WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3046/19**
Applicant: **John Morfitis**
Respondent: **Boral Resources (NSW) Pty Ltd**
Date of Determination: **3 October 2019**
Citation: **[2019] NSWWCC 321**

The Commission determines:

1. Pursuant to section 4(a) of the *Workers Compensation Act 1987* the applicant sustained injury to his cervical spine and right shoulder in the course of his employment with the respondent on 1 June 2017.

2. Pursuant to section 60 of the *Workers Compensation Act 1987* the surgery proposed by Dr Davies, being a cervical foraminotomy, is reasonably necessary treatment as a result of injury to the applicant's cervical spine on 1 June 2017.

3. The respondent is to pay the costs of the abovementioned surgery and associated treatment expenses at the appropriate gazetted rates and subject to the provisions of the *Workers Compensation Act 1987.*

4. The respondent is to pay the claimed past section 60 expenses on production of accounts, receipts and/or Medicare Notice of Charge.

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

Josephine Bamber
Senior 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 JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr John Morfitis is aged 65 and he has worked for the respondent for about 14 years as a full time concrete truck driver. He alleges that he sustained injury to his neck and right shoulder in the course of his employment with the respondent on 1 June 2017. His counsel confirmed he is relying on "injury" as defined in section 4(a) of the *Workers Compensation Act 1987* (the 1987 Act). The claim for compensation made in these proceedings is confined to section 60 expenses, for the past and also for the cervical spine surgery proposed by Dr Davies.

2. The respondent confirmed that it disputes both injury to the neck and right shoulder, but if the Commission finds for Mr Morfitis in relation to either or both body parts, then it does not dispute liability under section 9A of the 1987 Act. The respondent in those circumstances was agreeable for a general order to be made in relation to past section 60 expenses. In relation to the proposed surgery, the respondent disputes that it is reasonably necessary and as a result of the alleged work injury.

PROCEDURE BEFORE THE COMMISSION

3. The matter proceeded in arbitration hearing on 9 August 2019. Mr Craig Tanner, of counsel, appeared for Mr Morfitis instructed by Mr Anthony Byrne, solicitor, and Mr David Saul, of counsel, appeared for the respondent, instructed by Mr Thomas Murray, solicitor, and Mr Brandon Mead from GIO.

4. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have 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

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

    (a) Application to Resolve a Dispute (ARD) and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents filed by Mr Morfitis dated 31 July 2019, and

    (d) A bundle of copies of Mr Morfitis' diary entries covering the period from 1 May 2017 to 3 September 2017 tendered by the respondent.

Oral evidence

6. There was no oral evidence excepting Mr Tanner, with the consent of Mr Saul, gave an explanation about the circumstances in which the diary entries were generated. He advised that Mr Morfitis became a union delegate on 2 May 2017 and was provided with a diary in his capacity as a delegate. The first time he made entries in relation to his injury was on 11 June 2017. So, all of the entries preceding 11 June 2017 were retrospectively recorded. The entries made on and after 11 June 2017 were made on the relevant dates in the diary.

7. The proceedings were sound recorded and a copy is available to the parties. A written transcript (T) has been made from the recording.

FINDINGS AND REASONS

Injury

8. Mr Saul submitted that the case does not turn so much on a medical contest, but far more on a factual contest and the facts underpinning whatever the medical opinions might be. His overarching submission was that Mr Morfitis did not suffer injury on 1 June 2017, or if he did, it was confined to a minor injury to the shoulder. Mr Saul largely relied upon a lack of contemporaneous record by the general practitioner, about the workplace accident, when Mr Morfitis attended on 8 June 2017. Mr Saul states that the credit of Mr Morfitis is in issue and, in the Commission, he is not required to cross-examine a witness if there is other evidence which does contest such evidence.

Lay evidence

9. Mr Tanner's submissions about the lay evidence may be summarised as follows:

    (a) Mr Morfitis gives evidence in his statement that before 1 June 2017 he never experienced any issues with his neck and with his right shoulder he discloses that nine years earlier he injured his right shoulder at work. He states he underwent rotator cuff surgery and gradually returned to his pre-injury duties.[1]

    (b) The facts surrounding Mr Morfitis' account of the operation of the chute on 1 June 2017 have not been disputed by the respondent. It was submitted that Mr Morfitis' account[2] should be accepted, that is:

        (i) He was working on a "Queensland Truck" on 1 June 2017 and they have heavier concrete chutes;

        (ii) He held the chute above his head to hook it into position;

        (iii) The chute fell and Mr Morfitis extended his right arm above his head and titled his body on an angle to support it. His right arm took the weight of the chute as it fell;

        (iv) His feet slipped as he was holding the chute and he fell, landing heavily on the ground;

        (v) Mr Morfitis felt a sharp pain from his neck to his right shoulder;

        (vi) Concreters at the site, who do not work for the respondent, put the chute on for Mr Morfitis after he fell, and

        (vii) An employee of the respondent, Merter Arik, witnessed the accident from a distance.

    (c) Mr Tanner submitted the above facts would explain an injury to the neck and right shoulder, because it was traumatic and involved a significant load and Mr Morfitis at the time had to deal with gravitational forces.

[1] ARD p12
[2] ARD p13

(d) It was submitted that Mr Arik gave his statement comparatively early, eight weeks after the injury. His account was that Mr Morfitis was directly in his sight across the road and he noticed that he was having difficulty trying to hold onto one of the chutes when he slipped. Mr Arik also states he saw concreters and others around him attend to his aid.

(e) Mr Tanner submitted that Mr Arik's evidence is corroborative of Mr Morfitis' account.

(f) It was also submitted that as the respondent was also Mr Arik's employer the Commission could have expected, if the respondent's records did not disclose that Mr Arik could have been present, they would have tendered such evidence.

(g) Mr Tanner submitted that Mr Morfitis' account of having sustained an injury at work on 1 June 2017 is supported by the statements given by members of his family, of their observations and conversations with him when Mr Morfitis arrived home after work on 1 June 2017. He submitted that their evidence is not inherently unreliable. That evidence is:

(i) Costa Morfitis - says his father told him on 1 June 2017 that he had an injury at work with the chutes and he found his father to have pain in his right shoulder and neck[3].

(ii) Skevi Morfitis - says her husband told her on 1 June 2017 that he hurt himself that day at work and she could see he was in a lot of pain[4].

(iii) Daniel Morfitis - who on 1 June 2017 saw his father in his recliner chair looking uncomfortable and asked him what was wrong and was told by Mr Morfitis that he hurt his right shoulder and neck at work while working on a truck[5].

(h) Reference was also made to Mr Morfitis' diary entries. The entry for 1 June 2017 states:

> "1300pm
> Hillcrest/Park St Homebush
> Incident with truck chutes. Pinched
> Muscle in shoulder blade R.H.S."

Mr Tanner stated he was instructed "RHS" means right-hand shoulder.

(i) The diary entries thereafter up until 10 June refer to "minor pain on and off RHS".

(j) On 11 June 2017, it is noted that Mr Morfitis woke up with a knot in his right shoulder blade, which was very painful and "nerve pinch RHS shoulder and arm. Inconsistent sleep. Pain running down R arm".

10. In the Reply is the Early Notification Form signed by Mr Morfitis on 11 July 2017 with a number of handwritten alterations. The date of injury is corrected to 1 June 2017 at 1.00 pm and the date reported to the employer is corrected to 13 June 2017. It is typed that the person completing the form was the manager Ben Patterson on 20 June 2017. Merter Arik is listed as a witness. Mr Morfitis has stated that Mr Arik was approximately 25 metres from him and saw what happened[6].

[3] ARD p18
[4] ARD p19
[5] ARD p20
[6] Reply p15

11. In Mr Morfitis' statement, he says that on 20 June 2017, Ben Patterson came to his house and he gave him the medical certificates. Mr Morfitis says that Mr Patterson asked him "what happened" and he said, "I hurt myself on the job but I thought I would be able to fix it with a few sickies and some physio"[7]. He said that Mr Patterson told him to lodge a worker's compensation claim and that he filled out an Early Notification Form.

12. Mr Tanner submitted that within three weeks of the injury Mr Morfitis had told Mr Patterson that he had a work-related injury and that the respondent has not put on evidence to dispute this account.

13. In the Application to Admit Late Documents filed on behalf of Mr Morfitis there is a reference dated 2 July 2018 from Ben Patterson, Production Manager-Concrete from Boral and he states that Mr Morfitis has been known to him for eight years and is of unquestionable honesty and very well respected by the Boral management team and fellow drivers.

Medical Evidence

Family Health Centre

14. Mr Morfitis has been treated by the general practitioners at Family Health Care, Roselands for many years. The Past Medical History summary in the clinical notes does not refer to him having prior neck or shoulder problems[8].

15. In the entries dated 19 April 2017 and 27 April 2017, it is recorded that he was "S/B Dr Chandra" which I infer means "seen by". In each entry, there is a heading "Examination" and findings listed underneath. Both consultations dealt with hypertension[9].

16. The next entry is on 8 June 2017 but there is no reference to "S/B." Dr Chandra's name is recorded but there is no heading "Examination". It is noted a Karvea Tablet prescription was printed. There is no blood pressure reading recorded. These facts are relevant to note because Mr Morfitis in his statement says he had run out of blood pressure pills so he rang the receptionist and she arranged for a prescription to be available. So, he says on 8 June 2017 he went into the medical centre and the reception gave him the prescription, but he never actually saw Dr Chandra[10]. In the Application to Admit Late Documents there is a record from the Chemist Warehouse, Lakemba, with a handwritten note stating the Karvea tablets were prescribed on 8 June 2017 and dispensed on 11 June 2017.

17. Mr Morfitis in his statement describes the events at work from 1 June 2017 until 14 June 2017 when he first sought medical assistance. He says on 13 June 2017 at work he attempted to climb into a truck and raised his right arm above his head and the pain increased significantly so he let go with his right hand and got down from the truck. He says Shawn Wilson witnessed this. He says he called his boss Ben Patterson and told him he was leaving work to get a massage. He went to a Chinese clinic for the massage and went home. He says as the pain from his neck to his right shoulder was getting worse he decided it was time to see a doctor.

18. On 14 June 2017, he went to the Family Health Care practice, where he had been a patient for 21 years. He says that Dr Chandra was booked out so he saw Dr Melanie Mapleson. Mr Morfitis states she was new to practicing as a doctor and that he thought he would just take sick leave, get it sorted and return to work. He states that Dr Mapleson provided him with a medical certificate. Mr Morfitis says in his statement that he thought he would recover and he did not intend to lodge a worker's compensation claim at that time[11].

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[7] ARD p15, para 40
[8] ARD p51 and 67
[9] ARD p82 and 81, (the notes appear in reverse page order)
[10] ARD 13-14
[11] ARD p15

19. In the clinical notes for Wednesday 14 June 2017,[12] Dr Mapleson has written a long entry commencing with a reference to

> "1} SHOULDER PAIN
> 3 days ago, woke with sharp pain under R shoulder blade
> does heavy lifting regularly as part of work
> pain worse with direct pressure over muscle
> radiates down R arm to wrist
> some intermittent paraesthesia of lateral R wrist
> had acupuncture and massage treatment on Mon/Tues
> minimal improvement, hasn't slept well for 3 nights due to pain
> taking Nurofen + Panadol PRN
> …
> NO upper limb weakness
> NO neck pain"

20. On examination, Dr Mapleson found full ROM of the right shoulder and that Mr Morfitis was maximally tender over right rhomboid muscle bodies with tense muscles to palpate. She also noted full power in the right arm and no sensory deficit in the right arm or hand. She recorded "slightly reduced neck rotation to R side and thoracic rotation to R side, worsens pain".

21. Dr Mapleson records that she discussed the case with Dr Nath and sets out her management plan including gentle back/shoulder/neck stretches and she issued a medical certificate for work. She ends the entry by noting "consider CT C-spine - ?nerve root compression if persisting". The non-WorkCover certificate just states that he was unfit to work from 14 to 17 June 2017[13].

22. On Friday 16 June 2017, Mr Morfitis saw Dr Chandra who took a history that cervical pain was radiating to the right shoulder blade and fingers and getting worse and that he had numbness on his finger. Various medications are referred to as being of no help[14]. It is also noted

> "Pain started on Sunday morning
> Unable to sleep at night due to pain
> Constipated
> Has not opened bowels for 3 days
>
> **Reason for contact:**
> Right Cervical -Pain
> Right shoulder impingement
> Constipation
> …"

23. Dr Chandra requested a CT cervical scan.

24. On 17 June 2017, Mr Morfitis saw Dr Mapleson who recorded notes about worsening neck pain radiating down the right arm and that she discussed the matter with Dr Chandra[15]. Dr Mapleson provided a referral for Mr Morfitis to see Mr Kanny Chow for therapeutic massage. She stated in the referral that Mr Morfitis had been treated with Diazepam, Panadeine and Nurofen and that she had made a provisional diagnosis of "right sided neck and arm pain ?radiculopathy"[16]. Dr Mapleson also requested the MRI scan of the cervical spine.

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[12] ARD pp80 and 81
[13] ARD p83
[14] ARD p79
[15] ARD p78-79
[16] ARD p44

25. On 19 June 2017, Mr Morfitis saw Dr Mapleson. In the clinical notes, she records that the ROM in the neck improved after the physiotherapy treatment and pain was well controlled with analgesia, but it gets worse at 3.00 am preventing sleep. She notes the results of the MRI scan. Dr Mapleson discussed the case with Dr Chandra and noted if the symptoms persisted she would refer him to Dr Schwartz for assessment and consideration of CT guided injection into the cervical spine[17].

26. On 27 June 2017, Mr Morfitis was reviewed again by Dr Mapleson and she records in the clinical notes:

> "1) WORK COVER ASSESSMENT- NECK PAIN
> Retrospective summary of events provided:
> >1st June- was at work attaching truck chutes, overhead lift manoeuvre
> >slipped and felt sharp pain in neck and shoulder
> >between 1st-13th June had persistent pain
> >during this time saw massage therapist for massage and acupuncture, minimal improvement
> >14th June -saw author for 1st time for medical review of severe persisting pain
> >since then has been reviewed by physiotherapist on several occasions"

Dr Mapleson records her examination findings in relation to the neck and right shoulder and her management plan. She notes she issued a letter re WorkCover.[18]

27. On 29 June 2017, Dr Mapleson records she had a phone call with Jason, the Injury Management Advisor, regarding facilitating a return to work. She says she provided clarification regarding the sequence of events as described by the author by Mr Morfitis. Dr Mapleson also records details of a conversation with "Dr Ian" and she revisited the history given by Mr Morfitis and dates were clarified. She notes she filled in the QBE form with the assistance of her supervisor[19]. The reference to "Dr Ian" is to Dr Ian Smith, whose report I have summarised below.

28. In the fax questionnaire from the insurer, QBE, Dr Mapleson answered on 29 June 2017 advising that Mr Morfitis had "soft tissue injury causing right sided cervical pain with radiculopathy, secondary to overhead lift" and also stated that employment was the substantial contributing factor to the injury as the overhead lift was at work[20].

29. In a referral letter dated 10 August 2017 to Dr Diwan the doctor noted Mr Morfitis had neck, shoulder and right arm pain which started on 1 June 2017 when he jarred his neck and arm trying to prevent a cement chute from falling. This copy of the referral is incomplete. But a corresponding clinical note on 10 August 2017 was written by Dr Christabelle Nath and it refers to the referral letter being issued[21]. I infer that DR Nath is the author of the referral letter. She noted that pain started in the right shoulder blade and neck with paraesthesia into the last two fingers of the right hand. She also recorded that he had restricted right neck flexion. It was noted that analgesia was not working and he had no neck pain prior to the injury. The provisional diagnosis was "cervical radiculopathy, ?subscaularis [sic] tear, cervical OA exacerbation post jarring at work"[22].

[17] ARD pp77-78
[18] ARD pp76-77
[19] ARD p76
[20] ARD pp46-47
[21] ARD p72
[22] ARD p48

30. In this clinical note a history of the alleged work accident is recorded:

> "injury 1/6/2017 jarred right shoulder when placing a chute on the cement truck- right hand side hook slipped and he tried to hold the shute. He felt pain in the right shoulder- sharp. Weight of shute 14kg. He was twisted and in a confined space to do the work. He continued to work- pain worse on 11 June 2017- woke up shoulder blade pain which is persisting- not relieved with analgesia
> Neck pain is better but limited rotation and lateral flexion
> Unable to do right neck flexion-makes pain worse and worsening of paraesthesia.
> Paraesthesia upper right arm and forearm ulnar side constant and 4th and 5th finger numb
> …
> patient wants to do full time work
> …[23]"

31. Dr Nath records details of the prior right shoulder injury and surgery by Dr George Murrell and then notes that Mr Morfitis had no past neck or shoulder pain, that it was new pain; aggravation of facet stenosis with jarring.

32. A referral in similar terms, to that for Dr Diwan, was given for Dr Davies on 14 June 2018 with the general practitioner adding that Mr Morfitis had seen Dr Diwan who had recommended physiotherapy and Dr Vigilone who did not feel that Mr Morfitis has carpel tunnel syndrome[24]. The copy of this referral is also incomplete, but the corresponding clinical note was written by Dr Nath[25].

33. The balance of the clinical notes has been read by me, but do not need to be summarised in these reasons in relation to the issue as to whether a work place injury occurred on 1 June 2017.

34. The first WorkCover NSW-certificate of capacity dated 27 June 2017 was issued by Dr Mapleson and in the diagnosis section there is only reference to the cervical spine and radiculopathy due to the overhead lift at work. The right shoulder is not mentioned. This diagnosis is the same in that doctor's subsequent certificates[26]. However, Dr Nath, in the certificate she issued on 10 August 2017, does refer to jarring on the right shoulder and that the pain started in the right shoulder[27], although her diagnosis related to the cervical pain and radiculopathy.

35. There are no clinical records from any physiotherapy practice in the ARD. Mr Nicholas Matsias, from Mendphysio issued a non-WorkCover medical certificate on 15 June 2017 certifying that Mr Morfitis was unfit for work that day due to injury, no further details are given.[28] On 13 June 2017, a tax invoice from Real Health at Roselands refers to "shoulders massage".

[23] ARD p73
[24] ARD p49
[25] ARD p58
[26] ARD pp86-97
[27] ARD p98
[28] ARD p84, Reply p12

Dr Ian Smith

36. Dr Smith conducted an Injury Management Consultation for the respondent's insurer on 29 June 2017. He states that he discussed Mr Morfitis' case with his general practitioner, Dr Mapleson, on 29 June 2017. Dr Smith records that Dr Mapleson first saw Mr Morfitis on 14 June 2017 when he gave a history of gradually increasing right sided neck pain which had not responded to massage and acupuncture and that there was no history of the condition being work related.

37. Dr Smith adds "However, Dr Mapleson is a newly qualified graduated doctor and was not aware of the workers compensation scheme or requirements for doctors"[29]. He says it was not until 27 June 2017 that Mr Morfitis mentioned that there had been an incident at work on 1 June 2017 when he slipped doing an overhead lift. Dr Smith refers to Dr Mapleson needing to discuss the matter with her supervisor who suggested that Mr Morfitis stay off work and a WorkCover certificate be issued.

Dr Diwan

38. Dr Diwan, orthopaedic surgeon, reported to Mr Morfitis' general practitioner, Dr Christabelle Nath, on 17 August 2017[30]. Dr Diwan considered the MRI scans and formed the impression that Mr Morfitis had a herniation of the C5/6 nucleus pulposus and C6/7 chronic disc disease. He was hopeful of the herniation resolving and prescribed a cortisone taper and possibly Lyrica. He stated that if in six to eight weeks Mr Morfitis continues to have ongoing symptoms he would consider a disc excision and stabilisation at two levels. He recommended against transforaminal epidural steroids due to high rates of complications.

39. Dr Diwan reported to Mr Morfitis' solicitors on 14 December 2017[31]. He referred to the EMG testing performed by Dr Schwartz[32] as showing C6-7 radiculopathy and mild medium nerve entrapment suggestive of carpel tunnel syndrome. But Dr Diwan adds that "However, Dr Schwartz's overall impression was that his symptoms are arising from his neck". Dr Diwan considered Mr Morfitis' statement, noting he had no neck symptoms before the injury and concluded that his employment was a direct and substantial contributing factor to his ongoing symptoms. In terms of surgery, Dr Diwan said it would be costlier upfront but in the long term it may turn out to be the more economical option.

Dr Charles New

40. Dr New, orthopaedic surgeon, provided a medico-legal report dated 10 October 2017 for Mr Morfitis[33]. The doctor refers to the date of injury as 7 June 2017, I accept this is more likely than not a typographical error.

41. He has a history about the circumstances of the incident with the chute, that it was not connecting properly and started to fall, Mr Morfitis extended his right arm above his head height, which was awkward. He notes the chute fell causing Mr Morfitis to fall heavily onto the ground. Dr New has the history that Mr Morfitis noticed neck and right shoulder pain as well as numbness in his right fingers, and that immediately prior to this incident he did not have these conditions. He does record that nine years earlier Mr Morfitis had right shoulder arthroscopic surgery, with an excellent result.

42. Dr New records that Mr Morfitis continued to work through the pain and on 14 June 2017, saw Dr Melanie Mapleson, who referred him for physiotherapy and he was then off work for nine days.

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[29] ARD p22
[30] ARD pp34-35
[31] ARD p36
[32] ARD p42
[33] ARD pp23-29

43. Dr New considered the CT and MRI scan results which reveal cervical spondylosis at C5/6 and C6/7. The doctor found on examination hypoaesthesia and dysaethesia in the C7 and C8 nerve root distribution which Dr New says is consistent with Mr Morfitis' history. Dr New found full range of movement in the shoulders.

44. Dr New considered the insurer's report from Dr Hitchen and comments that, although Dr Hitchen is an orthopaedic surgeon, he is not a tertiary referral spinal surgeon unlike Dr New. Dr New disagrees with Dr Hitchen who describes Mr Morfitis as having non-verifiable radicular complaints whereas Dr New says Mr Morfitis does have genuine radicular symptoms. He also found diminished reflexes in C7. Dr New believes Mr Morfitis' clinical presentation is entirely consistent with the incident described. Dr New recommended nerve conduction studies be undertaken.

45. Dr New re-examined Mr Morfitis on 9 January 2019 and in a supplementary report dated 14 January 2019 stated that he was of the opinion that Dr Davies' proposed surgery is a reasonable medical procedure arising from the work place injury. He notes that Dr Davies is a very experienced surgeon with an outstanding reputation[34].

Dr Davies

46. Dr Davies is a Conjoint Associate Professor, UNSW, and Head Department of Neurosurgery, St George Hospital. He is treating Mr Morfitis and has provided a report dated 10 December 2018[35].

47. He was sent Dr New's report dated 23 October 2017, the MRI cervical spine reports dated 19 June and 14 July 2017 and a nerve conduction study dated 18 October 2017. He also refers to the CT scan report dated 16 June 2017. He diagnosed "right C8 (or C7) radiculopathy secondary to C7/T1 (or C6/7) foraminal stenosis." He expresses the opinion that the cervical radiculopathy has occurred directly as a result of the injury at work on 1 June 2017, noting there were no previous injuries or history to suggest previous cervical radiculopathy. Dr Davies acknowledged that Mr Morfitis did have a background level of degenerative changes on imaging typical of a person of his age, but he says his clinical problem is separate to this. He adds "were it not for his work injury it would be very unlikely he would have developed these symptoms spontaneously in the future".

48. Dr Davies states that he spoke to Mr Morfitis about treatment options and he believed that stronger analgesics including narcotics would be futile. He felt the symptoms were unlikely to resolve with time. He noted that Mr Morfitis was against a periradicular nerve root block, particularly as it was likely to be temporary. Dr Davies recommended surgery in the form of a cervical foraminotomy, which he said would have an 80% chance of helping the radicular shoulder and arm symptoms.

49. Dr Davies commented on the EMG nerve conduction studies reported on by Dr Raymond Schwartz on 18 October 2017 stating they showed neurophysiological evidence of a mild right C6/7 radiculopathy and mild right carpel tunnel syndrome. He adds however, that such testing is not useful to diagnose a cervical radiculopathy as they do not have sufficient specificity and sensitivity[36].

50. Dr Davies' estimate of the cost of surgery is attached to his report.

[34] ARD p30
[35] ARD p31
[36] ARD p32

Dr Paul Hitchen

51. Dr Hitchen, is an orthopaedic specialist who according to his letterhead specialises in knee and shoulder surgery. He has provided a medico-legal report for the respondent dated 17 July 2017. Dr Hitchen records the following history:

> "Mr Morfitis alleges a workplace injury on 1 June 2017. On that date, he states that his usual truck was not available and he had to drive a Queensland registered truck for Boral. During a concrete pour, he noted that as the aluminium chutes were assembled and disassembled, each were about 4.5kg heavier than what he was used to. This did not prevent him from doing the job, but on one occasion he went to hang up a chute to a hook. The chute still had a small amount of concrete slurry in it and when trying to hang it at one end, he missed the hook and suddenly took the strain of the chute. It did not fall to the ground and he was able to restrain it with his right arm somewhat flexed at the elbow and wrist. He then hung the chute. When the episode occurred, he states he felt a stinging sensation around his right trapezial region but "did not think too much of it". He was otherwise able to complete the job at hand. He did not make any injury notification at the time."

52. Dr Hitchen thereafter records on the Sunday of the long weekend, on 11 June, Mr Morfitis said he awoke with a new symptom, being marked pain travelling from the neck down the posterior aspect of the arm and into the ulna two fingers of the right hand and that It was associated with a sensation of tingling and numbness in the fingers.

53. Dr Hitchen noted that Mr Morfitis consulted his union diary to refer to dates.

54. Dr Hitchen expressed the opinion that Mr Morfitis suffered from the effects of a constitutional condition. He diagnosed cervical spondylosis with non-verifiable radicular pain in the right arm. He states that the CT and MRI scans do not reveal any clear signs of right C7 or C8 nerve root compression. The doctor reasons

> "There is no temporal relationship between the non-verifiable radicular symptoms in his right arm that occurred upon waking and the alleged lifting event 10 days prior on 1 June 2017. His clinical behaviour in the days that followed the alleged event is not consistent with the effects of a significant acute workplace injury. That is, he was not grossly incapacitated and did not need to go promptly to a doctor or Emergency Department."

55. Dr Hitchen also stated he was unconvinced that lifting a heavier chute than normal was the cause. He described his neck and arm symptoms as sporadic and idiopathic, that is not due to injury or aggravation. Dr Hitchen refers to the AMA Guides to the Evaluation of Disease and Injury Causation, Second Edition to inform himself about the issue of causation.

Discussion

56. The problem with Dr Hitchen's reasoning is that it does not take into account that Mr Morfitis does not allege his injury is due to a simple heavier lift than normal. He alleges in his statement the chute fell and he had to catch it and he extended his right arm above his head and tilted his body to support it, and that his feet slipped as he was holding the chute and that he fell and landed heavily on the ground.

57. Yet Dr Hitchen did state that nerve roots are very sensitive structures and if acutely touched would cause immediate onset of neurological symptoms. Mr Morfitis says he felt a sharp pain from his neck to his right shoulder. Dr Hitchen has not considered such evidence.

58. Therefore, Dr Hitchen has a different factual scenario recorded in his history to that described in Mr Morfitis' statement in relation to the mechanism of injury and to the immediate symptoms experienced by Mr Morfitis. The doctor states he did not fall and that he then hung the chute. However, not only are these not the facts that Mr Morfitis alleges, Mr Arik says he saw Mr Morfitis slip and he said he saw the concreters and others around him go to his aid.

59. I find that Mr Arik's statement, while not as detailed as that of Mr Morfitis, is consistent with Mr Morfitis' version of events in his statement. Mr Morfitis says these other concreters at the site put the chute on for him, because he could not do it himself as he was in pain.

60. Mr Morfitis refutes Dr Hitchen's history in his statement. He says this is not what he told him, he says as he was lifting the heavy chute he also slipped and fell and landed heavily. The respondent has not referred Mr Morfitis' statement to Dr Hitchen's for comment, to check his notes as to what he was told.

61. At the outset of these reasons I recorded that the respondent's counsel said the question of injury was "a factual contest and the facts underpinning whatever the medical opinions might be". I agree that the findings about the facts as to what occurred are important in this matter to determine. If I accept Mr Morfitis' version of events, as detailed in his statement, then that necessarily means, in my view, that Dr Hitchen has formed his opinion upon an incorrect basis.

62. Not only does Mr Arik provide support that Mr Morfitis slipped, Dr Mapleson records the history that he "slipped and felt sharp pain in neck and shoulder". These are both reasonably contemporaneous records. A few months later in October 2017, Dr New has the history that the chute started to fall and Mr Morfitis extended his right arm above his head, which placed him in an awkward position. He states the chute fell, causing Mr Morfitis to fall heavily to the ground.

63. Mr Tanner submits that the circumstances of the injury described by Mr Morfitis would explain injury to both the right shoulder and the neck. He further submits that Mr Morfitis had no prior neck problems, notwithstanding he had been involved in heavy work before 1 June 2017. He submits it is "a matter of glaring common sense that the sudden experience of neck symptoms would be explained by that event and the suggestion that there was some spontaneous experience of it is at odds with the evidence". Mr Tanner describes the event on 1 June 2017 as "traumatic" and there is no reason for Mr Morfitis' account of what happened on 1 June 2017 not to be accepted.

64. Mr Saul disputes that any injury was sustained on 1 June 2017 and specifically disputes that Mr Morfitis fell. He relies firstly on the fact that on 8 June 2017 the clinical notes of Dr Chandra have no mention of a work injury or of complaints to the neck, shoulder or right arm. Mr Saul says this is "critical". However, I have carefully considered that entry in the clinical notes in my summary of the medical evidence above. I have noted that the two preceding entries record "examination" findings and have written "S/B" Dr Chandra whereas on 8 June 2017 there is neither of these notations. I find that the fact that these are absent from the note on 8 June 2017 is, more likely than not on the balance of probabilities, consistent with Mr Morfitis' account that he did not actually see Dr Chandra, but just picked up a script from reception.

65. The next point made by Mr Saul relates to the entry by Dr Mapleson on 14 June 2017. He relies upon the fact that there is no mention of a fall or any injury at work and that the doctor has recorded that Mr Morfitis woke with a sharp pain under the right shoulder blade three days earlier. He also refers to the history of no neck pain, although he acknowledged on examination there is reference to slightly reduced neck rotation to the right side. Mr Saul also relies upon the entry by Dr Chandra on 16 June 2017 who did not refer to any work cause but wrote "pain started on Sunday morning". He notes that on 17 and 19 June 2017 Dr Mapleson has not recorded any history of an injury at work.

66. Mr Saul acknowledged that one needs to be wary of clinical notes, but he submits these notes are very detailed and he speculates that Dr Mapleson, being a new doctor, would be extra cautious. However, against such speculation is the fact that Dr Smith has cautioned the insurer about Dr Mapleson telling them she was newly qualified and was not aware of the workers compensation scheme or requirements for doctors.

67. The reference by Dr Mapleson to Mr Morfitis waking three days ago with sharp pain under his shoulder blade is consistent with his diary entry that he woke with a knot in his right shoulder blade on 11 June 2017. I find that this does not negate that he could have had an injury on 1 June 2017 as Mr Morfitis alleges. Similarly, the entry by Dr Chandra on 16 June 2017 that the pain started on Sunday morning does not negate that Mr Morfitis could have had the earlier injury. Clearly one has to approach the interpretation of clinical notes and what inferences that can be drawn from them with caution, because they do not purport to be a verbatim account of the consultation with the doctor. This case highlights the issue discussed in *Davis v Council of the City of Wagga Wagga*[37] wherein it was stated at [35] "Experience teaches that busy doctors sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury."

68. The question as to whether Mr Morfitis sustained an injury on 1 June 2017 really comes down to whether he can be accepted as a witness of truth. To find there was no injury would involve a finding that he is lying and that his family members are lying, or at least he lied to his family members. Mr Arik's evidence does not establish that Mr Morfitis sustained an injury to his neck and shoulder *per se*, but does establish that on 1 June 2017 Mr Morfitis was having difficulty holding the chute up and that he slipped and others came to his aid. I find this is powerful evidence to support Mr Morfitis' account of what happened. Coupled with this is the fact that before 1 June 2017 Mr Morfitis had no complaints of neck problems and for many years had no issues with his right shoulder and he was able to do heavy work. I also note that Mr Morfitis' supervisor at the respondent, Mr Patterson, has advised that Mr Morfitis has unquestionable honesty and is very well respected by the Boral management team and fellow drivers. Furthermore, while I acknowledge that Mr Morfitis has the onus of proof, I accept the submission of his counsel that it is telling that Mr Morfitis' account, of him telling Mr Patterson on 20 June 2017 that he injured himself at work, has not been contradicted by Mr Patterson. This is relevant because it was before the history was given to Dr Mapleson on 27 June 2017.

69. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [38] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.

70. In many cases entries in, or omissions from, clinical notes will be determinative when deciding facts about whether an injury occurred as alleged. However, in Mr Morfitis' case I find that they are not conclusive and, for the reasons explained above, I feel an actual persuasion of the existence of the facts he alleges and I find that on 1 June 2017 Mr Morfitis struggled when handling the chute from an overhead position and that he slipped and fell, when he was trying to prevent the chute from falling. I find it is more likely than not on the balance of probabilities that he did not, thereafter, fix the chute onto the truck and this was done by others, as he says.

[37] [2004] NSWCA 34
[38] [2008] NSWCA 246

71. The respondent at one point asserted that even if the Commission was satisfied that an injury occurred on 1 June 2017, it could not be satisfied that it was anything more than a minor right shoulder injury. I do not accept such a submission. The respondent drew attention to the diary entries that only refer to the right shoulder and the fact that Dr Mapleson on 14 June 2017 took a history of right shoulder pain and noted no neck pain. I find it is relevant that she found on examination some reduced rotation in the neck, but also that she did at the end of her note for that day write "consider CT c-spine- ? nerve root compression if persisting". This indicates to me that Dr Mapleson was considering if there was pathology in the neck. Just two days later Dr Chandra on 16 June 2017 found right cervical pain and right shoulder impingement and the next day Dr Mapleson noted worsening neck pain radiating down the right arm. Furthermore, when Dr Mapleson considered the role of a work injury in the consultation on 27 June 2017 she notes she saw Mr Morfitis for the first time on 14 June 2017 for medical review of severe persisting pain. She notes that Mr Morfitis told her when he slipped on 1 June 2017 he felt a sharp pain in his neck and shoulder. She does not express any view that this mechanism of injury was improbable.

72. Furthermore, when Dr Mapleson was asked by the insurer questions she advised on 29 June 2017 that Mr Morfitis had an injury causing right sided cervical pain with radiculopathy secondary to an overhead lift. I find this response to be significant because within a month of the date of injury the general practitioner who first examined Mr Morfitis has supported the presence of a causal connection and accepted that injury did occur.

73. The respondent also relied on the notification of injury form as only referring to the right shoulder. However, it was signed by Mr Morfitis on 11 July 2017, therefore, after he had complained of neck pain and told Dr Mapleson that he had neck pain at the time of injury. So, it is hard to give weight to this document. The diary entries are brief and do not purport to give a full account of what happened on 1 June 2017, so I find it difficult to give them weight.

Surgery

74. Mr Morfitis relies on the opinion of two practising spinal surgeons, Dr New and Dr Davies, that the surgery proposed by Dr Davies is reasonably necessary treatment as a result of injury to the cervical spine on 1 June 2017 at work. Mr Tanner draws attention to the fact that Dr Hitchen is not similarly qualified or experienced in dealing with cervical surgery, relying on Dr New's comments. Mr Tanner also relies upon Dr Davies' opinion about the presence of radiculopathy and submits more weight should be given to his opinion than that of Dr Hitchen.

75. Mr Tanner was also critical of Dr Hitchen for relying on the fact that Mr Morfitis did not immediately seek medical attention and it was submitted that Mr Morfitis has explained how he hoped his injury would resolve and he did not want to make a claim.

76. Mr Saul drew attention to the history recorded by Dr Davies, which referred to the heavy chute starting to slide and that Mr Morfitis twisted to stop it falling and he developed acute right sided scapular and cervicothoracic region pain. Mr Saul queries where thoracic pain came from. However, I find when one reads the entirety of Dr Davies report it is apparent that the reference to cervicothoracic region pain is the doctor's description of it. Dr Davies had before him Dr New's report, which had a more detailed history of the accident, that in the process of the injury that Mr Morfitis fell to the ground and complained of neck and right shoulder pain. Dr Davies also had the MRI cervical spine scans of 19 June and 14 July 2017. He comments that Mr Morfitis suffered disabling right upper limb scapular and neck pain secondary to C8 nerve root compression at the C7/T1 level[39]. Dr Davies explains further that the C7 nerve root can mimic C8 radiculopathy in the absence of a motor deficit. In light of these comments by Dr Davies, I do not consider his use of the term "cervicothoracic" renders his opinion on causation "worthless" as submitted by the respondent.

[39] ARD p32

77. Mr Saul also submits that in terms of the recommendation for surgery weight should not be given to Dr New's criticism of Dr Hitchen's qualifications.

78. Dr Hitchens found operative treatment was not indicated as there was no clear evidence of right sided nerve root compression at C7 or T8. He adds "if his right arm symptoms persisted then his GP may wish to trial selective right sided foraminal outlet injection under CT". So, it seems while Dr Hitchen does not find a work place injury he did allow that Mr Morfitis may have further symptoms. He has not examined Mr Morfitis again and so I find I cannot give any weight to his opinion that operative treatment was not indicated.

79. Furthermore, Dr Hitchen has not considered Dr Davies' opinion and his recommendation for surgery. This is not a criticism of Dr Hitchen as his report pre-dates that of Dr Davies, but the respondent has not sought a further opinion from him. I do not know if the doctor would have been swayed by Dr Davies' opinion. The surgery that Dr Davies has proposed is a foraminotomy to treat the radiculopathy.

80. I accept that Dr Davies is well qualified to provide an opinion regarding the type of treatment Mr Morfitis requires. He is a highly qualified neurosurgeon. I find weight should be given to his opinion, which is well explained and reasoned. Dr Davies states he spoke to Mr Morfitis about treatment options and that he believes stronger analgesics including narcotics would be futile and probably counter-productive and he noted that a nerve root block would only be temporary. Applying the principles in *Diab v NRMA Ltd* (*Diab*)[40], I am satisfied that the treatment recommended by Dr Davies is appropriate and this is supported by Dr New. I also consider the alternative treatment considered and rejected by Dr Davies would be unlikely to be as effective. The cost of the treatment has not been cited by the respondent as excessive and Dr Davies has advised that there is an 80% chance of the surgery helping the radicular symptoms, so I consider it is reasonably necessary treatment.

81. In terms of whether the proposed cervical surgery is reasonably necessary as a result of the work-related injuries, the case of *Murphy v Allity Management Services Pty Ltd*[41] is authority for the proposition that a condition can have multiple causes and the work injury does not have to be the only, or even a substantial cause, before the treatment is recoverable under section 60 of the 1987 Act. Deputy President Roche stated in *Murphy* that a worker only has to establish that the treatment is reasonably necessary as a result of the injury; that is, did the work-injury materially contribute to the need for surgery.

82. Dr Davies has expressed the view that Mr Morfitis does have a background level of degenerative changes typical for his age, but he says the clinical problem is separate to this and were it not for the work injury it would be very unlikely that he would have developed these symptoms spontaneously in the future. In addition to the reasons I have given earlier when finding there was a work-related injury, I accept this explanation from Dr Davies which differs to the opinion of Dr Hitchen on causation. Dr Hitchen relied on the publication he cited, whereas Dr Davies has considered the actual presentation of Mr Morfitis. I consider more weight should be given to Dr Davies' opinion as it is clear that he has found that the work injury has materially contributed to the need for surgery.

83. Therefore, I find the surgery proposed by Dr Davies, being a cervical foraminotomy, is reasonably necessary treatment as a result of injury to the applicant's cervical spine on 1 June 2017.

SUMMARY

84. The determination and orders are as follows:

[40] [2014] NSWWCCPD 72
[41] [2015] NSWWCCPD 49 (*Murphy*)

(a) Pursuant to section 4(a) of the 1987 Act the applicant sustained injury to his cervical spine and right shoulder in the course of his employment with the respondent on 1 June 2017.

(b) Pursuant to section 60 of the 1987 Act the surgery proposed by Dr Davies, being a cervical foraminotomy, is reasonably necessary treatment as a result of injury to the applicant's cervical spine on 1 June 2017.

(c) The respondent is to pay the costs of the abovementioned surgery and associated treatment expenses at the appropriated gazetted rates and subject to the provisions of the 1987 Act.

(d) The respondent is to pay the claimed past section 60 expenses on production of accounts, receipts and/or Medicare Notice of Charge.