

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2914-20
Applicant: Shang Lian Yang
Respondent: Halliday Engineering Pty Ltd
Date of Determination: 2 September 2020
Citation: [2020] NSWCC 298

The Commission determines:

1. Award for the respondent.

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

Michael Perry
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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (ARD) dated 27 May 2020, Shang Lian Yang (the applicant) claims \$6,875 lump sum compensation under s 66 *Workers Compensation Act 1987* (the 1987 Act) in respect of 5% whole person impairment (WPI) cervical Spine. The claim is based on alleged personal injury to the applicant's lumbar and cervical spine as a result of an incident in the course of his employment with Halliday Engineering Pty Ltd (the respondent) on 13 February 2007 (the incident).

PROCEDURE BEFORE THE COMMISSION

2. The parties attended a conciliation conference and arbitration hearing on 8 July 2020. Mr Jak Callaway of Counsel, instructed by Ms Krislyn Sinclair, appeared for the applicant. Mr Lei Yang, interpreter in the Mandarin language, attended also to assist the applicant. Mr Andrew Parker of counsel, instructed by Mr Graham White, solicitor, appeared for the respondent. Ms Nicole Jenkins from the insurer, GIO, (GIO) also attended.
3. I used my best endeavours in attempting to bring the parties to a settlement, acceptable to each, during the conciliation phase. I am satisfied they had sufficient opportunity to explore settlement and were unable to reach a resolution. I am also satisfied they understand the nature of the application and legal implications of any assertion made in the evidence.
4. During the arbitral phase, Mr Parker stated the respondent did not rely upon issues raised in the notice issued under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the s 78 notice) regarding the applicant's alleged failure to provide notice of and claim for the cervical spine injury, and the s 78 notice should be read as not including reliance upon such issues. The s 78 notice had never disputed the alleged injury to the lumbar spine.

ISSUE FOR DETERMINATION

5. This leaves one essential issue - whether the applicant sustained injury to his neck and or cervical spine (neck) arising out of or in the course of his employment, and to which the employment was the main contributing factor. This includes the issue raised in the s 78 notice about whether any current impairment of his neck was caused by the injury on 13 February 2007. It overlaps with and can be regarded as part of the essential issue.

EVIDENCE

Documentary evidence

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

Applicant's statements 7 May 2007 (2007 statement) and 13 February 2020 (2020 statement)

7. In his 2007 statement, the applicant stated he was born 26 August 1954 in China, and came to Australia with his family in June 1989. He "cannot understand English properly without the assistance of an interpreter". He commenced employment with the respondent as a machinist in April 1997 and was, at the time of this statement, still so employed.

8. On 13 February 2007 was fit and well and attending to the repairs of a damaged electricity generator shaft. He was working alone. In order to repair the centre of the shaft, he needed to turn it until the centre was fixed. The shaft was heavy. He then stated:

“I was standing with both my feet on the ground and with both hands held above my head, I levered the pipe downwards to move the shaft. Because of that movement, it injured my lower back and very painful but tolerable at the time ... felt an instant pain to my lower back although it didn't seem serious at the time, the pain was tolerable ... lower back felt twisted ... were no other workers around ... couldn't report the incident at the time ... about an hour later, Shane came to see how I was working ... I reported the incident to him ... said 'Shane, shaft damage, job heavy, back sore' ... worked the rest of my shift ... finished ... 3.30pm ... home ... same night I felt pain ... lower back and the right leg on the outer thigh and the right foot ... following day ... returned to work ... saw the boss ... Halliday ... said 'My back's sore, my leg very sore, I can't walk, I can't stand, I see doctor...' ... left work shortly after 7am ... went to ... doctor at Beamish Street, Campsie ...” (ARD 3).

9. Dr Si referred him to Dr Alexander Woo, orthopaedic surgeon (Dr Woo). He was off work since the accident. Dr Woo recommended surgery. He needed “to use a walking stick all the time to assist in walking ... also feel numbness to the bottom of my right foot ... since ... this injury I have seen various ... doctors, Dr Watts ... Dr Si and Dr Chang ... prior to this accident I have never experienced any similar injury”. His “general health ... is fine ... have hypertension and see Dr Si ... for that ... do not have any other medical conditions ... have not had the need to see a doctor for about 4 to 5 years before this lower back injury ...”
10. Although there is reference to is a translator's certificate; a Ms Shi, having “... translated this written statement to (the applicant)...”, there is no evidence the applicant signed or dated the 2007 statement, or that it was witnessed, or that its content was translated to him.
11. The 2020 statement is signed, both by the applicant and an interpreter, Guo Ying Zhao, on 17 February 2019. The applicant noted an assessment had been made in relation to his neck injury by Dr Poplawski in a report on 11 October 2018, and that prior to the incident, he had:

“...never felt any pain in my neck or my back ... following ... accident ... felt pain in my neck and my back ... back pain was unbearable and ... much more severe than the neck and my back was the main focus of my complaints to the doctors however I did complain about my neck pain ... neck pain has continued to be a problem for me up to the present time ... I complained to Dr Woo about my neck from the outset ... he refers to my complaints about neck pain from June 2009 ... I had ... undergone a CT scan of my cervical spine on 25 June 2008 ... when I saw Dr Powell on 22 May 2007, I told him ... I had injured my neck in the accident and ... neck pain continued to cause me problems ... in his report ... August 2008 Dr Powell noted I remained symptomatic in regard to my neck ... neck condition has deteriorated and ... symptoms in my arms have worsened...”

Campsie Family Medical Centre (the centre) – Dr Joy Si, General Practitioner (GP)

12. Dr Si was the main GP treating him at the centre. The clinical notes of the centre commence on 19 February 2007. Dr Si saw the applicant and noted him complaining of “right thigh ... buttock posterior, pain with numbness for 1 wk ? injury ...”. On 22 February 2007, he returned to the centre and saw Dr Tan, who noted he was “numb on right lateral [sic] leg, pain at right buttock ... ? sciatica, for ct l/s ...” On 23 February 2007, he returned and saw Dr Si who noted “poor sensation L5/S1 area ... power weak on right toe”. Dr Si then referred him to Dr Woo; with reference to “CT: L5/S1 disc prolapse”.

13. On 24 February 2007, the applicant returned and saw Dr Si who noted “? Work related injury on 13/2/2007, pulled and pushed hard, during work. back pain next day. right foot injury 1wk prior to that day’s wokring [sic]”. On 28 February 2007, he returned and saw Dr Si who noted “Came back for w/c ... letter created ... re ... WorkCover ... will return for details of workplace”. On 1 March 2007 he returned and saw Dr Si who noted “...for workcover ... going to have MRI ... letter created ...”
14. The applicant attended the centre on nine further occasions up to 1 May 2007. Many of these visits were for matters other than his back and neck. Up to this point there had still been no mention of any neck injury, incident or symptoms, in the centre notes. Then, on 1 May 2007, he saw Dr Chang, who noted this:

“letter from CGU ...unable to accept liability for his WorkCover claim ...letter read and explained to pt ... history taken and noted. Pt told work that he injured his foot on 29/1/07. He also injured himself at work ... 25/1/07 and saw Dr Lui ... that day where an x-ray .. right foot ... ordered ... on 13/2/07 ... injured himself at work ... LBP, but boss suspects ... not work related ... Dr Tan 22/2/07 ... CT L-spine ... also had MRI ... disc herniation affecting S1 nerve root ... actions ... letter ... WorkCover (missing old certs) ...” (ARD 103).
15. The applicant saw Dr Si on 16 May 2007, when she noted “CGU accept as a w/c ... pt to cont physio”. On 23 May 2007, it appears Dr Si had a conversation with a “CGU case manager called, Haylor ... pt was seen by various ... dr. re ... back pain ? work related ...” Dr Si then saw the applicant again on 28 May 2007 and noted she had discussed the report of Dr Watts (physio) with him. Dr Si also wrote two reports to Mr Haylor from CGU, the respondent’s previous insurer (CGU), on 9 June 2007. These reports are consistent with or confirm Dr Si’s history and diagnosis recorded in the centre notes; relevantly, relating to a lower back injury with no mention of a neck injury (ARD 854-858).
16. The applicant then saw Dr Si on about 20 occasions up to 24 June 2008 at which stage she noted “neck pain, for several month, request imaging”. This is the first time the centre notes record any reference to the applicant’s neck symptoms. On those occasions, between May 2007 and 24 June 2008, there were various notes of ongoing problems with his low back. On 5 January 2009, Dr Si noted the applicant’s attendance and also a “CT neck”. The next entry in relation to the neck is on 28 April 2009 when Dr Si noted “upper thoracic back pain and neck pain, intermittent for long time, worse than back pain ... reason for contact ... osteoarthritis ... prescription ... Panadol Osteo 1 tab daily ...” (ARD 95).
17. On 27 May 2009, Dr Si noted the applicant was examined in relation to “RTA form for fitness for driving and mobility parking form filled ...” (ARD 94). This appears to relate to the “mobility parking scheme application” completed by Dr Si for the applicant on 27 May 2009 (ARD 1025-1027) – including a certificate from her supporting the application on the basis of a diagnosis of “lumbar nerve compression... back pain ... right leg weakness”. There is no mention of a neck problem. The next reference in the notes of Dr Si is on 31 March 2010 when “neck pain” is recorded as well as back and buttock pain. But during that period there is little, if any, specific reference to back pain either.

Dr Alexander Woo, orthopaedic surgeon

18. Dr Woo first saw the applicant on or about 28 February 2007 (15 days after the incident). Relevantly, Dr Woo recorded a history that the applicant:

“...he was fitting with pressure when he had right hip pain ... went home ... rested ... pain persisted ... developed weakness of the right leg ... complains of pain around the right hip radiating down to the right leg to the foot ... complains of numbness of the whole right leg ... on examination ... scoliosis in the lumbar spine ...”

19. Dr Woo saw the applicant on five further occasions between 21 March and 1 August 2007 and prepared reports each time, without recording any complaint of neck symptoms. It is then nearly two years before the applicant saw Dr Woo again on 17 June 2009. He then reported:

“... still complains of back ... with left leg pain ... back pain is slightly better than ... on 1/8/07 ... *also complains of neck pain at the time of his work injury which was mild initially and gradually increased in the last 12 months ... complains of numbness of the right arm ... on examination ... tenderness over the cervico-thoracic spine ... neck had normal movements ... decreased sensation of the right arm over the ulnar side ... needs further investigation of his neck injury...*” (emphasis added: I also note Dr Woo’s handwritten notes at that examination refers to “... also neck pain since June/July 2007...” ARD 669).

20. On 1 July 2009, Dr Woo reviewed the applicant. His examination of the applicant’s cervico-thoracic spine resulted in the same or similar findings as those on 17 June 2009. He also noted the applicant “...had a CT scan of the cervical spine on 25/6/09 [sic - I read that as 25/6/08]”. While Dr Woo noted this scan “shows left paracentral disc-osteophyte protrusion at C4/5 with left lateral recess stenosis and impingement of the left C5 nerve root”, he thought further investigation with an MRI of the neck was necessary in order “to assess the need for further treatment including surgery”. The applicant returned to see him on 22 July 2009 when he commented that the said MRI, dated 10 July 2009, showed “disc protrusion at C4/5 with cord indentation on the **left** side ... his clinical symptoms to not correspond to the MRI findings. I would treat him conservatively ... (Dr Woo’s emphasis - ARD 45)”.
21. Dr Woo continued to treat the applicant from time to time up until about mid-2018, at least. While the applicant’s neck pain does feature from time to time in his records up to that point, he does not express any clear opinion that the applicant’s neck condition relates to the incident or the employment at all.

Bruce Watts

22. Dr Si referred the applicant to Mr Watts for physiotherapy. He reported to Dr Si on 25 May 2007, noting the applicant had “presented on 6/3/07” with right sided low back and right leg symptoms. After briefly analysing that injury, he opined that the applicant needed to see a surgeon as soon as possible, and in the meantime, manipulation was not being carried out. He was “attempting to maintain Mr Yang in a comfortable and mobile state” (ARD 172).
23. On 19 June 2007, Mr Watts wrote again to Dr Si, with a letter containing much repetition of his earlier letter. But on this occasion he also noted that “English is a second language to Mr Yang and I am not certain that he understood all of the information provided to him (regarding treatment and surgery) ...” (ARD 275).

Dr Richard Powell, orthopaedic surgeon (report 5 August 2008 – ARD 651-658)

24. This report was prepared at the request of Moray & Agnew Solicitors who, I infer, were acting for CGU in 2008. It is unclear whether that was in the context of earlier proceedings. Neither party raised an issue about the applicability of Regulation 44 Workers Compensation Regulations 2016 (Reg 44). I raised it with Mr Parker in the context of expressing a preliminary view that he may need to elect between various possible forensic reports. The ARD alleges there were no previous proceedings. Reg 44 refers to a forensic medical report as not including a report “obtained ... in respect of another claim or dispute”. The present claim is pursuant to s 66 of the 1987 Act for a lump sum in respect of WPI for the cervical spine. That claim does not appear to have been made before. I will proceed on the basis that the applicant is entitled to rely upon this report. This is different to the election Mr Parker made. The applicant relies on one forensic report (Dr Poplawski). Mr Parker has elected to use the 10 September 2010 report of Dr Cairns as the respondent’s forensic report.

25. Dr Powell's 5 August 2008 (2008 report) report was based on an examination on 29 July 2008. He had earlier examined the applicant on 22 May 2007 and, it appears, he issued a report about that time. But the respondent did not present the 2007 report. Mr Parker explained that the GIO did not have it, and when the file was transferred from CGU to the GIO, that report never arrived. Mr Callaway accepted that explanation but submitted that an inference should be drawn that the opinion in Dr Powell's 22 May 2007 report (2007 report) did not assist the respondent's case.
26. In his 2008 report, Dr Powell recounts the "HISTORY OF INJURY", without referring to the applicant's neck being injured (ARD 652). But under the heading "CLINICAL PROGRESS" (ARD 653), he noted "More recently he has developed some cervical spine symptoms without any obvious precipitating event ... CT ... in June 2008 revealed multi-level cervical spondylosis extending between C4/5, C5/6 and C6/7 ..." Then, under the heading "CURRENT SYMPTOMS", Dr Powell writes:

"Remains symptomatic in regards to the neck and lower back ... indicates that he had been aware of some discomfort in the cervical spine since the original injury though his back had been more problematic and consequently attention was directed towards that. No other specific precipitating events could be identified ..."

Dr Leon Le Leu, occupational physician (report 29 April 2009) (ARD 1018-2024)

27. Dr Le Leu was engaged by CGU to assess the applicant. He noted "the interpreter did not turn up so I proceeded without one ... however, I noted a previous medical reviewer had difficulty getting a good history from him even with an interpreter". Dr Le Leu noted the applicant said that he had "both an upper and lower back injury ... subject accident caused the pain in the lower back but he became sore in the upper back after about 2 months ..."

Slobodan Stancevic, Work Conditioning Program Manager – "Peak Conditioning"

28. Relevantly, the final report of Mr Stancevic, dated 3 July 2009 (ARD 1033-1035), refers to "lumbar disc protrusion, neck injury" beside the heading "Injury". However, at the "initial fitness review summary" dated 6 April 2009 (ARD 194-195), Mr Stancevic noted the assessment took place at the rooms of Dr Si at Campsie with Dr Si, the applicant, an official Chinese interpreter and Mr Stancevic in attendance. Relevantly, the "injury details" noted includes that the applicant :

"presented with ... low back disc injury and chronic neck pain ... injured as a result of attempting to repair a machine he was working with ... presented to his local doctor with low back pain ... radiated to the right leg ... referred to Dr Woo ... currently receiving physiotherapy to the neck and thoracic spines ..."

Dr Lew Pierides, occupational physician report 24 July 2009 (ARD 1079-1084)

29. Dr Pierides assessed the applicant at the request of CGU, principally for the purpose of assessing fitness for work. His examination relevantly referred to complaints of "low back pain going into the right leg ... also has neck pain radiating into both upper limbs, right side worse than left ..." He also noted a cervical spine MRI scan on 10 July 2009 – which he wrote "revealed a significant disc protrusion at C4/5 with indentation of the spinal canal ...".

Dr Anthony Cairns, orthopaedic surgeon (report 10 September 2010 – ARD 632-638)

30. Dr Cairns' saw the applicant on 3 September 2010. He identified various medical records he considered – including from Drs Woo, Powell, Pierides, Le-Leu, and Dr Powell's 2007 report. I do not see anything in Dr Cairns' report that allows me to draw an inference as to what Dr Powell said in that report. As to the injury itself, Dr Cairns noted:

“... Mr Yang advises ... on 13 February 2007 ... hurt his back ... was aware of pain in the back and pain radiating throughout the right lower extremity ... reported the incident and notwithstanding his discomfort continued to work for the following few hours ... end of his shift he proceeded home, but pain was such as to interfere with his sleep that night ... following morning ... pain was significantly increased in his lower back radiating into his right leg...” (ARD 634)

31. Later, under the heading “Past Medical History”, Dr Cairns recorded that “Mr Yang advises that he has also developed pain in his neck during 2008, extending to his upper back ...” (ARD 635). He also conducted an examination, including of the applicant’s “Back/Spine” noting the applicant “indicated the location of pain as in the cervico-thoracic and lower back area”. He also considered radiological investigations including the CT scan of the cervical spine (25 June 2009 – sic, again I read that as 25 June 2008) and the 10 July 2019 MRI of the cervical spine. In summary, Dr Cairns, relevantly, found that “the subsequent development of cervico-thoracic symptoms is, in my opinion, unrelated to his employment”.

Dr Zbigniew Poplawski, orthopaedic surgeon (ARD 660-666)

32. The applicant’s solicitor engaged Dr Poplawski for forensic purposes. He examined the applicant on 10 October 2018, with the benefit of “a Chinese interpreter”, and found a 5% cervical spine WPI. He noted the “HISTORY OF CURRENT PROBLEM” as follows:

“... pulling ... and twisting forcibly to one side ... developed a sudden onset of low back pain and pain in the back of his neck ... cervical problem was initially confined to pain at the back of his neck, but over the years has worsened somewhat and is now causing some intermittent discomfort down the lateral aspect of the right upper arm and forearm ... ultimately an MRI ... of the cervical spine was carried out on 19 December 2017 ...”

33. Dr Poplawski also conducted an examination of the applicant’s head and neck. Relevantly, he ultimately found the applicant sustained:

“...injury to his lumbar ... and cervical spine on 13 February 2007 ... resulted in a disc prolapse at the L5/S1 level in his back with right ... radiculopathy, which persists to date ... also suffers ... neck pain as a result of this injury ... likely ... will develop further problems in the future. There are degenerative changes which are likely to result in further narrowing of the neural foramina...”

Submissions for the applicant

34. Mr Callaway’s oral submissions have been recorded. It is unnecessary to recite them in full. They may be summarised as follows. The applicant’s 2007 statement makes it clear that he “cannot understand English properly without the assistance of an interpreter”. This is relevant to the issue about the lack of contemporaneous history of neck injury on 13 February 2007. He has provided such history to some doctors and such has not been recorded for that reason. The applicant suffered much pain, particularly in his low back area, following the incident. He was distracted by his low back pain, particularly during the early period after the incident. Although his neck pain was there at all times since the incident as well, his back pain was much worse then and so was not the focus of his complaints.
35. The applicant “is a poor historian”. The lack of his skills as an historian does not mean that his neck was not injured at the time of the incident. It rather explains it.
36. In any event, he was complaining to Dr Woo at the outset. Caution should be taken before assuming that the absence of complaints in clinical records of treating doctors means there was no complaint of an injury or symptom (*Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 (*Davis*) ; *Gulic v O’Neil* [2011] NSWCA 361). This also applies to Dr Si.

37. The applicant saw Dr Powell on 22 May 2007. No report at that time appears from him. In his 2008 report, he refers to his 2007 report. An inference should be drawn that his opinion in his 2007 report would not assist the respondent's case. Although he notes in his 2008 report that "more recently he has developed ... cervical spine symptoms without any obvious precipitating event ..." (ARD 653), he also notes:
- "... Mr Yang remains symptomatic in regards to the neck and lower back ... indicated ... he had been aware of some discomfort in the cervical spine since the original injury though his back had been more problematic and consequently attention was directed towards that ... no other specific precipitating events could be identified ..." (ARD 653).
38. Mr Callaway also pointed out Dr Powell's recording of neck symptoms, clinical findings and radiological findings. These are summarised above.
39. On 25 May 2017, Mr Watts, physiotherapist, reported the applicant's complaints of back and right leg pain and suggested a surgeon be seen as soon as possible. This showed also the significance of the pain the applicant had in 2007, again showing how and why he was distracted, by that pain, from complaining about his less significant neck pain (ARD 994).
40. Dr Woo first saw the applicant about 15 days after the incident. Although Dr Woo does not then record any mention of neck injury, the applicant has stated that he "complained to Dr Woo about my neck from the outset". Caution should be taken in relation to looking at clinical records of busy doctors (*Davis*). Although Dr Woo did not record complaints of neck pain until June 2009, he did not see the applicant between August 2007 and June 2009. The first time he returned to Dr Woo, about 17 June 2009, there is a record of neck pain; so it should not be assumed that the gap in the reporting the neck injury is over two years, given the applicant did not see Dr Woo between August 2007 and mid-2009.
41. The report of Dr Leon Le Leu, occupational physician, also illustrates the relevance of the applicant's difficulties as an historian and in the English language. Dr Le Leu (ARD 1018) saw the applicant for CGU on 29 April 2009 and referred to an "interpreter alert", noting there was supposed to be a Mandarin interpreter for the session but none turned up. The doctor proceeded anyway. He also noted a previous medical reviewer had difficulty getting a good history from the applicant even with an interpreter. Dr Le Leu noted that the applicant told him he had both an upper and a lower back injury with the subject accident causing the pain in the lower back but him then becoming sore in the upper back after about two months. Only a bit over a month later, the "Peakconditioning" report (Mr Stancevic) of 5 June 2009 (ARD 1029) does refer to a neck injury at the time of the incident
42. Dr Lew Pierides, occupational physician, reported to CGU on 24 September 2009, having seen the applicant the day before. A history is taken in this report of neck pain radiating into both upper limbs, right side worse than left. Also, Dr Pierides noted an MRI of the cervical spine of 10 July 2009 was ordered by Dr Woo which revealed a significant disc protrusion at C4/C5 with indentation of the spinal canal.
43. The history taken by Dr Woo on 17 June 2009 is important in that the applicant is recorded to have said that he "also complained of neck pain at the time of his work injury which was mild initially and gradually increased in the last 12 months ... complains of numbness of the right arm." That is the correct history. Although the applicant said he had given that history at the start. It is consistent with the history taken by Dr Poplawski. That history is correct too. There is consistency with that first history to Dr Woo when Dr Poplawski records that the cervical problem was initially confined to pain at the back of the neck, but that over the years it had worsened somewhat and was now causing intermittent discomfort down the lateral aspect of the right upper arm and forearm. Dr Poplawski finds the necessary causal relationship with respect to the cervical spine, and this should be accepted.

Submissions for the Respondent

44. Mr Parker's oral submissions have been recorded. It is unnecessary to recite them in full. They may be summarised as follows. The omission of any reference to the applicant injuring his neck in his first statement is very important in the analysis. He now wishes to have his 2020 statement – 13 years later – accepted over his 2007 statement, and “everything else”. Memories fade over time (*Watson v Foxman* (1995) 49 NSWLR 315 and 319 (*Watson*)). The applicant is mistaken when he now recollects his neck was injured in the incident.
45. Neither the GIO nor the respondent are able to locate Dr Powell's 22 May 2007 report. CGU was the insurer then and as far as the GIO is aware, that report never arrived from CGU. The report is not in the possession of the legal representatives for the respondent either.
46. The applicant concedes he is a poor historian. This is consistent with his version in his supplementary statement being mistaken. His memory has likely faded over time. It does not assist the applicant's case for him to say he is a “poor historian” because the failure to mention an injury to his neck at the time of the incident is not only able to be seen in various histories taken by doctors, but also in his own documents. The first statement made three months after the incident ought to have included such reference if in fact there was a neck injury at the time. Also, his claim form of 19 April 2007 did not refer to any neck pain or neck injury. In this regard, both counsel agreed that while the claim form was not in evidence, the statement to that effect in the s 78 notice was correct.
47. If the evidence is looked at as a whole, it is more likely that the applicant was not complaining of neck pain or injury contemporaneously to the incident. There is nothing in the applicant's second statement, or anywhere else, that explains why he fails to mention neck symptoms, pain or injury contemporaneously to the incident.
48. Dr Si records show that she does record matters with care. This factor points to the likelihood that she would have recorded any complaints by the applicant of neck symptoms, pain or injury if he had indeed mentioned them to her. This is corroborative with the report and opinion of Dr Cairns.
49. Dr Powell did record the applicant indicating that he had been aware of some discomfort in the cervical spine since the original injury, though his back had been more problematic and consequently attention was directed towards that – and that “no other specific precipitating events could be identified”. However, Dr Powell also recorded that the applicant had “more recently ... developed ... cervical spine symptoms without any obvious precipitating event ...”
50. The report of Dr Poplawski is problematic for the applicant's case. It does not explain how and why the injury to his neck came about, or exists, or is related to the employment or the incident. Also, this report is premised on the assumption that the pain and symptoms were in the applicant's neck from the time of the incident and that is not the case.

Submissions in Reply for the applicant

51. Dr Woo organised an MRI for the applicant's cervical spine in July 2009 and noted that it showed disc protrusion at C4/5 with cord indentation on the left side. The applicant accepts the respondent does not have Dr Powell's May 2007 report. The applicant or his legal advisors do not have it either.

FINDINGS AND REASONS

52. The applicant made no mention of any injury to his neck or upper spine in his 2007 statement - where that statement provides significant detail in relation to the background to the incident, its circumstances, and the resulting low back and right leg injury. It is by no means an unprofessional statement. I infer it has been prepared by a person with reasonable skills in taking statements, such as a solicitor or investigator, and who has done his or her best to record what the applicant told him or her. The statement also refers to the applicant having had the benefit of it being to and for him. But there is no evidence he signed it or that it was translated to him. This statement is relatively contemporaneous to the incident and a reference to injury or symptoms in or about the neck would have advanced the applicant's case. Clearly, the statement does not advance the applicant's case. As to whether it harms it, I need to exercise substantial caution because it has not been signed. I propose to go no further than infer that it illustrates the absence of evidence of contemporaneous material in support of the applicant's case that he did injure his neck at about the time of the incident.
53. I agree with the submission for the respondent that Dr Si's records show she does tend to record matters with care. This also applies to the records entered by the other doctors at the centre. This is apparent from the summary of the notes in pars12-17 above. I recognise the line of authority in cases such as *Davis*. But in this case centre doctors saw the applicant on four occasions in relation to injury arising from the incident between 19 and 24 February 2007, and clearly enough Dr Si and other centre doctors made careful records, including of clinical examination results. Then, on 28 February 2007, Dr Si and the applicant met when she recorded that he had returned for reasons which appear, at least partly, to do with the injury claim. She records "will return for details of workplace". On 1 March 2007, the applicant did return, and her notes refer to "WorkCover ... letter created".
54. After the applicant attended the centre on nine more occasions up to 1 May 2007, mainly seeing Dr Si, when there was still no mention of any neck injury or symptoms, the applicant saw Dr Chang at the centre. The notes indicate CGU was unable to accept liability for a WorkCover claim, and that there was a letter read and explained to the applicant, and a history taken from him. In this context, the applicant referred to a right foot injury as well as his low back injury. This shows to me that both Dr Si and Dr Chang were likely not only treating the applicant's injury, but also attempting to cooperate with him and his WorkCover claim. The same applies to the consultation on 16 May 2007. Dr Si also then appears to have discussed the claim with the applicant, then also have a conversation with a CGU case manager a few days later. As noted in par15 above, she also wrote two reports to CGU, which were consistent with or confirmed the history and diagnosis she had made up to that point, i.e. a low back injury with no mention of a neck injury.
55. Then, after about 20 more visits to the centre up to 24 June 2008, there is a record of the applicant referring to "neck pain for several month ..." I am satisfied this close examination of the centre notes shows Mr Parker's submission in this respect should be accepted; and that such does point to the likelihood that there would have been a record of any complaints of symptoms in or injury to the neck had such complaints been made before 24 June 2008.
56. My opinion that it is likely that the applicant did not make any complaints to the centre doctors, particularly Dr Si, until 24 June 2008, is not dispositive. But it is a significant factor militating against his case. It is a further example of an absence of evidence the applicant needs in order to prove his case. Dr Si does not otherwise provide any clear opinion that she is of the view that the applicant's complaints of symptoms and/or injury about his neck are related to either the incident or his employment generally. I do not infer Dr Si believes the neck symptoms or injury is not related to the incident or employment either. But again, there is an absence of evidence to the contrary. I need to feel actual persuasion of the facts that need to be proved for the applicant to succeed, and on the probabilities (*Nguyen v Cosmopolitan Homes* [2008] NSWCA 246).

57. This is not a case involving proof of a secondary or consequential condition. That is not the way the case was put, nor does such a case theory arise, at least with sufficient clarity, from the evidence. Nevertheless, I do bear in mind the principles in *Kooragang Cement Pty Ltd v Bates* (1994) 35NSWLR452; 10NSWCCR796. This is not only to take into account “a common sense evaluation of the causal chain” – but also to remember that “the mere passage of time between a work incident and subsequent incapacity ... is not determinative of the entitlement to compensation”. That last principle is relevant to the facts in this case.
58. I also acknowledge that when the applicant was recorded as mentioning the neck injury or symptoms to Dr Si on 24 June 2008, he did say he had experienced such pain “for several month...” This leaves an inference open that such could possibly mean he was intending to refer to the 16 months that had passed since the incident. I also again bear in mind the difficulties the applicant has with English. While it seems that Dr Si and/or Dr Chang have Chinese names, I am not in a position to decide if the applicant was able to communicate with them in Mandarin, or the extent to which there may have been language difficulties with them. However, at least in relation to the critical parts I have identified above, it is not, at least clearly, indicated in the centre notes that there were any communication difficulties. The reference to “several month” could also possibly mean, for example six months.
59. While Dr Woo also seems to have a Chinese name, again, I am unable to come to any conclusion about whether he was able to communicate to any extent with the applicant in any Chinese language or dialect. He has seen the applicant on multiple occasions over a period of about 10 years. In each of the reports, there appears no reference to a translator or interpreter, except on a couple of occasions where other persons were present, at rehabilitation meetings. This is similar to the appearance in the centre records. Like in those records, Dr Woo does not make any mention about communication difficulties. I am unable to come to a view that he was able to communicate in a Chinese language.
60. Dr Woo saw the applicant 15 days after the incident and on a further five occasions until 1 August 2007. During that time he did not record any complaint of neck symptoms. Such complaint is not recorded until 17 June 2009. Mr Callaway points out that the consultation on that date was the next one following the 1 August 2007 consultation. While Dr Woo did record, on 17 June 2009, the applicant referring to his neck pain being relevant “at the time of his work injury”, I believe it necessary to exercise caution with the applicant’s evidence in this regard. Dr Woo’s handwritten notes indicate the applicant told him he had experienced neck pain since “June/July 2007” (ARD 669) - about four to five months after the incident.
61. As with Dr Si, there also appears no clear indication or comment by Dr Woo, in any of his reports, to suggest he was of the opinion that the applicant’s neck symptoms are related to the incident or the employment. Dr Woo observed that the pathology noted on the 10 July 2009 cervical spine MRI did not correspond to the applicant’s clinical symptoms. Dr Woo has indicated that the MRI findings show cord indentation on the left side, whereas the applicant was complaining of right arm symptoms. I bear in mind the applicant states that he did tell Dr Woo about his neck symptoms coming on at the time of the accident “from the outset”. I also take into account the principles referred to in the *Davis* line of authority.
62. I find it is unlikely that the applicant did report this to Dr Woo as he alleges. I believe this is a feature of the fallibility of his memory due to the lapse of substantial time (*Watson*; see also *Nominal Defendant v Cordin* [2007 NSWCA6 at [165] per Davies J (*Cordin*)]. It has been submitted for the applicant that he “is a poor historian”. In cases of this type, this is a not uncommon submission. But having regard to all the circumstances, I do find such a submission does not ultimately assist the applicant’s case. This includes the applicant’s 2020 statement; which was prepared about 13 years after the incident. On one hand, the applicant’s position is that the fact he has poor English skills should be taken into account in discounting the omission of reference to neck symptoms up to 17 June 2009. On the other hand, his position is that the history recorded on that day is the correct one, and the one he had always given.

63. There is no explanation by Dr Woo about the extent to which language difficulties may have been relevant. There was no interpreter assistance recorded at any of the consultations up to August 2007 or 17 June 2009. I also find that the records of Dr Woo are sufficiently carefully prepared to cause me to believe that if the applicant had complained of neck symptoms before 17 June 2009, they likely would have been noted by Dr Woo. I find it more likely that the applicant is mistaken in both his 2020 statement that he told Dr Woo of his neck symptoms “from the outset”, and, his recollection on or about 17 June 2009, when Dr Woo recorded the applicant saying that he had neck symptoms “at the time of the work injury”. I believe he is a “poor historian”, and it is in this context, in concert with the usual fallibilities of human memory with the passing of time, that he is so mistaken. Given all the circumstances, I think it likely that if he had any significant neck symptoms during the six consultations with Dr Woo up to August 2007, he would have communicated that, and it would have been recorded in Dr Woo’s notes; even if such communication was by body language, say, by him pointing to or otherwise indicating symptoms in the neck. This last comment applies equally to the many opportunities the applicant had to so communicate any neck symptoms to the centre doctors, including Dr Si.
64. Again, the result of the analysis of Dr Woo’s material illustrates an absence of evidence, at least that which is satisfactory in the probative sense, to cause me to be actually persuaded that he sustained a neck injury on 13 February 2007. Procedure in the Commission is to be conducted with as little formality and technicality as proper consideration of a matter permits. But conclusions need to be drawn from satisfactory material, in the probative sense, to ensure they are not seen to be capricious, arbitrary or without proper foundation or material (*OneSteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 at [2] (*OneSteel*)).
65. The material from Mr Watts clearly shows, as has been submitted by Mr Callaway, that the applicant had very significant pain in his low back and right leg in May and June of 2007. Mr Watts did not wish to manipulate the applicant’s spine. He could only attempt to maintain the applicant in a “comfortable and mobile state”. He was recommending surgery, as was Dr Woo. The applicant has resisted that. I find the evidence of Mr Watts does not assist the applicant’s case, because there is no recording of neck symptoms or pain. Mr Watts also made reference to language difficulties. To some extent, it is plausible that he was distracted by the low back and right leg pain, from mentioning the neck symptoms. But it is a further example of an absence of relevant evidence from contemporaneous material.
66. Dr Powell’s 2008 report is about two months after Dr Si recorded the applicant’s complaint of neck symptoms. As with her record, Dr Powell’s history under “CURRENT SYMPTOMS”, (see par 26 above), provides a relatively contemporaneous history of neck symptoms “since the original injury”. These symptoms are referred to by him as “*some discomfort*”. But even though this history has relative contemporaneity, it is still given over 18 months after the incident. In my opinion, that is a significant enough time to cause me to exercise much caution with it on the basis that the applicant’s memory is likely, in all the circumstances, to have been faulty (*Cordin*).
67. I do accept that an inference should be drawn that Dr Powell’s 2007 report does not advance the respondent’s case. But that does not mean I must draw an inference that the applicant told Dr Powell, in 2007, that he had been experiencing neck symptoms from the time of the incident. On one reading of Dr Powell’s 2008 report, that could be inferred. But on another, noting a history of “more recently ... developed ... cervical spine symptoms without any obvious precipitating events ...” such inference would not be available. In *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 at [2], Dixon CJ, after referring to *Bradshaw v McEwans Pty Ltd* (1951) 217ALR1 (*Bradshaw*) and *Holloway v McFeeters* [1956] HCA25; 94CLR470, stated:
- “... the law which this passage (*Bradshaw* at [5]) attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for the definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied.”

68. I am unable to find that this evidence gives rise to a reasonable and definite inference that the applicant did tell Dr Powell, in May 2007, that he injured his neck, or had neck or cervical spine symptoms, from the time of the incident. This would require me to surmise such was so, despite there being no appearance of that fact when Dr Powell set out the “History of Injury” (in circumstances where the low back and right side & right buttock and leg are all mentioned), on page 2 of his report, then on page 3, the reference under “Clinical Progress” to “more recently he has developed ... cervical spine symptoms without any precipitating event”; and *then*, under the heading “Current Symptoms” there appears the words “*remains* symptomatic in regards to the neck and lower back ... indicated ... had been aware of some discomfort in the cervical spine since the original injury though his back had been more problematic ...” The order or placement of these passages, as well as their content, gives rise to, *at least*, conflicting inferences of equal degrees of probability. As such, I am unable to find that the applicant did tell Dr Powell, in May 2007, that he had injured or had suffered symptoms in his neck or cervical spine from the time of the incident. I can, and do, take into account that the applicant told Dr Powell that in August 2008. I also take into account that Dr Powell had the benefit of an interpreter at that time.
69. Nevertheless, to the extent that the history in Dr Powell’s 2008 report does allow for an inference that the applicant had neck symptoms “since the original injury” I find the applicant is mistaken in this respect, and that it is an inaccurate reconstruction.
70. Dr Pierides examined the applicant in July 2009, and did note neck pain. I accept that Dr Pierides did observe significant neck and right arm symptoms. However, there is nothing persuasive in relation to whether or not the history of neck pain was complained of from the time of the incident, let alone such pain or injury being caused by incident or the employment. The same applies to the report of Mr Stancevic who assessed the applicant on various occasions, including at the rooms of Dr Si, with a Chinese interpreter, in April 2009. The reference to “presented with ... low back disc injury and chronic neck pain ... injured as a result of attempting to repair a machine he was working with ... presented to his local doctor with low back pain ... radiated to the right leg ... referred to Dr Woo ...”, at best gives rise to competing inferences about whether or not a history was given at that time that the applicant either injured or suffered symptoms in his neck at the time of the incident. Even if would allow for a finding the applicant then (April 2009) gave a history of neck symptoms from the time of the incident, I am unable to accept his recollection would be accurate in such respect for the same reasons given above.
71. When Dr Cairns assessed the applicant in September 2010, he had the benefit of an interpreter. The relevant history of injury at or about the time of the incident is set out in pars 30-31 above. There was no record of the applicant indicating that he had injured or suffered symptoms in his neck or cervical spine at or about that time. Dr Cairns also obtained a clear history of the applicant developing neck pain “during 2008, extending to his upper back”. On examination, the location of the pain was both in the lower back and cervico-thoracic area of the spine. In my opinion, this history is more consistent with the weight of the other evidence.
72. I also believe that the finding by Dr Cairns that “the subsequent development of cervico-thoracic symptoms is ... unrelated to his employment” has force if only because the underlying history is consistent with what I find most likely – i.e. I am not persuaded that the applicant suffered symptoms or injury to his neck at the time of the incident. I come to that view by reference not only to his report and opinion, but by assessing it against the evidence otherwise. The history of the development of neck or cervico-thoracic symptoms in 2008 is at least approximately consistent with the history taken by Dr Si, who noted on 24 June 2008 the applicant’s history of neck pain for “several month”.

73. While the extent of any difficulty in the applicant effectively communicating with Dr Si is unclear, if there was any problem at all, I comfortably infer that if the applicant had any neck or cervical spine problems before 24 June 2008, Dr Si would have noted it. Effective communication depends upon all circumstances. In this case, I am of the opinion that the applicant had sufficient time, over the course of many attendances, to at least indicate neck symptoms to Dr Si, or other centre doctors, for example, by pointing to his neck. That factor does not necessarily apply to the applicant's visits to all doctors, particularly those who he saw on a single occasion. But it does apply to at least Dr Si and Dr Woo. While both of those doctors have ultimately recorded what they noted the applicant eventually told them about the onset of his neck symptoms, there does not appear any clear expression of view or certification by them about the necessary causal relationship between the incident and the neck or cervical spine symptoms or injury. And to the extent that the applicant did ultimately tell Dr Si and Dr Woo that he suffered neck symptoms or injury from the time of the incident, I do not, with respect to him, accept his recollection was correct.
74. The forensic medical report of Dr Poplawski is the only report that expresses an opinion that there is a causal relationship between the incident and the applicant's neck and/or cervical spine symptoms. But there are a number of difficulties with this opinion. Firstly, it is premised on the applicant having "developed a sudden onset of low back pain and pain in the back of his neck ..." For reasons given earlier, I do not accept the applicant did have symptoms in his neck at that time. I believe it most likely, taking all the evidence into account, that the applicant did develop some symptoms in his neck some months later. It is not clear precisely when that occurred. But it is clear enough that it was many months after the incident. That is consistent with the histories taken by Dr Si and Dr Cairns. It is also not inconsistent with the history of Mr Watts. It is also consistent with the histories provided to Dr Woo – up to 17 June 2009, at which point the applicant stated that he had neck pain "at the time of his work injury which was mild initially and gradually increased in the last 12 months ... complains of numbness in the right arm".
75. The applicant has degenerative changes in his cervical spine. Dr Poplawski noted that (ARD 662 and 664). This is consistent with the opinion of Dr Woo (e.g. ARD 715). I also note the fax memo from the CGU case manager to Dr Woo of 13 October 2009 where he was asked, *inter alia*, "Do you feel that the disc protrusion at C4/5 is work related or degenerative changes?" He responded that such protrusion was "related to degenerative changes". Dr Pierides also thought the applicant had "neck pain and some significant degenerative change in his neck" (ARD 1083).
76. Dr Poplawski also noted that the applicant's "cervical problem was initially confined to pain at the back of his neck, but over the years has worsened somewhat and is now causing some intermittent discomfort down the lateral aspect of the right upper arm and forearm". It is submitted for the applicant that this is consistent with the history taken by Dr Woo on 17 June 2009. But I do not think such history is correct insofar as the timing of the onset of the neck pain is concerned. Otherwise, it is consistent with Dr Woo recording the applicant as complaining of symptoms in his right arm. In this regard, he pointed out that the 10 July 2009 MRI cervical spine showed cord indentation on the **left** side – and, the applicant's clinical symptoms did not correspond to the MRI findings. This is not mentioned by Dr Poplawski. He also does not appear to raise, or be aware of, the 10 July 2009 cervical spine MRI. But he does note the cervical spine MRI of 19 December 2017 – including that it "reports a large central – left paracentral disc extrusion ... mild left foraminal narrowing secondary to ... degenerative change ..."

77. While I am unable to interpret radiological findings, I do see that the pathology seems to be referred to as being on the left side, including at the C5/6 and C6/7 levels (ARD 662). I am unable to make findings on the basis of conducting a medical analysis of this nature myself. However, the applicant carries the onus to prove his case that he did sustain an injury to his neck or cervical spine on 13 February 2007. I find that he has not proved this. Dr Poplawski does not explain, at least with sufficient clarity given all the circumstances, what the nature of the neck injury is and how it came about. When recording the history of the onset, he simply refers to “sudden onset of ... pain in the back of his neck”. He later (ARD 661) referred to the “cervical problem ... over the years worsened ... now causing some intermittent discomfort down the ... right ... arm ...” Then, under “Summary”, after dealing in adequate detail in relation to the nature of the lumbar spine injury, he simply says “... also suffers from neck pain as a result of this injury”.
78. I agree with the submission from the respondent that Dr Poplawski’s report does not explain how and why the injury to the neck came about, or exists, or is related to the employment or the incident. It is premised on the assumption that the pain and symptoms were in the applicant’s neck from the time of the incident. I find that assumption incorrect. There is insufficient satisfactory material, in the probative sense, to be satisfied otherwise (*OneSteel*).
79. For the above reasons, there will be an award for the respondent.