

**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION: *Mateo v Workers' Compensation Regulator*  
[2022] QIRC 150

PARTIES: **Mateo, Joselito**  
Appellant

v

**Workers' Compensation Regulator**  
Respondent

CASE NO: WC/2019/209

PROCEEDING: Appeal against a decision of the Workers'  
Compensation Regulator

DELIVERED ON: 4 May 2022

HEARING DATES: 23, 24, 25 and 26 August 2021

DATES OF WRITTEN  
SUBMISSIONS: Appellant's submissions, 21 September 2021  
Respondent's submissions, 6 October 2021

MEMBER: McLennan IC

HEARD AT: Brisbane

ORDERS:

- 1. The appeal is dismissed.**
- 2. The decision of the Workers' Compensation Regulator is confirmed.**
- 3. The Appellant is to pay the Respondent's costs of the Hearing, to be agreed or, failing agreement, to be subject to a further application to the Commission.**

CATCHWORDS: WORKERS' COMPENSATION – APPEAL  
AGAINST DECISION OF WORKERS'

COMPENSATION REGULATOR – PHYSICAL INJURY – where appellant was employed as a food service assistant – where appellant sustained a personal injury to his right shoulder – whether appellant suffered an aggravation of a personal injury – whether aggravation arose out of, or in the course of, the appellant's employment – whether appellant's employment was a significant contributing factor to the aggravation – appeal dismissed

LEGISLATION:

*Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32

*Workers' Compensation and Rehabilitation Regulation 2014* (Qld) s 132

CASES:

*Carman v Q-COMP* [2007] ICQ 43

*Church v Workers' Compensation Regulator* [2015] ICQ 031

*Cronin v Workers' Compensation Board of Queensland* (1997) 156 QGIG 100

*JBS Australia Pty Ltd v Q-COMP* [2013] ICQ 13

*Karipa v Q-COMP* [2013] QIRC 161

*Kavanagh v Commonwealth* (1960) 103 CLR 547

*Linke v Simon Blackwood (Workers' Compensation Regulator)* [2014] QIRC 181

*Morrison v Workers' Compensation Regulator* [2016] QIRC 065

*Nunan v Cockatoo Docks and Engineering Co Ltd* (1941) 41 SR (NSW) 119

*Omanski v Q-COMP* [2013] ICQ 7

*Pleming v Workers' Compensation Board of Queensland* (1996) 152 QGIG 1181

*Ribeiro v Workers' Compensation Regulator*  
[2019] QIRC 203

*Seltsam Pty Ltd v McGuinness* (2000) 49  
NSWLR 262

*State of Queensland (Queensland Health) v Q-  
COMP and Beverley Coyne* (2003) 172 QGIG  
1447

*Tuesley v Workers' Compensation Regulator*  
[2021] QIRC 071

*Workers' Compensation Regulator v  
Queensland Nurses and Midwives' Union of  
Employees (No 2)* [2021] ICQ 13

APPEARANCES:

Dr G J Cross of counsel, instructed by Patinos  
Lawyers for the Appellant.

Ms K M Riedel of counsel, directly instructed  
by the Respondent.

**Reasons for Decision**

- [1] Mr Joselito Mateo is a 55 year old married gentleman, with five adult children.<sup>1</sup>
- [2] Born in the Philippines, Mr Mateo settled in Australia in 2006.
- [3] Since then, Mr Mateo has undertaken a number of physically demanding jobs. He toiled in the bakery industry for almost five years, then worked in an abattoir for seven years, before finding employment in a hospital kitchen.
- [4] Mr Mateo started at the Mater Misericordiae Limited (the Mater; the hospital) as a food service assistant on 30 July 2018.
- [5] Less than three months later, Mr Mateo claimed a left shoulder injury whilst working in the hospital kitchen. That application for workers' compensation was accepted.
- [6] After his left shoulder injury, Mr Mateo returned to work in the kitchen under a restricted duties Return to Work (RTW) plan.
- [7] A subsequent injury to Mr Mateo's right shoulder was said to have occurred between 20 October 2018 and 11 March 2019 (the relevant period).
- [8] Mr Mateo claimed his shoulders became sore after finishing work on 11 March 2019.

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<sup>1</sup> Exhibit 1, 96, 147.

- [9] A factual dispute exists as to the actual work tasks performed by Mr Mateo in the relevant period.<sup>2</sup> Mr Mateo said his duties included loading meal trays into food trolleys, then pushing and pulling them into position, ready for dispatch to patients. That is denied by the Regulator.
- [10] Mr Mateo asserted that his right shoulder injury occurred both as a consequence of performing those particular work duties and because he was favouring his right side in order to do that work. That right shoulder injury has been characterised as an aggravation of the accepted left shoulder injury.
- [11] The four medical experts are divided as to whether or not Mr Mateo's employment was a significant contributing factor to his right shoulder condition.

### **Claim details**

#### *The accepted left shoulder injury*

- [12] An undated Online Claim Form was lodged by the Mater for a left shoulder injury, sustained by Mr Mateo from lifting pots on 19 October 2018.
- [13] WorkCover accepted that application for Mr Mateo's left rotator cuff injury (provisional diagnosis).
- [14] By Statutory Declaration sworn 17 June 2021, Mr Mateo stated that the left shoulder injury was sustained over the period 30 July 2018 to 19 October 2018.<sup>3</sup>

#### *The right shoulder injury, subject of this Decision*

- [15] WorkCover contacted Mr Mateo on 14 March 2019 upon receipt of a medical certificate and advice of an incident relating to his right shoulder. Mr Mateo explained that he was on restricted duties, working on the expeditor line, as well as pushing and pulling trolleys. He told WorkCover that on 11 March 2019 he worked a full eight hour day and both shoulders were sore after work.
- [16] In its 2 May 2019 decision, WorkCover rejected Mr Mateo's application on the basis that the factual and medical information available did not evidence a causal connection between Mr Mateo's left shoulder injury and the development of his right shoulder bursitis.
- [17] WorkCover concluded that Mr Mateo's claim relating to a secondary injury to his right shoulder was not accepted under s 32 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (the Act).
- [18] Mr Mateo applied to the Workers' Compensation Regulator (the Regulator) to review that decision on 19 July 2019.

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<sup>2</sup> 20 October 2018 to 11 March 2019.

<sup>3</sup> Exhibit 2.

[19] The Regulator confirmed WorkCover's determination in its review decision of 4 November 2019, contained in correspondence dated 20 November 2019.

[20] Mr Mateo subsequently filed this appeal against the Regulator's decision on 27 November 2019.

**What legal tests must be satisfied for Mr Mateo's appeal to succeed?**

[21] The definition of injury, including an aggravation, per the iteration of the Act at the relevant time, was:

**32 Meaning of injury**

- (1) An *injury* is personal injury arising out of, or in the course of, employment if—
- (a) for an injury other than a psychiatric or psychological disorder—the employment is a significant contributing factor to the injury;
- ...
- (3) *Injury* includes the following—
- ...
- (b) an aggravation of the following, if the aggravation arises out of, or in the course of, employment and the employment is a significant contributing factor to the aggravation—
- (i) a personal injury other than a psychiatric or psychological disorder;
- (ii) a disease;
- (iii) a medical condition other than a psychiatric or psychological disorder, if the condition becomes a personal injury or disease because of the aggravation;
- ...
- (4) For subsection (3)(b) and (ba), to remove any doubt, it is declared that an aggravation mentioned in the provision is an injury only to the extent of the effects of the aggravation.

[22] An injury arises out of employment where there is a causal connection between the employment and the injury.<sup>4</sup>

[23] The Act prescribes that an aggravation is an injury "...to the extent of the effects of the aggravation".<sup>5</sup>

[24] An appeal such as this is a hearing de novo.<sup>6</sup> Mr Mateo bears the onus to prove, on the balance of probabilities, that he sustained an injury within the meaning of the Act. As explained by Deputy President Merrell:

The balance of probabilities test requires a court to reach a level of actual persuasion and that process does not involve a mechanical application of probabilities.<sup>7</sup>

<sup>4</sup> *Kavanagh v Commonwealth* (1960) 103 CLR 547, 558 - 559.

<sup>5</sup> *Workers' Compensation and Rehabilitation Act 2003* (Qld), s 32(4)

<sup>6</sup> *Church v Workers' Compensation Regulator* [2015] ICQ 031, [27]; *State of Queensland (Queensland Health) v Q-COMP and Coyne* (2003) 172 QGIG 1447.

<sup>7</sup> *Ribeiro v Workers' Compensation Regulator* [2019] QIRC 203, [101], citing *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, [136].

### Questions to be determined

[25] There is no dispute between the parties that:

- Mr Mateo was a worker within the meaning of s 11 and sch 2 of the Act, during the relevant period; and
- Mr Mateo sustained a personal injury to his right shoulder.<sup>8</sup>

[26] This case turns on whether or not Mr Mateo is able to prove to the required standard that:

- his right shoulder injury arose out of, or in the course of, his employment at the Mater; and
- his employment was a significant contributing factor to his right shoulder injury.

[27] My consideration of those questions will be further informed by the following matters:

- Mr Mateo's right shoulder condition.
- Circumstances of Mr Mateo's right shoulder condition.
- Mr Mateo's left shoulder condition.
- Was the right shoulder condition an aggravation of the left shoulder condition - or an aggravation of an underlying degenerative condition?
- Chronology.
- Work tasks performed in the relevant period.
- Medical opinions about whether favouring his right side to perform the work duties, whilst recovering from his left shoulder injury, contributed to Mr Mateo's right shoulder injury.
- When did Mr Mateo report the right shoulder injury?
- When was Mr Mateo required to report it?
- What accounted for the delay in doing so?
- Mr Mateo's prior medical history.

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<sup>8</sup> Respondent's Closing Submissions, filed 6 October 2021, 1 [5]; Respondent's Statement of Facts and Contentions filed 11 August 2021, 31 [42].

## **Summary of Findings**

[28] In my view:

- Mr Mateo's right shoulder condition did arise in the course of his employment;
- there has been an aggravation of Mr Mateo's pre-existing right shoulder degenerative condition; and
- Mr Mateo's employment was not a significant contributing factor to his right shoulder condition.

[29] My reasons follow.

## **Evidence and submissions**

[30] Written closing submissions were directed in the order Appellant – Respondent – Appellant (in reply, on issues of law only).

[31] The Appellant's written closing submissions were filed on 21 September 2021.

[32] The Respondent's written closing submissions were filed on 6 October 2021.

[33] The Appellant did not file any written closing submissions in reply.

[34] The evidence of the witnesses and nine exhibits tendered at the Hearing, together with the written closing submissions, the Statements of Facts and Contentions, the Workers' Compensation Regulator notice of appeal and other materials filed in this matter were considered in this Decision. I have determined not to approach the writing of this Decision by summarising the entirety of the evidence provided and submissions made, but will instead refer to the parties' positions in my consideration of each question to be decided.

## **Witnesses**

[35] The witnesses for the Appellant's case were:

- Mr Joselito Mateo, the Appellant himself;
- Dr Mark Robinson, the Appellant's treating Orthopaedic Surgeon;<sup>9</sup> and
- Dr Bruce Low, Orthopaedic Surgeon.

[36] The witnesses for the Respondent's case were:

- Mr Brendan Host, formerly Team Leader of Room Service at the Mater;
- Mr Jimmy Ruiz, Food Service Supervisor at the Mater;

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<sup>9</sup> Hand and upper limb surgeon, specialising in shoulder surgery and microsurgery; T 2 - 28, lines 1 - 2.

- Ms Blazenka Solar, Food Service Supervisor at the Mater;
- Mr Vincent Hall, Food Service Supervisor at the Mater;
- Ms Tracey Ceh, formerly Rehabilitation Advisor at the Mater;
- Ms Alison Devereux, Senior Health and Safety Advisor at the Mater;
- Ms Rebecca Part, formerly Health and Safety Advisor at the Mater;
- Ms Leanne Loch, Occupational Health Physiotherapist and Ergonomist;
- Dr Desmond Soares, Orthopaedic Surgeon; and
- Dr Brett Halliday, Orthopaedic Surgeon.

Dr Peter Wang and Dr Dale Lee were also to be called by the Respondent. However, the parties' representatives confirmed that their documents were accepted, without the need to cross-examine them.

#### **Mr Mateo's right shoulder condition**

##### *Dr Mark Robinson*

- [37] Mr Mateo's treating Orthopaedic Surgeon, Dr Robinson, diagnosed Mr Mateo with "right rotator cuff tendinitis / subacromial bursitis"<sup>10</sup> in a report dated 21 June 2019.<sup>11</sup>
- [38] In his report of 26 September 2019, Dr Robinson also noted that Mr Mateo "...has an element of age and activity-related degeneration."

##### *Dr Bruce Low*

- [39] On 28 July 2020, the Appellant's lawyers requested Dr Low, Orthopaedic Surgeon, undertake an examination of Mr Mateo and prepare a report. Dr Low examined Mr Mateo on 6 August 2020.
- [40] The report dated 30 September 2020 recorded Dr Low's diagnosis as "Left and right shoulder subacromial bursitis and rotator cuff tears in the workplace."<sup>12</sup>

##### *Dr Brett Halliday*

- [41] On 20 August 2019, WorkCover requested Dr Halliday, Orthopaedic Surgeon, undertake an Independent Medical Examination of Mr Mateo.

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<sup>10</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 8 [13].

<sup>11</sup> WCR Notice of Appeal filed 27 November 2019, 4.

<sup>12</sup> Exhibit 1, 188.



[42] Dr Halliday's report dated 16 September 2019 recorded that Mr Mateo "has not returned to any work since March 2019 prior to his operation. During his period of time on light duties Mr Mateo has developed issues with his right shoulder."<sup>13</sup>

[43] In a supplementary report dated 9 October 2019, Dr Halliday opines that Mr Mateo's "symptoms in the right arm are constitutional."<sup>14</sup> Dr Halliday later observed those to be "consistent with his age".<sup>15</sup> He further stated that "The symptoms in the right shoulder relate to constitutional conditions and it is likely that there is a significant constitutional component to his left shoulder condition as well."<sup>16</sup>

*Dr Desmond Soares*

[44] On 5 April 2019, WorkCover requested Dr Soares, Orthopaedic Surgeon, undertake an Independent Medical Examination of Mr Mateo.

[45] The report dated 16 April 2019 recorded the diagnosis of "Right shoulder bursitis".<sup>17</sup>

[46] Dr Soares stated "I do believe that his symptoms are due to an exacerbation of underlying degenerative rotator cuff partial tears. These are not related to his employment. He has been employed at the Mater kitchen for only two months. In the absence of a specific traumatic incident the time period is not long enough for him to develop a degenerative injury in his role at the Mater."<sup>18</sup>

[47] Dr Soares concluded that Mr Mateo's right shoulder symptoms are due to "a degenerative underlying condition" which is a "degenerative rotator cuff tears rather than any work-related condition."<sup>19</sup>

*Dr Andrew Jeremijenko*

[48] Dr Jeremijenko issued a Workers' Compensation Work Capacity Certificate on 13 March 2019. That recorded the diagnosis of "Right rotator cuff tear, right bursitis".<sup>20</sup>

*Dr S Anderson*

[49] Dr Anderson issued a Workers' Compensation Work Capacity Certificate on 29 March 2019. That recorded the diagnosis of "Right rotator cuff tear, right shoulder bursitis".<sup>21</sup>

*MRI report dated 6 June 2019*

[50] The MRI report ordered by Dr Robinson concluded a diagnosis of:

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<sup>13</sup> Ibid 168.

<sup>14</sup> Ibid 174; WCR Notice of Appeal filed 27 November 2019, 4.

<sup>15</sup> Exhibit 1, 181.

<sup>16</sup> Ibid 174.

<sup>17</sup> Ibid 147; WCR Notice of Appeal filed 27 November 2019, 3.

<sup>18</sup> Exhibit 1, 146.

<sup>19</sup> Ibid 147.

<sup>20</sup> Ibid 136; WCR Notice of Appeal filed 27 November 2019, Annexure A, 1, [7], 3.

<sup>21</sup> Exhibit 1, 142; WCR Notice of Appeal filed 27 November 2019, Annexure A, 1 [8], 3.

1. Minor fraying to the supraspinatus and subscapularis tendons and a background of tendinosis, no discrete tear. Associated subacromial bursitis.
2. Superior labral tear from 11 to 1 o'clock which is nondisplaced and demonstrates a small adjacent paralabral cyst.<sup>22</sup>

### **Circumstances of Mr Mateo's right shoulder condition**

#### *Regulator's position*

- [51] The Regulator's position was that "The right shoulder condition was a pre-existing degenerative condition which would have arisen even if the Appellant was not performing any work related tasks."<sup>23</sup>
- [52] The Regulator stated that the personal injury to Mr Mateo's right shoulder "pre-existed the commencement of his employment at the Mater in July 2018."<sup>24</sup>

#### *Appellant's position*

- [53] The Appellant's position is that the right shoulder injury was an aggravation of the accepted left shoulder injury. This is asserted on the grounds that Mr Mateo aggravated his right shoulder, whilst attempting to rehabilitate his left shoulder.<sup>25</sup>
- [54] After sustaining a left shoulder injury - either on 19 October 2018, or in the period from 30 July 2018 to 19 October 2018 - Mr Mateo returned to work under a restricted duties program.
- [55] However, Mr Mateo's evidence was that only a few weeks after his left shoulder injury, the reality was that he was working the same duties as other kitchen staff:

Ms Riedel: ...I suggest to you, Mr Mateo, that when you returned to work after injuring your left shoulder, in October 2018, you were put into a supernumerary role. So you were an extra in the kitchen?

Mr Mateo: ---Yes.

Ms Riedel: Yes. So you were on light duties?

Mr Mateo: ---On the first weeks. Yeah.

Ms Riedel: On the first weeks. Well, I'm suggesting to you that for the entirety of your time in the kitchen, after injuring your left shoulder, you were always on light duties?

Mr Mateo: ---No.

Ms Riedel: No?

Mr Mateo: --- [indistinct]

Ms Riedel: And I suggest to you that for the entirety of the time after you injured your left shoulder, you were as a supernumerary?

Mr Mateo: --- [indistinct]

Ms Riedel: And I suggest to you that during that entire time, after injuring your left shoulder, you never had a specific role?

Mr Mateo: --- [indistinct]

Ms Riedel: You were just as a supernumerary?

<sup>22</sup> Exhibit 1, 153.

<sup>23</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 31, Attachment B, [43bi].

<sup>24</sup> Ibid [42].

<sup>25</sup> Appellant's Closing Submissions filed 21 September 2021, 4 [26].

Mr Mateo: --- [indistinct]  
Ms Riedel: And, in particular, I suggest that you were rostered simply to help the people who were working on the plating line, and, in particular, the people who were working in a starter or the middle position?

Mr Mateo: --- [indistinct]  
Ms Riedel: I suggest to you that even if you were working in the starter and the middle positions, those roles didn't involve reaching above your head, did they?

Mr Mateo: ---I think reaching the – the – the order from the – from the patient was already above my head. And reaching the bread, as a midd – as in the middle, is already above your head. Reaching the drinks at the back or the [indistinct] back is already reaching – reaching above your head. Reaching the cooked food that the chef prepared is reaching over your head – over your chest already.

Ms Riedel: Well, I suggest to you that those tasks weren't above your head height, and if they were then any items that you needed to reach for were moved by your colleagues to a – to below chest height?

Mr Mateo: ---No.  
Ms Riedel: And I suggest to you that those were the requirements of – that were set out in all of the return to work programs that we've been through, that you were not to reach above chest height?

Mr Mateo: ---Yeah.  
Ms Riedel: So your programs – you agree that the programs stated very clearly that you were not to work above chest height?

Mr Mateo: ---I'm not supposed to reach overhead – chest high. Yes.  
Ms Riedel: Yes. And I suggest to you that various – firstly, that the roles – the start and the middle positions, on the plating line, didn't involve reaching above chest height?

Mr Mateo: ---It does involve chest high reaching.  
Ms Riedel: And I suggest to you that steps were taken by your colleague and by the supervisors, to move anything that was above chest height to a height that you could reach without not – so in your compliance with your programs?

Mr Mateo: ---Some of the tasks being for a starter, the middle and the expediter, would be using above chest height.

Ms Riedel: Now, when you returned to work on the return to work program – so after injuring your left shoulder in October 2018, I suggest to you that you did not work in the dish room?

Mr Mateo: ---No.  
Ms Riedel: Do you agree with that? So - - -?  
Mr Mateo: ---First weeks. Yes.  
Ms Riedel: So the first – you're saying that the first couple of weeks back - - -?  
Mr Mateo: ---Yeah.  
Ms Riedel: - - - you didn't work in the dish room?  
Mr Mateo: ---Is it after the injury?  
Ms Riedel: After the injury? Af - - -?  
Mr Mateo: ---First weeks I didn't work in the dish – dishwashing. Yes.  
Ms Riedel: So I'm suggesting to you that from the 28th – sorry – from the 19th of October 2018 through to March 2019, you did not work in the dish room?

Mr Mateo: ---I've work in the dish room.  
Ms Riedel: And I suggest to you that during that period, from the 19th of October 2018 through to the March 2019, you did not work in the expediter position?

Mr Mateo: ---I work in the expediter.  
Ms Riedel: And I suggest to you that you weren't pushing trolleys?  
Mr Mateo: ---I pushed the trolley.  
Ms Riedel: And you didn't put trays on the trolleys?  
Mr Mateo: ---I put the tray in the trolley.

- Ms Riedel: And I suggest to you that there was no frequent reaching and bending below the shoulder?
- Mr Mateo: ---There's frequent and repetitive use of that when you doing – when you are in this expediter position or in the – even though it's starter, middle, expediter, you are doing a repetitive action [indistinct]
- Ms Riedel: And I suggest to you, Mr Mateo, that you weren't doing the same duties during that period of 19 October 2018 to March 2019 – you weren't doing the same duties as the other staff, during that period?
- Mr Mateo: ---I was treated as this – as a regular employee. So what I'm doing that way is the same thing that the regular employees are doing.<sup>26</sup>

[56] Mr Mateo's evidence was that an unnamed co-worker had trained him in the expediter position and that Mr Vincent Hall had also trained him in how to use the monitor equipment required.<sup>27</sup>

[57] Mr Mateo stated that the work duties he performed in the relevant period included stacking meal trays, and pushing and pulling the food trolleys. This work was done following Mr Mateo's left shoulder injury. Further, Mr Mateo's working hours on 11 March 2019 had also just increased to eight hours that day, although he had resisted that increase.

#### *Incident Report*

[58] An Incident Report was completed on 13 March 2019 regarding the occurrence after work on 11 March 2019 as follows:<sup>28</sup>

On Monday I was performing my normal duties e.g. making juices and working on the line. I left work at 16:30 and about 18:00 I noticed my right shoulder was sore. I was off the next day and I thought that it would be better but it is still sore.

[59] The Incident Type was described as "Manual handling", "Muscular stress handling objects (not lift, carry or put down)" and "Pushing objects".<sup>29</sup>

[60] The conditions in the kitchen were described in that document as "Cluttered".<sup>30</sup>

#### *WorkCover*

[61] Mr Mateo told WorkCover on 14 March 2019 that:

He's working in area on suitable duties but really is working the same as other staff. On started and expediter line, pushing and pulling the trolleys.

When I worked full 8 hours Monday 11 March 2019 I felt pain left shoulder and that's why TMS reduced the hours.

When I worked Monday 11 March 2019 full day also felt soreness right shoulder. Approx. first felt it at 6 pm that evening.

<sup>26</sup> T 1 - 62, line 34 - T 1 - 64, line 24.

<sup>27</sup> T 1 - 62, lines 1 - 22; T 4 - 21, lines 19 - 23; Mr Vincent Hall had no recollection of training Mr Mateo in the expediter role.

<sup>28</sup> Exhibit 1, 221, 311; WCR Notice of Appeal filed 27 November 2019, Annexure A, 1 [6].

<sup>29</sup> Exhibit 1, 311.

<sup>30</sup> Ibid 313.

Placed on starter line where have to get cutlery and go round and take order of patient and put it on tray and pass onto middle person and after 2 hours will be moved to expediter which is putting tray onto trolley and when push trolley to distributor position ready to be taken to wards by someone.

Felt soreness when I got home, not at time when I was working.

Went back to work on Wednesday and reported to the supervisor at work and did incident report and saw doctor at MPECC, Dr Jeremijenko.<sup>31</sup>

[62] When asked by WorkCover what he thought had caused the shoulder pain, Mr Mateo replied:

Maybe just the work duties, my right side I am using mainly so think this is contributing to the pain and working the full hours.<sup>32</sup>

[63] Mr Mateo also told WorkCover about his movements between finishing work at 4:30 pm and when his right shoulder became sore later that evening. He said that:

I was waiting for my wife to finish work for 30 mins at parking lot and we went home. I was driving. No incidents on way home.

Got home 5:45 pm and when I started resting / lying on bed, I felt soreness in both shoulders.

Had to rest for a while before I started doing the dinner and everything.<sup>33</sup>

*Dr Mark Robinson*

[64] Mr Mateo's treating Orthopaedic Surgeon, Dr Robinson, opined that Mr Mateo had aggravated his right shoulder whilst attempting to rehabilitate his left shoulder.<sup>34</sup>

[65] In his report to WorkCover dated 27 May 2019, Dr Robinson noted Mr Mateo was most recently reviewed on 22 May 2019 and that "He was experiencing increasing pain to his right shoulder because he was using his shoulder exclusively, whilst his left arm was in the sling."<sup>35</sup>

[66] In a report dated 14 March 2019, Dr Robinson stated (my emphasis):<sup>36</sup>

Joselito returned for a review on 13 March 2019. He is struggling with his return to work program. They have increased his hours to eight hours a day and he reported increasing pain to his left shoulder and also he is starting to develop symptoms in his right shoulder.

[67] In that report, Dr Robinson stated that he had now "...reduced him to 6 hours a day, at his request..."<sup>37</sup>

<sup>31</sup> Appellant's Amended Statement of Facts and Contentions filed 26 July 2021, 7 [3K]; Exhibit 1, 219.

<sup>32</sup> Exhibit 1, 220.

<sup>33</sup> Ibid 219.

<sup>34</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 8 [13]; WCR Notice of Appeal filed 27 November 2019, Annexure A, 2 [13].

<sup>35</sup> Exhibit 1, 151.

<sup>36</sup> WCR Notice of Appeal filed 27 November 2019, Annexure A, 2 [10].

<sup>37</sup> Exhibit 1, 138.

*Dr Bruce Low*

[68] In his report dated 30 September 2020, Dr Low explained:

He had sustained bilateral shoulder tendinitis and impingement syndrome and rotator cuff tears. The left shoulder has had surgery, rotator cuff repair and a subacromial decompression, complicated by adhesive capsulitis which is slowly resolving. The left is recognised as work-related. He has similar pathology in both shoulders. Bursitis, tendinitis, impingement all mean the same thing.

The right was more of an aggravation due to restricted duties of not being able to use his left arm when his left arm was sore. The right became painful because he could not use his left arm, and it would be regarded as an aggravation / injury / rotator cuff tear. The left was more related to a discrete injury. There is similar pathology in both shoulders.<sup>38</sup>

*Dr Brett Halliday*

[69] In his 14 May 2020 report, Dr Halliday described Mr Mateo's left shoulder injury due to an incident at work on 19 October 2018, the ensuing light duties, his left shoulder surgery on 4 April 2019, after which time Mr Mateo had not returned to any work.

[70] Dr Halliday noted that "Just prior to his shoulder surgery Mr Mateo reports that he began to develop pain in his right shoulder."<sup>39</sup> Later he added, "Mr Mateo has some constitutional right shoulder symptoms consistent with his age which have developed since this (left shoulder) injury."<sup>40</sup>

*Dr Desmond Soares*

[71] Dr Soares' report dated 16 April 2019 noted that Mr Mateo "states he was virtually having to do the same as normal duties and claims and because he was pushing trolleys, that he only used his right shoulder and developed pain in his right shoulder. It was sent back to emergency to have a repeat ultrasound and a further partial tear was diagnosed in the right shoulder..."<sup>41</sup>

[72] Dr Soares' report dated 16 April 2019 further stated that "The findings on his ultrasounds and MRI are consistent more with a degenerative rotator cuff tear consistent with someone is 52 years old." Further, that "I do believe that his symptoms are due to an exacerbation of underlying degenerative rotator cuff partial tears. These are not related to his employment. He has been employed at the Mater kitchen for only two months. In the absence of a specific traumatic incident the time period is not long enough for him to develop a degenerative injury in his role at the Mater."<sup>42</sup>

[73] Dr Soares was emphatic that Mr Mateo's right shoulder condition was not work-related. Dr Soares stated, "He has no work-related incapacity in his right shoulder. His right shoulder symptoms are due to a degenerative underlying condition...It is likely that he may benefit from surgery to his right shoulder. However that surgery would be aimed at

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<sup>38</sup> Ibid 189.

<sup>39</sup> Ibid 180.

<sup>40</sup> Ibid 181.

<sup>41</sup> Ibid 146.

<sup>42</sup> Ibid.

is underlying degenerative condition which is a degenerative rotator cuff tears rather than any work-related condition."<sup>43</sup>

- [74] At the Hearing, Dr Soares said that Mr Mateo had embarked on his overseas holiday after his left shoulder symptoms had begun. Whilst he was away, his symptoms were not as severe. That lead Dr Soares to conclude that Mr Mateo's condition was an 'exacerbation' rather than a compensable 'aggravation', the difference between the two being that in the former case, work made his shoulder pain worse but was not actually changing the nature or course of the disease – and in the latter case, aggravation is a long-term permanent change in the course of a disease.<sup>44</sup>

*Rehabilitation Advisor*

- [75] Ms Tracey Ceh's notes of her meeting with Mr Mateo and supervisor Sushi Kapoor on 22 February 2019 reported Mr Mateo as telling her that "...the only day he had problems with his work tasks was on 29.01.19. I note that this is different information than what is reported in Dr Robinson's letter to his GP."<sup>45</sup> However, Ms Ceh's notes of her meeting with Mr Mateo and Mr Host on 31 January 2019 made no reference to Mr Mateo's contemporaneous indication of any issues with performing his work tasks, although Ms Ceh stated he had been reminded to raise any concerns.

- [76] Ms Tracey Ceh's notes of her meeting with Mr Mateo and Mr Brendan Host on 8 March 2019 indicated both that Mr Mateo "States no new event but occasionally does get pain doing a task."<sup>46</sup> In that same meeting, Mr Mateo went on to resist the increase to his daily working hours.

- [77] On 13 March 2019, Ms Tracey Ceh emailed Mr Brendan Host following a discussion with Mr Mateo. She stated that Mr Mateo had:

...advised that he had discomfort in his right shoulder after work on Monday and he went to see Dr Robinson today and has a new medical certificate to reduce his hours to 6 hour shifts x 3 days per week. Dr Robinson has advised Joselito to attend Mater Private Emergency Care Centre for his right shoulder. I have discussed with him that he needs to return to the kitchen and let his supervisor know. He will need to complete an Eric for the right shoulder.<sup>47</sup>

*Outside work activities*

- [78] At the Hearing, Mr Mateo was asked about any outside work activities that may have contributed to his right shoulder condition.

- [79] In cross-examination, he agreed with the proposition that in the period after his left shoulder injury up until 11 March 2019 he was getting on with life as normal, when not working in the kitchen at the Mater. Mr Mateo accepted that he was still driving, though his contribution to cooking was "minimised" because his wife was doing that. Mr Mateo said he was having a hard time doing the activities of daily life such as getting dressed

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<sup>43</sup> Ibid 147.

<sup>44</sup> T 3 - 9, lines 2 - 8.

<sup>45</sup> Exhibit 1, 269.

<sup>46</sup> Ibid 270.

<sup>47</sup> Ibid 316.

and brushing his teeth, notwithstanding he is right hand dominant and it was only his left shoulder that was injured at that time.<sup>48</sup>

- [80] I would observe that Mr Mateo's account above is at odds with what he told WorkCover about his movements after work on 11 March 2019, in terms of getting dinner ready after having a rest.

*Increase to daily working hours*

- [81] Dr Robinson's report dated 3 January 2019 stated that:

...Movement and strength of his shoulder continues to improve. He is coping with his current program of light duties and I expect this can be gradually upgraded. Further review is planned in 7 weeks.<sup>49</sup>

- [82] Mr Mateo advised rehabilitation adviser, Ms Tracey Ceh, on or about 24 January 2019 that he was coping well with his restricted duties and wanted to increase his hours of work.<sup>50</sup>

- [83] On 7 February 2019, Mr Mateo told Mr Brendan Host that he wanted to reduce his weekly hours of work to below 20 hours per week. Mr Mateo had stated that working 23 hours per week affected the financial hardship payment arrangements that had been approved by his bank. Mr Host had advised Mr Mateo that the Mater was required to provide him with the average hours of work prior to the injury and if he was medically cleared to work those hours he was obliged to do so. Mr Host concluded that Mr Mateo had been unhappy with that response and had indicated his intention to pursue the reduction of his working hours with Ms Ceh.<sup>51</sup>

- [84] In his meeting with Ms Tracey Ceh and Mr Brendan Host on 8 March 2019, Mr Mateo again raised his concern about the increase to his daily working hours, saying that he did occasionally get pain when doing a task. Ms Ceh had noted that "We discussed that we had increase the hours per day and reduced the days per week to ensure that he is working the 23 hours as required by WorkCover and three days per week. He said that he thought he would continue on the reduced hours and we discussed that Dr Robinson has not requested this."<sup>52</sup>

- [85] The Return to Work Plan signed by Dr Robinson on 10 March 2019 indicated his approval for Mr Mateo to work 23 hours per week, comprising two 8 hour shifts and one 7 hour shift.<sup>53</sup> It noted "Use of the left upper limb for light functional tasks is important to maintaining range of movement and minimizing muscle atrophy."<sup>54</sup>

- [86] From 11 March 2019, the Mater increased Mr Mateo's daily working hours, although he was rostered only three days a week.<sup>55</sup>

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<sup>48</sup> T 1 - 70, lines 9 - 37.

<sup>49</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 14 [5Mb].

<sup>50</sup> Exhibit 1, 268; Respondent's Statement of Facts and Contentions filed 11 August 2021, 15 [5Mc].

<sup>51</sup> Exhibit 1, 310; Respondent's Statement of Facts and Contentions filed 11 August 2021, 15 [5Me].

<sup>52</sup> Exhibit 1, 270.

<sup>53</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 17 [5Sc].

<sup>54</sup> Ibid [5S].

<sup>55</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 4 [2R] - [2S].



- [87] In his 14 March 2019 report, Dr Robinson noted that "I have reduced him to 6 hours a day, at his request..."<sup>56</sup>
- [88] I would observe that throughout the month of January, upon return from his overseas trip, Mr Mateo's shoulder appeared to be improving, he was coping with his restricted duties and wanted to increase his working hours. That ambition changed on 7 February 2019, when Mr Mateo identified the impact an increase in working hours would have on the financial hardship consideration that had been arranged with his bank. Unhappy with the response from Mr Host when raising the matter, Mr Mateo took up the matter with Ms Ceh. Her notes of their meeting a month later indicated that Mr Mateo remained resolute in his position that he did not now want his weekly working hours to be increased, stating now that he did occasionally get pain when doing a task. It was explained by Ms Ceh that Dr Robinson had authorised Mr Mateo to perform 23 hours work over three days per week, comprising two 8 hour shifts and one 7 hour shift. After seeing Mr Mateo on 13 March 2019, Dr Robinson wrote that he was reducing Mr Mateo's working hours to six hours per day *at his request*.
- [89] In my mind remains the question of whether Mr Mateo asked for his working hours to be reduced because of the right shoulder pain that occurred after working a full day on 11 March 2019 – or because of the negative impact of doing so with respect to arrangements with his bank. The sequence of events I have explained at [88] above evinces serious doubt about the sincerity of Mr Mateo's representations on that point.

#### *Overseas trip*

- [90] Mr Mateo and his family went on an overseas holiday to Vietnam, Thailand and the Philippines for a wedding in the period between Christmas 2018 to New Year January 2019 to attend his son's wedding.<sup>57</sup> Mr Mateo was away from work entirely in order to do so.<sup>58</sup>
- [91] Dr Soares recounted that Mr Mateo had told him he didn't carry any bags on the duration of that overseas trip, recalling that he had mentioned that other people carried the bags.<sup>59</sup>
- [92] The Functional Capacity Assessment Report dated 4 January 2019 noted that "Mr Mateo will resume physiotherapy now that he has returned from his overseas holiday" and that "Mr Mateo reported managing well during travelling and avoided lifting and handling luggage, which was done by family members."<sup>60</sup>
- [93] The matter of the overseas holiday was rather reluctantly conceded by Mr Mateo in cross-examination the Hearing.<sup>61</sup> Initially, Mr Mateo said he couldn't recall. When Ms Riedel made specific reference to Mr Mateo travelling overseas for a wedding in the Philippines, he first queried "A wedding?" before conceding "I think so. Yes."<sup>62</sup> I found that reticence

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<sup>56</sup> Exhibit 1, 138, 316, 318.

<sup>57</sup> T 3 - 30, lines 1 - 3.

<sup>58</sup> T 1 - 33, lines 30 - 47.

<sup>59</sup> T 3 - 10, lines 1 - 15.

<sup>60</sup> T 3 - 29, lines 39 - 40; T 3 - 30, lines 9 - 10.

<sup>61</sup> T 1 - 33, lines 34 - 44.

<sup>62</sup> Ibid lines 34 - 47.

strange. A family wedding and a trip overseas are both exciting events - even prior to the COVID-19 global pandemic. Both events also require a lot of time in the planning and also likely significant expense. The events happened less than three years ago, at the time of the Hearing.

[94] Mr Mateo's left arm was not in a sling and not out of action entirely at that time.<sup>63</sup>

[95] I observe that Mr Mateo did not call his wife or another family member to support his statement on the Functional Capacity Assessment Report that he did not carry or lift any luggage whilst on the overseas holiday. Although I recognise that neither was the proposition put to Mr Mateo that it was not the case.

### **Mr Mateo's left shoulder condition**

[96] Less than three months after Mr Mateo commenced in the Mater kitchen, he claimed a left shoulder injury.

[97] WorkCover accepted that Mr Mateo sustained a left shoulder injury on 19 October 2018, in the course of working in the pot wash.

[98] However, Mr Mateo later swore a statutory declaration on 17 June 2021 amending his left shoulder injury claim to allege that it occurred over the period 30 July 2018 to 19 October 2018.<sup>64</sup>

[99] While the parties dispute whether or not that accepted left shoulder injury was a 'set date' injury or instead occurred 'over a period of time', that is not a question that needs to be determined here.<sup>65</sup>

[100] However, the statutory declaration would appear to contradict Mr Mateo's contemporaneous accounts of the workplace event considered to have caused his left shoulder injury.

[101] In his 14 March 2019 report, Dr Robinson observed that "Joselito seems to be running his own agenda on this shoulder injury considering the injury occurred in October 2018 and he declined the suggestion of surgery in November. I have reduced him to 6 hours a day, at his request and I await approval to proceed with surgery on the left shoulder."<sup>66</sup>

[102] In the Functional Capacity Assessment Report prepared by Ms Leanne Loch dated 29 November 2018, she noted that "Mr Mateo reported a sudden onset of left shoulder pain on 17/10/18 which he attributed to lifting a commercial cooking pot full of water and food scraps..."

[103] Ms Loch further stated that "Mr Mateo reported no other joint problems and reported no prior history of shoulder pain."<sup>67</sup> Mr Mateo's claim as contained in her report is belied

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<sup>63</sup> T 3 - 13, lines 33 - 35.

<sup>64</sup> Exhibit 2.

<sup>65</sup> T 1 - 4, lines 40 - 46.

<sup>66</sup> Exhibit 1, 138.

<sup>67</sup> Ibid 95 - 96.

by the medical evidence regarding various consultations with medical practitioners regarding his left shoulder problems over several years.

- [104] At the Hearing, Mr Mateo confirmed in cross-examination that his left shoulder hurt right from his first day of work at the Mater on 30 July 2018.<sup>68</sup>
- [105] If that was indeed the case, it would seemingly contradict Mr Mateo's position that the accepted left shoulder injury was caused by his work in the Mater kitchen. Further, I note that Mr Mateo had ceased work as a leading hand at an abattoir a mere four months prior to his commencement at the Mater.<sup>69</sup>
- [106] Given the left shoulder claim was already accepted by WorkCover, and indeed the operation occurred on 4 April 2019 after some extensive deferrals on Mr Mateo's part, I hold some reservations as to *why* the step to amend the timeframe of injury was taken almost three years after the event. In the normal course, it is accepted that one's recollection of an event is more likely to fade with time, rather than become clearer.
- [107] Mr Mateo also gave different people different reasons for why he wanted to delay the left shoulder surgery, after the claim was accepted by WorkCover. In November 2018, Mr Mateo told Ms Leanne Loch that he was "reluctant to undergo surgery at this time since his wife and their 5 children and partners will travel to Vietnam for his son's wedding in December."<sup>70</sup> Mr Mateo told Mr Brendan Host that he would have surgery in January 2019, due to his planned annual leave and then his doctor's leave.<sup>71</sup> Then on 22 February 2019, Mr Mateo told Ms Ceh that "if there has been no improvement in the MRI then Dr Robinson has recommended surgery which he is scared of having. He discussed his fears of light anaesthetics but said he understood he will be asleep fully for the operation."<sup>72</sup>
- [108] This muddled narrative reflected poorly on Mr Mateo's credit. The contents of the statutory declaration and Mr Mateo's evidence at the Hearing that his left shoulder hurt right from his first day at the Mater do not comfortably coexist with his contemporaneous reports of the 19 October 2018 pot wash event to Dr Robinson, Ms Loch and others and his accepted account as provided to WorkCover.
- [109] Whilst this is not a key factor in this Decision, when considered alongside other factors explained below, Mr Mateo's recount causes me some disquiet.

**Was the right shoulder condition an aggravation of the left shoulder condition - or an aggravation of an underlying degenerative condition?**

- [110] Dr Robinson and Dr Low share the opinion that Mr Mateo aggravated his right shoulder whilst attempting to rehabilitate his left shoulder.<sup>73</sup> Notwithstanding, upon review of an ultrasound and MRI of Mr Mateo's right shoulder dated 13 March 2019 and 6 June 2019

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<sup>68</sup> T 1 - 34, lines 15 - 35.

<sup>69</sup> Exhibit 1, 293.

<sup>70</sup> Ibid 96.

<sup>71</sup> Ibid 307.

<sup>72</sup> Ibid 269.

<sup>73</sup> Ibid 155, 189.

respectively, Dr Low and Dr Robinson agreed that the findings in those images were consistent with a degenerative rotator cuff tear in a person around 50 years of age.<sup>74</sup>

[111] Dr Soares rejected the notion that "shoulder pain in the right shoulder is as a consequence of overuse secondary to his left shoulder injury"<sup>75</sup> but:

- is of the view that Mr Mateo's "symptoms are due to an exacerbation of underlying degenerative rotator cuff partial tears";<sup>76</sup>
- what Mr Mateo "was doing in the kitchen was - was heavyish enough to - to make his pain slightly worse, but was not the cause of the injury";<sup>77</sup>
- considers certain activities caused "an exacerbation, rather than an aggravation"<sup>78</sup> and "a previously symptomatic injury to become symptomatic, to become more symptomatic without changing the nature of the injury itself";<sup>79</sup>
- accepts the proposition that certain activities "caused an increase in the pain that caused the underlying condition to become symptomatic";<sup>80</sup> and
- is of the view "Work-related activities exacerbated his symptoms."<sup>81</sup>

[112] Dr Halliday considered pain in Mr Mateo's right shoulder to be a "reflection of his constitutional condition."<sup>82</sup> During cross-examination, the following exchange took place:

So when you say there's a degenerative shoulder, the degeneration is age-related, according to some of the reports I've read, where he had age-related degeneration of his rotator cuff in the right shoulder; is that correct?---Yeah, a con – I call it constitutional degeneration. It can occur in younger people.<sup>83</sup>

[113] Despite the divergent views with respect to the relationship between the left and right shoulder conditions, the four orthopaedic surgeons agreed that Mr Mateo suffered from a pre-existing degenerative right shoulder condition.<sup>84</sup>

[114] I accept that Mr Mateo suffers from both a left shoulder injury and a pre-existing degenerative right shoulder condition. Pursuant to s 32(3)(b) of the Act, an "injury" includes an aggravation of a personal injury, if the aggravation arises out of, or in the course of employment and the employment is a significant contributing factor to the aggravation.

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<sup>74</sup> T 2 - 102, lines 13 - 15, 19, 27 - 31; T 2 - 45, lines 1 - 3, 16 - 17.

<sup>75</sup> Exhibit 1, 146.

<sup>76</sup> Ibid.

<sup>77</sup> T 3 - 9, lines 25 - 27.

<sup>78</sup> T 3 - 16, lines 35-36.

<sup>79</sup> Ibid lines 38 - 40.

<sup>80</sup> Ibid lines 42-43.

<sup>81</sup> T 3 - 28, lines 42 - 43.

<sup>82</sup> T 3 - 59, lines 44 - 45.

<sup>83</sup> T 3 - 51, lines 5 - 8.

<sup>84</sup> T 2 - 102, lines 39 - 41; T 2 - 105, lines 1 - 4; T 2 - 33, lines 40 - 47; T 3 - 16, line 30; T 3 - 38, lines 22-33.

[115] In *WorkCover Queensland v BHP (Qld) Workers' Compensation Unit*, Hall P concluded (citations omitted):

It is settled that the activation of pain is to be equated with the aggravation of an underlying disease; i.e., it is sufficient that an asymptomatic disease becomes painful, even if there is no change to the underlying pathology.<sup>85</sup>

[116] Further, in *Mimica v Q-Comp*, Commissioner Blades cited the view of de Jersey P in *Pleming v Workers' Compensation Board of Queensland*<sup>86</sup> that "pain brought on by work activity may constitute an aggravation of a pre-existing injury, even though no pathological change takes place."<sup>87</sup>

[117] In *Heald v Q-COMP*, Hall P said:

A degenerative condition may be aggravated in the sense that it may be made worse, i.e. after the aggravation the degenerative disorder is worse than it was before. But there can also be aggravation in the sense of an increase of symptoms associated with a degenerative condition which, after the cessation of the symptoms, returns to its pre-aggravation state.<sup>88</sup>

[118] It has been accepted that an aggravation can include an "exacerbation" of an injury.<sup>89</sup>

[119] I am not convinced by the opinions of Dr Robinson and Dr Low with respect to the impact that rehabilitation of Mr Mateo's left shoulder had on his right shoulder. Based on the unanimous view of the orthopaedic surgeons, I accept that Mr Mateo suffers from a pre-existing degenerative right shoulder condition and consider it more likely that any symptoms he suffered as at 11 March 2019 stemmed from that condition rather than as a consequence of the left shoulder injury.

[120] On that basis, I reject Mr Mateo's argument that he has suffered an aggravation of his left shoulder injury. Rather, if anything, I consider Mr Mateo may have suffered an aggravation of his pre-existing degenerative right shoulder condition. Based on the evidence, I find:

- Mr Mateo's pre-existing degenerative right shoulder condition had been asymptomatic since 30 October 2009;
- on 11 March 2019, Mr Mateo experienced an "activation of pain";
- on and from 11 March 2019, Mr Mateo experienced an "increase of symptoms associated with a degenerative condition"; and
- Mr Mateo's pre-existing degenerative right shoulder condition has been exacerbated somewhat.

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<sup>85</sup> (2002) 170 QGIG 142.

<sup>86</sup> (1996) 152 QGIG 1181.

<sup>87</sup> [2007] QIRC 3, 4.

<sup>88</sup> (2004) 177 QGIG 769, 771.

<sup>89</sup> *Omanski v Q-COMP* [2013] ICQ 7, 2 [15]; *Karipa v Q-COMP* [2013] QIRC 161, 6 [42].

[121] On that basis, I conclude that Mr Mateo's pre-existing degenerative right shoulder condition has been aggravated in a medical sense. However, in *Carman v Q-COMP*, Hall P said (emphasis added):

It must be remembered that *Pleming v Workers' Compensation Board of Queensland* (1996) 152 QGIG 1181 is an often cited but ageing authority. The worker who was successful on the point of law about the content of 'aggravation' was unsuccessful on the facts. Pleming v Workers' Compensation Board of Queensland, *ibid*, does not decide that a worker afflicted by a degenerative back suffers an injury if the back becomes painful at work. Neither does Pleming, *op. cit.*, establish that a worker with a degenerative back suffers an "injury" if the work is a cause of the onset or intensification of pain. Pleming, *op. cit.* establishes that a worker with a degenerative back will suffer an injury where the back becomes painful or more painful and the employment is a significant cause of the onset or intensification of pain.<sup>90</sup>

[122] Although I have accepted that there has been an aggravation of Mr Mateo's pre-existing degenerative right shoulder condition, Mr Mateo must demonstrate that the aggravation arose out of, or in the course of his employment *and* that his employment was a significant contributing factor to that injury.<sup>91</sup>

### **Chronology**

[123] The injury to Mr Mateo's left shoulder occurred either on or in the period prior to, 19 October 2018.

[124] Mr Mateo was then under a series of restricted duties RTW plans in the period from 20 October 2018 until his left shoulder surgery on 4 April 2019.

[125] Dr Robinson's evidence was that he recommended Mr Mateo undergo left shoulder surgery in November 2018 but that Mr Mateo had "put it off until April 2019 as he was trying to get it to settle down non-operatively."

[126] In an email dated 14 November 2018, Mr Brendan Host told Ms Tracey Ceh that:

Lito informed me that he needs major surgery on his shoulder but has asked the doctor to postpone the op as he wants to go on leave and then the doctor will be on leave so wont happen till end of Jan next year and he will be on quartertone until the op.<sup>92</sup>

[127] Mr Mateo and his family went on an overseas holiday to the Philippines, Vietnam and Thailand between 23 December 2018 and 2 January 2019 to attend his son's wedding.<sup>93</sup>

[128] Mr Mateo claimed his right shoulder was sore after work on 11 March 2019.

[129] Notwithstanding that, Mr Mateo did come to work on 13 March 2019 - but thought perhaps he did not come to work again thereafter.<sup>94</sup>

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<sup>90</sup> [2007] ICQ 43.

<sup>91</sup> *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32(3)(b).

<sup>92</sup> Exhibit 1, 307.

<sup>93</sup> T 3 - 30, lines 1 - 3.

<sup>94</sup> T 1 - 70, lines 42 - 47; T 1 - 71, line 1.

[130] In his 14 March 2019 report, Dr Robinson noted that "I have reduced him to 6 hours a day, at his request and I await approval to proceed with surgery on the left shoulder."<sup>95</sup>

[131] The surgery on Mr Mateo's left shoulder was done on 4 April 2019. Mr Mateo did not return to work at the Mater kitchen from that time.<sup>96</sup>

### **Work tasks performed in the relevant period**

#### *Normal Duties of a Food Service Assistant*

[132] The normal duties of a food service assistant are captured in the document titled "Inherent Requirements – Food Service Assistant".<sup>97</sup> I will not reproduce that list of work tasks in this Decision.

[133] There are three distinct roles on the plating line:

- a. A starter position which involves...reading the docket detailing the patient's order and placing items such as salt, pepper and cutlery on a tray along with a base if a hot meal has been ordered.
- b. A middle position which involves placing items such as biscuits, coffees, bread rolls and drinks onto the tray. This is considered to be the lightest role in the kitchen.
- c. The expediter position which involves placing hot meals onto the tray, checking that the meal is correct, allocating the meal to a trolley and placing the tray into the trolley. The person in the expediter position then pushes the trolley from the end of the plating line to the entrance of the kitchen (a distance of approximately 10 to 15 metres) where it is collected by the dining hosts who deliver the meals to patients. That route involves turning the trolley. Only the person performing the expediter role pushes the trolley.<sup>98</sup>

[134] The key point is settling the factual dispute between the parties as to the actual work tasks performed by Mr Mateo in the relevant period.<sup>99</sup>

[135] Mr Mateo said his duties included loading meal trays into food trolleys, then pushing and pulling them into position, ready for dispatch to patients. That is denied by the Regulator.

#### *Restricted Duties and RTW Plans*

[136] After Mr Mateo's left shoulder injury on 19 October 2018, he was placed on restricted duties under a series of various RTW plans.

[137] From 11 March 2019, the Return to Work Plan included:

Occasional lifting up to 6 kg in comfortable postures with the right hand taking most of the weight eg. for handling meal trays at expeditor station or for crockery.

Frequent overhead reaching with right hand. No overhead reaching with left hand.

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<sup>95</sup> Exhibit 1, 138.

<sup>96</sup> T 1 - 71, lines 3 - 8.

<sup>97</sup> Exhibit 1, 240.

<sup>98</sup> Respondent's Closing Submissions filed 6 October 2021, 3 [21].

<sup>99</sup> 20 October 2018 to 11 March 2019.

Frequent bilateral forward reaching.

Frequent bending.

Work at the dishwashing line. No requirement to restrict hours.<sup>100</sup>

[138] I note that the above inclusions were also part of the RTW plans issued for the period 20 October 2018 to 24 February 2019, then again for the period 24 February 2019 to 24 March 2019.

[139] The RTW plan extract above self-evidently contains the inclusions of lifting meal trays at the expeditor station with the right hand taking most of the weight, frequent overhead reaching with the right hand, frequent forward reaching and frequent bending.

[140] As the RTW plans are developed for the individual worker, it seemed odd to me that those tasks would have been included in the personalised plan if Mr Mateo was not required to undertake them.

[141] Though Ms Ceh and Ms Loch's evidence was that the plans and assessments contained the scope of tasks that the worker could do - rather than did do, or must do.

#### *Regulator's position*

[142] The Regulator submitted that Mr Mateo was not working the same duties as other staff since his left shoulder injury in October 2018 because he:

1. Worked restricted duties at the Mater.
2. Was placed in a supernumerary position assisting another kitchen staff member.
3. Performed duties which all required less than 60 (degrees) of shoulder flexion, with the majority of the tasks being performed at waist level.
4. Performed duties which did not involve lifting items heavier than 5 or 6 kilograms.
5. Did not perform duties that required him to push or pull food trolleys or place food trays in the food trolleys or remove food trays from the food trolleys.<sup>101</sup>

[143] The Regulator submitted that was also the case on 11 March 2019, when Mr Mateo:

1. Worked restricted duties.
2. Was placed in a supernumerary position assisting another kitchen staff member.
3. Was placed on the expeditor line in the middle facilitator position assisting another kitchen staff member perform the tasks associated with that role.
4. Performed the tasks associated with the middle facilitator position which involved placing items such as tea bags, coffee satchels, bread rolls and drinks onto a patient's tray, none of which weighed more than 500 grams or were located in positions that required the Appellant to reach for them, and sliding the tray along the plating line.
5. Performed duties which all required less than 60 (degrees) of shoulder flexion, with the majority of the tasks being performed at waist level.<sup>102</sup>

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<sup>100</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 6 [2S].

<sup>101</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 19 [6cii].

<sup>102</sup> Ibid.



*Appellant's position*

[144] On 11 March 2019, Mr Mateo worked a full eight hour day and both his left and right shoulders felt sore when he was at home after work.<sup>103</sup>

[145] Mr Mateo's right shoulder "...injury came on when he was on restricted duties at the Mater but working the same duties as other staff. (He) commenced duties retrieving cutlery, taking patient orders which were placed onto a tray and after two hours he was moved to the expeditor area which involved putting trays onto a trolley and, once full, pushing the trolley "to distribution position"."<sup>104</sup>

[146] He loaded and pushed the food trolleys using only his right hand. As the kitchen area was cluttered, Mr Mateo had to stop and start the trolley. The force required to push the trolley exceeded the restricted duties plan. The action of loading the bottom rows of the food trolley required Mr Mateo to "...bend at the waist and reach out in a "flexion" type action repetitively."<sup>105</sup>

*Mr Mateo's evidence*

[147] Mr Mateo's evidence was that only a few weeks after his left shoulder injury, the reality was that he was working the same duties as other kitchen staff.

[148] Mr Mateo was cross-examined on his account of the duties undertaken in the kitchen in the period after his left shoulder injury. That exchange is reproduced at [55] of this Decision.

[149] Mr Mateo maintained that his work duties included bending to load meal trays, pushing trolleys and reaching above chest height – and that he was not merely assisting another worker as a supernumerary in the kitchen.

[150] On 11 March 2019, Mr Mateo's evidence was that he worked a full eight hour day in the expeditor position, "pushing and pulling all the trolleys and it was really, really busy day...Everything is really cluttered and everything is in the [indistinct] really busy one."<sup>106</sup>

*Incident Report*

[151] In the Incident Report completed on 13 March 2019, Mr Mateo stated that he was:<sup>107</sup>

...performing my normal duties e.g. making juices and working on the line.

[152] That account would seem to be consistent with Mr Mateo working on the middle position, the lightest role in the kitchen and the position the supervisors said someone on light duties would be allocated to as a supernumerary.

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<sup>103</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 6 [2U].

<sup>104</sup> Ibid [3].

<sup>105</sup> Ibid 7 [3G].

<sup>106</sup> T 1 - 21, lines 24 - 28.

<sup>107</sup> Exhibit 1, 211, 311; WCR Notice of Appeal filed 27 November 2019, Annexure A, 1 [6].

[153] Though that report also stated that Mr Mateo had been "Pushing objects"<sup>108</sup> amongst other tasks, in kitchen conditions he had described as "Cluttered".<sup>109</sup>

[154] At the Hearing, Ms Alison Devereaux's evidence was that reference was based on Mr Mateo's comment and that did not align with her own observations upon inspection.<sup>110</sup>

*Mater Private Hospital records*

[155] Only a month earlier,<sup>111</sup> it was noted that Mr Mateo "Has been put on light duties – no pushing / pulling or overhead activities."<sup>112</sup>

*Work Capacity Certificates – 13 March 2019*

[156] In the Work Capacity Certificate completed by Dr Jeremijenko on 13 March 2019, Mr Mateo was recorded as having been "Putting things inside trays. Putting them onto trolleys. On light duties due to L shoulder. Only using R arm for work."<sup>113</sup>

[157] In the Work Capacity Certificate completed by Dr Robinson on 13 March 2019, Mr Mateo was recorded as having stated the mechanism of injury to be "Injury lifting at work".<sup>114</sup>

*Work Capacity Certificate – 29 March 2019*

[158] On 29 March 2019, Dr Anderson noted the mechanism of injury to be "putting things inside trolley and using right arm more."

*WorkCover*

[159] Mr Mateo told WorkCover on 14 March 2019 that:

He's working in area on suitable duties but really is working the same as other staff. On started and expediter line, pushing and pulling the trolleys.

When I worked full 8 hours Monday 11 March 2019 I felt pain left shoulder and that's why TMS reduced the hours.

...

Placed on starter line where have to get cutlery and go round and take order of patient and put it on tray and pass onto middle person and after 2 hours will be moved to expediter which is putting tray onto trolley and when push trolley to distributor position ready to be taken to wards by someone.<sup>115</sup>

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<sup>108</sup> Exhibit 1, 311.

<sup>109</sup> Ibid 313.

<sup>110</sup> T 1 - 99, lines 8 - 27.

<sup>111</sup> 14 February 2019.

<sup>112</sup> Exhibit 1, 51.

<sup>113</sup> Ibid 136.

<sup>114</sup> Ibid 135.

<sup>115</sup> Appellant's Amended Statement of Facts and Contentions filed 26 July 2021, 7 [3K]; Exhibit 1, 219.

[160] I note that Dr Robinson reported that Mr Mateo's working hours had been reduced *at his request*. That difference causes me to question whether Mr Mateo's account to WorkCover was entirely accurate.

*Mr Brendan Host*

[161] Mr Host explained that a person on light duties would be "an extra person" and "would need to follow the return to work program that they've been given".<sup>116</sup> Mr Host could not be certain as to what role Mr Mateo undertook during the relevant period, but contemplated he would have acted in the middle facilitator role, helped out as a floater or potentially in the sandwich room.<sup>117</sup>

[162] Mr Host explained that a floater would make drinks, engage in preparation, make special orders and deliver to wherever required.<sup>118</sup> Mr Host further explained that a person on light duties would assist in another role but would not be in charge of fully completing that role.<sup>119</sup>

[163] When questioned about whether he checked in with Mr Mateo, Mr Host recalled:

I do remember one time that he mentioned that reaching up to the top shelf – the supervisors advised me that reaching up to the top shelf was causing a bit of pain on his injured shoulder. That – so that must have been from the first one. But then we moved everything down so he didn't have to reach.<sup>120</sup>

[164] On two separate occasions when cross-examined, Mr Host stated that Mr Mateo was not rostered to push trolleys and contemplated that Mr Mateo would only have pushed trolleys if it was in his suitable duties plan and it would only have been for a very short period of time.<sup>121</sup>

[165] Also during cross examination, Mr Cross for the Appellant read aloud the following excerpts from Ms Ceh's notes:

*Phone call catch-up with Lito and Brendan Host. Advised Lito of upgraded duties as per Leanne Loch to include making sandwiches in larder, expeditor line, pushing trolleys 10 to 15 metres in the kitchen. Discussed a work in wash dish area or pot scrubbing and no lifting above chest height in pantry and pot wash. Discussed need to split heavy metal trays and to place trays onto trolleys at or above – below chest height. Advised to ask other staff to assist with tasks outside of work restrictions.*

*... Discussed that Leanne had provided instructions on pushing trolleys and he was to work within these guidelines and he confirmed he had been provided with the instructions. Discussed no lifting of boxed fruit, bread crates or trays or dessert when working in the cold larder.*

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<sup>116</sup> T 4 - 82, lines 39 - 43.

<sup>117</sup> T 4 - 83, lines 10 - 12.

<sup>118</sup> Ibid lines 20 - 24.

<sup>119</sup> T 4 - 84, lines 4 - 6.

<sup>120</sup> Ibid lines 37 - 40.

<sup>121</sup> T 4 - 86, lines 21 - 23; T 4 - 87, lines 18 - 20.

[166] After reading those excerpts aloud, Mr Cross suggested to Mr Host that as at 4 December 2018, Mr Mateo's activities, as part of his restricted duties, included those activities as identified in Ms Ceh's notes. Mr Host replied "Correct".<sup>122</sup>

[167] Mr Cross then referred to the work programs that had 15 plan numbers and included duties Mr Mateo was required to perform as well as the restrictions. Mr Cross asked, "do you accept that the duties he was required to perform in column 1 were duties he did at work, but with the restrictions as identified in paragraph 2?" Mr Host replied, "Yeah, I think so, yeah."<sup>123</sup>

[168] Mr Cross also suggested to Mr Host that:

Mr Mateo wasn't limited in his work activities after his first injury to his left shoulder to, simply, positions 1 and 2 on the expeditor line; he was also doing tasks that are noted in the duties – in the suitable duties programs, pushing trolleys, putting trays into trolleys?

[169] Mr Host responded:

---So at the – like, eventually, like, when his work restrictions were upgraded, yeah, he was able to do that. But definitely not rostered in that position.<sup>124</sup>

[170] Mr Cross then questioned Mr Host about his recollection of Mr Mateo's role on 11 March 2019:

And on the day of the 11th of March, he worked eight hours. Now, during that eight hours, he would have been performing – he was performing, on Mr Mateo's case, all those tasks which are identified in his 20 duties plan, with the restrictions as identified in his return to work plans; do you accept that?---He could have, yes.<sup>125</sup>

...

So if you puts – put Mr Mateo down as light duties, he still couldn't – if he's following his return to work plan, he could be still performing tasks such as pushing the trolleys, putting trays into the trolleys on the expeditor line for those eight hours that he was working on the 11th of March, but he would be titled as "suitable duties" – or, sorry, "light duties"?---Correct.<sup>126</sup>

...

- - - but if he was performing the duties such as pushing a trolley, putting trays into the trolleys and that was part of his suitable duties program, then you have – you're confident that he would have been performing some of those – those duties and others in the eight hour period?---Yeah, for a very short period of time, yeah.<sup>127</sup>

...

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<sup>122</sup> T 4 - 89, line 42 - T 4 - 90, line 13.

<sup>123</sup> T 4 - 90, lines 15 - 22.

<sup>124</sup> T 4 - 92, lines 1 -6.

<sup>125</sup> Ibid lines 19 - 22.

<sup>126</sup> Ibid lines 28 - 32.

<sup>127</sup> Ibid lines 40 - 44.

Yes. You've got no record of that, how much time he spent on the 11th of March, doing trolleys or putting trays into trolleys or expeditor or other tasks?---I don't have a record, no, but I know that someone was rostered in that position, so there would have been somewhere there, doing that job.

All right. And finally – but he was also doing it? He was also doing it - - -?---Yeah. Sharing the load?---There might have been a 10 minute window when someone was on a break or something like that, yeah.

Yes. I would suggest to you that's incorrect, that he was performing the tasks for the eight hour period?---That's definitely not correct, because there was someone rostered in that position.<sup>128</sup>

[171] Then, during re-examination, Ms Riedel on behalf of the Regulator questioned Mr Host as follows:

So the question I was just about to ask you was during that period from the 19th of October 2018 right through to the 11th of March 2019, so after the left shoulder injury up to the right shoulder injury, do you recall ever seeing, on a shift that you worked with Mr Mateo, him working in the expeditor role?---I definitely – he was definitely never rostered. He could have – like I said, he could have done some task in that position.

But did you see him?---I can't recall.

*Ms Blazenska Solar and Mr Jimmy Ruiz*

[172] An undated account of Mr Mateo's work duties was in evidence at the Hearing.

[173] That written material stated that Mr Mateo was:

...on light duties, his duties mainly were starter and middle position putting condiments and cutlery on tray, while on light duties he never had a position, he was a spare staff member if he need to move anything heavy he was told to ask another staff member, most of the time he worked in pairs, no staff members EVER works in the dish room on light duties he was always told to follow his work plan and if he was unable to do a certain task he was to advise the supervisor, The supervisors desk is opposite the line and he was seen on numerous time using both hands. Lito never reported any injury's or pain while he was on light duties he was asked every shift if he was ok and his response was "I'm fine".<sup>129</sup>

*Ms Blazenska Solar*

[174] Ms Solar was questioned generally about the role of a person subject to a return to work duties program "that says they can do a whole bunch of different things":

They indicate that Mr Mateo can do things such as pushing trolleys, pulling trolleys, lifting, forward reaching, bending, all sorts of different things - - -?---Yes.

- - - would you still put that person in the middle position?---In the middle. Yes.

Okay. Even if they have the capacity to do things - - -?---Yes.

- - - other than the middle?---Yep. It's sort of like an unspoken rule, but as soon as they go on light duties it's the middle.

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<sup>128</sup> T 4 -93, lines 3 - 15.

<sup>129</sup> Exhibit 1, 260.

Right. Would they be pushing trolleys?---Yes and no.

And how – can you explain that comment?---If they were to go into the expediter - - -

Yes?--- - - - position - - -

Yes?--- - - - they could push, but you would need two hands to push.

Sure. All right. So can you push a trolley with only one arm?---No.

Okay. And what about putting trays onto the trolley? Would they be doing that?---Yes.

They would be putting trays on the trolley?---If they go into that expedited position.

Okay. Sure. And is that something you can do with one arm?---No.<sup>130</sup>

[175] When questioned about her recollections of Mr Mateo specifically, Ms Solar provided:

When you were working with Mr Mateo, particularly during those March shifts, but even between the October 2018 injury on the 19th of October, and the 11th of March 2019, when you worked with Mr Mateo, what position did you put him in or what posit - - -?---He would've been in the middle if he was on light duties.

Sure. And did you ever see him working in the dishwashing area?---No.

No?---No.

And did you ever see him working on the expediter position?---No.

Did you ever see him pushing trolleys?---No.

What about putting trays onto the trolleys?---No.

And we've been through those suitable duties plans, and they say that Mr Mateo can do a whole number of things more than just putting things on a tray. Does that change your evidence that he was only ever in the middle position?---No.

And what about when the kitchen was really busy, would Mr Mateo have still been in that middle position?---Yes.

And was Mr Mateo actually given a specific role?---Well, he was never – look, he always had a person with him.

Sure?---So he was like the off-sider.

And what do you mean by off-sider? How did that - - -?---Like, when he get to the expediter position, there was that original person that was rostered there, and I'm sure if you go through Kronos you will see that there's a middle person, a well. So he was the extra.

Sure. So would it be fair to say that he was just assisting - - -?---Yes.

- - - and an extra person?---Yep.<sup>131</sup>

<sup>130</sup> T 3 - 98, line 45 - T 3 - 99, line 27.

<sup>131</sup> T 3 - 101, line 23 - T 3 - 102, line 10.

[176] With respect to the expediter role, Ms Solar could not recall whether Mr Mateo was trained in the expediter role but concluded "I don't think so."<sup>132</sup>

[177] During cross examination, Mr Cross suggested to Ms Solar that Mr Mateo pushed trolleys past the supervisor's desk to which Ms Solar replied, "Possibly."<sup>133</sup> However, when questioned about the possibility of pushing a trolley with one arm, Ms Solar replied:

Mr Mateo had some deteriorating – the evidence before the court is he had a deteriorating left shoulder, which has got considerably worse in late February, early March. And he said that he – in his duties of pushing trolleys he would predominantly use his right arm, he might rest his left arm there, but all the pushing was done with the right arm. Why do you say that you couldn't do it with one hand?---I tried and it – it's just too difficult.

Yes. Okay?---It is really difficult.

So can you do it, but it's really difficult?---Very very difficult.

Is that because the forces of pushing it - - -?---Yeah. You haven't got control.<sup>134</sup>

[178] During re-examination, Ms Riedel questioned Ms Solar with respect to the trolleys:

But when you were working with him, did you ever see him pushing trolleys?---No.

Did you ever see him putting trays on the trolleys?---No.

And what position was he rostered in when you worked with him during that period?---There was either the two positions.

Yes?---So it was either the starter - - -

Yes?--- - - - or the middle.

Thank you. And you said in your cross-examination – you were asked whether he pushed trolleys after the first two weeks, and you said, "He might have"?---I didn't see it.

Okay. So you were only talking about, in terms of the ro – the days that you might have worked with him?---Yes.

Did you see him pushing the trolleys?---No. I do remember seeing him working on the line, and he was getting fruit from the line, and then we have a trolley that's got fruit and cups and everything on it. And I do recall seeing him reaching over and getting that. But that's - - -<sup>135</sup>

*Mr Jimmy Ruiz*

[179] Mr Jimmy Ruiz's evidence was that the expeditor role required training. He did not remember whether or not he had trained Mr Mateo in that role. Although Mr Ruiz confirmed that such training would have been conducted by a supervisor, if it had in fact been done.<sup>136</sup>

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<sup>132</sup> T 3 - 103, line 44.

<sup>133</sup> T 3 - 107, line 49.

<sup>134</sup> T 3 - 108, line 38 - T 3 - 109, line 3.

<sup>135</sup> T 3 - 110, line 20 - T 3 - 111, line 4.

<sup>136</sup> T 4 - 44, lines 23 - 37.

[180] Mr Ruiz could not recall whether he ever trained Mr Mateo to perform the expeditor role but stated Mr Mateo would not have been put in the role if he was not trained.<sup>137</sup>

[181] When questioned generally about employees placed on light duties, Mr Ruiz provided:

All right. So if you've got a person working on a shift with you who is on a restricted – light duties or has a return to work program, what do you get them to do?---We put them always in the middle.

Okay. And why's that?---Because it – you don't have to go into the dish room. You're – it's all light duties. Like, all the condiments are very light - - -

...

- - you'd never have someone on a return to work program or on light duties going and working in the dish rom?---No, definitely not.

And what about working on that expediter position?---Definitely not.

Would they be pushing trolleys?---No.

Would they be putting trays into trolleys?---No.

And what about if the lines – what about a sort of really busy day in the kitchen. Would the person who is on the restricted duties, would they be asked to do something other than the middle position?--No.

And what about if the return to work program says that they can do pushing, pulling trolleys and those sorts of things. What would – would that change what you got them to do?---When – when I have anyone with light duties, I – we're always putting them in the middle. If – if they're allowed to push a trolley, if it says work – their work back thing, yes, they would be able to. Because, usually, with the – when they have any kind of injuries, every couple of months or when they go to MEC, that could – that could change in a couple of weeks.<sup>138</sup>

[182] Mr Ruiz was questioned about his recollection of working with Mr Mateo during the period between when Mr Mateo injured his left and right shoulders:

Would – do you have any recollection of him doing any dishwashing during that period?---Not in my recollection, no.

No. Did you see him doing any dishwashing?---No.

Did you see him working on the expeditor position?---Expeditor? No.

No. Did you see him pushing trolleys?---No.

Did you see him putting trays into trolleys?---No.

And given – what about in circumstances – when he's working in the middle position, if there are items that he had to achieve that were located up higher- - -?---Mmm.

- - - what would have happened in those instances?---So when I start anyone on light duties in the middle – I remember when Lito was – when he first came onto light duties and we moved some stuff that were a little bit too high for him, we moved them down. So he would have been instructed,

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<sup>137</sup> Ibid lines 32 - 37.

<sup>138</sup> Ibid line 39 - T 4 - 45, line 23.



like I do to everybody, that if he struggled with anything, that he was to come to tell the supervisor  
 \_ \_ \_<sup>139</sup>

[183] When questioned about trolleys, Mr Ruiz explained:

And how would you describe pushing the trolley? Is it hard? Easy? Are they heavy? Light?---  
 They're just a normal trolley, yeah, but you have – you need both hands.

Okay. Have you tried to push it with one hand?---I tried once.

Yes?---I couldn't – I couldn't push it.

Okay. And what about putting the trays in the trolleys? Is that something you've done?---Yes.

And how would you describe that particular task?---Well, you have to be precise with the trays.  
 You need both hands, because that's the way we're meant to pick up the trays and that's - - -

Yeah?--- - - - how we train everyone and then you have to slot it in - - -

Okay?--- - - - and they go like that – so, yeah.

Sure. Is that something you can do with one hand?---No.<sup>140</sup>

[184] During cross-examination, Mr Ruiz was again questioned about the trolleys:

Mr Mateo was observed by an occupational therapist in performing the activities with the trolleys  
 – and I think it was on – at least one, but I think two, occasions where he was identified pushing  
 trolleys with one arm. You never saw that occur?---I never saw that.<sup>141</sup>

[185] During cross-examination, Mr Ruiz was also again questioned about Mr Mateo's duties:

He was doing other duties with restrictions?---When Lito worked with me, he always worked in the  
 middle.

Yeah. I suggest to you he was doing other activities other than that; he was doing those activities  
 under the duties in those return to work plans. Do you - - -?---I can't – I can't recall him doing any  
 other duty - - -

All right?--- - - - but the middle, sorry.<sup>142</sup>

*Mr Vincent Hall*

[186] Mr Vincent Hall's evidence was that the expeditor role required training<sup>143</sup> and also  
 expressed the importance of the role.<sup>144</sup> Mr Hall could not recall whether Mr Mateo was  
 trained in the performance of the expeditor role.<sup>145</sup> Mr Hall was subsequently advised

<sup>139</sup> T 4 - 50, line 46 - T 4 - 51, line 17.

<sup>140</sup> T 4 - 52, lines 14 - 33.

<sup>141</sup> T 4 - 59, lines 43 - 46.

<sup>142</sup> T 4 - 62, lines 14 - 21.

<sup>143</sup> T 4 - 8, line 23.

<sup>144</sup> Ibid lines 14 - 15.

<sup>145</sup> T 4 - 21, lines 19 - 20.

that it was Mr Mateo's evidence that Mr Hall had trained him in the expeditor role to which Mr Hall confirmed - "I don't have recollection of that. No."<sup>146</sup>

[187] When questioned generally about employees subject to return to work plans, Mr Hall explained:

Okay. So if you've got someone who's on a return to work plan when you're starting your shift, is there anything that you do in relation to that?---So we make sure that – so someone who is on a return to work, we generally – so where they're stationed, they'll be in the middle. So we've always had the middle person, like, assisting the middle person or working around them, a floater person as well. So that'll just be leading things up, condiments, all that sort of stuff – light duties. Yep.<sup>147</sup>

...

Yes. So if a person's on restricted duties are they going to be working in the dishwashing room?---Well, the dishwashing room is – no. Unless – yes. No. No.

And what about on the expediter position? Would they work in the expediter position?---No.

Would they push trolleys?---No.

Would they put trays into trolleys?---No.<sup>148</sup>

...

And is that the case for other roles when you're working – when you have someone on light duties? Are they in a particular role, or - - -?---So that's just roles that we had set out for anyone who is on light duties, that we would sort of buddy them up in the middle, general – always on the public side – and then they would assist with the floater area according to their restrictions and incidents, yes.

Sure. So when you say buddying them up, so what do you mean by that?---So they'd be like a subservient person to that person who's in that role already.

Okay. So they're not actually doing that role?---No.

They're just helping. Okay?---Yes.<sup>149</sup>

[188] When queried specifically about his recollection of working with Mr Mateo, Mr Hall stated:

Sure. So on the times that you worked with Mr Mateo, and based upon this document we can see that you worked with Mr Mateo on the 1st of March?---Correct.

And you worked with Mr Mateo only for half an hour on the 7th of March 2019 between one and 1.30. And similarly on the 8th of March?---Yep.

And then for a couple of hours on the 11th of March?---Correct.

Yes. So when you were working with Mr Mateo on those particular dates, what – do you have any recollection of what position he would have been working in?---So to my recollection he would have been in the middle. Then again, it is going back a few years and particular time and dates are quite hard to recall.

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<sup>146</sup> Ibid lines 22 - 23.

<sup>147</sup> T 4 - 7, lines 14 - 19.

<sup>148</sup> T 4 - 8, lines 35 - 43.

<sup>149</sup> T 4 - 13, line 41 - T 4 - 14, line 6.

Sure. And over that period, from when he injured his left shoulder on the 19th of October 2018 right through to the 11th of March 2019, if Mr Mateo was on a return to work program, based upon your usual practise, is there a particular role that he would have been working in?---So he would have been working in the middle. So he would have been a subservient person to the middle person in the [indistinct]

Sure. During that period from 19 October 2018 through to the 11th of March 2019, would he have been working in the dishwashing room?---Not that I can recall. No.

And would he have been working on the expediter position during those shifts?---Not that I can recall. No.

And would he be pushing trolleys during your shifts?---I can't recall him pushing trolleys.

Did you ever see him pushing a trolley during any shifts that you work - - -?---Not that I can recall. It's going back a few years, but I have no recollection of him pushing trolleys, so - - -

Would he have been putting trays into the trolleys?---Again, I can't recall him putting trays in the trolleys, no.

And during that period of 19 October 2018 right through to the 11th of March 2019, on – I appreciate your evidence earlier was that on some shifts it would have been busier than others, and you would have spent a lot of time at the table, at the supervisor's desk?---Correct.<sup>150</sup>

[189] With respect to pushing trolleys and the handling of trays, Mr Hall provided:

Yes. How would you describe pushing the trolley?---So you would have to have – so there's two handles on either side. So you would have to firmly hold both handles and manoeuvre it around. Because where, say on the public side, you would have to come down a bit of a corridor and then down another corridor as well.

Sure. Can you push the trolley with one hand?---Absolutely not.

Have you tried?---I personally haven't tried.

Yes?---But it's – the weight of those carts – there is no possible way that you could manoeuvre it around.

Sure. And what about putting the trays in the trolley. Have you done that task?---I have. Yes.

And how would you describe that?---So what you've got to understand with trays – so you'll have various different condiments. You've got hot water. You've got a base. You've got cutlery. You've got things that will throw a tray out of – out of whack, essentially. So there's – you need to firmly hold – two hands – on a tray before allocating it to a cart.<sup>151</sup>

[190] Mr Hall was also queried about an increase in Mr Mateo's suitable duties:

Yeah. Mr Hall, I suggest to you that as the suitable duties plans were expanded, the duties required expanded and over period of time – and I can go back and identify the other plans – Mr Mateo's duties increased. His restrictions were still in place, but he was performing duties on the expediter line. He was performing duties of placing trays into trolleys, and he was performing duties of pushing trolleys?---So that's something that, again, Joselito and the team leader or injury management claim would discuss, and we would make sure that, sort of it, it was adhered to, what their restrictions are.

<sup>150</sup> T 4 - 19, line 24 - T 4 - 20, line 14.

<sup>151</sup> T 4 - 22, lines 3 - 22.

...

- - - the duties increased over time, if you refer to the return to work plans?---Yep.

The restrictions were always in place, and over a period of time, his duties increased to those duties identified in each of those return to work programs. Do you accept that?---If that's what was stated, that would be correct.<sup>152</sup>

[191] During cross-examination, Mr Hall was queried about Mr Mateo's role specifically:

All right. So they still push the trolleys. They still put trays into the trolleys. They still work on the expediter line?---No, they assist someone in the middle. So they would be - - -

...

Yeah. I suggest to you that Mr Mateo's activities were not restricted to being in the middle section of the expedit - - -?---I can't – I'm sorry. I can't recall that. So - - -

All right. Well, I'll just put the question, because I have to put my case to you - - -?---Yep.

- - - and I understood your answer. The suggestion to you is that Mr Mateo was not limited in his role to number 2 position on the expediter line. He was performing tasks such as pushing trolleys, putting trays into trolleys?---Again, I have no – I don't have a recollection of that.<sup>153</sup>

[192] During re-examination, Mr Hall confirmed:

So in those plans, they include things like pushing and pulling trolleys and working in the dishwashing room?---Again, we would rather have someone working sort of a subservient person to the middle and get a bit of a range of tasks. I don't recall Mr Mateo pushing or allocating trays to carts, no.

Okay. And it was put to you as well that the return to work plans indicate that over a period of time, the duties that Mr Mateo could do increased, his restrictions remained, and his hours at work increased as well. And I think you're – in those circumstances where you've got this increase of duties in terms of what someone could do, would someone who's on light duties still be put in the middle role?---So we've always had – so that's just been our go-to, as far as anyone on restricted or light duties would always be put in the middle role, subs – subservient person, sorry.<sup>154</sup>

...

Yeah. So during that three and a-half hours that you were working with Mr Mateo on the 11th of March 2019, was he – did you see him working on the expediter position?---Not that I can recall, no.

Did you see him pushing any trolleys?---No, I didn't see him pushing trolleys that – I can't recall him pushing trolleys on that day, no.

Did you see him putting cutlery and taking orders of patients and working the starter line?---Not that I can recall.<sup>155</sup>

[193] The Appellant submits that Mr Hall had extreme difficulty with his recollection of Mr Mateo and contends that Mr Hall's evidence does not support the Respondent's case.<sup>156</sup>

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<sup>152</sup> T 4 - 29, lines 14 - 34.

<sup>153</sup> T 4 - 32, line 45 - T 4 - 33, line 12.

<sup>154</sup> T 4 - 35, lines 17 - 27.

<sup>155</sup> T 4 - 36, lines 37 - 38.

<sup>156</sup> Appellant's Submissions, 21 September 2021, 7 [41] with reference to T 4 - 34, lines 35 - 40.

*Ms Tracey Ceh*

[194] In her email to WorkCover dated 19 March 2019, Ms Tracey Ceh stated that Mr Mateo's restricted duties tasks included "placing the trays into the trolley..." and "Occasional moving of the trolley approximately 10 metres to the dispensing area."<sup>157</sup>

[195] That is consistent with Ms Ceh's notes of 4 December 2018 as follows:

Advised Lito of upgraded duties as per Leanne Loch to include making sandwiches in the larder, expediter, line, pushing trolleys 10 to 15 metres in kitchen. Discussed no work in wash/dish area or pot scrubbing and no lifting above chest height in pantry and pot wash area. Discussed need to split heavy meal trays and to only place trays onto trolleys at or below chest height.

...

Discussed that Leanne has provided instruction on pushing trolleys and he was to work within these guidelines and he confirmed that he had been provided with this instructions.<sup>158</sup>

[196] Ms Ceh also confirmed at the Hearing that she had no doubt that Mr Mateo was putting trays into trolleys and pushing trolleys. She said "That's correct. I was down there when Leanne Loch went through with him how to push the trolleys."<sup>159</sup>

[197] Ms Ceh's evidence appears to support Mr Mateo's claim that he was pushing trolleys and stacking meal trays.

*Ms Leanne Loch*

[198] In the Functional Capacity Assessment Report dated 4 January 2019, Ms Leanne Loch recorded that Mr Mateo was coping well with his suitable duties program "on the plating line and expediter duties in the Mater Kitchen."<sup>160</sup>

[199] With respect to dishwashing functional tasks capability, Ms Loch stated that Mr Mateo performed tasks "(mostly with the dominant right hand)."<sup>161</sup>

[200] Ms Loch also reiterated the injury management advice for manoeuvring carts around corners as:

...step around and use two hands on the vertical hand rails at waist-height to avoid torsional force at the shoulders. Carts should not be pushed with right hand alone.<sup>162</sup>

[201] Ms Loch's 4 January 2019 report made reference to the functional tasks of "Bench work", "Pushing / pulling", "Bending" and "Squatting" "As previously assessed".<sup>163</sup> She also referred to "Work duties" as previously reported.

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<sup>157</sup> Exhibit 1, 140.

<sup>158</sup> Ibid 267.

<sup>159</sup> T 2 - 82, lines 23 - 28.

<sup>160</sup> Exhibit 1, 108.

<sup>161</sup> Ibid 109.

<sup>162</sup> Ibid 110.

<sup>163</sup> Ibid 109.

[202] In the earlier Functional Capacity Assessment Report dated 29 November 2018, Ms Loch noted that "While on suitable duties, Mr Mateo has worked on the plating line at the starter and middle stations. He has been restricted from the expediter station due to the need to push the trolley a short distance of 10 – 15 m. He remains restricted from dishwashing and pot washing."<sup>164</sup>

[203] In her earlier report, Ms Loch had also assessed Mr Mateo with a demonstrated capacity to lift items "less than 5 kg with the weight mostly taken on the right hand and only when working below chest height". With respect to bench work, Mr Mateo was assessed as "No limitation or compensatory movement observed when working below chest height with tasks that are completed mostly with the dominant right hand." Ms Loch also commented about Mr Mateo's capacity to push and pull the food trolleys as follows "Demonstrated capacity to push and pull wheeled meal carts 10 – 15 m with no compensation and no provocation of symptoms. Task involves low exertion, no torsional force (because there is space to step to change cart direction) and is performed only occasionally, over a short distance."<sup>165</sup> Those earlier assessments were referenced in Ms Loch's subsequent report.

[204] My consideration of those two reports is that Ms Loch's advice would be seemingly superfluous if Mr Mateo's tasks did not include pushing trolleys and working expediter duties.

*Ms Alison Devereaux*

[205] Ms Devereaux's evidence was that on 1 April 2019 Mr Brendan Host told her that Mr Mateo was pushing trolleys from the end of the line to the door, though nothing he was doing would have been more than one kilogram.<sup>166</sup>

[206] Ms Devereaux also spoke with Mr Mateo as part of her investigations in April 2019 and was told that "His suitable duties have been putting food on trays, putting trays on trolleys, pushing and pulling trolleys from the line to the delivery area."<sup>167</sup>

[207] On 2 July 2019, Mr Host told Ms Devereaux that he did not have any staff on suitable duties pushing trolleys with one hand and he would not have staff do this task while on suitable duties.<sup>168</sup>

[208] Ms Devereaux's evidence was that Mr Host gave her two different accounts of Mr Mateo's duties.

*No co-workers called*

[209] Mr Mateo did not himself call any co-workers to give evidence as to what duties he was undertaking or what position on the line he was working in prior to his right shoulder injury.

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<sup>164</sup> Ibid 97.

<sup>165</sup> Ibid 98.

<sup>166</sup> T 1 - 102, lines 1 - 10.

<sup>167</sup> Ibid lines 36 - 43.

<sup>168</sup> T 1 - 103, lines 1 - 11.

[210] I have also noted that whilst Mr Mateo's evidence was that a co-worker had indeed trained him in the expeditor position, he did not name that person other than to say it was not a supervisor. Mr Mateo understood the significance of the expeditor position and that training was required to perform the role. Surely the importance of demonstrating Mr Mateo had been trained in that role was also understood. That claim could be readily supported by calling the unnamed co-worker as a witness in this matter.

**Medical opinions about whether favouring his right side to perform the work duties, whilst recovering from his left shoulder injury, contributed to Mr Mateo's right shoulder injury**

[211] The medical experts in this case were divided as to whether or not 'favouring' his right side to perform the work duties, whilst recovering from his left shoulder injury, contributed to Mr Mateo's right shoulder injury.

[212] Though that inquiry was ultimately overtaken by the question of whether or not Mr Mateo established that he was using his right arm above 60 degrees under a load.

*Dr Mark Robinson*

[213] Dr Robinson's view was that Mr Mateo protected his injured left arm and predominantly used his right arm for most restricted duties, causing the right shoulder to become symptomatic.

[214] In Dr Robinson's view, that was the significant contributing factor to the development of Mr Mateo's right shoulder symptoms.<sup>169</sup>

[215] Dr Robinson said that it was a "preposterous assumption" that "because someone can walk comfortably for two kilometres on two legs, they should be able to hop comfortably on one leg for one kilometre."<sup>170</sup>

[216] In Dr Robinson's report of 26 September 2019, he stated that Mr Mateo "...has an element of age and activity-related degeneration." At the Hearing, Dr Robinson clarified this to mean simply that the degeneration was not unusual to Mr Mateo's age, saying "Basically, he's 52 years old or something like that, and his shoulder isn't the same as a 25 year olds. So a 25 year old doing the same activity probably wouldn't have any symptoms. That's the point I make there."<sup>171</sup>

[217] Dr Robinson's evidence at the Hearing was that:

...Mr Mateo's symptoms became significantly worse immediately after the left shoulder operation, because I put that arm in a sling for six weeks. He could not use his left arm for anything. So he was using his right arm for everything, both at home and when he back to light duties at work. So actually, his right shoulder became more symptomatic not whilst he was on light duties, but – when he wasn't working, but because his left arm was out of action completely.<sup>172</sup>

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<sup>169</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 9 [14] - [15].

<sup>170</sup> Exhibit 1, 162.

<sup>171</sup> T 2 - 32, lines 35 - 46.

<sup>172</sup> T 2 - 33, lines 28 - 34.

- [218] However, with respect to the timing of that occurrence, Mr Mateo's left arm was not in a sling until his operation on 4 April 2019 – after he alleges the right shoulder condition occurred in the period between 20 October 2018 and 11 March 2019.
- [219] Dr Robinson's evidence was that he recommended an operation to Mr Mateo's left shoulder be done in November 2018, but that he put it off until April 2019 as he was trying to get it to settle down non-operatively. Dr Robinson said that whilst Mr Mateo was "...participating in that suitable duties program with increasing hours, his right shoulder became symptomatic, as you've said, on the 11<sup>th</sup> of March. He reported that to me on the 13<sup>th</sup> of March, and then within two weeks, or just over two weeks, I was operating on his left arm...The arm was immobilised in a sling completely for six weeks, and during that period of time, the symptoms in his right arm deteriorated whilst he wasn't at work."<sup>173</sup>
- [220] Dr Robinson rejected the proposition that Mr Mateo would have had a similar right shoulder condition to what he experiences now as a result of the degenerative aging process. He said "No, because his work in the kitchen caused the problem in his left shoulder. If he didn't have a problem in his left shoulder, then he may not be having any problems with his right shoulder."<sup>174</sup>
- [221] Dr Robinson's report of 14 March 2019 contained no description of the tasks performed at the time of Mr Mateo developing right shoulder symptoms.<sup>175</sup>

*Dr Bruce Low*

- [222] Dr Bruce Low diagnosed Mr Mateo's right shoulder injury as an aggravation because he was using his right arm in preference to his injured left shoulder, whilst working on restricted duties.
- [223] Dr Low's view was that Mr Mateo's right shoulder injury was clearly work related.<sup>176</sup>
- [224] In his 30 September 2020 report, Dr Low stated that Mr Mateo had advised him that he was working the same duties as other staff on 11 March 2019 and he used his right arm in preference to his injured left shoulder.
- [225] Dr Low opined "In treating persons with one bad shoulder I have very frequently observed that when using the other good limb it can become symptomatic. They overuse the good limb in protecting the injured limb. I agree with Dr Robinson that in protecting his injured left shoulder and predominantly using his right arm for most suitable duties has led to the development of symptoms in the right shoulder. The occupational exposure, light duties and immobilisation of the left shoulder was a significant contributing factor to the development of the right shoulder symptoms."<sup>177</sup>

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<sup>173</sup> T 2 - 50, lines 23 - 33.

<sup>174</sup> Ibid lines 43 - 46.

<sup>175</sup> Exhibit 1, 138.

<sup>176</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 8 [15A].

<sup>177</sup> Exhibit 1, 191.



[226] Dr Low's report was the last of the four medical expert reports in evidence in this matter, with that examination occurring approximately one and a half years after the right shoulder symptoms reported on 13 March 2019.

*Dr Brett Halliday*

[227] In his report dated 16 September 2019, Dr Halliday noted Mr Mateo had said that he developed "pain in his right shoulder from exclusive use while his left shoulder was in pain."<sup>178</sup>

[228] It was put to Dr Halliday that "...If a person who hasn't had symptoms for 10 years is then performing activities which are double what he was previously required to use to – to use with his right arm, and as a consequence of that, he then suffers symptoms, are you saying in that context there's no injury?" To which Dr Halliday replied "I can't identify a work-related injury in this case. The symptoms didn't come on gradually. "This week it's a bit sore. It's getting a bit sorer." It happened on one particular day."<sup>179</sup>

[229] At the Hearing, Dr Halliday was asked to comment on Dr Robinson's opinion that Mr Mateo's right shoulder condition was work-related over a period of time resulting in symptoms on 11 March 2019, with further aggravation after he was unable to use his left arm after the April 2019 surgery. Dr Halliday stated:

Well, that was my – the direct opposite of my opinion. I don't believe he has had an over-a-period-of-time injury to his right shoulder while he has been on a suitable duties program.

...

...I disagree with that statement. I believe it is – the right shoulder symptoms are constitutional, and I can't identify an injury while on light duties that could explain this.<sup>180</sup>

...

...you can't predict when a constitutional condition will become symptomatic. I would agree with that...I would see many new patients each week, middle-aged, with shoulder pain, who don't have jobs. They just – they don't work anymore, for whatever reason. They – they just have shoulder pain. So it's not occupational necessarily. Some are, some aren't. So it's a very common condition in the general population.<sup>181</sup>

[230] In conclusion, Dr Halliday explained:

And I use the opposite analogy, that if you build a house and put the washers in the taps, and 50 years later you turn off the tap and the tap drips, it's not the fault of the person who just turned the tap off.<sup>182</sup>

*Dr Desmond Soares*

[231] Dr Soares' report dated 16 April 2019 noted that Mr Mateo had stated that "he was virtually having to do the same as normal duties and claims and because he was pushing trolleys that he only used his right shoulder and developed pain in his right shoulder."<sup>183</sup>

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<sup>178</sup> Ibid 166.

<sup>179</sup> T 3 - 61, lines 38 - 43.

<sup>180</sup> T 3 - 60, lines 29 - 45.

<sup>181</sup> T 3 - 61, lines 8 - 18.

<sup>182</sup> T 3 - 62, lines 3 - 5.

<sup>183</sup> Exhibit 1, 146.

- [232] Dr Soares stated "There is no causal relationship between his left shoulder injury and the development of his right shoulder bursitis..."<sup>184</sup>
- [233] Dr Soares opined that "There is no basis for his claim that shoulder pain in the right shoulder is as a consequence of overuse secondary to his left shoulder injury."<sup>185</sup> Dr Soares referred to the AMA Guides to the Evaluation of Disease and Injury Causation, Edition 2, pages 763 – 766 and stated that "favouring" is not a reasonable cause for development of symptoms in the contralateral shoulder. "Thus, even if symptoms in the second limb develop after symptoms are present in the first limb (a temporal relationship), there is no scientific support for the concept that having symptoms in the first limb causes an increased rate of disease in the second limb."<sup>186</sup>
- [234] At the Hearing, it was put to Dr Soares that when your left shoulder is out of action, you're using your right shoulder more. Dr Soares disagreed with the proposition that simply using your right shoulder more is going to cause injury. His reasoning was that "...there's a number of reasons, but the – the most important one, I guess, is that the loads are not sufficient to – to cause acute damage over a very short period of time. Sure, over 10 years, 15 years, that would be the case. But not over a month or two months or three months."<sup>187</sup>

#### *Areas of agreement*

- [235] The four doctors agreed Mr Mateo had a pre-existing degenerative right shoulder condition. Doctors Low and Robinson agreed that the ultrasound and MRI images were consistent with a degenerative rotator cuff tear in a person around 50 years of age. Dr Halliday opined that such a constitutional condition could develop as part of the natural aging process, without any injury occurring at all.
- [236] The four doctors agreed that Mr Mateo's right shoulder symptoms and diagnosis of shoulder tendinitis were the same in October 2009 and March 2019.
- [237] The four doctors agreed that Mr Mateo's left shoulder symptoms in October 2012 and October 2018 were similar to, if not the same, as that experienced on 19 October 2019.
- [238] The four doctors agreed that the activities that were likely to cause an injury of the kind suffered by Mr Mateo in his right shoulder involved use of the shoulder while under a load, with the amount of stress being placed on the shoulder the critical factor. The doctors noted shoulder injuries typically occurred when the arm was being used above 60 degrees while forces were applied.
- [239] The four doctors were shown photographs of a person standing beside a trolley. The four doctors accepted that a person pushing a trolley with their arms in that neutral position was unlikely to result in excessive stresses being placed on the shoulder.
- [240] Doctors Soares, Halliday and Low noted that the symptoms associated with a degenerative rotator cuff tear would come and go over time.

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<sup>184</sup> Ibid 147.

<sup>185</sup> Ibid 146.

<sup>186</sup> Ibid.

<sup>187</sup> T 3 - 33, lines 16 - 27.

[241] Dr Soares and Dr Halliday did not consider the action of lifting meal trays and placing them in the trolleys likely to cause Mr Mateo's right shoulder injury.

[242] With respect to the split medical expert opinion as to the question of "favouring", Doctors Halliday and Soares rejected the suggestion – and Doctors Robinson and Low supported that view. However, as the Regulator submitted in closing:

The issue was ultimately resolved, however, by virtue of the doctors all agreeing that shoulder injuries typically occurred when the arm was used above 60 degrees under a load. Whether or not a particular arm is favoured is therefore irrelevant. All that truly matters is whether or not it is established by the evidence that the person was using the allegedly injured arm above 60 degrees, under a load. It is respectfully submitted that based upon the evidence adduced in this matter...Mr Mateo has not established that he was using his right arm above 60 degrees under a load.<sup>188</sup>

### **When did Mr Mateo report the right shoulder injury?**

*11 March 2019*

[243] Mr Mateo's evidence was that he worked a full eight hour day in the expediter position on 11 March 2019 and it was a really busy day.<sup>189</sup>

[244] Mr Mateo said "I didn't work as a supernumerary. I work as a regular and normal – normal employee that day."<sup>190</sup>

[245] Mr Mateo said that he didn't experience pain in his right shoulder during the shift on 11 March 2019 but added "Since it's really, really busy, cluttered, exhausted, my plan is just to go home and have some rest." Mr Mateo finished work at 4:30 pm and it was around 6 o'clock when at home that he felt pain in his right shoulder.<sup>191</sup>

[246] Mr Mateo's evidence was that he did not complain to any other person about his right shoulder pain nor go to the doctor about it that evening.<sup>192</sup>

[247] I found it odd that Mr Mateo did not complain to any other person about his right shoulder pain that evening, given that he lived with wife who was a nurse at the Mater<sup>193</sup> and also an adult daughter. It would have been quite normal for Mr Mateo to draw upon the expertise in his immediate family to ask his wife to have a look at his shoulder or for her advice about what to do or what to take for it. Even if Mr Mateo's prior experience with shoulder conditions meant he knew what to do about it without seeking his wife's assistance, there remains the matter of who was cooking the family's meal that evening. Mr Mateo told WorkCover on 14 March 2019 that his right shoulder was so sore that he "Had to rest for a while before I started doing the dinner and everything." Even if Mr Mateo did not draw upon his wife's experience as a nurse that evening, surely it would have been a simple matter for him to explain to his wife or adult daughter that his shoulder was sore from work that day and could one of them make dinner that night. In my view,

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<sup>188</sup> Respondent's closing submissions filed 6 October 2021, 11 [52].

<sup>189</sup> T 1 - 21, lines 14 - 28.

<sup>190</sup> T 1 - 22, lines 25 - 26.

<sup>191</sup> T 1 - 21, line 38 - T 1 - 22, line 5.

<sup>192</sup> T 1 - 22, lines 38 - 44.

<sup>193</sup> Exhibit 1, 184.

it simply does not ring true that Mr Mateo told no-one about his sore right shoulder that evening.

*13 March 2019*

[248] On 13 March 2019, Mr Mateo reported to Ms Tracey Ceh that "he had discomfort in his right shoulder after work on Monday..."<sup>194</sup> and that he had already seen Dr Robinson earlier that day.

[249] Dr Jeremijenko and Dr Robinson both provided Work Capacity Certificates dated 13 March 2019.

[250] Mr Mateo also reported his right shoulder condition to his supervisor, Ms Solar - "Zooky".<sup>195</sup>

[251] Ms Solar stated that Mr Mateo did not tell her he had any problems with his shoulders but then proceeded to indicate she was aware of the "first incident" which appears to be reference to the left shoulder injury.<sup>196</sup>

[252] Dr Robinson stated Mr Mateo first reported symptoms in his right shoulder on 13 March 2019 and that arose from protecting his injured left arm and predominantly using his right arm for most suitable duties.<sup>197</sup>

[253] The Regulator's position was that Mr Mateo did not raise any concerns in relation to his right shoulder prior to 13 March 2019, despite regular meetings to discuss his progress, check ins by supervisors and requirement to report any problems coping with the Return to Work program or increase in symptoms.

#### **When was Mr Mateo required to report it?**

[254] The RTW programs signed by Mr Mateo required "Should symptoms or pain levels increase during this plan, you must see your Supervisor immediately and contact the Rehabilitation Advisor."<sup>198</sup>

[255] Ms Tracey Ceh confirmed that the usual procedure was to report any concerns to the supervisor "immediately".<sup>199</sup>

#### **What accounted for the delay in doing so?**

[256] Having finished work at 4:30 pm on 11 March 2019, Mr Mateo was already at home when he stated his right shoulder became sore at about 6 pm that evening.

[257] He was not rostered to work on 12 March 2019.

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<sup>194</sup> Ibid 271.

<sup>195</sup> T 1 - 24, line 40.

<sup>196</sup> T 3 - 104, lines 14 - 20.

<sup>197</sup> WCR Notice of Appeal filed 27 November 2019, Annexure A, 3 [15].

<sup>198</sup> Exhibit 1, 104.

<sup>199</sup> T 2 - 80, lines 42 - 45.

[258] Upon his return to work on 13 March 2019, Mr Mateo's evidence was that he did report his right shoulder pain to Ms Solar, after speaking with Ms Ceh.

[259] He also obtained Work Capacity Certificates from Dr Robinson and Dr Jeremijenko dated 13 March 2019.

[260] I do not find it unreasonable that Mr Mateo waited until his return to the workplace to report his right shoulder soreness to his employer.

[261] When Mr Mateo had hurt his left shoulder previously on 17 October 2018 during an evening shift, he reported that he had finished his shift "and expected the discomfort to settle" but eventually sought medical assistance two days later. With that in mind, it is not remarkable that Mr Mateo took essentially the same approach on the next occasion.<sup>200</sup>

### **Mr Mateo's prior medical history**

#### *Right shoulder*

[262] Mr Mateo was diagnosed with right shoulder tendinitis on 30 October 2009.<sup>201</sup>

[263] At the Hearing, Dr Robinson accepted that the diagnosis of right shoulder tendinitis is the same or extremely similar to Mr Mateo's latest presentation.<sup>202</sup>

[264] For the next ten years, Mr Mateo reported no further pain or symptoms to his right shoulder until 11 March 2019.<sup>203</sup>

[265] Dr Robinson opined that even if Mr Mateo had some age related degeneration, the use of the right shoulder (whilst he was rehabilitating his left shoulder) was the causative event of it becoming symptomatic.<sup>204</sup>

#### *Left shoulder*

[266] Mr Mateo had sought medical attention for left shoulder pain on several occasions since 2012.<sup>205</sup>

[267] Mr Mateo was diagnosed with tennis elbow in the context of his left lateral and medical epicondyle being tender on 2 July 2012. He made a workers' compensation claim with respect to that condition.<sup>206</sup>

[268] He was diagnosed with left shoulder muscular strain on 4 October 2012.<sup>207</sup>

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<sup>200</sup> Exhibit 1, 90.

<sup>201</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 3 [4aa].

<sup>202</sup> T 2 - 51, lines 17 - 20.

<sup>203</sup> Appellant's Closing Submissions, filed 21 September 2021, 1 [5].

<sup>204</sup> Appellant's Amended Statement of Facts and Contentions, filed 26 July 2021, 9 [14].

<sup>205</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 3 [4].

<sup>206</sup> Exhibit 1, 24, 321,

<sup>207</sup> Ibid 25.

- [269] Mr Mateo was referred to physiotherapy in relation to left shoulder muscular strain on 13 June 2013.<sup>208</sup>
- [270] Mr Mateo experienced left shoulder pain said to have commenced in July 2018 that revealed a partial thickness supraspinatus tendon tear and subacromial / subdeltoid bursitis.<sup>209</sup>
- [271] He also had previous trigger finger releases.<sup>210</sup>
- [272] The Regulator submitted that Mr Mateo's pre-existing left shoulder injury was the same or similar to the condition identified in an MRI and diagnosed by Dr Robinson in November 2018.<sup>211</sup>

*Disclosure to WorkCover, medical practitioners and others*

- [273] The Regulator submitted that Mr Mateo denied any pre-existing left shoulder injury in his WorkCover application and thence to several medical practitioners and an allied health professional in the months that followed.<sup>212</sup>
- [274] On 30 October 2018, Mr Mateo told WorkCover he had not suffered from any previous injuries. His evidence at the Hearing was that he had denied any previous injuries to WorkCover because "An injury is something like – that happened when you're doing something or – but at this time – this, nothing, no injury. I don't need to report any." Mr Mateo was asked why he hadn't disclosed his prior history of shoulder problems to WorkCover when asked, he replied "...I believe it's not an injury. It's just a normal sore shoulder. I just need to seek some advice on which – medicine I will take. It's just merely a sore shoulder, a normal one."<sup>213</sup>
- [275] I agree that Mr Mateo did not reveal that prior medical history to WorkCover.
- [276] It is also the case that Mr Mateo had already made two previous workers' compensation claims for two different conditions by that time. Mr Mateo was therefore familiar with the process for making a workers' compensation claim. I found Mr Mateo's response as to why he had not made the appropriate disclosure to WorkCover to be quite disingenuous.
- [277] Dr Robinson's report dated 16 November 2018 noted that Mr Mateo denied a history of previous injuries to his left shoulder.<sup>214</sup>
- [278] Dr Halliday's report dated 16 September 2019 stated that "There is no past history before his employment at the Mater Hospital of any shoulder issues."<sup>215</sup>

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<sup>208</sup> Ibid 26.

<sup>209</sup> Ibid 13.

<sup>210</sup> Ibid 91.

<sup>211</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 3 [4b].

<sup>212</sup> Ibid 4 [4c].

<sup>213</sup> T 1 - 13, lines 6 - 36.

<sup>214</sup> Exhibit 1, 90 - 93.

<sup>215</sup> Ibid 168.

- [279] Dr Low's report dated 30 September 2020 included the background that Mr Mateo has had shoulder and elbow injuries", though noted that Mr Mateo "had no shoulder trouble like this in the past".<sup>216</sup>
- [280] Ms Loch's report dated 29 November 2018 noted that Mr Mateo reported no other joint problems and no prior history of shoulder pain.<sup>217</sup>
- [281] Dr Soares' report dated 16 April 2019 noted that Mr Mateo "has had a significant past medical history and was seen by me for a previous IME and a PI assessment for lateral epicondylitis. They were related to claim number [X]."<sup>218</sup> Dr Soares had prior knowledge of Mr Mateo's medical history.
- [282] In my view, it reflects poorly on Mr Mateo's credit that the only persons to whom he disclosed his prior medical history was Dr Soares (the doctor already aware of it) and Dr Low (the last medical expert to provide a report).

*Disclosure to Mater*

- [283] On 23 July 2018, Mr Mateo completed a pre-commencement medical history for the Mater.<sup>219</sup>
- [284] Mr Mateo signed the acknowledgement that he had disclosed all relevant information and that the information provided was true and correct.<sup>220</sup>
- [285] However, Mr Mateo did not respond at all to the question about whether there were any current or recent physical injuries or had required surgery.<sup>221</sup>
- [286] Neither did Mr Mateo respond to the question about whether he currently had or ever suffered from any significant medical conditions. I note that "Hearing conditions" and "Respiratory conditions" were two of the response options prompted, that would have been consistent with Mr Mateo's prior medical history records in evidence.<sup>222</sup>
- [287] On the same pre-commencement form, Mr Mateo denied suffering from any current medical conditions that may affect his ability to perform his role.<sup>223</sup>

**Did Mr Mateo's right shoulder injury arise out of, or in the course of, his employment at the Mater?**

*Appellant's position*

- [288] The Appellant submitted that the work activities Mr Mateo was given whilst on restricted duties were causative of his right shoulder injury.<sup>224</sup>

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<sup>216</sup> Ibid 183 - 194.

<sup>217</sup> Ibid 95 - 100.

<sup>218</sup> Ibid 146.

<sup>219</sup> Ibid 295.

<sup>220</sup> Ibid 296.

<sup>221</sup> Ibid 295.

<sup>222</sup> Ibid 296.

<sup>223</sup> Ibid.

<sup>224</sup> Appellant's closing submissions filed 21 September 2021, 15 [79].

[289] It was further asserted that Mr Mateo was "pushing food trolleys and placing trays into food trolleys whilst on restricted duties. The Appellant gave a consistent version to his doctors, his employer and to WorkCover."<sup>225</sup>

*Regulator's position*

[290] The Regulator submitted that the right shoulder injury did not arise out of, or in the course of, employment because:

- Mr Mateo "has not identified any specific task that he was undertaking when he first experienced the alleged onset of right shoulder pain";
- Mr Mateo "did not report any injury or incident to his employer until 13 March 2019, some two days after he first allegedly experienced the onset of right shoulder pain";
- Mr Mateo "asserts that his right shoulder first felt sore when he arrived home after work";
- Mr Mateo "did not report his right shoulder symptoms until two days after they first arose";
- Mr Mateo "was performing restricted duties on 11 March 2019";<sup>226</sup> and
- the orthopaedic experts concur that "Mr Mateo suffers from a pre-existing degenerative rotator cuff. In circumstances where Mr Mateo did not identify a specific event giving rise to an injury, [the orthopaedic experts] explained that such a condition was typically caused by use of the arm at angles in excess of 60 degrees to the axis of the body, under a load."<sup>227</sup>

*Arising out of his employment*

[291] In *Linke v Simon Blackwood (Workers' Compensation Regulator)*,<sup>228</sup> Commissioner Neate said:

...an injury is said to arise out of employment where there is a causal connection between the employment and the injury although the words arising out of do not require the direct or proximate relationship which would be necessary if the phrase used was caused by;

In *Morrison*, he went on to say that there must be some causal or consequential relationship between the worker's employment and the injury.<sup>229</sup>

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<sup>225</sup> Ibid 9 [52].

<sup>226</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 31 [43a].

<sup>227</sup> Respondent's Closing Submissions filed 6 October 2021, 14, [75] - [76].

<sup>228</sup> [2014] QIRC 181; quoted in LexisNexis, *Industrial Law Queensland*, 110,124, [71,005].

<sup>229</sup> *Morrison v Workers' Compensation Regulator* [2016] QIRC 065.



[292] As observed by Jordan CJ and Roper J in *Nunan v Cockatoo Docks and Engineering Co Ltd*<sup>230</sup>, "Was it part of the injured persons employment to hazard, to suffer, or to do that which caused his injury? It must arise out of the work which the worker is employed to do – out of his service."<sup>231</sup>

*Arising in the course of his employment*

[293] It has been said that "It has generally been accepted that these words do not require a causative element but a temporal one..."<sup>232</sup>

[294] Commissioner Neate explained in *Morrison*<sup>233</sup> that:

An injury "in the course of employment" means an injury sustained while the worker is engaged in the work that he or she is employed to do or in something which is concomitant of, or reasonably incidental to, the person's employment to do that work.

*Consideration of the Appellant's position*

[295] I cannot accept the Appellant's submission that Mr Mateo gave a consistent version of his work duties to his doctors, his employers and to WorkCover. That was not the case. Mr Mateo recorded in the Incident Report<sup>234</sup> that he was "making juices and working on the line" (the reference to the "juices" would seemingly indicate he was working the middle position on the plating line).

Mr Mateo told Dr Robinson that he started to develop symptoms in his right shoulder after working an eight hour day and in the Work Capacity Certificate the mechanism of injury was said to be "Injury lifting at work".<sup>235</sup>

Mr Mateo told Dr Jeremijenko he had been "Putting things inside trays. Putting them onto trolleys."<sup>236</sup>

Mr Mateo told WorkCover that he was "On started (sic) and expediter line, pushing and pulling the trolleys" and also attributed soreness in his right shoulder to working the "full 8 hours Monday 11 March 2019".<sup>237</sup>

The various accounts of work tasks performed in the relevant period have been detailed at paragraphs [132] – [193] and need not be repeated here in full.

*Consideration of the Regulator's position*

[296] There is also some issues with the Regulator's arguments on this question.

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<sup>230</sup> (1941) 41 SR(NSW) 119.

<sup>231</sup> LexisNexis, *Industrial Law Queensland*, 110,116, [71,005].

<sup>232</sup> Ibid.

<sup>233</sup> *Morrison v Workers' Compensation Regulator* [2016] QIRC 065.

<sup>234</sup> Dated 13 March 2019.

<sup>235</sup> On 13 March 2019.

<sup>236</sup> Ibid.

<sup>237</sup> On 14 March 2019.

[297] While it is true that Mr Mateo "has not identified any specific task that he was undertaking when he first experienced the alleged onset of right shoulder pain", that is not required here. As Industrial Commissioner Hartigan observed in *Tuesley v Workers' Compensation Regulator*:

It is accepted that an injury may occur over time. As such, the matters leading up to when the injury is sustained, albeit over a period of time may be considered relevant to the causation of that injury.<sup>238</sup>

[298] The Regulator had submitted that Mr Mateo "did not report any injury or incident to his employer until 13 March 2019, some two days after he first allegedly experienced the onset of right shoulder pain."

Mr Mateo had told his employer in February and March 2019 that he did have problems doing a work task, although I note that was after he had started to agitate for a reduction in weekly working hours due to a separate matter of bank loan repayment arrangements.<sup>239</sup>

[299] The Regulator had submitted that Mr Mateo "asserts that his right shoulder first felt sore when he arrived home after work" but that he "did not report his right shoulder symptoms until two days after they first arose."

While it is true that Mr Mateo did not report any shoulder soreness to the Mater or a medical practitioner until 13 March 2019 when he was next rostered to work, I do not find that in itself problematic for the reasons I have explained at paragraphs [256] – [261] of this Decision. Mr Mateo's actions this time were consistent with the approach taken previously in October 2018 when he hurt his left shoulder.

What I do find remarkable is that Mr Mateo did not complain about his sore shoulders to either his wife, who is herself a nurse at the Mater, or to his adult daughter, who resides with her parents. I have explained my reasons at paragraphs [246] – [247] of this Decision.

[300] The Regulator had submitted that Mr Mateo "was performing restricted duties on 11 March 2019."<sup>240</sup>

Mr Mateo's RTW Plans were signed and approved by his treating medical specialist, Dr Robinson.

While I accept that is the case, the rather broad scope of Mr Mateo's RTW Plan did include "handling meal trays at expediter station" in the current iteration of approved tasks as at that date.<sup>241</sup>

I have earlier in this Decision recounted Ms Ceh's evidence that Mr Mateo's restricted duties included pushing trolleys, at paragraphs [194] – [196].

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<sup>238</sup> [2021] QIRC 071, [16].

<sup>239</sup> See paragraphs [75] - [76] of this Decision.

<sup>240</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 31 [43a].

<sup>241</sup> See paragraphs [136] - [139] of this Decision.

I have earlier in this Decision recounted Ms Loch's Functional Capacity Assessment Report with respect to how Mr Mateo was coping with his restricted duties program "on the plating line and expediter duties", including his "Demonstrated capacity to push and pull wheeled meal carts 10 – 15 m with no compensation and no provocation of symptoms..." reiterating the injury management advice for manoeuvring carts around corners using both hands, at paragraphs [198] – [203].

I have earlier in this Decision recounted Ms Devereux's evidence was that Mr Host had told her that Mr Mateo was pushing trolleys from the end of the plating line to the door, although Mr Host had later recanted from that statement, at paragraphs [205] – [208] of this Decision.

[301] The Regulator has concluded that the orthopaedic experts concur that "Mr Mateo suffers from a pre-existing degenerative rotator cuff. In circumstances where Mr Mateo did not identify a specific event giving rise to an injury, [the orthopaedic experts] explained that such a condition was typically caused by use of the arm at angles in excess of 60 degrees to the axis of the body, under a load."<sup>242</sup>

A specific event giving rise to an injury is not required, as earlier addressed in *Tuesday*.

However, Mr Mateo has not proved to the required standard that his right shoulder condition was caused by use of the arm at angles in excess of 60 degrees to the axis of the body, under a load.

I will elaborate on my reasons later in this Decision, with respect to the question of whether or not Mr Mateo's employment was the significant contributing factor to his right shoulder condition.

*Consideration - Arising in the course of his employment*

[302] Mr Mateo was diagnosed with right shoulder tendinitis on 30 October 2009.

[303] Mr Mateo started work at the Mater as a food service assistant from 30 July 2018.

[304] He performed the full range of duties of that position until his left shoulder was injured in the pot wash on 19 October 2018 (although Mr Mateo later swore this left shoulder injury occurred over time between 30 July 2018 and 19 October 2018).

[305] After 20 October 2018, Mr Mateo was placed on restricted duties. The scope of those duties were detailed in successive RTW Plans and Functional Capacity Assessment reports were also prepared.

[306] Mr Mateo did not report any further right shoulder pain or symptoms to a medical practitioner until 13 March 2019. That was some ten years after first being diagnosed with right shoulder tendinitis.

[307] The evidence before me supports the conclusion that Mr Mateo's right shoulder condition became symptomatic *after* he commenced work at the Mater.

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<sup>242</sup> Respondent's Closing Submissions filed 6 October 2021, 14 [75] - [76].

- [308] Bearing in mind that what is required here is a temporal element, not a causative one, it is the case that Mr Mateo's right shoulder injury arose "during" or "at a time when" he was employed at the Mater.
- [309] Further I accept that Mr Mateo's right shoulder condition arose whilst he was engaged in the work that he was employed to do in the relevant period.
- [310] In my view, Mr Mateo's right shoulder condition arose "in the course of" his employment at the Mater. I find that particular element to be satisfied.
- [311] To clear the hurdle of this test, it is sufficient for the Appellant to prove that the injury either arose "out of" or "in the course of" his employment. It need not be both.
- [312] As I have found that Mr Mateo's right shoulder condition arose "in the course of" his employment, consideration of the first limb of this test is not required here.
- [313] Notwithstanding that, there is clearly overlap in my consideration of whether Mr Mateo's work had some causal or consequential relationship to the onset of his right shoulder condition – and whether his employment was a significant contributing factor to it.
- [314] I will address those as twinned considerations below.

**Was Mr Mateo's employment a significant contributing factor to his right shoulder injury?**

- [315] My consideration now turns to whether or not Mr Mateo's employment was a "significant contributing factor" to his right shoulder condition, in accordance with the elements of a compensable "injury" so defined under s 32 of the Act.

*Appellant's position*

- [316] The Appellant submitted that even if Mr Mateo had some age related degeneration then the use of the left shoulder was the causative event of the right shoulder becoming symptomatic.
- [317] The Appellant noted that Dr Robinson had opined that Mr Mateo's "occupational exposure, light duties and post-operative immobilisation of his left shoulder was a significant contributing factor to the development of his right shoulder symptoms."<sup>243</sup>
- [318] Dr Robinson's file note was also referred to where he stated that "If people are doing light duties, often they are not using the injured arm so essentially 100% of the light duties are being performed by the opposite side which is likely to cause symptoms."<sup>244</sup>
- [319] Dr Low's report of 30 September 2020 "diagnosed an aggravation due to restricted duties whilst not being able to use his left arm when his left arm was sore." In his view, Mr Mateo's right shoulder condition was work-related and would require surgery. Dr Low

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<sup>243</sup> Appellant's Closing Submissions filed 21 September 2021, 9 [55].

<sup>244</sup> Ibid [54].

opined that Mr Mateo's right shoulder symptoms in October 2009 had "absolutely nothing" to do with the symptoms suffered in March 2019.<sup>245</sup>

*Regulator's position*

[320] The Regulator submitted that Mr Mateo's employment was not a significant contributing factor to the right shoulder injury because:

- it was "a pre-existing degenerative condition which would have arisen even if [he] was not performing any work related tasks";
- "Despite being absent from the workplace and not performing any tasks, both Dr Robinson and Dr Halliday noted that [Mr Mateo's] right shoulder condition continued to deteriorate";
- "Between October 2018 and March 2019, [Mr Mateo] was working fewer hours at the Mater and performing very restricted tasks",<sup>246</sup>
- the orthopaedic experts concur that Mr Mateo suffers from a pre-existing right shoulder condition;<sup>247</sup>
- Mr Mateo's right shoulder condition has been symptomatic since 2009<sup>248</sup> and his evidence was that shoulder pain was not an unusual experience for him,<sup>249</sup> and
- the Regulator stated that "In circumstances where there is a clear history of Mr Mateo experiencing right shoulder pain prior to 11 March 2019, it cannot be said that there has been an aggravation of his condition, namely it is not the case that an asymptomatic condition has been rendered symptomatic. In those circumstances, it is respectfully submitted that Mr Mateo has not established that an injury in the form of an aggravation was suffered."<sup>250</sup>

*Consideration*

[321] Earlier in this Decision, I have considered the question of whether Mr Mateo's right shoulder condition was an aggravation of the left shoulder condition - or an aggravation of an underlying degenerative condition.

[322] For the reasons explained at paragraphs [110] – [122], I have found that there has been an aggravation of Mr Mateo's pre-existing degenerative right shoulder condition.

[323] I have also found that the right shoulder condition arose "in the course of" Mr Mateo's employment at the Mater.

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<sup>245</sup> Ibid 9 - 10 [56].

<sup>246</sup> Respondent's Statement of Facts and Contentions filed 11 August 2021, 31 [43b].

<sup>247</sup> T 2 - 102, lines 39 - 41; T 2 - 105, lines 1 - 4; T 2 - 33, lines 40 - 47; T 3 - 16, line 30; T 3 - 38, lines 22 - 33.

<sup>248</sup> Exhibit 1, 15 - 16, 17 - 41.

<sup>249</sup> T 1 - 13, lines 31 - 36.

<sup>250</sup> Respondent's Closing Submissions filed 6 October 2021, 14 [73].

[324] However, those findings are not sufficient for Mr Mateo's appeal to succeed.

[325] Mr Mateo bears the onus of proving to the required standard that his employment was a significant contributing factor to the aggravation of his right shoulder condition that arose in the course of his employment.

[326] I have earlier referred to the explanation given by Deputy President Merrell in *Ribeiro*<sup>251</sup> as to the standard of proof required:

The balance of probabilities test requires a court to reach a level of actual persuasion and that process does not involve a mechanical application of probabilities.

[327] I have *not* reached a level of actual persuasion that Mr Mateo's employment was a significant contributing factor to his right shoulder condition.

[328] In my view, there are a number of aspects of Mr Mateo's account that simply do not ring true, and thence reflect poorly on his credit - or are otherwise problematic to his case, in that they perhaps raise more questions than answers. My reasons follow.

*a) Statutory Declaration - Timing*

[329] The Statutory Declaration sworn on 17 June 2021<sup>252</sup> recasting Mr Mateo's left shoulder injury as an 'over time' rather than 'set date' one was a curious development.

[330] I note that Mr Mateo's appeal was filed with the Industrial Registry on 27 November 2019, so his matter had already been on foot for quite some time. However, the Statutory Declaration was proximate to the filing of the Appellant's Amended Statement of Facts and Contentions about five weeks later.

*b) Statutory Declaration - Purpose*

[331] Given the right shoulder condition was said to be the same pathology as the left shoulder, one wonders if the accepted left shoulder injury is now said to have occurred 'over time' to bolster the plausibility of a right shoulder injury 'over time', absent any particular right shoulder injury 'event' occurring on 11 March 2019 – other than Mr Mateo working "a full 8 hours" and the work tasks that he allegedly performed.<sup>253</sup>

*c) Statutory Declaration - Contradicts previous account of left shoulder injury*

[332] An obvious effect of the Statutory Declaration is that it contradicts Mr Mateo's account of his left shoulder injury made to WorkCover and various others, at a time proximate to the injury 'event' in the pot wash.

[333] Mr Mateo had not complained of any shoulder pain in the few months between commencing at the Mater and the 19 October 2018 'event' - yet his Statutory Declaration claims the left shoulder injury occurred over that entire period, commencing from the

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<sup>251</sup> *Ribeiro v Workers' Compensation Regulator* [2019] QIRC 203, [101], citing *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, [136].

<sup>252</sup> Exhibit 2.

<sup>253</sup> Paragraphs [105] - [106] of this Decision.

first day of his employment at the hospital. A cogent reason for Mr Mateo's changed claim has not been provided.

*d) Statutory Declaration - Disclosure*

[334] As Mr Mateo's Statutory Declaration now states that his left shoulder injury occurred 'over time' from 30 July 2018, it makes it even more odd that he did not disclose his prior shoulder conditions and answer all questions about his medical history on the Mater's pre-employment form dated 23 July 2018.<sup>254</sup>

*e) Statutory Declaration - Nature of condition*

[335] In my view, it also makes it more likely that Mr Mateo's shoulder conditions were pre-existing degenerative problems, attributed to "age or activity-related".

[336] Absent a specific injury 'event', it is altogether rather too neat to claim the onset of an injury commencing on precisely day one of his employment at the Mater. That is especially true in circumstances where Mr Mateo had only recently ceased in the position of Leading Hand at an abattoir just four months prior.<sup>255</sup>

*f) Prior medical history – Shoulders*

[337] Mr Mateo made many representations that he had no prior issues with his shoulders.

[338] Mr Mateo made that representation to WorkCover, Doctors Robinson and Halliday, to Ms Leanne Loch and (by omission) on the Mater pre-employment form.

[339] I recognise that Mr Mateo did reveal the prior problems with his shoulders to Dr Soares (upon whom he had previously attended for an IME consultation) and to Dr Low (the last medical expert to provide a report).

[340] Mr Mateo's concealment of the prior issues with his shoulders reflects poorly on his credit in my view.

[341] As explained at paragraphs [274] – [276] of this Decision, I am sceptical of the reason provided by Mr Mateo for not mentioning that prior history of shoulder problems to WorkCover, ahead of his left shoulder claim.

On 30 October 2018, Mr Mateo told WorkCover he had not suffered from any previous injuries. Mr Mateo explained this was because "An injury is something like – that happened when you're doing something or – but at this time – this, nothing, no injury. I don't need to report any." Further that, "...I believe it's not an injury. It's just a normal sore shoulder. I just need to seek some advice on which – medicine I will take. It's just merely a sore shoulder, a normal one." By that time, Mr Mateo was experienced in navigating his way around workers' compensation processes, having already made two accepted claims previously. It cannot be true that he was unaware of what was required to be disclosed when asked directly.

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<sup>254</sup> Exhibit 1, 296.

<sup>255</sup> Ibid 293.

*g) Decrease to working hours after 11 March 2019*

- [342] Mr Mateo told WorkCover that Dr Robinson determined to decrease his working hours after 11 March 2019 because working a full eight hour day had been problematic for his shoulders. However, Dr Robinson had stated that Mr Mateo's working hours had been decreased at his *own* request. That is outlined at paragraph [67] of this Decision.
- [343] I am not satisfied that Mr Mateo's motivation for asking Dr Robinson to decrease his working hours was pure. Mr Mateo had already energetically agitated for the Mater to decrease his working hours without success, approaching first Mr Brendan Host and then Ms Tracey Ceh with that request.

Despite the different perspectives of the Mater and Mr Mateo as to what arrangement to artificially decrease his working hours was possible or perhaps appropriate, it no doubt became evident to Mr Mateo that the Mater would not agree to a reduction to his working hours to facilitate his access to a more beneficial loan repayment arrangement with his bank.

- [344] Mr Mateo's awareness of, and desire to, access the more favourable loan repayment arrangements with his bank had clearly not abated though. Very soon afterwards, his claim of a sore right shoulder after work on 11 March 2019 emerged. That was the basis of Mr Mateo's report to Dr Robinson on 13 March 2019. Dr Robinson accepted Mr Mateo's account that working a full eight hour day had caused his right shoulder to become sore and acceded to his request to reduce his working hours.
- [345] It struck me that, by different means, Mr Mateo had achieved the outcome of reduction of working hours. Presumably what flowed was his ability to access the more beneficial loan repayment arrangements after all.

*h) Overseas trip*

- [346] I have considered matters pertaining to Mr Mateo's overseas trip at paragraphs [90] – [95] of this Decision.
- [347] Mr Mateo had told both Ms Loch and Dr Soares that family members had managed the luggage throughout the trip. That arrangement would not have been without its difficulties, when needing to stow and retrieve smaller bags into the overhead luggage compartments on the aeroplane for instance.
- [348] I recognise that Mr Mateo was not asked how those arrangements were managed at the Hearing by either representative. Neither did Mr Mateo call a family member, such as his wife, to confirm that point either.
- [349] As I have earlier remarked upon, I found it odd that Mr Mateo seemed to have difficulty recalling the trip at the Hearing until pressed. A son's wedding and an overseas holiday are each exciting and much anticipated events, even before COVID – and especially in circumstances where they occurred only about three years prior to the Hearing. It appeared to me that Mr Mateo was instead reluctant to talk about it.



*i) The period between Mr Mateo ceasing work on 11 March 2019 and his commencing work on 13 March 2019*

[350] I have considered matters pertaining to Mr Mateo's outside work activities more generally at paragraphs [78] – [80] of this Decision.

[351] At the Hearing, Mr Mateo said his contribution to cooking was "minimised" because his wife was doing that.<sup>256</sup> That account does not sit comfortably with what Mr Mateo told WorkCover about needing to rest before getting dinner ready because both his shoulders were sore after work on 11 March 2019.

[352] I have earlier commented at paragraph [247] that I found it odd that Mr Mateo did not mention his sore shoulders to either his wife or adult daughter with whom he resides, in the period between finishing work on 11 March and commencing again on 13 March 2019.

[353] If Mr Mateo's contribution to cooking was minimal and usually his wife's domain, as he had reported, it is curious that he did not ask his wife or daughter to do that particular task on the night he had sore shoulders after work.

[354] Given Mr Mateo's wife works as a nurse at the Mater, I also find it odd that he did not mention his sore shoulders to her in that period. If he had done so, Mr Mateo may have called his wife to give evidence about that in support.

[355] While Mr Mateo had told WorkCover that there was no incident on the way home from work on 11 March 2019, I acknowledge he was not asked further about that at the Hearing.

[356] Likewise, Mr Mateo was not asked at the Hearing whether anything happened at home that may have caused his right shoulder to become sore in the period between finishing work on 11 March and starting his shift on 13 March 2019.<sup>257</sup>

*j) Left shoulder operation delay*

[357] Mr Mateo could have had surgery on his left shoulder much earlier but instead chose to put it off until well into 2019.

[358] Dr Robinson had offered to perform the operation back in November 2018, though that suggestion was rebuffed by Mr Mateo. In correspondence to Dr Wang, Dr Robinson observed that "Joselito seems to be running his own agenda on this shoulder injury considering the injury occurred in October 2018 and he declined the suggestion of surgery in November..."<sup>258</sup>

[359] Mr Mateo gave different people different reasons for why he had put off the surgery. As detailed in paragraphs [107] – [109] of this Decision, Mr Mateo first told Mr Brendan

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<sup>256</sup> T 1 - 70, lines 9 - 37.

<sup>257</sup> Upon commencing his shift at the Mater on 13 March 2019, Mr Mateo did report his sore right shoulder to Ms Ceh, his supervisor, Doctors Robinson and Jeremijenko.

<sup>258</sup> Exhibit 1, 138.

Host that the delay was due to the annual leave of both himself and his doctor.<sup>259</sup> He then told Ms Leanne Loch that he did not want to have the operation before going on the overseas family holiday.<sup>260</sup> Then finally at the end of February 2019, Mr Mateo told Ms Tracey Ceh that he was fearful of anaesthetics and surgery would be recommended by Dr Robinson if there was no improvement in his MRI results.<sup>261</sup> Those different accounts reflect poorly on Mr Mateo's credit in my view.

[360] Further, while it was the case that Mr Mateo's left arm was immobilised in a sling after his left shoulder operation on 4 April 2019, that does not appear to be a cogent reason to delay the operation if others were indeed handling all the luggage on the overseas trip.

k) *Sequence and context of Mr Mateo's reported shoulder pain*

[361] The following chronology details the sequence and context of Mr Mateo's reported shoulder pain, prior to 11 March 2019:

3 January 2019                      Dr Robinson reported that Mr Mateo was improving and expected his light duties to be continually upgraded.<sup>262</sup>

24 January 2019                    Mr Mateo told Ms Tracey Ceh that he was coping well with his light duties and wanted to increase his hours of work.<sup>263</sup>

7 February 2019                    Mr Mateo told Mr Brendan Host he wanted to work less than 20 hours per week, in order to continue to access financial hardship loan repayment arrangements.<sup>264</sup>

In an email to Ms Ceh that same day, Mr Host said he had explained to Mr Mateo that "...if he has been cleared to be able to do the required hours then we are obligated to work the hours 23 hours per week as he is getting paid for those hours." However, Mr Host added that "Lito was not happy with my response and wanted to discuss this with you to reduce his worked hours to below 20."<sup>265</sup>

22 February 2019                    Mr Mateo told Ms Ceh that he had trouble with his work tasks on 29 January 2019, though I note that Ms Ceh's notes of her meeting with him on 31 January 2019 made no reference to Mr Mateo's later suggestion.<sup>266</sup>

8 March 2019                        Mr Mateo told Ms Ceh that he did occasionally get pain doing a work task. That statement was made in the same meeting in

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<sup>259</sup> Ibid 307.

<sup>260</sup> Ibid 96.

<sup>261</sup> Ibid 269.

<sup>262</sup> See paragraph [81] of this Decision.

<sup>263</sup> See paragraph [82] of this Decision.

<sup>264</sup> See paragraph [83] of this Decision.

<sup>265</sup> Exhibit 1, 310.

<sup>266</sup> See paragraph [75] of this Decision; Exhibit 1, 266 - 272.

which Mr Mateo was resisting the increase to his working hours.<sup>267</sup>

11 March 2019 Mr Mateo claims his shoulders were sore after working a full 8 hour shift.

13 March 2019 Mr Mateo reported shoulder pain and his working hours were reduced to six hours a day at his request.

[362] In my view, the evidence showed that Mr Mateo wanted his working hours to be fewer than 20 hours per week, in order to access more beneficial financial arrangements and he was ultimately successful in that endeavour within a short period of time.

[363] In summary, the sequence of events was that Mr Mateo was coping well with his light duties and all indications were they were likely to be upgraded, including the number of working hours per week. That was until Mr Mateo realised that the more beneficial loan repayment arrangements obtained would be jeopardised unless he worked fewer than 20 hours. Mr Mateo was unsuccessful in securing the Mater's support in doing so – and it was only shortly thereafter that he began mentioning that he had pain in his shoulders. Mr Mateo's report of right shoulder pain on 13 March 2019 ultimately resulted in Dr Robinson reducing his working hours to 6 hours a day at his request (or 18 hours per week).<sup>268</sup>

*l) Work duties performed*

[364] I believe the range of Mr Mateo's work duties were expanded to include loading meal trays into food trolleys and pushing them into the dispatch position, though he did this using both hands on the occasions when he did this task. My reasons follow.

[365] Ms Leanne Loch and Ms Tracey Ceh were present when Mr Mateo demonstrated his capacity to do that task with both hands.

[366] Mr Jimmy Ruiz and Mr Vincent Hall both said trays could not be loaded one-handed or the contents would spill.

[367] The food trolleys could not be pushed with one hand in any case. The evidence was that all the supervisors had tried it without success.

[368] I note that the Mater's promise to patients was that food ordered would be delivered within 45 minutes. This meant that the food trolleys were also unlikely to be fully loaded with meal trays, reducing both the weight and force required to push them.

[369] Mr Brendan Host was advised by Ms Tracey Ceh to expand the range of duties Mr Mateo was performing, with the exception of pot wash. Ms Ceh's notes of 31 January 2019 read (in part) "Brendan had not been rostering Joselito to work in all areas as stipulated are available to Joselito. We discussed the importance of variety of tasks. Brendan said he will speak to the supervisors to make sure that Joselito increases the tasks he is attending

<sup>267</sup> See paragraph [76] of this Decision; Exhibit 1, 266 - 272.

<sup>268</sup> Exhibit 1, 138.

to. We discussed that as per usual if Joselito is not able to do tasks or has concerns to please let supervisor know..."<sup>269</sup>

[370] However, I remain unconvinced that Mr Mateo was trained in the expeditor position because of the "unnamed employee" he said trained him, although other witnesses attested that it was a supervisor who conducted such training if at all. Mr Mateo failed to recall and thence call the unnamed colleague who he contended trained him in the expeditor position or indeed any other colleague who saw him working in that role. While Mr Mateo had suggested that Mr Vince Hall had provided some rudimentary instruction, Mr Hall's evidence was that he "had no recollection of that."

[371] At its highest, I would only accept Mr Mateo's story of working in the expeditor position if it were as a supernumerary (or helper) to the colleague allocated to that role – and only then, certainly not for the entire shift on 11 March 2019.

In the 13 March 2019 Incident Report, Mr Mateo stated that he was "pushing objects" but also "making juices". The former task could have been the pushing of trolleys indicative of the expeditor position, whilst the latter task was instead reflective of either the middle position on the plating line or in a floater position.<sup>270</sup>

On 14 March 2019, Mr Mateo told WorkCover that he was in the starter position for the first 2 hours of his shift on 11 March 2019.

On 19 March 2019, Ms Tracey Ceh told WorkCover that pushing trolleys and stacking meal trays were part of Mr Mateo's work tasks.<sup>271</sup>

On 4 January 2019, Ms Leanne Loch's Functional Capacity Assessment Report noted Mr Mateo was on plating line and expeditor duties.<sup>272</sup>

Ms Alison Devereaux also stated that Mr Mateo's work duties included stacking meal trays and pushing trolleys.<sup>273</sup> Ms Devereaux's evidence was that while Mr Host had originally told her that Mr Mateo was performing those work duties in April 2019, he changed his story by July of that year.<sup>274</sup>

Mr Brendan Host's evidence was that Mr Mateo was not rostered to push trolleys and if he did so then it would only have been for a very short period of time.<sup>275</sup> However, Mr Host accepted that by December 2018, such tasks were within Mr Mateo's scope of suitable duties.<sup>276</sup>

[372] Ms Blazenkar Solar and Mr Jimmy Ruiz's written evidence was that for the duration of time that Mr Mateo was on light duties, he was mainly in the starter and middle position. At the Hearing, they both stated that it was an unwritten rule in the Mater kitchen that

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<sup>269</sup> Ibid 268.

<sup>270</sup> See paragraph [162] of this Decision.

<sup>271</sup> See paragraph [194] of this Decision.

<sup>272</sup> See paragraph [198] of this Decision.

<sup>273</sup> See paragraph [206] of this Decision.

<sup>274</sup> See paragraphs [205] - [208] of this Decision.

<sup>275</sup> See paragraph [164] of this Decision.

<sup>276</sup> See paragraphs [165] - [171] of this Decision.

people on restricted duties worked only in the middle position – the role considered to be the lightest in the kitchen. They were both equally united in their account that they had never seen Mr Mateo load meal trays or push food trolleys whilst he was on restricted duties.<sup>277</sup>

[373] I do not accept that Mr Mateo was *rostered* in the expeditor position on the plating line that day. Nor am I satisfied that Mr Mateo was himself working in that *position*. Mr Mateo's own account is that he was doing other work tasks for at least *some* of the 8 hours shift on 11 March 2019. Though it is also true that Mr Mateo had been assessed as capable of performing the tasks of pushing food trolleys and stacking meal trays, and that he had been instructed on how to do that safely. Similarly, Mr Mateo had demonstrated his understanding of the technique for doing so, to the satisfaction of Ms Leanne Loch and Ms Tracey Ceh. Only about six weeks prior, Mr Host had been advised to ensure that Mr Mateo was worked in all areas stipulated as being available to him and committed to speaking to the supervisors to ensure that the full range of tasks were attended to.

[374] On the evidence before me, I find it most probable that Mr Mateo worked - as a supernumerary - assisting the colleague who was rostered in the expeditor position, on what was an extremely busy shift by his account. I accept that for *some* (but not all) of the shift on 11 March 2019, Mr Mateo pushed food trolleys and stacked meal trays in that capacity. I believe Mr Mateo did such work tasks using both hands, in the manner that he had been instructed to do and indeed demonstrated he could safely do. I am mindful that Mr Mateo's left arm was not immobilised in a sling until after his left shoulder operation on 4 April 2019. Further, due to the Mater kitchen's 45 minute delivery promise to patients, it was also most probable that the food trolleys were both not full - and that Mr Mateo was unlikely to have been helping the colleague rostered in the expeditor position for any length of time for the very practical reason that he would likely have been slower in the performance of that work due to his left shoulder condition at that time. Finally, I have not been persuaded that Mr Mateo was using his right arm above a 60 degree angle under a load.

*m) A natural progression of the condition*

[375] Having regard to the evidence before me, I am satisfied that any right shoulder pain Mr Mateo experienced was an aggravation of his pre-existing degenerative condition. However, on the balance of probabilities I find that employment was not a significant contributing factor to the aggravation because the aggravation was a result of natural progression of the pre-existing degenerative condition and would have occurred even if Mr Mateo had not been employed at the Mater during the relevant period.

[376] Whilst I can accept that Mr Mateo experienced those right shoulder symptoms sometime after finishing his shift on 11 March 2019, it is most probable that his employment at the Mater kitchen was merely the setting or background to its occurrence.<sup>278</sup>

[377] Even if the nature of the work tasks contributed in some way to the aggravation of Mr Mateo's right shoulder condition, I do not believe that his employment was a significant contributing factor to any claimed aggravation. My reasons follow.

<sup>277</sup> See paragraphs [172] - [185] of this Decision.

<sup>278</sup> *Cronin v Workers' Compensation Board of Queensland (1997) 156 QGIG 100*, applied in *JBS Australia Pty Ltd v Q-Comp* [2013] ICQ 13, 3.

[378] Two of the medical experts concluded that Mr Mateo could have suffered the right shoulder condition, regardless of whether he worked at the Mater or elsewhere.

[379] Dr Robinson's evidence was somewhat equivocal in part. He stated, "If (Mr Mateo) didn't have a problem in his left shoulder then he *may* not be having problems with his right shoulder". In order to reach an actual level of persuasion that Mr Mateo's employment was a significant contributing factor, a more certain endorsement of that position would be of assistance, such as evidence that it would be highly unlikely that Mr Mateo would be having problems with his right shoulder, for example.

[380] Whilst the doctors all concede that Mr Mateo's right shoulder symptoms have "developed" or been "exacerbated" since the left shoulder injury, that is different to accepting that has been a significant contributing factor to the right shoulder injury. Notably also, two of the doctors believe that the period of time is too short for employment to be the significant contributing factor, absent a particular "event".

[381] It is also relevant that Mr Mateo's right shoulder symptoms got worse, not better, when he was not working. A point remarked upon by Drs Robinson and Halliday.

[382] Finally, while it is possible that Mr Mateo's employment may have contributed to the onset of his right shoulder pain, I am not convinced to the required standard that it was a significant contributing factor to it based on the evidence before the Commission.

[383] I find that instead Mr Mateo's right shoulder problem to be a natural progression of the condition.

[384] Mr Mateo's employment was not a significant contributing factor to his right shoulder injury.

### **Costs**

[385] In light of my conclusions above, an order will be made in favour of the Respondent to dismiss the appeal and confirm the Regulator's Review decision of 4 November 2019.

[386] I will now consider the issue of costs.

[387] In *Workers' Compensation Regulator v Queensland Nurses and Midwives' Union of Employees (No 2)*,<sup>279</sup> Justice Davis considered the issue of costs in a Workers' Compensation Appeal and relevantly stated the following (citations removed):

[16] The power to award costs under s 558 of the WCR Act is not limited like the power to award costs given by s 545 of the IR Act. It therefore follows that costs ought ordinarily follow the event. While costs would normally follow the event of the appeals to the QIRC, there is a discretion to make some other costs order. In *Davidson v Blackwood*, the point is made that in the absence of any reasons to make any other costs order, costs follow the event. That does not remove the discretion to make some other order and does not extinguish the necessity to give reasons why any costs order was made...

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<sup>279</sup> [2021] ICQ 13.

...

[24] Section 558 provides as follows:

**"558 Powers of appeal body**

- (1) In deciding an appeal, the appeal body may—
  - (a) confirm the decision; or
  - (b) vary the decision; or
  - (c) set aside the decision and substitute another decision; or
  - (d) set aside the decision and return the matter to the respondent with the directions the appeal body considers appropriate.
- (2) If the appeal body acts under subsection (1)(b) or (c), the decision is taken for this Act, other than this part, to be the decision of the insurer.
- (3) Costs of the hearing are in the appeal body's discretion, except to the extent provided under a regulation. (emphasis added)

[25] By s 558(3), what is "in the appeal body's discretion" (here the QIRC ) are the "costs of the hearing". The "costs of the hearing" may be quite a different thing to the "costs of the appeal".

[26] The power to award costs is not a common law power. It is one granted by statute. Consequently, if the QIRC does not have a power vested by statute to award costs of the appeal beyond the costs of the hearing, then it cannot do so.

...

[28] However, the QIRC's only power to award costs in this case probably comes from the WCR Act, not restricted by s 545 of the IR Act. In determining the proper construction of s 558(3), and in particular the meaning of the term "costs of the hearing", regard must be had to the context and purpose of the section having regard to the statute as a whole.

[29] In my view, the legislature has clearly deliberately limited the costs which can be recovered on an appeal to the QIRC. It has drawn a clear distinction between different parts of the appeal process. While the legislation envisages that the appeal process may involve a conference, no power to award costs associated with a conference is given. The costs are limited to the "costs of the hearing".

[30] The law of costs recognises "costs of action" and "costs of trial". In my view, they equate to "costs of appeal" and "costs of hearing" respectively. The distinction is explained by Professor Dal Pont in his work Law of Costs in these terms:

"1.19 An order for 'costs of the action' includes not only costs of the trial but also those of interlocutory proceedings and their preparation (such as costs relating to interrogatories, notices to produce and admit and preparation of counsel's brief). These represent the costs to which the successful party in the action is entitled on taxation or assessment, in the absence of an order to the contrary. The 'costs of the trial' cover only the costs incurred in the conduct of the trial itself, not any interlocutory matters preceding the trial. In any case, as an action ends with judgment, each of these orders excludes costs incurred after final judgment. Costs of executing the judgment are therefore not costs of the action (or of the trial) but are payable of the execution."

[31] I accept that distinction. I consider that the term "costs of the hearing" in s 558(3) is equivalent to "costs of trial" recognised by the law of costs and explained by Professor Dal Pont.

[32] Consequently, when the QIRC is exercising a discretion under s 558(3) of the WCR Act, the order which should be made is not "costs of the appeal" but "costs of the hearing" and costs assessors should assess the "costs of the hearing" as they would "costs of trial" as explained by Professor Dal Pont.

[388] Section 132(1) of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) provides that "A decision to award costs of a proceeding heard by an industrial magistrate or the industrial commission is at the discretion of the magistrate or commission."

[389] I accept that costs in Workers' Compensation Appeals ordinarily follow the event. Had Mr Mateo not determined to initiate this proceeding, the Regulator would not have incurred the expense which it did during the hearing of this matter. An award of costs in favour of the Respondent is reasonable and appropriate, not to punish Mr Mateo for initiating the proceeding but rather out of fairness to the Respondent in ensuring appropriate indemnification. For those reasons, a costs order will be made in favour of the Regulator.

[390] For the reasoning outlined in *Workers' Compensation Regulator v Queensland Nurses and Midwives' Union of Employees (No 2)*,<sup>280</sup> Mr Mateo will only be required to pay the "costs of the hearing" rather than the "costs of the appeal".

### **Conclusion**

[391] Mr Mateo laboured in a number of physically demanding jobs since he came to Australia in 2006.

[392] That included working in bakeries and as a leading hand in an abattoir, before finding employment in a hospital kitchen in 2018.

[393] Only a few months after commencing at the Mater, Mr Mateo reported an injury to his left shoulder had occurred whilst working in the pot wash. That workers' compensation claim was accepted. Mr Mateo resumed work on a series of restricted duties RTW plans.

[394] At the beginning of 2019, Mr Mateo's treating specialist, Dr Mark Robinson, opined that he expected that the program of restricted duties would be gradually upgraded. Mr Mateo himself expressed a desire to increase his working hours.

[395] All that changed when an increase to Mr Mateo's working hours to the pre-injury average of 23 hours per week jeopardised the more favourable loan repayment arrangements negotiated with his bank. Mr Mateo expressed concern that would result in a negative effect to his take home pay. He sought the Mater's support in retaining his weekly working hours to less than 20 hours per week, without success.

[396] The following month, Mr Mateo complained that both shoulders had become sore after work. Broadly, Mr Mateo attributed his shoulder pain to working a full 8 hour shift and

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<sup>280</sup> [2021] ICQ 13.



the nature of his work duties undertaken; though I have found his accounts to be inconsistent.

[397] The result was that Dr Robinson then reduced his weekly working hours at Mr Mateo's request.

[398] As he had done so with respect to the prior left shoulder injury, Mr Mateo sought workers' compensation for the right shoulder condition.

[399] Mr Mateo finally accepted Dr Robinson's advice, undergoing the recommended surgery for his original left shoulder injury in April 2019.

[400] WorkCover denied Mr Mateo's application for workers' compensation for his right shoulder condition.

[401] WorkCover's decision was confirmed by the Regulator in its review decision of 4 November 2019.

[402] Mr Mateo appealed the Regulator's decision. That is the subject of this Decision.

[403] In a curious twist, Mr Mateo swore a Statutory Declaration last year by which he sought to amend the date of his left shoulder injury from a 'set date' to an 'over a period of time event' occurring from 30 July 2018 to 19 October 2018.

[404] In the course of this Decision, I have commented on several matters impacting on Mr Mateo's credit. He was not straight with either his employer, WorkCover, allied health professionals and even some doctors when giving account of his prior medical history. He was cagey about the overseas family holiday. Mr Mateo's agitation to decrease his weekly hours of work to obtain a benefit, proximate to the onset of his right shoulder condition symptoms, also disturbed me. Where Mr Mateo's evidence was unable to be corroborated by others, I have weighed it accordingly.

[405] Nonetheless, I have found that Mr Mateo's right shoulder condition *did* arise in the course of his employment at the Mater - and there has been an aggravation of his pre-existing degenerative right shoulder condition.

[406] Those two findings are not enough for Mr Mateo's case to succeed. Mr Mateo must also demonstrate that his employment was a significant contributing factor to the aggravation of his pre-existing degenerative right shoulder condition.<sup>281</sup>

[407] Mr Mateo has not proved to the required standard that his right shoulder condition was caused by use of the arm at angles in excess of 60 degrees to the axis of the body, under a load. I am not persuaded that there is sufficient evidence before the Commission to accept Mr Mateo's contention that his employment at the Mater was a significant contributing factor to his right shoulder condition.

[408] I order accordingly.

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<sup>281</sup> *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32(3)(b).

**Orders**

- 1. The appeal is dismissed.**
- 2. The decision of the Workers' Compensation Regulator is confirmed.**
- 3. The Appellant is to pay the Respondent's costs of the Hearing, to be agreed or, failing agreement, to be subject to a further application to the Commission.**