SUPREME COURT OF QUEENSLAND

CITATION:	*Hinrichsen v Glencore Queensland Limited* [2019] QSC 112
PARTIES:	**WILLIAM ERNEST HINRICHSEN** (applicant) **v** **GLENCORE QUEENSLAND LIMITED (ACN 009 814 019) T/AS XTRACARE** (respondent)
FILE NO/S:	No 227 of 2019
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	7 May 2019
DELIVERED AT:	Rockhampton
HEARING DATE:	10 April 2019
JUDGE:	Crow J
ORDER:	**1. A declaration that the Plaintiff need not comply with a request by the Respondent pursuant to section 282 of the *Workers' Compensation and Rehabilitation Act 2003* to undergo a medical examination with an Orthopaedic Surgeon other than Dr Simon Journeaux in connection with his claim for damages for personal injuries arising out of an incident on 19 January 2016.** **2. The Respondent pay the Applicant's costs of and incidental to the application.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – MEDICAL EXAMINATIONS – SUBMISSION TO MEDICAL EXAMINATION – where applicant applies for a declaration he need not comply with an a request to undergo an examination pursuant to s 282 of the *Workers Compensation and Rehabilitation Act* 2003 (Qld) – where respondent applies to compel the applicant to undergo a medical examination pursuant to s 282 of the *Workers Compensation and Rehabilitation Act* 2003 (Qld) – whether the compliance with the request is unreasonable or unnecessarily repetitious - whether applicant should be compelled to undergo a further medical examination

Workers' Compensation and Rehabilitation Act 2003 (Qld)

Ratcliffe v Raging Thunder Pty Ltd [2010] QSC 60
Woolworths (Qld) P/L v Berry-Porter [2002] QSC 360
Moore v Stage Coach Qld Pty Ltd [2004] QSC 003
Jackson v State of Queensland [2005] QSC 161
Behrens v Nguyen & Anor [2017] QSC 14
Muller v Nebo Shire Council [2002] QSC 084

COUNSEL: S Deaves for the applicant
G O'Driscoll for the respondent

SOLICITORS: Taylors Solicitors for the applicant
Barry.Nilsson for the respondent

[1] The applicant, Mr Hinrichsen, filed an application on 26 March 2019 seeking the following orders:

> "1. A declaration that the Plaintiff need not comply with a request by the Respondent pursuant to section 282 of the *Workers' Compensation and Rehabilitation Act 2003* to undergo a medical examination with an Orthopaedic Surgeon other than Dr Simon Journeaux in connection with his claim for damages for personal injuries arising out of an incident on 19 January 2016.
>
> 2. The Respondent pay the Applicant's costs of and incidental to the application;
>
> 3. Such further or other order as this Honourable Court deems appropriate."

[2] The respondent, Xtracare, filed an application on 4 April 2019 seeking the following orders:

> "1. That the Applicant comply with a request by the Respondent pursuant to section 282 of the *Workers' Compensation and Rehabilitation Act* 2003 to undergo a medical examination by an orthopaedic surgeon to be selected by the Applicant from a panel comprising Dr Christopher Blenkin, Dr Philip Duke and Dr John Walters.
>
> 2. The Applicant pay the Respondent's costs of and incidental to the application.
>
> 3. Such further or other order as this Honourable Court deems appropriate."

[3] Both applications engage s 282 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the Act") (reprint current at 9 October 2015) which provides as follows:

> "**Worker to undergo medical examination**

> (1) An insurer or a contributor may at any time ask the worker to undergo either or both of the following, whether at 1 time or at different times, at the expense of the insurer or contributor—
>
> (a) a medical examination by a doctor to be selected by the worker from a panel of at least 3 doctors nominated in the request;
>
> (b) an assessment of cognitive, functional or vocational capacity by a registered person to be selected by the worker from a panel of at least 3 persons with appropriate qualifications and experience nominated in the request.
>
> (2) The worker must comply with the request unless it would be unreasonable or unnecessarily repetitious.
>
> (3) If 3 doctors or persons with appropriate qualifications and experience are not available for inclusion on a panel, the number on the panel may be reduced to 2."

[4] Mr Hinrichsen is currently 63 years of age having been born on 4 December 1955. On 19 January 2016, Mr Hinrichsen suffered an injury during the course of his employment at the Hail Creek Mine. In the incident Mr Hinrichsen was driving a bulldozer pushing a large rock out of a hole when the rock slipped off the blade of the bulldozer and the bulldozer was severely jolted when it fell into the hole left by the rock. In the incident Mr Hinrichsen was thrown forward causing him to hit his forehead on the GPS unit mounted on the cabin of the bulldozer. The event occurred whilst Mr Hinrichsen was holding the gear stick of the bulldozer in his left hand and Mr Hinrichsen's left shoulder was forced back rapidly. Mr Hinrichsen alleges that immediately after the accident he was suffering from pain in his forehead, left shoulder, neck and upper back. After the incident Mr Hinrichsen was taken to the paramedics on the mine site and later attended his general practitioner and an application for statutory benefits under the Act was lodged. Mr Hinrichsen has received medical treatment from his general practitioner, Dr Michael Lockwood at Sarina, physiotherapy treatment from Active Physiotherapy Mackay and rehabilitation treatment from Extend Rehabilitation in Wickham Terrace, Brisbane. Numerous radiographs were taken by Mackay Radiology, Sarina Medical Imaging and Queensland X-rays.

[5] On 21 March 2016 Mr Hinrichsen attended upon Dr Cunneen, occupational physician, who examined Mr Hinrichsen, had reference to the radiology available and diagnosed an exacerbation of pre-existing degenerative cervical spondylosis and an exacerbation of pre-existing degenerative left ACJ (shoulder) with minor bursitis. Dr Cunneen provided opinions as to the nature and extent of the injury opining on page 7 of his report of 21 March 2016 that:

> "Any persisting systems/signs beyond further 8 week period (four months post injury during late May 2016) would be seen as due totally to his pre-existing degenerative cervical spondylosis and osteoarthritic left ACJ alone. Any further treatment beyond late May 2016 would be to manage these pre-existing conditions and his work related exacerbations from January 2016 would have resolved."

[6] On 4 May 2016 WorkCover Queensland wrote a letter to Dr Simon Journeaux, orthopaedic surgeon, seeking an "expert opinion in this matter". Dr Journeaux examined Mr Hinrichsen on 10 May 2016 and provided a report dated 12 May 2016.[1] Dr Journeaux diagnosed a whiplash type of injury to the cervical spine with ongoing symptomatic aggravation of pre-existing degenerative disease of the left shoulder which Dr Journeaux thought was consistent and the mechanism of injury. Dr Journeaux provided careful and reasoned opinions on pages 9 and 10 of his report concerning the nature and extent of the injuries sustained. On page 10 of his report Dr Journeaux said:

> "It is my view that his left shoulder is less problematic than his cervical spine but nevertheless is symptomatic and in my view directly related to the work related accident. Most of the degenerative changes are in my view pre-existing but it is more likely than not that additional internal derangement occurred as a direct result of the mechanism of the injury described. I would agree that much of the current presentation appears to be based around a symptomatic acromioclavicular joint (note bone scan result) and it is more likely than not that he will need further management in respect of his shoulder and in particular operative management."

[7] WorkCover Queensland then referred Mr Hinrichsen to Dr Kenneth Cutbush, orthopaedic surgeon, who examined Mr Hinrichsen on 9 June 2016, advised that surgery was required and obtained approval and proceeded to surgery on 11 June 2016. Dr Cutbush on examination detected that Mr Hinrichsen was obviously uncomfortable with his neck and had a limitation in range of motion of his left shoulder. Dr Cutbush's diagnosis was of (traumatic arthrosis of his left AC joint). Of the effect of the incident Dr Cutbush said on page 2 of his report of 15 June 2016:[2]

> "Whilst it is likely that William has had pre-existing degenerative change in his AC joint, his shoulder has been asymptomatic and he has not seen his general practitioner or any other medical practitioner regarding his shoulder, and he was able to work with his shoulder normally prior to this injury. There has been a very significant change of a step-wise nature from the time of that injury and it would appear that his traumatic arthrosis of his left AC joint in the setting of pre-existing degenerative change."

[8] I pause to record that Dr Cutbush is an orthopaedic surgeon who performs "surgery of the shoulder". Dr Cutbush's diagnosis and opinions concerning Mr Hinrichsen's injury is the same as Dr Journeaux's.

[9] At the request of WorkCover Queensland, Dr Cunneen further examined Mr Hinrichsen on 30 June 2017. Dr Cunneen was provided with the further radiology and the benefit of the opinions of both Dr Journeaux and Dr Cutbush. Dr Cunneen's diagnosis was that Mr Hinrichsen had suffered from "traumatic arthrosis left ACJ (aggravation) requiring surgery, exacerbation of pre-existing degenerative cervical spondylosis – resolved and disfigurement left shoulder and face." Dr Cunneen assessed 8 per cent permanent impairment with respect to the left shoulder injury but deducted 25 per cent for pre-

---

1 Ex CAW-2 to the Affidavit of Craig Andrew Worsley sworn 26 March 2019.
2 Ex JRY-2 to Affidavit of James Ross Tealby

existing degenerative thus his final assessment was 6 per cent for the left shoulder. In addition Dr Cunneen diagnosed assessment 0 per cent for the cervical spondylosis resolved and 1 per cent for the disfigurement of the left shoulder and face.

[10] On 14 January 2019 a Notice of Claim for damages was forwarded to WorkCover Queensland. WorkCover Queensland informed Mr Hinrichsen's solicitor that the self-insurer Xtracare had replaced WorkCover in liability in respect of the injury pursuant to s 87 of the Act. Mr Hinrichsen then delivered a fresh Notice of Claim to the respondent Xtracare on 31 January 2019. The respondent appointed Barry Nilsson Lawyers. On 5 March 2019 Barry Nilsson Lawyers sent a request to Mr Hinrichsen's solicitors Taylors pursuant to s 282 requiring Mr Hinrichsen "To undergo independent medico legal examination with an orthopaedic surgeon." The panel it was proposed consisted of Dr Philip Duke, Dr Chris Blenkin and Dr John Walters. The following day 5 March 2019 Taylors Solicitors responded on behalf of Mr Hinrichsen failing to select one of the panel suggested but agreeing to a further medical examination by Dr Journeaux as Dr Journeaux "is more than qualified to provide your client with an appropriate medico legal report in relation to our client's injuries and we believe your client's request that Mr Hinrichsen undergo further examination by another orthopaedic surgeon is unnecessary and unreasonable in the circumstances."

[11] On 6 March 2019 Barry Nilsson responded pointing out that Dr Journeaux "was utilised by WorkCover Queensland in the course of the statutory claim. Xtracare, by whom we are instructed, is the insurer which now responds to the claim as Hail Creek Coal Pty Ltd" and "Xtracare has not yet had your client examined for the purpose of his statutory common law claim, but has a right to do so under s 282 WCRA."[3] Barry Nilsson pointed out that given that Xtracare had not briefed Dr Journeaux previously in the matter and Mr Hinrichsen had not seen Dr Journeaux since 10 May 2016 and that "Dr Journeaux's web presence at Mater Health professes speciality in respect to the lower limb with special interests in adult and paediatric trauma; and hip and knee replacement including complex revision surgery." Barry Nilsson argued that "[i]n order to properly consider your client's claim, our client requires examination and opinion from an orthopaedic surgeon with an upper limb speciality. Each of the specialists put on our panel have that expertise."

Section 282 authority

[12] Section 282 has been judicially examined on many occasions. In *Ratcliffe v Raging Thunder Pty Ltd*[4] the plaintiff was injured in the course of his employment with the defendant on 15 July 2005 suffering from lower back injuries and an associated psychiatric disorder. In the statutory phase of the claim the plaintiff was examined by three orthopaedic surgeons including Dr Todd and by three psychiatrists generating a total of nine medical reports and including three from Dr Todd. On 27 September 2007 the plaintiff's lawyers arranged for the plaintiff to be examined by Dr Scott Campbell a neurosurgeon. The defendant responded with a panel of three neurosurgeons and the plaintiff refused to attend. In granting the defendant's application Jones J said:

---

[3] Ex CAW-8 to the Affidavit of Craig Worsley sworn 26 March 2019.
[4] [2010] QSC 60.

"[11] The plaintiff opposes the application, making a number of assertions that the new examination is unnecessary; that it inconveniences the plaintiff by invasion of his personal liberty and privacy when there have already been a number of examinations; that the defendant is 'doctor shopping', and that the defendant is attempting to avoid some part of Dr Todd's opinion which he suggests the defendant finds inconvenient.

[12] The suggestion that the defendant's request is activated by some motives of the kind alleged has no relevance to my consideration. The only question is the reasonableness or otherwise of the request. The proper course for me is to examine the medical reports which have been placed in evidence and to assess whether the further examination by a neurosurgeon is justified, having regard to the defendant's rights.

[13] The reports received during the period of the statutory claim are now quite dated. I do not see in the approach of either party any intention to call all of the specialists who made a contribution during that period. In dealing with injuries to the spine there is often some overlap in the reliance of the opinions of neurosurgeons and of orthopaedic surgeons. Practitioners in each specialty traditionally carry out surgery in this area. Such practitioners are competent to advise as to whether surgery is necessary. That, however, does not mean that each specialty approaches the task the same way or using the same techniques.

[14] The question really turns on whether a neurosurgeon brings to the issue different insights or skills which warrant the further examination. The defendant argues that the plaintiff having obtained a second opinion from Dr Campbell, neurosurgeon, now denies the defendant the right to do the same thing. The fact that the plaintiff has chosen reports from a specialist in the particular field does not of itself give a right to a defendant to seek an examination by a matching specialist. It remains a matter of whether the request is a reasonable one. Whether that is so, ultimately is a matter of discretion. *Starr v National Coal Board*. A perusal of the three reports of Dr Todd reveals his view that the plaintiff had signs of 'fairly significant degeneration in his lumbar spine and a pars defect at levels L4 and L5'; that the plaintiff 'did sustain a musculoligamentous injury or aggravation of his pre-existing degeneration from the injury in question'; that he was totally incapacitated for work; that the injuries had stabilised; that surgical treatment was not recommended; and that some pain had a psycho-somatic basis.

[15] Dr Scott Campbell had regard to the reports of Dr Todd and also to a number of reports from the abovementioned orthopaedic surgeons and psychiatrists as well as various general practitioner reports. Dr Campbell expressed the opinion that the plaintiff 'sustained an L4/5 disc protrusion as a result of the work accident'; that he suffers

> chronic lower back pain and right radicular symptoms; that the work accident was the sole cause of the disk protrusion; and he has 'an 11% whole person impairment'; and, that he would not recommend lumbar fusion.
>
> [16] The comparison of these reports indicates there are differences in the opinions of the specialists, particularly as to the level of the plaintiff's impairment that might be attributed to the incident. That difference might not be particularly wide once each specialist is questioned as to the bases relied upon, but there is a sufficient difference in my view to justify the defendant making the request for an examination by a neurosurgeon rather than being forced to rely upon the opinion expressed by Dr Todd in this field of overlapping expertise." (footnotes omitted).

[13] It is plain from Justice Jones' decision in *Ratcliffe* that where a plaintiff introduces a new specialist in circumstances where "each speciality approaches the task the same way or using the same techniques" medical evidence from a practitioner in another speciality is good reason to conclude that that other speciality may "brings to the issue different insights or skills which warrant further examination" such that ordinarily one would expect that an examination by an expert in the similar field of speciality "is justified having regard to the defendant's rights." In the present case the plaintiff does not seek to introduce the evidence of a specialist outside that of orthopaedic surgery.

[14] In *Woolworths (Qld) P/L v Berry-Porter*[5] Cullinane J said at para 27:

> "[27] As I have said I do not accept that the Applicant has an unqualified right to a further examination by a psychiatrist and by an orthopaedic specialist and that earlier examinations are irrelevant to that question. In the absence of any acceptable reason why the Applicant should now seek to have examinations by other specialists and given the Respondent's readiness to be re-examined by the specialists the Applicant chose to have the Respondent examined by previously, I am of the view that the examinations sought would not be reasonable and would do no more than provide the Applicant with an opportunity to call a multiplicity of specialist witnesses, or to confer upon it a choice to call the most favourable of the specialist witnesses who would have examined the Respondent."

[15] In *Moore v Stage Coach Qld Pty Ltd*[6] Douglas J referred with approval of the decision in *Woolworths* before stating at [8]:

> "[8] Mr Fryberg, with some justification, argues that this reasoning should determine the matter in his client's favour. At the least it is a decision that can be seen as highly persuasive in arriving at that result. Mr Holyoak submits that the issue before his Honour in *Woolworths* was

---

5 [2002] QSC 360.
6 [2004] QSC 003.

> whether the employer had an 'entitlement' to have further medical examinations rather than an argument that the discretion to order a further examination should be exercised in its favour: see paras [14] and [27]. That may well be so but his Honour's language at [27] requires an acceptable reason for further examinations by other specialists than those who have already examined a plaintiff."

[16] In refusing a defendant's request for further medical examination Justice Cullinane said in *Jackson v State of Queensland*:[7]

> "[24] This is not a case in which it is suggested a second examination by the same doctor or professional is required because of some alteration in the plaintiff's situation. Nor is it a case in which any additional claim advanced on the plaintiff's behalf would justify a further examination.
>
> [25] The grounds advanced seem essentially to relate to the differences which it is said have emerged between the report of Mr Donovan and the report of Ms Purse with a desire for a more extensive opinion in the light of these matters of the plaintiff's capacity as to work. One might detect in the submissions of counsel for the plaintiff a faint suggestion that the wrong choice had been made at the time the examination by a physiotherapist was sought but the matter was not advanced on this basis. I have already referred to what appears to have been a significant factor in the making of such a choice.
>
> [26] It is difficult to avoid the conclusion that what the defendant in substance seeks is some additional support in those areas where there is a dispute between Ms Purse and Mr Donovan. If the only advantage that can be seen to flow from the additional medical examination is to have an additional expert to assist the defendant's case or to provide a choice between two or more experts I do not think that it is wrong to describe any such examination as unreasonable or unnecessarily repetitious. See *Woolworths (Qld) Pty Ltd v Berry-Porter* [2002] QSC 360. I should add that I accept the evidence contained in Mr Turner's affidavit. Counsel for the defendant acknowledged that it was likely Mr Donovan would be called as a witness and there is nothing to suggest that he would not be available to be so called."

[17] *Jackson v State of Queensland* was referred to with approval by Burns J in *Behrens v Nguyen & Anor*.[8] *Behrens* case is factually quite different and relates to an application by the defendant for a further examination of the plaintiff pursuant to s 46A of the *Motor Accident Insurance Act* 1994 (Qld). The plaintiff Mr Behrens suffered from incomplete tetraplegia as a result of a motor vehicle accident and in respect of which 21 medico-legal reports had been obtained by the parties. In the plaintiff's case an orthopaedic surgeon Dr Brocks had opined the plaintiff would require "joint replacement procedures for both shoulders, both elbows, both hips and both knee joints

---

7 [2005] QSC 161 at [24].
8 [2017] QSC 14 at [24].

as well as at least two surgical revisions for each joint over his lifetime." In addition Dr Brocks proffered an opinion that there would need to be further surgery in the nature of "joint preserving procedures on his hands and feet, endoprosthetic or arthrodesis ankle surgery and at least two multi-segmental operations on his spinal column." The cost of the treatment being estimated by Dr Brocks between almost €7.1 million and €10.6 million. The defendant had obtained an orthopaedic opinion from Dr Wiesner. Importantly as set out in paragraph 8:

> "[8] This issue is addressed in the reports obtained on behalf of the insurer but, it contends, not in a way that allows it to reliably estimate the future care component of the plaintiff's damages. Although the neurologists — Dr Krützelmann, Dr Thayssen and Professor Gerloff — have expressed the opinion that no further spinal surgery is indicated and the rehabilitation physician — Dr Hill — has reported that he anticipates the plaintiff will require a haemorrhoidectomy 'at least once or possibly twice during the course of the rest of his life" but presumably no other surgery, the insurer claims that the orthopaedic surgeon retained to examine the plaintiff on its behalf — Dr Wiesner — has insufficiently answered the questions put to him about the opinions expressed by Dr Brocks. For the insurer, it was submitted that Dr Wiesner has proven to be so uncooperative that there is, in effect, little point persisting with attempts to obtain more precise information from him regarding the plaintiff's future medical and hospital needs."

[18] Unsurprisingly Burns J ordered that there be a further examination of the plaintiff by an orthopaedic surgeon from the panel provided by the defendant.

[19] The present case differs significantly from each of the earlier cases. In particular the defendant eschews any suggestion that Dr Journeaux has been uncooperative and importantly any suggestion that Dr Journeaux is not qualified to express the opinions that he has set out in his report. There is no suggestion on behalf of the defendant that the defendant does, or has reasons to, question the opinion of Dr Journeaux. The medical opinion currently obtained from the treating surgeon Dr Cutbush and the occupational physician Dr Cunneen (in his second report) provides the same diagnosis and opinion of Mr Hinrichsen's injuries as that expressed by Dr Journeaux.

[20] Although in its correspondence Xtracare takes the point that it had not retained Dr Journeaux to provide an opinion, that point is not pursued in the written submissions. As Justice Jones said, whether in terms of s 282(2) the task is whether the request is unreasonable or unnecessarily repetitious. The alteration in insurance arrangements for and on behalf of the defendant cannot, in my view, render a request for further medico legal examination reasonable. The statutory rights contained in s 282(2) of the Act are conferred upon an insurer or contributor and in this respect the two examinations from Dr Cunneen, the examination of Dr Journeaux and the examination of Dr Cutbush have been examinations undertaken at the request of the insurer. I cannot accept that the change in insurer can affect the statutory right to obtain further medico-legal reports unless the insurer is able to point out, and with good reason, why that is so.

[21] This is not a case where a claimant has refused further review. In *Muller v Nebo Shire Council*[9] Mackenzie J observed that where there has been a change in the claimant's condition it may be appropriate to order a further review. In the present case there has been a change in Mr Hinrichsen's position in that he has obtained surgery from Dr Cutbush on 11 June 2016, a little over a month after he was examined by Dr Journeaux on 10 May 2016. Certainly an updated review is necessary, however the issue is whether the defendant ought to be permitted to obtain that review from another orthopaedic surgeon or whether it ought to obtain that review from Dr Journeaux. In the present case there will be no delay in obtaining a report from Dr Journeaux, he is available 21 May 2019 and although Doctors Blenkin and Duke are available prior to 21 May 2019, a short delay in obtaining an appointment date for a little over a month is insignificant given the accident occurred approximately three years and four months ago.

[22] The respondent's argument is that in the terms of s 282(2) of the Act, Mr Hinrichsen must comply with their request as he has not shown that the request is unreasonable nor unnecessarily repetitious because Dr Journeaux's assessment occurred so long ago on 10 May 2016 and it is reasonable for the defendant to seek to obtain an opinion from an orthopaedic surgeon with a sub-speciality in upper limb surgery. Exhibited to the affidavit of Mr Tealby are the curriculum vitaes of Dr Blenkin, orthopaedic surgeon, Dr Walters, orthopaedic surgeon, Dr Duke, orthopaedic surgeon and Dr Journeaux, orthopaedic surgeon. Each of the orthopaedic surgeons are extremely experienced. Dr Duke has been a orthopaedic surgeon since 1994, and Dr Walters has been an orthopaedic surgeon since 1973. Doctors Duke and Blenkin have been orthopaedic surgeons since 1994 and Dr Journeaux has been an orthopaedic surgeon since 1995. Doctors Walters, Duke and Blenkin have a sub-speciality in upper limb surgery. Dr Journeaux does not.

[23] In respect of his speciality Dr Journeaux has a private practice involving seeing patients with all orthopaedic conditions and he has confirmed that:

> "The surgical part of [his] practice primarily encompasses lower limb, hip and knee arthroplasty and revision. In [his] private practice [he] would not usually undertake any shoulder surgery, although [he] would undertake perhaps one shoulder operation per year through the public system. While [he[will treat and assess shoulder conditions in [his] private practice, if [he] thought someone required shoulder surgery [he] would refer them to a colleague."[10]

[24] Dr Blenkin observes that:[11]

> "an orthopaedic surgeon with a sub-speciality providing a medico-legal opinion is able to give a more informed opinion on the genesis and prognosis of conditions within their speciality, such as the progression of degeneration existing within a shoulder, as well as treatment modalities."

---

9 [2002] QSC 084.
10 Ex JRT-14 to the Affidavit of James Ross Tealby sworn 4 April 2019.
11 Ex JRT-15 to the Affidavit of James Ross Tealby sworn 4 April 2019.

[25] Dr Duke says:

> "a shoulder surgeon currently operating on shoulder conditions is better placed and more able to evaluate a shoulder injury."[12]

[26] In Dr Journeaux's file note of 9 April 2019 Dr Journeaux records:[13]

> "[H]e is in clinical practice seeing all orthopaedic conditions that are referred including those with shoulder conditions. Dr Journeaux confirmed that when he is treating a patient with a shoulder condition, he would not refer the patient on to a colleague, unless surgery was required. If the case was unusual or complicated, then he would refer appropriately onto a colleague with shoulder surgery expertise. When assessing a shoulder injury for medicolegal purposes Dr Journeaux considers the most frequently asked questions pertain to the causation of the condition and the prognosis of the injury. Dr Journeaux considers that there is no need to be a specialist shoulder surgeon in order to adequately assess the causation and prognosis of an injury. The expertise is well within the training and expertise of an experienced independent medicolegal examiner with the appropriate qualifications. Dr Journeaux confirms that he has remained educated and up to date on the topic of shoulder injuries and their treatment including surgical management. When asked about Mr Hinrichsen's condition, Dr Journeaux said the condition Mr Hinrichsen has is a common one and there is no controversy in respect of the treatment of it."

[27] There is no material to suggest the condition that Mr Hinrichsen has suffered in his left shoulder is unusual or controversial. To the contrary, Dr Journeaux has provided evidence of the condition that "there is no controversy in respect of the treatment of it."

[28] Certainly if there is something particularly unusual about an injury or condition suffered by a plaintiff then that may call for an opinion from a subspecialist because an ordinary trained specialist in this area may not have experience of an unusual or peculiar condition. The present case does not fall into that category. The materials provided currently show that the left shoulder condition being a degenerative condition aggravated by the incident is common.

[29] Although Dr Cunneen suggests that the effects of Mr Hinrichsen's neck injury is worse (in terms of pain) than the left shoulder injury Mr Hinrichsen's case is set out in Schedule D to his Notice of Claim for damages records that Mr Hinrichsen's neck injury is equally as painful as his left shoulder injury.[14]

[30] As set out in paragraph 14 of Mr Tealby's affidavit, the proper quantification of damages for loss of economic capacity is a major issue between the parties. The definition of percentage impairment within the AMA guides specifically excludes a rating in respect of work incapacity. Nothing can be gained, in terms of the significant

---

12 Ex JRT-16 to the Affidavit of James Ross Tealby sworn 4 April 2019.
13 Ex JAC-1 to the Affidavit of Jenna Ann Cruikshank sworn 9 April 2019.
14 Ex JRT-1 to the Affidavit of James Ross Tealby sworn 4 April 2019.

issue, in examining the percentage impairments currently opined by Dr Cunneen. An assessment which needs to occur is the assessment of the effect of the neck and shoulder injury upon Mr Hinrichsen's economic capacity. It is necessary to examine the effect of both injuries in their combined impact upon Mr Hinrichsen's economic capacity. Accordingly a subspecialty opinion upon the shoulder injury alone will provide little guidance in the proper determination of the quantification of damages for loss of economic capacity.

[31] In my view it has not been shown that there is an acceptable reason why the applicant should now have to undertake examinations by other specialists given his readiness to be re-examined by Dr Journeaux. In the present case the medical evidence convinces me that injury sustained by Mr Hinrichsen to his cervical spine being an aggravation of pre-existing asymptomatic degeneration and the injury to Mr Hinrichsen's left shoulder diagnosed by Doctors Blenkin, Cutbush and Cunneen as a traumatic arthrosis of the left AC joint a setting of pre-existing degeneration in the left AC joint are commonly suffered injuries and for which Dr Journeaux is more than adequately qualified to provide proper guidance to the court. In circumstances where Mr Hinrichsen has suffered from a common form of injury to his neck and left shoulder and when there is currently a consistent diagnosis in respect of both conditions and where the conditions that Mr Hinrichsen has suffered are well within the expertise of Dr Journeaux who himself is a very experienced orthopaedic surgeon I consider it unreasonable and unnecessarily repetitious for Mr Hinrichsen to attend upon a subspecialist proposed by the defendant. Accordingly I dismiss the application filed by the defendant on 4 April 2019.

Costs

[32] In *Augustat v WorkCover Queensland,* unreported 10 April 2019, I concluded that s 318C of the Act is not engaged in pre-litigation applications. I consider that *Muckermann's* case[15] and *Kidd's* case[16] are correct, that UCPR 681 is engaged that such costs ought to follow the event.

[33] I make the following orders:

1. A declaration that the Plaintiff need not comply with a request by the Respondent pursuant to section 282 of the *Workers' Compensation and Rehabilitation Act 2003* to undergo a medical examination with an Orthopaedic Surgeon other than Dr Simon Journeaux in connection with his claim for damages for personal injuries arising out of an incident on 19 January 2016.

2. The Respondent pay the Applicant's costs of and incidental to the application.

---

[15] [2013] QSC 194.
[16] [2012] QSC 220.