WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5825/19**
Applicant: **Julie Anne Sullivan**
Respondent: **Southern Meats Pty Limited**
Date of Determination: **7 April 2020**
Citation: **[2020] NSWWCC 110**

The Commission determines:

1. The applicant did not suffer a disease process of gradual onset in her cervical spine within the meaning of section 4(b)(i) of the *Workers Compensation Act 1987* or an aggravation, acceleration, exacerbation or deterioration of any disease process in her cervical spine within the meaning of section 4(b)(ii) of the *Workers Compensation Act 1987* arising out of or in the course of her employment with the respondent between 1 July 1992 and 2 September 1992.

The Commission orders:

2. Award for the respondent in relation to the applicant's claimed injury to the cervical spine on 2 September 1992.

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

Anthony Scarcella
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mrs Julie Anne Sullivan, is a 65-year-old woman who was employed by Southern Meats Pty Limited (the respondent) initially, as a labourer/packer in the boning room.

2. Mrs Sullivan alleged that, as a result of her prolonged strenuous and repetitive work involving lifting and storing heavy pieces of meat whilst employed by the respondent at its Goulburn abattoir between 1 July 1992 and 2 September 1992, she sustained injuries to her left shoulder, thoracic spine and cervical spine (neck).

3. On 7 March 1997, Mrs Sullivan was awarded lump sum compensation under section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of 17% permanent impairment of her back and lump sum compensation for pain and suffering under section 67 of the 1987 Act as a result of injury in the course of her employment with the respondent on 2 September 1992.[1]

4. On 3 December 2010, Mrs Sullivan entered into a section 66A Complying Agreement with the respondent on the basis of a 20% permanent loss of the efficient use of the left arm at or above the elbow as a result of injury in the course of her employment with the respondent on 2 September 1992.[2]

5. On 28 February 2017, the respondent issued a Dispute Notice pursuant to section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying liability for injury to Mrs Sullivan's neck and declining to pay for injections into her neck.[3]

6. On 14 March 2017, the respondent issued a notice under section 39 of the 1987 Act informing Mrs Sullivan that, based on the medical evidence in its possession, her whole person impairment was under 21% and that her entitlement to receive weekly benefits was likely to reach the 260 week limit in December 2017.[4]

7. On 1 June 2017, Mrs Sullivan underwent a C5-6 and C6-7 anterior discectomy, fusion and post-operative repair of CSF leak from left C7 nerve root by Dr Peter Mews.

8. On 2 May 2018, Mrs Sullivan requested a review of the decision contained in the respondent's section 39 notice dated 14 March 2017 under section 287A of the 1998 Act and relied on the report of Dr Endrey-Walder dated 28 April 2018.[5]

9. On 28 May 2018, the respondent issued a Dispute Notice pursuant to section 74 of the 1998 Act maintaining its decision disputing liability for the neck under sections 4 and 9A of the 1987 Act and maintained its decision in relation to the section 39 issue.[6]

10. Mrs Sullivan lodged an Application to Resolve a Dispute (ARD) dated 6 November 2019 in the Workers Compensation Commission (the Commission) claiming lump sum compensation under section 66 of the 1987 Act for permanent impairment of the neck under the Table of Disabilities, as a result of the injury sustained in the course of her employment with the respondent on 2 September 1992.

---

[1] Application to Resolve a Dispute at page 19
[2] Application to Resolve a Dispute at pages 26-29
[3] Reply at pages 1-2
[4] Reply at pages 3-4
[5] Application to Resolve a Dispute at page 58
[6] Reply at pages 5-8

ISSUES FOR DETERMINATION

11. The parties agreed that the following issue remained for determination:

    (a) Did Mrs Sullivan suffer a disease process of gradual onset in her neck within the meaning of section 4(b)(i) of the 1987 Act or an aggravation, acceleration, exacerbation or deterioration of any disease process in her neck within the meaning of section 4(b)(ii) of the 1987 Act arising out of or in the course of her employment with the respondent between 1 July 1992 and 2 September 1992?

Matters previously notified as disputed

12. The issues in dispute were notified in the Dispute Notices referred to above.

Matters not previously notified

13. No other issues were raised.

PROCEDURE BEFORE THE COMMISSION

14. The parties attended a conciliation conference/arbitration in Wagga Wagga on 14 February 2020. Mr Timothy Abbott, Solicitor appeared for Mrs Sullivan and Mr Josh Beran of counsel appeared for the respondent.

15. During the conciliation phase the parties agreed as follows:

    (a) Section 9A of the 1987 Act does not apply because it had not been enacted at the date of Mrs Sullivan's injury on 2 September 1992.

    (b) The applicant did not pursue the claim for pain and suffering under section 67 of the 1987 Act and I granted the applicant leave to amend Part 5.6 of the ARD to delete the claim for pain and suffering.

    (c) The only determination I am required to make is whether Mrs Sullivan sustained an injury to her neck on 2 September 1992 and if so, to remit the matter to the Registrar for referral to an Approved Medical Specialist for an assessment of impairment of her neck under the Table of Disabilities.

16. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary Evidence

17. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) ARD dated 6 November 2019 and attached documents;

    (b) Reply dated 28 November 2019 and attached documents;

(c) Applicant's Application to Admit Late Documents dated 14 February 2020 and attached chronology, that was inadvertently omitted as an attachment to the applicant's statement dated 26 September 2019 attached to the ARD.

Oral Evidence

18. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

FINDINGS AND REASONS

Did Mrs Sullivan injure her neck at work?

19. The onus of establishing injury falls on Mrs Sullivan and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*[7] (*Ireland*) and *Nguyen v Cosmopolitan Homes*[8] (*Nguyen*).

20. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*[9] (*Kooragang*). As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*[10] (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.

21. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act.

22. Section 4(a) of the 1987 Act defines 'injury' as a personal injury arising out of or in the course of employment. As the deemed date of Mrs Sullivan's injury is 2 September 1992, section 4(b) then provided that 'injury' includes a 'disease injury'. 'Disease injury' is a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor: section 4(b)(i); and, the aggravation, acceleration, exacerbation or deterioration of any disease where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration: section 4(b)(ii).

23. As to the meaning of disease, in *Federal Broom Co Pty Ltd v Semlitch*[11] (*Semlitch*), Kitto J said:

> "In its ordinary meaning 'disease' is a word of very wide import, comprehending any form of illness; and there is no reason I can see for reading it in the present context as not extending to mental illness."[12]

This decision was applied by the Court of Appeal in *Cook v Midpart Pty Ltd t/as McDonalds Foster*[13].

[7] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134
[8] *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246
[9] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796
[10] *Kirunda v State of New South Wales (No 4)* [2018] NSWWCCPD 45 at [136]
[11] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626
[12] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 632
[13] *Cook v Midpart Pty Ltd t/as McDonalds Foster* [2008] NSWCA 151

24. In *Commissioner for Railways v Bain,*[14] Windeyer J stated:

> "The word 'disease' seems to me apt to describe any abnormal physical or mental condition that is not purely transient …"[15]

25. In *Perry v Tanine Pty Ltd t/as Ermington Hotel*[16] (*Perry*), Burke CCJ held carpal tunnel syndrome to be a "disease," saying:

> "In general it seems to me that carpal tunnel syndrome is a failure of an area of the body to cope with repeated stress imposed upon it and reacts to that stress by developing swelling, pain and loss of function as a consequence. That seems to me to be classically a disease process. Where work is the source of the relevant stress it connotes to me that the worker has received injury either by the contraction or aggravation of a disease."[17]

Perry was referred to with approval in the Court of Appeal by Mason P in *Fletcher International Exports Pty Ltd v Barrow*.[18]

26. In *Semlitch*, Kitto J said:

> "There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism".[19]

27. In *Semlitch*, Windeyer J said:

> "The question that each [aggravation; acceleration; exacerbation; deterioration] poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient."[20]

28. In *Semlitch*, Windeyer J also posed the following questions:

> "Was the applicant suffering from a disease? If so, was there an aggravation, acceleration, exacerbation or deterioration of it? If so, was her (or his) employment a contributing factor? If so, did a total or partial incapacity for work result from such aggravation, acceleration, exacerbation or deterioration?"[21]

Discussing whether there was "aggravation, acceleration, exacerbation or deterioration" Windeyer J said:

> "… the answer depends upon whether for the sufferer the consequences of his affliction have become more serious".[22]

---

[14] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246
[15] *Commissioner for Railways v Bain* [1968] HCA 5; 112 CLR 246 at 272
[16] *Perry v Tanine Pty Ltd t/as Ermington Hotel* [1998] NSWCC 14; (1998) 16 NSWCCR 253
[17] *Perry v Tanine Pty Ltd t/as Ermington Hotel* [1998] NSWCC 14; (1998) 16 NSWCCR 253 at [57]
[18] *Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA 244; (2007) 5 DDCR 247.
[19] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626
[20] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 639
[21] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 638
[22] *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 637

29. Burke CCJ, applying *Semlitch* in *Cant v Catholic Schools Office*[23] (*Cant*) said:

> "The thrust of these comments is that irrespective of whether the pathology has been accelerated there is a relevant aggravation or exacerbation of the disease if the symptoms and restrictions emanating from it have increased and become more serious to the injured worker."[24]

30. The proper test is whether the aggravation impacted the individual concerned. It is not necessary for the particular disease to be made worse: *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond*[25] (*Raymond*) applying *Semlitch* and *Cant*.

31. Roche DP in *Kelly v Western Institute NSW TAFE Commission*[26] (*Kelly*), citing *Semlitch*, said:

> "An aggravation or exacerbation of a disease occurs where the experience of the disease by the applicant is increased or intensified by an increase or intensifying of symptoms."[27]

32. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

33. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties.

34. The respondents' principal submissions may be summarised as follows:

    (a) Mrs Sullivan has not met the necessary burden of proof to demonstrate that the nature and conditions of her employment with the respondent caused the disease or aggravation of the disease in her neck.

    (b) Mrs Sullivan's evidentiary statement dated 26 September 2019 was created some 27 years after the date of injury. Accordingly, the statement should not be given as much weight as the contemporaneous medical evidence.

    (c) The respondent accepted that the rolling of legs of mutton described by Mrs Sullivan in her evidentiary statement was most likely heavy work. However, she does not say how she employed her neck to carry out the tasks described.

    (d) In her evidentiary statement, Mrs Sullivan stated that she first felt neck pain in September 1992. This is a statement of fact that is not borne out by the contemporaneous medical evidence.

    (e) Contrary to her evidentiary statement, Mrs Sullivan did not consult her general practitioner, Dr Gordon Goodwin in November 1992. She did not consult him until 1994.

---

[23] *Cant v Catholic Schools Office* [2000] NSWCC 37; (2000) 20 NSWCCR 88
[24] *Cant v Catholic Schools Office* [2000] NSWCC 37; (2000) 20 NSWCCR 88 at [17]
[25] *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond* [2006] NSWWCCPD 132; (2006) 6 DDCR 79
[26] *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71
[27] *Kelly v Western Institute NSW TAFE Commission* [2010] NSWWCCPD 71 at [66]

(f) In her evidentiary statement, Mrs Sullivan described the light work she performed for the respondent involving boxes, which the respondent accepted was arduous work. However, Mrs Sullivan did not describe how she employed her neck to carry out any of these tasks.

(g) Mrs Sullivan stated that she had not worked for the respondent since November 1994, which provides the time frame for her alleged nature and conditions of employment claim.

(h) Contrary to Mrs Sullivan's evidence, Dr Goodwin reported that she first consulted him for a second opinion on 11 August 1994 for the pain in her left scapula that had been present since September 1992. Dr Goodwin also referred to Mrs Sullivan's back and thoracic spine but made no reference to her neck.

(i) On 24 August 1995, Dr T G Lithgow, Pain Management Specialist, did not refer to any complaint of neck pain by Mrs Sullivan in his report.

(j) On 20 November 1995, Dr J S Middleton, Rehabilitation Physician, did not refer to any complaint of neck pain by Mrs Sullivan in his report and his examination did not reveal any issues with the neck. Dr Middleton referred to a plain x-ray, a bone scan and MRI scan performed in 1994 and 1995 as demonstrating long-standing minor degenerative changes particularly between C6 and T9 and some bulging posteriorly of the C6/7 intervertebral disc at the base of the neck. This was the first occasion that the medical evidence referred to the neck. However, he concluded that Mrs Sullivan had developed a problem with pains through the right posterior shoulder girdle structures in the course of her employment with the respondent in 1992. Whilst Dr Middleton opined that she was unfit for work of a demanding nature in terms of manual handling requirements and work involving heavy or repeated lifting, repetitive movements or prolonged unrelieved static posturing of her head, neck, upper limbs or upper trunk, this does not mean that she suffered an injury to the neck.

(k) On 21 November 1995, Dr Geoffrey Coffey, Consultant Neurologist, noted that an MRI scan referred to some disc degeneration at C6, C7. Importantly, Dr Coffey took a history that, following a series of nerve block injections into her mid to lower thoracic spine, Mrs Sullivan developed for the "first time, stiffness and pain in her neck" that only lasted several days. After the second series of injections, in September 1995, she had persistent pain and stiffness in her neck made worse by any movement. There is no allegation of a consequential condition to the neck in these proceedings. Dr Coffey opined that she had developed fluctuating pain and stiffness in her neck on a fibrositic or soft tissue basis, but he did not provide an opinion that it was related to her employment with the respondent.

(l) On 22 November 1995, more than a year after she ceased employment with the respondent, Dr Brett Courtenay, Surgeon, took a history that Mrs Sullivan had developed neck, shoulder, left arm and chest problems as a result of duties she performed in her employment with the respondent between July and September 1992. This was the first time that any doctor recorded a link between Mrs Sullivan's duties and any neck pain. Dr Courtenay did not take any history as to when or how she sustained pain or symptomology in her neck. He provided a bold assertion that she had continuing problems with her neck and shoulder and stopped working in November 1994. The assertion is totally contrary to the histories taken by Dr Goodwin and Dr Coffey. Dr Courtenay examined her

cervical spine. However, he provided no opinion or diagnosis as to an injury to the neck. Dr Courtenay's report can be given very little weight in respect of this claim, as his opinion only identified the development of left thoracic pain radiating into the left arm.

(m) On 10 April 2000, Dr Martin Jude, Consultant Physician Neurologist, reported that some of Mrs Sullivan's pain may be referred from her neck. However, he did not provide any opinion as to causation.

(n) On 18 October 2010, Dr Peter Isbister, Orthopaedic Surgeon, took no history of neck pain. Thoracic spine pain was identified. He recorded her present symptoms as being in the left shoulder with pain radiating from the shoulder to the neck. In reference to her neck he noted that Mrs Sullivan stated that she had left-sided pain relating to her shoulder condition. There is no clear link to a pathological change in her neck. Dr Isbister observed that the neck had slight restriction partially due to muscle symptoms. The respondent submits that the muscle symptoms related to the left shoulder. Dr Isbister made a diagnosis of musculo-ligamentous sprain of the thoracic spine and a frozen shoulder impingement. There was no diagnosis of any injury to the neck.

(o) On 3 July 2012, Dr David McGrath, Specialist in Musculoskeletal and Occupational Medicine, made no reference to any neck injury. He concluded that Mrs Sullivan's thoracic spine pain and discomfort spread to her left shoulder girdle.

(p) On 28 January 2016, Dr Michael Ow-Yang, Neurosurgeon, identified Mrs Sullivan as suffering from left brachialgia with evidence of left C6 and C7 nerve compression.

(q) On 7 February 2017, Dr Thomas Davis, Consultant Surgeon, recorded no history of neck pain or neck symptoms.

(r) On 22 February 2017, Dr Imke Hinze, General Practitioner, in response to a questionnaire from the insurer, opined that Mrs Sullivan had C6 and C7 radicular pain due to C5/6 and C6/7 degenerative discs, which caused referred pain into the left arm. There was no link drawn by Dr Hinze to the nature and conditions of Mrs Sullivan's employment with the respondent.

(s) Mrs Sullivan's claim is based on the report of Dr Peter Endrey-Walder, General and Trauma Surgeon dated 18 April 2018. Dr Endrey-Walder took a history that through July to September 1992, Mrs Sullivan developed gradually increasing neck, left arm and upper back pain in her employment with the respondent. Such history is inconsistent with that referred to in the medical reports of Dr Goodwin, Dr Lithgow, Dr Middleton and Dr Coffey.

(t) Dr Endrey-Walder opined that Mrs Sullivan developed symptoms at the neck, left shoulder/arm and upper thoracic back as a direct consequence of her work with the respondent during a two to three month period between July and September 1992. Such opinion is not borne out in the contemporaneous medical evidence. The opinion is limited to the period between July and September 1992 and anything that occurred after that is not covered in Dr Endrey-Walder's report.

(u) Dr Endrey-Walder provided no reasoning as to how he arrived at his opinion, except for referring to the repetitive nature of Mrs Sullivan's work. There was no history taken or evidence of the involvement of the neck in the repetitive work. Dr Endrey-Walder's opinion as to causation cannot be accepted. On the assumptions made and the history not being supported by the contemporaneous evidence, the opinion must be rejected or given little or no weight.

(v) There is no evidence supporting an aggravation of a disease or causation of a gradual disease process as pleaded. At the very most, Dr Endrey-Walder said that Mrs Sullivan's work caused an injury of some description to her neck. In order to find injury, the arbitrator must feel a degree of actual persuasion (*Nguyen*). The most persuasive evidence comes from the reports of Dr Goodwin, Dr Lithgow and Dr Coffey, all of whom identified the commencement of neck pain years after Mrs Sullivan is alleged to have sustained injury.

35. Mrs Sullivan's principal submissions may be summarised as follows:

(a) The respondent's medical evidence is restricted to two reports. The chronology discloses that Mrs Sullivan attended on a large number of doctors for the respondent over the years, whose reports do not appear in the Reply. The reports include those of Dr Seamus Dalton, an earlier report of Dr Davis, Dr James Bodel, Dr Thomas Sheehan, several reports of Dr Leon Le Leu and Dr Christo Hanekom. It should be inferred from absence of those reports in evidence, that they do not assist the respondent.

(b) Dr McGrath's report dated 3 July 2012 was prepared at a time when his focus was on assessing Mrs Sullivan's back and shoulder.

(c) All the evidence is that Mrs Sullivan was performing hard physical work with the respondent. One does not require evidence from an occupational therapist or occupational physician to analyse the mechanics of the involvement of her neck in performing such work. The work involved lifting and twisting. It ought to be accepted that kind of work caused degenerative changes in the neck and back.

(d) Dr Davis' report dated 7 February 2017 made no reference to Mrs Sullivan's neck. However, he did prepare a report to FAI Insurance in 1996, referred to in the chronology but not in evidence, where he stated that her neck had become stiff.

(e) None of the respondent's medical evidence addresses whether Mrs Sullivan suffered a neck injury. Therefore, the evidence of Mrs Sullivan and Dr Endrey-Walder should be accepted.

(f) Dr Endrey-Walder's reasoned opinion as to causation ought to be accepted.

(g) There are a number of references to Mrs Sullivan's neck in the medical reports over the years. Early on, her main problems were with her back and left shoulder, for which she had surgery. The neck symptoms developed over time until Mrs Sullivan underwent surgery to her neck in 2017.

(h) The respondent's submissions in relation to Dr Coffey are not correct because he does make reference to Mrs Sullivan's neck. Dr Courtenay referred to neck problems having developed as a result of her work duties. On 18 May 1998, Dr Leicester referred to a lot of neck pain with radiation down the arm. Dr Jude referred to the neck.

(i) The medical evidence is overwhelmingly in favour of Mrs Sullivan having sustained an injury to her neck in the course of her employment with the respondent. The unrefuted evidence in her statement ought to be accepted.

36. The respondents' submissions in reply may be summarised as follows:

    (a) Mrs Sullivan bears the onus of proof in this case. She must provide some evidence of how the nature of her duties were linked to her alleged neck injury.

    (b) The respondent does not have to file any evidence at all.

    (c) Mrs Sullivan's chronology that summarised the contents of opinions in some medical reports are not in evidence. The contents of the chronology cannot be taken as a basis for medical opinion.

    (d) There is no section 66 notice of claim in evidence. It is not known when the claim was made. Therefore, it is not known whether Dr Davis' report dated 7 February 2017 was commissioned before or after the claim was made for lump sum compensation. So, it is difficult to know why his report was prepared.

37. In evidence, there is a statement by Mrs Sullivan dated 26 September 2019.[28] Mrs Sullivan stated that she commenced employment at the respondent's Goulburn abattoir in June 1992 as a labourer/packer. Mrs Sullivan's duties included rolling legs of mutton, weighing about 2 kg, wrapping them and placing them in a box, after they had been boned by the boner standing opposite her on the conveyor line. The work was very hard and repetitive.

38. Mrs Sullivan provided further detail of her duties in the history she provided to Dr Middleton, including that, some 2,000 sheep were being processed per day and that the processing line ran fairly rapidly.[29] Dr Middleton described Mrs Sullivan's duties as "prolonged rapid repetitive manual handling movements".[30] Dr Coffey recorded the nature of Mrs Sullivan's duties as involving long periods of standing in the one position; making repetitive movements with the arms and hands; lifting meat; packing meat; carrying boxes of meat; all at a fast pace.[31] Dr Courtenay obtained further details from Mrs Sullivan in relation to her duties with the respondent. He recorded that, the boxes in which she was packing the legs of mutton were behind her, either to the left or right hand side. At the time, the factory was processing 10.5 sheep per minute. There were four people doing the packing and rolling. This worked out at packing and rolling five legs of mutton per minute. She worked at this pace for probably two to three hours and would then have a break. She worked for a total of nine hours per day, five days per week.[32] Dr Isbister took an additional piece of information, namely, that Mrs Sullivan had to twist around to load the mutton into boxes.[33]

39. Dr Davis succinctly described Mrs Sullivan's duties with the respondent in the following terms:

> "In the process of working in the boning room, Ms Sullivan had to work at a table, at chest height. On this table, there was meat separated from the bones and she had to pack the meat in plastic wrapping and then twist from one side or the other in rapid succession to place the wrapped meat in boxes."[34]

40. The nature of Mrs Sullivan's duties as described from the various sources referred to above was unchallenged. The respondent accepted that Mrs Sullivan's duties were most likely heavy work.

---

[28] ARD at pages 59-60
[29] ARD at page 6
[30] ARD at page 8
[31] ARD at page 10
[32] ARD at page 15
[33] ARD at page 31
[34] Reply at 16

41. Mrs Sullivan stated that, in about September 1992, she started developing pain in her back at the level of her bra fastening strap, in her neck and in her left shoulder. Initially, she thought it was muscle soreness from the heavy lifting in her new job. However, the pain reached the point where it became persistent and, in November 1992, she consulted her general practitioner Dr Goodwin. Dr Goodwin issued her with a medical certificate certifying her unfit for work for one week. She underwent physiotherapy. She was referred for a CT scan and placed on light duties. Mrs Sullivan's recollection about consulting Dr Goodwin in November 1992 was clearly incorrect. Dr Goodwin reported that he first consulted Mrs Sullivan on 11 August 1994 for a second opinion.

42. Mrs Sullivan's history to Dr Courtenay provides some clarification as to who she first consulted for medical treatment in 1992. Dr Courtenay noted that Mrs Sullivan reported that she continued performing her duties rolling deboned legs of mutton until she had so much pain, she began to develop some numbness. She saw "the company doctor"[35] in September 1992. He examined her and found a numb area over her back. He suggested she return to some light duties and undergo physiotherapy. The physiotherapist focused on her posture, but Mrs Sullivan felt it only aggravated her condition. She returned to work on various different duties. She was unhappy with her progress but did not realise that she was able to seek a second opinion. It was only in September 1994 that she saw her local doctor (Dr Goodwin).[36] Dr Middleton also took a history that Mrs Sullivan initially consulted "the company doctor".[37] Dr Courtenay also took a history that Mrs Sullivan eventually reported her problem to "the company medical officer" in September 1992.[38]

43. In her evidentiary statement, Mrs Sullivan stated that she returned to work on a number of light duty positions in 1992. Initially, she was involved in making up boxes from cardboard and placing them in a chute. Lifting the boxes with her left arm aggravated the pain. So, she was transferred to another section where she had to check the weight of scrap meat in boxes. The boxes had to be filled to a weight of 25 kg and she had to push them around the conveyor belt to weigh them. She then had to remove or add scrap meat to make the 25 kg weight. Other light duty positions included working in the lamb room, on the slaughter floor and on the visceral table. All of these duties involved repetitive lifting, pushing and pulling type work. They were not light duties. Mrs Sullivan's description of the alleged light duties provided to her by the respondent were unchallenged. The respondent accepted that it was arduous work.

44. Mrs Sullivan stated that, in November 1994, the respondent requested her to take 12 months off. She was paid workers' compensation during this period. When she returned to work, she was terminated because there were no light duties available for her. She remained on workers' compensation benefits until the end of 2017.

45. Mrs Sullivan stated that the problems with her neck continued and increased. She referred to the chronology in evidence setting out the dates of consultations with various doctors. She had undergone physiotherapy, acupuncture and nerve blocks. She attended a three-week pain clinic. She underwent surgery to her neck by Dr Mews (incorrectly referred to as Meares) in June 2017. She continues to suffer from a lot of pain and restriction of movement in her neck. She takes medication, including Nexium, Lipitor, Endep, Lyrica, Tramal, Panadol Osteo and Panamax.

46. In her evidentiary statement, Mrs Sullivan did not describe the nature and precise location of the pain in her neck at the time of injury, except to say that she thought it was muscle soreness. She did not describe the increase in the "problems"[39] with her neck. She did not identify an approximate date in relation to the alleged increase in her neck "problems".

---

[35] ARD at page 15
[36] ARD at page 16
[37] ARD at page 6
[38] ARD at page 11
[39] ARD at page 60 at [10]

Mrs Sullivan's evidence in relation to her neck was limited to her present symptoms, which she very simply described as "a lot of pain in my neck and restriction of movement in my neck".[40] Mrs Sullivan's evidentiary statement was silent on the reporting of her neck symptoms to the various medical practitioners she consulted.

47. In evidence, there is a report by Dr Goodwin dated 11 August 1995.[41] Dr Goodwin reported that he first consulted Mrs Sullivan on 11 August 1994. She complained of ongoing pain in the region of her left scapula that had been present since about September 1992. Dr Goodwin took a history of the nature of Mrs Sullivan's duties with the respondent that was consistent with the evidence. He examined her thoracic spine and diagnosed left-sided T8 thoracic nerve root pain. Dr Goodwin reported no complaint of neck symptoms by Mrs Sullivan. Nor did he report that Mrs Sullivan claimed to have injured her neck at work with the respondent.

48. Dr Goodwin's report is chronologically the earliest report in a series of reports in evidence. This can be explained by the fact that Mrs Sullivan was consulting the respondent's medical officer between September 1992 until 11 August 1994, when she sought a second opinion from Dr Goodwin. The clinical records of the respondent's medical officer relating to Mrs Sullivan were not in evidence. This is not surprising, nor is it a criticism, when one takes into account the significant amount of time that has passed since Mrs Sullivan's work-related injuries. However, it does mean that there is a two-year gap in the medical evidence commencing from the time of injury.

49. In evidence, there is a report by Dr Lithgow dated 24 August 1995.[42] Dr Lithgow diagnosed thoracic spinal pain that was probably caused by the nature of Mrs Sullivan's work involving repeated lifting and twisting movements, which led to rendering minor thoracic spine degenerative changes symptomatic. Dr Lithgow reported no complaint of neck symptoms by Mrs Sullivan. Nor did he report that Mrs Sullivan claimed to have injured her neck at work with the respondent.

50. In evidence, there is a medico-legal report by Dr Middleton dated 20 November 1995 commissioned by Mrs Sullivan's lawyers.[43] Mrs Sullivan described to Dr Middleton that her pain extended through the left-sided posterior interscapular musculature from just below the inferior angle of the scapula, up along the left side of the vertebral spine to the left trapezius fold and left supraspinatus muscle belly. Dr Middleton reported no complaint of neck symptoms by Mrs Sullivan. Nor did he report that Mrs Sullivan claimed to have injured her neck at work with the respondent. Dr Middleton referred to x-rays, a bone scan and an MRI scan of Mrs Sullivan's dorsal spine in 1994 and 1995. He opined that those investigations demonstrated long-standing minor degenerative changes in the mid-dorsal region extending particularly between C6 and T9 and some bulging posteriorly of the C6/7 intervertebral disc at the base of the neck. He concluded that Mrs Sullivan had developed a problem with pains through the right posterior shoulder girdle structures in the course of her prolonged, rapid and repetitive manual handling movements in her employment with the respondent. He opined that there was no definite indication that the spondylitic degenerative changes in her dorsal spine had any direct relationship to her shoulder girdle pain symptoms but the possibility that some aggravation of the condition was a contributing factor could not be excluded. Whilst Dr Middleton considered that Mrs Sullivan was unfit for work of a demanding nature and, in particular, work involving heavy or repetitive lifting, repetitive movements or prolonged unrelieved static posturing of her head, neck, upper limbs or upper back; he did not diagnose an injury to her neck.

[40] ARD at page 60 at [13]
[41] ARD at pages 1-3
[42] ARD at pages 4-5
[43] ARD at pages 6-9

51. In evidence, there is a medico-legal report by Dr Coffey dated 21 November 1995 commissioned by Mrs Sullivan's lawyers.[44] Dr Coffey took a history from Mrs Sullivan that she had sustained a strain/muscular injury to her thoracic spine region at work with the respondent between July and September 1992. She also provided a history that she started to develop pain under the left shoulder blade and in the mid to lower thoracic spine region towards the end of each shift at work. Dr Coffey took a history of the nature of Mrs Sullivan's duties with the respondent that was consistent with the evidence. Dr Coffey noted the MRI scan which demonstrated the presence of some disc degeneration at the C6/7 level.
Dr Coffey did not report that Mrs Sullivan claimed to have injured her neck at work with the respondent. Dr Coffey also took a history that, following a series of nerve block injections into her mid to lower thoracic spine in March/April 1995, Mrs Sullivan developed for the "first time, stiffness and pain in her neck"[45] but that it only lasted several days. However, after a second series of injections, in September 1995, she had persistent pain and stiffness in her neck, made worse by any movement. Dr Coffey opined that she had developed fluctuating pain and stiffness in her neck on a fibrositic or soft tissue basis as an "associated phenomenon".[46] I interpret "associated phenomenon" to mean that the fibrositic or soft tissue condition of Mrs Sullivan's neck was a consequential condition to the accepted injuries on 2 September 1992. However, a consequential injury to the neck has not been pleaded.

52. In evidence, there is a medico-legal report by Dr Courtenay dated 22 November 1995 commissioned by Mrs Sullivan's lawyers.[47] Dr Courtenay reported that Mrs Sullivan presented with a history of having developed neck, shoulder, left arm and chest problems as a result of duties she performed with the respondent between July and September 1992.
The history of injury to the neck, is inconsistent with the histories Mrs Sullivan provided to Dr Goodwin, Dr Lithgow, Dr Middleton and Dr Coffey, where no reference was made by any of those doctors to her reporting an injury to her neck at work. Dr Courtenay opined that on the history provided, Mrs Sullivan performed some very strenuous work for the respondent over a prolonged period of time and, as a result, developed progressive pain in her left thoracic area radiating out into her left arm. The work involved a lot of lifting, twisting and turning. She did not have the opportunity to rest completely and the lighter duties provided to her involved a lot of heavy lifting and caused further aggravation of her symptoms.
Dr Courtenay assessed Mrs Sullivan as having a 20% permanent impairment of the back on the Table of Disabilities as a result of the work injury. He did not provide a diagnosis of any injury to the neck. He did not provide an opinion as to causation in relation to the neck. He made no assessment of permanent impairment of the neck on the Table of Disabilities.

53. On 7 March 1997, Mrs Sullivan was awarded lump sum compensation under section 66 of the 1987 Act in respect of 17% permanent impairment of her back on the Table of Disabilities and lump sum compensation for pain and suffering under section 67 of the 1987 Act as a result of injury in the course of her employment with the respondent on 2 September 1992.[48] No claim was made for the permanent loss of efficient use of the left arm at or above the elbow. No claim was made for permanent impairment of the neck.

54. On 9 April 1998, Mrs Sullivan underwent a left shoulder ultrasound that demonstrated impingement but no tear.[49]

55. In mid-1998, Mrs Sullivan underwent a subacromial cortisone injection under ultrasound on the referral of Dr Andrew Leicester, Orthopaedic Surgeon. Dr Leicester reported that initially there was an excellent response, with pain virtually resolving. However, two weeks prior to 14 July 1998, she experienced a recurrence of her pain and Dr Leicester requested a repeat

[44] ARD at pages 10-14
[45] ARD at page 11
[46] ARD at page 13
[47] ARD at pages 15-18
[48] ARD at page 19
[49] ARD at page 20

injection under ultrasound guidance.[50] On 26 November 1998, Dr Leicester reported that Mrs Sullivan only experienced temporary relief in each of her cortisone projections. He recommended an arthroscopic subacromial decompression with acromioplasty.[51] On 6 April 1999, Mrs Sullivan underwent a left shoulder arthroscopic subacromial bursectomy and acromioplasty by Dr Leicester.[52]

56. In evidence, there is a report by Dr Jude dated 10 April 2000.[53] Dr Jude made a brief reference to Mrs Sullivan's employment with the respondent rolling boned legs of lamb. He was provided with a history that since her employment with the respondent, her symptoms have included diffuse pain in the left arm; intermittent numbness and tingling affecting the arm, index finger, third and fourth fingers of the left hand and the third and fourth fingers of the right hand; and sore elbow joints. On examination, Dr Jude found no focal motor or sensory change objectively; symmetrical and normal reflexes; and no vasomotor change. He referred to normal nerve conduction studies. He was unable to find any objective evidence of neuropathic problems affecting her limbs. Although Mrs Sullivan experienced intermittent abnormal sensations, he felt the dominant problems were musculoskeletal in nature. Dr Jude opined that some of Mrs Sullivan's pain may be referred from her neck but there was no strong element of radicular discomfort or any evidence of focal nerve root compression clinically. He provided no opinion as to causation of the possible pain referred from the neck. Dr Jude reported no complaint of neck symptoms by Mrs Sullivan. Nor did he report that Mrs Sullivan claimed to have injured her neck at work with the respondent.

57. In evidence, there is a medico-legal report by Dr Isbister dated 18 October 2010 commissioned by Mrs Sullivan's lawyers.[54] Dr Isbister made reference to Mrs Sullivan's duties with the respondent, that were consistent with the evidence. Mrs Sullivan provided him with a history that, in or around September 1992, she experienced pain in her thoracic spine at the level of her bra fastening. She continued with her work and her pain became worse. Dr Isbister reported her present symptoms as pain in the left shoulder, particularly when abducting; pain radiating to the left side of the neck relating to her shoulder condition; wasting of the shoulder muscles; restricted range of shoulder movement; sensations of pins and needles in the fingers mainly occurring at night; a sensation of "dead weight" in the left arm at night; left hand discolouration with blueness and blotches; and pain in the mid thoracic area between the shoulder blades. Dr Isbister observed that the neck had slight restriction partially due to muscle symptoms. This observation appeared immediately after his reference to the development of what appeared to be a frozen shoulder with subacromial bursitis and in this regard, I interpret the slight neck restriction to be related to the left shoulder injury. Dr Isbister did not report that Mrs Sullivan claimed to have injured her neck at work with the respondent. He made no diagnosis of any injury to the neck. In fact, his diagnosis was a musculo-ligamentous sprain of the thoracic spine and a frozen left shoulder with impingement. Dr Isbister assessed a 20% permanent loss of the efficient use of the left arm at or above the elbow under the Table of Disabilities. He made no assessment of permanent impairment of the neck on the Table of Disabilities.

58. On 3 December 2010, Mrs Sullivan entered into a section 66A Complying Agreement with the respondent on the basis of a 20% permanent loss of the efficient use of the left arm at or above the elbow under the Table of Disabilities as a result of injury in the course of her employment with the respondent on 2 September 1992.[55] No claim was made for permanent impairment of the neck.

[50] ARD at page 21
[51] ARD at page 22
[52] ARD at page 23
[53] ARD at pages 24-25
[54] ARD at pages 30-39
[55] ARD at pages 26-29

59. In evidence, there is a medico-legal report by Dr McGrath dated 3 July 2012 commissioned by the respondent's insurer.[56] Mrs Sullivan provided him with a history that, she developed pains at work in about September 1992. The pains were initially experienced along the left side of the middle thoracic spine. As time progressed, she developed increasing dysfunction of the left shoulder girdle, culminating in an arthroscope of the gleno-humoral joint. Dr McGrath opined that there were very minimal degenerative changes in the thoracic spine. He opined that the bony reaction (hypertrophy) at T7/8 resulted from the events at work. Dr McGrath reported no complaint of neck symptoms by Mrs Sullivan. Nor did he report that Mrs Sullivan claimed to have injured her neck at work with the respondent.

60. In evidence, there is a report by Dr Ow-Yang to Dr Mews dated 28 January 2016.[57] Dr Ow-Yang opined that Mrs Sullivan suffered from left brachialgia with evidence of left C6 and C7 nerve compression on MRI. He noted that she had failed to improve with conservative treatment and wished to consider surgery. He had previously offered Mrs Sullivan a C5/6 and C6/7 anterior cervical discectomy plus rhizolysis plus fusion and internal fixation. However, she could not afford to undergo surgery in the private sector and wanted to consider surgery at a public hospital. Dr Ow-Yang did not provide an opinion on work-related causation in relation to Mrs Sullivan's left brachialgia and C6 and C7 nerve compression.

61. Dr Ow-Yang referred Mrs Sullivan for CT-guided injections. Mrs Sullivan underwent a CT-guided left C6 perineural injection on 14 March 2016[58] and a CT-guided left C7 peri radicular injection on 16 March 2016.[59]

62. In evidence, there is a medico-legal report by Dr Davis dated 7 February 2017 commissioned by the respondent's insurer.[60] I disagree with the respondent's submission that the purpose of seeking Dr Davis' opinion is unknown. The report was relied on to terminate Mrs Sullivan's weekly compensation benefits under section 39 of the 1987 Act.[61] Dr Davis reported no complaint of neck symptoms by Mrs Sullivan. Nor did he report that Mrs Sullivan claimed to have injured her neck at work with the respondent. Dr Davis did not conduct an examination of Mrs Sullivan's neck. He diagnosed a work-related aggravation of spondylosis of the thoracic spine and impingement syndrome of the left shoulder.

63. On 22 February 2017, Dr Hinze, in response to a questionnaire from the respondent's insurer, diagnosed C6 and C7 radicular pain due to C5/6 and C6/7 degenerative discs, that caused referred pain in the left arm.[62] The diagnosis was based on a cervical spine MRI scan and review by Dr Mews. The diagnosis was provided in response to the question:

> "Do you have a recent imaging report which shows pathology in the cervical spine which could generate pain in the left shoulder/thoracic spine?"[63]

The insurer's questionnaire related to a request for approval of CT-guided injections. Dr Hinze pointed out in his response that the injections had already taken place at Mrs Sullivan's own expense.

64. On 31 May 2017, Mrs Sullivan underwent an MRI scan of her cervical spine. The scan demonstrated multilevel degenerative disco vertebral and facet joint changes, most marked at C5-C6 and C6/C7 level with moderate narrowing of the spinal canal; and multilevel neural exit foraminal narrowing most marked at C5-C6 and C6/C7 level.[64]

---

[56] Reply at pages 9-14
[57] ARD at pages 40-41
[58] ARD at page 42
[59] ARD at page 43
[60] Reply at pages 15-21
[61] Reply at pages 3-4
[62] Reply at pages 22-23
[63] Reply at page 22
[64] ARD at page 49

65. On 1 June 2017, Mrs Sullivan underwent a C5-6 and C6-7 anterior discectomy, fusion and post-operative repair of CSF leak from left C7 nerve root by Dr Mews.[65]

66. In evidence, there is a report by Dr Endrey-Walder dated 18 April 2018 commissioned by Mrs Sullivan's lawyers.[66] Dr Endrey-Walder noted that Mrs Sullivan's duties with the respondent were very physically demanding and involved rolling deboned legs of mutton into plastic and placing these into cardboard boxes weighing between 20 kg and 30 kg, which then had to be lifted and shifted. He also noted that between July and September 1992, Mrs Sullivan developed gradually increasing neck, left arm and upper back pain carrying out the work described above.

67. Dr Endrey-Walder reported Mrs Sullivan as complaining of neck stiffness; pain when tilting her head to the side; an inability to turn her head quickly; neck pain waking her at night; and post-operative numbness in her left index and middle fingers. On examination of her neck, Dr Endrey-Walder observed the cervical spine was straight; the neck squat; a 5 cm surgical scar at the anterior aspect of the neck; lack of 40° at the limit of extension of the neck, barely beyond neutral position, 20° deficit at the limit of flexion; inability to rotate the head beyond 30° to the right, 40° to the left; and an inability to appreciate the 5 mm gap on two-point discrimination at the tips of the left index and middle fingers.

68. Dr Endrey-Walder opined that Mrs Sullivan developed symptoms at the neck, left shoulder/arm and upper thoracic back as a direct consequence of the nature and conditions of her daily work with the respondent between July and September 1992. Her daily work was of a repetitive nature requiring rapid movement of the upper limbs, lifting heavy loads in cardboard boxes on a regular daily basis. Despite trialling different jobs in the workplace, her symptoms failed to improve, and she went off work at the end of 1994.

69. Dr Endrey-Walder referred to a gap of 10 to 15 years when Mrs Sullivan "acquiesced about her symptoms"[67] because nobody was able to assist her. She took various medications and tried physiotherapy and hydrotherapy. He noted that in January 2016, she underwent neurosurgical assessment (Dr Ow-Yang), and when her left upper limb symptoms adjudged to be radiculopathy, failed to improve with CT-guided injections, surgery to her cervical spine was recommended and performed in June 2017.

70. I do not find Dr Endrey-Walder's opinion in relation to Mrs Sullivan's neck persuasive and give it no weight. He provided no diagnosis of an injury to Mrs Sullivan's neck. He simply referred to her developing symptoms at the neck as a direct consequence of the nature and conditions of her work with the respondent during the relevant time. Such conclusion was based on Mrs Sullivan's history that she developed gradually increasing neck pain at the time. This is inconsistent with the medical evidence discussed above and, in particular, with the evidence of Dr Coffey, who took a history from Mrs Sullivan that, following a series of nerve block injections into her mid to lower thoracic spine in March/April 1995, she developed for the "first time, stiffness and pain in her neck",[68] being some 2.5 years after the pleaded injury.

71. Dr Endrey-Walder did not provide any reasoning to support the pleaded proposition that Mrs Sullivan suffered a disease process of gradual onset in her neck which was contracted by her in the course of employment and to which the employment was a contributing factor; or any reasoning to support the pleaded proposition that she suffered an aggravation, acceleration, exacerbation or deterioration of a disease process to the neck where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration during the period claimed.

---

[65] ARD at pages 44-50
[66] ARD at pages 51-57
[67] ARD at page 56
[68] ARD at page 11

72. Rule 15.2(3) of the Workers Compensation Commission Rules 2011 provides that "evidence based on speculation or unsubstantiated assumptions is unacceptable." Further, it is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd*[69] (*Paric*); *Makita (Australia) Pty Ltd v Sprowles*[70] (*Makita*); *South Western Sydney Area Health Service v Edmonds*[71] (*Edmonds*); and *Hancock v East Coast Timbers Products Pty Ltd*[72] (*Hancock*); that there must be a "fair climate" upon which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, more than a mere "ipse dixit" (an assertion without proof) is required and the latter seems to be precisely what Dr Endrey-Walder has done in this matter in relation to the Mrs Sullivan's neck.

73. The respondent did not put into evidence any medico-legal report dealing with the question of injury to Mrs Sullivan's neck. Nor was it required to do so. Mrs Sullivan bears the onus of proof.

74. There are significant temporal gaps in the medical evidence. There is an absence of a reasoned diagnosis of any work-related injury to Mrs Sullivan's neck. I have taken into account that histories in medical records are often used to attack the credit of a worker. Reference is made either to a failure to mention relevant matters, or a description in a medical record which is different to what the worker now says in evidence. Care should be taken when considering such evidence, not to place too much weight on the clinical notes of treating doctors, given their primary concern with treatment. Experience demonstrates that busy doctors sometimes misunderstand, omit or incorrectly record histories of accidents or complaints by a patient, particularly in circumstances where their concern is with the treatment or impact of an obvious frank injury: *Davis v Council of the City of Wagga Wagga*[73]; and applied in *King v Collins*[74] and *Mastronardi v State of New South Wales*[75]. I have exercised caution in this regard in relation to the treating medical records and reports in evidence and considered all the evidence, including the evidence in Mrs Sullivan's evidentiary statement.

75. Whilst I have no reason to doubt Mrs Sullivan's credibility, I have significant concerns about the reliability of her evidence in relation to her neck symptoms after all these years. Such concerns were borne out in the contradictory early medical evidence examined above. Mrs Sullivan's statement was completed with the assistance of her lawyer on 26 September 2019, some 27 years after her work-related incident.

76. The value of contemporaneous evidence has been repeatedly endorsed by the courts. In *Onassis and Calogeropoulos v Vergottis*[76], Lord Pearce said of documentary evidence:

> "It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance."

---

[69] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA
[70] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705
[71] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421
[72] *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43
[73] *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34
[74] *King v Collins* [2007] NSWCA 122
[75] *Mastronardi v State of New South Wales* [2009] NSWCA 270
[76] *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at 431

77. However, the absence of contemporaneous evidence is not determinative on the issue of causation where there is other evidence: *Owen v Motor Accidents Authority of NSW*[77] and *Bugat v Fox*.[78] While independent corroboration of complaints of pain will often be helpful and relevant in assessing the probative value of the evidence overall, such evidence is not a "requirement" that must be satisfied before an arbitrator can feel actual persuasion about the existence of a fact in issue: *Department of Aging, Disability and Home Care v Findlay*[79].

78. I have weighed the evidence of Mrs Sullivan together with other objective evidence and/or the absence of it: *Department of Education and Training v Ireland*.[80] Having done so, and for the reasons stated above, I find that Mrs Sullivan first suffered stiffness and pain in her neck when she underwent the series of nerve block injections into her mid to lower thoracic spine in March/April 1995, some 2.5 years after the pleaded injury. In making that finding, and for the reasons referred to above on the available evidence, I am not satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Mrs Sullivan suffered a disease process of gradual onset in her neck within the meaning of section 4(b)(i) of the 1987 Act or an aggravation, acceleration, exacerbation or deterioration of any disease process in her neck within the meaning of section 4(b)(ii) of the 1987 Act arising out of or in the course of her employment with the respondent between 1 July 1992 and 2 September 1992.

CONCLUSION

79. Mrs Sullivan did not suffer a disease process of gradual onset in her neck within the meaning of section 4(b)(i) of the 1987 Act or an aggravation, acceleration, exacerbation or deterioration of any disease process in her neck within the meaning of section 4(b)(ii) of the 1987 Act, arising out of or in the course of her employment with the respondent between 1 July 1992 and 2 September 1992.

80. Award for the respondent in relation to Mrs Sullivan's claimed injury to the neck on 2 September 1992.

[77] *Owen v. Motor Accidents Authority of NSW* [2012] NSWSC 650 at [52]
[78] *Bugat v Fox* [2014] NSWSC 888 at [31], [32] and [34]
[79] *Department of Aging, Disability and Home Care v Findlay*
[80] *Department of Education and Training v Ireland* [2008] NSWWCCPD 134