WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **644/20**
Applicant: **Milka Alavanja**
Respondent: **Lynch Manufacturing Group Pty Ltd**
Date of Determination: **15 July 2020**
Citation: **[2020] NSWWCC 238**

The Commission determines:

1. Pursuant to section 4(b)(ii) of the *Workers Compensation Act 1987* the applicant sustained injury to her cervical spine, with her employment being the main contributing factor to the aggravation of disease.

2. Pursuant to section 4(b)(i) of the *Workers Compensation Act 1987* the applicant sustained injury to her left shoulder, with her employment being the main contributing factor to the disease.

3. The lump sum claim is remitted to the Registrar for referral to an Approved Medical Specialist to assess permanent impairment as follows:

    (a) Date of injury: 3 December 2019 (deemed), being the date of the lump sum claim.

    (b) Body parts: cervical spine, left upper extremity (shoulder, thumb, hand, wrist, elbow and peripheral nerve) and right upper extremity (shoulder, wrist and peripheral nerve).

4. The matter requires an in-person assessment.

5. The documents to be referred to the Approved Medical Specialist are as follows:

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

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents filed by the respondent dated 13 May 2020, with the exception that Dr Tjeuw's report dated 12 November 2013 was only admitted as to its history, and

    (d) Application to Admit Late Documents filed by the applicant dated 28 May 2020.

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.

L Golic

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

STATEMENT OF REASONS

BACKGROUND

1. In these proceedings, Milka Alavanja (the applicant) makes a claim for lump sum compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act). She alleges that due to the nature and conditions of her employment with Lynch Manufacturing Group Pty Ltd (the respondent) she sustained a number of injuries. Her Application to Resolve a Dispute (ARD) was amended on page 8 as follows:

    (a) in relation to "Type of Injury", the word "personal" was deleted and "disease" was inserted;

    (b) in relation to the references to "Date of Injury", "26/11/2019" was deleted and "3/12/2019 deemed" was inserted, being the date of the lump sum claim[1];

    (c) the "injury description" was deleted and replaced with "Nature and conditions of employment with a deemed date of injury of 3/12/2019 - cervical spine, left upper extremity (shoulder, thumb, hand, wrist, elbow and peripheral nerve) and right upper extremity (shoulder, wrist and peripheral nerve)". It is noted that the reference to the thoracic spine and right elbow were withdrawn because no permanent impairment had been assessed by her doctors for those body parts, and

    (d) in relation to the permanent impairment systems claimed, following "left upper extremity" "(shoulder, thumb, hand, wrist, elbow and peripheral nerve)" were added and in relation to "right upper extremity", "(shoulder, wrist and peripheral nerve)" were added.

2. In dispute notices dated 18 April 2018 and 3 February 2020, and at the Arbitration Hearing, the respondent agreed that Ms Alavanja sustained injury to her right upper extremity (shoulder, wrist and peripheral nerve) and in relation to her left upper extremity (hand, wrist, elbow and peripheral nerve), but it disputed she had injured her left shoulder and cervical spine[2].

PROCEDURE BEFORE THE COMMISSION

3. This matter was listed for conciliation conference/arbitration hearing initially on 30 April 2020. However, the matter was adjourned because there had been documents produced to the Commission pursuant to a direction for production order which had not been made available to the parties due to the COVID-19 situation.

4. After the parties had been given access to those documents, the matter was listed on 5 June 2020 for conciliation conference/arbitration hearing. Mr Andrew Parker, counsel, instructed by Mr Evan Griffith, solicitor, appeared for Ms Alavanja. Gordana Simic, Serbian interpreter was in attendance. Mr Fraser Doak, counsel, instructed by Belinda Brown, solicitor, and Ms Alexandra Gajic from EML represented the respondent. The conciliation conference/arbitration hearing was conducted by telephone due to the COVID-19 situation.

[1] ARD p 19.
[2] ARD pp 13 and 20.

5. 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

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

    (a) ARD and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents filed by the respondent dated 13 May 2020, with the exception that Dr Tjeuw's report dated 12 November 2013 was only admitted as to its history, and

    (d) Application to Admit Late Documents filed by the applicant dated 28 May 2020.

Oral evidence

7. There was no oral evidence. Both counsel made oral submissions which were sound recorded. A copy of the recording is available to the parties. I note the sound recording is in two parts as the recording was paused at the end of the respondent's submissions and then re-started. The reason for this adjournment was to sort out a situation that had arisen regarding the Application to Admit Late Documents dated 13 May 2020, as it had transpired that both counsel did not have a complete copy of that Application, although a complete copy had been filed with the Commission.

FINDINGS AND REASONS

Ms Alavanja's statements

8. Ms Alavanja commenced employment with the respondent in about 1995 on a full time basis. In her statement dated 8 August 2019 she describes her work duties making up flower arrangements and bouquets. This involved cutting stems, holding stems in her left hand and using her right hand to tie them together, placing the bouquets on pallets and shelves. She also had to reach up to get flowers down from high shelves. She describes the work as very repetitive in nature.

9. She describes in about September 2006 experiencing pain in her left wrist which subsequently became more and more noticeable. She says she began to notice significant pain and stiffness in her neck.

10. Ms Alavanja outlines the medical treatment she received for her left wrist and thumb in 2006 including that she use a splint on her left arm. She states that in May 2013 she changed from Dr Lai to Dr Mohan and in this time she had been doing lighter work, but she began to experience pain in her elbows. She describes in July 2013, when bunching flowers with two metres high stems lifting them and feeling a popping noise and significant increased pain in her left elbow, and numbness radiating from her left elbow into her left hand and involving the left ring and little fingers. She states that after this time she has not worked. I note her claim form dates the incident occurring on 3 June 2013.

11. Ms Alavanja states that she attended Dr Rozario on 17 September 2013 and complained of pain she was experiencing in her neck, left and right elbows, wrist and hands. She says her treatment included injections into her elbows and an MRI scan of the neck on 30 September 2013. She outlines in her statement the other scans she had and states on 30 May 2014 she attended on Dr Rozario and complained of significant pain in her neck, upper back, shoulders, left and right arms, left and right wrists and hands. She says she underwent an MRI scan of her right shoulder on 24 October 2014.

12. She relates a further attendance on Dr Rozario on 28 November 2014 when she says she complained of pain in her left and right shoulders. Ms Alavanja says she was recommended to see an orthopaedic surgeon, which she did on 15 December 2014 when she saw Dr Dave. She says she complained to Dr Dave of pain in both her shoulders and she was advised to have surgery to her right shoulder. She states that this surgery was performed on 11 December 2015. She mentions that throughout 2015 she continued to see her general practitioner for reviews and that she saw Dr Rozario on 28 May 2015, again complaining of pain in both shoulders.

13. Ms Alavanja outlines the treatment she received after the right shoulder surgery and she says she continued to experience pain, stiffness and restriction of movement in her neck, and both shoulders, wrists and elbows. She states that she continued to experience tingling and numbing sensation radiating down her arms into her fingers. She also says she found looking upwards and rotating her head to the left difficult.

14. In her further statement dated 18 December 2019 she says prior to the incident on or about 3 June 2013 and the cessation of her work for the respondent she suffered from pain in her cervical spine, right upper extremity (wrist/shoulder/peripheral nerve) and left upper extremity (thumb/wrist/elbow/shoulder/peripheral nerve).

Claim form

15. Ms Alavanja signed a claim form on 7 August 2013 referring to injury on 3 June 2013, which only refers to her left elbow being painful and having a popping sensation when picking up the bunch of gladioli on the production line[3].

Kelly Peverill statement

16. Ms Peverill has given the respondent's insurer's investigator a statement dated 17 September 2013[4]. She is the National Human Resource Manager and at the time of making her statement worked for the respondent for 15 months. She says the respondent is in the business of providing wholesale flowers to retailers including the major supermarkets. She says Ms Alavanja was a process worker with her normal duties standing at a conveyor belt and sorting and bunching flowers. She says the flowers are sourced from a pallet and when bunched put onto the conveyer.

17. I find her statement is of little probative weight because she did not work with Ms Alavanja for most of her 19 years employment with the respondent and also because she did not witness her work. Much of what she relates is concerned with the early claims process and the issue in dispute requiring my determination relates to the cervical spine and left shoulder, and her statement does not refer to the same.

[3] ARD p 9.
[4] Reply p 23.

Eman (Emma) Oshana statement

18. Ms Oshana also gave the investigator a statement dated 19 September 2013[5]. Ms Oshana says she was employed by the respondent for 11 years and was the supervisor of Ms Alavanja for about seven years. She says on 3 June 2013 Ms Alavanja was working with Sandy, a casual, and Sokvisa. Ms Oshana says she did not see the incident, but that Ms Alavanja told her that she could not move her left arm and she had a sore left elbow. Ms Oshana said she did not talk to Sandy or Sokvisa about the incident.

19. Ms Oshana states that the gladioli flowers are in large bunches wrapped in cardboard and they are in a pallet bin and two people get them out and carry them to the table for sorting. She says the bunch would weigh 10 to 15 kg. She said normally Ms Alavanja would get the boys to do the lifting. She says she had never seen her lift the gladioli before. Ms Oshana says she knew that Ms Alavanja "had modified duties from the other claim". She does not say how they were modified. Although she says Ms Alavanja was allowed to have a five minute break every half hour and she did stop work and stretch her arms, neck and twist her back.

Sandy Nguyen statement

20. Ms Nguyen gave a statement to the investigator dated 19 September 2013. She is a process worker and she says she worked with Ms Alavanja for about a year. She says she was working with her on 3 June 2013. Ms Nguyen says that Ms Alavanja would not carry the flowers and she was always asking someone to carry them for her to the table. She says she would carry a couple of bunches but not a whole bucket. She says that Ms Alavanja went to get some gladioli. She says they always have two people carrying them as they are "a bit more heavy than the normal flowers" and the boys help if they are not busy. She says she was not watching her, and she does not know who helped her, but someone did. Ms Nguyen says when she came back Ms Alavanja asked her to help get the flowers onto the table which was only about 40 cm away. She said she helped her, and Ms Alavanja started talking about her sore left elbow. She says Ms Alavanja complained a lot at work.

Sokvisa San statement

21. Ms San also gave a statement the same day to the investigator[6]. Ms San said on 3 June 2013 Ms Alavanja called her over and she said that she had a bunch of gladioli resting on her left arm and she could not get her arm out. Ms San said she did not know why Ms Alavanja did not use her right hand to move the flowers. She said if flowers like the gladioli are too heavy they get two people to lift them. She described Ms Alavanja as a slow worker who always complained about pain if she had too much to do.

Dr Lai

22. A Direction for Production was issued for Dr Lai's records, but the respondent advised the doctor is retired and no records were produced. The insurer wrote to Dr Lai on 14 February 2007 and asked him a series of questions, for which he gave handwritten replies[7]. The writing is somewhat difficult to read. He was asked if there are any non-work related conditions attributed to Ms Alavanja's current level of fitness? He replied, "Yes she does have other medical problems". The doctor was also asked, "If there has been aggravation of underlying non-work related conditions would you have considered this to have now ceased?" Dr Lai answered, "Her non-work related conditions have NOT been compromised by her □ wrist problems." However, I cannot see where Dr Lai states what the non-work related conditions are.

[5] Reply p 30.
[6] Reply p 36.
[7] ARD p 27.

23. In a further questionnaire dated 3 May 2007, the insurer refers to an examination with Dr Murray Stapleton in relation to her left De Quervain's issue and he agrees that decompression surgery may be indicated and discusses return to work but not to the same duties as pre-injury to avoid recurrence[8].

Dr Mohan

24. Dr Mohan is Ms Alavanja's current general practitioner, having taken over her care after Dr Lai. Dr Mohan states that he first treated Ms Alavanja on 17 May 2013 in relation to a workplace injury. He says she complained of pain in both elbows. He noted that she told him that her work was very repetitive involving bunching of flowers. On examination Dr Mohan states that Ms Alavanja was tender on the left forearm, left lateral epicondyle area and right side of her cervical spine. Dr Mohan states he saw her on several occasions after that when "she would complain of worsening pain on the left side of her neck, shoulder, upper arm with paraesthesias [sic], left 4th and 5th finger and spreading to the rest of her fingers".

25. Dr Mohan said he referred her to Dr Rozario, and he diagnosed her suffering from soft tissue injury to her left elbow, upper and lower arm, left shoulder and neck, more than the right side[9]. Dr Mohan opined that this was a direct result of her work relating to bunching, holding, cutting and arranging flowers while she was employed.

26. In Dr Mohan's referral to Dr Dave dated 9 February 2015 he does not refer to the cervical spine or left shoulder, just the right shoulder concerning which he says that Ms Alavanja developed rotator cuff tendonitis slowly, but became worse especially in the last 8-12 months from lifting heavy buckets of flowers and stacking them on overhead shelves[10].

27. In the Late Documents filed by the respondent dated 13 May 2020 are records produced by Dr Mohan. The handwritten clinical progress notes are not particularly detailed with some dates not having any notes recorded for the attendance. There appears to be a reference to "strain neck" on 27 August 2008[11]. On a date in May 2013 there is a reference to painful elbows from holding bunches of flowers all the time. There are also several medical certificates which do not refer to the left shoulder or cervical spine.

Dr Rozario

28. Dr Rozario is a Consultant Rheumatologist who commenced treating Ms Alavanja at the request of Dr K T Lai. In her report to Dr Lai dated 20 October 2006 Dr Rozario states that Ms Alavanja had a one month history of left sided De Quervain's tenosynovitis. She noted that her work bunching flowers was rapid, repetitive and involves heavy use of her hands. On physical examination the doctor referred to the presence of swelling, warmth and tenderness along the base of the left thumb. Dr Rozario said she had organised a local steroid injection of the thumb and for Ms Alavanja to use a splint[12].

29. In report dated 8 November 2006 to Dr Lai, Dr Rozario gave an update regarding Ms Alavanja's left De Quervain's tenosynovitis, noting she was on a rehab programme and was back at work[13].

[8] ARD p29.
[9] ARD p 52.
[10] Late Documents dated 28.5.2020 p 4.
[11] Late Documents dated 13.5.2020 p 69.
[12] ARD p 25.
[13] ARD p 26.

30. On 17 September 2013, Dr Rozario reported to Dr Mohan[14]. Dr Rozario stated that Ms Alavanja's work involves bunching flowers. She says, "Some of these can be as tall as a few metres and it is quite heavy work in spite of her being in assumed light duties." Dr Rozario had a history that in July she was lifting very heavy gladiolus and describes the left elbow symptoms experienced by Ms Alavanja, with a sudden onset of numbness radiating from her left elbow into her left hand especially involving the left ring finger and little fingers, and tremors in her left hand.

31. In her examination findings, in addition to her findings about Ms Alavanja's elbows, Dr Rozario noted that Ms Alavanja had stiffness and discomfort on movements of the cervical spine. The doctor stated she would review her with an MRI of the cervical spine.

32. On 17 October 2013, Dr Rozario reported to Dr Lai that,

> "The MRI of the cervical spine was done which shows a small right paracentral disc protrusion with adjacent osteophyte development encroaching on the theca without discrete neural compromise. At the C6/C7 level, there was minor posterior bulging of the disc with no neural encroachment."

33. Dr Rozario advised that Ms Alavanja had undergone steroid injections in both lateral epicondyles with no improvement in her symptoms. She stated that she had recommended Nerve Conduction Studies of both upper limbs. She added that the cause of Ms Alavanja's pains were not clear, it may most likely be related to the epicondylitis, however Dr Rozario said she would like to exclude any cervical radiculopathy[15].

34. On 30 May 2014, Dr Rozario reported to Dr Mohan that Ms Alavanja's problems were mainly musculoskeletal with pain in her cervical spine radiating into her upper back, shoulders and both upper limbs. She also noted that she particularly had pain in both wrists and hands corresponding to the first MCP joints. While Dr Rozario stated that the cervical problem was primarily constitutional as a result of her underlying degenerative disease, along with some carpel tunnel syndrome and epicondylitis, she added that no doubt it was aggravated by the nature and conditions of her employment[16].

35. Dr Rozario expressed the opinion that given the nature of her work and the type of musculoskeletal complaints, her symptoms will exacerbate if she were to go back to her work with the respondent.

36. On 28 November 2014, Dr Rozario reported to Dr Mohan about the steroid injection to the right shoulder[17].

37. On 1 May 2015, Dr Rozario reported to Dr Mohan that Ms Alavanja was complaining of progressive right shoulder pain which is not improving. She noted she was on the waiting list for surgery with Dr Dave. It was noted that Ms Alavanja continued to have elbow problems, mostly on the basis of tendonitis[18].

38. On 22 July 2016, Dr Rozario reported to Dr Mohan noting cervical pain and on examination restricted movement. Restricted movement was also found in both shoulders. Dr Rozario says she reviewed the MRI of the cervical spine and said it did not show any significant abnormalities to explain the paraesthesia in her ring and little fingers.[19]

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[14] ARD p 31.
[15] ARD p 32.
[16] ARD p 33.
[17] Late Documents dated 28.5.2020 p 2.
[18] ARD p 35.
[19] Late Documents dated 28.5.2020 p 3.

39. On 22 August 201,6 Dr Rozario reported to Dr Mohan that the MRI of both elbows showed features of lateral epicondylitis, but not ulnar nerve entrapment. Also, that the previous nerve conduction study showed mild carpel tunnel syndrome but no evidence of ulnar nerve abnormalities. Dr Rozario stated that she reviewed the MRI of the cervical spine performed in 2013 and it showed at C4/5 and C6/7 minor disc prolapses nothing to suggest ulnar nerve involvement. Dr Rozario recommended examination by Dr Rail, neurologist, she had seen earlier to evaluate the numbness in the fourth and fifth fingers bilaterally. She also recommended physiotherapy to help with the aches and pains in Ms Alavanja's arms[20].

40. Dr Rozario provided a medico-legal report dated 12 August 2018 to Ms Alavanja's solicitors[21]. She noted that in 2013 she found stiffness on examination in Ms Alavanja's cervical spine without any gross neurological deficits. After discussing all of Ms Alavanja's symptoms, Dr Rozario states that she felt her symptoms were

> "mechanical primarily as a result of underlying degenerative disease aggravated by her working conditions affecting her cervical spine causing some carpal tunnel symptoms and epicondylitis as well as aggravating her symptoms of osteoarthritis in her hands causing it to be painful[22]."

41. Dr Rozario relates that when she saw Ms Alavanja on 1 August 2014 she started complaining of pain in both shoulders especially the right shoulder. She notes the complaints started about two weeks prior to this appointment. Dr Rozario answered the questions of the solicitors. She advised that the cause of Ms Alavanja's left shoulder problems "are most likely because of the type 2 acromion, moderately severe osteoarthritis of the AC joint and the nature of her work all which precipitated causing impingement of the left shoulder."
Dr Rozario stated that "the left shoulder range of movement was restricted suggestive of some mild impingement in the left shoulder similar to what was seen previously in the right shoulder."

42. Dr Rozario added that the cervical spine problems are on the basis of mild disc protrusions, but she concluded that as there was no neurological impingement in the cervical spine her pain was most likely muscular along with aggravation of the mild degenerative changes. Dr Rozario attributed the cervical pain and aggravation to the nature and conditions of her work.

Dr Dave

43. Dr Dave is the orthopaedic surgeon who has treated Ms Alavanja. He reported to Dr Rozario on 15 December 2014[23]. He diagnosed that Ms Alavanja had right shoulder subacromial impingement; AC joint damage and rotator cuff tendonitis. He noted that her job involved a fair amount of repetitive work and overhead lifting. He records that she said the main issue with her shoulder started six months previously. He recommended surgery.

44. Dr Dave reported to Dr Mohan on 2 March 2015 that he saw her again that day. He said on the last visit he placed Ms Alavanja on the waiting list at Fairfield Hospital for a shoulder decompression and excision at the outer end of the clavicle. He recounts that Ms Alavanja worked as a flower buncher for nearly 19 years and that the job involved lifting heavy buckets up to and above the shoulder level many times in a day. Dr Dave said in this way any shoulder rotator cuff pathology could be related to the conditions of her work and he would be supportive of this[24].

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[20] ARD p 38.
[21] ARD p 49.
[22] ARD p 50.
[23] ARD p 67.
[24] ARD p 34.

45. On 11 December 2015, the right shoulder surgery was performed[25]. Dr Dave reported to Dr Mohan on 21 December 2015[26] and 8 March 2016 about the condition in the right shoulder post-surgery[27], no mention is made of the left shoulder or cervical spine.

Dr Kafataris

46. Dr Kafataris is an Injury Management Consultant engaged by the insurer who has provided a report dated 9 November 2013[28]. Dr Kafataris notes that Ms Alavanja was experiencing constant pain in the medial and lateral aspects of her left elbow and medical aspects of the right elbow. He records that she stated that these symptoms then radiate approximately to her neck but on other occasions the symptoms radiate from her cervical spine distally. Paraesthesia was noted over the left little finger distal to the ulnar nerve.

47. Dr Kafataris recorded his examination of her cervical spine and movements in all directions were less than normal. He states the movements were curtailed by guarding. He adds that the upper limb neurological examination was unremarkable. The doctor records the finding of the MRI cervical spine taken on 30 September 2013. He stated that the MRI scan did not reveal any substantial disc protrusion or neurocompression and that there was some guarding and symptom magnification during his assessment.

Dr Tjeuw

48. Dr Tjeuw is a consultant rheumatologist engaged by the insurer who has provided them with a report dated 12 November 2013[29]. At the Arbitration Hearing it was admitted only as to its history. Dr Tjeuw makes reference to a factual investigation report. He said Ms Alavanja described the bunches of flowers were usually two metres tall and can weigh up to 7 or 8 kg whereas he stated the factual report suggests the flowers are usually one metre long and weight between 10 to 15 kg. He does not take a history of left shoulder complaints. In relation to her cervical spine he has a history of the MRI scan undertaken at the request of Dr Rozario.

Dr Browne

49. Dr Browne is a rheumatologist engaged by the insurer who has provided them with a report dated 15 September 2014. Physical examination of the cervical spine was restricted in range of rotation to the left and right side. Dr Browne noted that her shoulders moved freely. The doctor's diagnosis included right and left epicondylitis and left ulnar neuropathy[30]. He related these conditions to her work.

Dr Patrick

50. Dr Patrick provided a medico-legal report for Ms Alavanja dated 13 July 2017[31]. He noted he had examined her on 23 October 2014, 28 November 2016 and 13 July 2017. Dr Patrick has a history about Ms Alavanja's work, and he records the details of the events in July 2013. He also notes that Ms Alavanja recalls at work there were trolleys which had high, medium and low sections and she would not infrequently be handling 10 litre buckets of water reaching and getting them down from an overhead position at times.

[25] ARD p 36.
[26] ARD p 68.
[27] ARD p 69.
[28] Late Documents dated 13.5.2020 p 14.
[29] Late Documents dated 13.5.2020 p 31.
[30] Late Documents dated 13.5.2020 p 61.
[31] ARD p 39.

51. Dr Patrick refers to the MRI of the cervical spine dated 27 September 2013 as demonstrating right posterior disc protrusion at C4/5 and at C6/7 some minor central posterior bulging. He adds that "perusal of these films actually shows a left posterior disc protrusion at C5/6 level also".

52. Dr Patrick has the history that after the 2013 events she was quite disabled with pain particularly in both elbows, and to some extent in her wrists, forearms, left thumb, left ring and little fingers and neck. He adds that she had also developed symptoms in her left then right shoulders. Dr Patrick quotes from Dr Rozario's report dated 30 May 2014 that Ms Alavanja's "problems are mainly musculoskeletal with pain in her cervical spine radiating into her upper back, shoulders and both upper limbs. She particularly has pain in both wrists and hands corresponding to the first MC joints...". Dr Patrick opines that "there was little doubt that her overall conditions were significantly aggravated by the nature and conditions of her employment over very many years.[32]" Dr Patrick also refers to reports of Dr Dave.

53. Dr Patrick lists Ms Alavanja's current symptoms, including in her shoulders and cervical spine and his examination findings. He states that there is "some diminution of sensation over lateral aspect right upper arm both proximal and distal to elbow (broadly C5, C6 nerve root distributions) but no other evidence for radiculopathy arising at cervical spine.[33]"

54. Dr Patrick expresses the opinion that Ms Alavanja's injuries, including to the cervical spine and left shoulder are "attritional, resulting from the particular nature and conditions of her work over many years…". He regarded them as occupational overuse type injuries.

Dr James Powell

55. Dr Powell, orthopaedic surgeon, provided a medico-legal report for the insurer dated 23 February 2018[34]. In relation to her cervical spine Dr Powell sets out his examination findings as follows:

> "Ms Alavanja held her neck slightly protracted, commensurate with her slight upper body stoop. There was no particular tenderness on palpation of the neck, midline nor to the sides.
>
> Range of motion showed a slight restriction of expected extension though without any guarding. There was a normal progression into flexion with synchronous motion. Lateral flexion and rotation, though reduced slightly in expected range, but was commensurate with her age, without any localised irritability."

56. Dr Powell noted the results of the MRI Cervical Spine scan of 30 September 2013. He states that this imaging has identified early cervical spondylosis change, but she is not symptomatic in this region.

57. In relation to the left shoulder, Dr Powell found on examination no particular tenderness to palpation and no differential wasting. Range of motion showed flexion to 100º, extension to 40º, abduction to 90º with adduction of 40º, external rotation 30º and internal rotation 60º.

58. When asked his opinion as to whether the claimed injuries can be related by way of cause, aggravation or acceleration to the nature and conditions of her employment, Dr Powell dealt with tenosynovitis. He concluded:

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[32] ARD p 41.
[33] ARD p 43.
[34] Reply p 49.

> "It is likely that the nature and conditions of Ms Alavanja's work at the time needing to open her hand widely to accommodate the bunches of flowers in the presence of her advancing age and age-related change affecting the musculoskeletal system and the possibility tendency towards inflammation, that she developed an acute tenosynovitis through activities in her work that led to her treatment."

59. When dealing with the right shoulder Dr Powell said the symptoms came on after she left work and no particular incident brought the symptoms on. He opined that it is possible that the initial presentation arose from the repetitive elevation of her arms in the latter stages of her employment through watering of plants above shoulder height. However, he says the delay in onset of symptoms after leaving work is a little difficult to explain on this basis. He says it is unclear whether her work had any direct influence on her presentation and subsequent management.

60. However, Dr Powell having examined both the left shoulder and cervical spine and having Dr Patrick's report of 13 July 2017, he does not express a view as to whether her work could have caused or aggravated these body parts.

Ms Alavanja's Submissions

61. It was submitted that Ms Alavanja's evidence is fairly well corroborated by the respondent's evidence. Mr Parker drew attention to Ms Alavanja's evidence about the nature of her work, which I have summarised earlier in these reasons. He submitted that her work was very repetitive, involved the use of both hands and sometimes she had to work up to 14 hours per day. Emphasis was also placed on the fact that Ms Alavanja had been doing this work since 1995.

62. Mr Parker referred to her first statement in paragraph 6 wherein she said she developed pain in her left hand but also that she had stiffness in her neck and that she saw Dr Lai. Reference was also made to paragraph 12, when in 2013 she was doing light duties but that she says the work was still quite heavy. Counsel submitted the history in Dr Rozario's report dated 17 September 2013 supports Ms Alavanja's statement, that the light duties were quite heavy, especially when working with the gladioli. It was submitted that Dr Patrick has a thorough history of her work and that Dr Powell described her work as still fairly arduous.

63. It was also noted that Dr Mohan had a similar history about her work. It was submitted when he first saw Ms Alavanja on 17 May 2013 it was at a time when she was working and even though she primarily complained of elbow pain, she also complained of tenderness in the cervical spine.

64. It was submitted that it is illogical to suggest that doing the same duties after the 2006 injury would not have still caused problems for her body. It was noted that the respondent had admitted liability for work-related problems in her right shoulder, and it is curious that they have disputed liability for the left shoulder.

65. Mr Parker submitted that the respondent's evidence had the flavour, that Ms Alavanja continued to have problems, was doing the same duties and she complained from time to time. It was submitted that Ms Peverill supported that Ms Alavanja kept doing the same tasks, so it was repetitive. It was submitted that Ms Oshana and Ms Nguyen both support that the work was heavy, and that Ms Alavanja complained of pain.

66. It was submitted that if the respondent were to submit that the notes from Dr Lai are not available as corroboration, that there is authority that corroboration is not required. Reliance was placed on the decision in *The Presbyterian Church (New South Wales) Property Trust v Pingol*[35] wherein Keating P stated:

> "[70] I reject the submission that Ms Pingol cannot succeed unless her version of events is corroborated by contemporaneous records or statements from work colleagues.
>
> [71] As Mr Stockley, counsel for Ms Pingol, submitted, the question of corroboration is one that goes to weight of the available evidence. In *Chanaa v Zarour* [2011] NSWCA 199 Campbell JA (Bathurst CJ and Tobias AJA agreeing) held (at [86]):
>
> > '...However, in the civil law corroboration is not a technical term, or a legal requirement.... Rather, the task of the judge is to decide, on the basis of the whole evidence (denials and all), what he or she accepts. In doing that, there is no requirement for the judge to accept the whole of the evidence of any one witness.'"

67. The Court of Appeal's decision in *Mason v Demasi*[36] was also relied upon. In that case the decision of Basten JA sets out the considerations that need to be borne in mind when a trial judge is determining whether a witness's oral testimony should be discounted due to apparent inconsistencies with accounts given to various health professionals. At [2] it was stated that caution should be exercised for the following reasons:

> "(a) the health professional who took the history has not been cross-examined about:
>
> (i) the circumstances of the consultation;
> (ii) the manner in which the history was obtained;
> (iii) the period of time devoted to that exercise, and
> (iv) the accuracy of the recording;
>
> (b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;
>
> (c) the record did not identify any questions which may have elucidated replies;
>
> (d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording, and
>
> (e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history."

[35] [2014] NSWWCCPD 80, *Pingol*.
[36] [2009] NSWCA 227, *Mason*.

68. Mr Parker submitted that Ms Alavanja was someone with limited English skills, and some of the clinical notes are not available, having not been produced. So, it was argued it cannot be found that she did not complain, because the records are not available from Dr Lai. It was submitted that Ms Alavanja says she complained of neck pain in 2006. It was further submitted that Dr Mohan refers to neck tenderness and Dr Rozario in 2013 records limitation in neck movement and arranged a scan of the cervical spine. Attention was drawn to Dr Kafataris, who in November 2013 refers to neck symptoms. Mr Parker argued that all these recorded complaints are fairly contemporaneous to Ms Alavanja's work for the respondent, particularly that of Dr Mohan.

69. In relation to the left shoulder, counsel argued that the MRI scan of the cervical spine refers to paraesthesia of the left upper limb and Dr Rozario refers to left upper limb paraesthesia. It was conceded that these references may not necessarily be to the left shoulder, but it was submitted that Dr Mohan says he saw Ms Alavanja on 17 May 2013 and several occasions thereafter when she would complain of worsening pain in the left side of the neck and shoulder and upper arm with paraesthesia spreading to the fingers. It was also noted that on 30 May 2014 Ms Alavanja complained to Dr Rozario of pain in her shoulders.

70. It was submitted the real significant point in the case is the medical evidence about causation. It was argued by Mr Parker that the case falls into a category of cases with *Arquero v Shannons Anti Corrosion Engineers Pty Ltd*[37]. It was submitted if the medical expert opinion about causation is based on a correct history and is logical and consistent, there is no reason not to accept the expert's opinion if there is no opinion opposing it. While acknowledging that *Arquero* was a case dealing with a consequential condition, which has a different legal test to one of "injury", nonetheless some of the consideration in that case supports the point Mr Parker was making. At [143] DP Wood stated:

> "The factual basis upon which his opinion rested was uncontroversial. Further, there was no evidence to contradict that of Dr Patrick. As a general proposition, a decision maker is not obliged to accept evidence on the basis that there is no evidence to the contrary. However, the evidence was consistent with the historical medical evidence and Mr Arquero's statement evidence. It was not inherently incredible, and provided a logical basis on which the necessary causal connection could be established." (footnotes omitted)

71. Mr Parker referred to Dr Dave's opinion in his report of 2 March 2015 about the right shoulder and the causal connection with the work duties of Ms Alavanja. Counsel argues that given her duties involved using both arms it would be illogical if the left shoulder symptoms were not also due to left shoulder work-related injury. It was submitted that this was a big problem in the respondent's case. It was also argued that Dr Rozario's opinion in her report dated 12 August 2018 was supportive of the causal connection with work and is supportive of a conclusion that work was the main contributing factor to the disease or aggravation of disease. It was submitted Dr Mohan also gives a consistent and logical opinion regarding causation.

72. By way of contrast, it was submitted that the respondent's opinion of Dr Powell is not logical and is inconsistent. In addition, it was submitted that Dr Powell's history is brief and unduly focuses on the May, June and July period in 2013. The overall submission was that Dr Powell does not directly address the left shoulder and cervical spine and he does not say that the symptoms in these body parts were not caused by work.

[37] [2019] NSWWCCPD, *Arquero.*

Respondent's submissions

73. Mr Doak submitted that *Arquero* has limited application in Ms Alavanja's case because *Arquero* was dealing with a consequential injury claim. However, as I observed above, the point Mr Parker was making with his reference to *Arquero* related more to the situation of an expert's opinion being unchallenged by the opposing party's expert.

74. In relation to Dr Powell's opinion, Mr Doak submitted he cannot contradict Mr Parker's submission that Dr Powell does not directly address either the left shoulder or cervical spine in terms of an opinion regarding onset or causation. He submitted that Dr Powell did examine the right shoulder, and examined the left shoulder finding no particular tenderness or wasting and it was submitted that the range of motion seemed to be consistent with someone of Ms Alavanja's age. He noted the MRI cervical scan of 30 September 2013. Mr Doak submits there are no investigations of the left shoulder.

75. Counsel referred to Ms Alavanja's first statement referring to injury in 2006 to her left wrist and she refers to also noticing particular pain and stiffness in her neck. It was noted by Mr Doak that the respondent had tried to obtain the records from Dr Lai, but he has retired and so they are not available to either party. He referred to Dr Lai's response to the insurer's questions dated 14 February 2007 and 3 May 2007 about the left wrist and he submitted that there is no reference in this document to the cervical spine. I have summarised this document earlier in these reasons. I am not persuaded that weight can be placed on the absence of a reference to the cervical spine as the doctor is answering particular questions put to him by the insurer pertaining to the left wrist.

76. Mr Doak also submitted that the compensation claim form for injury on 2 April 2008 does not make reference to the cervical spine. However, this is not particularly surprising as that claim was concerning a fall of Ms Alavanja in the carpark and she says she injured her left bottom, forearm causing a laceration and bleeding[38].

77. It was submitted in 2013 the claim form in relation to picking up the gladioli on 3 June 2013 did not refer to the cervical spine.

78. It was also submitted that Dr Rozario's reports in 2006 do not refer to the cervical spine. This was contrasted with Ms Alavanja's statement, where at paragraph 6 she refers to pain in her wrist in September 2006 and that she also "began noticing significant pain and stiffness in her neck".[39] Counsel submits that you would have expected Ms Alavanja to inform Dr Rozario about her cervical symptoms. It was also submitted that if Ms Alavanja informed Dr Rozario, one would have expected the doctor would refer to such symptoms in her reports.

79. Counsel submits there is no contemporaneous corroborative evidence at this stage that she was experiencing neck pain.

80. Mr Doak referred to Ms Alavanja's statement dealing with 2013 and that Dr Mohan took over her treatment. However, she relates in attending on that doctor in relation to pain in her elbows. Counsel notes she then recounts details about the incident with the gladioli and the left elbow, and that she did not return to work since 15 July 2013. Mr Doak submits there is no reference in this part of her statement referring to her suffering from neck and left shoulder problems. He draws attention to paragraph 17 of this statement that on 17 September 2013 she attended upon Dr Rozario and complained of neck pain, as well as pain in her elbows and hands.

[38] Reply p 17.
[39] ARD p 1.

81. Counsel referred to Dr Rozario's report of 17 September 2013 and says this is the highest point of her case. He notes in paragraph 4 there is a finding by the doctor of stiffness and discomfort in the cervical spine. He argues this is an isolated finding. He submits that the history to Dr Rozario does not refer to injuring her cervical spine and left shoulder at work. So, it was argued at this point Ms Alavanja was off work for about three months and it was submitted that some care should be adopted by the Commission in dealing with this finding of Dr Rozario about stiffness and discomfort in the cervical spine.

82. Mr Doak further submitted that Dr Rozario organised the MRI scan of the cervical spine to work out a reason for her elbow pain, to exclude cervical radiculopathy. It was argued that in the report dated 12 August 2018 Dr Rozario gave this as the reason for the scan. It was submitted that at that stage there was not a complaint that she developed neck pain due to her work or of a specific incident or that it came on over time. It was submitted this first identification of cervical spine pain was made well after she ceased work. It was argued that this colours Dr Rozario's opinion about the neck and left shoulder.

83. It was noted that Dr Rozario felt Ms Alavanja's cervical spine pain was most likely muscular along with aggravation of mild degenerative changes, all from the nature and conditions of her work. Counsel criticised this opinion firstly because the doctor did not state the extent of the aggravation or give a basis for her opinion. Counsel refers to various cases such as *Makita (Australia) Pty Ltd v Sprowles*[40], *Hancock v East Coast Timbers Products Pty Limited*[41] and *Rolleston v Insurance Australia Ltd*[42] which identify the need for a medical expert to set out the underlying factual assumptions and expose the reasoning by which they come to the conclusion. It was argued Dr Rozario's view does not disclose that the employment was the main contributing factor. It was submitted if it was most likely muscular, the complaint came on three months after she ceased work. It was argued we do not know the extent of the aggravation and the doctor has not explained how symptoms would come on three months after she ceased work.

84. Mr Doak referred to Dr Patrick's report and submits he has it around the wrong way in that he says she initially developed pain and stiffness in the neck in 2006, and also the earlier symptoms comprised some tenosynovitis. However, it was submitted that the contemporaneous documents at that stage do not refer to the neck. It was noted that Dr Patrick when relating the incident on 3 June 2013 lifting the gladioli, Dr Patrick said she had some neck pain and counsel says this is not correct because the records of Dr Rozario at that time do not refer to the neck. Counsel submitted that in relation to this incident Ms Alavanja was complaining of pain in her elbows, not her neck. It was submitted this affects Dr Patrick's opinion about the cervical spine as it is not based on the correct history as he does not seem aware that there is an absence of complaint about the cervical spine until September 2013, months after she has ceased work.

85. In relation to the left shoulder, counsel notes that Dr Patrick has a history of pain in 2013. However, it was submitted that there is an absence of complaint about the left shoulder throughout the material. It was noted there was reference to symptoms in the shoulders in Dr Rozario's report of 30 May 2014, but it was in the context of pain in the cervical spine radiating into the shoulders. So, it was argued this is not a basis from which to draw a conclusion that the left shoulder was injured.

[40] [2001] NSWCA 305, *Makita.*
[41] [2011] NSWCA 11, *Hancock.*
[42] [2017] NSWCA 168, *Rolleston.*

86. Counsel referred to the 2018 report of Dr Rozario that Ms Alavanja did start to complain of pain in her shoulders until when the doctor was filling out the superannuation forms on 1 August 2014. He noted that the doctor says the pain came on shortly before that examination and counsel submits that was over a year since Ms Alavanja ceased work. Mr Doak was critical of Dr Rozario's diagnosis and opinion that the nature of her work caused impingement of her left shoulder. It was argued that it was not explained how the nature of the work would have caused impingement of the left shoulder. It was noted that Mr Parker submitted that given the respondent had accepted liability for the right shoulder and the same mechanism of her work would have caused problems in the left shoulder. However, Mr Doak says one cannot draw that inference, noting that Ms Alavanja is right hand dominant. Furthermore, it could be said that Dr Rozario refers to three causes and only one is work, so it was submitted that there is a problem with main contributing factor.

87. Dr Patrick's opinion about the left shoulder was also the subject of criticism by Mr Doak. He submitted that his history is not consistent with the contemporaneous records and he does not identify the mechanism of injury or time of injury. It was submitted that Dr Patrick relied on Dr Rozario and given the issues that counsel identified with Dr Rozario's opinion, then the opinion of Dr Patrick should not be accepted. It was also argued that one needs more than Dr Patrick's statement that there has been occupational overuse.

88. The respondent submitted that Ms Alavanja had not satisfied her onus of proof that the cervical spine and left shoulder are causally related to her work with the respondent, or that they resulted from overuse or gradual onset. Mr Doak submitted that there is no evidence to support a finding under section 4(b)(i) of the 1987 Act.

89. Reference was made to the statement at page 33 of the Reply which said the work carrying the buckets was not heavy. Ms San confirmed the only complaint about the July 2013 incident was in relation to the elbow. Counsel stated he was not suggesting that aspects of the work were not heavy, but that the respondent's lay witnesses suggest it was not as heavy as Ms Alavanja makes out.

90. At the conclusion of Mr Doak's submissions I asked about the Claim for Total and Permanent Disablement Benefit – Medical Attendant's Statement contained in the Application to Admit Late Documents filed on 13 May 2020[43]. It transpired that both counsel did not have a complete copy of this Application. An adjournment took place to enable them to peruse the documents.

91. This document refers to the doctor having been professionally acquainted with Ms Alavanja for six and half years. The doctor was asked to list the patient's medical impairments. "O/A cervical spine" is listed, amongst other conditions. The doctor was asked when had Ms Alavanja first consulted him about the conditions he had listed, and he wrote "4.5.13". However, a difficulty placing weight on this form is that it is evident from the bottom right hand corner of the form that it is "Page 1 of 2" and the doctor who filled out the form is not identified.

92. On the next page of that Application[44] is another similar form. It is noted that the doctor had been professionally acquainted with Ms Alavanja since October 2006 and had been first consulted about her conditions on 17 September 2013. Listed in the conditions is "OA Cx spine". Again, only page 1 of 2 of the document is in the material and the doctor filling out the form is not identified.

[43] Late Documents 13.5.20 p 44.
[44] Late Documents 13.5.20 p 45.

93. Mr Doak submitted that in addition to the difficulties regarding these documents being incomplete and the authors unknown, is that the references to "O/A (osteoarthritis) cervical spine" do not say "aggravation of osteoarthritis of the cervical spine".

94. Mr Doak referred to the report of Dr Mohan dated 7 June 2019 in the ARD in which he says he first saw Ms Alavanja on 17 May 2013 in relation to a work place injury and on examination she was tender on the left forearm, left lateral epicondyle area and right side of the cervical spine. Mr Doak submitted it was not clear when that examination took place. He notes that Dr Mohan then states that he saw Ms Alavanja on several occasions when she would complain of worsening pain on the left side of her neck.

95. Mr Doak said there are clinical notes in the Late Documents preceding the Permanent Disablement forms, and none of the clinical notes in May 2013 refer to the cervical spine or the left shoulder[45]. So, he submits this is problematic, that is, working out when the complaint of cervical spine was first recorded.

96. Mr Doak referred to Dr Tjeuw's history in relation to the incident with the gladioli in 2013 where there is no reference to complaints in the cervical spine or left shoulder.

Ms Alavanja's submissions in reply

97. Mr Parker submitted that *Arquero* was a useful case to consider about the standard of proof required to determine injury. He submitted that the criticisms made by the respondent of Drs Rozario and Mohan were misplaced because principles such as outlined in *Makita,* would not apply to them as they are treating doctors and are not providing expert opinions. It was submitted that guidance could be found in the decision of DP Roche in *RSL (QLD) War Veterans' Homes Ltd v Watkins*[46] at [62]:

> "The scientific basis for Dr Summersell's opinion was not explained in any greater detail than is present in Professor Ghabrial's reports. What is required by way of an explanation for the basis of the expert's opinion will depend on the circumstances in each case (*Adler v Australian Securities and Investments Commission* [2003] NSWCA 131 at [631]). However, the authorities are clear that an expert does not have to 'offer chapter and verse in support of every opinion' (*Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 at [89]). As Spigelman CJ (Giles and Ipp JJA agreeing) explained in *Australian Security and Investments Commission v Rich* [2005] NSWCA 152 at [170] ' [a]n expert frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, that it is not able to be articulated'. In other words, experts are allowed to use their general experience and knowledge, as experts, even though it is not stated in their reports."

98. The above passage appeared in Roche DP's decision in *Watkins* after he considered the Court of Appeal's decision in *Hancock.* Roche DP then made the point that Professor Ghabrial had based his decision on the worker's history, the finding in a bone scan and his clinical findings. Roche DP said Professor Ghabrial's history provided a "fair climate" for accepting his opinion. Roche DP found at [64]:

> "His evidence complied with the principles governing expert evidence in the Commission and it was open to the Arbitrator to accept the Professor's conclusions, along with Ms Watkins' evidence, and to find that Ms Watkins suffered an injury to her right hip in the fall in February 2009."

[45] Late Documents 13.5.20 p 43.
[46] [2013] NSWWCCPD 44, *Watkins*.

99. Mr Parker submitted that Dr Rozario, even though she was a treating doctor, did have a history which provided a "fair climate" for her opinion on causation and that it should be accepted. He submitted that the respondent made an attempt to dissect her opinion by asserting she was giving three different causes. Mr Parker submitted that this is not how her report should be interpreted, she was diagnosing the medical injury and finding it was caused by the nature and conditions of Ms Alavanja's employment. It was submitted she had a fair climate for providing this opinion and has given a logical and consistent opinion.

100. In relation to Dr Mohan, it was submitted that while his report may be considered as less complete, it should be borne in mind that he has been Ms Alavanja's treating general practitioner for many years. It was submitted that Dr Mohan's report dated 7 June 2019 can only be read that the examination findings were those made on the initial consultation on 17 May 2013, that there was tenderness at right side of the neck. It was submitted this was while Ms Alavanja was still working for the respondent, and it was further submitted that the Permanent Disablement form does refer to complaints about the cervical spine on 4 May 2013.

101. Mr Parker submitted that it is not surprising that Ms Alavanja would not have included in her claim form such complaints, when she had incurred such a significant injury to her elbow. He argues the reports of Dr Mohan and the Permanent Disablement form does confirm she was having cervical symptoms while she was working.

102. As to the clinical notes in the Late Documents, Mr Parker submitted that they were very brief and hard to read. He submitted, in these circumstances, it is not surprising that you do not see corroboration.

103. In relation to the respondent's submissions about Dr Patrick it was submitted reliance was placed on *Watkins,* that there is a clear injury to multiple parts of the body, and history of heavy work. It was further submitted that it is up to the Commission not the doctors to determine the main contributing factor, and it was the fact that the only contributing factor was Ms Alavanja's employment and it does not matter that the treating doctors do not refer to the main contributing factor.

104. In conclusion, Mr Parker stated that he objected to the report of Dr Tjeuw dated 12 November 2013 being relied upon for anything apart from the history. The respondent's counsel agreed with this approach.

Determination: Cervical spine

105. Ms Alavanja worked for the respondent between 1995 and 2013, roughly between ages 46 to 64 years. From her statements, I accept the description of her duties as being very repetitive, some work involved reaching high shelves and there was some heavy lifting involved. In addition, she was working bunching flowers on a conveyer belt. The respondent's lay witnesses do not really challenge that these were facets of her employment. Their statements are focused on the incident with the gladioli on 3 June 2013. Ms Alavanja also states that after her 2006 injury she returned to work on light duties, but that her duties were not that light. Again, the respondent's lay witnesses do not really challenge this assertion. In fact, as Mr Parker submitted, they confirm she continued to work in the same job location in the premises. There is reference to her duties being modified in Ms Oshana's statement, but she does not give any details as to how they were modified. Therefore, I accept Ms Alavanja's contention that her duties after 2006 were not that light.

106. Ms Oshana confirms that Ms Alavanja's work had heavy elements as the gladioli weighed between 10 to 15 kg and required a two person lift. She states that normally Ms Alavanja would get the boys to do the lifting. She mentions that in breaks Ms Alavanja would stretch her body, including her neck. However, she does not comment on the repetitive nature of her work and all the aspects of her job over her many years of employment.

107. Ms Nguyen states that Ms Alavanja would complain a lot at work. But Ms Nguyen does not consider if such complaints were due to her feeling pain. Such an interpretation is open because Ms San states Ms Alavanja would complain of pain if she had too much to do. As Ms Alavanja's counsel submitted, such observations by these witnesses can be viewed as being consistent with Ms Alavanja experiencing pain in multiple parts of her body over the lengthy time she worked for the respondent.

108. I find there is nothing in these witnesses' statements that cause me to doubt the truthfulness of Ms Alavanja's statements. She says in her more recent statement that before the incident on 3 June 2013 she had neck problems.

109. One of the reasons that the respondent denies injury to her cervical spine is because there are no contemporaneous, documented records of neck complaints during the time she was employed by the respondent. Ms Alavanja's counsel says her evidence should be accepted and a lack of corroborative material is not fatal to her establishing injury, given the physical demands of her employment.

110. The respondent drew attention to the fact that the 2008 and 2013 claim forms did not refer to symptoms in the cervical spine and left shoulder. I do not consider that to be remarkable or determinative as she was reporting specific incidents in those claim form, not relating to her cervical spine or shoulder.

111. Ms Alavanja's counsel also relies upon the evidence of Dr Mohan in the report of 7 June 2019 as corroboration that she had cervical complaints in May 2013. However, the respondent's counsel does not agree that the report can be interpreted that way. As the submissions dealt at some length with this report, I have reproduced the relevant parts below, for ease of reference:

> "This is to certify that the first time I saw Mrs Milka Alavanja was on 17/5/2013 in relation to a work place injury. Milka complained of pain in both elbows, left elbow more to the lateral epicondyle more than the medial side and in her right side, more pain in right medial epicondyle side than the lateral.
>
> Milka told me her work was very repetitive involving bunching of flowers and making into large bouquets. She would be holding scissors in right hand and cutting the stems and putting flowers in the plastic bags.
>
> On Examination: She was tender on left forearm left lateral epicondyle area and right side of cervical spine.
>
> I saw her on several occasions after initial consultation when she would complain of worsening pain on left side neck, shoulder, upper arm with paraesthesias, left 4th and 5th finger and spreading to rest of fingers.
>
> Milka complained she could not grab with left hand and frequently drops out of her hand.
>
> As she was not improving, I referred her to rheumatologist Dr Rozario.

> Diagnosis: Soft tissue injury to left elbow, upper and lower arm, left shoulder and neck, more than the right hand side.
>
> This is a direct result of her work relating to bunching, holding, cutting and arranging the flowers as described above while she was employed.
> …"

112. A consideration of Dr Mohan's clinical notes does not shed light on when this physical examination took place. There is a clinical note for a date that cannot be determined in May 2013 which refers to painful both elbows from holding bunches of flowers all the time and x-ray and ultrasound appear to have been ordered[47]. There does not appear to be a reference to the cervical spine. On a different clinical card there is an entry on 10 May 2013 which says "recurred pain both elbows…" but the rest of that sentence is difficult to decipher. It could say refer for x-ray and U/S, or it could be a reference to the neck. This cannot be deduced with any certainty. The handwriting is so poor that I do not consider it appropriate to rely upon this entry one way or another.

113. Mr Parker also submitted the partial copy of the Claim for Total and Permanent Disablement Benefit- Medical Attendant Statement in the Late Documents refers to "O/A Cervical Spine" (and other body parts) and that the patient first consulted the doctor about this on 4 May 2013[48]. The respondent urges the Commission not to place weight on this document as it is incomplete, and the date 4 May 2013 does not marry up with the date of 17 May 2013 referred to by Dr Mohan in his report. However, on the clinical cards the entry above 10 May 2013 is 4 May 2013. So, it appears Ms Alavanja did see a doctor on 4 May 2013. A difficulty in deducing anything from these records is the entry on 4 May 2013 has nothing is written beside that date. I find that I cannot make any sound findings about these records and because the Permanent Disablement form is incomplete I find it would be unsafe to rely on it.

114. Therefore, none of these ancillary documents help with the interpretation of Dr Mohan's report dated 7 June 2019.

115. I find that a plain reading of the report dated 7 June 2019 supports Mr Parker's interpretation of it, and not that of the respondent. Dr Mohan in the first paragraph sets out that he first saw Ms Alavanja on 17 May 2013 and refers to her complaints in relation to her elbows. He then notes what she told him about her work tasks. In the following paragraph he refers to his examination findings, which includes the reference to right sided neck tenderness. I find the structure of the report leads to the interpretation that he is now finished describing the initial consultation, because in the next paragraph he says he saw her on several occasions after initial consultation. Furthermore, he adds that in these later consultations "she would complain of worsening pain on *left* side neck" (my emphasis). This change from tenderness on the *right* side of neck, to pain on the *left* side supports, in my view, that it was on the initial examination on 17 May 2013 that he found tenderness in the right side of the cervical spine.

116. One of the reasons Mr Parker wished to rely on Dr Mohan having examined the cervical spine on 17 May 2013 and finding tenderness is because this was during Ms Alavanja's work with the respondent. Ms Alavanja in her last statement says she had pain in her cervical spine prior to the incident on 3 June 2013 and prior to when she ceased work in July 2013. I accept this statement because it is consistent with this finding by Dr Mohan.

117. Mr Parker also submitted that weight should be afforded to Dr Mohan's opinion about causation, because he has been Ms Alavanja's general practitioner for many years. Mr Parker submits that he has diagnosed injury to the neck (as well as other injuries) and he attributes this to the direct result from her work relating to bunching, holding, cutting and arranging the flowers.

[47] Late Documents 13.5.20 p 69.
[48] Late Documents 13.5.20 p 44.

118. I find that Dr Mohan's opinion about causation of the cervical spine symptoms is consistent with the opinion of Dr Rozario. Ms Alavanja had been treated by Dr Rozario in 2006 and again starting from 17 September 2013. I consider this date to be highly relevant. While it was after Ms Alavanja had ceased work, it was only a matter of about eight weeks later. Dr Rozario found on examination that Ms Alavanja had stiffness and discomfort on movements of the cervical spine. Dr Rozario arranged for the MRI scan of the cervical spine. While the doctor was trying to identify the cause of the arm pains being experienced by Ms Alavanja, I do not consider that it can be inferred that this was the only reason that the scan was ordered in light of her examination findings.

119. When one reads all of Dr Rozario's reports, I find she has embarked on a thorough investigation and consideration of Ms Alavanja's presentation. She reported to Dr Mohan that her problems were mainly musculoskeletal with pain in her cervical spine that was radiating to her upper back, shoulders and upper limbs. While Dr Rozario considered the cervical problem was primarily constitutional, she did express her opinion that there was no doubt it was aggravated by the nature and conditions of her employment. In her report dated 12 August 2018 she offers the same opinion adding that her pain was most likely muscular along with aggravation of the mild degenerative changes, both of which she attributed to the employment with the respondent. I consider Dr Rozario has given a very fair assessment of Ms Alavanja's cervical condition. At all times she has acknowledged that there is no neurological deficits in the cervical spine.

120. Furthermore, I find that Dr Rozario had an understanding of Ms Alavanja's work tasks both stemming from the time she treated Ms Alavanja in 2006 and also from 2013.

121. I have acknowledged when summarising Dr Dave's reports that he does not refer to the cervical spine. Dr Dave had been treating the right shoulder and Dr Mohan's referral to him only mentioned the right shoulder, so I do not consider it particularly remarkable that he did not mention the cervical spine. Dr Rozario had offered an opinion about the cervical spine to Dr Mohan as part of Ms Alavanja's treatment, which was well before she was asked to provide a medico-legal report to Ms Alavanja's solicitors. Therefore, I do not place weight on the fact that Dr Dave does not refer to Ms Alavanja's cervical spine.

122. In addition, Dr Kafataris on 9 November 2013, some two months after Dr Rozario first referred to cervical spine, also found that Ms Alavanja's movements in the cervical spine in all directions were less than normal, although he makes comments about guarding and symptom magnification. The fact that Dr Tjeuw three days later does not particularly take a history about the cervical spine is undercut by the fact he refers in his history to the cervical MRI arranged for Dr Rozario. On 15 September 2014 the respondent's Dr Browne found on his examination the cervical spine was restricted in range of rotation and the left and right side. The further reports of Dr Rozario also report ongoing cervical complaints.

123. Therefore, I consider there is a consistent body of evidence supporting that Ms Alavanja had cervical symptoms starting before she ceased work and up to the examination by Dr Patrick. Dr Patrick says he examined Ms Alavanja on 23 October 2014, 28 November 2016 and 13 July 2017. Only the report from the last day is before the Commission. While I consider that all the reports of an expert should be tendered, there was no objection taken by the respondent in this regard. Dr Patrick does not set out his findings from his two earlier examinations. He relies heavily on the reports and findings of Dr Rozario, which I have accepted. Dr Patrick expresses the view that the cervical spine has been injured, attritionally from the nature of her work with the respondent over a long period of time.

124. I accept Dr Patrick's opinion as I consider he has a history regarding the nature of work performed by Ms Alavanja both taken from her and also by him having regard to Dr Rozario's reports. The respondent submitted that Dr Patrick did not understand there was a delay in Ms Alavanja experiencing cervical symptoms. I do not accept this is an issue I am satisfied she did have cervical symptoms before she ceased work.

125. The onus of proof lies with Ms Alavanja, not the respondent. However, the respondent's position has been made more difficult by the fact that Dr Powell, having examined Ms Alavanja's cervical spine, offers no opinion as to whether the work with the respondent could have caused or aggravated her cervical spine. He did note in his examination findings that the lateral flexion and rotation was reduced but said this was commensurate with her age. However, he also found slight restriction in range of motion on extension without guarding but did not say this was commensurate with her age.

126. In summary, I am satisfied largely because of Dr Rozario's opinion, but reinforced by the opinions of Dr Mohan and Dr Patrick, that Ms Alavanja has discharged her onus of proof to establish she has sustained an injury to her cervical spine due to the performance of her work duties with the respondent over a protracted period of time and noting the physical requirements of such duties and the repetitious nature of the work.

127. I am satisfied that the requirements of section 4 of the 1987 Act are met. Dr Rozario found the injury included an aggravation of the underlying degenerative changes in her cervical spine. Dr Rozario opines that the work aggravated the underlying disease, being the degenerative condition in the cervical spine. I have accepted that Ms Alavanja's evidence that she had symptoms before she ceased work and certainly within eight weeks thereafter symptoms were being recorded by Dr Rozario.

128. There is a requirement in section 4(b)(ii) that the employment is the main contributing factor to the aggravation of the disease. I consider Dr Rozario's opinion establishes this. Notwithstanding the submissions of the respondent, I find it is clear that her opinion regarding causation is clear that the work did aggravate the underlying condition and no other cause for her symptoms were postulated.

Determination: left shoulder

129. While the type of duties that Ms Alavanja performed over the years involved the use of both arms, I cannot just accept the submission of her counsel that it is illogical that the respondent has accepted liability for the right shoulder being injured and disputed that the left shoulder was also injured. A significant difference is the fact she was right arm dominant. It does not necessarily follow that a worker will injure both shoulders when performing work with both arms. So, it is necessary to look at the evidence to make a determination.

130. In Ms Alavanja's statement she does not say she reported left shoulder pain to Dr Rozario on her visit on 17 September 2013. She states she reported her shoulder pain to the doctor on 30 May 2014. That is almost a year after she ceased work, but of more concern is that is not mentioned by Dr Rozario. Dr Rozario at that time refers to radiation of pain from the cervical spine to the shoulder. She also says when she was referred to Dr Dave she reported pain in both shoulders to him. Dr Dave does not refer to the left shoulder at all. I find this surprising had she done this that Dr Dave would not have recorded it.

131. Dr Mohan in the report of 7 June 2019, unlike the situation with the cervical spine, does not say he examined the left shoulder on 17 May 2013 and when he relates her complaints in the consultations thereafter he only refers to "shoulder" using the singular tense. So, I cannot infer this is a reference to the left shoulder. Yet in his diagnosis he states:

> "Soft tissue injury to left elbow, upper and lower arm, left shoulder and neck, more than the right hand side."

132. Again, Dr Mohan's clinical notes are of no assistance as they are too brief to identify complaints at particular consultations. Unlike the situation with the cervical spine, I have concerns relying on Dr Mohan's final opinion. He has included the left shoulder in his diagnosis but nowhere else in the report referred to it and he does not seem to refer to the right shoulder for which there was operative treatment. In addition, his referral to Dr Dave does not mention the left shoulder. In these circumstances, I consider it would be unsound to place weight on Dr Mohan's opinion about injury to the left shoulder.

133. Dr Rozario does not take a history of left shoulder pain at her consultations on 17 September 2013 or 17 October 2013. In her report dated 30 May 2014 she reported the cervical pain radiated into the upper back, shoulders and both upper limbs. I accept the respondent's submission that this finding is not consistent with a left shoulder injury because radiation of pain from an injured cervical spine does not prove a shoulder injury. Nowhere in that report does she refer to a left shoulder injury, nor did she inform Dr Mohan about a diagnosis in relation to the same. I find this is significant because she advised Dr Mohan of her diagnosis regarding the cervical spine, carpel tunnel and epicondylitis. Given how thorough Dr Rozario was in her investigations, I find it remarkable if the left shoulder was symptomatic at that point in time that she would not have mentioned it to Dr Mohan.

134. However, later in her medico- legal report dated 12 August 2018 she says on 1 August 2014 Ms Alavanja started complaining of pain in *both* shoulders, especially the right. It is of some significance that she advises that Ms Alavanja said her complaints started two weeks before that appointment. So, this would be about one year since she ceased work. I accept that this history to Dr Rozario about the onset of left shoulder symptoms is likely to be more reliable than that given by Ms Alavanja in her statements.

135. On 28 November 2014 Dr Rozario reports to Dr Mohan about the injection to the right shoulder. She discusses the right shoulder on 1 May 2015. In the report dated 22 July 2016, Dr Rozario mentions to Dr Mohan that Ms Alavanja has restricted movement in *both* shoulders.

136. Dr Rozario expressed the opinion that the cause of the left shoulder problems are most likely because of type 2 acromion, moderately severe osteoarthritis of the AC joint and the nature of her work, all of which precipitated, causing impingement of the left shoulder. The doctor found the left shoulder's range of movement was restricted suggestive of some mild impingement similar to what was seen on the right shoulder. I accept that Dr Rozario was well placed to make such a diagnosis, notwithstanding she did not have the benefit of radiological investigations of the left shoulder. I accept that this is a finding that can be made by an experienced clinician such as Dr Rozario.

137. Dr Kafataris and Dr Tjeuw do not refer to the left shoulder, but that is not remarkable given Dr Rozario's history of the problems coming on two weeks before 1 August 2014, as both Drs Kafataris and Tjeuw examined Ms Alavanja before that time. However, Dr Browne examined Ms Alavanja on 15 September 2014 just six weeks after Dr Rozario and found her shoulders moved freely. I prefer the opinion of Dr Rozario to Dr Browne because she has had the benefit of seeing Ms Alavanja over many consultations and Dr Browne only saw her the once.

138. As mentioned earlier, Dr Patrick's reports from the examinations on 23 October 2014 and 28 November 2016 are not before the Commission, but as no point was taken by the respondent about that I will not draw any inferences by their absence. Dr Patrick expresses the opinion that the left shoulder was injured attritionally resulting from the particular nature and conditions of her work over many years. His opinion was criticised by the respondent because he does not seem to be aware of the delay in onset of symptoms one year after Ms Alavanja ceased work. Dr Patrick's report was issued in 2017 and Dr Rozario's report, referring to the 2014 onset of symptoms in relation to the left shoulder, was issued in 2018 so I consider it is unsafe to rely upon Dr Patrick's opinion because he did not seems aware of this delay.

139. Dr Powell examined Ms Alavanja's left shoulder and found no particular tenderness or wasting and he sets out his range of motion findings but does not express any opinion at all about a diagnosis or causation. He expressed a cautious opinion about the right shoulder drawing attention to the delay in symptoms after she left work and postulated that the initial presentation could have arisen from the repetitive elevation of her arms in the later stages of her employment but he questions the delay and says it is unclear if the work had any direct influence on her presentation. However, he does not extend these comments to her left shoulder and so I cannot speculate one way or another as to what his opinion would have been.

140. As I mentioned when dealing with the cervical spine, Ms Alavanja has the onus of proof and it is not for the respondent to disprove the case. However, Mr Parker submitted that if the worker's expert has a consistent history, or fair climate, and expresses an opinion on causation which is logical and consistent with that history and when there is no countervailing opinion then the Commission, while not obliged to accept the opinion, should do so in this matter.

141. I have approached the question of injury regarding the left shoulder cautiously because of the concerns I have identified. However, Dr Rozario was aware of the delay in onset of symptoms but nonetheless attributes the symptoms in the left shoulder to Ms Alavanja's work with the respondent. Dr Rozario has seen Ms Alavanja many times and from her treatment of her in 2006 and starting again in 2013 I find she was well acquainted with the nature of Ms Alavanja's work duties and the toll they took on her physically. This fact, coupled with the physical nature of the work with the respondent, and the length of time she worked in that job I am persuaded to the standard required in *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*[49] that the employment did cause an injury to Ms Alavanja's left shoulder.

142. The respondent submitted that Ms Alavanja's evidence does not meet the requirement in section 4(b) of the 1987 Act regarding main contributing factor. I am aware that there are no investigations of the left shoulder, however Dr Rozario found the left shoulder's range of movement was restricted which she opined was suggestive of some mild impingement. She attributed this to the nature of her work. Therefore, while economically expressed, I accept the doctor's opinion based upon her expertise and speciality and find that was in a position to make this finding from her clinical examination. I consider that her opinion is sufficient for me to find that Ms Alavanja's work was the main contributing factor to her developing disease in the left shoulder pursuant to section 4(b)(i) of the 1987 Act, particularly in the absence of a contradictory opinion from Dr Powell.

143. Accordingly, I find Ms Alavanja has established an injury to her left shoulder with her employment being the main contributing factor to the development of disease in the shoulder.

SUMMARY

144. Pursuant to section 4(b)(ii) of the 1987 Act the applicant sustained injury to her cervical spine, with her employment being the main contributing factor to the aggravation of disease.

145. Pursuant to section 4(b)(i) of the 1987 Act the applicant sustained injury to her left shoulder, with her employment being the main contributing factor to the disease.

146. The lump sum claim is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess permanent impairment as follows:

    (a) Date of injury: 3 December 2019 (deemed), being the date of the lump sum claim.

[49] [2008] NSWCA 246, *Nguyen*

(b) Body parts: cervical spine, left upper extremity (shoulder, thumb, hand, wrist, elbow and peripheral nerve) and right upper extremity (shoulder, wrist and peripheral nerve).

147. The matter requires an in-person assessment.

148. The documents to be referred to the AMS are as follows:

(a) ARD and attached documents;

(b) Reply and attached documents;

(c) Application to Admit Late Documents filed by the respondent dated 13 May 2020, with the exception that Dr Tjeuw's report dated 12 November 2013 was only admitted as to its history; and

(d) Application to Admit Late Documents filed by the applicant dated 28 May 2020.