WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5180/19**
Applicant: **Andreas Souros**
Respondent: **Redaze Pty Ltd t/as Claudios Quality Seafoods**
Date of Determination: **7 February 2020**
Citation: **[2020] NSWWCC 37**

The Commission determines:

1. There is an award for the respondent.

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. Mr Andreas Souros, the applicant brings an action against Redaze Pty Ltd t/as Claudio's Quality Seafoods, the respondent.

2. Mr Souros seeks lump sum compensation in respect to injury to his right upper extremity and cervical spine. The injuries were alleged to have occurred on 14 July 2016. A s 78 notice issued on 9 August 2019 and the Application to Resolve a Dispute (ARD) and Reply were duly lodged.

ISSUES FOR DETERMINATION

3. The parties agree that the following issue remains in dispute:

    (a) Was the condition of Mr Souros' cervical spine caused or aggravated by injury on 14 July 2016.

PROCEDURE BEFORE THE COMMISSION

4. This matter was heard on 25 November 2019 at Sydney. The applicant was represented by Ms Jennifer Hillier of Counsel, and Mr Luke Morgan of Counsel appeared for the respondent.

5. 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;

    (b) Reply and attached documents.

Oral Evidence

7. No application was made for oral evidence.

FINDINGS AND REASONS

8. Part 4 of the ARD described the injury on 14 July 2016 as follows:

    > "On 14 July 2016, the worker was injured while attending to his duties as a fish filleter. On the date of injury, the worker was attending to his usual duties of filleting fish and cleaning boxes when he felt a sudden and sharp pain in his right shoulder and neck."

9. On 27 August 2018, a s 74 notice issued, accepting liability for the injury to the right shoulder, but denying liability of injury to the neck. A s 78 notice issued on 9 August 2019 confirming that notice. The issue before me is accordingly confined to whether Mr Souros has suffered an injury to his neck/cervical spine.

10. Mr Souros made a statement on 30 September 2019. He gave a thorough description of his work duties as a fish filleter for the respondent. He recounted a fairly extensive previous claims history. Amongst those claims was a reference to symptoms in his neck in 2003 which he continued to experience through to 2009, he said.[1] He said that in 2010 he entered into a settlement regarding injuries sustained to his neck and back in 2002, 2003 and 2004, which we will return to shortly.

11. Mr Souros said that he returned to the workforce as a truck driver in 2011 for a year. He then worked for six months or so in a scrap metal yard before being employed full time by Claudio's Quality Seafoods in 2013. He worked there until he had hernia surgery in 2015, which put him off work for three months. He returned to Claudio's for a further three months, and then resigned to open his own business. That did not prove to be financially successful, and after five months or so he returned to Claudio's, where he worked for a further year until he commenced with the respondent in March 2016.[2]

12. When he returned to work in 2011, his neck and back stabilised and had not been causing him any further difficulties, he said.

13. As to the injury itself, Mr Souros said[3]:

> "[19] On 14 July 2016, I sustained injuries to my right shoulder and neck while in the course of employment working as a fish filleter with Redaze. I also developed shoulder tendinitis and bicep tendinitis. I experienced neck pain and radiculopathy down my right arm and with numbness into my fingers."

14. At paragraph [9] of his statement Mr Souros described in some detail the duties he was required to perform. He said:[4]

> "[9] While working as a fish filleter at Redaze, my duties included, but were not limited to the following: -
> a. Scaling, gutting and filleting of fish (about forty (40) to fifty (50) boxes of fish a day);
> b. Transporting ice to and from shelves;
> c. Shovelling ice (between eight (8) to twelve (12) boxes per day);
> d. The general work associated with the preparation of fish;
> e. Preparing fish for orders;
> f. Lifting and carrying between forty (40) to fifty (50) boxes of fish per day (which weighed between 30 – 35 kg each) and filling orders for shop window stock;
> g. Cleaning market tubs/boxes;
> h. Throwing out rubbish;
> i. Setting up and packing away filleting bench;
> j. Picking up and dragging fish with a hook and taking them to the fish filleting bay;
> k. Stacking fish into boxes which were about thirty (30) to thirty-five (35) kilograms each and then storing them back into the cool room after filleting;
> l. Repetitive manual lifting of fish; and
> m. Unloading stock from shipping container that was transformed into a cool room involving between twelve (12) to fourteen (14) boxes of salmon and other fish and was difficult to move around due to the limited space."

[1] ARD page 3 [16]
[2] ARD page 1
[3] ARD page 3 [19]
[4] ARD page 2

15. Mr Peter Lazaris was employed as Café Manager at the Fish Market Café and had known Mr Souros for some years. On 12 September 2017, he supplied a statement to the respondent saying that to the best of his recollection, Mr Souros had complained about his shoulder when he bought his usual morning coffee on 14 July 2016.[5] Mr Lazaris was a friend of Mr Souros and over the previous four years or so Mr Souros had complained to Mr Lazaris that he was under a lot of pressure in the shop, where he would be cutting more boxes of fish than his other colleagues, and that he was working extremely long hours. He also complained of being bullied.

16. Mr Angelo Zafiris also supplied a statement dated 12 September 2017[6]. Mr Zafiris was employed as a truck driver for the respondent. He had known Mr Souros for about four years. He was informed by Mr Souros that he had sustained an injury in about July 2016. He could not remember Mr Souros complaining about pain in his right shoulder prior to that date, and he, like Mr Lazaris, reported that Mr Souros was a hard worker who performed the more arduous tasks of the business, and who worked under pressure. Although Mr Zafiris did not identify the injury, I infer from his comment about the right shoulder that Mr Souros complained about an injury to that area.

Medical evidence

17. The day following the accident, 15 July 2016, Mr Souros was sent by his general practitioner, Dr John Criticos for an ultrasound and MRI of his right shoulder.

18. Dr Criticos referred Mr Souros to see Dr Wade Harper, who reported on 10 November 2016. The history he took was that Mr Souros "presented with a four month history of right shoulder pain, loss of function, weakness and stiffness". He related the onset to repetitive fish filleting and manual work.[7] No complaint was made about the cervical spine - indeed Dr Harper would appear to have examined it in examining Mr Souros' right shoulder, as he said:[8]

> "On examination, Andreas localised his pain over the superior and lateral aspects of the shoulder. He was point tender over the acromioclavicular joint and rotator cuff insertion. He had a painful arc with positive impingement signs. He had symmetrical external rotation in adduction, excluding a capsulitis. He had restriction of internal rotation and forward elevation that could be improved passively. The cross body adduction signs reproduced his superior shoulder pain. *With cervical spine motion there was no right shoulder pain*." (Emphasis added).

19. I infer accordingly that no complaint about the neck was made by Mr Souros when it was examined as part of the shoulder enquiry. Dr Harper recommended an arthroscopic subacromial decompression if conservative measures did not succeed. Surgery was eventually carried out on 2 May 2017.

20. In his statement, Mr Souros said that he saw Dr Harper following the surgery on 15 May 2017, 19 July 2017, 30 October 2017, 26 February 2018 and 25 June 2018. In a report dated 26 February 2018, Dr Harper noted improvement, but that Mr Souros was unhappy with the outcome if the surgery. Dr Harper said:[9]

> "… He complained of associated numbness in the C6 nerve root distribution. He remained very frustrated by his injury and the recovery process. He continued to see a psychologist. I expect his movement to continue improving. I encouraged him to be more aggressive with stretching exercises. I planned to review him in 4 months."

[5] Reply page 21
[6] Reply page 23
[7] ARD page 27
[8] ARD page 28
[9] ARD page 137

21. Mr Souros was sent for physiotherapy to the Crown Street Physiotherapy Clinic. He attended Mr Yo Han Ko, whose notes were lodged.[10] The first attendance was on 3 August 2016, and Mr Souros was seen regularly until 7 February 2018. On 3 August 2016, Mr Ko's notes recorded:[11]

> **"Patient progress report**
> c/sp disc bulging
> patient is c/o upper back pain and neck pain
> off work for 3/52
> left shoulder behind scapular, felt pinch / / h/p reduce pain but if moving pain and pinching on t/sp
> works comp".

22. The next entry was dated 6 August 2016:

> **"Presenting complaint**
> Fish filleter started 4 years ago, for 2 years (had hernia) , then went solo for a few months, and then returned to employer for fish filleter , informed employer that he had pre-existing injuries but was forced to work. then was discharged, lost entitlement, was not provided paperwork for dismissal or paperwork for tax, pushed beyond limits,
> Employer: Claudio seafoods, Redaze holdings , Insurance company: CGU
> **Complaint history**
> 14/7/26 felt shoulder sore at work, found fluid from US,
> pain between shoulder blades, had cortisone injection in right shoulder - following Thursday, helped but not l00% between shoulders
> **Medical history**
> protruding disc in neck and lower back, has workers comp before, 2002, 2003 has carpal tunnel, and had tennis elbow, had a few injections for the elbow".

23. I assume that the date "14/7/26" was intended to read "14/7/16."

24. During the course of physiotherapy, Mr Ko recorded complaints about Mr Souros' neck. In chronological order they occurred on 27 September 2017 (when Mr Souros thought he was overusing his left arm), 15 November 2017 (a complaint of neck pain), and 6 December 2017 ("C3-4 Z joints" causing pins and needles).

25. Following Mr Souros' dissatisfaction with the shoulder surgery outcome, he was referred to Dr Mobbs, and at this point it becomes necessary to examine in more detail the prior neck and back injuries. Mr Souros said:[12]

> **"Previous claims history**
> [11] In 2002, while working as a fish filleter, I developed lower back pain and left sciatica pain while attempting to pick up a large tuna. In the same year while shovelling ice at work, I began develop numbness in my right arm.
> [12] In 2003, I was filleting fish and had difficulty pushing a knife through the fish and developed pain in my upper back near the scapular region and developed cervical spine stiffness.
> [13] Although in 2003, I had problems with my neck and lower back, but I only ever received conservative treatment.
> [14] In 2004, I slipped on a puddle of water and injured my lower back with pain radiating down to my thoracic spine.
> [15] In 2006, I received a lump sum payment of $20,000.00 when I sustained injuries while working with De Costi Bros Seafood (Holdings) Pty. Ltd.

[10] ARD page 43
[11] ARD page 126
[12] ARD page 2

[16] Following various consultations with doctors between 2003 to 2009, I continued to experience problems with my neck, right arm, lower back, and legs. However, at the request of my previous lawyers, I was advised to accept a pay-out for my neck dysfunction at the time. I relied on my previous lawyers' advice at the time.

[17] In 2010, I entered a settlement with De Costi Seafood (Holdings) Pty Limited t/as De Costi Seafood Bros Seafood in the amount of $250,000.00 in relation to injuries sustained to my neck and back in 2002, 2003 and 2004."

26. The Terms of Settlement were lodged by the respondent and were dated 19 January 2010.[13] The Particulars claimed injuries between 2002 and 2004, together with a claim that the nature and conditions of employment had also caused injury.

27. Dr Vijay Panjratan was retained as Mr Souros' medico-legal referee in that matter. His report was dated 16 June 2004, and he noted that Mr Souros was "very, very sore" with wide ranging symptoms which included the neck.[14] Dr Panjratan reported:[15]

> "When he touches the right side of his neck he experiences pain radiating into the right upper arm."

28. Investigations of the cervical spine referred to by Dr Panjratan included a CT scan and an MRI scan. The CT scan, taken on 10 April 2003, showed pathology at C3/4 and C6/7.[16] The MRI scan was taken on 2 June 2003. It showed:[17]

> "There is a small left paracentral focal disc protrusion at the C3-4 level, indenting the thecal sac anteriorly. The lateral margin of this focal disc protrusion abutts the left C4 nerve root as it enters the neural forearm.[sic – foramin]
>
> There is a small right sided focal disc protrusion at the C5-6 level, abutting the anterior thecal sac margin and the right C7 nerve root proximally.
> The spinal canal is capacious and no abnormal bright signal is seen within the cervical cord at the C3-4 and C5-6 levels."

29. Mr Souros said:[18]

> "[18] In 2011 when I first returned to work the injury to my neck and back had stabilised and it wasn't causing me any more problems. I was not having any regular treatment or taking any medication. I also re-commenced working as a fish filleter in 2013 with Claudio's Seafoods. I was not in any pain, I felt up to doing the work, I was not having any medical treatment and was not taking any medication. I did not have any difficulties performing the role of a fish filleter up until 14 July 2016."

30. However, on 2 March 2011 Dr Ralph Mobbs, Neurosurgeon reported to Dr Criticos that he had examined Mr Souros:

> "…who presents with a number of problems including neck pain that is worse on the right, and low back pain with right sided sciatica. On an average day he rates his aches and pains as 4/10. He has had this problem for many years since a work related Incident in 2004. He takes a combination of Mobic and Tramal."[19]

[13] Reply page 130
[14] Reply page 87
[15] Reply page 90
[16] Reply page 82
[17] Reply page 84
[18] Statement ARD page 3
[19] Reply page 142

31. Dr Mobbs reported again on 31 May 2011, following MRI scanning. He said:[20]

> "The MRI scan is certainly indicative of why he has been having problems with neck symptoms, arm symptoms and some early problems with his gait dysfunction.
> ……
> On a repeat examination today, he certainly has increased reflexes throughout in both the upper and lower extremities. This is likely due to the cord involvement at C3/4. There is no sustained clonus at this stage. …
>
> I have discussed with Andreas that I am of the opinion that he should have an ACDF procedure at C3/4 and C5/6.
>
> It would be best not to use a plate but rather to use interbody grafts and to place him in a collar such as a Miami J for eight weeks post--op. Andreas understands that he needs to stop smoking before this intervention, I will place him on the waiting list and he is aware that it may take quite some months before his turn comes up."

32. The MRI scan was taken on 24 May 2011, and Dr Mobbs described its findings in the same report (no report by the radiologist was lodged):

> "C3/4. He has a broadbased posterior disc bulge with degenerative disc disease and central canal stenosis. On the sagittal sequences it appears he has some early signal change in the cord.
>
> C5/6 - Again he has degenerative disc disease with a broadbased disc bulge, foraminal stenosis and canal stenosis."

33. The proposed surgery did not proceed, and Dr Mobbs did not see Mr Souros again until the referral following Mr Souros' dissatisfaction with Dr Harper following the shoulder surgery of 2 May 2017.

34. Although there were the incidental references to neck pain by Mr Ko to which I have referred, the first time any relationship between neck pain and the incident of 14 July 2016 was suggested was in the report of Dr Ralph Mobbs on 4 July 2018, who said:[21]

> "Unfortunately, with, his shoulder issues, this has impacted negatively on his neck. He now presents with a number of concerning features consistent with cervical myelopathy."

35. Dr Mobbs had before him an updated MRI scan dated 24 May 2018. The radiologist's report was not tendered, but Dr Mobbs described it. He said:[22]

> "The MRI scan performed 24/5/18 reveals changes at C3/4 and *CS/6.* At C3/4 he has cord signal change and at C5/6 he has advanced degenerative disc disease with canal stenosis, without cord signal change."

36. Dr Mobbs repeated his advice of 31 May 2011, that Mr Souros should be treated surgically with regard to his neck.

37. Mr Souros also relied upon an opinion of Dr Noel Dan, Neurosurgeon dated 12 October 2018. Dr Dan had access to the reports of Dr Mobbs, and commented on the condition of Mr Souros' cervical spine. He said:[23]

> ***"Injuries:***

[20] Reply page 143
[21] Reply page 160
[22] ARD page 24
[23] ARD page 130

It is clearly demonstrated that Mr Souros had the cervical spinal lesion in 2011 well before the subject matter.

Whilst, on the basis of the available reports, it seems that the lesion al C3/4 has progressed it is progression which has occurred over a period of some seven years and it is difficult to see that it could be attributable to the nature and conditions of his work as suggested.

Mr Souros had the right shoulder dysfunction and, on balance, I think it is likely that that was associated with the nature of his work as I could not identify any evidence that it pre-existed.

The suggestion that the cervical changes were aggravated by the shoulder injury is difficult to agree with."

38. Dr Stephen Buckley, Consultant Physician in Rehabilitation Medicine , also provided a report dated 25 March 2019. Dr Buckley took a general and vague history of both the injury, and Mr Souros' past history. Dr Buckley noted that Mr Souros had been "paid out" for neck and back trouble in "2003." Dr Buckley took a history that Mr Souros had seen Dr Mobbs in 2018, but was unaware that Dr Mobbs had seen Mr Souros in 2011, and had recommended surgery then.

39. Dr Buckley diagnosed a cervical intervertebral injury with spinal cord compression and mild myelopathy. He took a history that Mr Souros had "suffered a sore shoulder" on 14 July 2016, and a consistent history of the surgery with Dr Harper on 2 May 2017. He said:[24]

> "Post-operatively he had physiotherapy and rehabilitation, and eventually Dr Harper said that the failure of improvement was due to his neck problems , or was possibly due to his neck problems."

40. Dr Buckley noted that Mr Souros had told him he had "discs and stenosis" since 2011:

> "…but thereafter there were further delays and eventually an MRI was obtained and he was referred to Professor Ralph Mobbs and Dr Pope, who confirmed that there were neck problems as well as shoulder problems."

41. He said:[25]

> **"ATTRIBUTABILITY**
>
> There is some evidence that he had neck trouble back in 2003, but was able to return to work during 2013 and worked for several years before the onset of new problems. In my opinion, it remains most likely that the work he was undertaking contributed to the development of spinal cord compression and myelopathy in the cervical spine and development of traumatic capsulitis in the shoulder. There is no prior evidence for such impairment."

42. In a later report of 8 May 2019, Dr Buckley supplied a Whole Person Impairment (WPI) assessment of 27% for the cervical spine, and 10% for the right upper extremity. Dr Buckley said:[26]

> "These injuries were sustained after he developed a sore shoulder while performing his work as a laborer [sic]."

[24] ARD page 223
[25] ARD page 228
[26] ARD page 235

43. On 13 November 2018, Dr R E Pope, Neurosurgeon, reported to Dr Criticos[27].

44. Dr Pope took a broadly consistent history of Mr Souros' health problems, noting that he went off work in 2016 for a shoulder injury. He also noted that Dr Mobbs had recommended surgery in 2011 when Mr Souros' neck condition had worsened. Dr Pope saw an MRI scan of the cervical spine taken "this year," by which I infer he was referring to the scan of 24 May 2018 which was before Dr Mobbs on 31 May 2018. He also took a history that the neck problems had worsened since 2011 "and particularly after 2016…"

45. Dr Pope's interpretation of the MRI scan was:[28]

> "[The MRI scan] showed C3/4 disc herniation with myelomalacic change and cord compression. There was canal stenosis at C5/6 and C6/7 with bilateral foraminal stenosis."

46. Dr Pope agreed that the surgery proposed by Dr Mobbs was reasonably necessary.

47. The respondent relied on the opinion of Dr John Bentivoglio dated 12 July 2019.[29] The history taken was that although Mr Souros went off work on 14 July 2016 his shoulder symptoms had been developing over the previous two or three days. Mr Souros told Dr Bentivoglio that he had experienced neck pain "right from the outset."

48. Dr Bentivoglio thought that Mr Souros had experienced a recurrence of his earlier neck symptoms of the early 2000s and 2011. Dr Bentivoglio noted that there was no complaint of neck symptoms following the injury to the shoulder, notwithstanding Mr Souros' insistence that he had made such complaints. His diagnosis was:

> "Diagnosis, neck; possible aggravation caused to pre-existing degenerative changes present in his cervical spine. I would consider however his neck complaint is a natural progression of the damage that he has had to his cervical spine in the past. The diagnosis is made on the history provided by Mr Souros, physical examination, as well as MRI scans and CT scan findings dating from 2003 up to 2018. I would consider the only disability that has resulted around 14 July 2016 was in relation to his shoulder."

SUBMISSIONS

Mr Morgan

49. Mr Morgan referred to the pleadings in this matter at Part 4 of the ARD. He submitted that the applicant had failed to satisfy his onus to prove injury to the cervical spine. The applicant had pleaded that he had suffered a frank injury, when the evidence was overwhelming that the symptomatology in his cervical spine was long standing. There had been no assertion that the provisions of s 4(b)(ii) of the 1987 Act applied and that accordingly the applicant was relying on a personal injury pursuant to s 4(a) of the 1987 Act.

50. Mr Morgan referred to the treating history, submitting that no history had been given of any insult to Mr Souros' neck, and that all contemporaneous complaints were concerned with the shoulder. He submitted that the evidence showed that the pathology in the cervical spine was well in place before 14 July 2016.

51. Mr Morgan submitted that the reports of Dr Panjratan and other contemporary reports of the early 2000s confirmed the presence of that pathology. Mr Souros could not be accepted when he said he had no more problems from his neck and back in 2011, as Dr Mobb's reports during 2011 demonstrated.

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[27] ARD page 132
[28] ARD page 132
[29] ARD page 252

52. Mr Morgan said that the references by Mr Ko to neck complaints were irrelevant, as they did not identify any cause, and were in the context of a man with significant pre-existing symptoms.

53. I could not accept Dr Buckley's opinion, it was submitted. He failed to take the history that Mr Souros' neck symptoms were so severe in 2011 that surgery was recommended – basing his opinion rather on a false assumption that several years had passed before the onset of new problems. Dr Buckley's opinion was no more than an ipse dixit.

54. The preferable opinions were those of both Dr Dan and Dr Bentivoglio, neither of whom supported the claim of injury to the cervical spine.

55. In that case, Mr Morgan submitted, the applicant had failed to establish an entitlement to lump sum compensation, as the 10% WPI assessed by Dr Buckley would not cross the threshold for a referral to an AMS.

Ms Hillier

56. Ms Hiller submitted that the reason the neck was not investigated for two years was that the medical practitioners either mistakenly treated the right shoulder over that time, or that it arose as a consequence of that treatment.

57. It was only when there was no improvement following surgery to the right shoulder that it was suspected that the neck was the cause of the symptomatology, the evidence was said to show. From 19 July 2017 Dr Harper was reporting that the surgery results were unsatisfactory. It was not until the opinion of Dr Mobbs was obtained on 4 July 2018 that the pathology in the cervical spine was identified as being the cause of Mr Souros' disability.

58. However, Ms Hillier contended that the notes of Mr Ko demonstrated that Mr Souros was also complaining of symptoms in his neck in September, November and December of 2017, which tended to support the later opinion of Dr Mobbs.

59. I would be satisfied that the MRI of 24 May 2018 demonstrated the basis for Dr Mobbs' opinion, and that the cervical condition either arose as a result of the shoulder treatment, or indeed at the time of the shoulder injury.

60. Ms Hillier argued that I would discount the opinion of Dr Dan, as he did not have access to the earlier MRI scans taken at the time of Dr Mobbs' report of 31 May 2011. Ms Hillier submitted that Dr Pope in his opinion of December 2018 found increased pathology at C6/7. This pathology had not been apparent in the 2003 scans.

Mr Morgan in reply

61. Mr Morgan replied that Ms Hillier had developed a theory regarding the increased pathology without any expert medical evidence to support it. In any event, her theory was also devoid of medical support, as the 2003 scan did indeed demonstrate pathology at C6/7.

DISCUSSION

62. Section 4 of the 1987 Act provides relevantly:

> **"injury"** -
> (a) means personal injury arising out of or in the course of employment,
> (b) includes a
> **"disease injury"** , which means--
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

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

63. Mr Souros' claim was pleaded at Part 4 of the ARD as a personal injury, or "frank" injury as it is commonly called. Whilst the nature of the injury is a matter for the Commission, a failure to plead correctly whether an injury falls within either sub-paragraph can often be viewed as a technicality, unless some prejudice can be shown to the respondent. I agree that Mr Souros' case has been wrongly pleaded, but do not regard that error to be determinative. The respondent has raised substantive arguments regarding the onus of proof which are more relevant to the outcome.

64. I have some difficulty in accepting all that Mr Souros claimed in his statement. It was taken well over three years after the event, and there is a danger that a person attempting to recollect the detail of matters that occurred so long ago might unwittingly reconstruct things to his advantage, and forget details which subsequently become significant.

65. In Mr Souros' case, the impression given by his evidence regarding his return to work following the settlement of his common law case on 19 January 2010 is that he was not having any further problems with either his back or his neck. That impression is underlined by the impressive history he gave of his work activities between 2011 and 14 July 2016. However, the stabilisation of his condition, as he described it, did carry with it some concern about his neck, as evidenced by the reports of Dr Mobbs dated 2 March 2011 and 31 May 2011. The omission by Mr Souros of that history has significant consequences, as will be seen.

66. The claim form, which had been signed by Mr Souros on 3 August 2016, described the onset of the injury as:[30]

"Worked Monday to Thursday
At (indecipherable) 10.30am Thursday 14/7/16
Pain in shoulder unbearable."

67. An inference that arises from that description is that the pain had been present over some of the preceding days in the shoulder. However, no mention was made of Mr Souros' neck, which the evidence demonstrates had been a constant problem since 2003, and in respect of which Dr Mobbs had found spinal cord involvement in 2011.

68. Ms Hillier referred to the occasional references within the notes of Mr Ko, the physiotherapist. Whilst the first entry of 3 August 2016 mentioned cervical spine bulging, and a complaint was recorded of upper back and neck pain, Mr Ko's notes are not primary evidence. In *Mason v Demasi*[31] *(Mason)* Basten JA at [2] urged caution when dealing with inconsistencies based upon clinical notes. He said:

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

(a) the health professional who took the history has not been cross-examined about:

(i) the circumstances of the consultation;

[30] Reply 16
[31] [2009] NSW CA 227

(ii) the manner in which the history was obtained;

(iii) the period of time devoted to that exercise, and

(iv) the accuracy of the recording;

(b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;

(c) the record did not identify any questions which may have elucidated replies;

(d) the record is likely to be a summary prepared by the health professional, rather than a verbatim recording, and

(e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning, which will each affect the content of the history."

69. *Mason* has been cited with approval in the Commission in *Qannadian v Bartter Enterprises Pty Limited*[32]where President Judge Keating said;

> 35. *Mason* is from a line of appellate authority dealing with the use of clinical notes in the fact finding process. A number of these authorities are referred to in *Winter v New South Wales Police Force* [2010] NSWWCCPD 121 (which was reversed on appeal, on a different basis), where Roche DP at [183] said:
>
> > "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349 at [54]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]; *King v Collins* [2007] NSWCA 122 at [34]–[36])."
>
> 37.The authorities (including *Mason*) do not preclude the use of such evidence in the fact finding process, nor do they provide that such evidence should not be relied on, in the absence of evidence from the author of the clinical notes. The authorities require the use of caution by a fact finder, including having regard to the circumstances in which such notes are brought into existence."

70. I have some hesitation is accepting the evidence of Mr Ko as establishing that Mr Souros injured his neck on 14 July 2016. In that first entry of 3 August 2016, Mr Ko identified the wrong shoulder, and I infer that it was well known to Dr Criticos by virtue of the report of Dr Mobbs to him on 31 May 2011 that Mr Souros suffered from disc bulging in his cervical spine. Dr Criticos had referred Mr Souros to Mr Ko. The referral was not lodged, but it is likely that Mr Souros' pre-existing conditions would have been advised to Mr Ko as essential background. Moreover, the complaints recorded spoke of pain in the upper back and the neck, without any cause being mentioned. The entry of 6 August 2016 revealed that Mr Ko knew that, as a matter of medical history, Mr Souros suffered protruding discs in his neck and lower back, but described the "presenting complaint" as being concerned with the right shoulder and making no reference to the neck.

[32] [2016] NSWWCCPD 50

71. I do not regard the complaints recorded by Mr Ko on the three occasions mentioned as being of assistance to Mr Souros' case. I described them as 'incidental' as there was no suggestion that they were related to the injury. Moreover, they were not made until over a year following 14 July 2016, and without expert evidence that they were relevant, were too remote in time for any inference to be drawn that there was any such connection.

72. It was submitted that the first time any connection between Mr Souros' neck condition and the injury was on 4 July 2018 by Dr Mobbs. It may be that the complaint by Mr Souros of associated numbness in the C6 nerve root distribution to Dr Harper on 26 February 2018 was the first complaint made that suggested the events of 14 July 2016 had caused a neck problem, but Dr Harper made no comment on that complaint, and Mr Souros may have been casting around for a reason that his shoulder surgery had not been successful. In any event, the complaint, coming as it did over a year and a half later, makes it unlikely that there was any medical basis to establish a causal link with the subject injury.

73. Ms Hillier developed a submission that there had been a deterioration in the pathology in Mr Souros' cervical spine. This was said to flow from Dr Mobb's opinion that the shoulder issues had impacted negatively on Mr Souros' neck.

74. Ms Hillier referred to an MRI scan referred to by Dr Mobbs dated 24 May 2018, and contended that it showed fresh pathology at C6/7, which Dr Pope had referred to. However, pathology was in fact detected in the MRI of 2003, which showed a small right sided focal disc protrusion at the C5-6 level, abutting the anterior thecal sac margin and the right C7 nerve root proximally.

75. Moreover, Dr Pope's interpretation that there was pathology at C6/7 was based upon the MRI scan obtained by Dr Mobbs on 24 May 2018. Dr Mobbs did not refer to C6/7, so that there is some controversy in any event as to its findings.

76. Ms Hillier's point was well argued, but it suffered from the defect identified by Mr Morgan, that her hypothesis had no medical support. I therefore reject that submission.

77. Mr Souros relied on the report of Dr Buckley, Consultant Physician in Rehabilitation Medicine. I am unable to accept his opinion, as it was based on the false assumption that that there was no evidence that spinal cord compression or myelopathy pre-existed the subject injury. He was unaware that Mr Souros had been seen on two occasions in 2011 by Dr Mobbs and that an MRI scan had been taken which demonstrated cord involvement at C3/4, for which Dr Mobbs had recommended surgery at that time. Dr Buckley's reference to "discs and stenosis" in 2011 appeared to be part of the history taking, the true significance of which was not appreciated by him.

78. Moreover, Dr Buckley assumed that the nature of the injury had been alleged as a s 4(b)(ii) injury – that is to say, the aggravation of a disease condition, as he attributed the onset of Mr Souros' problems to the work he had been undertaking. Whilst Dr Buckley noted that the injuries were sustained following the onset of the shoulder problem, he failed to explain how the injury to the neck was occasioned on the date of injury, 14 July 2016.

79. Further, Dr Buckley did not explain how the evidence showing that Mr Souros complained that he had injured only his shoulder on 14 July 2016 also inculpated an injury to the cervical spine. He was mistaken in his assumption that Dr Harper had told Mr Souros that possibly the neck problems were the cause of his failure to improve from his shoulder surgery.

80. The claim form, Mr Ko's description of Mr Souros' "presenting complaint", the evidence of Messrs Lazaris and Zafiris, the history taken by Dr Harper, and the fact that Dr Criticos only ordered investigations of the right shoulder the following day, 15 July 2016, were all evidence that the right shoulder only had been injured on 14 July 2016.

81. I prefer the evidence of Dr Dan, whose qualifications as a Neurosurgeon I find to be more appropriate, with respect, to assess an injury of this type, than a Consultant Physician in Rehabilitation Medicine, which is Dr Buckley's specialty. Dr Dan was fully conversant with the relevant history of Mr Souros' cervical spine. He noted that the C3/4 lesion had progressed since 2011, and found that it was "difficult to see how it could be attributable to the nature and conditions of [Mr Souros'] work". He said that it was difficult to agree that the cervical changes were aggravated by the shoulder injury. For the reasons I have given, I agree with Dr Dan.

82. I also accept the opinion of Dr Bentivoglio. He quite properly allowed for the possibility that Mr Souros' work had aggravated the pre-existing changes, but thought rather, as did Dr Dan, that the evidence demonstrated that the neck complaint was a natural progression of the damage Mr Souros' neck had sustained in the past.

83. For the reasons given above, I concur with that latter view.

84. There will therefore be an award for the respondent in relation to the claim for injury to the cervical spine. The assessment of the right shoulder injury by Dr Buckley was 10% WPI. That is below the threshold for an entitlement to lump sum compensation, and accordingly the claim for lump sum compensation for injury to the right shoulder also fails.

SUMMARY

85. There is an award for the respondent.