WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1110/20**
Applicant: **Steven Anand**
Respondent: **Suprima Bakeries Pty Ltd**
Date of Determination: **19 May 2020**
Citation: **[2020] NSWWCC 160**

The Commission finds:

1. The applicant injured his cervical spine in the accident of 22 November 2017.

2. The proposed surgery by Dr Abraszko set out in her report of 25 July 2019, namely an anterior cervical discectomy and fusion at C6-7 and C5-6, is reasonably necessary.

The Commission determines:

3. The respondent will pay for the costs of and associated with an anterior cervical discectomy and fusion at C6-7 and C5-6 as proposed by Dr Abraszko.

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Steven Anand, the applicant, brings an action for a declaration that proposed surgery to his cervical spine is reasonably necessary.

2. Section 78 notices were issued denying liability, and an Application to Resolve a Dispute (ARD) and Reply were duly lodged.

3. Liability was denied because the respondent claimed that Mr Anand had not injured his cervical spine in the subject injury of 22 November 2017.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:

    (a) Did the applicant injure his cervical spine on 22 November 2017?
    (b) Is the proposed surgery reasonably necessary?

PROCEDURE BEFORE THE COMMISSION

5. This matter was heard by way of telephone conciliation/arbitration on 21 April 2020. Mr Greg Young of counsel appeared for the applicant instructed by Ms Jessica Cheung of Law Partners Personal Injury Lawyers. The respondent was represented by Mr Josh Beran of counsel, instructed by Mr Mark Van der Hout from BBW Lawyers. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents, and
    (b) Reply and attached documents.

Oral evidence

7. No application was made with regard to oral evidence.

FINDINGS AND REASONS

The injury

8. On 22 November 2017, Mr Anand was injured whilst working for the respondent where he was employed as a machine operator, having commenced in 2015. He described that part of his duties were to load silos with heavy bags of flour, weighing roughly 800-1000 kg, which were lifted by a crane and other lifting mechanisms.

9. On 22 November 2017, one of the bags containing flour was leaking and Mr Anand was instructed by his supervisor to take the bag off the machine.

10. Mr Anand said[1]:

> "14. As I was performing this manoeuvre, the frame supporting the bag, which I estimated to weigh approximately 350 kilograms, gave way and malfunctioned. The frame fell and struck me in my right arm and shoulder. This initial impact forced the other side of the frame to strike my head, causing a laceration to my right scalp…. "

11. The mechanism of the accident was consistently described to the various medical practitioners who treated by Mr Anand. Mr Anand also said that his head and neck was twisted around due to the impact. He then said:

> "15. I felt immediate pain to my right elbow, which I suspected I sustained a fracture. I also felt intense pain my right shoulder, head and neck."

Liverpool Hospital

12. Mr Anand was so badly injured by the accident that he was taken to Liverpool Hospital where his presenting complaint was recorded in the Discharge Referral 24 November 2017 as follows:[2]

> "PRESENTING COMPLAINT
> Referred to ED from work post a frame steel wighting 100kg felt over his Rt side.
> The frame slightly hit the top of his head and felt on his Rt arm.
> No headache.dizziness or drowsiness.
> Denies any CP, SOB or palpitations.
> No abdominal pain, nausea or vomting.
> Denies any spinal or neck pain or stiffness.
> Denies any problem with his legs.
> Complaints of some tingling and numbness of the left arm.
> Can move his Lt wrist and fingers.
> 0/E:
> Hemodynamically stable. Afebrile.
> Well pertused peripherally.
> Alert, oriented.
> Chest: clear
> abdomen: SNT, +BS
> Neurologiclly:Intact
> HS: dual, no murmers.
> 2 cm laceration on Lt top of his head
> I: MobileCXR
> Ct brain: no IC hg" (As written).

13. It was found that Mr Anand had fractured his right humerus and Dr Richard Walker, Orthopaedic Surgeon, led a team of surgeons that operated on 23 November 2017 to treat the fracture by the insertion of a plate and screws.

[1] ARD page 2.
[2] ARD page 13.

14. The clinical history recorded:[3]

> "Clinical History: 41 years old gentleman had a steel frame weighting 100kg fall over right side of head and arm.
>
> Findings:
> There is no Intraparenchymal haemorrhage or extra-axial collection.
> There is a large scalp haematoma over the right cranial vertex, measuring up to 7 mm in depth. There Is no underlying skull vault fracture.
> The ventricles and sulcal spaces outline normally.
> The grey-white matter differentiation Is within normal limits.
> The posterior cranial fossa structures are unremarkable.
> The mastoid air cells and visualised paranasal sinuses are normally aerated.
> Comment:
> Scalp haematoma over the cranial vertex to the right of midline.
> No Intracranial injury."

Subsequent progress

15. In his statement of 5 February 2020, Mr Anand said he remained under the care of Dr Walker. By 5 December 2017 he could still not move his arm very much at all, and was experiencing numbness and occasional pins and needles. He said[4]:

> "21. …My right shoulder and neck pain also did not seem to improve over the next two months; however, the fracture and pain in my right elbow dominated the medical clinical picture, and all my treatment providers focused on making sure my right elbow fracture was settling and healing well. I was told by my doctors that I should focus on dealing with treatment for one injured body part at a time."

16. Mr Anand said that whilst he was undergoing physiotherapy with Ms Pinole Gurie in February 2018, he was struggling to rotate his shoulder which caused pain in his neck. He said that Ms Gurie used heat packs to relieve his neck pain.

17. He said[5]:

> "23. As I continued with physiotherapy, the pain in my neck became more prevalent and as such, more obvious. Around March 2018, I began to experience severe headaches that were influencing my ability to function and I could not continue physiotherapy due to the headaches.
>
> 24. It was not until 24 April 2018 that my neck pain was identified by Dr Walker. I believe that my treating doctors thought that the pain I was describing as neck pain was because of my shoulder, so it had been neglected in treatment…."

18. No evidence was lodged from Ms Gurie, but the clinical notes from Dr Walker showed that on 24 April 2018 he complained of "pain in the shoulder, arm pain, stiffness neck".[6]

[3] ARD page 17.
[4] ARD page 3.
[5] ARD page 4.
[6] ARD page 214.

19. Mr Anand said that he believed that his treating doctors thought that the pain he was describing as neck pain was because of his shoulder, so his neck had been neglected in treatment. He said:

> "I recall that Dr Walker had told me that he specialises in bones and joints and does not specialise in neck pain".

20. Mr Anand returned to light duties in about July 2018, doing office work and supervising.

Mr Aaron King

21. Mr Anand was referred to an exercise physiologist, Mr Aaron King at "Fitclinic" as part of his rehabilitation.

22. On 31 July 2018, Mr King listed the "current symptoms and barriers to outcome measures"[7]. He recorded that Mr Anand was complaining of:

> "• Numbness fingers
> • Pain in rt humerus/biceps area
> • Rt shoulder pain
> • Stiff neck
> • Sleeplessness
> • Worry and anxiety (current and future)"

Dr Bodel

23. On 25 November 2018, Dr James Bodel, Orthopaedic Surgeon, provided a report. In the history taken by Dr Bodel he noted that Mr Anand was struck on the head when the frame fell on him as well as the right shoulder and the arm. Mr Anand said he was dizzy as a result of a cut on the back of the head on the right side. Under "Current Complaints" Dr Bodel noted a complaint of headache and neck pain. On examination he noted that Mr Anand had tenderness in the trapezius muscles in the base of the neck on the right side and a reduced range of neck flexion, extension and rotation in all directions.

24. As to causation he said that the "ongoing pathology in the neck, right shoulder and arm and elbow is directly related to the effects of the injury". [8]

Dr Thomson

25. Mr Anand was made redundant in February 2019. The insurer had Mr Anand assessed by Dr Ronald Thomson on 22 February 2019. Dr Thomson is a Consultant Surgeon.
Dr Thomson did not take any further particulars regarding the injury, which he described in a consistent manner. Again, he did not examine the neck or comment on it.

Dr Wallace

26. On 25 February 2019, Dr Raymond Wallace reported to the respondent's solicitors, having seen Mr Anand on 14 February 2019[9]. The history taken by Dr Wallace was that whilst a co-worker was operating the remote control crane, the frame, weighing 150 kg, fell from a height of 3 metres and struck Mr Anand at the midshaft of his right humerus and vertex of his skull.

27. In recording Mr Anand's complaints Dr Wallace noted there was no paraesthesia or numbness at the upper limbs but there was weakness in the right arm.

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[7] ARD page 249.
[8] ARD page 25.
[9] ARD page 133.

28. Dr Wallace did not examine the neck, nor did he take a history of any injury to it. He assessed whole person impairment for the right shoulder and the scar.

29. In discussing Dr Bodel's report, Dr Wallace disagreed that Mr Anand had suffered any work related injury to the cervical spine. He said:

> "…At the time of my review with Mr Anand on 14 February 2019, he complained of no cervical spinal symptoms."

Dr Nandan

30. After his retrenchment, Mr Anand said that he continued to suffer worsening pain and stiffness in his neck, which led to his undergoing a CT scan on 16 May 2019.

31. On 22 May 2019. Mr Anand's general practitioner (GP), Dr Marion Nandan, referred Mr Anand to Dr Renata Abraszko, Neurosurgeon. Dr Nandan gave a history that Mr Anand had been injured in a work related incident on "22/10/17". She noted the injury to the head and the fractured right humerus. She said: [10]

> "He is seeing a shoulder specialist for Rt shoulder pains (Dr David Lieu)
> He c/o neck pains with radiation to both shoulders says symptoms occured after his injury but then settled Recent pains for the past 2 months ? trigger as he is not working at present (was retrenched)
> **Ct scan shows Rt C7 and bilateral C4 nerve root impingment**"
> (As written).

Dr Abraszko

32. Dr Abraszko reported back to Dr Nandan on 11 June 2019. The history she took was:[11]

> "….. He and two other workers that day were emptying a bag to the silo. The frame where the bags were hanged and the frame itself, which was weighing about 300 kg, collapsed and hit Mr Anand in his right arm. He sustained arm, neck and head injury. He was taken by ambulance to the Liverpool Hospital, and the next day he underwent an operation for the right humerus fracture. With time he started to develop neck pain. The neck pain radiates to his right arm, and there are 'pins and needles' in the right and left hand. The pain radiates to the top and the bottom of his cervical spine and is constant."

33. Dr Abraszko recommended an MRI scan of the cervical spine be undertaken. This was done on 21 June 2019[12]. The comment by the radiologist, Dr Jason Wenderoth was:

> "Initially significant central canal stenosis at C5/C6 and C6/C7. Severe right foraminal stenosis at CS/06 and C6/C7. Foraminal stenosis at these levels is likely source of radiculopathy."

34. The clinical details recorded by Dr Wenderoth were "neck pain, radiation to the right upper limb".

35. On 25 July 2019, Dr Abraszko reviewed Mr Anand and reported back to Dr Nandan. Dr Abraszko noted that Mr Anand complained of neck pain getting worse and with pain radiating to both shoulders and down both arms.

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[10] ARD page 167.
[11] ARD page 49.
[12] ARD page 46.

36. She said:[13]

> "I had a long discussion with him. Spinal canal stenosis at C6-C7 level was discussed with him in details. He got the Pamphlet of College of Surgeons about the surgery. He got the pamphlet about decompression. Given canal stenosis and the fact that he is neurologically getting worse, I recommended him surgery, anterior cervical discectomy and fusion at C6-C7 and C5-C6 level. The risks of the surgery including infection, injury to the nerve root/dura, CSF leakage, spinal cord injury, swallowing problems, hoarse voice, failure of the fusion, failure of the hardware and adjacent level disease were discussed in details. Given the severity of his symptoms, he is happy to take the risks, and we are asking insurance company for approval of his surgery."

37. On 22 August 2019, Dr Abraszko reported again to Dr Nandan, having again reviewed Mr Anand. On this occasion she took further detail as to the circumstances of the accident. She said that when the frame was lifting the flour bag, it came off the hook and he sustained a fracture of the right arm.

38. Dr Abraszko said[14]:

> "At the same time, part of the frame hit his head and rotated his head in the other side; and at that moment, he sustained injury to his neck, which was similar to a whiplash injury. When he was admitted to the hospital, the x-rays and scan of the CT brain was done and pain he was experiencing in the neck, was attributed, to his shoulder and to his head injury. Therefore, in my opinion, this cervical spine injury is work-related."
> (As written).

Dr Stening

39. On 15 November 2019, Dr Warwick Stening, Neurosurgeon supplied a medico-legal report to Ms Cheung, Mr Anand's solicitor. The history taken by Dr Stening was[15]:

> "As [Mr Anand] was performing this manoeuvre, the frame supporting the bag, which he estimates weighed 350 kg, gave way and struck his right arm. He sustained a fracture of his right humerus. The impact forced him into the other side of the frame which she struck with his head, producing a laceration of the right scalp. His head was also twisted around. He did not lose consciousness."

40. Dr Stening took a history that Mr Anand "had some neck pain from the outset" however, the focus during that admission was on his right arm and hand.

41. Mr Anand told Dr Stening that he was still suffering neck pain which he thought was getting worse and was radiating to the tops of both shoulders.

42. On examination, cervical spine movements were restricted to about 2/3rd of the normal range in forward flexion, ½ of the normal range in retroflexion rotation and lateral flexion.

43. Dr Stening said[16]:

> "There was reduced pinprick sensation in the right C6 distribution and in the inner aspect of his right forearm.

[13] ARD page 34.
[14] ARD page 57.
[15] ARD page 37.
[16] ARD page 38.

There was mild weakness of elbow flexion and elbow extension, wrist extension, finger flexion and finger abduction on the right side."

44. Dr Stening saw the CT scan and the MRI scan of the cervical spine and analysed the documents that had been produced because of this spinal condition. Dr Stening said, in giving his diagnosis[17]:

> "a) ***Diagnosis of each injury***
> I will confine my answer to my area of specialty, the cervical spine. I am not an expert on upper limb injuries.
>
> There was pre-existing degenerative change in the cervical spine, most marked at C5/6 and C6/7, and, to a lesser degree, at C3/4. This may well have been asymptomatic prior to the subject accident.
>
> The mechanism of the accident, as described to me, would have transferred some of the impact energy into the cervical spine, and may well have caused a mild contusion to the right C6 and possibly C7 nerve roots. This has resulted in the development of a radiculopathy, in particular the reduced pinprick sensation in the right C6 dermatome.
>
> b) ***Disabilities consequential upon the injuries or treatment received***.
> The main disability, within my specialty, he is continuing neck pain radiating into both arms. There is reproducible loss of sensation in the right C6 dermatome, which constitutes a radiculopathy."

45. Dr Stening's opinion as to causation was as follows[18]:

> "The impact of the hoist, which was estimated to weigh approximately 350 kg, onto the right arm, forcing the worker to the ground, would have been substantial. It was certainly sufficiently substantial to fracture the mid shaft of the right humerus.
>
> This would have transferred some of the energy of the impact into rotating the neck. As there was pre-existing quite severe degenerative change at C5/6 and C6/7, with severe foraminal stenosis on the right side, it is not unreasonable to conclude that the right C6 and C7 nerve roots suffered mild contusions which have initiated the radicular symptoms.
>
> Therefore, on the balance of probabilities, the work incident of 22 November 2017 caused the aggravation of the pre-existing degenerative change in the cervical spine, and initiated the radiculopathy."

46. Dr Stening thought that Mr Anand's employment was the main contributing factor to the aggravation of the cervical spondylosis and the initiation of the radiculopathy.

Dr Casikar

47. The medico-legal referee relied on by the respondent was Dr Vidyasagar Casikar, Neurosurgeon. He reported on 18 September 2019.[19] Dr Casikar took a consistent history of the event on 22 November 2017. He noted that the frame had hit Mr Anand's right arm and shoulder, and that a laceration had also been caused to the right side of the skull.

[17] ARD page 39.
[18] ARD page 39-40.
[19] Reply page 20.

48. In his examination findings, Dr Casikar found that movements of the neck were within normal limits. He noted the imaging of 16 May 2019 and 2 June 2019, and diagnosed an aggravation of cervical spondylosis. He said:[20]

> "Mr Anand seems to have had predominantly a shoulder injury on 22 November 2017 when he had a major fracture of the humerus of the right shoulder. His complaints of pain in the neck were probably related to the shoulder injury. Neck pain is common both to shoulder problems and to the cervical spondylosis. Since the neurological examination is completely normal, I am not convinced that his persistent neck pain is due to the injury or aggravation of his cervical spondylosis. Mr Anand has very significant degenerative disease of the cervical spine. This explains his prolonged symptoms."

49. As to the question of whether the proposed surgery was reasonably necessary, Dr Casikar thought it "controversial." He conceded that the imaging demonstrated "significant degenerative changes and canal stenosis." However, he stated that in the face of a normal neurological examination, and with no evidence of signal changes in the cervical cord, the indications for surgery were difficult to justify.

SUBMISSIONS

Mr Beran

50. Mr Beran opened by submitting that there were four issues to be considered:

- There was little, if any, contemporaneous evidence of the neck injury.
- The evidence as to the nature of the injury was unclear and confusing.
- Whether the need for surgery resulted from an employment injury.
- If so, the proposed surgery was not reasonable necessary.

51. Mr Beran referred to the Discharge Notice which specifically stated there was no neck pain or stiffness. This entry was inconsistent with Mr Anand's statement, and should be preferred, as it was contemporaneous. Mr Beran stated that there were no treatment notes lodged by the GP, so that there was no other early contemporaneous evidence.

52. The earliest evidence in clinical notes came from the treating surgeon, Dr Walker when he noted stiffness of the neck on 24 April 2018, it was alleged. The next reference was that of 31July 2018 by the physiologist at Fit Clinic, which again recorded a complaint of a stiff neck.

53. Mr Beran submitted that the neck was eventually investigated by Dr Abraszko on 22 May 2019 following a referral from the GP after a CT scan had been taken.

54. Mr Beran noted the findings of both the CT scan and the subsequent MRI scan, that showed significant degenerative change at multiple levels. However, he submitted, there was no evidence that the changes were either caused or aggravated by the injury.

55. The suggestion by Dr Abraszko on 22 August 2019 that the nature of the injury was similar to a whiplash injury, Mr Beran argued, was not consistent with the lack of earlier contemporaneous evidence to which he had referred. Mr Beran referred to the fact that none of the certificates issued between 31 July 2018 and 8 January 2019 made any reference to any neck involvement, submitting that this was consistent with the terms of the referral by Dr Nandan to Dr Abraszko dated 22 May 2019, which indicated that the neck pain complaints had started only two months previously. That would place the onset of the neck pains in approximately March 2019.

[20] Reply page 22.

56. I was referred to the next report of Dr Nandan of 12 June 2019 – three weeks later – which, Mr Beran submitted, recorded a history of the injury which was inconsistent with the history contained in Dr Nandan's referral to Dr Abraszko on 22 May 2019. Moreover, it was contended that Dr Abraszko was clearly wrong in her report of 11 September 2019 when she recorded that the neck injury had been present from the time of the injury, and that it had been confirmed in the notes of Liverpool Hospital.

57. The result, Mr Beran said, was that the earliest onset of the neck complaints proved to be in about March 2019. Dr Abraszko's opinion was compromised by the fact that she gave no explanation as to what occurred between the date of injury, 22 November 2017, and the onset of neck pain in March 2019. Dr Nandan's opinion that the mechanism of the accident "may have" caused the neck injury was no more than an ipse dixit, argued Mr Beran.

58. I was referred to the report of Dr Thomson who was retained in an injury management role for the insurer. His report of 22 February 2019 contained no history of any neck pain, which Mr Beran argued was consistent with the lack of neck complaints in the medical certificates.

59. With regard to Dr Bodel, Mr Beran submitted that he did not take any history of neck injury and "importantly" did not give any diagnosis or opinion as to any causal nexus between the injury and the neck. Mr Beran submitted that at the time of Dr Bodel's report 25 November 2018, the CT scan and the MRI scan of the cervical spine had not been taken.

60. Dr Stening's opinion of 15 November 2019, Mr Beran said, again took a history that was inconsistent with the hospital notes. Although Dr Stening diagnosed radiculopathy, Dr Bodel and Dr Casikar did not, and accordingly Dr Stening's report also was of no probative weight.

61. Mr Beran also referred to Dr Wallace's report of 25 February 2019, noting that Dr Wallace neither found any neurological involvement nor did he record any complaint regarding the cervical spine.

62. Mr Beran said however that Dr Casikar gave a clear diagnosis that the CT and MRI scans revealed degenerative changes which were of constitutional origin, and which had no causal link to the subject injury.

63. Mr Beran argued that Dr Stening was the only doctor to give an explanation for the neck injury, but his opinion could be discarded because Dr Stening was the only doctor to find radiculopathy. If that were the case in any event I would not be able to find the surgery was reasonably necessary because it was designed to treat Mr Anand's spondylosis, and not the nerve root compression found by Dr Stening.

64. Mr Beran submitted that accordingly Mr Anand had not met his burden of proof.

Mr Young

65. Mr Young submitted that the notes in the hospital that affirmatively stated that there were no symptoms in the neck, had to be viewed in the context of the more serious injuries from which Mr Anand was suffering when he was admitted. He had fractured his humerus and he had a laceration on the right side of his head that was of such immediate concern that a brain scan was taken. It is hardly surprising that Mr Anand would not be able to make a comprehensive survey of every single symptom he was then experiencing.

66. Mr Young referred to *David v Wagga Wagga City Council*[21] as to the dangers in coming to conclusions of fact based upon clinical notes. Mr Young stressed in some detail the mechanics of the injury itself. He acknowledged that there were various weights given in the evidence as to the weight of the frame that fell on him; it varied between 100 kg and 350 kg. Even at 100 kg Mr Young submitted a falling object of that weight would generate considerable force when dropped from 3 metres high. The object had fallen not only on the right arm, but it had also hit Mr Anand's head, leaving a 7 mm deep haematoma.

67. Taking into account those mechanical forces, common sense would accept that the impact was of some force, and the effect of an object of that weight falling on someone's head might well cause a whiplash as indeed was the view of Dr Abraszko.

68. Mr Young contended that what needed to be borne in mind was the fact that Mr Anand in that time was undergoing treatment for his fractured right humerus, and the focus of Dr Walker, whose care he was in, was on that serious injury.

69. It was common ground, Mr Young argued, that it was not until early 2018 that Mr Anand had recovered sufficiently from surgery to enable him to start physiotherapy. Mr Young challenged Mr Beran's assertion that there had been a gap between the time of the injury and the first complaint of neck pain. Mr Anand had undergone surgery, he had to undergo a period of convalescence to mobilise and heal. Mr Young submitted that as Mr Anand progressed for the first time there was a distinction between the shoulder symptoms and those coming from the neck.

70. Dr Walker's handwritten note of 24 April 2018 saying "stiffness neck" was an indication that after the focus on the fractured right arm, the neck condition began to make itself obvious, Mr Young submitted. It was by then so prominent that Dr Walker, who did not express any expertise in neck pain, recorded Mr Anand's complaint.

71. Mr Young submitted that the gap between the subject accident and that entry was explicable by the fact that it was during that time that Mr Anand was recovering from the surgery and under strong medication.

72. Mr Young stressed that the progression of the neck stiffness and pain as a source of continuing symptomatology began in April 2018, although the focus was still on the injured arm. It was submitted that the respondent misconceived the applicant's case, which was that the nature of the neck injury consisted of the aggravation of the underlying degenerative condition.

73. In referring to Dr Bodel's report, Mr Young conceded that Dr Bodel did not provide a satisfactory explanation of the cause of the neck injury, but his description of the forces involved in the mechanics of the injury were nonetheless consistent with other accounts, and unchallenged.

74. Mr Young then referred to the opinion given by Dr Abraszko on 25 July 2019, which established that Mr Anand had radiculopathy, as he complained of radiating pain into his arms. This was confirmed by Dr Stening,

75. This, Mr Young submitted, was contrary to the assumption underlying the respondent's submission, that Dr Stening was the only medical practitioner to find radiculopathy.

76. Mr Young made submissions as to the reports of Dr Wallace and Dr Casikar, which will be addressed in the following discussion. He submitted that Dr Stening's opinion constituted his case "in a nutshell."

[21] [2004] NSWCA 34 *(David)*.

77. Mr Young submitted that the diagnoses of Dr Stening, Dr Abraszko and Dr Casikar all agreed that the injury to the cervical spine was an aggravation of cervical spondylosis. Dr Casikar may have found that the aggravation had ceased. Mr Young submitted that the opposite was the case, although it was not in fact clear what Dr Casikar was saying.

Mr Beran in response

78. Mr Beran responded that the applicant had failed to gloss over the lack of contemporaneous evidence to explain the delay before complaints about the neck pain began. He referred to Dr Nandan's referral to Dr Abraszko, which said that the condition had only began two months earlier, which would have put the onset of the condition in about March 2018.

DISCUSSION

79. The reluctance by the respondent and its insurer to accept liability is understandable in these circumstances. The injury occurred on 22 November 2017, and the first mention of Mr Anand's neck was not made until 24 April 2018, when Dr Walker mentioned neck stiffness in a handwritten note, when he also noted that it was approaching five months post injury.

80. The only other complaint of neck stiffness in 2018 was made to the physiologist Mr King on 31 July 2018. The evidence establishes that Mr Anand's neck complaints were not assessed until the worsening pain and stiffness in his neck led to Dr Nandan referring him for a CT of his cervical spine on 16 May 2019. This disclosed pathology of sufficient severity that Dr Nandan then referred Mr Anand to Dr Abraszko for management.

81. The respondent has submitted that, granting the circumstances of the injury were extremely serious, the period of 18 months between its occurrence (22 November 2017) and the first neck assessment (16 May 2019) was too long to connect the neck symptoms to the accident, without some explanation for the delay.

82. The respondent submitted further that there were two matters that prevented Mr Anand from establishing such a connection. Firstly, the Discharge Summary from Liverpool Hospital positively excluded neck involvement, as it said "Denies any spinal or neck pain or stiffness."

83. Secondly, the referral dated 22 May 2019 from Dr Nanadan to Dr Abraszko advised that Mr Anand had suffered "recent pains for the past two months." The pains being described as "neck pains with radiation to both shoulders."

84. From a temporal viewpoint therefore, the respondent's reservations about the neck claim are clear: there was a denial by Mr Anand of neck pain at the hospital, and an allegation by Dr Nandan that the neck condition did not become serious enough to warrant complaint until only some time in March 2019.

85. There are, however, other circumstances that are relevant. Mr Anand did not make a statement until 5 February 2020, but gave a detailed account of his progress and recovery from the primary injuries that were caused to him in the accident of 22 November 2017. It is appropriate to approach such evidence with some caution due to the danger that Mr Anand might have unconsciously reconstructed events over the period since, but it was not suggested that he was a witness who could not be believed.

86. He said that his neck was involved in the accident. He said he thought he had fractured his right elbow, but also mentioned intense pain in his right shoulder, neck and head. He also said that his head and neck were involved in the mechanism of the accident, in that the impact twisted his head and neck around. He said that immediately he suspected he had broken his arm, but he added that he felt intense pain in his right shoulder, head and neck.

87. Although the Discharge Summary affirmatively recorded a denial of spinal or neck pain, it also contained some further relevant evidence. The mechanism of the accident was recorded as a steel frame weighing 100 kg slightly hitting the right side of Mr Anand's head and falling on his right arm. Many different guestimates have been given as to the weight of the frame, from 100 kg to 350 kg. I do not think anything turns on the actual weight, as even a 100 kg weight falling onto a person's head would constitute a serious threat of significant injury. It is little wonder that a brain scan was carried out. The notes as to the presenting complaint recorded a "2cm laceration on Lt top of head," and the clinical history noted a "large scalp haematoma over the right cranial vertex, measuring up to 7mm in depth." The note specifically recorded that no underlying skull vault fracture was detected.

88. There is some confusion over the 2 cm laceration on the left top of the head and the 7 mm deep haematoma on the right cranial vertex, but nonetheless the nature of these injuries speak of an accident involving significant forces at play. The bags being lifted weighed between 800 and 1000 kg. The collapsing frame fell some distance before striking Mr Anand. Dr Wallace recorded a history that the frame had fallen three metres[22], Dr Thomson recorded that the frame "fell from above."[23]

89. There is some corroboration for Mr Anand's account. Dr Walker was managing his recovery, and I infer that the handwritten notes produced under Direction were made on 24 April 2018 as part of that recovery. Dr Walker noted that it was then five months post injury, and his entry as to neck stiffness must have been a note of a complaint made by Mr Anand to him. A report from Dr Walker was within the documents produced under Direction, addressed to Dr Nanda, and dated 18 August 2018. It did not mention any neck symptoms, but reported on the progress of the fracture, and reported that Mr Anand's shoulder was the source of his impediment to work efficiently.[24]

90. It is clear that Mr Anand still had symptoms in his neck around that time, as on 31 July 2018 Mr Anand's physiologist, Mr King, reported a number of symptoms, including a stiff neck.

91. Mr Anand said that Dr Walker told him that he, Dr Walker, did not specialise in neck pain, but was concerned with "bones and joints." The failure by Dr Walker in his report of 18 August 2018 to mention the neck stiffness he had noted some months earlier could be explained on the basis that there had been no further complaints made to him. They could however also be explained on the basis that his focus was on the injuries which he had been treating.

92. The evidence from Mr King established that Mr Anand was complaining to him about his neck three weeks before seeing Dr Walker, and that is some corroboration for Mr Anand's evidence that his neck (and right shoulder) pain did not improve, but that he had been told that he should focus on treatment for one injured body part at a time. The dominating clinical picture had been the fracture and the pain in the right elbow. Mr Anand was consistent in his evidence and his histories that his neck condition has continued to deteriorate and worsen.

93. This approach is also evident in the reports of the specialists retained on both sides of the record prior to when Mr Anand's neck became the subject of investigations in May 2019.

94. Mr Anand was seen by Dr Bodel on 25 November 2018 for a medico-legal report to Mr Anand's solicitors. It is apparent that Dr Bodel's brief was to report as to the primary injuries suffered in the accident, namely the fractured humerus and the right shoulder. His diagnosis was only concerned with those two areas, and his opinion as to work capacity, future treatment and domestic assistance was confined to the primary injuries.

[22] ARD page 134.
[23] Reply page 12.
[24] ARD page 247.

95. Notwithstanding, Dr Bodel also included in his report a finding that the neck had been injured. Why this was so could either be because Mr Anand complained to him, or that Dr Bodel found on examination asymmetry of movement consonant with an assessable impairment, or both. No radiological investigations had at that time been carried out, and Dr Bodel found no clinical sign of radiculopathy.

96. Mr Young conceded that Dr Bodel's opinion as to causation, in which he included injury to the neck, was unsatisfactory.

97. Dr Bodel's opinion is of limited assistance regarding any reliable account of the neck involvement in the accident. However it does confirm that Mr Anand was having symptoms in November 2018, and that the examination showed restriction in Mr Anand's range of motion of his cervical spine. Dr Bodel's opinion accordingly provides further support for Mr Anand's assertion that he continued to suffer worsening pain and stiffness in his neck.

98. Mr Anand was also assessed in February 2019 by two experts retained by the insurer. Dr Thomson reported on 22 February 2019, and concerned himself only with the primary injuries for the purpose of assessing the management of those injuries. It provides some basis for Mr Beran's submission that there was no report of any neck pain because there were none at that stage. However, it has to be born in mind that the purpose of the referral to Dr Thomson was the management of the primary injuries.

99. It would be speculative to draw a conclusion that Mr Anand's failure to mention a neck condition was an indication that he did not have one at that stage. There was a possibility that Dr Thomson did not enquire as to any other complaints in view of Dr Thomson's remit, and, more significantly, such a submission does not explain the corroborative evidence to which I have referred.

100. The second expert who reported to the insurer in February 2019 was Dr Wallace, whose report came three days later, on 25 February 2019. Again, it was apparent that Dr Wallace had not been asked to give an opinion as to the neck, as his focus was on an assessment of Mr Anand's right arm. Dr Wallace did not refer to Mr Anand's neck until he was asked to review Dr Bodel's report. Whilst Dr Wallace reported that Mr Anand did not complain of any symptoms in the cervical spine, Dr Wallace did not indicate that he enquired about them either. Moreover, Dr Wallace did not examine the cervical spine, nor did he give any diagnosis regarding it.

101. I do not regard the failure by Dr Thomson or Dr Wallace to record complaints about the neck as being significant. The failure does not support an inference that Mr Anand was not experiencing symptoms in his neck, it merely confirmed that neither specialist had been asked to investigate it. In the light of the other matters I have already referred to, it does not displace a prima facie case that Mr Anand was in fact experiencing such symptoms. It rather confirms that his medical treatment was concerned with the primary injuries. It is unlikely that, in the circumstances of an assessment from an insurance medical expert as to specific injuries, an injured worker would do any more than answer what was asked of him/her.

102. The first investigations into Mr Anand's neck complaints were taken at the behest of Dr Nandan. The CT scan she authorised on 22 May 2019 revealed nerve root impingement at C7 and C4, and Dr Nandan referred Mr Anand to Dr Abraszko. Dr Abraszko's report of 25 July 2019 recommended the surgery that is part of the current dispute.

103. Mr Beran submitted that the pathology seen on the CT scan and subsequent MRI of 21 June 2019 was not related to the accident of 22 November 2017. His reliance on the entry in the Discharge Summary from Liverpool Hospital I do not find to be persuasive. The context in which Mr Anand was said to have denied any spinal or neck pain, was that he had fractured his humerus and sustained a significant blow to his head in an accident involving significant trauma.

104. The management team, in whose charge he was, were confronted with possible skull fracture and brain damage. The enquiry as to his neck pain or stiffness was, I assume, to exclude any neurological involvement, and I note a degree of ambiguity in that Mr Anand was recorded as complaining of tingling and numbness in the left arm in any event. Be that as it may, I do not conclude in the circumstances of his admission to hospital after such a violent and traumatic accident, that much credence may be placed on that entry. It is certainly not consistent with the accounts given by Mr Anand himself, and the supporting evidence to which I have referred.

105. I do not accept either that the referral by Dr Nandan of 22 May 2019 can be interpreted as conclusively establishing that Mr Anand's pains did not begin until two months prior. Such a contention overlooks the evidence of the prior complaints to which I have referred, and it also fails to take account of the full context of the referral. Dr Nandan also advised Dr Abraszko that the complaints occurred after his injury but that they had settled.

106. Just what was meant by the word "settled" is not clear in the light of the two recorded complaints in 2018, and it underscores the warning issued by the Superior Courts as to the caution that must be observed when considering the evidence of health professionals. Mr Young referred to *David* in this regard. *Mason v Demasi*[25] and *Qannadian v Bartter Enterprises Pty Limited*[26] are also relevant decisions in this regard.

107. Dr Nandan referred to the fact that Mr Anand had been retrenched, and I note that he was on light duties from July 2018 to February 2019. This may have led to a conclusion that the neck stiffness had not been as prominent a symptom has it had become at the time of his CT scan, but it does not demonstrate that the symptoms had settled completely. It is consistent with Mr Anand's evidence that his neck symptoms deteriorated after his retrenchment, but that they had always been present.

108. Dr Abraszko found that, in keeping with Mr Anand's complaints, Mr Anand was neurologically worsening. She noted his complaint of radiating pain down both arms. I have no expert opinion before me that these complaints of radiating pain amounted to radiculopathy. However, Dr Stening affirmatively found radiculopathy, noting the same complaints of radiating pain as had Dr Abraszko. Dr Stening carried out the appropriate tests on examination, and concluded that such radiculopathy was established. I therefore infer that the symptoms of which Mr Anand complained to Dr Abraszko were also caused by the mild contusions to the right C6 and C7 nerve roots which were causing radicular symptoms, as described by Dr Stening.

109. Mr Beran submitted that Dr Bodel had not found evidence of radiculopathy in November 2018. However, whilst Dr Bodel found no clinical evidence of radiculopathy, he had no investigations available, and he does not appear to have been briefed to assess the neck complaint

110. I accept that Dr Abraszko's finding that the neck injury had been confirmed in the notes of Liverpool Hospital is not accurate. As I have indicated, there may have been some support for the neurological involvement of the cervical spine in the presence of complaints of tingling and numbness in the left arm, but nonetheless there was also a clear denial of neck pain or stiffness. As I have indicated, that entry I do not find to be compelling in the circumstances.

111. I also accept that the nature of the accident has elements of whiplash. I accept Mr Anand's description that when the frame impacted his right arm and shoulder, his head and neck were twisted around, and this account was also accepted by Dr Abraszko. The evidence of the sutures needed, and the depth of the haematoma on Mr Anand's head recorded at the hospital, made such an involvement of a twisting of the neck likely.

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[25] [2009] NSWCA 227 *(Mason).*
[26] [2016] NSWWCCPD 50 *(Qannadian*).

112. A similar description was also made by Dr Stening, whose reconstruction of the forces involved in the accident I accept. The blow occasioned to Mr Anand's head by the impact of a 100 kg frame was highly likely to have rotated his neck in the process.

113. I was not assisted by the report of Dr Casikar. Dr Casikar's diagnosis was that Mr Anand had aggravated his cervical spondylosis. However, he found no neurological abnormality on examination and said that he was not therefore convinced that the persistent neck pain was due to Mr Anand's cervical spondylosis. He then found that the "significant degenerative disease of the cervical spine" was the explanation for Mr Anand's neck symptoms. His opinion was accordingly somewhat circuitous, with respect.

114. The only reason Dr Casikar appears to have changed his mind was because he had not found signs of radiculopathy on examination. He did not assert that the aggravation he initially diagnosed had ceased. He rather appeared to find that it did not exist in the first place. The radicular pains had instead been caused by radiating pain from the right shoulder injury.

115. Dr Casikar also suggested that there might be psychological reasons for Mr Anand's persistent complaints of pain over two years, which was "probably due to his cervical spondylosis", and recommended a referral to a psychologist. No other specialist suggested that there was any psychological component to Mr Anand's case.

116. It can be seen that within the one report there were a number of contradictions.

117. In any event I am satisfied that Mr Anand was exhibiting signs of radiculopathy, as found by Dr Abraszko and Dr Stening, but Dr Casikar's reference to the shoulder injury is a demonstration of Mr Anand's contention that his neck pain was originally thought to have been caused by shoulder injury.

118. Dr Casikar, amongst his various opinions. appeared to favour his original diagnosis that Mr Anand had aggravated his cervical spondylosis in the accident. It is an opinion shared by Dr Abraszko and Dr Stening, and I am satisfied that Mr Anand injured his cervical spine in this way, in the accident of 22 November 2017.

119. Although the respondent denied liability on the basis that the proposed surgery was not reasonably necessary, the emphasis in its case was that the applicant had failed to satisfy his onus of proof that his cervical spine had been injured at all. The only point raised by Mr Beran as to whether the surgery was reasonably necessary was that, as I understood him, the proposed surgery was to treat cervical spondylosis, whereas the surgery required, as defined by Dr Stening, was to treat the nerve root compression demonstrated on the imaging. I reject that submission, as the nerve root compression has been caused by the aggravation of Mr Anand's spondylosis. It is a distinction without a difference.

Summary

120. Accordingly, I find that the applicant injured his cervical spine in the accident of 22 November 2017.

121. I find that the proposed surgery by Dr Abraszko set out in her report of 25 July 2019, namely an anterior cervical discectomy and fusion at C6-7 and C5-6, is reasonably necessary.

122. The respondent will pay for the costs of and associated with an anterior cervical discectomy and fusion at C6-7 and C5-6 as proposed by Dr Abraszko.