WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1129/20**
Applicant: **Deborah Theodossiou**
Respondent: **State of New South Wales**
Date of Determination: **24 April 2020**
Citation: **[2020] NSWWCC 129**

The Commission determines:

1. The applicant sustained an injury to her cervical spine on 17 October 2019 arising out of and in the course of her employment to which her employment was a substantial contributing factor.

2. Award for the applicant in respect of the claim for weekly compensation as follows:

    (a) $946.56 per week from 29 October 2019 to 12 December 2019;
    (b) $448.32 per week from 13 December 2019 to 27 January 2020;
    (c) $298.94 per week from 28 January 2020 to 24 February 2020, and
    (d) $797.18 per week from 25 February 2020 to date and continuing.

3. The respondent is to pay the applicant's section 60 expenses.

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

Deborah Moore
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 DEBORAH MOORE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Deborah Theodossiou, was employed by the respondent, the State of NSW (Northern Sydney NSW Local Health District) as a registered nurse.

2. In her statement dated 24 February 2020, she claimed that she was injured on 17 October 2019 as follows:

> "I was in a conference with my colleagues. I had a laptop in front of me. We were doing case reviews. I was typing away and trying to listen to what was being said and making notes at the same time. A colleague of mine had been whispering to me and tapping me for quite some time on the shoulder, asking me for assistance with a computer problem. I was extremely frustrated and I turned my head really fast and I felt a crack in my neck. I had immediate pain in my head."

3. She remained at work for a period of time, then resumed on and off for several months until she underwent surgery in the form of an anterior discectomy and fusion procedure at the CS/6 level on 25 February 2020.

4. She has remained off work since that time.

5. Liability for the injury was declined by the respondent's insurer, QBE Insurance (Australia) Ltd (QBE) in a section 78 Notice dated 16 January 2020 on the grounds that employment was not a substantial contributing factor to the injury as required by section 9A of the *Workers Compensation Act 1987* (the 1987 Act).

ISSUES FOR DETERMINATION

6. The parties agreed that the principal issue in dispute was the operation of section 9A of the 1987 Act.

7. The parties helpfully agreed on the periods of incapacity and the applicable rates in respect of the claim for weekly compensation.

PROCEDURE BEFORE THE COMMISSION

8. 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

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

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

    (b) Reply and attached documents;

    (c) An Application to Admit Late Documents filed by the applicant on 10 March 2020, and

(d) An Application to Admit Late Documents filed by the applicant on 16 April 2020 (a brief amended statement by the applicant admitted by consent.)

THE EVIDENCE DISCUSSED

10. The nature of the injury as described by the applicant is set out above.

11. The balance of her statement dealt with her treatment, return to work on limited duties and her symptoms.

12. Relevant to the issue in dispute she added:

> "Even though the pain was bad, I continued being present at the meeting. After the meeting, I said to another colleague that I hurt my neck. I woke up the following morning with so much pain and also paraesthesia into my left shoulder and left arm. In the days preceding [sic], the pain significantly increased in the neck, left shoulder and left arm…
>
> I had to stop working on 29 October 2019. I told my manager that I was unable to work anymore due to the pain. I filled out an incident report…
>
> Even though the MRI said that I have 'long term osteoarthritic process causing foraminal stenosis at C5/6 level', I have never before suffered any pain in my neck. The incident at work on 17 October caused the pain and significant debilitation that I am in…
>
> Dr Biggs booked me in for surgery on 25 February 2020…
>
> Dealing with the insurance company has also been a hurdle during this whole ordeal. The insurance company QBE have relied on Dr Vidyasagar Casikar. The Doctor even says in his report that employment is the main contributing factor to my injuries. He agrees that it is a work related injury. I spoke to Arianna from QBE who told me that even though Dr Casikar believes it is a work related injury, they do not. She literally told me over the phone that even though Dr Casikar agrees with me, she does not. I was shocked and could not believe what I was hearing."

13. In her supplementary statement dated 16 April 2020 the applicant confirmed that when she used the word "preceding" she intended to say "succeeding."

14. In her claim form dated 29 October 2019, the applicant described the incident as follows:

> "I was sitting in a clinical review meeting and another staff member sitting beside me ask [sic] for assistance with a computer problem as I turned to the right to assist I felt a crack pain in my neck - left side."

15. On 1 November 2019, QBE wrote to the applicant as follows:

> "Information provided to date indicates that the injury may not be related to employment.
>
> QBE has been advised by your employer that you are not certain if you [sic] injury occurred on 16 or 17 October 2019 and that no initial notification of injury or report made to your employer of injury at the time.

> QBE was advised that you continued to work, without reporting injury until a Certificate of Capacity was obtained on 29 October 2019 that certified you with no capacity to work from 29 October 2019 to 4 November 2019.
>
> You advised that your injury occurred whilst you were in a morning meeting with colleagues, seated at a desk with your computer in front of you, turning your neck suddenly to see a work colleague alongside of you who had been tapping the desk. You reported feeling a crack and pain at the time.
>
> You confirmed that following injury, you continued to work but advised later feeling headache, sore back and difficulty sleeping. You initially sought private treatment of massage and acupuncture. A work colleague suggested that you try physic and you reported after seeing the physiotherapist that he advised you may have a C5 injury. You made report of your injury and were advised to see your doctor.
>
> Dr James Barron advised you have a 'Neck injury with probable cervical nerve root entrapment' and issued Certificate of Capacity stating you have no capacity to work.
>
> From the mechanism of injury that you have reported, being that you turned your neck suddenly to look at someone seated next to you, potentially sustaining a CS vertebral injury does not indicate that your workplace is the main substantial cause for your injury, given that this type of injury could have occurred at any point whether you were in the workplace or elsewhere."

16. A subsequent section 78 Notice dated 16 January 2020 was in similar terms, but added:

> "QBE required further information from Dr Barron as to how your employment had caused your injury. QBE received a response Dr Barron… that the incident was reported as occurring at work and was apparently witnessed.
>
> Given this information did not provide sufficient reasoning regarding a substantial link between your work duties and your injury, QBE arranged an independent medical examination.
>
> On the 5th of December 2019, you attended an independent medical examination with Dr Vidysakar Casikar. Dr Casikar advised in his report dated the 17th of December 2019 that he believed you had suffered from a soft tissue injury and that employment was the main contributing factor as the injury occurred whilst at work. QBE returned to Dr Casikar to obtain further clarification of which of your work duties in his opinion because caused your injury. Dr Casikar advised that the nature of you injury is because [you] suddenly turned [your] neck to look at [your] colleague. Dr Casikar further advised that the injury could have occurred anywhere at any time.
>
> Currently the information to date from both your nominated treating doctor and the independent medical examiner do not provide a substantial link or clinical reasoning as to how your work duties were the main contributing factor to your injury. QBE are there [sic] declining your claim for Workers Compensation."

17. The applicant consulted her general practitioner, Dr Barron, on 29 October 2019. The entry reads as follows:

> "Couple of weeks ago patient at meeting at work, tapped on shoulder and moved head quickly, feeling crack and pain at lower Cx spine Never had neck problems before since then worsening pain especially radiating down left arm, with pins and needles at left thumb and index and middle fingers Examination: tender++ around C5/C6 Diagnosis: probable radiculopathy from disc prolapse at left CS."

18. The report of an MRI scan performed on 1 November 2019 read:

> "Crack and pain at lower cervical spine after turning head. Subsequent pain down left arm and pins and needles left thumb and index and middle fingers ? C5 radiculopathy…
>
> There is moderate to marked foraminal stenosis on the left side at the C5/6 level. This could be causing radicular impingement on the exiting C6 nerve. The foraminal stenosis relates to uncovertebral osteoarthrosis."

19. QBE wrote to Dr Barron on 1 November 2019 requesting further information on the claim. The letter read:

> "I am contacting to request further Information regarding workplace Injury of Deborah Theodossiou to assist with liability determination, management of her claim, Injury and return to work.
>
> Deborah advised her employer that she was seated with work colleagues and in process of doing morning meeting. She had workers either side of her and laptop in front of her. She reports one of the workers was tapping on the desk and she turned her neck quickly at one point. Deborah stated she heard and felt an Immediate crack- hurting her neck. Deborah stated she continued to work. She sought Chinese massage and had some acupuncture, but realised that she had ongoing pain and headaches. It was suggested by a supervisor that Deborah make a report of injury- at the time she had not taken any leave from employment and had managed to work her full hours…"

20. Dr Barron was asked to respond to a series of questions, which he did, stating:

> "The date of Injury was reported as 16/10/19.
>
> The mechanism was sudden turning of the head after she was touched by somebody beside her to get her attention…Neck pain and pain and pins and needles down the left arm. As far as I am aware no treatment had been given before consulting myself...The MRI shows a long term osteoarthritis process causing foraminal stenosis at the C5/C6 level. The sudden turning of the head was the 'straw that broke the camel's back' in causing impingement on the exiting CS nerve. This is entirely conceivable. The incident was reported as occurring at work and was apparently witnessed…"

21. On 20 January 2020, Dr Barron wrote to Dr Biggs as follows:

> "Thank you for seeing Deborah Theodossiou who in October last year was turning her head suddenly during a meeting at work, and since then has fe!t severe pain down the left arm. MRI cervical spine showed likely left C6 nerve root compression. It was a workcover claim but unfairly (in my opinion) has been refused as work-related… do you think it is time to look at surgical decompression?"

22. Dr Biggs replied on 30 January 2020 as follows:

> "Thank you for referring Deborah whom I saw on the 30th January 2020. She was at work on 17th October 2019 when she turned to a colleague on her right and felt a crack in the neck. This was followed by neck pain and left temporal pain. Over the ensuing 24-48 hours she developed left arm symptoms ad worsening neck pain.

Current symptoms are pain in the neck that goes to the left medial scapula, left shoulder, posterior arm, medial forearm to the first 3 digits of the left hand. She had a cortisone injection around her left C6 nerve which resolved her pain whilst the local anaesthetic was working, but provided no long term relief.

MRI shows minor bulging of her C4/5 and C6/7 discs, as well as a larger left/paracentral disc/osteophyte complex at C5/6 compressing the left C6 nerve root. This I believe is responsible for her left arm symptoms.

Deborah is sick of the pain and is keen to proceed to surgery. She will need to undergo a CS/6 anterior cervical discectomy and fusion (ACD&F)."

23. The applicant saw Dr Endrey-Walder at the request of her solicitor on 11 February 2020. In a report of the same date, he said:

"On 17 October 2019, she had occasion to attend a Unit Meeting at the Community Health Clinic, a laptop in front of her, she was keying, concentrating intensely, recalling that 'the consultant was giving me orders about one of the patients'.

She remembers one of her colleagues sitting by her side 'did continuously tap on my shoulder repeatedly over the previous half an hour, she wanted some help with her laptop'. During one of these taps she had suddenly turned to her colleague, rotating her head to the right, experiencing a cracking sensation and some pain.

Over the rest of the day the neck pain became more intense, and about an hour after the incident she began experiencing pain down her left arm…

Ms. Theodossiou precipitated impingement of the left C6 nerve root as a consequence of a sudden, rapid rotation of her head to the right during the Unit Meeting in her job on 17 October 2019.

She could recall no history of any neck or arm pain, the latter having come to light within an hour or two of the neck injury…

I believe that this lady has, indeed, precipitated radiculopathy on account of the trauma-induced impingement of the left c·6 nerve root, displaying clinical evidence of loss of biceps reflex, as well as obvious aggravation of the radiiculopathy by flexing the neck.

I do believe that the injury suffered in. the incident described is the precipitating factor of her current predicament.

It may well be that the main culprit in an anatomical sense is the uncovertebral osteoarthrosis impacting on the left C5-6 neural exit foramen, but the foraminal stenosis was there for some time prior to the work incident without causing symptoms and might ,very well have remained completely and totally asymptomatic for many years, perhaps forever, were it not for the particular sudden rotary movement at the neck.

Dr. Casikar wrote (17.12.2019) that 'Ms.Theodossiou appears to have had a soft tissue injury to the shoulder'.

There is nothing in your client's history nor on physical examination to suspect injury to this lady's left shoulder girdle.

> The doctor then goes on to note that 'As far as the foraminal stenosis is concerned, this is an osteophyte compression. I have not been able to identify any neurological evidence of C6 nerve root compression. Therefore, in my opinion, the radiological appearances are probably incidental'
>
> The doctor appears to be at great pains in avoiding making any mention of the precipitating factor, the sudden rapid rotation of the head.
>
> As to Dr Casikar's inability to identify any neurological evidence of nerve root compression, I would respectfully suggest that if he were to review your client, he would have found absence of the left biceps reflex.
>
> Ms. Theodossiou is not fit for any kind of remunerable work at this stage…"

24. Dr Casikar first saw the applicant on 5 December 2019.

25. In a report dated 17 December 2019, he said:

> "On 16/10/2019…she was at her desk and she started typing on her computer. While the team meeting was going on, one of the colleagues on her right side kept tapping her on the shoulder to draw her attention. Ms Theodossiou was very disturbed by this interference and she turned her neck suddenly to the right. Immediately she felt a crack in the neck and she developed a headache. She, however, continued to work. Over that period, her left arm became very sore…
>
> She has had no previous history of similar complaints…
>
> MRI Report dated 1/11/2019: The radiologist reports at CS/6 a left-sided osteophyte compression of the lateral recess. He has suggested the possible C6 nerve root compression...
>
> Ms Theodossiou appears to have had a soft tissue injury to the shoulder…
>
> As far as the foraminal stenosis is concerned, this is an osteophyte compression. have not been able to identify any neurological evidence of a C6 nerve root compression. Therefore, in my opinion, the radiological appearances are probably incidental…"

26. When asked his opinion "as to whether employment is a main contributing factor to Deborah's condition and diagnosis…[taking into account the matters listed in s9A]" he said: "In my opinion, the employment is the main contributing factor. This was a specific injury that occurred while she was at work. Her lifestyle activities and health issues have not made any contribution to it."

27. In a subsequent report dated 31 December 2019 Dr Casikar was asked:

> "QBE need to establish a substantial link to the nature of or tasks associated with Deborah's employment, more than that the experience of symptoms occurred whilst in the workplace. Could you please advise of the specific work task and mechanism that caused Deborah's symptoms?"

28. He replied:

> "The nature of her injury is because she suddenly turned her neck to look at her colleague. This kind of activity normally produces soft tissue injury to the neck and shoulder. This is further substantiated by the fact that she had pain that radiated to the shoulders. She had difficulty in fixing her bra straps, washing her hair and reaching out for things above the level of her head. These are the classical features of a soft tissue injury to the neck and shoulders. This is related to her employment."

29. He was then asked: "Given the innocuous event of turning her head, could you please advise if you believe that the injury could have occurred at anytime, anywhere."

30. He replied:

> "Turning the head suddenly could produce soft tissue injuries to the neck and shoulders. This injury could have occurred at anytime, anywhere. However, the incident occurred while she was at work. Therefore, to that extent, one would have to accept that she had a soft tissue injury to the neck and shoulder (but no evidence of injury to the cervical spine) while she was at work. She does not have any evidence of cervical spondylosis being responsible for her symptoms."

FINDINGS AND REASONS

31. Section 9A of the 1987 Act is in the following terms:

> "**No compensation payable unless employment substantial contributing factor to injury**
>
> (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> Note. In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
>
> (a) the time and place of the injury,
>
> (b) the nature of the work performed and the particular tasks of that work,
>
> (c) the duration of the employment,
>
> (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
>
> (e) the worker's state of health before the injury and the existence of any hereditary risks,
>
> (f) the worker's lifestyle and his or her activities outside the workplace.

(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:

(a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment…"

32. At the outset, it is important to note the terms of section 9A(2) to the extent that the list of matters to take into account is not exhaustive, entails a certain subjective component, and are examples only.

33. The respondent relied upon the provisions of section 9A(2)(d), namely "the *probability* (my emphasis) that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment."

34. Determination of the question of probability is not straightforward. It is to some extent subjective, and the evidence presented does not necessarily resolve the issue.

35. In the present case, we simply have the opinion of Dr Casikar, in response to a direct (and I may say leading) question from QBE: "Given the innocuous event of turning her head, could you please advise if you believe that the injury could have occurred at anytime, anywhere."

36. His reply that "This injury could have occurred at anytime, anywhere" was appropriate to the nature of the question, much like any other innocuous events such as getting a cup of tea or going to the bathroom, which may or may not occur in the workplace.

37. But as he then pointed out, qualifying his answer, that "the incident occurred while she was at work. Therefore, to that extent, one would have to accept that she had a soft tissue injury to the neck and shoulder…"

38. In my view, it was clear from the outset that QBE had something of a mindset about the consequences of what it described to Dr Casikar as an "innocuous event".

39. That view however was not entirely supported by Dr Casikar since he said:

> "The nature of her injury is because she suddenly turned her neck to look at her colleague. This kind of activity normally produces soft tissue injury to the neck and shoulder. This is further substantiated by the fact that she had pain that radiated to the shoulders. She had difficulty in fixing her bra straps, washing her hair and reaching out for things above the level of her head. These are the classical features of a soft tissue injury to the neck and shoulders. This is related to her employment."

40. In short, on my reading of the whole of the evidence of Dr Casikar, he was not persuaded by the insurer's attempt to rely on the provisions of section 9A(2)(d).

41. It is timely to note the observations of Basten JA in *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [2009] NSWCA 324 (*Badawi*) where he said:

> "127. The conclusion that 'employment' has the same meaning in s 9A(1) as in the definition of 'injury' in s 4 is supported by the reference in *Mercer*, 48 NSWLR 740 at [13], adopting the passage in the judgment of Kitto J in *Semlitch* set out above. However, in that passage in *Mercer*, Mason P stated that 'the legislation is not referring to the fact of being employed, but to what the worker in fact does in the employment'. That, however, is not the distinction drawn in *Semlitch*; rather, in the passage set out at [124] above, Kitto J was at pains to reject the suggestion that employment was 'something distinct both from the fact of the employment …

and from any consequence of the employment'. Subject to that understanding, *Mercer* is authority for the proposition that one is not required, in applying s 9A(1), to identify some 'inherent features or essential incidents of' the employment and reject as not part of the employment, factors which are merely incidental to those features or incidents.

128. Thus, subject to one qualification, *if the conduct out of which the injury arose occurred in the course of employment and was the effective cause of the injury (there being no pre-existing condition or involvement of another person) the only conclusion reasonably open is that the employment was a substantial contributing factor to the injury*. (my emphasis)

129. The qualification arises with respect to activities occurring during an interval or interlude within a period of employment…"

42. In the present case, there is no doubt that the other examples in section 9A were satisfied, namely the time and place of the injury (at work), and the nature of the work performed and the particular tasks of that work, (typing in a meeting and turning her head suddenly).

43. There is simply no evidence that "the worker's state of health before the injury and the existence of any hereditary risks [and] the worker's lifestyle and his or her activities outside the workplace" contributed in any way, as observed by Dr Casikar.

44. Counsel for the respondent was at pains to suggest that the applicant's description of the incident somehow expanded or became embellished as time went by, such that I should accept the incident as "innocuous."

45. I do not accept that submission.

46. Details in a claim form and doctors' notes are invariably scant, since it is unlikely that a legal issue (as this is) would be in the forefront of anyone's mind.

47. As Counsel for the applicant correctly pointed out, details provided to a lawyer by way of a statement should of necessity be thorough and comprehensive: that is the task of a competent lawyer.

48. In any event, the applicant's description of the incident, and particularly the crack in her neck she experienced, has been consistent throughout.

49. The mechanism of the injury was explained by both Dr Endrey-Walder and Dr Casikar, both of whom accepted its consequences.

50. Section 9A was more recently considered by Keating P in *E-Dry Pty Ltd v Ker* [2017] NSWWCCPD 26 (15 June 2017) where he said:

"107. The test under s 9A requires an applicant for compensation to establish that the employment concerned is a substantial contributing factor to the injury. It is a question of fact which is determined following an evaluation of all the evidence…

109. Section 9A requires consideration of 'the employment concerned' to determine whether it was a substantial contributing factor to the injury in view of the relevant circumstances in which the injury occurred, including matters in s 9A(2) (*Badawi* at [105]). In *Badawi* the plurality stated (at [101])…

> ... a decision maker, in determining under s 9A whether the employment concerned is a substantial contributing factor, is required to consider the employment concerned and the circumstances surrounding the occurrence of the injury…

111. Section 9A(2) provides a non-exhaustive list of matters to be considered in determining whether the worker's employment is a substantial contributing factor… In *Badawi* (at [89]… the Court said:

> 'To the extent that the matters specified in paras (a)-(f) are relevant to the case under decision, they must be taken into account and applied according to their terms. A decision maker is not confined to the matters specified in s 9A(2) and may take into account other factors that are relevant to the determination of the question in issue: viz, *whether the employment concerned was substantial contributing factor to the injury*.' (my emphasis)

112. The assessment of whether the employment is a substantial contributing factor to the injury is not solely a medical question but a question which is based on 'an assessment of all the evidence, lay and expert' (*Smith v Parkes Shire Council* [2010] NSWWCCPD 130 (confirmed by Court of Appeal in *StateCover Mutual Ltd v Smith* [2012] NSWCA 27)).

113. Whether employment is a substantial contributing factor to an injury is a "question of fact and is a matter of impression and degree (McMahon v Lagana [2004] NSWCA 164; 4 DDCR 348 (*McMahon*)) to be decided after a consideration of all the evidence…'

114. Expert evidence may assist in determining questions of causation but is not necessarily determinative… In *Nguyen*, Justice McDougall (McColl and Bell JA agreeing) said (at [60]-[61]):

> 'In a particular case, expert evidence may assist the court to find causation in fact; but the court is not bound by an expert's expression of an opinion that, on the balance of probabilities, a causal relationship has been established... The court does not abdicate its responsibility to an expert; an expert's opinion cannot be determinative, particularly in relation to ultimate facts…'

122. In other words, even if a consideration of s 9A(2)(d) militated against a finding that the employment was a substantial contributing factor to the injury, it was still open to conclude that the section had been satisfied if the evidence, as a whole, including the remaining matters in s 9A(2), supported that conclusion.

127. The drawing of an inference is 'an exercise of the ordinary powers of human reason in the light of human experience' (*G v H* [1994] HCA 48; 181 CLR 387 at 390). An inference may be drawn because of common knowledge and ordinary human experience (*Nicolia v Commissioner for Railways (NSW)* (1970) 45 ALJR 465).

128. Moreover, in evaluating questions of causation, the Commission is entitled to rely upon commonsense (*Adelaide Stevedoring Co Ltd v Forst* [1940] HCA 45; 64 CLR 538 at 563–4, 569; *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720 per Mason J at 725). Nevertheless, as Ipp JA pointed out in *Flounders v Millar* [2007] NSWCA 238 at [35], a claimant who relies on circumstantial evidence to prove causation must show 'that the circumstances raise the more probable inference in favour of what is alleged'."

51. A commonsense approach to the facts of this case, and the evidence before me lead me to the conclusion that "the circumstances raise the more probable inference in favour of what is alleged".

52. The "probability" that such an incident would have happened anyway if the applicant was not at work in my view is unlikely. As Counsel for the applicant pointed out, "there is no evidence that in normal life she would have been whipping her head around like that…it happened unwillingly for the applicant and was an unnatural movement."

53. I accept that as Counsel for the respondent submitted, ""whipping her head around" was not put as highly as that by the applicant in her various statements, I can accept that there was at least a degree of ""whipping" consistent with her description of the sudden movement she made.

54. In my view the evidence overwhelmingly supported the conclusion that the contribution of the employment to the injury was "real and of substance" (*Badawi*).

55. I find that s 9A was satisfied on the whole of the evidence, noting that "Nothing in s 9A makes a finding on any one of the examples in s 9A(2) determinative (*Badawi* at [36])."

56. For these reasons I find that the applicant sustained an injury to her cervical spine on 17 October 2019 arising out of and in the course of her employment to which her employment was a substantial contributing factor.

57. Accordingly, there will be an award in favour of the applicant.