it gave him pain relief. He said he did not get tired or fatigued depending on the number of repetitions and sets<sup>129</sup>.

---

<sup>124</sup> Transcript p 106.

<sup>125</sup> Transcript p 106.

<sup>126</sup> Transcript p.78

<sup>127</sup> CB p.215.

<sup>128</sup> Transcript pp. 95,96.

<sup>129</sup> Transcript pp 81,82.

156. The Worker also initially did not agree that he told Dr Reza that he could not afford to see a psychiatrist because his payments were cancelled. He denied that he did not go and see a psychiatrist once his payments restarted and this was because he believed he had no need to see one. He stated he did see a mental health professional, called Mary, in 2019 at Orbost and he believed that was after a discussion with Dr Reza who recommended he see a psychiatrist, but he could not recall her qualifications<sup>130</sup>. The Worker's evidence was confusing about attending on the Mental Health Worker Mary and no evidence of any attendance was forthcoming.
157. When the Worker was taken to the first report of Dr Reza of 28 June 2019 he agreed he did tell the Doctor he could not afford to see a psychiatrist because his compensation payments stopped.<sup>131</sup>
158. One aspect of the Worker's cross examination was the challenge to his evidence regarding his difficulty toileting. It was put to him that his evidence regarding difficulties toileting was a recent complaint invented by him to bolster his claim and had not been raised with either Dr Nyunt or Dr Reza or documented in the medical notes or physiotherapy notes after the workplace incident. As such it was suggested that the Worker had included this detail to exaggerate his symptoms and support his claim.
159. The Worker denied this. He explained that he had no recollection of the questions asked in his various interviews regarding his toileting. He explained that he may not have included this detail due to embarrassment rather than exaggeration or fabrication<sup>132</sup>.
160. The Worker agreed that in the second examination with Dr Reza on 25 September 2020 he said nothing had changed referring to his near constant neck pain shoulder pain and upper back pain. The Worker qualified his evidence by saying that the pain was variable depending on his level of exertion and on a normal day it was between 3-5 on the pain scale but it could progress to crippling depending on what he had been doing.<sup>133</sup>
161. The Worker was also cross-examined about the certificate of fitness for work signed by Dr Samuel Inwang<sup>134</sup> on 23 September 2019 which the Employer submits supports the position that the Worker was fit to return to work.<sup>135</sup>
162. The Worker was cross examined about his work at Orbost Foodworks which commenced in October 2019 to March 2020. He agreed that he often worked well beyond a 38 hour week. Five examples were given where the worker worked, 45 hours, 43 hours, 49 hours, 39 hours and 38 hours.<sup>136</sup>
163. The Worker says in the circumstances the certificate is of no moment. The Worker explained that he obtained the certificate after his worker's compensation payments had been cancelled. However I am of the view that the fact the Worker engaged in work for periods of between 38 and 49 hours a week on at least five occasions in the weeks immediately subsequent to the Notice is a relevant consideration in determining the reliability of the evidence of the Worker regarding his capacity and the expert evidence of Dr Reza in his first report.

---

<sup>130</sup> Transcript 94.

<sup>131</sup> Transcript p 94.

<sup>132</sup> Transcript p.122.

<sup>133</sup> Transcript pp107,108

<sup>134</sup> Exhibit P2 Certificate of Capacity for pre-injury employment from 16 August 2019 of Dr Samuel Inwang dated 23 September 2019.

<sup>135</sup> Exhibit E2. See also T86.6-87.

<sup>136</sup> Transcript pp. 110,111.

## The Worker's Evidence – Attendance on Dr Nyunt:

164. The Worker was specifically cross examined about the examination with Dr Nyunt. I find that the Worker had either a poor recollection of the examination with Dr Nyunt on 26 May 2020, a little over two years since the workplace incident, and was not able to be precise about any history asked about, or was evasive and unhelpful in his evidence.
165. When it was suggested to the Worker that he had not disclosed any history of previous injuries to the Doctor he stated he was not too sure if that is what he said. The Report of Dr Nyunt at page 59 paragraph [18] records: *'Mr Bradford denied any previous histories of injuries to his lower back neck and right shoulder'*;
166. The Worker was also taken to another part of the expert report where the Doctor recorded at paragraph [68]: *'According to Mr Bradford he had no previous history of low back pain, neck pain and right shoulder pain.'* Again the Worker did not agree that he denied a history of previous pain stating that he did not believe that would have been true and correct.<sup>137</sup>
167. The Worker then went on to seek to qualify his answers by suggesting that the questions asked of him were different questions to those documented in the report and only referred to any injuries or pain 'post' accident not previous injuries or pain<sup>138</sup>.
168. I find that the Worker through these answers took issue with significant matters documented in Dr Nyunt's report and did not agree that he was asked about any prior injuries and pain to his neck shoulder and back by Dr Nyunt.
169. The Worker stated he could not remember if he told Dr Nyunt about any prior treatment including physiotherapy; that he had been certified fit for work by Dr Samuel Inwang in September 2019; that he had worked at Foodworks in Orbost; or his bipolar diagnosis. He also stated he could not recall denying any history of medical or other treatment when asked by Dr Nyunt.<sup>139</sup>
170. When cross examined about whether he was ever asked directly by Dr Nyunt if he had any previous history of lower back pain, neck pain and right shoulder pain he stated he could not answer the question because he could not remember.<sup>140</sup>
171. I find that the Worker sought to suggest that the questions documented in the Expert report were open to interpretation. I don't accept his explanations in evidence and find that he either did not have a good recollection of the examination or the questions asked or was attempting to explain and justify his denials in hindsight.
172. Dr Nyunt was not challenged by the Worker about the questions he documented asking the Worker and in fact he confirmed in evidence that he was indeed asking about the Worker's prior history of past injury and pain. I find that this was a crucial enquiry which would as stated by the Expert affect any diagnosis of opinion given.
173. I prefer the evidence of Dr Nyunt to that of the Worker on the Balance of Probabilities and find that the Worker was asked to provide a history of both previous injuries and previous

---

<sup>137</sup> Transcript p 113.

<sup>138</sup> Transcript p.113.

<sup>139</sup> Transcript p.118.

<sup>140</sup> Transcript p.116.

pain to his neck, back and right shoulder prior to 11 April 2018. Further I find the Worker denied any such previous history.

174. It was also put to the Worker that he intentionally misled Dr Nyunt about:

- a) his medical history;
- b) the fact he had prior treatment;
- c) that he had worked at Foodworks;

with the aim of the doctor writing a report that was favourable to his claim for compensation because he wanted the Doctor to form the view that his work injury was the cause of his ongoing problems and that notwithstanding any injuries he had no capacity for work<sup>141</sup>.

175. It was also put to him that he did not tell Dr Reza about his difficulties with toileting and showering because they were not true and he was raising them now to bolster his claim and they were fabricated<sup>142</sup>.

176. Dr Nyunt documented the effect of *Activities of Daily Living* based on a history provided by the Worker. He states in his report that<sup>143</sup>:

*Mr Bradford can perform almost all activities of daily living such as driving. He can perform all aspects of cooking and washing etc... He is unable to perform overhead activities with right hand as [out] the hanging of clothes. Gardening is difficult because of a back and neck pain. **He can take care of his personal hygiene.***

177. The Worker categorically rejected both these assertions.<sup>144</sup> The Worker also submits that in fact the Worker did document his difficulties in toileting as he documented this detail and it is recorded in the report<sup>49</sup> and evidence<sup>50</sup> of Ms Ilao.

178. The Worker argues that logically, that the Employer's argument is flawed. Mr Bradford argues that both allegations can be met in one submission that had he been seeking to exacerbate his claim or mislead medical professionals for the purpose of obtaining a more favorable report, he would no doubt have disclosed his difficulties toileting to the doctors. He gave evidence to that effect in the following exchange with the Employer's Counsel:<sup>145</sup>

*The reason you didn't tell Dr Nyunt and Dr Razer about the toileting issue and the problem with your washing, was that it is something that is only - it is what is called a recent invention. It is something you've only invented at some time post seeing - - - ?--- No. It's because it's personal and if I was trying not to exacerbate the claim I definitely would have told the IME that I have trouble wiping my backside and embarrass myself even farther.*

#### **Discussion of the Worker's Evidence:**

179. The Court had an opportunity to observe the Worker giving evidence and it is entitled to consider not only the words that he used but also the manner in which they were spoken.

---

<sup>141</sup> Transcript p.118.

<sup>142</sup> Transcript p.124.

<sup>143</sup> CB 59 Expert Report of Dr Nyunt dated 25 June 2020; Date of examination 26 May 2020.

<sup>144</sup> Transcript p.118-120.

<sup>145</sup> Transcript p.128.

180. Contrary to the Worker's submissions, I do not accept that the Worker presented not only as an entirely honest witness but also a reliable one. I do not agree or accept that he gave evidence which was entirely consistent with his previous accounts to the various medical and health professionals he has seen since the injury. Though he made concessions during his evidence he did not volunteer to either expert his previous history of injury or pain to his neck, back and right shoulder.
181. I don't accept that he did not seek to embellish his evidence regarding his symptoms and pain, specifically regarding the level of pain he experienced when examined by Dr Reza the first time on 14 June 2019 and then after the cancellation of his benefits.
182. Dr Reza specifically commented in his first report dated 25 June 2019 on the difference between his formal and informal observations of the Worker's range of movement of his right shoulder when dressing unaware. I find that I accept Dr Reza's evidence when he opined the Worker had exaggerated limited range of movement of his right shoulder during the formal examination. Dr Reza also concluded that the Worker had exaggeration of pain symptoms during the formal examination due to a number of factors including negative psycho social factors.
183. My impression is that during his evidence the Worker's descriptions of the pain he experienced and his incapacity after 16 August 2019 was disproportionate to the physical pathology diagnosed in the MRI of 30 April 2019. The Worker's evidence was inconsistent with his evidence that he regularly worked in excess of a 38 hour week at Orbost Foodworks. The Worker's evidence was also inconsistent with the evidence and history provided to both Expert Medical Doctor's about how the injuries affected his ability to toilet, wash himself and attend to his personal hygiene, cook and do housework for himself and drive a car. He contradicted much of the history he had previously provided the Experts when testifying in Court.
184. I find that the Worker's evidence is also inconsistent with what is documented in Dr Reza's report regarding the Worker's self-reported symptoms at the time of the first examination in June 2019. He denied telling Dr Reza many things recorded at p.33 of the Expert's first report yet the symptoms recorded are similar to his own evidence of symptomology immediately after the incident and similar to complaints recorded in medical records from Cavanagh Medical Center from 2018.
185. It is not possible to reconcile when the Worker was experiencing the symptoms documented by him and by Dr Reza in his report and if they were ongoing or had resolved, as he denied in cross examination that he reported them to Dr Reza at all in the first examination in June 2019.
186. I also find his evidence very difficult to reconcile regarding the significant omissions of any reference to his prior injuries to his neck, back and right shoulder to Dr Nyunt and the Worker's explanations about why he did not document or self-report any history of prior injury or pain or treatment. I do not accept his attempt to clarify his answers.
187. I find that the questions about prior history of injury and pain to his right shoulder, neck and back were asked by Dr Nyunt and denied by the Worker and significantly that the Worker did appreciate the significance of the questions. I also find that the questions about prior treatment were asked and denied. Regardless of the Worker's motivation, the absence of the medical history given to the expert is of consequence to the weight to be given to the evidence of Dr Nyunt.

188. I find similar difficulties arise regarding the toileting issue and the Worker's explanation for why he did not include it as a consequence he was experiencing following the incident at work when he was examined by Dr Reza. He also told Dr Nyunt that he had no difficulties with his personal hygiene during that examination on 26 May 2020.
189. Whilst the Worker has given many accounts of the way in which he sustained his injury and the symptoms he suffered, I do not accept the Workers' submission that the accounts in the medical notes and physiotherapy notes subsequent to the incident in 2018, are consistent and accord with his evidence as to the symptoms and pain he suffered immediately following the incident. Nor do I find his account is consistently documented in the medical notes and reports as to how he says he continues to suffer from it. His accounts have not been entirely consistent especially when it comes to his right shoulder pain and impingement. I have discussed this below.
190. I do accept the Employer's submission, that the Worker's demeanor in the box changed from being upset and co-operative, to being less cooperative and defensive at certain times in cross examination and find much of his evidence was difficult to follow.
191. The Worker denied documented and reported history attributed to him by both experts in their reports on multiple occasions. This leads me to conclude his memory is either unreliable or he was evasive and unhelpful in evidence. While I have taken into account that some of his presentation might be explained by the nature of the proceedings and the subject matter, regardless, I prefer the evidence of both experts as to the history taken by them at the time of their examinations when they document what Mr Bradford told them or omitted to tell them, about his medical history and treatment.
192. Ultimately I find the Worker's answers for the reasons he advanced for the failure to inform Dr. Nyunt about his pre-existing conditions were evasive and less than satisfactory.<sup>146</sup> I find his answers were:
- a) inconsistent with his earlier evidence, in cross, as to his understanding of the necessity to be fulsome in disclosure with the Doctor;<sup>147</sup>
  - b) self-serving; and
  - c) inconsistent with the Expert's evidence that the questions were expressly put and directly answered.<sup>148</sup>
193. I also find there are numerous examples of the Worker being more concerned with where questions were leading than with answering them.<sup>149</sup>
194. As such I am not satisfied on consideration of the Worker's evidence and the whole of the medical evidence, including the Expert medical evidence discussed below, that the Worker's accounts are consistent as to the symptoms and level of pain he was experiencing and as such I don't find that the Worker's evidence can be accepted.
195. It does not follow from his evidence alone that the injuries he sustained on 11 April 2018 are still affecting him and preventing him from being able to work in a way he was able to prior to 11 April 2018. As such it is crucial to determine if the medical evidence supports the Employer's asserted changed in circumstance.

---

<sup>146</sup> Transcript at pp.113-120.

<sup>147</sup> Ibid at p.90.

<sup>148</sup> Ibid at p.134.

<sup>149</sup> Transcript at pp.79, 89, 92 and 118.



**Q) The Worker pleaded he suffered the injuries in paragraph 5 of the SOC, “multiple physical injuries, specifically to the spine and right shoulder”. Has the worker established that the shoulder injury arose out of or in the course of employment;**

**No – see discussion below**

**Shoulder Injury:**

196. The Worker submits that as of 11 April 2018 the evidence is any previous injuries to his neck, back and shoulders had resolved and had no effect on him. Further his underlying degenerative condition was asymptomatic. He was physically unlimited in the performance of his duties.
197. On the question of whether the court should accept the Worker’s account on the balance of probabilities I have considered the Worker’s evidence in conjunction with the contemporaneous medical documents and records, the expert medical evidence and opinions.
198. The Worker’s evidence is of sudden and immediate onset of pain on 11 April 2018 as a direct result of the workplace incident. The Worker says that his account of injury and pain is supported by his evidence and the medical records and expert evidence. As such the Court should accept his evidence as credible and reliable that prior to the workplace incident he had no pre-existing conditions that caused him any incapacity or were symptomatic. Further he submits his evidence demonstrates a history of injury consistent with his pleadings.
199. However, on close analysis of the medical records and evidence, I do not agree with the Worker’s submissions that his account is supported by the contemporaneous medical documents and records. The chronological analysis of the records do not demonstrate that the Worker’s evidence as to detail of the injury as a result of the workplace incident and the level of the pain he experienced remained unchanged over time.
200. In particular the contemporaneous medical documents and records relating to any reference to a shoulder injury or pain are telling in this regard.
201. The work related injury occurred on 11 April 2018. Within two days of the date of injury, the Worker submitted a claim form to the Employer (the Claim), in respect of the same.<sup>150</sup>
202. The Employer asserts that the accepted Claim by the Employer on 17 April 2018 was for injuries as set out in the Workers Compensation Claim Form. Relevantly the Claim describes the injury as:<sup>151</sup> “*Cervical musculoskeletal sprain and lumbar facet joint sprain.*”
203. This is not in accordance with the injuries pleaded in the Workers SOC at paragraph 5 as ‘*multiple physical injuries, specifically to the spine and right shoulder...*’ In its Defence, the Employer denies it accepted the right shoulder injury and asserts that it accepted the injury notified in the Claim<sup>152</sup>.
204. The Worker goes on, however to argue that the Claim was made in respect of incapacity as a consequence of the injury and that liability was accepted for the Claim. The Worker then admits, in his *Reply and Defence to Counterclaim* (Reply) the Employers pleading in this regard (Employers Defence at para [6]).

---

<sup>150</sup> A copy of the claim appears at CB pp229-235

<sup>151</sup> CB at p.230

<sup>152</sup> See the Employer’s Defence at [6]

205. In short, there is a Claim for a neck and back sprain, but no mention of any right shoulder injury at this time. The Employer asserts in the Defence pleadings that there was no acceptance for shoulder injury. The Employer pleads the neck and back sprain is the accepted Injury and that the Worker admits this in the Reply pleadings.
206. The Employer relies on the medical evidence to submit the evidence does not support any assertion by the Worker that a shoulder injury was caused by the workplace incident or accepted by the Employer.
207. Relevantly and when the Worker attended upon Dr Eamus on 7 June 2018 in Darwin (the first medical evidence before the Court following the date of injury), the notes of that attendance record:<sup>153</sup> “*very long consultation - essentially had a workplace injury - neck and back pain without significant neurological symptoms and normal CT scan*”. There is no mention in the subject notes of any right shoulder injury.
208. The first reference to any shoulder problems in the evidence before the Court post 11 April 2018, is found with respect to an attendance on Dr Eamus on 28 June 2018.<sup>154</sup> Relevantly the notes for that attendance disclosed a reference to the shoulder, “*shoulder improved, neck and headaches continue*”<sup>155</sup>
209. Given the Worker’s history of injuries to both the left and right shoulder<sup>156</sup>, and not having had the benefit of hearing from Dr Eamus, I cannot conclude the reference on 28 June 2018 to a “shoulder” was to the “right shoulder” or that, even assuming it was, the improvement was with respect to any condition referable to the work related injury as opposed to against an underlying pre-existing condition to the right shoulder.
210. There is no further reference in the evidence before the Court to any shoulder injury or pain, until an attendance upon Dr Eamus on 17 September 2018.<sup>157</sup> Relevantly the notes of that attendance disclose: ‘*didn’t attend work on Friday due to a sore shoulder .... has been on 3hrs a day.... **now** has right shoulder pain and trapezius spasm*’ (emphasis added)
211. The earliest evidence before the Court that the Employer might have been aware of any alleged right shoulder injury, appears in the physiotherapist’s records for the period 11 October to 7 December 2018.<sup>158</sup> However those records again do not specifically record a right shoulder injury but instead reference R) *neck/UFT and shoulder pain*.<sup>159</sup> The physiotherapist was also not called to clarify the notes therefore I cannot conclude on the notes alone whether the reference is to an injury purportedly suffered during the workplace incident by the Worker.
212. In the Claim, the term “*cervical*” according to the dictionary meaning does not encompass the shoulders and is reserved to the cervical spine/cervix. In this regard:
- a) the Oxford Dictionary<sup>160</sup> relevantly defines the terms as:  
 “1. Of or relating to the neck (cervical vertebrae) 2. Of or relating to the cervix...”  
 and

---

<sup>153</sup> CB at 217

<sup>154</sup> Ibid at 214

<sup>155</sup> Ibid

<sup>156</sup> As to the left shoulder see CB at pp 180,181,182

<sup>157</sup> Ibid at p.209

<sup>158</sup> Ibid pp.220-225

<sup>159</sup> Ibid

<sup>160</sup> Australian Concise Oxford Dictionary (5<sup>th</sup> ed.). Oxford University Press, Sydney 2009.

b) Black's Medical Dictionary<sup>161</sup> simply defines cervical as: "means anything pertaining to the neck, or to the neck of the womb."

213. While the Worker admitted to reading the Claim before it was lodged, he gave evidence under cross examination that it was completed on his behalf.<sup>162</sup> The Worker was not able to say by whom and the author of the claim form was not called to give evidence.

214. The Worker elided to put any medical evidence before the Court as to his attendances on medical professionals in the days and weeks immediately following the injury.<sup>163</sup>

215. The Claim shows that the Worker attended at Malabam Health Services at Maningrida, between the time of the work injury and the lodgement of the Claim,<sup>164</sup> however no evidence has been advanced as to what diagnosis was proffered at the time of that attendance.

216. On the evidence before me I can only infer that the diagnosis proffered at that time was that articulated in part 5 of the Claim itself, reproduced above with no reference to a right shoulder injury or pain.

217. The Worker attended on Dr Samuel Inwang on Tuesday April 16 2019 about 1 year after the Workplace incident. The notes state '*Suffered workplace injury to neck and back 1 yr in NT. Persistent neck pain radiating to occipital region and lower back pain/strain... Diagnostic imaging requested: MRI - Spine - Cervical; MRI - Spine - Lumbar MRI Rt Shoulder...*'. Whilst an MRI of the right shoulder was requested there is no notation of the Worker complaining of any pain to the right shoulder or impingement during that consultation.

218. On Wednesday July 3 2019 the Worker attended on Dr Richard Bills for a medical examination. The notes are '*needs WC cer [NT] plus worried about being off the 'heart medication for a period of time and what impact this had on heard and worries cos he (now - sic) has episodes where he suddenly feels really tired and stressed has all these debtors on his back*'.

219. On Thursday 1 August 2019 he attended on Dr Clement Le Liever and requested a Workers comp cert for '*neck and low back pain, getting daily pain, more if he does more, has apparently seen physio with a view to rehab plan*'. Again whilst the Worker is noted to have been complaining of neck and low back pain there is no reference to any shoulder pain or impingement during this consultation.

220. Moreover, the Worker elided to lead any medical evidence clarifying medical notes concerning any right shoulder injury arising out of the workplace incident on 11 April 2011. The only medical evidence led by the Worker about the right shoulder injury is that of the expert Dr Nyunt of 26 June 2020.

221. In Dr Nyunt's Expert report he refers to a medical report by Dr Gher dated 4 September 2018. Dr Nyunt notes that Dr Gehr said the Worker did not exhibit any signs of non-organic pain syndrome. He also surmised that Dr Gehr mentioned the Worker's signs and

---

<sup>161</sup> Black's Medical Dictionary (33<sup>rd</sup> ed.). William A.R. Thomson, A. and C. Black Publishers Ltd London 1981.

<sup>162</sup> Transcript at p.60.

<sup>163</sup> The first evidence before the Court in this regard is to be found in the records of the Cavanagh Medical Centre and relates to an attendance on Dr. Maya Eamus on 6 June 2018 – see CB. P.217.

<sup>164</sup> See CB at p.230.

symptoms were consistent with the history of injury and he diagnosed soft tissue injury to the cervical spine and lumbar spine and impingement of the right shoulder.

222. The reference to Dr Gehr's report by the Expert witness Dr Nyunt does mention impingement of the right shoulder, however Dr Gehr's report was not tendered in evidence nor was he called as a witness. I do not place any weight on the reference by Dr Nyunt to Dr Gehr's purported diagnosis or make any findings as to the reference to the right shoulder injury being caused by the history given by the Worker as I have no evidence of what that history actually was.

223. As such, I find that absent the Worker's evidence, there is no independent evidence, medical or otherwise, immediately following the workplace incident which supports his contention that he suffered an injury to his right shoulder and resultant pain. There is no clarification in his evidence that the medical notes which reference shoulder pain are as a result of the workplace incident. The first reference to any shoulder pain in the medical notes are the visit to Dr Eamus on 6 June 2018, 2 months after the incident and that cannot be attributed to the workplace incident or to the Right Shoulder on the evidence before the court.

224. I find that I unable to draw inferences that the medical evidence corroborates the Worker's account in his evidence that his presentation following the workplace incident was consistent with immediate onset of right shoulder pain and impingement. I find that his medical records from Darwin show a lack of complaint of *right shoulder pain* and impingement immediately after the incident and no reference is made until 17 September 2018 some 5 months after the incident.

225. Further, leading up to the cancellation of weekly benefits by the Employer on 16 August 2019, despite multiple medical examinations and visits for treatment in Victoria where he complained of neck and back pain on presentation to his medical practitioners, I find that his medical records show a lack of complaint of shoulder pain and/or impingement though he complains of neck and back pain.

226. There is evidence in the medical and health notes that following the Notice of Decision on 16 August 2019 he attended on a physiotherapist and by letter dated 23 August 2023 there is reference to shoulder and neck conditions, however the shoulder condition is not attributed to the right shoulder or the workplace incident.<sup>165</sup>

227. There is evidence that following the examination by Dr Nyunt on 26 May 2020, the Worker reported experiencing '*ongoing right sided neck and shoulder pain, has limited movement around his right shoulder, writer notes MRI findings bursitis...*' with Dr Elvis Igbinovia on Friday September 18 2020.

228. This physiotherapist and this Doctor were not called to give evidence in the proceedings.

#### **Expert Evidence/Causation Shoulder Injury:**

229. The Employer denies accepting the shoulder injury occurred out of or in the course of employment.'

230. As to causation in *Jason Bannister Green v Porosus Pty Ltd [2013] NTMC 005* Dr Lowndes CM at [28] applied and followed the High Authority of *Medling v State Government Insurance Commission* (1995) 182 CLR 1, which made it clear that the legal

---

<sup>165</sup> CB p.52 Letter from Mitchell Schwenke dated 23 August 2023

test of causation does not merely involve the application of the “but for” test, but is a question of fact to be resolved on the balance of probabilities as a matter of commonsense and experience.

231. Generally as to the experts opinions as to the shoulder injury, when the only history provided by the Worker to Dr Nyunt was of acute incident, the opinion tended to support the more likely cause as being attributable to the Workplace incident as opposed to degenerative change or a gradual onset or an exacerbation of a pre-existing condition.
232. The difference of opinion between Dr Gehr and Dr Nyunt was explicable by the MRI results being with Dr Nyunt. This provided incontrovertible evidence of degenerative change and led him to concur with Dr Reza that the cause of injury to the neck and back was more likely to be an exaggeration of a pre-existing condition. However in the absence of any history of injury to the back and neck and shoulder I found that the Expert was not able to contemplate the possibility that any injury to the shoulder was caused by exacerbation of a pre-existing injury or a as a result of a gradual onset due to degenerative change.
233. This is in stark contrast to Dr Reza’s opinion proffered in the context of a more accurate and complete history of prior injury and treatment and a keen and astute physical examination of the patient which identified pre-existing right shoulder injuries and other injuries corroborated by medical records.
234. Dr Reza recognized 2 possible causes of the injury: an exacerbation of a pre-existing condition to the back, neck and shoulder, however he also opined another possibility for the shoulder bursitis as being degenerative and gradual as opposed to acute. It was only upon the ascertainment and acceptance of a more accurate history of the Worker’s prior injuries that Dr Reza opined other possibilities for causes of the injuries (as opposed to Dr Nyunt and Dr Gehr).
235. However Dr Nyunt did not appear to take the existence of any prior injury into account in giving his opinion for the shoulder and back injury. This was despite having Dr Reza’s report which documented confirmation by the Worker of what could only be described as significant prior injury to the right shoulder. Dr Nyunt proceeded to diagnose in the face of a denial of prior injury to same by the Worker, despite claiming to have appraised himself of Dr Reza’s report.
236. I can only conclude that the factual premise on which the opinion of Dr Nyunt was based was the history provided by the Worker and not any reference to history obtained by Dr Reza. It is now known that the history provided was flawed and is not supported by the contemporaneous medical records, nor the Worker’s own evidence which was less than reliable and credible in regards to the history given.
237. Accordingly the substratum of facts on which the opinion of Dr Nyunt was based was undermined. No other objective evidence was identified in support of his opinion as to causation of the shoulder bursitis other than his physical tests. As the basis on which the opinion rested was unreliable and discredited the opinion could be given very little if any weight.
238. As discussed, given that I am of the opinion that Dr Nyunt’s opinion as to causation of the shoulder injury is fundamentally flawed and should not be relied on, I prefer the opinion of Dr Reza regarding any injury to the Worker’s right shoulder and conclude that if there was such an injury it was a *temporary exacerbation* that had resolved at the time of the Notice and was not actuating any incapacity for work.

### **Conclusion – Shoulder Injury:**

239. The worker bears the burden of proving the requisite connection between his complaints of shoulder pain and the workplace incident. That onus has not been discharged.
240. First, there is no medical evidence or sufficiently cogent medical evidence to establish to the satisfaction of the Court a causal nexus between the shoulder pain and the workplace incident. The present case is an instance where the absence of supportive medical evidence and expert evidence so weakens the worker's case that a finding in his favour would be against the weight of the evidence.
241. Secondly, as submitted by the Employer, the Court has only the worker's assertion that the occurrence of shoulder pain and impingement is due to the workplace incident as the medical evidence immediately subsequent does not sufficiently support any complaint of such injury and the treating Doctor's were not called to clarify the medical notes and records.
242. Thirdly, the absence of reporting of complaints of shoulder pain to his doctors during a significant part of the post workplace incident period does not assist the worker in discharging the requisite burden.
243. Fourthly, the reported (and substantiated) complaints of neck and back pain without any reference to shoulder pain do not assist the Worker. I further note that those references in the medical notes, other than to Dr Reza and Dr Nuynt do not go beyond proving the occurrence of such pain to his neck and back and shoulder.
244. Fifthly, the reasoning process of intuitive inference does not assist the worker in establishing the requisite causal nexus. The mere fact that the worker did not have shoulder, neck and back pain immediately before the workplace incident but had it afterwards, does not give rise to an intuitive or presumptive inference that the workplace incident caused the shoulder, neck and back pain. The medical evidence must establish a causal nexus to the Court's satisfaction.
245. For all of those reasons the Court cannot be reasonably satisfied on the balance of probabilities that the shoulder pain complained of by the worker is attributable to workplace incident.
246. For the same reasons set out above the Court also cannot, in the absence of reliable and accepted expert medical evidence find that the ongoing symptomology documented by the Worker is attributable to the workplace incident.

### **Reconciliation of the Expert Evidence:**

**Q) Has the Employer established a change in circumstances, namely, that the worker had fully recovered from any the compensable work related injury; or was no longer incapacitated as a result of any compensable work related injury, as of the Notice of Decision on 16 August 2019?**

**YES – see discussion below**

247. I find that I cannot conclude, on the evidence presented at the hearing that any incapacity the Worker may have as a result of any right shoulder injury arises out of the workplace incident.

248. This is because I cannot place a great deal of weight if any, on the evidence of Dr Nuynt in his report of 26 May 2020 and his evidence in court, that the right shoulder bursitis diagnosed on the MRI Scan of 30 April 2019 and that the worker's presentation and pain symptoms in relation to the shoulder impingement was directly attributable to the workplace incident. Dr Nuynt's report was given more than 2 years after the workplace incident on 11 April 2018 and then affirmed in Court.
249. My conclusion about the weight to be given to his report and evidence is due to a combination of factors which mitigate against me relying on and accepting his opinion that the right shoulder injury was attributable solely to the workplace incident, namely:
- i) the Worker's evidence about his history of prior injury to his right shoulder;
  - ii) the worker's delayed history of complaint of any right shoulder pain to his Darwin Doctor and/or physiotherapist;
  - iii) the Worker's absence of complaint of right shoulder pain or injury to his medical Doctor's in Victoria;
  - iv) Dr Nyunt's misconceived view and the absence of evidence before him from the worker or any other source (such as in the form of the Worker's medical records/history and notes) of multiple prior injuries to and/or pain to the Worker's right shoulder;
  - v) Dr Nyunt's misconceived view that the Worker had no treatment after the workplace incident and failure to furnish with medical records of same.
250. As such I am of the view that Dr Nyunt's opinion about the cause of the right shoulder injury and incapacity as a result, (bursitis/impingement) is unreliable as he was not given the opportunity to be fully informed of the Worker's medical history before proffering his opinion. As already noted, he examined the worker some 2 years after the incident and not proximate to the incident.
251. The Expert Doctor was entitled to assume that he was being given an accurate history from his patient, however, that was not the case. I find that given the nature and extent of the number of prior assaults to the Worker's right shoulder over time, I am not persuaded that I should proceed to rely on or prefer Dr Nyunt's opinion.
252. Further I am not persuaded that I should dismiss the Expert Opinion of Dr Reza who examined the Worker one year and 2 months after the workplace incident, observed formal and informal movement of the Worker and who was significantly better informed about the Worker's medical history and the prosocial reinforces impacting on him at the time of his examination.
253. Significantly Dr Reza's keen clinical observations of the Worker's physical person and his movements detected accurately other existing past injuries and conditions impacting on the Worker's agility and movement (ie. uneven gait due to past injury to achilles in RHS and marked and noticeable difference in AC joints of shoulders and position of right shoulder). Dr Reza's observations were born out on the evidence as being attributable to past injuries.
254. Dr Reza took the time to take as detailed a history from the Worker as possible in the circumstances based on his observations and his testing was both formal and informal revealing inconsistent results which informed his conclusions and opinions.

255. Both Doctor Reza and Dr Nyunt referred to the medical report of one Dr Gehr of 4 September 2018 who apparently diagnosed soft tissue injury to the cervical and lumbar spine and impingement of the right shoulder. This Doctor apparently saw the Worker at an early time, some 5 months after the workplace incident. Dr Gehr apparently stated he saw no evidence of non-organic pain symptoms and attributed the symptoms and signs he observed to the workplace incident.
256. As identified by Dr Nyunt in his evidence, he agreed with Dr Gehr's opinion that the Worker did not exhibit any non-organic pain symptoms. He also highlighted that Dr Gehr's opinion about whether the Worker exhibited any non-organic pain symptoms differed markedly from Dr Reza's observations and opinions.
257. Dr Nyunt reasoned that the marked difference in opinion of the 2 Doctors could be explained due to the passage of time and proximity of examination to the workplace incident. Dr Gehr saw the worker 5 months after the incident while Dr Reza saw the Worker some time later 1 year and 2 months after the incident. Dr Nyunt also stated it was a significant matter that Dr Gehr did not have the benefit of having an MRI of the Worker on which to base his opinion and diagnosis while Dr Reza did.
258. Whilst Dr Nyunt may have had access to the MRI report when preparing his report, I note that the MRI report does not appear to be a document or report he has recorded in as being available to him. It may be that Dr Nyunt was relying on the MRI information referred to in the report of Dr Reza who clearly documented that he did have an MRI on which to base his opinion. That MRI report was from 30 April 2019 (report date 1 May 2019), a little over 1 year after the workplace incident.
259. I find I can give little if any weight to the opinion of Dr Gehr as his report was not tendered or put before me on the hearing nor was Dr Gehr called to give evidence. Significantly, it is apparent that Dr Gehr's opinion was also lacking in a similar manner to that of Dr Nyunt's, who had no history of prior injury, in that he was not furnished with an MRI on which to diagnose the Worker before proffering his opinion about the injuries or pain suffered by the Worker.
260. Whilst Dr Nyunt comments that having the MRI Report put Dr Reza at a distinct advantage to Dr Gehr and he also properly considers that when Dr Reza saw the Worker it was some 9 months after Dr Gehr and cites that Dr Reza mentioned in length the presence of inorganic pain symptoms and that there was a substantial inconsistency between the history and clinical presentation and clinical findings, Dr Nyunt disagreed with Dr Reza and stated he agreed with Dr Gehr. Dr Nyunt stated that during his video consultation he observes no evidence of inorganic pain symptoms.
261. Regardless of the reasoning of Dr Nyunt as to the marked differences of opinion of the 2 Doctors which I find is a logical basis from which the 2 Experts may have arrived at different opinions, Dr Nyunt concurred with Dr Gehr that during his examination he did not observe any signs or symptoms of non-organic pain symptoms. I find however unlike Dr Reza, Dr Nyunt did not document why in his opinion he discounted the detailed reasons given by Dr Reza for finding the existence of non-organic pain symptoms or how that compared or differed to his own observations that all of the signs and symptoms observed in the Worker by him were attributable to pathology.
262. Regardless, I find that due to the absence of an accurate history from the Worker or reference to the Worker's medical notes which clearly document multiple prior assaults and injuries to the Workers right shoulder, the factual foundation of Dr Nyunt's opinion



was flawed and he proceeded to diagnose the Worker's injury as seen on the MRI, the bursitis, as attributable to the Workplace incident. I find it was not possible, without the accurate medical history of the Worker about the history of right shoulder injuries for him to even consider the possibility that the injuries observed on the MRI were exacerbations or aggravations of pre-existing conditions or alternatively not attributable to the workplace incident at all but were the result of a pre-existing condition, degeneration.

263. Whilst I accept that it is not disputed in this case that the Worker did suffer injury at work whilst moving the gun safe, it is disputed that the shoulder injury was caused during the workplace incident.

264. At the highest the Employer submits the Court can only find that the shoulder injury complained of by the Worker was a temporary *exacerbation* of a pre-existing condition. Dr Nyunt agreed with Dr Reza that the Worker did suffer from pre-existing conditions as evidenced by the MRI:

1. Degenerative disc disease C4/5 and C5/6
2. Degenerative disc disease Broad disc bulge L5/S1
3. Mild Tendonopathy of right shoulder

265. Whilst I find it is possible that the Worker *may* have suffered a temporary exacerbation of a pre-existing injury to his right shoulder and that the bursitis diagnosed on the MRI scans *may* have been attributable to the workplace incident I am not satisfied on the BOP that it has been proven or established on the evidence that the shoulder injury is attributable to the workplace incident.

266. This is because I find that as I can give little if any weight to the evidence of Dr Nyunt for the same reasons set out above, as his Expert medical opinion is ultimately flawed, not just regarding any shoulder injury but in regard to his ultimate medical opinion.

267. The Worker failed to disclose any history of prior injury or pain to his neck and back as well, despite multiple prior injuries and symptoms of neck and back pain recorded in the medical notes.

268. Once I make that finding I must consider if I accept the Expert evidence of Dr Reza that any incapacity that the Worker has is no longer attributable to the workplace injury.

269. I am persuaded by Dr Reza's evidence for the reasons given above, that his opinion and conclusions show that due to the thorough and informed examination of the Worker at the time of his examination on 14 June 2019 he was no longer incapacitated as a result of the workplace injuries and was fit to return to pre-injury duties. Further, I am satisfied that Dr Reza's evidence proves that any ongoing incapacity of the Worker was not attributable to the workplace incident or did not arise in the course of employment.

270. Likewise in relation to the cervical spine and lumbar spine, I find that both Doctors are consistent in the diagnosis of degenerative disc disease. I find that the Worker did suffer a workplace injury on 11 April 2018. The Worker's Expert Dr Nyunt asserts that this resulted in an *aggravation* of a pre-existing condition. However the Employer asserts it was an *exacerbation* of a pre-existing condition and only temporary. The pathology is diagnosed is evidenced in an MRI of 30 April 2019

271. The diagnosis of a broad based disc bulge L5-S1 with minimal contact of the left S1 nerve root is the most significant diagnosis for the Worker in relation to his neck and spine. The

Doctors disagree whether any workplace injury to the pre-existing conditions was temporary or permanent however both Doctors state that the MRI shows that the disc bulge is due to a pre-existing condition and evidence of degenerative disc disease.

272. Again Dr Nuynt relied on the Worker's history in his report and evidence that he had no pre-existing injuries to his cervical and lumbar spine and received no treatment and still complained of pain in the neck and lower back pain and pain stiffness of right shoulder (para 51). He also concluded that he observed no evidence of non-organic pain symptoms.
273. I respectfully do not accept the Expert Doctor's opinion that the injury was an *aggravation* as opposed to an *exacerbation* of the pre-existing injury. I find that the history and material relied on by the Dr was significantly flawed for the same reasons already given in relation to the shoulder diagnosis.
274. The Worker had a history of complaints of lower back pain consistent with the underlying pathology diagnosed in the MRI of 30 April 2019.
275. Further, in the absence of Dr Nyunt's opinion, which I put to one side regarding the cause and the severity of any injury and the Worker's incapacity as a result, I am persuaded by Dr Reza that the Worker did present with a number of psychosocial factors that could have impacted on his pain perception and symptomology.
276. I find that the cursory history provided by the Worker to Dr Nyunt is in marked contrast to the matters explored by Dr Reza documented in his report. I do accept his opinion about the Worker's heightened pain perception given the impressions he formed of the Worker against the background information he ascertained to the best of his ability during his consultation on 14 June 2019. I find that much of his factual findings were supported and confirmed by the Worker in Court during the Worker's evidence. I find that Dr Reza did not take irrelevant or wrong considerations into account when finding that there were negative psychosocial factors that he believed impacted on the Worker's heightened pain perception.
277. The pre-existence of injury is an important factor to consider when determining if the Worker was still laboring under incapacity due to injury as a result of the workplace incident. Whilst I find that the Worker may indeed have presented with some pain and discomfort as a result of his pre-existing conditions, I am persuaded by the detailed explanation in Dr Reza's report and his evidence that his close observation and physical examination of the Worker led him to conclude that the Worker's non-specific pain symptoms and his exaggerated sensitivity to the physical examination was evidence of a heightened pain perception in the context of a number of demonstrably negative psychosocial factors against a history of depression, poor education and skill background, poor social infrastructure and support, relocation to multiple places, anxiety and depression, loss of job etc...<sup>166</sup>
278. I find that the Employer has established on the Balance of Probabilities, on the evidence which I accept in this case that as of:

- i) the examination with Dr Reza on 14 June 2019; and
- ii) the date of the Doctor's Final Certificate, issued 15 July 2019;<sup>167</sup>

---

<sup>166</sup> CB at p.38 p.9 of Dr Reza's report of 27 June 2019

<sup>167</sup> CB at p.47.

- a) any exacerbation of the Worker's pre-existing conditions had resolved;
- b) the Worker was no longer incapacitated for work as a result of any work related injury;
- c) the Worker was certified as fit to a return to his pre-injury duties by his own treating GP on 23 September 2019;<sup>168</sup> and
- d) the Worker in fact subsequently worked at Food works Orbost for periods exceeding that associated with his pre-injury employment;<sup>169</sup> and
- e) the situation Dr. Reza opined and concluded diagnosed in Dr' Reza's June 27 2019 Report continued to subsist when he saw the Worker again in September 2020, in short there was no change in the Doctor's views as to the circumstances pertaining in the intervening period.<sup>170</sup>

279. As the Decision issued on 16 August 2019, the circumstances which prevailed at that time, were such that any work related injury had ceased to actuate any incapacity for work.

280. I find that the Employer has established on the evidence of Dr Reza that the Worker's ongoing incapacity has either wholly resolved or the Worker is no longer incapacitated for work as a result of the workplace injury for the same reasons. As such I find that the Employer has discharged their onus in establishing a change in circumstance and proving the validity of the Notice of 16 August 2019.

### **Partial Incapacity from September 2019 – Revisionary Onus on Worker**

281. The pertinent dates for the determination of this issue are:

- i) the date of the Decision being 29 August 2019;
- ii) Dr. Inwang's September 2019 certification; and/or
- iii) Dr. Reza's attendance on the Worker in September 2020.

282. As to the reversionary onus on the Worker to prove that the worker was partially incapacitated from September 2019, given the findings I have made about the problems with Dr. Nyunt's report, I find that there is simply no medical evidence before the Court which suggests that the position provided for in Dr. Reza's June Report changed. In fact he confirmed his opinion as to the Worker's incapacity or lack thereof as a consequence of the work related incident in his September report and again in October 2019.

283. As such the Court must conclude that from September 2019 after the Notice was served on the Worker the Expert evidence preferred by the Court of Dr Reza is that the work related injury did not actuate any incapacity from September onwards as any exacerbation of any pre-existing conditions due to the workplace incident which resulted in incapacity had resolved. Further any ongoing incapacity was no longer attributable to any workplace injury/disease.

---

<sup>168</sup> Ibid at p.175 and Exhibit E2.

<sup>169</sup> See CB at pp.256-266, particularly the payslips issued 11/12/19 (p.258); 18/12/19 (p.259); 08/01/20 (p.260); 15/01/20 (p.260) and 05/02/20 (p.261).

<sup>170</sup> See the 2 October 2020 Report at CB. pp.76-92.

284. Also in this regard and whilst:

- a) the CB includes two letters from Dr Inwang to a Mitchell Schwenke, both dated 23 August 2019, which suggest ongoing limitations in capacity;<sup>171</sup> and
- b) Exhibit P2, notwithstanding that it certifies the Worker fit for a return to his pre-injury duties, does include restrictions on lifting and the raising of the right arm beyond shoulder height, given Dr. Reza's evidence and the fact that Dr. Inwang was not called, the Court can only conclude that any such ongoing limitations were the result of the pre-existing conditions and not any exacerbation of the same.

285. In the absence of medical evidence which contradicts Dr Reza's evidence that any ongoing incapacity was no longer attributable to the workplace incident at the time of his examination, I am not satisfied that the Worker can prove the revisionary onus with respect to any incapacity due to workplace injury.

286. I agree with the Employer that the medical evidence of Dr Inwang does not prove or establish any ongoing incapacity is attributable to the workplace injury. Likewise whilst the Worker can give evidence about his symptoms and pain and the impact on him he cannot prove the underlying pathology or cause any injury.

#### **Conclusion:**

287. Both parties urged the court to determine the issues by reference to the Expert Medical Evidence and as was alluded to in the Employer's opening,<sup>172</sup> and the Worker's written submissions, the Worker's evidence. I am of the view that the Worker's evidence is relevant to a determination of the issues, as it informed what fell from the experts.

288. Dr Nyunt was a witness whose evidence is contained largely in his report. He was not the subject of extensive cross-examination.

289. Ultimately, the key conclusions Dr Nyunt reached are that the Worker's accepted injuries from 11 April 2018 were an aggravation of pre-existing degenerative disc disease in the cervical spine and lumbar spine. The Shoulder injury bursitis was caused by the workplace incident.

290. It is conceded by the Worker that Dr Nyunt reached his findings on the assumption that the Worker had no previous injury and no previous history of pain in the neck, lumbar spine and the shoulder.

291. I do not accept the Worker's submission that this does not however, affect the conclusion reached by Dr Nyunt because his conclusion was that the Worker's injuries were consistent with those of Dr Reza. I find that their expert evidence and opinions differ markedly not only as to whether the injuries were exacerbation or exaggerations but as to whether they were pre-existing conditions that had resolved or were ongoing.

292. In this regard I agree with the Employer's submissions that although the Worker can give evidence of how much pain he might experience on a day to day basis the Worker cannot give evidence as to the physiological genesis of that pain. That is a matter for the medical experts.

---

<sup>171</sup> CB at pp.51 and 52.

<sup>172</sup> Transcript at p.138.

293. The medical evidence before the Court being that, on and from at least the attendance referable to Dr. Reza's June 27 Report 2019 (being an attendance on 14 June 2019), the genesis of such pain, if any, was the pre-existing conditions affecting the back and shoulder and not any 11 April 2018 exacerbations of the same.

294. In the end there is Expert Evidence to support the Employer's case as to a change in circumstance and to prove the validity of the Notice. Likewise upon analysis there is nothing remaining in the expert medical opinions of either Expert which objectively supports the Worker's case given that I have not relied on Dr Nyunt's opinion or given it any real weight.

295. I have considered what weight to give the Expert opinion of Dr Reza at the date of the Notice of the Decision and find that I accept his evidence that the Workplace Injury to the Worker's back, neck and shoulder was at best a temporary exacerbation of pre-existing conditions (degeneration) and which had resolved and no longer resulted in the Worker's incapacity. As such I find the Employer has discharged its onus in proving a change in circumstance as set out in the Notice.

296. The Worker's Application must fail.

#### **THE EMPLOYER'S COUNTERCLAIM**

297. The Court only need turn to consider the Counterclaim if it finds against the Employer on the substantive claim in these proceedings.

298. As such as I have found in favour of the Employer that the Notice cancelling the Worker's payments was valid and further as I have found that the Revisionary Onus on the Worker to prove any partial incapacity has not been proven, I dismiss the Counterclaim.

#### **ORDERS**

299. The Worker's Application filed 24 October 2019 is dismissed.

300. The Counterclaim is dismissed.

#### **COSTS**

301. I will hear arguments as to Costs.