WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**6698/19**
Applicant:	**Nikolaos Poniris**
Respondent:	**Hanson Construction Materials Pty Ltd**
Date of Determination:	**19 March 2020**
Citation:	**[2020] NSWWCC 82**

The Commission determines:

1. The applicant sustained injury to his cervical spine on 22 December 2017 pursuant to ss 4(a) and 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 as follows:

Date of injury:	22 December 2017
Body parts:	Left upper extremity (shoulder)
	Cervical spine
Method:	Whole person impairment

3. The materials to be referred to the Approved Medical Specialist are to include the Application to Resolve a Dispute and all attachments and the Reply and all attachments.

A brief 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.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Nikolaos Poniris (the applicant) was employed as concrete truck driver by Hanson Construction Materials Pty Ltd (the respondent).

2. On 22 December 2017, the applicant was holding a concrete chute with his left arm whilst discharging concrete when another worker suddenly pulled the chute away from the applicant causing his left arm to be wrenched forward. The respondent has accepted that the applicant sustained an injury to his left shoulder in this incident. The applicant claims he also injured his cervical spine in the incident.

3. The respondent disputed the cervical spine injury and a claim for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in a dispute notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1987* (the 1998 Act) on 4 October 2019.

4. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed on 19 December 2019, seeking lump sum compensation for permanent impairment of the applicant's left upper extremity (shoulder) and cervical spine as a result of the injury on 22 December 2017.

PROCEDURE BEFORE THE COMMISSION

5. The parties appeared for conciliation conference and arbitration hearing on 24 February 2020. The applicant was represented by Ms Eraine Grotte of counsel, instructed by Ms Katherine Harley. The respondent was represented by Mr Paul Rickard of counsel.

6. 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.

ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain in dispute:

   (a) Whether the applicant sustained injury to his cervical spine on 22 December 2017; and

   (b) The degree of permanent impairment resulting from injury on 22 December 2017.

EVIDENCE

Documentary Evidence

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

   (a) Application to Resolve a Dispute and attached documents;

   (b) Reply and all attached documents.

9. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

10. The applicant's evidence is set out in a written statement signed by him on 18 December 2019.

11. The applicant stated that prior to the injury on 22 December 2017, he had undergone surgery to his lumbar spine and had a heart defibrillator implanted, both with good results. The applicant was able to carry out physical work prior to the injury.

12. On 22 December 2017, the applicant had driven his vehicle containing concrete to a delivery site. As the applicant commenced discharging the concrete from his truck, he was holding the chute with his left hand whilst using his right hand to hose excess concrete from the chute with a high-pressure hose. The applicant was looking up and into the chute.

13. Whilst doing this, the applicant noticed another worker, known as a "tester", walk to the passenger side of the applicant's vehicle. The tester suddenly pulled the chute towards himself with both hands. The applicant was pulled off balance and his left shoulder wrenched away from his body, causing a whiplash or jarring motion to the applicant's neck. The applicant felt immediate pain and a burning sensation in his left shoulder. The motion caused the applicant to almost fall into the blades of the concrete pump.

14. The applicant was able to drive back to the depot but was experiencing severe pain in his left shoulder, which increased over time. The applicant reported the injury to his manager and went to see general practitioner, Dr John Kyriazis. Dr Kyriazis referred the applicant for an ultrasound of his left shoulder, prescribed pain relief and certified the applicant as fit to return to work with restrictions including no lifting with his left arm and no truck driving.

15. The applicant underwent an x-ray and ultrasound of his left shoulder on 2 January 2018 and was referred to orthopaedic surgeon, Dr Kwan Yeoh, whom the applicant saw on 15 January 2018. The applicant was referred for an MRI, which he underwent on 22 January 2018. On 23 January 2018, Dr Yeoh recommended left shoulder arthroscopic surgery. At this point, the applicant was reliant on Endone, Oxycontin and Targin to assist with his pain.

16. The applicant was not happy with the treatment he was receiving from Dr Kyriazis and consulted another general practitioner, Dr Eric Lim, on 19 March 2018. The applicant discussed pain in his neck radiating into his left arm and hand with Dr Lim. Dr Lim referred the applicant for a CT scan of his cervical spine, which he underwent on 28 March 2018.

17. Dr Lim also referred the applicant to another orthopaedic surgeon, Dr Gavin Soo, for a second opinion. On 24 April 2018, Dr Soo also recommended a rotator cuff repair surgery. The applicant said he had taken his usual pain medication on the day of the consultation with Dr Soo and his neck was not troubling him.

18. On 17 May 2018, the applicant underwent left shoulder arthroscopy performed by Dr Gavin Soo. The applicant wore a sling for approximately six weeks after the surgery. After the surgery, the applicant's gout flared up and he had to be hospitalised. The applicant underwent extensive physiotherapy.

19. The applicant said the pain in his neck had increased since the shoulder surgery. The applicant said he was using his right arm to compensate for his left arm and he believed this was placing additional pressure on his neck.

20. The applicant said he had been unable to undergo an MRI of his cervical spine due to his defibrillator.

21. The applicant described his neck as stiff and sore with pain radiating into his left arm and hand. The applicant had difficulty moving his neck sideways and found it almost impossible to move his head backwards. The applicant continued to take pain medication including Endone.

Evidence from the treating practitioners

22. Clinical records prepared by Dr John Kyriazis on 22 December 2017, noted:

> "at work today, leaning on chute left arm, while hosing wright [sic] someone pulled chute away, caused left arm to pull away felt pain left shoulder tried to keep working, but increasing pain and weakness left shoulder"

23. Orthopaedic surgeon (hand, wrist and upper limb), Dr Kwan Yeoh, saw the applicant on 15 and 25 January 2018 with respect to the left shoulder injury. Dr Yeoh recorded no examination or reports of symptoms in relation to the applicant's neck.

24. Dr Eric Lim prepared a report for the insurer, dated 19 March 2018. Dr Lim took a history of the incident that was consistent with the applicant's evidence. Dr Lim noted that the applicant had been on high doses of narcotic medications.

25. Dr Lim described the applicant's symptoms as including neck pain and stiffness; left shoulder pain; intermittent pins and needles in the left hand; and left arm weakness. Dr Lim diagnosed cervical spine radiculopathy and said the applicant would require an MRI of the cervical spine as well as physiotherapy. The applicant required a narcotic reduction program also.

26. The report of a CT cervical spine dated 28 March 2018 indicated degenerative changes at multiple levels. At C5/6 there was,

> "…uncovertebral degenerative changes and a disc osteophyte complex resulting in bilateral neural foraminal narrowing potentially impinging the exiting nerve roots and a mild/moderate central canal stenosis."

27. The clinical notes of a consultation with physiotherapist, Mr Ryan Heuston, on 19 March 2018, recorded a history of the injury that included,

> "pain b neck pain; PVAS 5/10
> occasional numbness in hand with prolonged sitting"

28. Mr Heuston's examination recorded, "Cervical ROM: flexion full, ext nil, rot 50%, side flex 50%" and he recommended heat therapy for the applicant's neck.

29. On 27 March 2018, the applicant reported to Mr Heuston that the heat therapy was helping him manage his symptoms. On 10 April 2018, Mr Heuston's notes record left hand tingling in the C8 dermatome.

30. On 24 April 2018, orthopaedic surgeon (shoulder, elbow, knee), Dr Gavin Soo reported to Dr Lim that the applicant had his left arm suddenly and forcefully pulled away from his body on 22 December 2017 and felt an immediate tear in the left shoulder with severe pain. Dr Soo reported,

> "Currently Mr Poniris suffers from constant pain throughout the day, worse at night, with associated weakness to the shoulder. He also noticed a deformity of his left biceps after the incident. For his ADL's he is using primarily his right arm. There is no associated numbness/paraesthesia to the left arm and he denies any neck pain.
>
> He is currently taking Targin for pain relief."

31. An operation report indicated that Dr Soo performed surgery to the applicant's left shoulder on 17 May 2018 and the applicant required an abduction sling for six weeks post-surgery.

32. In the period following the applicant's surgery, the clinical notes of the applicant's general practitioners revealed significant difficulties involving gout and psychological symptoms. The applicant reported that he was still experiencing neck and left shoulder pain on 3 October 2018. On 7 November 2018, the applicant reported severe pain including weakness in his left hand. Neck pain was recorded again on 28 November 2018. On 10 April 2019, the applicant reported persistent neck pain and pain referred to his arms, weakness in his left hand and dropping things.

33. A report from orthopaedic and spine surgeon, Dr Bisham Singh, dated 11 December 2018 recorded,

> "Mr Poniris does have limitation of range of motion of the neck, however he does not seem to be getting radicular pain from the neck and his pain in the left shoulder seems to be arising from the left shoulder. He would like to leave things alone at this stage and I recommend he persist with physiotherapy. Should he develop radicular symptoms of the neck, I would be happy to review him in my rooms."

34. Dr Singh reviewed the CT scan which revealed cervical spondylosis with potential impingement of the nerve roots, mainly at C5/6. Dr Bisham had a long discussion with the applicant regarding the radiographic findings in the clinical findings. The applicant wished to "leave his neck alone for now as it was not giving him trouble".

35. The report of a CT cervical spine performed on 11 November 2019 notes a clinical history as follows,

> "2 – 3 weeks of neck pain radiating down left arm to index finger, tingling, currently under WorkCover left shoulder rotator cuff tendon tear, rule out cervical radiculopathy."

36. The investigation found,

> "Severe left sided C2/3. Moderate left C3/4. Bilateral C4/5, C5/6 and C6/7 foraminal narrowing due to uncovertebral osteophytes and disc-osteophyte complex."

Dr Patrick

37. The applicant relies on medicolegal reports prepared by general and vascular surgeon, Dr WGD Patrick, dated 10 July 2019 and 12 December 2019.

38. In his first report, Dr Patrick took a history of the injury on 22 December 2017 that was consistent with the applicant's own evidence although Dr Patrick noted that the applicant was aware of neck pain and pain into his left arm immediately after the incident. Dr Patrick noted that the imaging of the applicant's left shoulder showed significant pathology including,

> "massive rotator cuff tears, including full-thickness full width tear of the supraspinatus and full-thickness tear also of adjacent infraspinatus, and some full-thickness tear subscapularis, indicating a massive injury to the left shoulder rotator cuff."

39. Dr Patrick noted that the applicant had pain radiating down the arm into the left-hand and needed a quality MRI of his cervical spine. The applicant had ongoing neck pain and stiffness. The applicant was reliant on strong opioid analgesic.

40. Dr Patrick's examination revealed,

> "There is muscle guarding evident at cervical spine. Active flexion is to 90% of expected, extension is nil, and lateral rotation to the right just 20% of expected and to the left 40% of expected."

41. Dr Patrick gave an opinion as follows:

> "… he has complaint of significant ongoing cervical spinal symptoms and he has no significant active extension and considerable limitation in sideways rotation but good flexion. As he presents now he clearly satisfies criteria for a radiculopathy affecting left upper extremity probably more in the C6 nerve root distribution with both biceps jerk and supinator jerk being significant diminished and with diminished sensation lateral left forearm. Quality MRI cervical spine is clearly indicated here. The CT cervical spine of 28 March 2018 is not sufficient.
>
> I do believe that Mr Nick Poniris's complained [sic] of continuing symptoms as described now are genuine, consistent with and significantly consequent upon work related injuries sustained on 22 December 2017."

42. Dr Patrick assessed 27% whole person impairment of the cervical spine and left upper extremity (shoulder).

43. In his supplementary report, Dr Patrick reiterated his view that on the balance of probabilities the applicant had sustained injuries to both his left shoulder and cervical spine at the time of the injury on 22 December 2017. Dr Patrick described the incident as a "quite serious episode" causing the applicant to be aware of severe left shoulder pain as well as neck pain going into the left arm.

44. Dr Patrick noted that "very early on post-injury" Dr Lim "appropriately" referred the applicant for a CT scan cervical spine which demonstrated significant pathology. Dr Patrick said it was likely there were pre-existing degenerative changes including some uncovertebral and facet joint degenerative changes but these were largely asymptomatic prior to the incident on 22 December 2017. Dr Patrick expressed the opinion,

> "Based on findings on clinical examination, when seen by me earlier in 2019, Mr Poniris clearly satisfied criteria for radiculopathy arising at cervical spine, and it is unacceptable that he has not been referred already for quality MRI cervical spine."

45. Dr Patrick noted that the respondent's Independent Medical Examiner, Dr Powell, found no muscle spasm but there was significant muscle guarding evident at Dr Patrick's examination. Dr Patrick noted that Dr Powell did record findings on clinical examination which may well indicate some accident related radiculopathy. Dr Patrick also found a very significant dysmetria which he believed was appropriately assessable. Dr Patrick concluded,

> "I do believe that the likelihood is that Mr Poniris has suffered a separate injury to cervical spine and the workplace incident of 22 December 2017 can be regarded as the main contributing factor to any aggravation, acceleration, exacerbation or deterioration of disease at the cervical spine (as well as his significant shoulder injuries)."

Dr Powell

46. The respondent relies on a medicolegal report prepared by orthopaedic surgeon Dr Richard Powell, dated 20 September 2019. Dr Powell took a history of injury and subsequent treatment consistent with the other evidence.

47. Dr Powell recorded that the applicant was aware of significant neck and left shoulder pain and was unable to continue working after the incident. The symptoms reported to Dr Powell included,

> "… burning pain and pins and needles over the dorsoradial aspect of the left wrist extending into the thumb. He also describes neck stiffness, though no pain."

48. The applicant was noted to be taking Oxycontin and anti-inflammatories and performing a home exercise program.

49. Dr Powell's examination revealed:

> "In relation to the cervical spine, there was no focal tenderness to palpation over the posterior bony elements of the cervical spine. There was no muscle spasm. Range of motion was restricted with full forward flexion, extension 10° and rotation half the normal range bilaterally.
>
> Neurological examination of the upper limbs revealed normal tone. He had generalised weakness of all muscles around the shoulder which appeared limited at least in part by pain. However, he also did have some weakness of elbow flexion, wrist and hand movements. He had reduced sensation to light touch involving the dorsoradial aspect of the left wrist and thumb. In regards to deep tendon reflexes, the biceps jerks were present, though symmetrically reduced, and the triceps jerks were absent bilaterally despite reinforcement."

50. Dr Powell reviewed the CT scan of the applicant's cervical spine dated 28 March 2018.

51. Dr Powell concluded that the applicant was suffering from multilevel changes of cervical spondylosis which were pre-existing and long-standing in nature. Dr Powell noted that the presentation to him was unusual and suggestive of an underlying neurological problem. Dr Powell noted that the applicant might benefit from the involvement of a neurologist.

52. Dr Powell concluded:

> "In relation to the cervical spine, this is a wholly pre-existing condition and I do not believe Mr Poniris' employment represents the main contributing factor in the ongoing aggravation of this degenerative disease process."

53. In view of these findings, Dr Powell found no assessable permanent impairment of the applicant cervical spine. Dr Powell assessed the applicant as having 7% whole person impairment of his left shoulder after deductions for significant pre-existing pathology.

Applicant's submissions

54. Counsel for the applicant, Ms Grotte noted the delay in reporting neck symptoms but said the delay was not determinative, referring me to *Kooragang Cement Pty Ltd v Bates*[1].

55. Ms Grotte submitted that the injury to the applicant's neck involved an aggravation or exacerbation of underlying degenerative pathology. Ms Grotte noted that there was no MRI investigation of the applicant's cervical spine due to the applicant's defibrillator but there were CT scans which confirmed the existence of underlying problems.

[1] (1994) 35 NSWLR 452; (1994) 10 NSWCCR 796.

56. Ms Grotte submitted that the applicant was fit and active prior to the injury. The mechanism of injury involved the applicant's left shoulder being wrenched, causing a whiplash or jarring motion to the applicant's neck. Although Ms Grotte conceded that the applicant did not describe experiencing immediate pain in his neck in his written evidence, the incident was sufficient to cause the applicant to almost fall into the blades of the concrete pump. The injury was significant and caused extensive tears to the applicant's left shoulder. Following the injury, the applicant was prescribed high doses of narcotic medication. Ms Grotte said this provided a reasonable explanation for the delay in reporting pain in the applicant's neck, as the pain was being masked.

57. Less than three months after the injury, the applicant consulted Dr Lim reporting pain and stiffness in his neck. Dr Lim diagnosed cervical radiculopathy.

58. Ms Grotte noted that the applicant had been referred to orthopaedic surgeons, Dr Yeoh and Dr Soo but noted that both specialised in upper limb surgery. The reports of Dr Yeoh and Dr Soo confirmed that the applicant had experienced a complex injury involving massive tears and pseudoparalysis of the left shoulder, causing significant pain. In this context, it was understandable that Dr Yeoh and Dr Soo focused on the applicant's left shoulder injury and omitted reference to any symptoms in the applicant's neck in their reports.

59. Ms Grotte noted that Dr Lim's clinical records showed intermittent complaints of neck pain and stiffness. Dr Lim referred the applicant to orthopaedic spinal surgeon Dr Singh. Ms Grotte submitted that Dr Singh's report was consistent with there being a neck injury.

60. Ms Grotte said there was no evidence of any neck symptoms prior to the date of injury. Dr Patrick found evidence of radiculopathy and gave an opinion consistent with there having been a frank neck injury which got worse with the additional pressure of having to use his right arm and wear a sling after the surgery to the applicant's left shoulder.

61. Ms Grotte noted that the history taken by Dr Powell was of neck pain on the day of the incident. Dr Powell found neck stiffness on examination although no pain. This was said to be consistent with the applicant's complaints. Although Dr Powell gave the opinion that the applicant's condition was wholly pre-existing, he did not expressly consider whether the mechanism of injury could have aggravated the pre-existing pathology. Ms Grotte said that Dr Powell failed to consider the applicant's particular case. Ms Grotte noted that Dr Powell did not exclude the possibility of injury based on delay.

62. Ms Grotte noted that Dr Patrick did not see the three-month delay in reporting neck symptoms as an issue. Dr Patrick described the applicant's spondylosis as being asymptomatic prior to injury and noted that the applicant was able to carry out quite physical activities previously. Ms Grotte referred me to the decision in *Murray v Shillingsworth*[2] and submitted that where the evidence was finely balanced I should err on the side of the worker. There was nothing in the evidence to discredit the worker's version of events. There was sufficient evidence to demonstrate on the balance of probabilities that the applicant did indeed sustain an injury to his neck.

Respondent's submissions

63. Mr Rickard noted that there was no reference in the applicant's written statement to any injury or sensation of pain in his neck at the time of the incident. No symptoms in relation to the applicant's neck were reported to Dr Kyriazis at the consultation on the day of the incident. Dr Kyriazis' notes referred only to left arm and shoulder symptoms and examination without any reference to the cervical spine. The WorkCover certificate issued by Dr Kyriazis made no mention of the cervical spine. Mr Rickard noted the absence of ongoing clinical notes from Dr Kyriazis.

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[2] (2006) 68 NSWLR 451; (2006) 4 DDCR 313; [2006] NSWCA 367.

64. Mr Rickard observed that the applicant had been referred to Dr Yeoh, noting that Dr Yeoh's reports in January 2018 contained no reference to any injury to the applicant cervical spine.

65. Mr Rickard noted that although there were substantial tears to the applicant's left shoulder, the applicant had extensive underlying pathology. Mr Rickard submitted that it would not have taken much to cause injury given the extent of the underlying pathology. The applicant had a very vulnerable shoulder already.

66. Mr Rickard noted that neck symptoms were first reported to Dr Lim on 19 March 2018. Mr Rickard noted that all of the doctors, including Dr Lim, obtained a history of a frank injury to the cervical spine. Mr Rickard submitted that the decision in *Kooragang* was only relevant where there was a consequential condition.

67. Mr Rickard noted that the CT scan of the applicant's cervical spine showed very significant underlying degenerative changes.

68. Mr Rickard took me to the report of Dr Singh and the opinion expressed there that the applicant's pain may be coming from his shoulder.

69. Mr Rickard took me to the report of Dr Powell who expressed the view that the degenerative pathology in the applicant's neck had not been rendered symptomatic by the injury. The evidence indicated that the applicant's neck symptoms were variable in nature and consistent with the underlying pathology.

70. Mr Rickard submitted that the only compensable injury on 22 December 2017 involved the applicant's left shoulder.

Applicant's submissions in reply

71. Ms Grotte submitted that the fact that the applicant's neck symptoms were intermittent did not mean there was no injury. The evidence indicated that the applicant had experienced different symptoms at different times.

72. Ms Grotte noted that Mr Rickard had submitted that the applicant's shoulder was already vulnerable and that it would not take much to have caused the injury. Ms Grotte submitted that equally, the applicant's cervical spine was vulnerable with degenerative changes shown at multiple levels. It would not have taken much force to aggravate the changes in the applicant's cervical spine either.

FINDINGS AND REASONS

73. 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."

74. The onus of proof as to causation rests upon the applicant and depends examination of the evidence as a whole. The Court of Appeal in *Nguyen v Cosmopolitan Homes*[3] 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.

75. In the present case there is no dispute that the applicant sustained an injury to his left shoulder in the incident on 22 December 2017. The evidence as to the mechanism of injury is not in dispute although submissions were made at arbitration with regard to the level of force it may have involved. Mr Rickard submitted that, given presence of significant degenerative changes in the applicant's left shoulder, it would not have required a great deal of force for the applicant to sustain the injury he did.

76. Dr Yeoh noted the pre-existing pathology in the applicant's shoulder in his report on 25 January 2018:

> "He had an acute injury at work on 22 December and says that his shoulder felt normal to him before this. However, there is clearly long-standing osteoarthritis and rotator cuff tears within the shoulder which were asymptomatic. I suspect and hope that there has been an acute extension of this tear which would explain the sudden loss of function."

77. The applicant's evidence indicates, however, that the wrenching of the concrete shute did involve sufficient force for him to lose balance and almost fall into the blades of the concrete pump. The applicant's evidence in this regard is unchallenged. Like Dr Yeoh, Dr Soo noted that the applicant had been well and active prior to the injury but was left with debilitating weakness and significant pain afterwards.

[3] [2008] NSWCA 246.

78. In the circumstances, I accept that the mechanism of injury involved a sudden and unexpected wrenching of the applicant's left arm sufficient to cause him to lose balance. I am satisfied that this mechanism of injury is not inconsistent with the applicant having sustained an injury to his cervical spine as well as his left shoulder.

79. Ms Grotte has described the injury to the applicant's cervical spine as involving an aggravation of degenerative pathology. Ms Grotte submitted that just as the mechanism of injury caused an exacerbation, aggravation or deterioration of the pathology in the applicant's left shoulder, the same occurred in relation to the pathology in the applicant's cervical spine.

80. There is clear evidence of widespread degenerative changes in the applicant's cervical spine. The respondent's expert, Dr Powell, has expressed an opinion that the symptoms in the applicant's neck are entirely attributable to this degenerative disease process. Dr Powell did not consider that employment had been the main contributing factor in the ongoing aggravation of that degenerative disease. As Ms Grotte has noted, however, Dr Powell did not explain the basis for this opinion in light of the history described to him. There is also no evidence of the applicant reporting any symptoms in his neck prior to the date of injury or of any investigations or treatment of the pre-existing pathology before 22 December 2017.

81. The respondent also relied on the delay in the applicant reporting symptoms in his cervical spine to his treating doctors for a period of almost three months after the incident. I accept that there is no reference to cervical spine symptoms in the clinical notes of Dr Kyriazis or the reports of Dr Yeoh. The applicant does not in fact claim that he did report neck symptoms to Dr Kyriazis, Dr Yeoh or Dr Soo. It is troubling that the applicant's own written evidence omits reference to any sensation of pain or other symptoms in his neck immediately following the incident.

82. The histories given to Dr Patrick and Dr Powell, however, were of immediate pain in the applicant's neck and into his left arm. The applicant reported neck pain associated with the injury to Dr Lim on 19 March 2018.

83. The value of contemporaneous evidence has been repeatedly endorsed by the courts: *Watson v Foxman*[4] and *Onassis v Vergottis*[5]. In the latter case, Lord Pearce observed,

> "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."

84. In *Department of Education and Training v Ireland*[6], the worker first reported an injury to her back almost three years after a fall in which other parts of her body were injured. Despite an absence of contemporaneous evidence of a back injury from the applicant's treating doctors, the arbitrator accepted the applicant's claim on the basis that her credit was not in issue. President, Judge Keating found the arbitrator to be in error at [91]:

> "In so doing, the Arbitrator wrongly directed himself that the matter could be decided based on the credit of Ms Ireland alone. The task before the Arbitrator was to weigh the evidence of Ms Ireland together with other objective evidence, or the absence of it. The Arbitrator erred in failing to give due weight to Ms Ireland's

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[4] (1995) 49 NSWLR 315.
[5] (1968) 2 Lloyds Report 403.
[6] [2008] NSWWCCPD 134.

failure to make any report of injury to her back on the day of the accident. The absence of any documentary evidence from Dr Epps or Dr Baker to support any complaints of back pain, either contemporaneous to the accident or at least at intervals during the period between the accident and when it was first reported to Dr Wallace, is a significant omission in Ms Ireland's case."

85. It is not the case, however, that a worker can never succeed in the absence of contemporaneous evidence. In *Department of Aging, Disability and Home Care v Findlay*[7], Roche DP observed at [32]:

> "Nothing in *Ireland* suggests or implies that a worker cannot succeed without independent contemporaneous evidence to corroborate his or her complaints. In civil law, corroboration is not a legal requirement; a judge's (and arbitrator's) task is to decide cases on an assessment of the whole of the evidence (*Chanaa v Zarour* [2011] NSWCA 199 at [86]). 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."

86. The applicant in this case has not specifically explained his failure to report neck symptoms although he does indicate that he was using strong pain relief in the form of Endone and Targin to manage the severe and debilitating pain he was experiencing in his left shoulder. Ms Grotte submitted on the applicant's behalf that this would provide a reasonable explanation for the delay in reporting symptoms in the applicant's cervical spine. I am satisfied on the evidence before me that the applicant was both experiencing severe pain in his left shoulder and taking high doses of narcotic medications.

87. Dr Lim diagnosed cervical spine radiculopathy and referred the applicant for a CT scan of his cervical spine on 19 March 2018. Neck symptoms including pain, restriction of movement and tingling and numbness in the applicant's left hand were reported on an intermittent basis to the applicant's general practitioners and physiotherapist, Mr Heuston, in the period that followed, culminating in a referral to orthopaedic surgeon, Dr Bisham. It is apparent from Dr Bisham's report that the symptoms were intermittent and not particularly troubling at that stage. The applicant was content to proceed without further intervention. I note that Dr Soo on 24 April 2018 reported that the applicant denied neck pain. The applicant explained this, saying he had taken his pain relief and was not experiencing pain on the day of that consultation.

88. It is fair to say that the evidence in this case is finely balanced. On the one hand, there is no contemporaneous evidence of injury to the applicant cervical spine and a delay of almost three months before the applicant reported any symptoms in his neck to his treating doctors. There is a degree of inconsistency in the evidence as to whether the applicant experienced an immediate onset of pain in his neck after the incident. There is clear evidence of pre-existing degenerative pathology in the applicant's cervical spine, intermittent symptoms and an expert opinion from Dr Powell indicating that the symptoms are entirely attributable to that pathology.

89. On the other hand, the delay was relatively short and covered the Christmas period. There is no evidence of the applicant reporting symptoms in his cervical spine or being referred for investigations or treatment of symptoms in his cervical spine prior to the date of injury, dispute the pre-existing degenerative pathology. From the time the applicant saw Dr Lim, he was referred for CT scan and physiotherapy in relation to his neck symptoms. Neck symptoms were consistently reported and treated on a periodic basis since that time, including a referral to a spinal surgeon and, more recently, further investigation by way of CT scan.

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[7] [2011] NSW WCCPD 65.

90. There is, I think, a reasonable explanation for the delay in reporting symptoms, in that the applicant was experiencing severe and debilitating pain and weakness at his left shoulder, a body part adjacent to the body part in dispute. The applicant was also taking strong narcotic pain relief from the time of the accident onwards. The symptoms in the applicant's cervical spine were intermittent and, at least in the early stages, not particularly troubling. At times, the applicant has reported experiencing no neck pain, for example in his consultation with Dr Soo on 24 April 2018.

91. Dr Patrick has provided an opinion consistent with the applicant's claim. Relying on the history given to him, his findings on examination, the investigations and the circumstance that the applicant was asymptomatic prior to the injury, Dr Patrick was satisfied that the incident on 22 December 2017 caused injury in the nature of an aggravation, acceleration, exacerbation or deterioration of disease at the applicant cervical spine. In contrast, Dr Powell has given no explanation for his opinion.

92. I am satisfied that the mechanism of injury was not inconsistent with the applicant having sustained an injury to his cervical spine.

93. After carefully weighing the evidence, I find myself satisfied on the balance of probabilities that the applicant did sustain an injury in the nature of an aggravation of the existing degenerative changes in his cervical spine in the incident on 22 December 2017. The injury meets the definitions in ss 4(a), 4(b)(ii) and 9A of the 1987 Act. The degree of permanent impairment resulting from that injury, taking into account the pre-existing pathology, will be a matter for an Approved Medical Specialist to assess.

94. I will order that the matter be remitted to the Registrar for referral to an Approved Medical Specialist for assessment of the degree of permanent impairment to the applicant's left upper extremity (shoulder) and cervical spine as a result of the injury on 22 December 2017.

SUMMARY

95. The applicant sustained injury to his cervical spine on 22 December 2017 pursuant to ss 4(a) and 4(b)(ii) of the 1987 Act.

96. The matter is be remitted to the Registrar for referral to an Approved Medical Specialist for assessment of the degree of permanent impairment to the applicant's left upper extremity (shoulder) and cervical spine as a result of the injury on 22 December 2017.