

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 677/20
Applicant: Mary Mayman
First Respondent: Poppy's Pies Pty Limited
Second Respondent: Workers Compensation Nominal Insurer
(Insurance and Care NSW – icare)
Date of Determination: 10 June 2020
Citation: [2020] NSWCC 194

The Commission determines:

1. The first respondent was not insured within the meaning of section 140(2)(a) of the *Workers Compensation Act 1987* at the time of the applicant's injury on 21 August 2015.
2. The applicant did not suffer an injury to the cervical spine arising out of or in the course of her employment with the first respondent on 21 August 2015 within the meaning of sections 4(a) and 9A of the *Workers Compensation Act 1987*.

The Commission orders:

3. Award for the respondents in relation to the applicant's claimed injury to the cervical spine on 21 August 2015.
4. The matter is remitted to the Registrar to add it to the medical assessment pending list for ultimate referral to an Approved Medical Specialist for assessment pursuant to the *Workplace Injury Management and Workers Compensation Act 1998* as follows:

Date of injury: 21 August 2015

Body System: The left upper extremity (left shoulder)

Method of Assessment: Whole Person Impairment.

5. The following documents are to be provided to the Approved Medical Specialist:
 - (a) Amended Application to Resolve a Dispute dated 23 March 2020 and the supporting documents attached to the Application to Resolve a Dispute dated 11 February 2020;
 - (b) second respondent's Reply dated 3 March 2020 and attached documents;
 - (c) second respondent's Application to Admit Late Documents dated 18 May 2020 and attached documents, and
 - (d) this Certificate of Determination and Statement of Reasons.
6. The second respondent pay any compensation and costs awarded against the first respondent from the Workers Compensation Insurance Fund established under section 154D of the *Workers Compensation Act 1987*.

7. Pursuant to section 142B(2) of the *Workers Compensation Act 1987*, the first respondent is to reimburse the second respondent for any compensation and costs awarded against it.

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

Anthony Scarcella
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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Ms Mary Mayman, is a 54-year-old woman who was employed by Poppy's Pies Pty Limited (the first respondent) as a casual shop assistant.
2. On 21 August 2015, at the respondent's premises, Ms Mayman alleges that, whilst approaching the hallway leading to the workroom, a solid wooden door unexpectedly swung open in the direction she was walking. The door heavily impacted the left side of her body. She was jolted by the impact and suffered injury.
3. The first respondent had not obtained, or was not maintaining in force, a policy of insurance for the full amount of its liability under the *Workers Compensation Act 1987* (the 1987 Act) in respect of Ms Mayman at the relevant time and accordingly, was uninsured.¹
4. The first respondent being uninsured, Ms Mayman lodged a claim under section 140(1)(a) of the 1987 Act with the second respondent on 14 August 2017.²
5. On 23 September 2019, Ms Mayman claimed permanent impairment compensation under section 66 of the 1987 Act in respect of the spine (cervical spine) and left upper extremity (left shoulder) based on the opinion of Dr William Patrick, General, Vascular and Trauma Surgeon.³
6. On 25 November 2019, the second respondent issued a Dispute Notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing Ms Mayman's entitlement to permanent impairment lump sum compensation because her accepted physical injury had not resulted in more than 10% permanent impairment as required by section 66(1) of the 1987 Act.⁴
7. Ms Mayman lodged an Application to Resolve a Dispute (ARD) dated 11 February 2020 in the Workers Compensation Commission (the Commission) claiming lump sum compensation under section 66 of the 1987 Act as a result of the injury sustained in the course of her employment with the first respondent on 21 August 2015.

ISSUES FOR DETERMINATION

8. The parties agreed that the following issues remained for determination:
 - (a) Did Ms Mayman suffer an injury to her cervical spine on 21 August 2015 within the meaning of sections 4(a) and 9A of the 1987 Act?
 - (b) Is Ms Mayman entitled to lump sum compensation within the meaning of section 66 of the 1987 Act?

Matters previously notified as disputed

9. The issues in dispute were notified in the Dispute Notice referred to above. At the Commission teleconference on 2 April 2020, leave was granted under section 289A(4) of the 1998 Act, without objection, for the second respondent to rely on a previously unnotified dispute, namely, disputing injury to the cervical spine.

¹ Section 140(2)(a) of the 1987 Act.

² Reply at pages 11-25.

³ Application to Resolve a Dispute at pages 32-33.

⁴ Reply at pages 26-31.

Matters not previously notified

10. No other issues were raised.

PROCEDURE BEFORE THE COMMISSION

11. The parties participated in a telephone conciliation conference/arbitration on 21 May 2020. Mr William Carney of counsel appeared for Ms Mayman and Mr Josh Beran of counsel appeared for the second respondent. There was no appearance by the first respondent as it had reached some form of agreement with the second respondent.

12. During the conciliation phase the parties agreed as follows:

- (a) I should make a determination that the first respondent was not insured within the meaning of section 140(2)(a) of the 1987 Act at the time of Ms Mayman's injury on 21 August 2015.
- (b) I should make an order that the second respondent pay any compensation and costs awarded against the first respondent from the Workers Compensation Insurance Fund established under section 154D of the 1987 Act.
- (c) If there is a finding of injury to the cervical spine, then section 9A of the 1987 Act will not be an issue for determination.
- (d) Paragraphs 35, 36, 37 and 40 in the statement by Constantine Hassiotis dated 28 July 2017, commencing at page 6 of the Reply, be deleted for the purpose of these proceedings only.
- (e) Following the determination of the dispute in this matter, it is to be remitted to the Registrar to add it to the medical assessment pending list for ultimate referral to an Approved Medical Specialist (AMS) for an assessment of Ms Mayman's whole person under the 1998 Act. In this regard, there was no dispute that the left upper extremity (left shoulder) should be referred to an AMS for assessment.

13. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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

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

- (a) Amended ARD dated 23 March 2020 and the supporting documents attached to the ARD dated 11 February 2020;
- (b) second respondent's Reply dated 3 March 2020 and attached documents, and
- (c) second respondent's Application to Admit Late Documents dated 18 May 2020 and attached documents.

Oral evidence

15. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

SUBMISSIONS

16. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties. I will refer to the parties' submissions under each relevant issue for determination set out below.

FINDINGS AND REASONS

Did Ms Mayman suffer an injury to her cervical spine on 21 August 2015 within the meaning of sections 4(a) and 9A of the 1987 Act?

17. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act.
18. Section 4(a) of the 1987 Act defines "injury" as a personal injury arising out of or in the course of employment.
19. The onus of establishing injury falls on Ms Mayman and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*⁵ (*Ireland*) and *Nguyen v Cosmopolitan Homes*⁶ (*Nguyen*).
20. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*⁷ (*Kooragang*). As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*⁸ (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.
21. In order to establish that a "personal injury" has been suffered within the meaning of section 4(a) of the 1987 Act, Ms Mayman must establish, on the balance of probabilities, that there has been a definite or distinct "physiological change" or "physiological disturbance" in her left shoulder for the worse which, if not sudden, is at least, identifiable: *Kennedy Cleaning Services Pty Ltd v Petkoska*⁹ (*Kennedy*) and *Military Rehabilitation and Compensation Commission v May*¹⁰ (*May*). The word "injury" refers to both the event and the pathology arising from it: *Lyons v Master Builders Association of NSW Pty Ltd*¹¹ (*Lyons*). While pain may be indicative of such physiological change, it is not itself a "personal injury".
22. *Castro v State Transit Authority*¹² (*Castro*) provides a useful review of the authorities and makes it 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.

⁵ *Department of Education and Training v Ireland* [2008] NSWCCPD 134.

⁶ *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246.

⁷ *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796.

⁸ *Kirunda v State of New South Wales (No 4)* [2018] NSWCCPD 45 at [136].

⁹ *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45.

¹⁰ *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19.

¹¹ *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25NSWCCR 496.

¹² *Castro v State Transit Authority* [2000] NSWCC 12; (2000) 19 NSWCCR 496.

23. *Zickar v MGH Plastic Industries Pty Ltd*¹³ (*Zickar*) highlighted that a worker can rely on injury simpliciter despite the existence of a disease. In *Zickar*, the High Court of Australia held that the presence of a disease did not preclude reliance upon that event as a personal injury. The terms “personal injury” and “disease” are not mutually exclusive categories. A sudden identifiable physiological (pathological) change to the body brought about by an internal or an external event can be a personal injury and the fact that the change is connected to an underlying disease process does not prevent the injury being a personal injury: *North Coast Area Health Service v Felstead*.¹⁴
24. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.
25. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties.
26. The second respondent’s principal submissions may be summarised as follows:
- (a) On the medical evidence, Ms Mayman had suffered a significant injury to her cervical spine on 6 December 2009 in an assault. She has ongoing symptoms in the cervical spine as a result of the assault. Following the assault, she attended the St George Hospital Emergency Department, where she was reviewed and treated.
 - (b) Thereafter, Ms Mayman’s injured cervical spine was treated by Dr George Nicola, General Practitioner, who on 6 September 2012, opined that she was not expected to recover from the injury suffered in the assault and that it was causing chronic manifestations. In referral letters to Dr Saeed Kohan, Neurosurgeon dated 29 May 2014 and 18 August 2014, Dr Nicola referred to Ms Mayman’s chronic neck pain. In a referral letter to Sydney Sports Centre dated 20 January 2015, Dr Nicola referred to Ms Mayman’s chronic neck pain.
 - (c) Dr Nicola’s clinical records noted Ms Mayman’s pre-21 August 2015 complaints of cervical spine pain or symptoms on 19 December 2009, 15 March 2010, 9 June 2010, 6 August 2010, 6 December 2010, 25 March 2011, 13 March 2013, 12 April 2013, 29 July 2014 and 2 September 2014.
 - (d) On 8 February 2010, Ms Mayman consulted Dr Andrew Henderson of St George Hospital Department of Neurology. Ms Mayman’s cervical spine was treated by Mr John Dahr, Physiotherapist. In July/August 2010, Ms Mayman was treated at St George Hospital Department of Physiotherapy. On 9 November 2010, Ms Mayman consulted Dr Marissa Lassere, Consultant Rheumatologist in relation to left-sided neck pain. On 6 December 2010, Dr Lassere identified pathology in the cervical spine upon reviewing Ms Mayman’s bone scan and cervical spine MRI. Ms Mayman’s cervical spine was treated by Mr George Hardas, Chiropractor, who found cervical symptomology and pathology. On 27 September 2012, Mr Hardas opined that Ms Mayman had suffered a permanent injury to her cervical spine and would experience ongoing symptoms in the long-term. Ms Mayman was treated by Mr Sam Borenstein, Clinical Psychologist. On 11 February 2010, Mr Borenstein referred to a neck injury related to an assault. On 27 September 2014, Mr Borenstein referred to Ms Mayman’s chronic neck pain.

¹³ *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310.

¹⁴ *North Coast Area Health Service v Felstead* [2011] NSWWCPCD 51 at [77].

- (e) On 14 April 2014, Dr Nicola completed a Centrelink Disability Support Pension medical report providing a diagnosis of cervical C4/5 disc lesion and spondylosis with the date of onset on 6 December 2009. The latter condition was described as the one with the most impact of the two conditions referred to in the medical report. The other condition referred to was diagnosed as a lumbar disc lesion at L5/S1. Ms Mayman subsequently qualified for a Centrelink Disability Support Pension.
- (f) On 28 August 2014, Dr Kohan referred to Ms Mayman's significant neck pain that had worsened over the years from the time of the assault in 2009 to the time of his consultation.
- (g) There can be no doubt that Ms Mayman had a serious and significant pre-existing cervical spine problem. The latter submission is further evidenced by the payment made to her in relation to the 2009 assault under the *Victims' Rights and Support Act 2013*. The Assessor who assessed Ms Mayman's claim in this regard referred to Dr Nicola's opinion that Ms Mayman was not expected to completely recover from the injury sustained in the 2009 assault.
- (h) The first entry in Dr Nicola's clinical records after Ms Mayman's injury on 21 August 2015 was recorded on 27 August 2015 and it made no reference to any cervical spine injury or symptoms. None of the entries in Dr Nicola's clinical records referred to any cervical spine injury or symptoms. Dr Nicola's clinical records in relation to Ms Mayman end on 2 June 2017.
- (i) In referral letters to Professor Justin Paoloni, Sports Physician dated 6 May 2016 and 8 August 2017 and to the Institute of Rheumatology and Orthopaedics dated 22 November 2016, Dr Nicola provided a description of Ms Mayman's injury on 21 August 2015 and made no reference to any cervical spine injury or symptoms.
- (j) The only reference to Ms Mayman's cervical spine in Professor Paoloni's numerous reports was in the report dated 20 December 2017, where he referred to a restricted range of motion in the neck. He made no reference to neck pain or any aggravation of any pre-existing pathology.
- (k) In a report dated 24 April 2018, Ms Helen Yoon, Exercise Physiologist, made no reference to any cervical spine injury or symptoms.
- (l) The medical imaging of Ms Mayman's cervical spine prior to and after 21 August 2015, demonstrated no significant change in pathology.
- (m) Ms Mayman's certificate of capacity dated 2 June 2017 and subsequent certificates of capacity described the diagnosis as being an injury to the left side of the anterior chest wall and fractures to the left third and fourth ribs.
- (n) There is a significant amount of evidence from Ms Mayman's treatment providers that identifies a significant pre-existing condition in the cervical spine. However, following the 21 August 2015 injury, there is no report by her to any treating doctor of any injury to or aggravation of the condition in her cervical spine.

- (o) Ms Mayman's statement dated 25 July 2017 is the most contemporaneous statement made by her. The statement makes no reference to any injury to her cervical spine.
- (p) On 14 August 2017, Ms Mayman completed a claim form and made no reference in it to any injury to or aggravation of the condition in her cervical spine.
- (q) Ms Mayman's statement dated 6 February 2020, was prepared with the assistance of a solicitor some five years post injury and after the report of Dr William Patrick, General and Vascular Surgeon. Ms Mayman stated that the pain in her neck increased as a result of the work-related accident. However, she did not report it to any treating doctor. Dr Paoloni did not report any complaints of left-sided neck pain and in one report had only referred to a restricted range of motion. Greater weight should be placed on the wealth of contemporaneous clinical evidence than on Ms Mayman's later statement prepared for the purposes of litigation.
- (r) Dr Patrick did not provide any real consideration of the pre-existing problems Ms Mayman had in her cervical spine. The history taken by Dr Patrick provided the first reference by any doctor of some aggravation to Ms Mayman's neck injury in the work-related incident on 21 August 2015. Such reference came four years and one month following the injury. It was on the basis of this history that Dr Patrick provided his opinion that there had been an aggravation of an injury to Ms Mayman's cervical spine. Ms Mayman complained to Dr Patrick of a significant increase in her neck pain which was now more left-sided. However, Ms Mayman complained of left-sided neck symptoms at the time she underwent a bone scan on 16 November 2010. Dr Patrick opined that Ms Mayman had aggravated her cervical spine, but he did not explain how it had been aggravated. There was no consideration of the mechanism of the injury; the pathology in the cervical spine; or the delay in reporting the aggravation of her cervical spine symptoms to her treating doctors.
- (s) Dr Robert Breit, Orthopaedic Surgeon was of the opinion that Ms Mayman's current symptoms were consistent with her pre-existing injury. Dr Breit referred to the diagnostic imaging and, in particular, the finding of C4/5 discovertebral arthritis in 2014. Dr Breit concluded that Ms Mayman had a long-standing cervical problem, the extent of which was so severe she was allegedly unable to work, and received a pension. He opined that her neck symptoms were related to her 2009 injury and its consequences and that there had been no aggravational component. Dr Breit's opinion is consistent with the description of injury provided to him.
- (t) On consideration of the evidence as a whole, there were no contemporaneous records of complaints of pain in the cervical spine after 21 August 2015. There was no temporal connection. Neck pain was only first recorded by Dr Patrick in 2019. A commonsense test of causation needs to be applied. Taking into consideration the mechanism of injury (the swinging door striking the anterior chest wall), commonsense leads to the conclusion that it would not cause an aggravation of pathology in the cervical spine. On the evidence, one could not be satisfied on the balance of probabilities, to a degree of actual persuasion that Ms Mayman suffered an aggravation of pre-existing pathology in her cervical spine.

27. Ms Mayman's principal submissions may be summarised as follows:

- (a) Ms Mayman suffered a condition in her cervical spine in 2009 arising from an assault. The condition was treated for a number of years on a regular basis. Suddenly, in August 2015, the mention of treatment to the cervical spine in the clinical records ceased. The chest wall and left arm became an issue and, belatedly, the cervical spine again.
- (b) Ms Mayman's 2017 statement speaks in general terms of the pain she suffered in the work-related incident. The statement dwelled on the chest pain and that becomes apparent when considering Ms Mayman's 2020 statement.
- (c) In Ms Mayman's 2020 statement, she described the left side of her body being heavily impacted by the thin edge of the solid wood door and being jolted by the impact. After undergoing a whole-body scan, Dr Nicola advised Ms Mayman that she had sustained two rib fractures. It was understandable that Ms Mayman focused on her fractured ribs at that point in time. Fractured ribs are very painful, albeit not necessarily of long duration. Ms Mayman explained that the pain to her chest was intense and much more severe than the pain in her neck, left shoulder and left arm. At some later time, she noticed increasing neck pain and problems with her left arm.
- (d) Ms Mayman referred to her first consultation with Professor Paoloni on 28 June 2016. Professor Paoloni commenced an aggressive regime of treatment to Ms Mayman's left shoulder.
- (e) Ms Mayman stated that her work injury significantly increased her neck pain. Before the injury she was able to manage the neck pain quite well. After the injury it became more difficult for her to manage the increased neck pain, which has continued to date. There was evidence of treatment and investigations relating to Ms Mayman's cervical spine condition arising from the 2009 assault as referred to by the second respondent in its submissions. However, there was no evidence of any aggressive form of treatment and no indication of surgery.
- (f) The clinical records of Dr Nicola disclosed that by 1 September 2015, Ms Mayman was taking Endep tablets and Lyrica capsules, both of which are potent medications. Thereafter, those medications were regularly prescribed. The first reference in the clinical records to limited cervical spinal pain post 21 August 2015 was on 2 August 2018 by Dr David Gorman, General Practitioner, some three years after the work-related incident. The reason why references to cervical spine symptoms stopped was that the other pain Ms Mayman suffered in the work-related incident was of a much more severe nature. The prescription of Endep and Lyrica referred to above was a significant event. It meant that, in effect, any pain that Ms Mayman was suffering in her neck, would have been treated by such prescriptions. Therefore, it is not surprising that there was no mention of Ms Mayman's neck until the reference to restricted neck range of movement in Professor Paoloni's reports in December 2017 and 11 January 2018. There was no reference to neck pain. This was consistent with the heavy pain relieving medication Ms Mayman was taking, which was, in effect, treating her neck.

- (g) Dr Patrick, after having noted the history of the 2009 assault on Ms Mayman and following a clinical examination, opined an aggravation to Ms Mayman's cervical spine as a result of the work-related incident.
- (h) Ms Mayman stated that the left side of her body was heavily impacted by the thin edge of the solid wood door and that she was jolted by the impact. Applying the commonsense test of causation, the mechanism of injury described could have caused a jolt that would have aggravated the pre-existing condition in Ms Mayman's cervical spine.
- (i) Whilst Dr Breit took a fairly thorough history, he did not properly consider Professor Paoloni's reports. He dismissed Ms Mayman's left shoulder injury as a trivial soft tissue injury that had ceased long ago. This casts some doubt on Dr Breit's opinion. Dr Breit did not really deal with the concept of an aggravation to the cervical spine because he was intent on playing the advocate.
- (j) Dr Patrick's opinion ought to be preferred over that of Dr Breit. Both the left shoulder and the cervical spine ought to be referred to an AMS for assessment.

28. The second respondent's submissions in reply may be summarised as follows:

- (a) The reference by Dr Gorman in the clinical records on 2 August 2018 to Ms Mayman's cervical spine clearly related to the 2009 assault. There was no reference to the work-related incident.
- (b) There was no evidence by Ms Mayman or any medical practitioner that the ingestion of Lyrica and other pain relieving medication referred to in her submissions, masked her cervical spine symptoms. It was not an evidence-based submission.
- (c) Professor Paoloni did provide a diagnosis in respect of the significant treatment that he provided to Ms Mayman, namely, left-sided costochondritis and left shoulder pain from supraspinatus tendon injury/subacromial bursitis.

29. In evidence, there are statements by Ms Mayman dated 25 July 2017¹⁵ and 6 February 2020.¹⁶

30. Ms Mayman's statement dated 25 July 2017 was taken by a representative of Lee Kelly Commercial Investigations on the instructions of the second respondent. The statement was taken almost two years after the subject work-related injury.

31. Ms Mayman's statement dated 6 February 2020 was taken by her lawyer for the purposes of these proceedings. The statement was taken some 4.5 years after the subject work-related injury.

¹⁵ Reply at pages 1-5.

¹⁶ ARD at pages 40-45.

32. In her evidentiary statements, Ms Mayman disclosed that, in 2005, she injured her lower back when she slipped on some melted ice cream at Westfield, Hurstville. She was compensated in relation to that injury. Ms Mayman also disclosed that, in 2009, she sustained an injury to her neck at Ramsgate shopping centre when she was assaulted by a "crazy woman".¹⁷ She received treatment following the neck injury and a few years later, received a victim's compensation payment. She managed her neck injury with medication, including Endep and Panadol. Ms Mayman's evidentiary statements provided no further information in relation to the nature of treatment she received for the injury she sustained to her cervical spine in 2009.
33. In the determination of this matter, it is important that I consider the evidence as to the nature and extent of the injury to Ms Mayman's cervical spine on 6 December 2009 and its consequences.
34. On 6 December 2009, Ms Mayman presented at St George Hospital Emergency Department where she was examined, treated and discharged the following morning. The St George Hospital Emergency Department discharge summary referred to Ms Mayman as having been assaulted by another female at the shops. The discharge summary noted that Ms Mayman had been punched twice to the left jaw; punched once to the right jaw; punched once to the right temporomandibular joint; dragged by her hair and had hit the back of her head twice. It also noted that she had been kicked on her knee whilst on the ground. Ms Mayman complained of severe neck pain, jaw pain, difficulty opening her jaw, headache and blurred vision. On examination, the medical officer observed tenderness over the cervical spine, both sides of the jaw and right temporomandibular joint. Ms Mayman underwent a CT scan of her head; x-ray of her cervical spine; and CT scan of her cervical spine. No abnormalities were revealed.¹⁸
35. In evidence, are Ms Mayman's Ashton Medical Practice clinical records.¹⁹ Ms Mayman first consulted her general practitioner, Dr Nicola of the Ashton Medical Practice in relation to the injuries she sustained in the assault at the Ramsgate shopping centre on 11 December 2009. Thereafter, the clinical records recorded complaints of ongoing cervical spine pain or symptoms on 19 December 2009, 23 January 2010, 15 March 2010, 9 June 2010, 6 August 2010, 6 December 2010, 25 March 2011, 15 June 2011, 13 March 2013, 12 April 2013, 29 July 2014 and 2 September 2014.
36. On 13 January 2010, Ms Mayman underwent an x-ray of her cervical spine by Dr Palmer, Radiologist. The x-ray demonstrated degenerative change at C4/5 with right-sided bony foraminal stenosis.²⁰
37. On 16 November 2010, Ms Mayman underwent a bone scan by Dr Patrick Butler, Radiologist. Dr Butler concluded that there was evidence of low-grade discovertebral arthritis at C4/C5.²¹
38. On 30 November 2010, Ms Mayman underwent an MRI scan of her cervical spine by Dr Lynette Masters, Radiologist. Dr Masters concluded that there was a disc protrusion with some osteophyte lipping at its margins at C4/5 extending into the proximal aspect of the foramen with potential mass effect on the left C5 nerve root. There was no central stenosis or cord compression. At C5/6 there was a right paracentral disc protrusion but no central stenosis or cord compression and no foraminal nerve root compressive lesion.²²

¹⁷ ARD at page 40 at [6].

¹⁸ Reply at pages 81-82.

¹⁹ Reply at pages 123-135.

²⁰ Reply at page 138.

²¹ Reply at page 139.

²² Reply at page 140.

39. On 6 September 2012, Dr Nicola referred to the assault on Ms Mayman in 2009 and the symptoms of ongoing pain in her neck and bilateral shoulders that ensued. He opined that Ms Mayman was not expected to ever completely recover from those symptoms and that the symptoms were causing chronic manifestations.²³
40. On 18 March 2013, Ms Mayman underwent CT scan of the cervical spine by Dr Lim, Radiologist. Dr Lim concluded that there was a degenerative C4/5 disc with anterior and posterior osteophytes causing narrowing and encroachment of the neural exit foramina, especially on the left side. There was also a shallow focal disc protrusion right of midline at C5/6 without nerve entrapment.²⁴
41. On 14 April 2014, Dr Nicola completed a Centrelink Disability Support Pension medical report providing a diagnosis of cervical C4/5 disc lesion and spondylosis with the date of onset being 6 December 2009. The latter condition was described as the one with the most impact of the two conditions referred to in the medical report. The other condition referred to was diagnosed as a lumbar disc lesion at L5/S1. Ms Mayman subsequently qualified for a Centrelink Disability Support Pension.²⁵
42. On 26 May 2014, Ms Mayman underwent a CT scan of the cervical spine by Dr Shearman, Radiologist. Dr Shearman concluded that there was evidence of multilevel spondylitic disease with significant discovertebral pathology and recommended an MRI for further evaluation.²⁶
43. In referral letters to Dr Saeed Kohan, Neurosurgeon dated 29 May 2014²⁷ and 18 August 2014,²⁸ Dr Nicola referred to Ms Mayman's chronic neck pain. In a referral letter to Sydney Sports Centre dated 20 January 2015, Dr Nicola referred to Ms Mayman's chronic neck pain.²⁹
44. Following the assault, Ms Mayman first consulted Mr Borenstein, Clinical Psychologist on 16 December 2009. On 11 February 2010, Mr Borenstein referred to a neck injury related to an assault in his report to Dr Nicola.³⁰ On 27 September 2014, Mr Borenstein referred to Ms Mayman's chronic neck pain in a report to Dr Nicola.³¹
45. On 8 February 2010, Ms Mayman consulted Dr Andrew Henderson of St George Hospital Department of Neurology in relation to her cervical spine.³² Ms Mayman's cervical spine was treated by Mr Dahr, Physiotherapist.³³ In July/August 2010, Ms Mayman was treated at St George Hospital Department of Physiotherapy.³⁴
46. On 9 November 2010, Ms Mayman consulted Dr Lassere, Consultant Rheumatologist in relation to left-sided neck pain.³⁵ On 6 December 2010, Dr Lassere identified pathology in the cervical spine upon reviewing Ms Mayman's bone scan and cervical spine MRI.³⁶ On 8 November 2011, Dr Lassere arranged for Ms Mayman to undergo a left C5 foraminal injection. There is no evidence that Ms Mayman underwent this procedure.

²³ Reply at page 54.

²⁴ Reply at page 143.

²⁵ Reply at pages 61-71.

²⁶ Reply at page 144.

²⁷ Reply at page 55.

²⁸ Reply at page 56.

²⁹ Reply at page 57.

³⁰ Reply at page 118.

³¹ Reply at page 119.

³² Reply at page 86.

³³ Reply pages 83-85.

³⁴ Reply at pages 87-88.

³⁵ Reply at pages 89-90.

³⁶ Reply at page 91.

47. Ms Mayman's cervical spine was treated by Mr Hardas, Chiropractor, who, on 5 March 2012 found cervical symptomology and pathology.³⁷ On 27 September 2012, Mr Hardas opined that Ms Mayman had suffered a permanent injury to her cervical spine and would experience ongoing symptoms in the long-term.³⁸
48. On 28 August 2014, in a report to Dr Miriam Nicola, Dr Kohan referred to Ms Mayman's significant neck pain that had worsened over the years from the time of the assault in 2009 to the time of his consultation. He also reported that diagnosis and management of chronic neck pain is complex and that, even with surgery, there is limited expectation. He believed that her symptoms suggested a focal spondylitic change that may be consistent with the focus of her pain generation at C4/C5 and that, if there was sufficient supporting investigation, surgery may be an option.³⁹
49. On 2 September 2014, Ms Mayman underwent a regional bone scan with tomography by Dr Richard Quinn, Radiologist. Dr Quinn concluded that there was evidence of moderate C4/C5 discovertebral arthritis.⁴⁰ On the same date, she also underwent an x-ray of the cervical spine by Dr Carl Bryant, Radiologist. Dr Bryant concluded that there was evidence of degenerative disc disease at C4/5.⁴¹
50. On 23 September 2014, Ms Mayman underwent an MRI scan of the cervical spine by Dr Jeff Kuan, Radiologist. Dr Kuan concluded that there was evidence of significant spondylitic narrowing of the C4/5 intervertebral foramina. There was also a mild broad-based right central disc protrusion at C5/6 without canal stenosis.⁴²
51. On the available medical evidence, there were no consultations in relation to Ms Mayman's cervical spine or diagnostic imaging of the cervical spine between 23 September 2014 and the date of the work-related incident on 21 August 2015.
52. On 31 October 2019, Ms Mayman informed Dr Breit that since the 2009 assault, she has had neck and trapezial pain but no arm pain or weakness, just tingling in both arms.⁴³
53. I am satisfied that the medical evidence revealed that Ms Mayman had sustained a significant injury to her cervical spine in an assault at Ramsgate shopping centre on 6 December 2009 and that the pathology related to that injury has continued.
54. In her evidentiary statement dated 25 July 2017, Ms Mayman described the work-related incident on 21 August 2015 as follows:
- "I was carrying coffee in each hand and I walked past the kitchen. As I approached the hall way that led to the workroom where they make the pies, the youngest son who was away from school due to being unwell, swung the door open in the direction I was walking and made impact with the thin edge of the solid wood door."⁴⁴
55. In her evidentiary statement dated 6 February 2020, Ms Mayman described the work related incident on 21 August 2015 as follows:
- "I was carrying a coffee in each hand and I walked past the kitchen. As I approached the hallway that led to the workroom where they make the pies, Poppy and Con's youngest son Vasilli, who was away from school

³⁷ Reply at page 94.

³⁸ Reply at page 95.

³⁹ Second respondent's Application to Admit Late Documents dated 18 May 2020 at pages 1-2.

⁴⁰ Reply at page 148.

⁴¹ Reply at page 149.

⁴² Reply at page 150.

⁴³ Reply at page 41.

⁴⁴ Reply at page 3 at [16].

for the day, swung the door open in the direction I was walking. The left side of my body impacted the thin edge of the solid wood door. It was a very heavy impact. I was jolted by the impact.”⁴⁵

56. The description of the work-related incident on 21 August 2015 in Ms Mayman’s first evidentiary statement did not refer to the left side of her body being impacted. There was no reference to it being a very heavy impact. There was no reference to being jolted by the impact.
57. In relation to the injuries Ms Mayman sustained in the work-related incident on 21 August 2015, her first evidentiary statement provided little detail and could be described as vague. I attribute the lack of detail to the statement taker. There was a reference to excruciating pain and chronic pain without identifying its location. Later in the statement there was a reference to a rib and weakness in an arm but no indication as to whether it was the left rib and left arm. Towards the end of the statement, there was reference to never having damaged her shoulders and ribs before the incident. There was no reference to pain or symptoms in the cervical spine.
58. In her second evidentiary statement, Ms Mayman described herself as being in shock after the work-related incident on 21 August 2015. She recalled placing her right hand over her left shoulder because of the pain. An ice pack was placed over her left shoulder. She recalled horrendous pain in her left ribs and that she had difficulty breathing. She did not refer to any pain or symptoms in the cervical spine at the time of the incident. However, later in the statement, she stated that the pain to her chest was intense and much more severe than the pain in her neck, left shoulder and left arm. This was the first time in her statement that she referred to her neck. Ms Mayman explained that, initially, the priority was on her fractured ribs. Towards the end of her statement, Ms Mayman stated that her work injury significantly increased her neck pain. At the time she commenced employment with the first respondent, she had been able to manage her neck pain quite well. After the work-related incident, it became harder for her to manage the increased neck pain, which has continued to date. Ms Mayman did not state when she first noticed the onset of the increased neck pain. In the medical evidence referred to below, there is no evidence of Ms Mayman reporting her post 21 August 2015 increased neck pain to any medical practitioner other than Dr Patrick.
59. On 27 August 2015, Ms Mayman first consulted Dr Nicola in relation to the work-related incident on 21 August 2015. Dr Nicola recorded that Ms Mayman hit against a door whilst helping a relative and he referred to the upper anterior left chest wall. He arranged for a regional bone scan and prescribed Endep tablets. There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.⁴⁶
60. On 1 September 2015, Dr Nicola prescribed Ms Mayman Lyrica capsules. There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.⁴⁷
61. On 4 March 2016, Dr Nicola noted that Ms Mayman had a painful left shoulder, especially on flexion and abduction for a period of six weeks. He also recorded “Nil trauma”. He referred Ms Mayman for an x-ray and ultrasound of her left shoulder.⁴⁸ There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.

⁴⁵ ARD at page 42 at [15].

⁴⁶ Reply at page 132.

⁴⁷ Reply at page 132.

⁴⁸ Reply at page 132.

62. On 15 March 2016, Ms Mayman underwent a bone scan by Dr Quinn, Radiologist. Dr Quinn concluded that there was increased tracer uptake noted in the mid cervical spine which corresponded with C4-C5 discovertebral arthritis on fusion SPECT.⁴⁹
63. On 31 March 2016, Dr Nicola diagnosed Ms Mayman as having suffered a partial tear of the left supraspinatus and osteoarthritis in the left AC joint. He arranged for her to undergo a local injection under ultrasound guidance to the left supraspinatus and the left AC joint.⁵⁰ There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
64. On 6 May 2016, Dr Nicola recorded Ms Mayman reporting progressively worsening pain of the left shoulder; pain to the anterior upper chest wall; and limited mobility of the left shoulder in all directions.⁵¹ In a referral letter to Professor Paoloni on the same date, Dr Nicola requested an opinion and management regarding Ms Mayman's progressively worsening pain in the left shoulder and anterior upper chest wall.⁵² There was no reference in the clinical record or the referral letter to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
65. On 12 August 2016, Dr Nicola prescribed Ms Mayman Endep tablets and Lyrica capsules. There was no reference as to the reason for the surgery consultation.⁵³ There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
66. On 27 October 2016, Dr Nicola prescribed Ms Mayman Endep tablets. There was no reference as to the reason for the surgery consultation.⁵⁴ There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
67. In a referral letter to the Institute of Rheumatology and Orthopaedics dated 22 November 2016, Dr Nicola requested an opinion and management regarding Ms Mayman's worsening left shoulder pain and the pain to the anterior upper chest wall.⁵⁵ There was no reference in the referral letter to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
68. On 13 January 2017, Dr Nicola prescribed Ms Mayman Endep tablets. There was no reference as to the reason for the surgery consultation.⁵⁶ There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
69. On 2 June 2017, Dr Nicola recorded Ms Mayman complaining of ongoing pain to the left anterior chest wall related to the work incident. He also noted a complaint of ongoing pain radiating to the left side of the chest and axillary area.⁵⁷ There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.

⁴⁹ Reply at page 151.

⁵⁰ Reply at page 132.

⁵¹ Reply at page 133.

⁵² Reply at page 58.

⁵³ Reply at page 133.

⁵⁴ Reply at page 133.

⁵⁵ Reply at page 59.

⁵⁶ Reply at page 133.

⁵⁷ Reply page 134.

70. On 8 August 2017, Dr Nicola recorded Ms Mayman complaining of ongoing pain to the left anterior chest wall and referred her back to Professor Paoloni.⁵⁸ There was no reference in the clinical record or in the referral letter to Professor Paoloni to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine. This was the last entry in the Ashton Medical Practice clinical records in evidence.
71. On 14 August 2017, Ms Mayman lodged an uninsured liabilities worker's claim form. In the claim form, Ms Mayman described the mechanism of her injury on 21 August 2015. In general, the description was consistent with the evidence. She described having injured her chest and left arm "close to where my left arm joins".⁵⁹ She referred to her condition as being a torn ligament in her left arm and pain in the left side of her chest. Ms Mayman disclosed her 2005 back injury on the claim form but did not disclose her cervical spine injury in the assault in 2009. There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
72. In evidence, there are a number of reports by Professor Paoloni to Dr Nicola.⁶⁰ On 5 October 2017, Professor Paoloni noted Ms Mayman's acute left anterior chest injury and left shoulder pain when she was struck by a door whilst working in a café. He diagnosed left-sided costochondritis and left shoulder pain from supraspinatus tendon injury/subacromial bursitis.⁶¹ There was no reference in any of Professor Paoloni's reports to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain in the cervical spine. However, in his reports dated 20 December 2017, 11 January 2018, 22 January 2018, 12 February 2018, 12 March 2018, 23 April 2018, and 7 May 2018, he referred to Ms Mayman's neck range of motion being restricted at end range lateral flexion and rotation. However, Professor Paoloni provided no explanation or opinion linking the restricted range of motion to the work-related incident on 21 August 2015.
73. On 24 April 2018, Ms Helen Yoon, Exercise Physiologist reported to Professor Paoloni that Ms Mayman described a history of left anterior medial costochondral pain around ribs 3-5 from a work-related injury sustained from a swinging door into the anterior left chest wall and shoulder. She noted that Ms Mayman complained of sporadic pain in the area described. There was no reference to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine. There was no reference to pain or other symptoms in the cervical spine.
74. On 1 March 2018, Ms Mayman underwent a regional bone scan and CT SPECT by Dr Bill Mouratidis, Radiologist. Dr Mouratidis concluded that there was evidence of minor discovertebral degenerative changes present at C4/5.⁶² I find that the diagnostic imaging of Ms Mayman's cervical spine prior to and after 21 August 2015 referred to above, demonstrated no significant change in pathology.
75. In evidence, are the clinical records of Dr David Gorman relating to Ms Mayman. The entry on 2 August 2018 referred to Ms Mayman's problem as being chronic anterior chest pain after rib fractures. Dr Gorman took a history of the 2015 work-related incident. He summarised the medical treatment history as provided to him by Ms Mayman which was consistent with the evidence. He noted that Ms Mayman was in receipt of a Disability Support Pension for neck pain as a result of an attack by a woman and low back pain as a result of slipping on melted ice cream. On examination Dr Gorman found limited cervical spinal pain; tenderness over the anterior chest on the left; left shoulder restriction; and tingling down the

⁵⁸ Reply at page 135.

⁵⁹ Reply at page 11.

⁶⁰ ARD at pages 4-14 and 17.

⁶¹ ARD at page 4.

⁶² Reply at pages 155-156.

left arm. I agree with the second respondent's submission that Dr Gorman's reference to limited cervical spinal pain related to the 2009 assault and not the 2015 work-related incident. The clinical records referred to further consultations with Ms Mayman on 5 June 2019 and 8 August 2019. None of the entries in the clinical records referred to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine as a result of the work-related incident on 21 August 2015.

76. In evidence, there are seven Certificates of Capacity issued by Dr Nicola in relation to the 21 August 2015 injury.⁶³ All the Certificates of Capacity referred to the diagnosis of work-related injury as being an injury to the left side of the anterior chest wall and fracture to the left third and fourth ribs. None of the Certificates of Capacity referred to an injury to the cervical spine or an aggravation of pre-existing pathology in the cervical spine as a result of the work-related incident on 21 August 2015.
77. On 30 May 2019, Ms Mayman consulted Dr Patrick at the request of her lawyers. In evidence, there is a report by Dr Patrick dated 16 September 2019.⁶⁴ Dr Patrick took a history from Ms Mayman that included her 2005 back injury at Westfield, Hurstville and the 2009 assault at Ramsgate shopping centre. He also took a history of the work-related incident on 21 August 2015, which was largely consistent with the evidence, in that, he recorded that a door was swung forcibly open with resultant severe forceful impact to the left side of Ms Mayman's chest and arm. Dr Patrick did not take a history of Ms Mayman being jolted by the impact as referred to in Ms Mayman's second evidentiary statement. He noted that Ms Mayman was aware of significant and severe pain at the left chest wall anteriorly and also significant left shoulder pain. He then added that she became aware of some aggravation to her neck. As in Ms Mayman's second evidentiary statement, there is no indication as to when Ms Mayman became aware of the aggravation. A history was taken of the post 21 August 2015 treatment received by Ms Mayman and it was largely consistent with the evidence.
78. Dr Patrick recorded Ms Mayman's presenting symptoms in relation to her cervical spine as follows:
- “2. She has she believes a significant increase in her neck pain which is now more left-sided.”⁶⁵
- Dr Patrick noted that Ms Mayman's major complaints were of left shoulder pain and stiffness with difficulty elevating the left arm above the horizontal at all. He also noted that she still had anterior left-sided chest wall pain about the region where her ribs were fractured.
79. On examination of Ms Mayman's cervical spine, Dr Patrick observed marked muscle guarding; active flexion to 60% of expected; extension 20%; lateral rotation to the right 70% and left 60% of expected. He attached imaging study reports to his report in chronological order. However, he did not discuss the diagnostic imaging of Ms Mayman's cervical spine or their relevance to his opinion. He did not compare and discuss the pre-21 August 2015 diagnostic imaging of the cervical spine to the post 21-August 2015 diagnostic imaging of the cervical spine in his report.
80. Relevantly, Dr Patrick opined that Ms Mayman had sustained a significant aggravation to her cervical spine as a result of the work-related incident on 21 August 2015 and that her employment with the first respondent was the main contributing factor to the injury.

⁶³ Reply at pages 166-192.

⁶⁴ ARD at pages 18-31.

⁶⁵ ARD at page 20 at [2].

81. On 31 October 2019, Ms Mayman consulted Dr Robert Breit, Orthopaedic Surgeon at the request of the second respondent. In evidence, there is a report by Dr Breit dated 12 November 2019.⁶⁶ Dr Breit took a thorough history from Ms Mayman. The histories provided in relation to her prior injuries, the subject injury and her treatment thereafter were largely consistent. Dr Breit reported Ms Mayman's present complaints as being left arm weakness; left axillary pain on extension and abduction; neck pain and headaches and tension, especially on exertion. Dr Breit did not obtain a history of a significant increase in Ms Mayman's cervical spine after the work-related incident on 21 August 2015.
82. On examination of the cervical spine, Dr Breit observed slight neck tenderness; no spasm; and despite free movements, there was only half normal range restricted symmetrically. Neurologically, there were said to be diminished sensation in the entire left arm, global weakness and reflexes revealed diminished left biceps and supinator jerk. Dr Breit referred to Ms Mayman's nuclear medical scan dated 2 September 2014 and the whole-body nuclear scan dated 31 August 2015. In particular, he noted the finding of C4/5 discovertebral arthritis in the 2 September 2014 report.
83. Dr Breit opined that the pathology and symptoms in Ms Mayman's cervical spine came from her previous injury (the 2009 assault) for which there had been no aggravational component. He explained that the range of movement displayed in the left shoulder was not such that it would result in added stress to the cervical spine. Dr Breit was of the opinion that Ms Mayman suffered from a long-standing cervical problem, the extent of which was so severe that she allegedly had been unable to work and had been in receipt of a pension.
84. Whilst I have no reason to doubt Ms Mayman's credibility, I have concerns about the reliability of her evidence on the causation issue in dispute. Ms Mayman's second evidentiary statement was completed with the assistance of her lawyer on 6 February 2020, some 4.5 years after the work-related incident. In relation to the allegation of having suffered increased pain in her cervical spine after 21 August 2015, it was inconsistent with her earlier and more contemporaneous statement dated 25 July 2017. It was also inconsistent in this regard with the claim form she lodged on 14 August 2017. It was also inconsistent with the contemporaneous treating medical evidence.
85. Histories in medical records are often used to attack the credit of a worker. Reference is made either to a failure to mention relevant matters, or a description in a medical record which is different to what the worker now says in evidence. Care should be taken when considering such evidence, not to place too much weight on the clinical notes of treating doctors, given their primary concern with treatment. Experience demonstrates that busy doctors sometimes misunderstand, omit or incorrectly record histories of accidents or complaints by a patient, particularly in circumstances where their concern is with the treatment or impact of an obvious frank injury: *Davis v Council of the City of Wagga Wagga*⁶⁷ and applied in *King v Collins*⁶⁸ and *Mastronardi v State of New South Wales*⁶⁹.
86. I acknowledge that caution must be taken when relying upon clinical records. I have exercised caution in this regard and considered all the evidence.

⁶⁶ Reply at pages 40-46.

⁶⁷ *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34.

⁶⁸ *King v Collins* [2007] NSWCA 122.

⁶⁹ *Mastronardi v State of New South Wales* [2009] NSWCA 270.

87. The value of contemporaneous evidence has been repeatedly endorsed by the courts. In *Onassis and Calogeropoulos v Vergottis*⁷⁰, Lord Pearce said of documentary evidence:

“It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.”

88. More recently, in *Watson v Foxman*,⁷¹ the McLelland CJ in Equity said:

“ ... Human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which the plausible details are then, again often subconsciously, constructed. All of this is a matter of human experience.”⁷²

89. However, the absence of contemporaneous evidence is not determinative on the issue of causation where there is other evidence: *Owen v Motor Accidents Authority of NSW*⁷³ and *Bugat v Fox*.⁷⁴ While independent corroboration of complaints of pain will often be helpful and relevant in assessing the probative value of the evidence overall, such evidence is not a “requirement” that must be satisfied before an arbitrator can feel actual persuasion about the existence of a fact in issue: *Department of Aging, Disability and Home Care v Findlay*⁷⁵. In this case, the ‘other evidence’ is Ms Mayman’s second evidentiary statement, some 4.5 years after the event and Dr Patrick’s evidence, which relies heavily on Ms Mayman’s evidence that she suffered a significant increase in neck pain after 21 August 2015. I have already expressed my concerns about the reliability of Ms Mayman’s evidence above.
90. I do not find Dr Patrick’s opinion in relation to Ms Mayman’s cervical spine persuasive. He provided no diagnosis of the injury to the cervical spine, other than to say that there had been an aggravation. Whilst he acknowledged Ms Mayman suffered cervical spine pain in the assault in 2009, he did not provide any reasoning behind his conclusion that the pathology in Ms Mayman’s cervical spine had been aggravated by the incident on 21 August 2015. He did not engage with the pathology in the pre-21 August 2015 and post-21 August 2015 diagnostic imaging. He did not engage with the mechanism of the injury. He did not deal with the delay in Ms Mayman reporting the increased symptoms in her cervical spine to her treating doctors. Notably, Dr Patrick was the first doctor to diagnose an aggravation to the condition of Ms Mayman’s cervical spine. None of the treating doctors had made such a diagnosis. Noting the deficiencies referred to above, at its highest, Dr Patrick’s opinion appears to be based on his acceptance of Ms Mayman’s complaint that she “believes”⁷⁶ she had a significant increase in her neck pain. Dr Patrick’s opinion is given even less weight taking into account the concerns I have expressed in relation to the reliability of Ms Mayman’s evidence.

⁷⁰ *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd’s Rep 403 at 431.

⁷¹ *Watson v Foxman* (1995) 49 NSWLR 315.

⁷² *Watson v Foxman* (1995) 49 NSWLR 315 at 319.

⁷³ *Owen v. Motor Accidents Authority of NSW* [2012] NSWSC 650 at [52].

⁷⁴ *Bugat v Fox* [2014] NSWSC 888 at [31], [32] and [34].

⁷⁵ *Department of Aging, Disability and Home Care v Findlay*

⁷⁶ ARD at page 20 at [2].

91. Rule 15.2(3) of the Workers Compensation Commission Rules 2011 provides that “evidence based on speculation or unsubstantiated assumptions is unacceptable.” Further, it is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd*⁷⁷ (*Paric*); *Makita (Australia) Pty Ltd v Sprowles*⁷⁸ (*Makita*); *South Western Sydney Area Health Service v Edmonds*⁷⁹ (*Edmonds*); and *Hancock v East Coast Timbers Products Pty Ltd*⁸⁰ (*Hancock*); that there must be a “fair climate” upon which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, more than a mere “ipse dixit” (an assertion without proof) is required and the latter seems to be precisely what Dr Patrick has done in this matter for the reasons referred to above.
92. I prefer the opinion expressed by Dr Breit over that of Dr Patrick for the reasons stated above. Dr Breit’s opinion is consistent with the description of injury provided to him and consistent with the medical evidence of Ms Mayman’s treatment providers.
93. I reject Ms Mayman’s submission that the pain relieving medication, including Lyrica, which she took after the work-related incident on 21 August 2015, masked her cervical spine symptoms. There was no evidence by Ms Mayman or any medical practitioner to support that submission.
94. I have weighed the evidence of Ms Mayman together with other objective evidence and/or the absence of it: *Department of Education and Training v Ireland*.⁸¹ Having done so, and for the reasons stated above, I am not satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Ms Mayman has established that there was a definite or distinct physiological change or disturbance in her already symptomatic cervical spine by way of a frank injury or an aggravation thereof arising out of or in the course of her employment with the first respondent on 15 August 2015.
95. Accordingly, I find that Ms Mayman did not suffer an injury to the cervical spine arising out of or in the course of her employment with the first respondent on 21 August 2015 within the meaning of sections 4(a) and 9A of the 1987 Act and I enter an award for the respondents in this regard.

Is Ms Mayman entitled to lump sum compensation within the meaning of section 66 of the 1987 Act?

96. Section 65(3) of the 1987 Act formerly provided that:

“If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist”.

97. Section 65(3) of the 1987 Act was repealed by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 amending Act) in schedule 2, clause 2. This schedule commenced on the date of proclamation which was 1 January 2019. Savings and transitional provisions were added by the 2018 amending act and appear in the 1987 Act in Schedule 6, Part 19L and clause 2 provides that an amendment made by the 2018 amending Act extends to an injury received before the commencement of the amendment, and a claim for compensation made before the commencement of the amendment. The repeal of section 65(3) applies to the present case.

⁷⁷ *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58

⁷⁸ *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705.

⁷⁹ *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421.

⁸⁰ *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43.

⁸¹ *Department of Education and Training v Ireland* [2008] NSWCCPD 134.

98. The repeal of section 65(3) of the 1987 Act, allows arbitrators to make determinations of permanent impairment. Neither party submitted that this was an appropriate case for me to determine Ms Mayman's entitlement to lump sum compensation without referral to an AMS. The difference in the assessments between Dr Patrick and Dr Breit is sufficient for me to consider that a referral to an AMS is appropriate. As a result, I will remit the matter to the Registrar to add it to the medical assessment pending list for referral to an AMS to assess the degree of permanent impairment of Ms Mayman's left upper extremity (left shoulder) as a result of injury on 21 August 2015.

CONCLUSION

99. Ms Mayman did not suffer an injury to the cervical spine arising out of or in the course of her employment with the first respondent on 21 August 2015 within the meaning of sections 4(a) and 9A of the 1987 Act.
100. The matter is remitted to the Registrar to add it to the medical assessment pending list for ultimate referral to an AMS for assessment under the 1998 Act in accordance with orders 4 and 5 in the Certificate of Determination attached to this Statement of Reasons.