

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 1975/20
Applicant: Eulalia Amate Coppin
Respondent: Woolworths Group Limited
Date of Determination: 3 July 2020
Citation: [2020] NSWCC 221

The Commission determines:

1. The applicant sustained an injury to her cervical spine as a result of the nature and conditions of her employment with the respondent between 1997 and April 2019 pursuant to s 4(b)(ii) of the *Workers Compensation Act 1987*.

The Commission orders:

2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment as follows:

Date of injury: 1997 to April 2019 (12 November 2019 deemed)
Body parts: Left upper extremity (shoulder)
Cervical spine
Right upper extremity (shoulder) (consequential)
Method: Whole Person Impairment.

3. The materials to be referred to the AMS are to include the Application to Resolve a Dispute and all attachments; the Reply and all attachments other than the report of Dr Andrew Keller from the heading, "Observation and Examination" at page 3 onwards; the document attached to the respondent's Application to Admit Late Documents filed on 3 June 2020; and this Certificate of Determination and accompanying Statement of Reasons.
4. The referral is to be placed on the Medical Assessment Pending List.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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



STATEMENT OF REASONS

BACKGROUND

1. Ms Eulalia Amate Coppin (the applicant) was employed by Woolworths Group Limited (the respondent) between 1997 and April 2019. The applicant was initially employed for a brief period at the respondent's Narrabeen store before transferring to the Mona Vale store. The applicant was employed mostly in the meat packing section as a scale operator and scale packer.
2. The applicant claims that as a result of the nature and conditions of her employment with the respondent, she sustained injury to her left shoulder and cervical spine and sustained a consequential condition affecting her right shoulder.
3. The applicant made a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) on 12 November 2019. The alleged injury to the applicant's cervical spine was disputed by the respondent in a notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), dated 16 January 2020.
4. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 8 April 2020 seeking lump sum compensation in respect of permanent impairment of the applicant's bilateral upper extremities and cervical spine.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant sustained an injury to her cervical spine as a result of the nature and conditions of her employment with the respondent between 1997 and April 2019;
 - (b) The degree of permanent impairment resulting from the applicant's injury.

PROCEDURE BEFORE THE COMMISSION

6. The parties appeared for initial teleconference on 7 May 2020 and conciliation/arbitration (conducted by telephone) on 10 June 2020. The applicant was represented by Mr Stuart Moffet of counsel instructed by Mr Steve Walker. The respondent was represented by Mr Andrew Parker of counsel, instructed by Mr Sean Patterson.
7. During the conciliation conference, directions were made admitting a supplementary medicolegal report by Dr Stephen Quain, lodged under an Application to Admit Late Documents by the respondent on 3 June 2020.
8. The medicolegal report of occupational physician, Dr Andrew Keller, attached to the Reply, was admitted only in relation to the history recorded (that is, up until the heading, "Observation and Examination" at page 3 of that report).
9. The ARD was amended to plead a disease injury with a date range of 1997 to April 2019. The parties agreed on a deemed date pursuant to s 16 of the 1987 Act of 12 November 2019 (being the date of claim).

10. 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

11. 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 other than the report of Dr Andrew Keller from the heading, "Observation and Examination" at page 3 onwards; and
 - (c) Supplementary report of Dr Stephen Quain lodged under cover of an Application to Admit Late Documents by the respondent on 3 June 2020.
12. Neither party applied to adduce oral evidence or cross examine any witness.

Applicant's evidence

13. The applicant's evidence is set out in a written statement dated 9 March 2020.
14. The applicant said she started working for the respondent in 1997 and was fit and well at the time. The applicant was employed mostly in the meat packing section as a scale operator and scale packer. The applicant started work early in the morning at around 6am and would work until 3pm. The applicant described the work as rigorous, highly repetitive and arduous. The applicant's tasks included, picking and packing from the cool room, lifting and shifting heavy boxes of meat and other produce, loading trolleys, repetitive loading and unloading of fridges, and cleaning the cool room, tables and floors. The applicant would help with customer service from time to time.
15. The applicant said that on 5 October 2017, she experienced increasing pain in the left shoulder whilst working. The applicant had been experiencing this pain for around three months but pushed on and did not report it. On that day, the applicant had to finish her shift early because she was troubled by the pain. The next day, the store manager arranged a physiotherapy appointment and x-ray. The applicant continued with work although she was in pain.
16. The applicant subsequently sought treatment from her long-standing general practitioner, Dr Paul Klemes. Dr Klemes issued a certificate of capacity and a claim was made. In March 2018, the applicant was referred to an orthopaedic surgeon, Dr McDougal, who performed two injections of the left shoulder. The injections did not reduce the applicant symptoms. In the meantime, the applicant continued to work full-time duties.
17. As a consequence of not being able to use her left shoulder, the applicant overused her right shoulder. The applicant relied on her right arm more at work, at home and in her activities of daily living. As a consequence, the right shoulder became painful and restricted.
18. The applicant said her neck was also painful particularly in the back, stating,

"I have also sustained injuries to my neck as a result of the nature and conditions of my employment. The meat packing section that I used to do required me bending my neck forward, looking down for hours on end.

My neck and both my shoulders get very stiff. The pain radiates to the shoulders. I believe that my neck has been injured due to the nature and conditions of my employment.”

Treating medical evidence

19. The clinical notes from the applicant’s general practitioners first referred to neck symptoms in a consultation recorded on 1 April 2014 when the applicant was given a prescription for “Panadol back + neck long lasting caplet”.
20. On 28 May 2015, there was a clinical note referring to a complaint of shoulder and girdle pain and right subscapular pain for a month:

“has had shoulder girdle pain and R subscapular pain for a month, is a packer in meat department, then wrapping via machine, stickers on, then putting meat in trolley, Woolworths. working in the job since 1997, lifting and turning, limit to lifting, pt doesn't recall it. doesn't want to make it wc. sleeping not disturbed by pain, just when moving. doesn't want to see a physio”
21. The examination performed on that occasion was recorded as:

“Examination: trapezius strain bilat, subscap discomfort, normal movements shoulders and paraspinal m cervically are tense and in mild spasm, full neck movements though, full back movements, pain with twisting to R.”
22. On 15 January 2016, a clinical note referred to achy shoulders and “achy neck, full ROM”.
23. On 10 July 2017, the applicant reported:

“Shoulder and neck pain
Works at Woolworths Meat Dept and does heavy lifting
Worked yesterday and worked harder than usual in the cold”
24. On 30 October 2017, the clinical notes referred to the applicant having sore muscles after lots of lifting work.
25. A “Follow-Up Report” prepared by Mr Reece Jones of MGS Physiotherapy Mona Vale, dated 10 November 2017, gave a diagnosis that included “cervical spine sprain/strain” described as a “repetitive movement injury”. The report indicated:

“Message to Employer/Doctor: Patient is using physiotherapy as a way to avoid work currently. I understand she has degenerative shoulders and likely spine, but patient is showing a large amount of yellow flags that should be addressed by a GP with either pain relief or modified hours. Patient is persistent on manual techniques rather than exercises to help herself. I don't believe patient will improve with 6 sessions of physiotherapy.”
26. In a further follow-up report dated 17 November 2017, Mr Jones again included a diagnosis of cervical spine sprain/strain and stated, “Patient feels she has recovered with neck and shoulder pain.”
27. A clinical note prepared by Dr Klemes on 27 November 2017 recorded:

“Build-up of pain and limited range of motion in the left shoulder, interscapular pain, neck pain, also lesser right shoulder pain. From repetitive work as a meat packer.
Can't sleep, stressed.

Has been off work for 2 weeks now and is still sore sick 2 weeks with URTI

Examination: chest clear, nil Cx nodes, throat red, resolving URTI

Good ROM neck but stiff upper Tspine. Rt shoulder some painful arc.
Left shoulder painful arc and limited internal rotation.”

28. A CT scan of the cervical spine was requested by Dr Klemes and performed on 27 November 2017. The report of the investigation relevantly found:

“At the C4/5 level, there is minor central disc bulge without significant thecal sac compression or nerve root impingement.

At the C5/6 level, there is moderate degenerative disc disease and minor bilateral facet joint hypertrophy causing narrowing of the C6 nerve root exit bilaterally.

At the C6/7 level, there is moderate degenerative disc disease without significant thecal sac compression or nerve root impingement.”

29. Also on 27 November 2017, Dr Klemes referred the applicant to another physiotherapist, Mr Gary Eastbourne for “upper back, neck and shoulder pain”.

30. On 4 December 2017, Dr Klemes recorded that the applicant was:

“a little better with the rest from work partial thickness tear of the left subscapularis muscle, soft tissue cervical spine pain and upper trapezius trigger points.”

31. Dr Klemes prepared a letter of referral to Mr Jones for assessment and management including physiotherapy to the applicant’s neck. A WorkCover certificate of capacity of that date gave a diagnosis of work-related injury/disease as follows:

“partial thickness tear of the left subscapularis muscle, soft tissue cervical spine pain and upper trapezius trigger points.”

32. A clinical note recorded by Dr Klemes and a WorkCover certificate of capacity issued on 11 December 2017, both referred to “soft tissue overuse injuries of neck shoulders upper traps and interscapular trigger points”. A number of certificates that followed referred only to the applicant’s shoulders.

33. On 8 January 2018, Dr Klemes recorded “neck is better – no more neck pain”. Following this, there were a large number of consultations throughout 2018 in the early part of 2019 without reference to neck symptoms until 1 April 2019. On that occasion, Dr Klemes recorded that the applicant’s back and neck had started aching. A WorkCover certificate issued on 1 April 2019 again included a diagnosis of “neck pain”.

34. On 8 April 2019, the applicant complained to Dr Klemes of pressure in the head and neck pain.

35. On 2 December 2019 Dr Klemes prepared a clinical note recording:

“working 4 hours a day for 5 days Wed to Sunday each week. Using Panadol when pain comes. The Panadol helps. Gets achy in both shoulders and the posterior neck. Has also been using cold packs to apply to the neck and left shoulder when she goes on break. Lies down on her breaks with the ice packs on. Standing most of the time and avoiding lifting any of the baskets and minimising the cleaning of the machines. Works 2 hrs and then has 15 min break.

Examination: right shoulder has full pain-free range with good strength. The left shoulder has limited range to 45 degrees abduction/flexion, very limited internal rotation. Pain on resisted left internal and external rotation.

Neck has full range. Mild tenderness of the bilateral trapezius muscles.”

36. The applicant was referred to physiotherapy. Clinical notes from GW Physio from 13 December 2019 onwards refer to treatment including at the cervical spine.

Dr Endrey-Walder

37. The applicant relies on a medicolegal report prepared by general and trauma surgeon, Dr P Endrey-Walder, dated 5 November 2019.
38. Dr Endrey-Walder noted that he had reviewed the CT scan of the applicant’s cervical spine, which reported multilevel mild to moderate degenerative changes, most especially at C5/6 and C6/7 levels, as well as foraminal narrowing at C5/6.
39. Dr Endrey-Walder recorded the applicant’s complaints with respect to her neck as follows:

"I get pain in the back of my neck. Doing the meat packing you have to work with the neck bent forward, looking down all the time for hours on end.

I get stiff in the neck and it spreads to the shoulders".

40. Dr Endrey-Walder’s examination of the cervical spine revealed:

“The cervical spine was straight, there was tension in the posterior cervical musculature, mild tenderness on palpation.

She had a physique and age-appropriate range of extension and flexion at the neck, although complained of pain at the limit of movement, had restriction on rotation, reaching 60 degrees to the right, only 30 degrees to the left on several attempts.”

41. Dr Endrey-Walder gave no express opinion diagnosing any condition at the cervical spine or explaining the causal relationship between any condition in the applicant’s cervical spine and her employment. Dr Endrey-Walder did however assess the applicant’s cervical spine as falling within DRE cervical category II, giving a 5% whole person impairment (WPI).

Dr Quain

42. The respondent relies on medicolegal reports prepared by orthopaedic surgeon, Dr Stephen Quain dated 29 October 2019 and 29 May 2020.
43. In his first report, Dr Quain took a history of the applicant’s shoulder conditions which was consistent with the applicant’s evidence. Dr Quain recorded that the applicant complained that since early 2019 her pain had spread to include pain at the base of the neck and some vague symptoms in her legs with burning.
44. Dr Quain’s examination of the cervical spine was recorded as follows:

“In the cervical spine there was no deformity and in conversation her movements appeared normal but on examination she immediately guarded and complained of pain at about the C6/7 level. However, there were no signs of any neurological abnormality in either arm.”

45. Dr Quain noted the CT scan of the cervical spine dated 27 November 2017 which he said showed degenerative changes between C5/6 and C6/7 but no specific root entrapment.
46. Dr Quain gave no express opinion with regard to diagnosis of any condition at the applicant's cervical spine or any causal relationship between such a condition and the applicant's employment. In assessing whole person impairment, Dr Quain recorded that he did not consider there was rateable impairment from the applicant's work situation at either her right shoulder or her cervical spine.
47. In his supplementary report, Dr Quain was asked specifically whether the applicant had sustained any cervical spine injury as a result of the nature and conditions of her employment with the respondent. Dr Quain said,

"I do not believe that Ms Coppin has had a cervical spine injury. I note her CT scan shows some degenerative changes around the C5/6 and C6/7 levels which clearly, in a lady of 67, are age-related."

48. Dr Quain was then asked to give his opinion as to the cause of the applicant's symptoms, to which he responded:

"Basically, some age-related degenerative changes mentioned above. I would accept that if she has a painful and stiff left shoulder, she may put a minor increased strain on the movements of her cervical spine but this is not a primary cause of her cervical spine symptoms. I would therefore disagree with Dr Endrey-Walder's assessment of cervical spine impairment."

Applicant's submissions

49. Mr Moffet submitted that the only issue requiring determination was the injury to the applicant's neck. Mr Moffet said the injury was one of an aggravation of age-related degenerative changes in the cervical spine. Mr Moffet said the aggravation consisted of the onset of pain to which employment was the main contributing factor.
50. Mr Moffet said it was necessary to evaluate the totality of the evidence and that in this case the medicolegal opinions would not necessarily carry the day. The injury could be found on a range of evidence.
51. Mr Moffet said the first early reference to a work-related cervical spine injury was set out in the reports of MGS Physiotherapy Mona Vale noting the diagnosis of a repetitive movement injury which as at 10 November 2017 included a cervical spine sprain/strain. Mr Moffet noted that those reports indicated that the applicant felt she had recovered with her neck and shoulder pain but said it was not an unequivocal recovery. Mr Moffet said the report was consistent with the applicant experiencing ongoing symptoms.
52. Mr Moffet referred to the clinical notes including, a referral for a CT scan of the cervical spine on 27 November 2017. Mr Moffet noted that this demonstrated that the applicant's general practitioner considered the applicant had sufficient symptoms at her cervical spine to justify the referral.
53. The CT scan showed degenerative changes in the nature of a disease in the cervical spine. Mr Moffet noted that the issue was whether this disease was aggravated and if so was employment the main contributing factor to the aggravation.

54. Mr Moffet noted that the applicant was referred for physiotherapy on 27 November 2017 and Dr Klemes' letter of referral identified symptoms in the applicant's neck. A further referral to Mr Jones on 4 December 2017 also referred to soft tissue cervical spine pain. Mr Moffet noted that the referral to the applicant shoulder specialist, Mr McDougall on 19 March 2018 included a history of neck injury.
55. Mr Moffet observed that the general practitioner's notes referred to neck symptoms from 28 May 2015 onwards in the context of work. Mr Moffet took me to each of the clinical notes referred to above and said they showed complaints of neck pain attributed to work actually performed by the applicant in her employment. Mr Moffet said the notes were sufficient to satisfy the evidentiary burden that there was an aggravation of a degenerative disease. No cause other than employment was identified. Employment was therefore the main contributing factor to the aggravation.
56. Turning to the report of Dr Endrey-Walder, Mr Moffet noted that he examined the applicant and considered the CT scan of the applicant cervical spine. Dr Endrey-Walder's report set the applicant's account of her symptoms which she linked to work. Mr Moffet conceded that Dr Endrey-Walder did not express an opinion in relation to the cervical spine but said there was a large body of contemporaneous medical evidence to support the conclusion that there was an injury in accordance with s 4(b)(ii). Mr Moffet said there was so much other evidence on that point that it went without saying that there was an injury. Dr Endrey-Walder's silence could only be understood as inadvertence noting the assessment of WPI at the cervical spine.
57. Mr Moffet noted that Dr Quain's history made no mention of the neck other than reference to pain spreading to that body part since early 2019. Mr Moffet submitted that this history was inconsistent with the contemporaneous documents. If Dr Quain had proceeded on the basis that the neck was only symptomatic from 2019 he would have made an incorrect assumption that there was little by way of work contribution to the pain at that time. In stating that neck pain had come on late in the piece, Dr Quain had an incorrect history and there was not a proper foundation for the acceptance of his opinion. The opinion expressed by Dr Quain was contaminated. Mr Moffet submitted also that Dr Quain's denial of an injury to the cervical spine constituted a *bare ipse dixit* and lacked explanation.
58. Mr Moffet referred also to the applicant's statement where she described her duties in detail, including the loaded neck position, in a manner consistent with the history provided to Dr Endrey- Walder.
59. In summary, Mr Moffet said the evidence demonstrated a history of neck pain from 2015 to 2019 over the last three to four years of the applicant's work as a meatpacker. The applicant reported symptoms on many occasions which she related to her duties. Mr Moffet submitted that I would be satisfied that the applicant had sustained an aggravation of age-related degenerative changes at her cervical spine.
60. Mr Moffet referred to the commentary on s 4(b)(ii) in *Mills Workers Compensation NSW* and said that for an aggravation to be found it is not necessary for there to be an actual worsening of the disease itself. An increase in symptoms and restrictions resulting from the disease was sufficient. Mr Moffet referred to *Kelly v Western Institute NSW TAFE Commission*¹ and said that an aggravation of a disease would occur when the experience of the disease by the worker was increased or intensified by an increase or intensification of symptoms.

¹ [2010] NSWCCPD 71 at [66].

61. Mr Moffet said there were no other competing factors identified as responsible for the increase in the applicant's symptoms. Although the applicant's statement was silent in this regard, Mr Moffet submitted that the applicant should not be expected to have specified that there were no other contributing factors.

Respondent's submissions

62. Mr Parker noted that the injury had been described as one falling within s 4(b)(ii), in which case the threshold question was whether employment was the main contributing factor to an aggravation. Mr Parker said there was no medical evidence before the Commission diagnosing an aggravation of a disease. Mr Parker said this was not something which would be a matter of common knowledge or inference. In the absence of medical evidence, the applicant's onus would not be satisfied. Mr Parker said it was not enough that the applicant complained of symptoms.
63. Mr Parker referred to the consideration of the main contributing factor test by Snell DP in *AV v AW*² at [78]. Mr Parker said there was no medical opinion on how the symptoms in the applicant's cervical spine were causally related to her work.
64. Mr Parker submitted that the applicant's statement was unsatisfactory. The applicant gave an opinion that she had an injury due to the nature and conditions of her employment which the applicant was not qualified to give. The applicant said she was bending her neck looking forward but Mr Parker said this was something that people do every day. Mr Parker said it was impossible to infer from the applicant's evidence that employment was the main contributing factor to an aggravation of the degenerative changes in her cervical spine.
65. Mr Parker submitted that the applicant merely reported pain in the context of work. This was insufficient to satisfy the legal test. The contemporaneous evidence showed a possible strain sprain or soft tissue injury but those diagnoses did not demonstrate an aggravation of degenerative changes.
66. Mr Parker submitted that there was a crucial link missing in the applicant's case. The applicant was 67 years of age and complaining of the common problem of neck pain. The pain was undiagnosed and there was a lack of conclusive evidence of a s 4(b)(ii) injury.
67. Mr Parker submitted that complaints of pain were not enough to demonstrate "injury", although they might be sufficient to demonstrate a consequential condition. Mr Parker referred in this regard to the decision in *Forestry Commission of New South Wales t/as Forests NSW v Graham*³ (*Graham*).
68. Mr Parker noted that Dr Endrey-Walder gave no opinion at all diagnosing an injury, let alone an opinion on whether employment was the main contributing factor. Mr Parker submitted that whilst degenerative changes were shown on the investigations, pain in the neck was a common experience.
69. Mr Parker noted that Dr Quain's supplementary report could be read as indicating some involvement from the shoulders but noted that the condition in the applicant's cervical spine was not pleaded as a condition consequential to the applicant's shoulder injury.
70. Mr Parker submitted that the applicant's pain could have arisen from multiple causes and the applicant had completely failed to provide evidence that employment was the main contributing factor to her pain. Mr Parker referred in this regard to the High Court's decision in *Russo v Aiello*⁴ and said the applicant's silence was relevant. If there were no other causes she should have said so.

² [2020] NSWCCPD 9.

³ [2014] NSWCCPD 73.

⁴ [2003] HCA 53; 215 CLR 643; 201 ALR 231; 77 ALJR 1775.

FINDINGS AND REASONS

71. Section 9 of the 1987 Act provides that a worker who has received an “injury” shall receive compensation from the worker’s employer. The term “injury” is defined in s 4 of the 1987 Act as follows:

“4 Definition of ‘injury’

In this Act:

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, 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.”

72. In *AV v AW*, Snell DP considered the expression, “main contributing factor” in s 4(b)(ii) and observed:

“The following may be taken from the above:

- (a) The test of ‘main contributing factor’ in s 4(b)(ii) is more stringent than that in s 4(b)(ii) in its previous form, which applied in conjunction with the test in s 9A. There will be one ‘main contributing factor’ to an alleged aggravation injury.
- (b) The test of ‘main contributing factor’ is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of ‘main contributing factor’ is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.
- (c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole.”

73. The expression, “aggravation, acceleration, exacerbation or deterioration” of a disease was considered by Windeyer J in *Federal Broom Co Pty Ltd v Semlitch*⁵ (*Semlitch*):

“The words have somewhat differing meanings: one may be more apt than another to describe the circumstances of a particular case: but their several meanings are not exclusive of one another. The question that each poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient. To say that a man's sickness is worse or has deteriorated means in ordinary parlance, oddly enough, the same thing as saying that his health has deteriorated.”

74. Justice Kitto in the same case found:

“Moffitt J. was right, I think, in saying: "There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of symptoms. The word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism". Accordingly if salt be applied to an open wound, making the wound no worse but causing it to smart as it had not smarted before, it is proper to say that there is an exacerbation of the wound.”⁶

75. The Court of Appeal in *Nguyen v Cosmopolitan Homes*⁷ has found that a tribunal of fact must be actually persuaded of the occurrence or existence of the fact before it can be found, summarising the position as follows:

- “(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
- (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
- (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found, and
- (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.”

76. As has been noted by the parties, there is a single issue requiring determination by me as arbitrator, namely, whether the applicant has sustained an injury to her cervical spine as a result of the nature and conditions of her employment with the respondent. It was made clear in submissions, that the injury relied on by the applicant was one which would satisfy the definition in s 4(b)(ii) of the 1987 Act as involving an aggravation, acceleration, exacerbation or deterioration of a disease process at the applicant's cervical spine.

⁵ [1964] HCA 34; (1964) 110 CLR 626 at 640.

⁶ At 635.

⁷ [2008] NSWCA 246.

77. Given the confined nature of the dispute, it is most unfortunate that despite the applicant having qualified a medicolegal expert to provide evidence, there is no clear expert opinion either as to a diagnosis of the condition at the applicant's cervical spine or its causal relationship to employment.
78. Dr Endrey-Walder has taken a history of symptoms at the cervical spine, considered the radiological investigations and performed an examination of the cervical spine. Yet, he has at no point in his report given an opinion on diagnosis or causation of a work injury, prior to providing an assessment of the degree of permanent impairment at the cervical spine.
79. In the context of his report as a whole, this appears to have been an inadvertent omission by Dr Endrey-Walder. That omission could have been readily addressed by requesting a supplementary report. This course would have rendered the applicant's task in discharging the evidentiary onus much simpler.
80. There is also no reasoned opinion from the applicant's treating practitioners as to diagnosis or the causal relationship between the symptoms in the applicant's cervical spine and her employment.
81. I am asked, therefore, to infer from the totality of the evidence both that there was an aggravation, acceleration, exacerbation or deterioration of a disease at the applicant's cervical spine and that the applicant's employment with the respondent was the main contributing factor to that aggravation, acceleration, exacerbation or deterioration.
82. There is no dispute that there is a degenerative disease process at the applicant's cervical spine. This was revealed by the CT scan performed in November 2017 and was confirmed by both Dr Endrey-Walder and Dr Quain.
83. I am also satisfied on the evidence before me that since at least 1 April 2014, the applicant has complained to her general practitioners of neck symptoms, predominantly of pain. In the statement prepared for these proceedings, the applicant related the pain in her neck to her work in the meat packing section, which required her to bend her neck forward and look down "for hours on end". I note that this account of the applicant's duties is unchallenged by the respondent's evidence.
84. The applicant first gave this history to her general practitioner on 28 May 2015, when she described her work as a packer in the meat department, wrapping meat via a machine, putting stickers on, then putting meat in a trolley. On that occasion, the applicant's doctor's examination revealed her paraspinal muscles cervically were tense and in mild spasm.
85. After this, the applicant intermittently complained of aching or painful neck symptoms which she again related to her work in the meat department on 10 July 2017.
86. On 10 November 2017, Mr Jones, the applicant's physiotherapist diagnosed cervical spine sprain/strain which was noted to be in the context of a likely degenerative condition at the applicant's cervical spine.
87. On 27 November 2017, Dr Klemes recorded a complaint of a build-up of neck pain from repetitive work as a meat packer. It was at this consultation that the CT scan of the cervical spine was ordered.
88. By 4 December 2017, it was clear that Dr Klemes was of the view that there was a work-related injury to the cervical spine which he described as "soft tissue cervical spine pain". This was recorded in the WorkCover certificate issued on that day and the referral to Mr Jones. Shortly afterwards, however, the applicant's symptoms appear to have subsided for a period of time with physiotherapy, rest and the modification of her duties at work.

89. Symptoms reappeared in the medical evidence from 1 April 2019, when the applicant complained to Dr Klemes of posterior neck pain. The applicant on that occasion described applying icepacks to her neck and lying down whilst on breaks at work. The applicant said she was standing most of the time but avoiding lifting any baskets and minimising the cleaning of machines.
90. I am satisfied on this treating medical evidence that the applicant was experiencing symptoms of pain at her cervical spine in the context of work from at least May 2015 onwards, although the evidence does suggest some ebbing and flowing of symptoms.
91. Given the way this case has been pleaded, it is necessary to consider whether those symptoms of pain constituted an aggravation of a disease.
92. The physiotherapist's reports and materials from the applicant's general practitioners contain broad diagnoses of posterior cervical "pain", "soft tissue pain", or cervical strain or sprain. There is no detailed explanation of the pathology causing such pain. Mr Parker's submissions suggested that these diagnoses were inconsistent with an aggravation of a disease in the applicant's spine.
93. Whilst I accept that the references to "soft tissue pain" or "sprain" are suggestive of damage to the ligaments or muscles surrounding the cervical spine rather than the discs of the cervical spine, the diagnoses given by the treating practitioners are ultimately very broad. It is difficult to discern from their limited evidence whether there was a relationship between those diagnoses and age-related degenerative changes.
94. Dr Quain has, however, given a clear opinion that age-related degenerative changes at the applicant's cervical spine did account for the applicant's pain, which I accept.
95. It is not necessary in order for the applicant to establish an aggravation or exacerbation of a disease to demonstrate some actual pathological change or deterioration of the disease. As the reasoning in *Semlitch* makes clear, it is enough for the purposes of s 4(b)(ii) to demonstrate that the applicant's experience of the disease is increased or intensified by an increase or intensifying of symptoms.
96. I am satisfied having regard to the contemporaneous medical evidence that the applicant did indeed experienced an increase or intensification of her symptoms of pain. Whilst it would have been desirable for the applicant to provide a reasoned medical opinion as to the nature and cause of the intensification of her symptoms, I find the facts of this case distinguishable from the decision in *Graham* to which Mr Parker referred. In that case, O'Grady DP stated:
- "The technical or scientific issues raised by Ms Graham's allegations concerning noise and EMF exposure required, in my opinion, something more than mere proof of a temporal connection between attendance at work and the onset of symptoms to permit a finding of injury within the meaning of s 4 of the 1987 Act. It follows that Ms Grahams' submission on this appeal that "this is the very type of case in which the existence of the injury is established by the symptoms as the possible causation of the injury and its pathology is not well understood" must be rejected."
97. On the particular facts of that case, O'Grady DP was concerned with the standard of proof in circumstances where the issues stood "outside the realm of common knowledge and experience"⁸. The injury in this case is rather different. I accept that there is sufficient medical evidence to satisfy me on the balance of probabilities that there has been an aggravation or exacerbation of the degenerative disease in the applicant's cervical spine.

⁸ See *Tubemakers of Australia Ltd v Fernandez* (1976) 10 ALR 303; (1976) 50 ALJR 720 per Mason J at 724E.

98. The question that remains then, is whether employment with the respondent was the “main contributing factor” to that aggravation or exacerbation of the applicant’s degenerative disease.
99. The test in s 4(b)(ii), does not require that employment be the only cause of an aggravation, acceleration, exacerbation or deterioration of a disease, but it must be “the main” contributing factor. The only contributing factors to the increase or intensification of the applicant’s symptoms suggested by the evidence before me are:
- (a) The nature and conditions of the applicant’s employment; and
 - (b) The natural progression of the disease in a 67 year old.
100. Whilst it is true that the applicant’s statement is silent as to whether there was any other circumstance or activity which could account for the increase in her symptoms, I do not accept Mr Parker’s suggestion that it was incumbent upon the applicant to state this. The facts of this case are distinguishable from *Russo v Aiello*, which was a case concerning whether the respondent had established that the appellants did not have “a full and satisfactory explanation for the delay” in making a claim governed by the *Motor Accidents Act 1988*.
101. Dr Quain has taken the view that the natural progression of the disease accounts for the applicant’s symptoms. I accept, however, that it is not apparent from Dr Quain’s report that he understood that the applicant had complained of neck pain, in the context of work, to her doctors not just from early 2019 but since at least May 2015. By early 2019, the applicant was already performing “suitable duties” at work. On Dr Quain’s history, it is understandable that he may have considered the contribution of the applicant’s work to have been minimal.
102. I am not satisfied that Dr Quain has given due consideration to the full history of reported symptoms or the type of work the applicant was performing in the meat packing section over a long period of time. Dr Quain has not expressly addressed whether the applicant’s work could have aggravated, accelerated, exacerbated or caused a deterioration in the age-related degenerative changes he found at the applicant’s spine.
103. Once again, there is simply no explicit medical opinion on the question of whether the applicant’s work was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease at her cervical spine. I am not, however, satisfied that the absence of such an opinion is necessarily fatal. There is before me a relatively substantial body of contemporaneous medical evidence linking the increase in neck symptoms to the applicant’s work.
104. The clinical records do not suggest an idiopathic or unexplained increase in symptoms. The applicant has consistently and contemporaneously reported to her general practitioners an increase in symptoms due to the nature of her work. The applicant’s work was for most of her long period of employment with the respondent repetitive and heavy. It involved standing and working with her neck bent forward, looking down whilst packing meat for long stretches of time. As a matter of common knowledge and experience I accept that this mechanism would be consistent with an increase in neck symptoms.
105. There is, in this case, consistent medical evidence of a disease, a medicolegal opinion from Dr Quain indicating that the disease was causing symptoms of pain and contemporaneous evidence of an increase or intensification of the applicant’s symptoms of pain in the context of performing her work. Whilst minds may differ given the unsatisfactory state of the evidence, I am, after careful consideration, satisfied that the applicant has sustained an aggravation, acceleration, exacerbation or deterioration in the course of employment of a disease at her cervical spine, to which employment was the main contributing factor.

106. I accept that the applicant sustained an injury to her cervical spine pursuant to s 4(b)(ii) of the 1987 Act. The cervical spine shall, therefore, be included in an assessment of the degree of permanent impairment resulting from injury. That is not a matter which I consider should be determined by me as arbitrator in all the circumstances of this case.
107. The matter will be remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment resulting from the injury to the applicant's left upper extremity (shoulder) and cervical spine together with the consequential condition at the right upper extremity (shoulder).
108. The materials to be attached to the referral shall include the documents admitted in these proceedings together with this Statement of Reasons.
109. Noting the protocols in place to respond to the COVID-19 pandemic, this matter should be placed on the Medical Assessment Pending List as a physical examination will be required.

SUMMARY

110. The Commission determines:

- (a) The applicant sustained an injury to her cervical spine as a result of the nature and conditions of her employment with the respondent between 1997 and April 2019 pursuant to s 4(b)(ii) of the 1987 Act.

111. The Commission orders:

- (a) The matter is remitted to the Registrar for referral to an AMS for assessment as follows:

Date of injury: 1997 to April 2019 (12 November 2019 deemed)

Body parts: Left upper extremity (shoulder)
Cervical spine
Right upper extremity (shoulder) (consequential)

Method: Whole Person Impairment.

- (b) The materials to be referred to the AMS are to include the ARD and all attachments; the Reply and all attachments other than the report of Dr Andrew Keller from the heading, "Observation and Examination" at page 3 onwards; the report attached to the respondent's Application to Admit Late Documents filed on 3 June 2020; and the Certificate of Determination and accompanying Statement of Reasons.
- (c) The referral is to be placed on the Medical Assessment Pending List.