WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2649/19**
Applicant: **Gaetano Di Donato**
Respondent: **Paesanella Food Emporium**
Date of Determination: **5 September 2019**
Citation: **[2019] NSWWCC 293**

The Commission determines:

1. Award for the respondent.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Gaetano Di Donato (the applicant) commenced employment as a chef with Paesanella Food Emporium (the respondent) in January 2014. The applicant claims that on 4 December 2014, during the course of his employment with the respondent, he slipped over in a cool room and sustained injury to his cervical spine.

2. A claim for compensation was signed by the applicant on 26 October 2016. On 31 July 2017, the respondent's insurer issued a notice pursuant to former s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) declining liability for the injury. The insurer disputed that the applicant had sustained an injury pursuant to ss 4 and 9A of the *Workers Compensation Act 1987* (the 1987 Act); that the applicant suffered any incapacity as a result of an injury; and that medical treatment was reasonably necessary as a result of an injury.

3. On 29 October 2018, the applicant, through his solicitors, forwarded a claim for lump sum compensation pursuant to s 66 of the 1987 Act. On 25 January 2019, the applicant was notified that liability for the injury remained declined.

4. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 30 May 2019. The applicant seeks compensation in the form of weekly benefits, medical expenses and lump sum compensation for permanent impairment.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a conciliation conference and arbitration hearing on 6 August 2019. The applicant was represented by Mr Graham Barter of counsel, instructed by Mr Joel Redman. The respondent was represented by Mr Stephen Flett of counsel.

6. 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.

ISSUES FOR DETERMINATION

7. During conciliation, the parties agreed that the applicable pre-injury average weekly earnings (PIAWE) figure was $1,300. The parties further agreed that a general order for medical expenses and referral to an Approved Medical Specialist (AMS) would be appropriate in the event of a determination favourable to the applicant.

8. The parties agreed that the following issues remained in dispute:

    (a) Whether the applicant sustained injury to his cervical spine on 4 December 2014;

    (b) The extent and quantification of any incapacity resulting from injury;

    (c) The applicant's entitlement to s 60 expenses, and

    (d) The applicant's entitlement to s 66 lump sum compensation.

EVIDENCE

Documentary evidence

9. 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) Documents attached to an Application to Admit Late Documents filed by the applicant on 30 July 2019, and

    (d) Documents attached to an Application to Admit Late Documents filed by the respondent on 30 July 2019.

10. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

11. The applicant's evidence is set out in a written statement made by him on 31 October 2018.

12. The applicant said he migrated to Australia from Italy in 1988. The applicant undertook tertiary education in hospitality, specifically cooking, in Italy then commenced an apprenticeship at a restaurant in Naples. After moving to Australia, the applicant completed several qualifications in cooking and restaurant catering and obtained a forklift license. Between 1989 and 2012, the applicant held numerous chef and head chef positions at restaurants and catering services in Sydney, including as the owner or partner of three businesses.

13. The applicant commenced employment as a head chef for the respondent in 2014. The applicant said he was never given any payslips by the respondent but was paid by direct debit into his bank account on a weekly basis.

14. Under the heading, "Health Background", the applicant said he had undergone surgeries to his nose and to remove kidney stones and underwent lap band surgery in August 2012. The applicant also said he was pre-diabetic. The applicant then said,

    > "Apart from the above, I have never suffered from any pre-existing disabilities or disorders to my neck and prior to my fall I did not display any of the symptoms, pain or incapacity connected to my current injuries to any significant degree as I have since the date of the accident."

15. The applicant was involved in minor motor vehicle accidents at the end of 2014 and in 2015 but did not sustain any injuries as a result of those accidents.

16. On 4 December 2014, between approximately 11.30 am and 12.00 pm, the applicant was at work preparing pizzas to be cooked for lunchtime service. The applicant was required to collect fresh pizza bases from the kitchen cool room upstairs.

17. The applicant walked into the cool room and was not carrying anything at that point. The applicant recalled that there was lots of condensation on the cool room ceiling which had dripped onto the floor and made the floor wet. The applicant picked up a large gastronome tray from a shelf. As the applicant turned to exit, carrying the tray containing a pizza base, the applicant slipped on the wet floor and fell. The applicant fell to the left side, hitting the back of his head and neck on the edge of a box of cheese about half a metre above the ground.

18. The applicant said he did not sustain any lacerations or bleeding and did not lose consciousness. The applicant felt an immediate sharp pain and burning sensation in the back of his head and neck which continued throughout the rest of the day. As it was a busy day and the applicant was in the middle of lunch preparation, he returned to work. The applicant confirmed that he did not complete a formal incident report.

19. The applicant said there were no witnesses to the incident but his brother, Giampiero Di Donato, who was the manager at the time, was working and the applicant told him what had happened. The applicant recalled that another worker by the name of Thomas O'Brien also worked that day.

20. The applicant said that he was in pain for the remainder of the day. The applicant experienced a constant, dull and numbing pain in his neck extending into his shoulder. The applicant also developed a severe headache and vertigo. The applicant continued to work but was noticeably more quiet and slow. In the days following the incident, the applicant felt sharp pain in the left side of his neck, made worse by repetitive movements of his left arm or neck.

21. The applicant did not seek immediate medical treatment and hoped the pain would stop but when the pain was more severe the following day he went to Dr Michael Panetta. Dr Panetta referred the applicant for radiological examinations and to neurosurgeon, Dr Adam Fowler. The applicant saw Dr Fowler on 10 December 2014 and surgical intervention was recommended.

22. The applicant asked his general practitioner for a second opinion and was referred to a second neurosurgeon, Dr Andrew Davidson, whom the applicant saw on 20 February 2015. Dr Davidson also recommended surgical intervention. The applicant decided to try other pain relief options before undergoing surgery. The applicant underwent one month of physiotherapy and was provided with a rehabilitation action plan. In April and May 2015, the applicant had injections in his neck, performed by Dr Craig Harris. The applicant took a variety of oral analgesia. This treatment provided little relief and eventually the applicant felt he had no option but to have surgery as his pain was becoming unbearable.

23. The applicant proceeded to undergo surgery in the form of a C4/5 and C5/6 laminoforaminotomy and spinal rhizolysis on 21 July 2015, performed by Dr Davidson. The surgery provided some initial relief but the pre-surgery symptoms returned. The applicant said he suffered from intolerable pain in his neck and head and dizziness and had been told to avoid fixed cervical flexion and extension for prolonged periods. The applicant said that repetitive movements of his left arm or neck caused severe pain.

24. The applicant said he was unable to return to his pre-injury employment as it would aggravate his condition considering the sustained flexion and use of the neck and arms required. The applicant said he loved his work and would return to work if he physically could. The applicant said he had tried retraining in security work.

25. On 26 December 2015, the applicant commenced casual employment as a security officer at the New South Wales Art Gallery earning approximately $22 per hour. The applicant found the work quite difficult due to the long hours standing and walking, which impacted on his legs, back and neck. The applicant continued that work until the end of June 2016 and said his work performance was affected by his discomfort and pain.

26. The applicant noted that in his worker's injury claim form he said he became dizzy and slipped and fell on the floor. The applicant said this was not accurate and the form was completed by his previous solicitors. The applicant said the truth was that he slipped on the wet floor.

Worker's Injury Claim Form

27. The applicant completed a worker's injury claim form on 26 October 2016. In response to a question about what happened and how the applicant was injured, the applicant responded,

> "I became dizzy and slipped and fell on the floor."

28. The applicant said he was "unpacking/packing ingredients in the cool room" at the time of the injury.

Dr Michael Panetta

29. The applicant's general practitioner, Dr Michael Panetta provided a report to the insurer dated 12 January 2018.

30. Dr Panetta indicated that he had treated the applicant as his regular family general practitioner since 2011. The applicant began suffering from headaches and facial pain in late 2013/early 2014 and was referred for MRI scan. The applicant was referred to an otorhinolaryngologist, Dr Andrew Wignall, who felt that the applicant's headaches and facial pains were more likely the result of cervical dysfunction than sinusitis.

31. Dr Panetta then referred the applicant to a local physiotherapist who concurred with the diagnosis of cervical dysfunction particularly at the C2/C3 levels. This treatment seemed to ameliorate the applicant's symptoms to the extent that he did not present with any further neck related issues until 7 November 2014. The applicant described a couple of vertiginous episodes with no light-headedness, presyncope or loss of balance. Dr Panetta felt the most likely cause was recurrent cervical dysfunction and referred the applicant back to the physiotherapist.

32. Dr Panetta then stated,

> "Upon returning to me Mr DiDonato described to me a workplace accident having occurred while in a cool room at Paesanella Food Emporium on 4th December 2014. Specifically, he stated that around midday he walked into the cool room empty-handed to get some pizza bases. He recalls that the cool room was quite loaded with product including some boxes which were stacked. Access was tight according to Mr Di Donato. He states that the floor was wet from falling condensation moisture.
>
> He picked up a large tray containing the pizza base and turned to exit the cool room. In the process of turning he states that he hit the back of his head/neck on the edge of one of the boxes in the cool room. He felt the immediate onset of a sharp and burning sensation in his posterior head and neck. He managed to get himself upright, recollecting the tray and exiting the room.
>
> On 5 December 2014, the day following his accident, Mr DiDonato presented with frank posterior neck pain, radiating to the occiput but also to the left shoulder and left upper limb. Given the significant increase in his head and neck pain plus the new radicular symptoms I felt that an x-ray and MRI scan of the cervical spine were warranted and I organised these as a matter of urgency."

33. Dr Panetta said the new MRI scan showed cervical spine degenerative changes, most marked at C5/6. Dr Panetta was concerned with these findings given the acute development of radicular symptoms and referred the applicant for a neurosurgeon review. The applicant was seen by Dr Fowler at Westmead who agreed with the MRI findings as reported and recommended surgical intervention. The applicant returned to Dr Panetta and requested a second opinion and was then referred to Dr Andrew Davidson who also recommended surgical intervention.

34. Dr Panetta said that the applicant displayed no evidence of exaggeration, malingering or deceitful behaviour with a view to secondary financial or other gain. Dr Panetta concluded,

> "While I believe that Mr Di Donato is very likely to have has some degree of cervical spine degeneration associated with years of work both as a chef and in his most recent employment, it is clear that prior to his fall he did not display either the clinical symptoms, pain or incapacity to any significant degree as he has since the injury."

35. Dr Panetta's clinical notes are in evidence. On 10 January 2014, Dr Panetta recorded a consultation in which the applicant reported he was six to eight weeks post headache and had associated bilateral face pain. The applicant reported nil trauma recently but noted he was a kickboxer when young. An MRI of the brain/skull base was ordered. A letter of referral to Dr Andrew Wignall was written on 23 January 2014. On 28 January 2014 the notes record that Dr Wignall felt the pain was "MSK inc C-spine dysfunction".

36. On 7 November 2014, Dr Panetta made a record of vertiginous spells. Under the heading "Examination", Dr Panetta noted "cervigenic vertigo".

37. On Friday 5 December 2014, the notes state,

> "Neck pain with radiculopathy, L shoulder and arm
>
> **Reason for visit:**
> Neck pain
>
> **Diagnosis:**
> Neck pain
>
> **Actions**:
> imaging request printed to Norwest Medical Imaging: XR+MR C-spine (neck pain with radiculopathy)
> Prescription printed: Panadeine Forte 500 mg; 30 mg tablet 2 Four times a day prn
> Medical certificate given from 05/12/2014 until 12/12/2014"

38. At a consultation on 6 December 2014, a letter of referral to Professor Brian Owler was written. An imaging request for x-ray and CT scan of the lumbar spine was also created. The notes refer to low back pain and lower limb pain. A medical certificate was given for 6 December 2014.

39. The letter of referral to Professor Owler, dated 6 December 2014 states,

> "Thank you for seeing Gaetano, privately insured, 47 years for assessment of C-spine degenerative causing flattening of the thecal sac and C6 compromise."

40. On 9 December 2014, it was noted that an injection was to be done to the lumbar spine and a letter to Professor Brian Owler printed. A letter from Dr Adam Fowler, neurosurgeon was imported on 2 January 2015.

41. The applicant reported "MSK pain" on 15 January 2015.

42. On 21 January 2015, the notes state,

> "Gaetano needs C – spine surg as pain intol now
> Gets dizzy also
>
> **Actions:**
> Medical certificate given from 21/01/2015 until 04/02/2015"

43. On 22 January 2015, the notes record that the applicant requested certification regarding his medical status so as to receive income while he could not work.

44. On 4 February 2015, the applicant reported being upset after a meeting with neurosurgeon Dr Fowler. The applicant reported that his pain was not well controlled.

45. On 5 February 2015, the applicant requested a sick certificate. It was noted that the applicant was "worried re finances".

46. On 16 February 2015, the applicant was referred to Dr Andrew Davidson. On 23 February 2015, applicant was referred for an x-ray and ultrasound of his left shoulder.

47. On 25 February 2015, the notes indicate that Dr Davidson had required further imaging. The notes state,

> "Chronic headaches ? SOL
> Cervical dgen=arm pain ? radiculopathy
> …
>
> **Actions:**
> Imaging request printed to Norwest Medical Imaging: MR brain + C-spine (chronic headaches ? SOL
> Cervical dgen=arm pain / radiculopathy"

48. On 7 April 2015, the applicant was noted to be awaiting "inj CT guided steroid". An imaging request for "LEFT C4/5 FACET JOINT INJECTION (Degen)" was created on 15 May 2015.

49. The applicant returned to Dr Panetta reporting increasing neck pain and radiation on 9 June 2015. On this occasion, Dr Panetta discussed surgery. On 15 July 2015, Dr Panetta had a pre-op discussion regarding the C-spine. On 14 August 2015, the applicant was reviewed following "C4/5+C5/6 laminoforamotomies [sic] + rhizolysis".

50. On 22 January 2016, the applicant reported worsening pain with his new job. On 26 July 2016, the applicant consulted Dr Panetta about chronic neck pain and was referred for an MRI and x-ray. On 27 July 2016 the results of the MRI were discussed. It was noted that the applicant was claiming "TPD" and would require forms to be done.

51. On 11 October 2016, Dr Panetta wrote a NSW WorkCover certificate of capacity. That certificate gave a diagnosis of C6 disc injury and radiculopathy. The patient stated date of injury was "cumulative starting late 2014/early 2015". Asked how the disease was related to work, Dr Panetta stated, "chronic flexed postures during food preparation, aggravated by fall while in cool room".

52. An additional diagnosis of reactive major depression was added to a certificate dated 12 November 2016. Further additional diagnoses of secondary lower back pain and meniscal tear and right knee pain were added to subsequent certificates.

53. Exacerbations of neck pain were reported on 5 April 2017 and 1 May 2017 including new symptoms of left hand finger numbness on the latter occasion. There then follows a number of further consultations with regard to ongoing neck pain and WorkCover on a regular basis.

Reports prepared for HCF Life Insurance

54. Dr Panetta prepared a series of reports for HCF Life Insurance on behalf of the applicant.

55. In a document titled “Income Protection Doctors Form”, completed by Dr Panetta on 22 January 2015, Dr Panetta described the applicant’s present medical condition as follows:

> “Premature degenerative disease of cervical spine and vertebral discs. Changes of degeneration are most marked at level C5 to C6 with disc dehydration and herniation led to impingement of thecal sac and bilateral exiting nerve root impingement.”

56. Asked, “when did the patient first consult you with this disability”, Dr Panetta responded “10/1/14”. Asked “what is the underlying cause of this disability”, Dr Panetta responded,

> “Recurrent and persistent neck flexion & likely genetic predisposition.”

57. Asked to provide “a full detailed report on the patient’s present condition”, Dr Panetta said,

> “Severe pain while maintaining flexed/static posture at work. Better with dynamic and direct postures. Has cervicogenic headaches, cervicogenic vertigo/disequilibrium. Having increasing left radiation of pain to shoulder and arm.”

58. Asked to provide details of medical practitioners consulted in the diagnosis and treatment of the patient, Dr Panetta identified Dr A Wignall, Dr A Fowler and Winston Hills Physiotherapy.

59. Dr Panetta was asked to provide a “full history of consultations and treatment for this patient”. Dr Panetta set out consultations on 10 and 28 January 2014, 13 October 2014, 7 November 2014, 5 December 2014, 6 December 2014, 9 December 2014, 15 January 2015 and 21 January 2015.

60. In a medical history form completed by hand on 29 January 2015, Dr Panetta answered a series of questions about the applicant’s condition. Asked whether the applicant had ever suffered from a required treatment for problems in the past, Dr Panetta indicated that the applicant had a degenerative C-spine condition. Dr Panetta described this as,

> “degenerative changes cervical spine with high likelihood of surgery this year. Referred Dr A Fowler – neurosurgeon”.

61. In a letter dated 5 February 2015, Dr Panetta wrote,

> “This gentleman has been a patient of this practice since 14 July 2011. He has during this time not had any symptoms associated with his current cervical spine condition until he first presented with this on 10 Jan 2014.”

62. In progress forms completed on 10 March 2015, 14 April 2015, 15 June 2015, 15 July 2015, 14 August 2015 and 14 October 2015 Dr Panetta again gave a description of the disability as “degenerative disease cervical spine with left vertebral artery lesion.”

Dr Andrew Davidson

63. The applicant’s treating neurosurgeon, Dr Andrew Davidson prepared a report for Dr Panetta dated 20 February 2015. The history taken by Dr Davidson was of a “long-standing history of neck pain”. Dr Davidson said the pain started in 2013 and was associated with a sore throat, however, the applicant did not have radicular pain at that time. The report then states,

> “In November 2014, while working, he experienced a sudden onset of neck, shoulder and left lateral arm pain, as well as dizziness, vertigo, vomiting and imbalance. He had a fall at the time and was unable to continue working.”

64. Dr Davidson said that an MRI scan of the cervical spine from December 2014 showed a C5/6 disc protrusion as well as an abnormality at the C4 vertebral body around the vertebral artery. Dr Davidson concluded as follows,

> "In summary, Mr Di Donato presents with neck, shoulder and lateral arm pain of sudden onset with associated vomiting, nausea, vertigo and imbalance. This could be due to his C5/6 disc protrusion, however, other pathologies need to be excluded."

65. On review on 30 March 2015, Dr Davidson described fluctuating left side axial neck pain. Dr Davidson did not find much of a radicular component to the pain and described the CT and MRI showing "a long-standing left C5/disc protrusion" although the symptoms did not fit with the left C6 radiculopathy and he did not have a satisfactory response to injection at this level. Dr Davidson did find early degenerative changes in the left C4/5 facet joint and speculated that this may be responsible for the neck pain. Dr Davidson found no need for surgery at that point.

66. Dr Davidson's opinion had changed by the time of his report dated 13 July 2015. On that occasion, Dr Davidson said

> "In summary, I think Mr Di Donato's pain is probably due to cervical radiculopathy rather than facet arthropathy."

67. Dr Davidson indicated he had discussed surgery with the applicant. The applicant did not require a cervical fusion but Dr Davidson arranged for him to have a left C4/5 and C5/6 laminoforaminotomy and nerve root decompression.

68. On 31 August 2015, Dr Davidson reported that despite some post-operative complications, the applicant had recovered extremely well. The radicular pain was all resolved although there was some slight numbness in the tip of the applicant's left thumb. The applicant was said to be looking for work.

Dr Michael Fearnside

69. The applicant relies on a series of medicolegal reports prepared by neurosurgeon, Dr Michael Fearnside. In his first report, dated 28 June 2018, Dr Fearnside took a history broadly consistent with the applicant's statement of him slipping on a wet floor and striking his neck on pallets stacked in a cool room, sustaining injury to the neck. Dr Fearnside reported that the applicant experienced immediate and severe neck pain. The applicant reported the incident and was able to complete his shift. Later that day, he experienced increasingly severe neck pain.

70. With regard to his prior medical history, Dr Fearnside noted that over the years the applicant had experienced minor neck aches, which Dr Fearnside described as unsurprising in view of the applicant's work as a chef. The applicant had never required any treatment for his neck pain and there was no history of brachial radicular pain. At the time of the accident the applicant had been living and working normally.

71. Dr Fearnside reviewed an MRI taken on 26 July 2016; x-rays of the thoracic and lumbar spine dated 4 April 2017; and a CT scan of the cervical spine dated 29 August 2017.

72. Dr Fearnside indicated that he had reviewed Dr Panetta's clinical notes and said that prior to the subject accident on 5 December 2014 there was only one reference to neck pain on 28 January 2014 where Dr Wignall thought that pain might be musculoskeletal. Following the injury, there were regular consultations regarding neck symptoms.

73. Dr Fearnside suggested Dr Davidson had incorrectly recorded the date of injury as November 2014. Dr Fearnside noted that Dr Davidson did not identify any radicular objective neurological symptoms but felt pain was consistent with C4/5 pathology. At a review on 30 March 2015, he felt that the applicant symptoms did not fit with the left C6 radiculopathy. Dr Fearnside commented that may have been so at the time but the applicant now had a left C6 radiculopathy.

74. Dr Fearnside noted that Dr Coroneos examined the applicant for the insurer. Dr Coroneos was not provided with any medical records, specialist records, reports, operative report or preoperative imaging.

75. Dr Fearnside gave the following opinion:

> "As a result of the workplace accident on 4/12/14, Gaetano Di Donato sustained an injury to his neck. The earliest radiological investigation available was an MRI scan of 26 July 2016 which was post-operative but did reveal cervical spondylosis. Although this investigation was taken over 2 years following the subject accident, it is probable that Mr Di Donato had cervical spondylosis at the time of the injury on 4 December 2014 and that this was aggravated by the fall. He clearly describes the mechanism of injury, blow to the back of the head as he fell and the immediate onset of neck and left arm pain. This is consistent with left brachial radicular pain and the symptoms of which he subsequently complained."

76. Dr Fearnside found the treatment to date had been reasonably necessary. Dr Fearnside said the applicant would not be fit to work in a manual capacity, including work as a chef, which was the only type of work the applicant had been performing and for which he was reasonably qualified. Dr Fearnside assessed the applicant as having 19% whole person impairment.

77. In a supplementary report, dated 2 August 2018, Dr Fearnside confirmed his earlier opinion. Dr Fearnside said there was no significant prior history of any injury or disorder affecting the applicant's neck although he had experienced some minor neck aches in his job as a chef, a moderately physical job. There was no history of brachial radicular pain.

78. In a further supplementary report dated 14 August 2018, Dr Fearnside reviewed imaging dated 5 December 2014 and 9 March 2015 and did not alter his previously expressed opinion. Dr Fearnside confirmed that at the time of the accident, the applicant did have significant cervical spondylosis.

79. In his final report dated 25 July 2019, Dr Fearnside indicated he had reviewed the reports and clinical notes of Dr Panetta. Dr Fearnside also reviewed a document titled "Income Protection Doctors Form" from HCF Life that indicated that the applicant was suffering premature degenerative disease of the cervical spine and vertebral discs. Changes of degeneration most marked at level C5 to C6…"

80. In response, Dr Fearnside said there was no argument that there was pre-existing cervical spondylosis, which he described as unexceptional given the applicant's age although there was no history of significant neck pain predating the subject accident, despite complaints of minor neck aches.

81. Dr Fearnside's review of the clinical notes identified reference to headache on 13 October 2014 and an entry for "C-spine dysfunction" on 28 January 2014. Dr Fearnside said there was no other references to neck symptoms prior to the accident. Dr Fearnside noted that the applicant had mentioned that he had experienced some general muscular pains associated with his work as a chef but said that at no time prior to the subject incident did he suffer any severe or debilitating neck symptoms.

82. Dr Fearnside said he had carefully considered the available information and did not amend his previously expressed opinion.

Respondent's evidence

83. The respondent relies on factual investigation reports prepared by Insight Intelligence Group dated 14 July 2017 and 25 July 2019.

Dr Adam Fowler

84. Amongst materials annexed to the 14 July 2017 report is a report from Dr Adam Fowler, neurosurgeon, dated 10 December 2014, addressed to Dr Panetta.

85. The history taken by Dr Fowler is recorded in this report as follows,

> "He is a 47-year-old right hand dominant chef who reports to me about a year's history of headaches and facial pain but also cervical pain and left arm pain which seems typical of a C6 radiculopathy. He describes headaches as his major problem however more recently in the last couple of weeks he has had some posterior neck pain both cordally and rosterally and also some pain radiating down the outside of his arm and into his forearm. There are no specific hand symptoms."

Thomas O'Brien

86. A witness statement prepared by Mr Thomas O'Brien, a chef employed by the respondent, taken on 28 June 2017, is also attached to the report.

87. Mr O'Brien said he was employed by the respondent between July 2014 and March 2015 as a sous chef reporting to the applicant. Mr O'Brien said the applicant never mentioned any previous injuries to him.

88. Mr O'Brien said he recalled that on the day of the incident he first noticed the applicant had injured himself at about 11.30 am when he came downstairs to help set up for lunch. The applicant was unusually quiet. Mr O'Brien asked the applicant words to the effect of "is there something wrong?". The applicant responded, "I have a lot of pain in my shoulder." Mr O'Brien noticed that the applicant was very quiet and not himself for the rest of the lunch service. Mr O'Brien noticed the applicant rubbing and holding his neck and left shoulder for the rest of the day. Mr O'Brien recalled that he offered to go get some painkillers from the first aid kit. The applicant declined the offer. The applicant did not tell Mr O'Brien specifically how he had injured himself nor was he informed of this by any other worker.

89. From that time onward, Mr O'Brien noted a massive change in the applicant's general demeanour. He was not his usual self, he was obviously in pain and he didn't really speak much anymore. The applicant became much quieter and slower in his work. Mr O'Brien said he could tell the applicant was definitely in pain.

90. Mr O'Brien said he believed the applicant was a very stoic and proud man who would not have wanted to report the injury formally as he probably feared losing his job as the owner had a short temper.

Grace Finn

91. A statement from Ms Grace Finn, dated 22 June 2017, is also attached to the factual investigation report. Ms Finn said she had been employed by the respondent for approximately 20 years on a casual basis. Ms Finn said the applicant used to take painkillers frequently and often asked her for painkillers if he didn't have any. Ms Finn said she would give the applicant Nurofen frequently. The applicant used to tell her that the bones in the back of his neck would get inflamed sometimes and that is why he asked for painkillers.

92. Ms Finn recalled that when the applicant first started working for the respondent he complained of ongoing pain in his neck. The applicant said words to the effect of “I have had pain in my neck for a long time because I have been a chef for a long time”.

93. Ms Finn said that to the best of her knowledge, the applicant never fell in the cool room on 4 December 2014. Ms Finn said the applicant had never informed her of having sustained any injury at the respondent’s premises, especially not falling in the cool room. The applicant’s brother also never told Ms Finn that the applicant had been injured.

Washington Bolivar Toaza

94. Mr Washington Bolivar Toaza made a statement dated 22 June 2017. Mr Toaza said he commenced working with the respondent in March 2012. Mr Toza said he had never known the applicant to use painkillers or other medication whilst at work, Mr Toaza could not recall the applicant ever complaining of having suffered an injury whilst employed by the respondent. The applicant never complained to him of having ongoing physical pain. Mr Toaza said he was never told by any other worker at the respondent that the applicant had suffered any injury or complained of physical pain. Mr Toaza confirmed there was a cool room behind the counter on Level Three of the respondent’s premises.

Giampiero Di Donato

95. The applicant’s brother, Mr Giampiero Di Donato, made a statement on 28 June 2017. Mr Di Donato said he commenced working for the respondent at the end of 2013.

96. Mr Di Donato recalled Grace Finn laughing at the applicant because he had fallen in the cool room. She said words in Italian to the effect, “he fell like a potato” as she laughed. Mr Di Donato recalled that this occurred in the morning at some point but he was unsure as to the exact time. Ms Finn then stopped laughing as she realised the applicant had hurt himself. She then asked the applicant words to the effect of “are you okay? Did you hurt yourself?” Mr Di Donato was unsure whether Grace Finn was in the cool room at the time of the incident.

97. Mr Di Donato recalled that the applicant appeared to be in pain for the remainder of the day. He kept rubbing his neck and shoulder and rotating his left shoulder as if it was causing him pain or was uncomfortable. Mr Di Donato said that if Ms Finn were to provide a statement, he was unsure whether she would say anything that would jeopardise her relationship with the owners of the respondent. Mr Di Donato said his gut feeling was that she probably would not. He said, “I feel that she may not be honest in her recollection of the day of the injury, to protect the owners.”

Dr Coroneos

98. The respondent relies on a medicolegal report prepared by neurosurgeon, Dr Michael Coroneos dated 22 June 2017.

99. Dr Coroneos’s report indicates that he asked the applicant whether he had any prior symptoms, complaints, treatments, injuries or investigations in regard to his neck, back or spine. The applicant reported, “no”.

100. The applicant reported the mechanism of injury on 4 December 2014 in a manner broadly consistent with his own evidence. The applicant told Dr Coroneos that he experienced immediate left-sided neck pain “sharp 10/10”.

101. Dr Coroneos indicated that he had reviewed an x-ray and MRI of the cervical spine dated 26 July 2016; an x-ray of the thoracic and lumbar spine, dated 4 April 2017; the worker's injury claim form, WorkCover NSW certificate of capacity, dated 11 October 2016; an inpatient discharge summary, dated 5 August 2015; and consent and photograph of a left C4/5 facet joint injection, dated 17 April 2015. Dr Coroneos said he had not been provided with any other medical material.

102. Dr Coroneos said given the nature of the briefing he received he could not provide any more specific commentary other than a diagnosis of cervical spondylosis with surgical intervention performed by Dr Andrew Davidson. Dr Coroneos said he could not comment on the effects of the incident on 4 December 2014 owing to the briefing with no contemporaneous medical reports of treating general practitioner, no contemporaneous medical records of treating surgeon, no operation report, no preoperative radiological films and no preoperative radiological reports.

103. Dr Coroneos said the x-ray and MRI of the cervical spine performed after surgery showed cervical spondylosis with no evidence of any traumatic change.

Applicant's submissions

104. Mr Barter identified the primary issue as being a factual dispute as to whether the applicant was injured in a slip and fall in a cool room on 4 December 2014, as claimed.

105. Mr Barter took me through the applicant's statement and the mechanism of injury described by him. Mr Barter found support for the applicant's evidence in the report of Dr Panetta, dated 18 January 2018.

106. Mr Barter noted that the applicant had presented to Dr Panetta with head and neck symptoms previously but Dr Panetta noted that on 5 December 2014, the day following his accident, the applicant presented with a significant increase in his head and neck pain plus new radicular symptoms.

107. Mr Barter noted that Dr Panetta's report was consistent with his clinical notes and submitted that the applicant's presentation on 5 December 2014 compared with previous presentations indicated something significant had happened. Mr Barter asked me to infer that prior to 5 December 2014 there was an accident on 4 December 2014 in the manner described by the applicant in his statement. Mr Barter noted that Dr Fearnside had taken the same history of injury as was set out in Dr Panetta's report and the applicant's evidence.

108. Mr Barter acknowledged that Dr Panetta's clinical notes contained no contemporaneous record of the fall but submitted that the notes were not intended to provide a detailed account of the consultations or provide an explanation for the cause of the symptoms complained of. Mr Barter submitted that the actions identified in the clinical note of 5 December 2014 were consistent with there having been a fall. The prior clinical notes recorded vertigo and other symptoms but no previous complaints of radiculopathy. Mr Barter submitted that the reason for the change was the fall. It followed that all the subsequent treatment, surgery, and investigations resulted from the fall.

109. Mr Barter submitted that Dr Davidson had conflated the symptoms reported to Dr Panetta in November 2014 and in the consultation on 5 December 2014. Mr Barter said it was unclear where Dr Davidson's history came from. Mr Barter submitted that Dr Davidson's reports confirmed that there was existing pathology and said this had been aggravated in a fall.

110. Mr Barter submitted that the applicant had given evidence about why he did not report or complain about the fall at the time. That is, the applicant liked his job, did not want to make a fuss or get his boss off side. Mr Barter said this was a credible explanation for why no detailed history of a fall was given to the treating specialists.

111. Mr Barter said there was nothing in the factual investigation to contradict the applicant's evidence and submitted that the witness statement of Thomas O'Brien was corroborative of the applicant's claim.

112. Mr Barter submitted that Ms Finn's statement revealed nothing more than that the applicant did not complain of the fall to Ms Finn. Mr Barter said that Mr Giampiero Di Donato's statement revealed that Ms Finn was particularly close to the business owner. It was noted that no supplementary statement had been obtained from Ms Finn.

113. Mr Barter submitted that up until 4 December 2014, the applicant's pre-existing condition had not affected the applicant's capacity to work. He subsequently became incapacitated and this claim was supported by the evidence of Mr O'Brien. Dr Panetta had also noted a significant change in symptoms after the alleged incident. Mr Barter submitted that it followed that I should find that the applicant suffered injury as alleged.

114. Mr Barter submitted that the applicant had no capacity to engage in pre-injury duties. Mr Barter noted that the applicant had attempted work as a security officer. Mr Barter submitted that at best, the applicant had capacity to do part-time work as a security officer earning in the vicinity of $300-400 per week.

Respondent's submissions

115. Mr Flett submitted that the applicant's credibility was in issue. Mr Flett noted that the applicant's evidence was that he moved to Australia in 1988, had completed courses in Australia and had an extensive work history including as the owner of a restaurant. Mr Flett said it was unlikely that the applicant had no experience with workers compensation in view of his background.

116. Mr Flett submitted that the applicant's evidence with regard to him not having received payslips was inconsistent with payslips in evidence. Mr Flett submitted that the applicant's evidence with regard to his pre-injury health also demonstrated a lack of credit. Specifically, the applicant denied suffering from any pre-existing disabilities or disorders relating to his neck. Prior to the fall, the applicant said he had not displayed any symptoms, pain or incapacity to any significant degree.

117. Mr Flett noted that the history of injury provided in the claim form was inconsistent with the applicant's current evidence. Although the applicant complained that the form had been completed by his former solicitors, he signed the form nonetheless.

118. Mr Flett noted the absence of any contemporaneous record of the fall. It was noted that the applicant had submitted that the statement of Mr O'Brien corroborated the applicant's claim. Mr Flett submitted that that statement corroborated only how the applicant felt but not any mechanism of injury.

119. Mr Flett submitted that Dr Panetta had engaged in a reconstruction of events that was completely out of step with his contemporaneous clinical notes. Mr Flett noted that the applicant consulted Dr Panetta on 7 November 2014. In his report, Dr Panetta suggested that "upon returning to see me" the applicant had disclosed a fall. Mr Flett submitted that Dr Panetta's notes of 5 December 2014 said nothing about a fall.

120. Mr Flett went through the clinical notes and said they identified a relationship between Dr Panetta and the applicant. The notes provided quite detailed reasons for presentation on each occasion when the applicant presented with a new condition. In contrast, the clinical note of 5 December 2014 was extremely brief and came in the context of earlier notes commencing in January 2014 in relation to which the applicant was referred to Dr Wignall.

121. Mr Flett noted that the letter of referral to Prof Owler contained no reference to workers compensation or any fall. The letter also indicated that the applicant was privately insured, suggesting no connection with any sort of work injury. Similarly, the imaging reports contained no reference to any sort of work injury or complaint.

122. Mr Flett noted that Dr Fowler took a history of the gradual onset of pain. Mr Flett submitted that the consultation with Dr Fowler would have been the perfect opportunity for the applicant to give a history of the fall but there was no mention of such.

123. Mr Flett observed that the medical history provided by Dr Panetta for HCF identified a degenerative cervical spine condition the underlying cause of which was persistent neck flexion and likely genetic predisposition. Dr Panetta indicated that the applicant had first consulted him with regard to the condition on 10 January 2014. Dr Panetta made no reference to any workplace accident.

124. Mr Flett submitted that Dr Panetta's evidence was unreliable and the applicant's evidence was riddled with inconsistencies and should not be accepted.

125. With regard to the witness statements, Mr Flett noted that the statement of Mr O'Brien indicated only that the applicant informed him that he was experiencing a lot of pain in his shoulder. Mr O'Brien did not recall that the applicant reported an injury or fall. Mr O'Brien's statement therefore provided no corroboration of injury, just a complaint of symptoms.

126. Mr Flett submitted that the applicant's statement did not sit well with Ms Finn's statement, where Ms Finn stated that the applicant used to tell her that his neck bones would get inflamed sometimes and ask her for painkillers. Ms Finn stated that the applicant complained of pain in his neck for a long time due to being a chef when he first started working for the respondent.

127. Mr Flett submitted that the witness statement of Washington Toaza did little to advance the matter and was evidence only that the applicant never informed him of the fall. Mr Flett submitted that the three witnesses had worked with the applicant for a long time and their evidence was entirely consistent with the medical notes.

128. Mr Flett submitted that the documents prepared for the applicant's income protection claim disclosed no report of work injury or fall. Mr Flett noted that the applicant bore the onus of proof and submitted that I would not be comfortable that that onus had been discharged.

129. With regard to incapacity, Mr Flett submitted that in the event of a favourable finding for the applicant, based on Dr Vincent's report, the applicant would have capacity for at least 15 hours per week in non-manual work other than as a chef. It was noted that the applicant was capable of earning $22 per hour as a security guard.

Applicant's submissions in reply

130. Mr Barter clarified that the applicant did not claim to be unfamiliar with workers compensation but rather due to his familiarity with the scheme did not want to make or be involved in a claim. The alternative proposition was that the applicant had manufactured a claim and somehow roped in his general practitioner. Having regard to the applicant's work history, engagement with retraining and attempts to return to the workforce, Mr Barter submitted that this was most unlikely.

131. Mr Barter submitted that the evidence of Ms Finn was unreliable and in particular her claim that the applicant was constantly complaining of neck pain and taking painkillers was not supported by anyone else. The applicant's brother's evidence was consistent with a worker's compensation claim being viewed as an anathema in the context of a small business. Mr Barter conceded that Mr O'Brien's statement indicated that his attention had been drawn to the particular date of injury by the investigator but said a particular day nonetheless had clearly stuck in the memory of Mr O'Brien and his evidence was consistent with a change in symptomology.

FINDINGS AND REASONS

132. Section 9 of the 1987 Act provides that a worker who has received an "injury" shall receive compensation from the worker's employer. The term "injury" is defined in s 4 of the 1987 Act as follows:

> **"4 Definition of 'injury'**
>
> In this Act:
> **injury:**
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

133. The Court of Appeal in *Nguyen v Cosmopolitan Homes*[1] has found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

> (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
>
> (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
>
> (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and

[1] [2008] NSWCA 246.

(4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.

134. The value of contemporaneous evidence has been repeatedly endorsed by the courts: *Watson v Foxman*[2] and *Onassis v Vergottis*[3].

135. The dangers in relying on clinical notes are, however, well acknowledged. In *Mason v Demasi*[4], Basten JA stated (at [2]):

> "First, the trial judge was invited to discount the appellant's oral testimony on the basis of accounts given to various health professionals, which appeared inconsistent either with each other, or with her oral testimony, or both. The difficulties attending this kind of exercise should be well-understood; as explained in *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8], such apparent inconsistencies may, and often should, be approached with caution for the following reasons, amongst others:
>
> (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."

136. In *Winter v New South Wales Police Force*,[5] Roche DP said:

> "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349 at [54]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]; *King v Collins* [2007] NSWCA 122 at [34]–[36])."

137. As Mr Barter has correctly identified, the primary issue in this case is a factual dispute as to whether the applicant was injured in a slip and fall in a cool room on 4 December 2014, as claimed.

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[2] (1995) 49 NSWLR 315.
[3] (1968) 2 Lloyds Report 403.
[4] [2009] NSWCA 227; BC200906897.
[5] [2010] NSWWCCPD 121 (*Winter*). The decision was set aside on appeal in *New South Wales Police Force v Winter* [2011] NSWCA 330, on a different issue.

138. Reviewing the evidence, it is apparent that the first reference to any fall appears in the report of Dr Davidson, dated 20 February 2015. Dr Davidson does not describe the mechanism of the fall, the circumstances in which it occurred, the particular date on which it occurred or its effect. Rather, he described a sudden onset of neck, shoulder and left lateral arm pain as well as dizziness, vertigo, vomiting and imbalance in November 2014, whilst working. Dr Davidson said there was a fall "at the time" and the applicant was unable to continue working. It is unclear, however, whether the applicant was unable to continue working because of the fall or because of the symptoms the applicant began experiencing in November 2014. It has been suggested by Dr Fearnside that Dr Davidson's reference to November 2014 may be a typographical error. However, that date does coincide with a consultation with Dr Panetta dealing with cervicogenic vertigo. It also provides a timeframe consistent with the history taken the other neurosurgeon seen by the applicant at the time, Dr Fowler.

139. It is then not until the WorkCover certificate issued by Dr Panetta on 11 October 2016, almost two years after the alleged fall, that the applicant's cervical spine condition is in any way attributed to a fall in a cool room. The nature of the fall is not further described in the WorkCover certificate.

140. A more detailed description of a fall appears in the worker's injury claim form completed on 26 October 2016. On that occasion, the applicant described becoming dizzy and slipping and falling on the floor. The applicant said he was unpacking/packing ingredients in the cool room at the time of the injury.

141. This description of a fall is difficult to reconcile with the applicant's written statement dated 31 October 2018 and the manner in which the fall has been described in the histories described in Dr Panetta's 2018 report and the independent medical experts' reports. The applicant now denies any fall due to a feeling of dizziness. The applicant now claims that he slipped due to the wet floor of the cool room. The applicant also does not now claim to have been unpacking or packing ingredients in the cool room at the time of the fall. The applicant says he went to the cool room to retrieve a pizza base on a large gastronome tray. Although the applicant has addressed this inconsistency in his statement, attributing it to error by his former legal representatives, the fact remains that the applicant signed the claim form himself. It is also noted that there was a significant passage of time between the event in question and the making of the claim.

142. It is not clear when the later description of the fall was provided to Dr Panetta. In his report dated 12 January 2018, Dr Panetta says the accident was described by the applicant "upon returning to me". This was following the consultation on 7 November 2014. It could be inferred that the history was given to Dr Panetta at the consultation on 5 December 2014.

143. If the history was given to Dr Panetta at that time, and noting the significant increase in pain and new radicular symptoms reported, it is highly surprising that no mention of the fall is made by Dr Panetta in his letter of referral to Professor Owler, his clinical records or the reports for the applicant's private insurer up until the time Dr Panetta first issued a WorkCover certificate, almost two years later.

144. That Dr Panetta either took no history of a fall on 5 December 2014 or did not consider it to be relevant is suggested by Dr Panetta's reports to HCF Life Insurance. In those reports, which commence on 22 January 2015, just over one month after the alleged fall, the applicant's condition is described as premature degenerative disease of the cervical spine. Dr Panetta expressed the opinion that the cause of the condition was recurrent and persistent neck flexion and likely genetic predisposition. Dr Panetta's responses to questions posed suggest that he considered the applicant's condition at that time to be a continuation of the condition in respect of which the applicant first consulted him on 10 January 2014 rather than the result of a fall on 4 December 2014. Dr Panetta described the radiating pain as "increasing".

145. The reports prepared for HCF Life Insurance are not in the nature of clinical notes prepared by a busy practitioner. They are responses to specific questions from an insurer intended to elicit detailed information with regard to the circumstances surrounding the onset and cause of the applicant's condition. It is reasonable to expect that if Dr Panetta had been aware of a significant fall involving the applicant striking the back of his head and neck on a box about half a metre off the ground, following which there was a sudden onset of radiculopathy or more severe pain, that it would have been mentioned by Dr Panetta in these reports.

146. Dr Adam Fowler, who saw the applicant only six days after the alleged fall similarly makes no reference to any fall in the history taken by him. To the contrary, the applicant is reported to have described a one year history of headaches, facial pain cervical pain and left arm pain, with an increase in radiating pain or radiculopathy "in the last couple of weeks". This history appears inconsistent with a sudden increase in symptoms in the context of a fall on 4 December 2014, but would be consistent with Dr Davidson's history of an onset of more severe symptoms in November 2014.

147. Mr Barter asks me to infer that something significant occurred prior to the presentation to Dr Panetta on 5 December 2014. Mr Barter asks me to infer that the significant event was a fall in the manner described by the applicant in his statement. I am not satisfied, however, that such an inference would be consistent with the contemporaneous medical evidence. I am not satisfied that the report prepared by Dr Panetta, dated 12 January 2018, is reliable evidence of the fall claimed.

148. The applicant has provided an explanation for the absence of reference to a fall of the kind now claimed in the contemporaneous medical evidence and his decision to pursue the matter initially through his private insurance. The applicant indicated that he enjoyed his job and did not want to lose it. The job was particularly convenient and one which was difficult to find. This sentiment is supported by the evidence of Mr O'Brien. Whilst this provides an explanation for the delay in the applicant's claim for workers compensation, I am not satisfied that it explains either his failure to reveal the fall to his treating practitioners or their failure to refer to it in their contemporaneous reports, if indeed it was significant or of the nature now claimed.

149. The witness statements of Mr O'Brien and the applicant's brother, Mr Di Donato are broadly consistent with the applicant's claim but I do not find them corroborative of his claim. It may be observed that Mr O'Brien's ability to recall in detail events which occurred some two and a half years earlier is somewhat surprising and suggestive of him having been prompted by the investigator as to the date and time of the alleged incident. Mr O'Brien refers to the applicant being unusually quiet after coming downstairs at around 11.30 am and claiming to have a lot of pain in his shoulder. Mr O'Brien does not state, however, that the applicant informed him that he had a fall. Mr O'Brien does not claim to have witnessed a fall or to have heard from anyone else that there was a fall. Mr O'Brien noticed a change in the applicant's general demeanour from that time onwards, however, such a change would not be inconsistent with the history taken by Dr Fowler and Dr Davidson of an increase in symptoms around that time.

150. Mr Di Donato's statement indicates there was a fall in the cool room, possibly witnessed by Grace Finn. It may be noted, however, that the applicant's evidence was that there were no witnesses to the fall and Ms Finn specifically denied any knowledge of a fall in the cool room or any other injury at the respondent's premises. Mr Di Donato has suggested that Ms Finn's denial might be because of her close relationship with the respondent's owners. Mr Di Donato does not claim to have witnessed the fall himself nor does he describe any mechanism of fall. Whilst I have placed weight on Mr Di Donato's evidence, I have approached it with some caution given that it is inconsistent with Ms Finn's statement and provides little detail.

151. Considering the evidence as a whole, I consider it possible, particularly having regard to Dr Davidson's and Mr Di Donato's evidence, that the applicant did have some type of fall at work, possibly in a cool room, sometime around November or early December 2014. I am not, however, satisfied on the balance of probabilities that the applicant had a fall on 4 December 2014, in the particular manner claimed, or that it had the effect claimed and asserted in the reports of Dr Panetta and Dr Fearnside. This is due to the applicant's apparent failure to describe the incident to his treating practitioners at the time or their failure to describe it either in their clinical notes, letters of referral, reports to other practitioners or reports for the applicant's private insurer apart from the brief reference to a fall in the report of Dr Davidson in the context of increasing neck symptoms since November 2014.

152. Notwithstanding the applicant's disavowal of any significant cervical symptoms prior to 4 December 2014, I am satisfied on the balance of probabilities that at least from January 2014, the applicant experienced headaches and associated bilateral face pain which were reported to Dr Panetta. Symptoms were sufficiently significant for Dr Panetta to refer the applicant for an MRI and to an ENT specialist who considered the pain was attributable to cervical spine dysfunction. I am satisfied that by 7 November 2014 there was an increase in symptoms with the applicant reporting vertiginous spells, which Dr Panetta also attributed to cervical spine dysfunction. Although the applicant now denies it, a fall associated with such vertiginous spells would appear to be consistent with the applicant's initial description of injury in the worker's injury claim form. Based on Dr Fowler and Dr Davidson's reports, I find that symptoms of radiating pain into the applicant's left arm and shoulder were experienced from November 2014 onwards. I am not satisfied that those symptoms suddenly increased on 4 December 2014 as a result of a fall or otherwise.

153. In making these findings, I have considered the report of Dr Coroneos but find it of little assistance. I have carefully considered the reports of Dr Fearnside. Dr Fearnside's opinions are, however, founded upon an acceptance of the history of a fall provided by the applicant, which for the reasons given above I do not accept. Although Dr Fearnside notes a change or increase in the applicant's symptoms in late 2014, this is consistent with the histories set out in the contemporaneous reports of Dr Fowler and Dr Davidson which I have accepted above.

154. It is entirely possible that the condition in the applicant's cervical spine is causally related to the applicant's work, either as a result of the nature and conditions of his employment or otherwise. That is not, however, the claim which I am tasked with determining. After careful consideration of the evidence as a whole, I am not satisfied on the balance of probabilities that on 4 December 2014 the applicant slipped and fell in a cool room on the respondent's premises causing injury to his cervical spine.

155. There will be an award for the respondent.