WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2965/20**
Applicant: **Lawrence Prasad**
Respondent: **Alhumd Group Pty Ltd**
Date of Determination: **10 August 2020**
Citation: **[2020] NSWWCC 269**

The Commission determines:

1. The applicant suffered an injury to his right shoulder and cervical spine (neck) on 3 December 2014.

2. The applicant suffered a consequential condition to his left shoulder as a result of the injuries to his neck and right shoulder.

3. The applicant did not suffer an injury to his thoracic or lumbar spines on 3 December 2014.

The Commission orders:

4. The matter is remitted to the Registrar to be referred to an Approved Medical Specialist (AMS) to assess the degree of whole person impairment arising from injuries to the right upper extremity (right shoulder) and cervical spine (neck) and left upper extremity (shoulder) on 3 December 2014.

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

    (a) the Application to Resolve a Dispute, and attachments, and
    (b) the Reply, attachments.

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

NICHOLAS READ
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 NICHOLAS READ, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Lawrence Prasad, the applicant, was employed by Alhumd Group Pty Ltd, the respondent. The respondent ran a Red Rooster franchise in Lakemba. The applicant was employed as an Assistant Manager.

2. The applicant claimed he suffered injuries to his shoulders, neck and back as a result of a fall in the kitchen at the respondent's premises on 3 December 2014. The incident was captured on CCTV.

3. The respondent disputed liability for the injury asserting that the circumstances of the accident as described by the applicant were not consistent with the CCTV footage. The respondent also pointed to inconsistencies in the applicant's evidence that supported a finding that the incident on 3 December 2014 was staged.

ISSUES FOR DETERMINATION

4. The issues for determination are:

    (a) Whether the applicant sustained injuries to his cervical spine, right shoulder, left shoulder, thoracic spine and lumbar spine as a result of the fall at work on 3 December 2014, as alleged by him, and

    (b) If so, whether the applicant sustained an injury to his left shoulder as a consequence of the above injuries.

5. The parties agree that if I find the applicant suffered injuries to the body parts claimed, the matter is to be referred to an Approved Medical Specialist (AMS) for assessment of the degree of permanent impairment resulting from the injury.

Matters previously notified as disputed

6. The issues were notified in dispute notice issued pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 5 August 2019.

PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conciliation conference and then arbitration on 21 July 2020.

8. Mr Jon Trainor of counsel appeared for the applicant. Mr Tony Baker of counsel appeared for the respondent.

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

EVIDENCE

Documentary evidence

10. The following documents were in evidence before the Commission and have been taken into account by me in making this determination:

    (a) Application to Resolve a Dispute, and attachments (ARD);

    (b) Reply, and attachments (Reply).

    (c) Application to Admit Late Documents lodged by the applicant, and attachments. This document was lodged in accordance with a direction made by me at the telephone conference on 26 June 2020 due to the excessive number of pages in the ARD and repeated documents (ALD), and

    (d) CCTV footage of the incident.

Oral evidence

11. The applicant made an application to adduce oral evidence from the applicant regarding his left shoulder injury. The application was not opposed by the respondent and was granted in the interests of justice. I have summarised the applicant's oral evidence below.

EVIDENCE

The applicant's evidence

12. In a statement made on 23 December 2014 the applicant said that he commenced working for Mr Afridi's Red Rooster franchises in 2011. At the time of the injury the applicant was the Assistant Manager of the store in Lakemba.

13. The applicant said on 3 December 2014 a co-worker had emptied a large block of ice (approximately 45cms long x 30cms wide and 20cms high) onto the floor above a small drain (Reply page 33).

14. The applicant said he assumed his co-worker had cleaned up the ice and therefore did not expect for it to be on the floor. The applicant described the incident as follows:

> "After I took out the chickens, I placed them in the warmer which is opposite. I then walked around the [sic.] go to the Burger Station where there are preparation benches. I walked around the edge of the bench and then stood on the ice and slipped.
>
> My legs went out in front of me and I am not sure but I may have grabbed one of the benches. I walked around the edge of the bench and then stood in the ice and slipped.
>
> My legs went out in front of me and I am not sure but I may have grabbed one of the benches. When I stood up the left side of my shirt was wet. I landed on my buttocks and my left side.
>
> Fia and Simona were in the kitchen and as Fia called out to Madan and he came in.

> After the incident I saw that the ice block had broken in half and had smaller pieces of it on the floor…
>
> …I was stretching and felt something in my arm. I thought this was from a normal fall and I went back to work…I feel I stretched my back and both of my arms when I fell" (Reply page 34).

15. After the incident an incident report form was completed.

16. The applicant said his back was sore and his wife applied deep heat and noticed there was "swelling and lumps" (ARD page 35).

17. The applicant said he was in the process of buying the Red Rooster franchise at Lakemba and was awaiting approval from the franchisor (ARD page 35).

18. In a further statement dated 21 May 2020 the applicant said he sustained an injury on 3 December 2014 "as a result of a slip and fall caused by water on the floor" (ARD page 1).

19. The applicant said the incident occurred as follows:

> "As I walked around the bench towards the timer tags, I attempted to take the quickest path there and step around the large ice block, however at that point my right foot slipped neither [sic.] large ice block. I attempted to brace myself, however I was quite overweight at the time weighing approximately 120kg, as I attempted to brace myself at my right arm on the bench it bent at a very awkward angle and I fell heavily to the ground...
>
> I did not place the small ice block there from the sink. I immediately braced myself with my right arm however was unable to do so injuring my right shoulder at the time of the incident. This is a genuine incident in which I suffered genuine injuries and have had a compromised work life as a result...
>
> The franchisee [Mr Afridi] came in on the same day and at about 5pm and said that the loan did not go through, the broker may have told him" (ARD page 2).

20. During the arbitration hearing I granted leave to the applicant to give oral evidence limited to the circumstances regarding the development of the alleged left shoulder condition. The applicant said since the injury to his right shoulder he had continued to experience symptoms. The applicant said he is right-handed and the ongoing symptoms in his right shoulder affected how he used it, for example he no longer carried a backpack with his right shoulder and did so with the left. The applicant said the amount of activity with his right shoulder had decreased due to pain and he used his left arm when he experienced pain. The applicant said since the fall he had begun to notice pain in the back of his left shoulder. The applicant could not recall when he first developed the symptoms and said the pain came and went.

Humayan Afridi's evidence

21. Humayun Afridi, the owner/franchisee of the restaurant, said prior to the incident the applicant had been subject to a number of disciplinary concerns and had been demoted from a Store Manager position.

22. Mr Afridi said the applicant had been trying to buy the Lakemba store from him for some time. Mr Afridi said approximately one week prior to the incident he had informed the applicant that his credit application had been declined. According to Mr Afridi, the applicant told him that he would check with the accountant and if there was no option of getting finance to buy the store he would resign by February 2015 (Reply page 44).
23. Mr Afridi said he had a number of problems with the applicant, including having to warn him about criticising and undermining him and the Store Manager and disclosing the potential sale of the business. Mr Afridi said he had given the applicant written warnings for breaches of food safety, being late and a final warning about confidentiality (Reply pages 44-45).

24. Mr Afridi said the day prior to the incident Mr Prasad was in good spirits. Mr Afridi told the applicant he would give him 10 days to arrange a loan.

25. Mr Afridi said he attended the Lakemba store on the day of the incident from around 3.30 pm and 6.00 pm and the applicant did not mention the incident to him.

Medical evidence

26. The day after the incident at approximately 12.50 pm the applicant saw his general practitioner, Dr Jacob Hui.

27. The clinical notes for 4 December 2014 record the following:

> "...had a fall yesterday at work slipped on ice on the floor
> work related
> fall while ice was spilled on the floor
> walking and slipped and fell
> reported to the manager
> happened around 2 pm
> felt some pain at the right elbow
> can't abduct past 90 degree
> cannot internally rotate at all
> can externally rotate to 90 degree
> right shoulder can abduct past midline" (ARD page 84).

28. Dr Hui referred the applicant for an MRI scan of his right shoulder due to not being able to abduct past 90 degrees and internally rotate his shoulder (ARD page 84).

29. In his letter of referral for the MRI investigation Dr Hui said the applicant's symptoms were right rotator cuff syndrome, cervical neck soft tissue pain (ARD page 135).

30. On 9 December 2014, the applicant had an MRI on his right shoulder. The MRI scan identified tendinopathy of the supraspinatus of moderate grade with a partial-thickness bursal-sided tear of the anterior insertion of the supraspinatus constituting up to 70% of cuff thickness at the point of tear and mild subacromial/subdeltoid bursitis (ARD page 49).

31. On 20 January 2015, the applicant reported pain in his right shoulder to Dr Hui. Dr Hui referred the applicant to Dr Alexander Woo, orthopaedic surgeon (ARD page 85).

32. On 22 January 2015, the applicant saw Dr Andrew Keller, occupational physician. Dr Keller recorded a history of the applicant slipping on a piece of ice. Dr Keller said the applicant reported immediate pain in his right shoulder and no other injuries. According to Dr Keller, the applicant denied any prior right shoulder injuries and reported neck and right shoulder pain (Reply pages 53-54).

33. Dr Keller diagnosed the applicant as suffering from right shoulder pain and no other injuries. Dr Keller said:

> "He had investigative evidence for tendinopathy in the right shoulder and bursitis. I note from the documents supplied there is evidence that Mr Prasad's story is different to the events observed. It is also possible that his pathology identified in the right shoulder is degenerative in nature and it is not uncommon in this age group and may be asymptomatic. It is possible he has similar pathology in the left shoulder in which he complains of no pain" (Reply page 55).

34. On 20 February 2015, the applicant saw Dr Woo. Dr Woo recorded a history of the applicant walking around the table and holding onto the table with his right hand before landing on his left side. Dr Woo recorded the applicant had right shoulder pain but managed to finish a shift, and his pain increased after he returned home. Dr Woo said the applicant's shoulder symptoms and range of movement were improving but he needed to continue physiotherapy (ARD page 14).

35. On 7 and 8 April 2015, the respondent undertook surveillance on the applicant. The applicant was observed working at Red Rooster in Taren Point using both hands/arms to prepare meals, as well as looking up to read orders off a display screen. During the surveillance the applicant's manager was heard saying to him "Good work Lawrence, you've still got it mate" (Reply page 10). According to the surveillance report, the applicant was observed regularly tilting his head back and looking upwards to read orders displayed on monitors positioned above head height. The report also said the applicant was observed regularly raising both arms to shoulder height and above to take the items from containers. The report said the applicant worked quickly displaying free and fluid movement (Reply pages 11-12).

36. On 14 April 2015, the applicant saw Dr Mengyi Chen, general practitioner. Dr Chen reported the applicant had felt shoulder pain during an exercise program recommended by the respondent's insurer and had worsening right shoulder pain in the anterior aspect with limited movement in all directions. Dr Chen referred the applicant to Dr Woo for review.

37. On 17 April 2015, the applicant saw Dr Woo. Dr Woo said the applicant had an exacerbation of his right shoulder, scapula and neck pain when attending the gym program. Dr Woo recorded anterior tenderness in the right shoulder and the right trapezius, restricted movement in the right shoulder, near normal neck movements with pain on turning to the left and no neurological deficit. Dr Woo reported the applicant had re-injured his right shoulder and needed a further MRI to assess the severity of the injury (ALD page 115).

38. On 15 May 2015, the applicant had a further MRI on his right shoulder which identified moderate tendinosis supraspinatus, mild tendinosis infraspinatus, and intermediate-grade interstitial insertional tear of the supraspinatus involving 40% of tendon thickness and no acute interval rotator cuff tear demonstrated (ARD page 51).

39. On 20 May 2015, following the MRI, the applicant saw Dr Woo. Dr Woo said the applicant's right shoulder had improved with rest and the repeat MRI showed a 40% tear of the supraspinatus tendon compared to 70% in the previous MRI. Dr Woo said the applicant has had a satisfactory recovery of his right shoulder injury, was fit for the majority of his preinjury duties as a shop manager with no lifting. Dr Woo reported the applicant had found a new job which he would start in two weeks (ALD page 118).

40. On 28 May 2015, the applicant saw Dr Chen who recorded the applicant's right shoulder condition had improved. The clinical notes record:

> "Buying a Red Rooster business
> No heavy lifting involved as has managers to work together
> Went to observe the business in uniform on 5 May 2015 – caught by insurance"
> (ARD page 86).

41. On or round 2 June 2015, a physiotherapy report and assessment form noted the applicant had complained of right shoulder and upper back pain in certain movements (ARD page 60).

42. On 18 August 2015, the applicant saw Dr Chen and reported right shoulder pain worsening over the last two months. The applicant reported that he had not been working during that time and did not start his own Red Rooster business as intended (ARD page 87).

43. On 6 October 2015, the applicant saw Dr Chen reporting right shoulder pain worsening over the last 10 days and seeking to reopen his workers compensation case (ARD page 87).

44. On 18 June 2016, the applicant saw Dr Danian Yang, general practitioner, who observed the applicant was tender at the right scapular/upper thoracic and neck muscles with a slightly reduced range of motion of the neck and a limited range of motion of the right shoulder. Dr Yang reported his findings in a letter to the applicant's solicitors on 8 October 2016 (ARD page 192).

Forensic medical reports

45. The applicant saw Dr Robert Breit on 25 February 2015. Dr Breit took the following history:

> "Mr Prasad states that he carried on with his work and walked around the side of the table saying that his hand must have been on the table. The foot slipped out and he claims not to have actually fallen suddenly but rather lowered himself to the ground and when he got up felt a strain in the right shoulder" (Reply page 58).

46. Dr Breit said the applicant described pain over the lateral right arm as well as the clavicle and intermittently annoying discomfort in the right trapezius (Reply page 58).

47. Dr Breit said the applicant had evidence of rotator cuff irritation which was consistent with the MRI, however, was largely constitutional. Dr Breit said the history, as described by the applicant, may have led to an aggravation and that with shoulder restriction people frequently had neck discomfort (Reply page 60).

48. Dr Breit refrained from commenting on a summary of the CCTV footage, noting that on the assumption the information provided by the applicant was true, there may have been an aggravation of his underlying condition. Dr Breit said there was a significant amount of pathology in the right shoulder and approximately 30% of people who suffered aggravations would continue having ongoing problems (Reply pages 60, 61 and 62).

49. On 25 May 2017, the applicant saw Dr Drew Dickson, orthopaedic surgeon. In a report dated 30 May 2017 Dr Dixon recorded the history of the applicants slipping on ice near the burger station and as he fell, grabbing the preparation bench with his right arm and sustaining a "traction injury" of his right shoulder and neck. Dr Dixon said the applicant felt immediate pain in the right shoulder extending up to his neck and into his upper back (ARD pages 26 to 27).

50. Dr Dixon said the applicant recorded pain and stiffness in his right shoulder with trapezial muscle and deltoid pain and difficulty with range of motion and lifting; right sided neck pain with difficulty looking to the side and intermittent weakness when trying to hold objects with his right hand (ARD page 28).

51. Dr Dixon diagnosed the applicant with a right shoulder injury with post-traumatic stiffness with subacromial bursitis with impingement on abduction and rotator cuff tendinopathy and aggravation of previously asymptomatic AC joint arthritis, and a right-sided neck strain injury with post-traumatic cervical facet arthralgial and trapezial muscle pain and radicular complaints (ARD page 30).

52. Dr Dixon opined the applicant's conditions were causally related to the injuries received in the slip and fall at work on 3 December 2014 (ARD page 30). Dr Dixon said:

> "He [Mr Prasad] does have persisting pain and stiffness in his neck and cervical spine. He did not report thoracic pain today. Causation is noted in the above report and his employment was a substantial contributing factor to the injury sustained in that the injury occurred during the course of his work duties" (ARD page 32).

53. On 16 April 2019, the applicant saw Dr Dixon for a further medicolegal assessment. In a report of 29 April 2019 Dr Dixon recorded the same history of the applicant walking around the preparation bench and stepping on the block of ice, slipping and falling (ARD page 35).

54. Along with recording complaints relating to the applicant's right shoulder, Dr Dixon said the applicant had developed pain and stiffness in his left shoulder which was mainly in the trapezius muscle and scapular region and had difficulty with sustained elevation of the arm associated with crepitus as a result of "favouring his right shoulder" (ARD page 37).

55. Dr Dixon said the applicant reported interscapular pain in his thoracic spine with pain on trunk rotation and back pain, which disturbed his sleep. According to Dr Dixon, the applicant also reported pain in his lower back with lumbar stiffness but no sciatica and difficulty with prolonged sitting and standing due to back pain (ARD page 37).

56. Dr Dixon diagnosed the applicant with a right shoulder injury with post-traumatic stiffness, a right sided neck strain injury, development of mild stiffness on elevation of the left shoulder associated with crepitus, interscapular thoracic backpain with post-traumatic stiffness with dysmetria on trunk rotation and lumber stiffness and pain (ARD pages 39, 663).

57. Dr Dixon opined the applicant's "conditions" were causally related to the injuries received in the slip and fall at work on 3 December 2014 (ARD page 39).

58. Dr Dixon said the applicant reported persisting pain and stiffness in his neck and thoracic pain, which had not "arisen initially, but has now recurred" and with favouring his right shoulder, he has developed stiffness on elevation of his left shoulder with associated crepitus. Dr Dixon confirmed his opinion that the work event was a substantial contributing factor to the injury sustained by the applicant (ARD page 40).

59. In a supplementary report dated 26 July 2019, Dr Breit said the applicant had continued to have symptoms in his right shoulder and neck without further treatment. Dr Breit recorded the applicant had undertaken light work at Lidcombe TAFE and Pet Barn.

60. Dr Breit said the applicant reported pain around the base of his neck extending into his right shoulder blade and in the pectoral area, restricted movements with his right arm and complained his left arm was "fatigued" because he was using it for everything. Dr Breit said the applicant and his wife shared domestic duties but he seemed to do more than his wife (Reply page 65).

61. Dr Breit said the applicant had evidence of a partial thickness rotator cuff tear on the basis of the December 2014 MRI, however there were no "acute injury changes" on the investigation (ARD page 67). Dr Breit said the right shoulder pathology pre-dated the injury.

62. Dr Breit said there was no thoracic abnormality or suggestion that this body part was injured.

63. Dr Breit said:

> "If one accepts that he injured his right shoulder then some neck symptomatology would also be reasonable but there is inadequate information to provide a clear-cut diagnosis and one would expect some underlying spondylosis" (Reply page 67).

64. Dr Breit said the applicant made no complaints of thoracic or lumbar pain when he first saw him in February 2015 nor did he make any complaint during the assessment in July 2019.

REASONS

Did the applicant suffer an injury to his neck, right shoulder, left shoulder thoracic spine and lumbar spine, as alleged by him, on 3 December 2014?

65. The applicant has the onus of proving that he suffered an injury to all of the claimed body parts, as alleged by him, on 3 December 2014.

66. The standard of proof is the balance of probabilities (see *Nguyen v Cosmopolitan Homes* (NSW) Pty Ltd [2008] NSWCA 246).

67. In *Malec v JC Hutton Pty Limited* [1990] HCA 20; (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at [642] – [643]:

> "A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred."

68. The applicant's onus to prove his case on the balance of probabilities extends to all matters for consideration (*Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1]). This includes proving an injury occurred, as alleged, and that the applicant injured the claimed body parts.

69. In *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 (11 May 2016) the plurality of the High Court observed:

> "[45] …As Gleeson CJ and Kirby J explained in *Kennedy Cleaning Services Pty Ltd v Petkoska*, if 'something ... can be described as a *sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state*, it may qualify for characterisation as an 'injury' in the primary sense of that word' (emphasis added).
>
> [46] That physiological change or disturbance of the normal physiological state may be internal or external to the body of the employee. It may be, for example, the breaking of a limb, the breaking of an artery, the detachment of a piece of the lining of an artery, the rupture of an arterial wall or a lesion to the brain. Each would be described as an 'injury' in the primary sense.
>
> [47] However, as the Full Court correctly held, 'suddenness' is not *necessary* for there to be an 'injury' in the primary sense. A physiological change might be 'sudden and ascertainable'. A physiological change might be 'dramatic'. The employee's condition might be a 'disturbance of the normal physiological state'. That an 'injury' in the primary sense can arise, and can be described, in a variety of ways does not mean that 'suddenness' is irrelevant. As the Full Court said, 'suddenness' is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying (and in one sense, closely related) disease (as occurred in *Zickar v MGH Plastic Industries Pty Ltd* and *Kennedy Cleaning*). But it is the *physiological* change – the nature and incidents of that change – that remains central (footnotes omitted)."

70. In order to succeed the applicant must establish on the balance of probabilities that the traumatic fall on 3 December 2014 caused physiological change to his right shoulder, neck, thoracic and lumbar spines.

71. In *Department of Education and Training v Ireland* [2008] NSWWCCPD 134 (*Ireland*) President Judge Keating discussed the relevance of contemporaneous evidence such as clinical notes or medical reports. His Honour warned against the dangers of decision-makers relying on findings of credit rather than evidence and emphasised that all of the evidence must be weighed up in determining questions of fact, such as whether an injury occurred and the nature of injury.

72. The respondent submitted I would not accept the injury occurred as the evidence did not support it was a fortuitous event but rather was "staged". The manner in which the respondent argued this point was to the effect that I need only be satisfied that the accident did not occur, as alleged by the applicant. Determining the probability that the accident did not occur as alleged requires consideration of the relative probabilities of it occurring as a staged event which underpinned the respondent's submission.

73. In assessing the evidence, I may take into account the gravity of the consequences which flow from a particular finding (cf. section 140(2) *Evidence Act 1955*; *Morely v Australian Securities & Investments Commission* [2010] NSWCA 331 (*Morley*) at [742]). The graver the consequences of a particular finding, the stronger the evidence needs to be in order to conclude the allegation is established on the balance of probabilities (*Morley* at [746]). I have taken this into account in my assessment of the evidence that supports the incident was staged, noting that persons do not ordinarily engage in the conduct of staging work accidents.

74. The CCTV footage was admitted into evidence. Both parties made submissions on what the footage showed.

75. On my review of the fall as depicted on the CCTV footage, the applicant placed his right hand on the food preparation bench almost simultaneously as his right foot stepped on the smaller piece of ice. The applicant's right-hand slid behind him along the bench. His upper body twisted towards the bench and he places both hands on the bench. The applicant's right foot slid forward and made contact with a rubbish bin.

76. Whilst I do not consider the fall to have been "violent", as described by the applicant's counsel, I also do not find that the applicant lowered himself to the ground in a controlled manner.

77. I am satisfied that the applicant's elbow and forearm remained on the preparation bench for some time during the fall which had the potential of causing injury by way of abduction and/or pulling of the right shoulder.

78. The events depicted in the CCTV footage leading up the fall are suspicious and give rise to concern that the incident did not occur, as alleged by the applicant, as does the inconsistent evidence given by the applicant himself. Contrary to his assertion in his statement evidence, I am satisfied that the applicant was well aware of the presence of both the larger and the smaller blocks of ice and they were not a hidden hazard. The CCTV footage shows the applicant shift the smaller block of ice with his left foot prior to the fall at approximately 1.48pm. This evidence suggests the scene of the fall was deliberately set up by the applicant.

79. However, I accept the applicant's submission, that the CCTV footage also shows him busily working, especially in the intervening period between the shifting of the ice with his left foot and the fall (approximately 14 minutes). In my view, the applicant's actions during this period are not consistent with the fall being staged. I also accept the applicant's submission that he did not "break stride" immediately prior to the fall.

80. After the fall the applicant immediately is shown to be rubbing and rolling his right shoulder (2:02:32pm) and performing an overhead triceps and shoulder stretch (2:03:27pm). In my view, this supports the fall it was more likely a fortuitous event.

81. The CCTV footage establishes the applicant has given untruthful evidence on a number of matters, for example his belief that his co-worker had cleaned up the ice, that two of his co-workers were in the kitchen at the time of the fall and that he did not look down prior to the fall (a matter which was conceded by the applicant's counsel during oral submissions in reply).

82. I find that the applicant's evidence concerning the mechanism of the fall was not intentionally untruthful. It is not surprising that the applicant did not recall the precise mechanics of the fall when making his statements. It is also not surprising that the applicant gave marginally different histories of the mechanism of the fall to different doctors.

83. The failure by the applicant to disclose a complete record of his prior work performance issues, in my view, is not a factor that supports he was been untruthful about the circumstances of the injury.

84. I am also not satisfied that the disciplinary action taken against the applicant was of such significance to provide him with motivation to stage the fall. Mr Afridi's evidence was that if the applicant could not secure finance he would "move on" (Reply pages 46-46). The exchanges between Mr Afridi and the applicant the day prior to the incident appear to have been cordial (see for example, Reply page 45, paragraph 20).

85. Similarly, the evidence surrounding the failure by the applicant to secure finance to purchase the store does not support he was untruthful about the circumstances of the injury or give rise to an inference that the fall was staged. Mr Afridi said the day prior to the incident the applicant indicated he would continue to seek finance. Notwithstanding the fall the applicant continued to attempt to purchase a different store in Taren Point, however this did not go ahead (ARD page 86).

86. The fact that applicant did not report the injury to Mr Afridi whilst he was at the store in the afternoon does not cause me to doubt the genuineness of the incident. Mr Afridi was the owner of the store/and not the applicant's on-site manager. There is no dispute the fall was reported. The minor delay in the applicant attending on his general practitioner (12.49pm the following day) is also not a factor that supports the fall being staged. The delay in seeking treatment is also consistent with the history recorded by Dr Keller, that the applicant was able to complete his shift but his pain worsened overnight (ARD page 54).

87. Although the CCTV footage coupled with the inconsistencies in the applicant's evidence provides basis for concern that the fall took place, as alleged, I am satisfied on the balance of probabilities that the fall was a fortuitous event and was not staged. I accept the applicant's evidence that the fall was a fortuitous event. The fact that the applicant has been untruthful about certain matters does not give rise to an inference that he has been untruthful about the genuine nature of the fall (see *Tobin v Ezekiel* [2012] NSWCA 285 at [60] and the cases cited therein).

88. The evidence of Dr Woo and the surveillance material appears to support limited (or no) restrictions in the body parts claimed to be injured by the applicant. However, in my view, the comment of the applicant's manager in Taren Point ("You've still got it mate") may give rise to an inference that the manager was aware of the fall and possible restrictions due to the injury. The applicant also has not provided a complete account of the employment undertaken by him post-incident. These matters are not of sufficient strength to allow a finding the event did not occur, as alleged. In my view, the matters are more relevant to the extent of the injury suffered by the applicant and any incapacity that he has suffered, as opposed to whether he staged the fall or not.

89. Having regards to the evidence and the party's submissions, I am satisfied on the balance of probabilities that the evidence is more consistent with a fortuitous event. I am not satisfied that the matters raised by the respondent when viewed individually and collectively are of sufficient weight to result in a finding that the applicant is unable to satisfy his onus of proving the fall was a fortuitous event.

90. The applicant bears the onus of establishing the nature of the injuries that occurred on 3 December 2014. The issue is to be determined on the basis of the factual and medical evidence, including the opinions given in the forensic medical reports. The weight given to expert medical opinion is to be determined by the extent of correlation between assumed facts and the facts that are proven (see *OneSteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 (*Sutton*) citing *Paric v John Holland Constructions Pty Ltd* (at 846) the Court (Mason CJ, Wilson, Brennan, Deane and Dawson JJ) at [67]).

91. From my review of the CCTV footage I am also satisfied that the mechanism of injury was capable of causing injury to the shoulder and neck. In particular I am satisfied that the fall caused abducting of the applicant's right shoulder.

92. There are contemporaneous complaints of both right shoulder and neck pain to the general practitioner and Dr Woo (ARD pages 84, 114 and 135). There are also no previous complaints of right shoulder or neck pain in the clinical notes preceding the fall. There is a close temporal connection between the event, the reported onset of shoulder and neck pain and the pathology identified in the MRI investigation of the right shoulder.

93. I accept the reference to elbow in the clinical note on 4 December 2014 is a typographical error given the subsequent reference to abduction in the notes and that the applicant was referred for investigations on his shoulder. There is no other record of right elbow pain in the evidence.

94. The MRI investigations undertaken post-incident shows significant pathology in the applicant's right shoulder. I am satisfied that some of the pathology in the applicant's shoulder pre-dated the incident and was constitutional in nature, as opined by Dr Breit. However, I am also satisfied on the medical evidence that the traumatic fall caused an aggravation of the underlying pathology in the shoulder and therefore physiological change.

95. That the surveillance footage recorded in early April 2015 showed the applicant apparently moving his neck freely whilst working does not cause me to doubt that he sustained an injury to his neck. However, the footage may be relevant to the extent of the injury to the neck.

96. I am satisfied that Dr Dixon's opinion on the cause of the injury to the right shoulder and neck was given in a reasonable factual climate. Dr Dixon recorded an adequate history of the incident and the finding of a traction-type injury was consistent with my interpretation of the CCTV footage. Whilst there appear to be factual inconsistencies regarding the activities of daily living and the number of attendances on his general practitioner and Dr Woo, these are matters that are of minor significance and more relevant to the assessment of the degree of impairment resulting from the injuries. They do no cause me to place less weight on Dr Dixon's opinion. I find Dr Dixon's opinion on the cause of the applicant's right shoulder and neck injury persuasive.

97. Dr Breit does not provide any strong opposition to injuries to the right shoulder and neck. Dr Breit correctly observed that whether the fall occurred, as alleged by the applicant, was a matter to be determined on the facts and not on the basis of medicine. I have found that the probability of the fall being a fortuitous event is greater than the probability of the fall having been staged. Dr Breit said if it was accepted the applicant suffered a right shoulder injury some neck symptomology would be reasonable (Reply page 67).

98. I therefore find that the applicant sustained injuries to his right shoulder and neck on 3 December 2014, as diagnosed by Dr Dixon.

99. The applicant alleged the fall also caused a injury to his thoracic and lumbar spines, in the form of interscapular back pain with dysmetria on trunk rotation and lumbar stiffness with lumbosacral pain (ARD page 663). In his statement on made on 23 December 2014 the applicant said he felt like he had stretched his back and both of his arms (Reply page 34). In his statement made on 5 May 2020 the applicant said after the fall he said he thought he experienced minor back pain and right shoulder pain which went "through his neck and lower back" (ARD page 2). Whilst the applicant's evidence as to the pain in his back after the fall is relevant, in making a finding on injury I must take into account and weigh up all of the available evidence and not merely accept his evidence at face value.

100. In my view, the mechanism of the fall depicted in the CCTV footage was less likely to cause an injury to the thoracic and lumbar spines, even noting that the applicant was overweight at the time of the incident. Further and importantly, there are no contemporaneous records supporting verifying complaints of pain of these body parts. The clinical note on 4 December 2014 refers to pain in the right shoulder only (ARD page 84). The referral from Dr Hui referred to right rotator cuff syndrome and cervical neck soft tissue pain (ARD page 135). This would suggest there was no injury to the thoracic and lumbar spines arising from the event on 3 December 2014.

101. The first reference to a complaint of upper back pain is in the physiotherapy report dated 2 June 2015, six months after the traumatic fall. The report states that the applicant complained of right shoulder and upper back pain in certain movements (ARD page 60). This adds very minor support for the applicant's assertion that he suffered injury to his thoracic spine. However, contrary to the applicant's assertion the report of thoracic pain is not connected to the work event but to the treatment arising from it. The record suggests that the onset of thoracic pain was during the treatment for the fall and not due to the fall itself. The fact that the applicant experienced pain in his upper back during treatment does not prove there was physiological change in his thoracic spine as a result of the event on 3 December 2014. The applicant does not make an allegation that he developed a consequential condition to the lumbar spine as a result of injury to his neck and right shoulder.

102. A further reference to a complaint of thoracic pain is in the clinical notes and letter from Dr Yang to the applicant's solicitors dated 18 June 2016, approximately 18 months after the fall (ARD pages 192, 406). The reference is made in connection with right scapular pain and in the context of the applicant re-opening his workers compensation case. During this time, and from December 2015 the applicant had undertaken work for other employers (ARD page 657).

103. The respondent correctly submitted there was no contemporaneous evidence supporting a complaint of low back pain. The first reference to low back pain is in Dr Dixon's report of 29 April 2019, over four years after the fall and in the circumstances where the applicant experienced back pain whilst undertaking subsequent employment (ARD pages 37 and 656). Given the absence of any contemporaneous documents recording complaints of low back pain, it is equally or more probable that the pain developed from the subsequent employment and is not connected to the fall.

104. An important factor in my mind is the absence of documented complaints of pain in the thoracic and lumbar spines by Drs Woo, Keller, Breit and Dixon (until his report of 29 April 2019). Prior to Dr Dixon's report the applicant did not report thoracic or lumbar pain to any of these doctors. Drs Keller, Breit and Dixon all expressly recorded an absence of complaints of pain in the thoracic and lumber spines (Reply pages 54, 67, ARD pages 33, 648).

105. There have been no investigations, such as an MRI scan, of either the applicant's spines to determine whether there has been any underlying clinical change.

106. I am not persuaded by Dr Dixon's opinion that the applicant's thoracic and lumbar spine conditions are causally related to the fall on 3 December 2014.

107. Firstly, I am not satisfied that Dr Dixon's history of the applicant experiencing pain in his right shoulder which extended into his upper back is accurate. Whilst the applicant gives evidence to this effect in his most recent statement, there is an absence of corroborating documentary evidence. If the applicant suffered an injury to his thoracic and lumbar spines during the fall, I would have expected there to be contemporaneous documents verifying complaints of pain to these body parts. I do not place any weight on the applicant's assertion that his wife identified lumps on his back. This is not recorded elsewhere and there are no contemporaneous records verifying such matters.

108. Secondly, Dr Dixon's diagnoses interscapular thoracic back pain with post-traumatic stiffness with dysmetria on trunk rotation was made over four years after the fall. Whilst I accept there is no requirement for physic logical change to be sudden, Dr Dixon has not provided any explanation for the significant delay in the complaints of pain, particularly given the express reference to an absence of complaints of pain in the thoracic spine in his prior report.

109. Thirdly, in his report of 29 April 2019 Dr Dixon said the applicant's upper back pain "had become more severe" since his previous review with interscapular pain in the thoracic spine (ARD page 657). However, Dr Dixon had previously reported the applicant having no complaints of thoracic pain (ARD pages 648 and 651). The inconsistency is not explained.

110. Fourthly, Dr Dixon's explanation of the cause of the thoracic spine condition is unclear. He said the applicant reported thoracic pain "which was not present initially but has now recurred and while favouring his right shoulder, he has developed stiffness on elevation of his left shoulder with associated crepitus" (ARD page 661). There is inconsistency between the thoracic spine injury not being identified by Dr Dixon initially and apparently having recurred.

111. Fifthly, the history of the injury, as explained in the letter of instruction to Dr Dixon, was that the applicant's pain from his right shoulder and cervical spine was "radiating down" to his thoracic spine and lumbar spine (ARD page 301). This is also consistent with the history taken by Dr Dixon that the applicant felt immediate pain in the right shoulder "extending up" to his neck and into his upper back. The history is suggestive of the injury to the neck and right shoulder was causing referred (or radicular) pain, as initially diagnosed by Dr Dixon, and not that the thoracic or lumbar spines were separately injured in the fall.

112. In respect of the alleged injuries to the thoracic and lumbar spines, I prefer the opinion of Dr Breit. Dr Breit's comment regarding the absence of injury to the lumbar and thoracic spines is more consistent with the absence of contemporaneous reports of pain to these body parts post-fall. I am not satisfied that the evidence is adequate to prove there was a trauma-induced physiological change to the thoracic or lumbar spines on 3 December 2014.

113. For the above reasons, in my view, the evidence is not satisfactory to prove on the balance of probabilities that the applicant sustained a physiological change to his thoracic and lumbar spines as a result of the fall on 3 December 2014. The applicant does not make any allegation that these body parts were consequential conditions resulting from injuries to the neck and right shoulder. There will be an award for the respondent on the allegation of injury to the thoracic and lumbar spines.

Did the applicant suffer a consequential condition to his left shoulder as a consequence of the injuries sustained on 3 December 2014?

114. The test to be applied when considering whether there has been a consequential condition from a workplace injury does not involve findings under sections 4 and 9A of the 1987 Act, but the application of principles of causation (see *Kumar v Royal Comfort Bedding Ltd* [2012] NSWWCCPD 8 (*Kumar*)).

115. There is no requirement for the applicant to establish that a pathological change took place in his left shoulder. The issue of whether the applicant suffered a consequential condition to his left shoulder is a question of fact (see *Moon v Conmah Pty Ltd* [2009] NSWWCCPD 134 and *Seif v Secretary, Department of Family and Community Services* [2020] NSWWCCPD 6 at [124]-[125]).

116. The applicant has the onus of proof. The standard of proof is the balance of probabilities.

117. I am satisfied that the applicant's right shoulder was relatively severe and was capable of affecting his left shoulder by way of modification of activities of daily living. Whilst Dr Woo said the applicant's right shoulder had improved in May 2015, Dr Breit noted there was a significant amount of pathology in the right shoulder and about 30% of people would have ongoing problems (ALD page 118).

118. Although the applicant had previously reported left shoulder pain to his general practitioner in February 2014 and was referred for investigations (ARD page 81), there are no reports of ongoing symptoms in the left shoulder resulting from this separate event.

119. The applicant has given evidence regarding the development of left shoulder pain due to favouring the left arm as a result of restrictions in the right shoulder. There is adequate evidence from the applicant of the activities the applicant undertook and the usage of the affected limb which supports to overuse and favouring the left shoulder, for example carrying the backpack with his left and not his right shoulder. The exercise physiology initial assessment report dated 23 March 2015 noted the applicant avoided activity requiring use of his right arm and tried to complete light chores with his left arm, i.e. cooking (ARD page 246). Whilst there is no satisfactory evidence of the timing of the onset of the symptoms, there is an adequate factual basis upon which to find the applicant suffered a consequential condition to his left shoulder.

120. Dr Dixon opined that the applicants had developed symptoms in his right shoulder had led to stiffness in his left shoulder with crepitus (ARD page 39). I accept Dr Dixon's opinion. In his report of 29 July 2019 Dr Breit also recorded a history of the applicant complaining his left arm was fatigued because he used it for everything (Reply page 65). Dr Breit also recorded that on impingement testing the left shoulder produced generalised pain (Reply page 66). This evidence supports the development of symptoms in the left arm and the development of a consequential condition.

121. I am comfortably satisfied on the balance of probabilities there is a common-sense causal connection between the injury to the applicant's right shoulder on 3 December 2014 and the development of a consequential condition to his left shoulder. The extent of any injury is to be determined by an AMS.

Summary

122. I am satisfied on the balance of probabilities that the applicant suffered an injury to his right shoulder and neck on 3 December 2014. I am also satisfied that the applicant suffered a consequential condition to his left shoulder as a result of the injury to his right shoulder and neck.

123. I am not satisfied on the evidence that the applicant suffered compensable injuries to his thoracic and lumbar spines on 3 December 2014. There will be an award for the respondent on allegation of injury to the thoracic and lumbar spines.

124. The issue of the extent of the whole person impairment suffered by the applicant as a result of an injury to his right shoulder, left shoulder and neck will be referred to an AMS for determination.