

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2889/19
Applicant: Shereen Abdelmalek
Respondent: Australian Unity Home Care Service Pty Ltd
Date of Determination: 8 November 2019
Citation: [2019] NSWCC 361

The Commission determines:

1. The applicant suffered injury to her lumbar spine, thoracic spine and both upper extremities (shoulders) as a result of the nature and conditions of her employment with the respondent between September 2016 and February 2018, with a deemed date of injury of 15 February 2018.
2. Award for the respondent on the claim for injuries to the cervical spine and lower extremities (knees).
3. The claim for permanent impairment compensation will be remitted to the Registrar for referral to an Approved Medical Specialist for determination of the permanent impairment arising from the following:

Date of injury: 15 February 2018 (deemed)
Body systems referred: Thoracic spine, lumbar spine, left upper extremity (shoulder) and right upper extremity (shoulder)
Method of assessment: Whole person impairment.

4. The documents to be referred to the Approved Medical Specialist for consideration are to include:
 - (a) This Certificate of Determination and Statement of Reasons;
 - (b) The Application to Resolve a Dispute and attachments;
 - (c) The Reply and attachments;
 - (d) The applicant's Application to Admit Late Documents dated 19 August 2019 and attachments;
 - (e) The respondent's Application to Admit Late Documents dated 19 August 2018 and attachments;
 - (f) The applicant's second Application to Admit Late Documents annexing a supplementary statement of the applicant dated 27 August 2019 and marked exhibit A;
 - (g) A payslip for the applicant for the period 19 August 2017 to 1 September 2017, admitted without objection and marked exhibit B.
5. The claims for medical expenses and for weekly benefits are to be listed for a telephone conference before me upon the Commission issuing the Medical Assessment Certificate.
6. I note the legal representatives of both parties are to have an uplift allowing for the complexity of this matter, to the maximum amount allowed under the Regulations.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Shereen Abdelmalek (the applicant) brings proceedings against Australian Unity Home Care Services Pty Ltd (the respondent) seeking payment of weekly benefits, medical expenses and permanent impairment compensation in respect of injuries to all three levels of her spine and both upper extremities.
2. The applicant immigrated to Australia in 2012. She worked for various employers as a care worker before commencing in that role with the respondent in September 2016.
3. The applicant's claim is that she suffered injuries to the body parts referred to in paragraph one above as a result of the nature and conditions of her employment between September 2016 and 15 February 2018, which is the deemed date of injury.
4. The applicant described various heavy work activities in her statements, including but not limited to moving heavy tables each Monday, Wednesday and Friday at various community halls and having to move a client who was in a manual wheelchair.
5. Additionally, the applicant set out at paragraph 12 of her statement some of her duties, as follows:
 - (a) Attending on clients and taking them shopping, to medical appointments and to run errands;
 - (b) Occasionally doing shopping for clients on her own which involved carrying heavy items such as cartons of 1 litre bottles of water;
 - (c) Cooking meals, washing clothes, cleaning stoves and cleaning fridges;
 - (d) Having to shower certain clients, as well as dress and undress them with the use of a hoist;
 - (e) Wheeling immobile clients around shopping centres and assisting with their transfer into and out of vehicles; and
 - (f) Other manual work requiring lifting, pushing, pulling and carrying.
6. On 9 October 2017, the applicant says she felt pain in her back as she moved one foldable table from a stack of such tables located at a community hall. She continued working, though she did consult her general practitioner.
7. On 12 February 2018, the applicant experienced further back pain while lifting and carrying tables and chairs at another community hall. She said she continued working despite increasing pain until 16 February 2018, when she called work to advise she was going to see her general practitioner, who in turn referred her for a CT scan.
8. The applicant had returned to work on 21 February 2018. She did not lift or carry tables, but instead helped serve food at various gatherings. She continued with these limited duties until 28 August 2018 when she says that she was in so much pain an ambulance was called to take her to hospital. She was certified unfit for two weeks and returned to work on 27 September 2018, again on selected duties.

9. The applicant says that in or about March or April 2018, she started feeling pain in both of her legs as well as sharp pain in the middle of her back. She described this pain as intermittent, though it has become worse over time. The applicant also says she suffered similar onset and development of pain in both shoulders.
10. The applicant had completed incident notification forms in relation to both the October 2017 and February 2018 incidents. On 23 February 2018, the applicant completed a workers' compensation injury claim form alleging a date of injury of 15 February 2018, due to the nature and conditions of her employment.
11. The applicant was paid weekly benefits for some periods up to 7 December 2018, however, it appears this was in respect of a frank low back injury arising from the incident in February 2018 rather than in respect of any nature and conditions of employment claim.
12. On 23 November 2018, respondent's insurer issued a section 74 noticed denying liability on the basis the applicant was no longer suffering the effect of any injury which she had suffered on 14 February 2018, or as a result of the nature and conditions of her employment.
13. The applicant's solicitors requested a review of the respondent's decision, and on 12 March 2019 the respondent's insurer issued a review notice confirming the denial of liability for reasons which are set out under the heading "issues" below.
14. On 13 June 2019, the applicant's solicitors commenced these proceedings.

ISSUES FOR DETERMINATION

15. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant suffered injuries to her thoracic spine, cervical spine, either upper extremity (knees) or either shoulder pursuant to sections 4 and 9A of the *Workers Compensation Act 1987* (the 1987);
 - (b) Whether the applicant suffers ongoing incapacity due to any of the claimed injuries;
 - (c) Whether the applicant requires any reasonably necessary ongoing treatment owing to any alleged injury.
16. The injuries to the applicant's thoracic and lumbar spine are not disputed, and the permanent impairment claims in respect of them will be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for the determination of the level of whole person impairment suffered by the applicant as a result of those injuries.

PROCEDURE BEFORE THE COMMISSION

17. The parties attended a hearing on 28 August 2019 and 25 September 2019. 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.
18. At the hearing of the matter, the applicant was represented by Ms L Goodman of counsel and the respondent by Mr R Hanrahan of counsel.

19. It was agreed between the parties that, upon the Commission making a determination in relation to which of the disputed body parts are to be referred to an AMS (if any), the claim for weekly benefits and section 60 expenses would be deferred until receipt of any Medical Assessment Certificate (MAC).

EVIDENCE

Documentary evidence

20. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attached documents;
 - (c) The applicant's Application to Admit Late Documents (AALD) dated 19 August 2019 and attachments;
 - (d) The respondent's AALD dated 19 August 2018 and attachments;
 - (e) The applicant's second AALD annexing a supplementary statement of the applicant dated 27 August 2019 and marked exhibit A;
 - (f) A payslip for the applicant for the period 19 August 2017 to 1 September 2017, admitted without objection and marked exhibit B.

Oral evidence

21. There was no oral evidence adduced at the hearing.

SUBMISSIONS

The Applicant's Submissions

22. Ms Goodman submitted the applicant's claim is based on the nature and conditions of her employment, which involved heavy and repetitive duties. After taking the Commission to the nature and extent of the applicant's duties, Ms Goodman submitted the applicant, who is diminutive in stature, was subjected to repeated heavy lifting, carrying and moving in the course of her employment with the respondent.
23. In relation to the medical evidence, Ms Goodman referred to the report of Dr Henry, general practitioner at page 35 of the Application, which notes the applicant presenting to her on 16 February 2018 with severe low back pain after lifting a table at work. Dr Henry arranged for the applicant to have a CT scan which demonstrated bulging discs at the level of her pain, and recommended physiotherapy.
24. I note Dr Henry is not the applicant's regular general practitioner, who is Dr Abdullah. Dr Abdullah was away on the day the applicant first presented to a general practitioner, however, he took over care of the applicant upon his return to work. Dr Abdullah's report, Ms Goodman noted, is at page 36 of the Application and refers to a disc prolapse at the L3/L4 level and also refers to "11/12." Ms Goodman submitted, and I accept, that that reference must be to vertebrae 11 and 12 of the applicant's thoracic spine (T11/12).

25. Relevantly, Ms Goodman submitted Dr Abdullah as treating general practitioner also recorded the applicant as having developed bilateral shoulder pain with restricted range of movement as a result of her duties with the respondent. She noted Dr Abdullah's comments that the applicant's bilateral facet joint degeneration in the thoracic spine were all aggravated by injury at work.
26. Ms Goodman then took the Commission to the report of Dr Toomey, dated on or about 23 April 2018, which referred to the applicant being diagnosed with lumbar disc bulging together with bilateral shoulder tendinopathy. She then took the Commission to Dr Toomey's report commencing at page 42 of the Application dated 20 March 2019 in which he reported "Back pains from neck, thoracic spine and lumbar spine more intensive at midthoracic area." And reports of "Bilateral shoulder pains and restriction of movement. Bilateral knee pain too." Dr Toomey, Ms Goodman noted, diagnosed the applicant's condition as follows:

"Most likely caused for multiple joints pain (the whole spine, shoulders and knees) is work-related repetitive injuries from repetitive physical client handlings and chores done at client's homes, and when she took client out shopping, pushing them in wheelchairs.

...

Lifting heavy tables and chairs at workplace was inappropriate for one worker."

I note, however, there is no issue the applicant was lifting tables predominantly with the assistance of another worker.

27. Ms Goodman then took the Commission to the report of Dr Guirgis, treating surgeon found at page 45 of the Application. Dr Guirgis has supplied a number of reports in this matter, to both the applicant's general practitioner and to her solicitors. Referring to the applicant's current symptoms, Dr Guirgis took a history of her duties in some detail and then found as follows:
- "The current problems in her neck and back are related to the nature and conditions of her employment which had caused post-traumatic mechanical derangement of the cervical, thoracic and lumbar areas of the spine. It is caused by cumulative micro traumatic musculoligamentous sprain and strain."
28. Dr Guirgis also referred to symptoms and signs of patellofemoral pain syndrome together with symptoms and signs of supraspinatus tendinitis, subacromial bursitis with bunching and impingement in the right and left shoulders, and said the applicant's employment was a substantial contributing factor to all of the injuries.
29. Ms Goodman submitted the applicant's claim was by way of micro traumata caused by the nature and conditions of her employment, and not a claim as a disease, or aggravation thereof. Nevertheless, Ms Goodman submitted that if the Commission was minded to deal with the claim on a disease basis, then it would be satisfied the applicant's employment was the main contributing factor to an aggravation of those pre-existing conditions.
30. Referring to the radiological investigations in the matter, Ms Goodman noted the presence of pathological changes consistent with injury to the applicant's claimed body parts.
31. Ms Goodman submitted the respondent's lay evidence supports the applicant's contentions was to the nature and extent of her duties. She submitted the applicant's complaints as to the nature and extent of her duties have been consistent throughout the course of this claim.

32. In relation to the report from Dr Shatwell, Independent Medical Examiner (IME) for the respondent, Ms Goodman noted Dr Shatwell's view that the applicant's scoliosis was not caused by her work. She submitted it was not the applicant's case that it was. Moreover, Ms Goodman noted Dr Shatwell's comments at page 119 of the Reply referring to "traumatic" aetiology were not consistent with the basis on which the applicant makes a case. Rather, the applicant's case is that micro traumata caused her injuries rather than one large traumatic event. Ms Goodman also criticised Dr Shatwell's opinion on the basis that he failed to provide a basis for his conclusion that the applicant's ongoing problems are not work-related.
33. Contrary to Dr Shatwell's assertion at page 120 of the Reply that the applicant's conditions had not been definitively diagnosed, Ms Goodman submitted they in fact were by each of Dr Toomey, Dr Guirgis and the findings on radiological examination. She submitted the Commission would accept the opinion of Dr Guirgis as a treating doctor over that of Dr Shatwell on the above bases, and also given the great level of detail provided by Dr Guirgis compared with that of Dr Shatwell.

The Respondent's Submissions

34. Mr Hanrahan relied upon the opinion of Dr Shatwell. That is, the applicant suffered a strain in February 2018 due to lifting heavy tables, however, by November 2018, the effects of that strain had ceased.
35. Mr Hanrahan noted that the applicant had executed her statements without the assistance of an interpreter and had also provided a handwritten document, suggestive that she can speak English and understand it in a complicated manner, despite the presence of an interpreter throughout the proceedings. Had the applicant been cross-examined, I would place some weight on this submission, however, given the nature and extent of the applicant's duties are largely not in issue, I do not place a great deal of weight on that submission, despite its accuracy.
36. Mr Hanrahan submitted that because of the vagueness of the history provided by the applicant to the various doctors and the lack of correlation in relation to the body parts claimed other than her back and shoulders, the Commission must have regard to the objective evidence. Mr Hanrahan then took the Commission to the various radiological studies.
37. Concerning the CT scan of 16 February 2018, he noted there was some disturbance to the applicant's spine, but it was not major. In relation to the scan of the shoulders on 19 March 2018 at page 93 of the Application, Mr Hanrahan accepted there was evidence of tears and bursitis. He noted the applicant had undergone a whole-body scan which is at page 96 of the Application, which showed disc disease across her entire spine.
38. In relation to evidence of micro traumata as set out by Dr Guirgis, Mr Hanrahan submitted the Commission can only rely on events up to and including 15 February 2018 for such evidence, as after that date the applicant was on selected and modified duties. He submitted there was nothing particularly significant which demonstrated any change to the applicant's knees, nor was there any evidence which correlated that any such change with her duties.
39. In terms of the left shoulder bursitis, Mr Hanrahan referred the Commission to an ultrasound of February 2019 and submitted those findings were not sufficient to account for the applicant's alleged symptoms.
40. Mr Hanrahan also submitted it was significant the applicant omitted referring to a fall which she suffered at home on 12 July 2016, for which she saw her doctor the next day. At the time of that consultation with her GP, the applicant was suffering from pain in her neck and back including a 15 mm sacral bruise. He submitted the Commission would find it significant the applicant did not reveal that fall to her treating doctors or to the IMEs in this matter.

41. In summary, Mr Hanrahan submitted the applicant's injuries were, at the time they were suffered, muscular in nature and she is no longer suffering from the effects of them. Rather, any pathological change was due to congenital and degenerative issues. He noted the applicant must satisfy the Commission that injuries to her neck and knees were work-related. Mr Hanrahan submitted, quite appropriately in my view, that there was a work-related back problem, however, he submitted the effects of that had passed. Likewise, whilst there was the presence of pathology in the applicant's shoulders, Mr Hanrahan submitted that apart from her own statement there was no other evidence linking that pathology to her employment.
42. In summary, Mr Hanrahan submitted that at most the applicant's thoracolumbar spines will be referred for assessment to an AMS, and possibly her shoulders but there will be no referral of her knee or neck.

The Applicant's Submissions in Reply

43. Ms Goodman referred to the applicant's prior fall in July of 2016 and noted that by September of that year the applicant was working for the respondent and there was no suggestion that she had taken any time off work due to her prior back injury. Accordingly, she submitted there was no basis for a contention that the prior fall was a factor in relation to the back symptoms which the applicant suffered in 2018.
44. In relation to the left shoulder impingement, Ms Goodman noted the applicant had a prior scan which is found at page 68 of the Application on 19 March 2018 which showed bilateral impingement of the shoulders. In other words, she submitted it was apparent the applicant had been complaining of problems with both of her shoulders and had undergone a scan because of those problems by 19 March 2018.
45. Ms Goodman noted and Mr Hanrahan agreed that there would be no referral in relation to the applicant's knees to an AMS as there was no assessment which gave rise to a claim for whole person impairment in relation to them.

DISCUSSION

Injury

46. The applicant bears the onus of proving that her alleged injuries are work-related. In determining the cause of an injury, the Commission must apply a common-sense test of causation. In the workers compensation context, the appropriate test for causation was set out by Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 10 NSWCCR 796 (*Kooragang*) where his Honour said:

“The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’, is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death or injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. **What is required is a common-sense evaluation of the causal chain.** As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.” (at 810; emphasis added)

47. "Injury" is defined in s 4 of the 1987 Act as follows:

"In this Act: injury means

- (a) personal injury arising out of or in the course of employment,
- (b) includes a "disease injury", which means:

- (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

- (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and

- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

48. There is a useful review of the authorities concerning the issue of injury in *Castro v State Transit Authority* (NSW) [2000] NSWCC 12; (2000) 19 NSWCCR 496 (*Castro*). That case makes clear that what is required to constitute "injury" is a "sudden or identifiable pathological change". In *Castro* a temporary physiological change in the body's functioning (atrial fibrillation: irregular rhythm of the heart), without pathological change, did not constitute injury.

49. Liability for an employer to pay compensation pursuant to s 9 is limited by the requirement under s 9A that employment is a substantial contributing factor to the injury. Section 9A was introduced shortly after the High Court's decision in *Zickar v MGH Plastic Industries Pty Ltd* (*Zickar*) [1996] HCA 31; 187 CLR 310, and relevantly provides:

"No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.

Note: In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4."

50. Subsection (2) of section 9A provides examples of matters to be taken into account in determining whether employment was a substantial contributing factor. The list, which is not exhaustive, has six examples:

- (a) the time and place of the injury,
- (b) the nature of the work performed and the particular tasks of that work,
- (c) the duration of the employment,
- (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
- (e) the worker's state of health before the injury and the existence of any hereditary risks,
- (f) the worker's lifestyle and his or her activities outside the workplace.

51. Whether employment is a substantial contributing factor to an injury is a question of fact and is a matter of impression and degree (*Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29] (*Dayton*); *McMahon v Lagana* [2004] NSWCA 164 (*McMahon*) at [32]) to be decided after a consideration of all the evidence. See also *Workcover Authority of NSW v Walsh* [2004] NSWCA 186.
52. It is important to recognise in s 9A that the employment must be a substantial contributing factor to the injury, not to the incapacity, need for treatment or loss. In *Rootsey v Tiger Nominees Pty Ltd* [2002] NSWCC 48; (2002) 23 NSWCCR 725 Neilson CCJ stated, “employment must be a substantial contributing factor to the event causing the injury; that is, to the receipt of the injury, rather than to be a substantial contributing factor to the ongoing incapacity” (at [19]).
53. It is also important to note that the employment must be “a” substantial contributing factor to the injury, not “the” substantial contributing factor. The Court held in *Mercer v ANZ Banking Corporation* [2000] NSWCA 138 that there may be more than one substantial contributing factor to a single injury, of which employment only need be one (at [16]). The Court also excluded the relevance of a predisposition or susceptibility to injury, Mason P saying:

“Section 9A does not require that the employment must be ‘the’ substantial contributing cause, nor does it attempt to exclude predisposition or susceptibility to a particular condition (cf *University of Tasmania v Cane* (1994) 4 Tas R 156).” (at [27]).
54. In this matter, it is appropriate to deal with each claimed body part in determining whether the applicant has proven her case with regards to injury.

Lumbar spine

55. The applicant’s claim with respect to the lumbar spine is made out. An examination of the medical evidence shows clear contemporaneous complaints of symptoms in the lower back, together with radiological evidence of sudden pathological change in the immediate aftermath of the applicant’s first visit to her general practitioner in February 2018. A CT scan of 16 February 2018 confirms the presence of disc bulges at L3/4 and L4/5. In my view, such a finding is clear evidence of pathological change sufficient to ground a finding of injury pursuant to section 4. I note Mr Hanrahan quite appropriately conceded the fact of the injurious event to the lumbar spine. He also submitted the injury was due to the frank event in February 2018 and the effects of that injury had passed. I respectfully disagree with that submission, and note the consistent complaints of the applicant with regards to her lumbar spine, and prefer the views of Dr Guirgis as treating surgeon who, having had the history of the event in February 2018, nevertheless attributes the injury to the nature and conditions of employment.
56. I accept Ms Goodman’s submission that Dr Shatwell does not provide a convincing basis for his assertion that the effects of any injury to the lumbar spine have ceased. In my view, that opinion flies in the face of the radiological evidence which demonstrates clear pathological change, and I prefer the view of Dr Guirgis with respect to this injury.

Thoracic spine

57. I find the applicant suffered injury to her thoracic spine as a result of the nature and conditions of her employment with the respondent. In so finding, I accept she suffered prolapsed discs at T11/12 as set out in the report of Dr Abdalla dated 10 April 2018, and for the reasons set forth by Dr Guirgis in his report of 11 June 2019, namely micro-traumata over the course of her employment with the respondent. I accept the applicant’s evidence that her back was asymptomatic before she worked with the respondent, notwithstanding her visit to the doctor following her fall at home in mid-2016. As Ms Goodman noted, the applicant commenced working with the respondent shortly after that fall, and aside from one visit to her doctor in its immediate aftermath, no other mention of it is made in the clinical records.

58. In making this finding, I again reject the opinion of Dr Shatwell, who in my view has failed to demonstrate sufficient reasons to justify his view that the effects of any injury on the applicant have passed. Rather, he simply dismisses the applicant's complaints as being caused by underlying degenerative conditions, without saying why that is the case or providing any or adequate reasons as to why those changes have not been rendered symptomatic by the applicant's employment. The injury to the thoracic spine is, in my view, an aggravation of previously asymptomatic degenerative disc disease which has been rendered symptomatic by the applicant's duties with the respondent. The applicant sets out those duties, and I accept her evidence they were at times heavy, and involved strenuous bending, lifting and carrying.

Upper extremities (shoulders)

59. There is clear evidence of pathological change in the applicant's shoulders by way of supraspinatus tendinitis and bursitis. I accept Dr Guirgis' finding that this condition is consistent with the nature and conditions of the applicant's employment. I prefer the view of Dr Guirgis as he is the treating surgeon in this matter and provides detailed reasoning to support his findings, namely:

"For the shoulders, the nature and conditions of the patient's duties caused the muscles that stabilise the shoulder joint (mainly the rotator cuff muscles) to be weak and fatigued; the muscles would then fail to fully stabilise the joint. If the head of the humerus was not kept in place against the glenoid, abnormal forces would be placed upon the tissues surrounding the shoulder joint resulting in tendonitis and bursitis. The result of the inflammatory response would be scarring in the sub acromial space which would result in narrowing of the space between the rotator cuff and the coracoacromial arch above it, leading to impingement."

60. By contrast, Dr Shatwell again simply dismisses the applicant's complaints regarding shoulder symptoms as being caused by degenerative changes. He says her duties would not have caused any of the injuries of which she complains, but provides no analysis at all of those duties, nor does he set out in any detail an explanation as to how the duties she undertook are not responsible for her injuries. For these reasons, I do not prefer his opinion in relation to the shoulder injuries.

Lower extremities (knees)

61. I reject the claim for injury to both knees. I note those alleged injuries do not sound in a claim for permanent impairment compensation, but nevertheless they are injuries alleged in these proceedings, which also involve claims for weekly benefit compensation and for section 60 medical expenses. Dr Guirgis, treating surgeon, only refers to a "patellofemoral pain syndrome" and provides no evidence for finding it linked to the applicant's employment, whilst the general practitioner Dr Toomey only refers to "joint pain" with respect to the knees. Unlike the thoracic and lumbar spines together with the shoulders, in my view there is no contemporaneous pathological change demonstrated which is sufficient to give rise to a finding of injury to the knees pursuant to section 4 of the 1987 Act, nor does Dr Guirgis provide sufficient bases for finding there is an aggravation of underlying disease processes in the knees caused by the applicant's employment.
62. Accordingly, there will be an award for the respondent with respect to this claimed injury.

Cervical spine

63. I also reject the claim for injury to the cervical spine (neck). There is no evidence of any neurological deficit or indeed of any other pathological sign which cannot be explained by degenerative changes. To that extent, the cervical spine in my view is different to the thoracic and lumbar spines. An applicant must discharge their onus. As with the claims for injuries to the knees, there is, in my view, insufficient evidence of a contemporaneous or objective nature to ground a finding of injury pursuant to section 4 of the 1987 Act. Likewise, I am not satisfied to the requisite standard that the applicant's employment was the main contributing factor to any aggravation or exacerbation of an underlying disease process in the applicant's cervical spine.
64. Dr Guirgis recorded guarded movements and tenderness in the cervical spine in his 2019 report, however, normal lordosis was preserved when he examined the applicant. There is a scan from September 2018 which reveals loss of normal lordosis, though that must have resolved when Dr Guirgis reported in February 2019. Moreover, there is a lack of contemporaneous complaint surrounding the cervical spine, unlike the shoulders and other levels of the applicant's spine. For example, Dr Abdalla makes no mention of the cervical spine in his question and answer report to the insurer in April 2018, and there is no mention of a cervical spine injury.
65. In my view, the applicant has not demonstrated to the requisite standard that she has suffered a workplace injury to her cervical spine, and there will be an award for the respondent with respect to this claimed injury.

SUMMARY

66. In light of the above reasons, the Commission will make the following findings and orders:

- (a) The applicant suffered injury to her lumbar spine, thoracic spine and both upper extremities (shoulders) as a result of the nature and conditions of her employment with the respondent between September 2016 and February 2018, with a deemed date of injury of 15 February 2018;
- (b) Award for the respondent on the claim for injuries to the cervical spine and lower extremities (knees);
- (c) The claim for permanent impairment compensation will be remitted to the Registrar for referral to an AMS for determination of the permanent impairment arising from the following:

| | |
|------------------------|--|
| Date of injury: | 15 February 2018 (deemed) |
| Body systems referred: | Thoracic spine, lumbar spine, left upper extremity (shoulder) and right upper extremity (shoulder) |
| Method of assessment: | Whole person impairment. |

(d) The documents to be referred to the AMS for consideration are to include:

- (i) This Certificate of Determination and Statement of Reasons;
- (ii) The Application and attachments;
- (iii) The Reply and attachments;
- (iv) The applicant's AALD dated 19 August 2019 and attachments;
- (v) The respondent's AALD dated 19 August 2018 and attachments;
- (vi) The applicant's second AALD annexing a supplementary statement of the applicant dated 27 August 2019 and marked exhibit A;

- (vii) A payslip for the applicant for the period 19 August 2017 to 1 September 2017, admitted without objection and marked exhibit B.
- (e) The claims for medical expenses and for weekly benefits are to be listed for a telephone conference before me upon the Commission issuing the MAC.
- (f) I note the legal representatives of both parties are to have an uplift allowing for the complexity of this matter, to the maximum amount allowed under the Regulations.

