WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2808/20**
Applicant: **Bronwyn Kelly-Anne Thornton**
Respondent: **State of New South Wales – Hunter New England Health District**
Date of Determination: **21 August 2020**
Citation: **[2020] NSWWCC 287**

The Commission determines:

1. The applicant suffered injury arising out of and in the course of her employment namely a cervical disc lesion on the background of degenerative disc disease on 1 January 2018.

2. The applicant's employment was a substantial contributing factor to the injury.

3. The applicant did not give notice of injury as soon as possible after the injury happened in accordance with section 254 of the *Workplace Injury Management and Workers Compensation Act 1998* but the respondent has not been prejudiced in these proceedings by late notice.

4. The applicant failed to make the claim within the time limited by section 261 of the *Workplace Injury Management and Workers Compensation Act 1998*, but her failure is not a bar to recovery as she has demonstrated reasonable cause for this failure.

5. As a result of her injury, the applicant had no current earning capacity from 4 July 2018 to date.

6. At all material times the applicant's PIAWE was $701.40.

7. Award for the applicant at the rate of $666.33 per week from 4 July 2018 to 3 October 2018 and at the rate of $561.12 per week from 4 October 2018 to date and continuing pursuant to sections 36 and 37 until such payments are suspended varied or terminated in accordance with the provisions of the *Workers Compensation Act 1987*.

8. Respondent to pay the applicant's medical and hospital expenses pursuant to section 60.

9. Liberty to apply in respect of the calculations above and in respect of any issue arising under section 60.

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

Paul Sweeney
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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

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

STATEMENT OF REASONS

INTRODUCTION

1. It is common ground that Bronwyn Thornton (the applicant) suffers from significant degenerative changes in her neck. She also has compression of the right C6 nerve which brought her to surgery under Dr Ferch, a neurosurgeon, at John Hunter Hospital on 17 July 2020.

2. The applicant alleges that the lesions in her neck were caused or materially aggravated whilst manoeuvring a patient in the course of her employment as an enrolled nurse at the Moree Hospital on 1 January 2018. Alternatively, she alleges that they were materially aggravated by the nature of her employment with the Hunter New England Health District (the respondent) before 4 July 2018, which involved arduous physical work.

3. The respondent denies that the applicant suffered an injury to her neck in the course of her employment on 1 January 2018 or by reason of the nature of her work prior to 4 July 2018. It also contends that the applicant did not give notice of injury or make a claim for compensation within the time prescribed by ss 254 and 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

PROCEDURE BEFORE THE COMMISSION

4. By these proceedings, the applicant claims weekly payments of compensation from 4 July 2018 and an order that the respondent pay her hospital and medical expenses pursuant to s 60 including the cost of the surgery performed by Dr Ferch some 10 days before the arbitration hearing. She alleges that her incapacity and need for medical treatment result from the injuries referred to above.

5. When the matter came on for conciliation and arbitration by MODRON video conferencing system on 27 July 2020, Mr Hickey, of counsel, appeared for the applicant and Mr Beran, of counsel, appeared for the respondent. I was informed by counsel that settlement negotiations had been exhausted at the telephone conference and on a previous occasion on which the matter had been listed before the Commission. I am satisfied that the parties, who were represented by experienced lawyers, had ample opportunity to resolve the matter, but were unable to reach any mutually satisfactory outcome.

DOCUMENTS

6. The following documents were in evidence before the Commission:

    (a) the Application to Resolve a Dispute and the documents attached;
    (b) the Reply and the documents attached, and
    (c) an Application to Admit Late Documents lodged by the applicant.

7. There was no objection to any of the material referred to above and no application to adduce further evidence in the matter.

8. In addition to the issues that I have set out above, Mr Beran stated that should the applicant prove injury there was a consequential issue as to the extent of her incapacity for work. Mr Hickey did not take issue with this assertion.

SUBMISSIONS

9. The submissions of the parties are recorded, and I do not propose to reiterate those submissions in full in these short reasons. It should be recorded, however, that the respondent's case involved an attack on the reliability of the applicant's evidence.

10. The respondent relied on the evidence of its employees Leslie Lillyman, Bronwyn Cosh and Susan Coleman and on the records of the St George Hospital where the applicant was admitted on 10 January 2018, in support of its contention that the alleged injury of 1 January 2018 did not occur as alleged by the applicant.

11. Both parties relied upon the clinical records of the Associate Medical Practice, Moree where the applicant consulted medical practitioners from 26 June 2009. Mr Hickey argued that aspects of these records, including a consultation with Dr Davida Shirky on 2 January 2018, supported the applicant's claim that she sustained injury to her neck on 1 January 2018 in the course of her employment.

12. Mr Hickey also relied on the opinions of several treating medical practitioners and of Professor Dan, a neurologist and Dr Bodel, an orthopaedic surgeon. He submitted that the latter two doctors had a reasonable grasp of the history of the onset of the applicant's neck problems and their opinions should be accepted by the Commission. Ultimately, he submitted that his client’s evidence had not been undermined by inconsistent statements in the notes of the St George Hospital or by the evidence of the respondent's witnesses.

13. Both parties argued I should draw inferences from the failure of the other to adduce evidence. Mr Hickey argued that the failure of the respondent to adduce the entirety of the roster/payroll records for 1 January 2018, undermined its case that the applicant had not suffered injury on that day, presumably on the basis of the principle in *Blatch v Archer* [1774] ENG R2.

14. Mr Beran argued that the failure of the applicant to adduce evidence of her application for benefits under a sickness and accident policy detracted from her case that she suffered injury to her neck in the manner alleged. He referred to the discussion on failing to adduce critical evidence in *Commercial Union Insurance Co of Australia Limited v Fercom Pty Limited* (1992) 22 NSWLLR 389 (Fercom). There was no reciprocal comment on the failure of the respondent to adduce a supplementary report from Dr Coroneos, the respondent’s medical expert.

15. It will be necessary to refer to the arguments of counsel further in attempting to resolve the issues in dispute. It is first necessary, however, to compendiously set out the evidence of the applicant, the respondent's witnesses and record the critical aspects of the contemporaneous clinical material from the Associate Medical Centre and the St George Hospital.

16. What follows is not intended to be a comprehensive survey of the evidence. Rather, I set out those aspects which permit an understanding of the way in which the Commission has resolved the dispute.

The applicant

17. The applicant's evidence is in writing. It consists of signed statements dated 4 March 2019, 28 October 2019, and 27 April 2020. It is my impression that the applicant's evidence and the nature of her case has evolved with the passage of time. It is also true, however, that there was no application to cross-examine the applicant at the arbitration hearing.

18. By her initial statement dated 4 March 2019, the applicant states that she had recommenced work with the respondent as an enrolled nurse at the Moree Hospital on 1 May 2017 having not worked for the previous eight years. She was employed on a casual basis.

19. In respect of her pre-injury health, she states that:

> "Prior to 1 January 2018 I had experienced back pain due to a congenital problem, osteoporosis but I had never experienced any neck pain."

20. The applicant then describes an incident which occurred at 10.45 pm on 1 January 2018, when, following a conversation with a nurse, Leslie Lillyman, she attempted to move an immobile male patient weighing in the vicinity of 140 kg. She states:

> "I then mechanically tilted the bed in which the patient was lying to the highest degree it could go. Myself and the Indian nurse were on one side rolling the patient onto his side and Ms Lillyman was on the other side of the bed holding him to make sure he did not roll right off the bed. We then used the slide sheets, in fact two slide sheets and attempted to roll them under the patient but he would not move. In the course of performing this manoeuvre I felt a pop in the back of my neck at about the C6 level, but I did not immediately feel any pain or numbness in my right arm. I did not think about it much at the time. I cannot recall if I said anything to Ms Lillyman at the time or to the Indian nurse."

21. The applicant is unable to remember the name of the Indian nurse. She says, however, that she finished her shift shortly after the incident and went home. She woke the next morning "feeling pain and a numb sensation" along the lateral aspect of her triceps and biceps of her right arm. She had no neck pain. She went to see a Dr Shirky, who she had not seen previously, at the Associate Practice in Moree and was prescribed Endone. She recounts a conversation that she had with the doctor concerning previous shoulder pain.

22. The applicant said that she did not report the incident to her employer as she was only employed on a casual basis and had previously been disciplined for missing two shifts. She said that she hoped the pain in her right shoulder and arm would settle down.

23. Approximately 10 days later, the applicant and her son drove to Sydney to visit an ill friend. She continues:

> "Over the course of the drive the pain and numbness in my right arm deteriorated to the point where it was excruciating."

24. On arrival in Sydney, the applicant attended the St George Hospital where she was admitted as an inpatient. She states:

> "I still did not want to report the incident to my employer because I was fearful of repercussions and I felt quite intimidated by my immediate supervisor."

She reiterates that she was also hopeful that her condition would improve.

25. The applicant was absent from work for four months. She then returned to work for two shifts but "on the second shift my I was in such pain that I vomited". She then informed a nurse supervisor in the emergency department, Ms Coleman about her injury.

26. By her supplementary statement of 28 October 2019, the applicant modifies her evidence in respect of her pre-injury heath. She states:

> "I wish to address an error in my Statement dated 4 March 2019. I had experienced neck pain prior to 1 January 2018 but it was nothing like the pain I experienced after 1 January 2018. Prior to 1 January 2018 I would describe any pain in my neck as nonradiating muscular pain."

The applicant also elaborates on her previous history of "muscular" right shoulder pain and upper back pain possibly related to an old thoracic fracture.

27. The applicant also elaborates upon the nature and circumstances of her injury. She states that she has been unable to recall the name of the Indian nurse, but thought that she was permanently employed by the respondent. She states:

> "There were a number of Indian nurses at Moree Hospital in 2017 and 2018 but not many of them worked in the maternity ward. Most of them worked on the general medical wards."

She recounts that she believes that she worked on 1 January to cover for Sarah Wells, an Enrolled Nurse who rang in sick.

28. By a supplementary statement of 27 April 2020, the applicant described her work with the respondent. She states it was heavy work that involved showering patients and manoeuvring them utilising slide sheets. She also made beds, moved furniture, and performed cleaning tasks including scrubbing the birthing rooms in the maternity ward.

29. After stating that she felt a pop in her neck when "pulling the slide sheet to move the patient", the applicant says that she woke up the next day in significant pain. She recounts:

> "The pain in my neck radiated down the length of my right arm and I experienced some slight numbness in my thumb."

She rested over the next 10 days, and then attempted to drive to Sydney with her son on either 9 or 10 January. She says that when she arrived, she was experiencing tingling in her right thumb and right pointer finger.

30. The applicant says that when she returned to work in the maternity ward, she performed duties which required heavy lifting and bending. She states that she felt "more sore after my shift on approximately 29 June 2018". The applicant also says:

> "On 3 July 2019, when I again worked in the maternity ward the pain in my neck and arm was unbearable. It was consistently radiating down the length of my right arm and I was experiencing numbness in my thumb and pointer finger."

31. The applicant says that her symptoms deteriorated during June and July 2018.

Susan Coleman

32. Susan Coleman is a nurse unit manager at the Moree Hospital. She was not at work on 1 January 2018. She states:

> "The only injury I was aware of that Bronwyn had suffered was when she called both myself and Bronwyn Cosh, the hospital manager, sometime earlier in the years [sic], from Sydney telling us she had hurt her back."

33. Ms Coleman continued:

> "I have no recollection of Bronwyn ever notifying me of any injury suffered by her at work after 1 January 2018. I was aware that Bronwyn had a bad back and just lately a sore neck but she never reported anything to me about having suffered any injury at work."

Bronwyn Cosh

34. Ms Cosh is the manager of the Moree Acute Hospital. She says that she first became aware of the alleged injury of 1 January 2018 on 31 July 2018 when the applicant telephoned her and, on the same day, forwarded a Workcover medical certificate. Ms Cosh continues:

> "However she had called me earlier in the year and told me that she had hurt her back or neck, I can't recall which. She said she was calling from Sydney and would not be able to attend work on her scheduled shift at that time because of that injury."

35. Ms Cosh states that the applicant did not "mention anything about suffering her injury while working". She says that she understood that the applicant had driven to Sydney and developed a sore back "there was nothing about work."

Leslie Lillyman

36. Ms Lillyman is a registered nurse at the Moree Hospital. By a signed statement dated 24 February 2020, she says that she did not work on 1 January 2018. On reviewing the respondent's work roster, Ms Lillyman states that she worked on the previous Sunday night and, therefore, would have ceased work at 7.15 am on 1 January, before the applicant started work for the day. She says that the roster confirmed this fact. She states that:

> "I did not see her or communicate with her on the date and time in question".

Notes of Associate Medical Practice Moree

37. On 17 May 2010, the applicant complained to Dr Mackun of upper neck and upper back pain. It is apparent that the doctor related this pain to a previous crush fracture at T7. Thereafter, there are spasmodic references to neck pain in the clinical record. On 10 August 2011, the doctor recorded that the applicant was "having neck pain related to the old T7 fracture".

38. On 23 March 2012, Dr Park noted that the applicant had neck pain but a full range of movement on examination with pain on extension. The doctor requested an x-ray of the cervical spine and appeared to relate the neck pain to osteoporosis.

39. On 30 July 2012, the applicant complained of left rhomboid and scapular pain. On examination she had some limitation of neck movement.

40. In 2012, the applicant complained of pain in the right side of her neck and right shoulder. She was diagnosed with a "wry neck". While there are subsequent references to the applicant's right shoulder, there are no further references to neck pain until after the alleged injury.

41. On 18 August 2017, Dr Nicholas Boyd recorded that the applicant had pain in her right shoulder and that if she turned her head to the right "feels the pain across shoulder blade & down the right arm". There was no numbness or tingling of the right arm/hand.

42. On 2 January 2018, Dr Shirky noted that the applicant had right shoulder pain and upper right back pain. She recorded that the applicant initially had a sore shoulder two weeks previously. She noted however, that the applicant:

> "Worked last night- transferred 150kg pt with slide sheet last night but did not pull/lift.
>
> Panadol/Nurofen not effective took some Panadeine Forte last night – nil effect no massage for two weeks"

43. The doctor recorded that the applicant initially suffered a sore shoulder "two weeks ago". On examination, she found hyperalgesia to touch over the right scapular. She treated the applicant with Endone, Voltaren and stated that she should not work for two weeks.

44. The applicant saw Dr Finlay again on 25 January 2018 for a prescription. Then, on 1 February 2018, Dr Finlay recorded that the applicant had "right C6 radiculopathy", which had been diagnosed in Sydney. He recorded that she could not "use hand effectively to drive or work".

45. On 11 May 2018, Dr Finlay recorded that the applicant had a semi frozen shoulder and weak right arm. She diagnosed a disc prolapse. On 31 May 2018, Dr Finlay recorded that the applicant went back to work in early May with an increase in her neck pain and right arm hypoesthesia. The applicant was prescribed Endone.

46. On 1 June 2018, Dr Sankar recorded that the applicant sought a referral to a neurologist. He also recorded:

> "Worsening pain in neck and right arm with patchy loss of sensation upper mid-arm".

47. On 5 June 2018, Dr Sankar recorded that the applicant's neck and right arm pain was "worsening". The applicant also reported symptoms in her left arm.

48. On 7 June 2018, Dr Finlay recorded that the applicant had been seen for her neck and arm pain in the emergency department that morning and had been treated with Valium and steroid injection in the left shoulder.

49. On 4 July 2018, Dr Sankar recorded that the applicant still had right arm pain radiating from the neck. He recorded that there were no new neurological signs. He prescribed Endone.

50. On 12 July 2018, Dr Sankar recorded that the applicant continued to complain of neck pain and right shoulder pain. He recorded:

> "Also states she is going to put injury and pain to work cover will talk to work cover and collect the facts and get back pain today ok".

51. On 25 July 2018, Dr Shirky replied to an email from EML thus:

> "Looking in Bronwyn's file does not appear that she has a Workcover claim. However, I have printed off my notes from the visit on 2/1/18 as well as the work certificate and this message will be saved to her file."

52. On 30 July 2018, Dr Sankar recorded that the applicant had initially presented to Dr Shirky on 2 January 2018 after a workplace incident "that precipitated the current situation". He recorded that the applicant "strongly stated" that she did not have a similar radiculopathy symptom prior to that incident "only had non radiating muscle pain in upper back and neck".

St George Hospital

53. The Discharge Referral Note of the St George Hospital dated 16 January 2018 states, inter alia:

> "Mrs Thornton presented with right neck and shoulder pain, associated with lateral right upper arm numbness.
>
> She had chronic issues with the right side of her back, neck and shoulder for years, however she developed an increased on chronic episode after driving 8 hours from Moree to Sydney. This is the first time she has experienced numbness.
>
> Nil prior history of any trauma."

54. That document also records a past medical history which included chronic back and neck pain, a T7 partial fracture and osteoporosis.

55. On the same day, a physiotherapist Lillyman Wong recorded that the applicant first experienced weakness in her right arm and neck three days ago. The record continues:

> "initially thought may be related to drive back from Moree day before worsening over last few days"

56. Ms Wong tentatively diagnosed a C5 radiculopathy and suggested a neurological consultation.

57. There are similar histories in the nursing notes, but provenance of these histories is not self-evident. A note recorded on the date of admission states:

> "pt has chronic pain in R) shoulder.
> 2/7 awoke with pain on R) shoulder, starting in r) neck, radiating down R) arm pt has had similar episode in the past, but symptoms resolved, pt states onset of numbness is new for pt."

Dr Noel Dan

58. Dr Dan, a neurosurgeon, saw the applicant on 8 November 2019, at the request of her solicitor. He recorded a history of the applicant experiencing a "slight pop in her neck" during the incident of 1 January 2018. He recorded that:

> "the pain did not commence until then next day when it was in the neck and then extended mostly down the lateral arm and forearm to the right thumb and index finger."

59. The doctor noted that after the applicant was driven to Sydney "the whole arm including the thumb and index finger became numb and lacked strength." He recorded that the applicant was treated at the St George Hospital and was presently on the wait list at John Hunter Hospital for anterior cervical decompression and fusion under Dr Ferch.

60. Dr Dan considered a summary of the notes of the Associate Medical Practice in Moree provided by the applicant's solicitor. He concluded:

> "Mrs Thornton has cervical degenerative changes most particularly at C5-7. At C5/6 she has a disc osteophyte complex.
>
> On a firm balance of probabilities, I believe that she had pre-existing spondylotic changes but that the disc extrusion occurred in association with the lifting incident that occurred on 1.1.18."

61. In response to a question from the applicant's solicitor, Dr Dan expressed the opinion that the degenerative changes which he diagnosed could not be specifically linked to the nature and conditions of the applicant's work for the respondent "although it also could not be excluded". He thought that the disc lesion was the main contributor to the applicant's clinical status. He stated that "on the basis of the heavy lifting that she did I believe it would be reasonably attributable to her employment with Moree Hospital."

62. Dr Dan expressed the opinion that the applicant was totally incapacitated for work and that the referred treatment was an anterior cervical discectomy and fusion at C5/6.

Dr Coroneos

63. Dr Coroneos saw the applicant at the request of the respondent's solicitor on 5 September 2018. He examined the applicant and noted her history and the medical evidence which had been provided to him. In particular, he noted that the file of the St George Hospital did not refer to a specific injury.

64. He declined to express an opinion as to whether the applicant had suffered an injury at work in the absence of the clinical record of her treatment in Moree. He expressed the opinion that the note taken on 2 January 2018 and "these contemporaneous records have NOT been disclosed to me and are crucial."

65. Curiously, although the respondent's solicitor has had access to a comprehensive set of notes in relation to the applicant's treatment including the note of 2 January 2018, Dr Coroneos has not provided a supplementary report.

Dr Bodel

66. Dr Bodel, an orthopaedic surgeon, provided three reports to the applicant's solicitors. On 10 June 2019, he saw the applicant and recorded a history of the incident involving the attempt to move large male patient on 1 January 2018 using a slide sheet. He then recorded:

> "While undertaking this activity she felt a sudden popping sensation in the neck and she 'could not move'. She managed to complete this shift and went home and had a hot shower. She went to a GP over the next few days and was told that she had a 'pulled muscle'. She was put off work for about four months and was treated conservatively at first with analgesic medication such as Panadeine Forte and icepacks, and some physiotherapy. She slowly improved."

67. Dr Bodel recorded that while the applicant was in Sydney, without further accident or injury, she experienced pain radiating to the right thumb and was admitted to St George Hospital where she was diagnosed with a disc injury.

68. Dr Bodel had access to the "local doctors' continuation notes and the referral letter to Dr Di Leva and also to Dr Tate". He specifically stated that "confirm this lady's injury and her ongoing treatment". Dr Bodel also thought that the cervical decompression and fusion were "reasonably necessary for the management of the injury of 1 January 2018".

69. He expressed the opinion that the applicant would "struggle" with normal nursing duties. He expressed the opinion that she should avoid repetitive tasks with the arms, particularly overhead, and that head down posture or strenuous or repetitive activities would aggravate her symptoms.

70. By a supplementary report, Dr Bodel expressed the opinion that the injury on 1 January 2018 had "probably caused some additional structural damage at the C5/6 level as well as aggravating and accelerating the degenerative disc disease at that level."

71. By a further report and, in answer, to a question from the applicant's solicitor Dr Bodel expressed the opinion that:

> "the nature and conditions of her work between 16 April 2018 and 3 July 2018 have caused her aggravation, acceleration, exacerbation and deterioration of the disease process in the cervical spine which has been caused by the original injury in January 2018."

LEGISLATION

72. In so far as it is relevant, s 254 of the 1998 Act is as follows:

> **"Notice of injury must be given to employer**
>
> (1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.
>
> (2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages it is found that there are special circumstances as provided by this section.
>
> (3) Each of the following constitutes special circumstances--
>
> (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
>
> (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause,
>
> (c) the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened,
>
> (d) the injury has been reported by the employer to the Nominal Insurer in accordance with this Act"

73. Insofar as it is relevant, s 261 is as follows:

> **"Time within which claim for compensation must be made**
>
> (1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.

(2) If a claim for compensation was made by an injured worker within the period required by this section, this section does not apply to a claim for compensation in respect of the death of the worker resulting from the injury to which the worker's claim related.

(3) For the purposes of this section, a person is considered to have made a claim for compensation when the person makes any claim for compensation in respect of the injury or death concerned, even if the person's claim did not relate to the particular compensation in question.

(4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either--

(a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or

(b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker."

DISCUSSION AND FINDINGS

Incident on 1 January 2018

74. Although I have reservations about the applicant's reliability, I have little doubt that an incident, similar to that alleged by the applicant, occurred during the course of her employment on 1 January 2018. While there is confusion as to the circumstances of the injury, and conflicting evidence as to the personnel who were present, the applicant's account of the incident to Dr Shirky during a consultation on the following morning is cogent reason to accept that she transferred a large male patient the previous evening and experienced pain shortly thereafter. Dr Shirky's note contains the following:

> "Worked last night- transferred 150kg pt with slide sheet last night but did not pull/lift".

75. This history was provided by the applicant to the doctor contemporaneously with the event and well before she contemplated making a claim for compensation against her employer. It is unlikely to be a fabrication. In proceedings to which the common law of evidence applies, the history would be admissible on several grounds including to rebut suggestion of recent invention. Of course, the rules of evidence do not apply to these proceedings and Mr Beran did not necessarily suggest that the incident was a recent invention. Rather, he put that the applicant was complaining of a shoulder injury when she saw Dr Shirky on 2 January 2018.

76. A finding that the applicant probably suffered injury when she transferred a patient on the evening of 1 January 2018 is not a rejection of the evidence of Ms Lillyman. I doubt that Ms Lillyman was present at the time of the incident relied upon by the applicant. She denies that she was present, and her recollection is corroborated by the respondent's roster for that day. There is no obvious reason to reject that evidence.

77. Similarly, it seems unlikely from the evidence in relation to the respondent's roster that an Indian nurse was working on the on the evening of the incident, although the evidence in respect of this point is not as emphatic.

78. The applicant first indicated her desire to make a claim against the respondent based on the incident with a medical practitioner on 12 July 2018 and did not report it to her employer until 31 July 2018. Given the interval between the incident and the applicant's report, it is unsurprising that her recollection of who was present at the time is imperfect. In my opinion, the applicant is probably mistaken in asserting that Ms Lillyman was present and involved in the manoeuvring of the patient. Her evidence in her second supplementary statement concerning Ms Lillyman does not persuade me to the contrary.

79. Mr Hickey asserted that I should more readily accept the applicant's assertion in respect of the incident as the respondent had failed to completely negate the presence of an Indian nurse at the time of the incident. This submission is quite puzzling, and I do not accept it.

80. The respondent's roster records, as reported by the factual investigator, probably negatives the likelihood that an Indian nurse worked on the evening of the incident. Again, there is no proper basis to reject that evidence.

81. I suppose that a more rigorous production and analysis of pay and roster records may have cast further light on the presence of an Indian nurse and, possibly, revealed her name. It was always open to the applicant to require production of these records, if she believed that those referred to in the investigation report were inadequate. I doubt, however, whether an acceptance of the presence of the nurse takes the applicant's case much further.

82. The applicant does not state that she informed the Indian nurse or Ms Lillyman of an injury. It is doubtful if the Indian nurse would recollect manoeuvring a patient with the applicant many months after the incident in any event. As the description given to Dr Shirky suggests, it was an unremarkable episode in the daily routine of nursing duties.

The applicant's reliability

83. I have found that the occurrence of a work incident on 1 January 2012 should be accepted as it is consistent with the account which the applicant gave to Dr Shirky. Nonetheless, the applicant's evidence concerning the presence of Ms Lillyman raises doubts about the accuracy of her recollection. Standing alone this may not be of great moment. But there are other examples of ambiguity in her evidence. The applicant says in her primary statement that she had not suffered neck pain prior to the incident on 1 January 2018. She retracted this evidence in her subsequent statements saying that she had suffered "muscular" pain in her neck and right shoulder prior to the incident. Both these accounts are decidedly different to the history recorded at the St George hospital following the applicant's admission on 10 January 2018.

84. In her initial statement, the applicant says that she did not experience neck pain prior to attending a medical practitioner on the morning after the incident. That might be contrasted with her evidence in her second supplementary statement that on waking on the morning of 2 January 2018 "the pain in her neck radiated down" the length of the right arm and involved her thumb. This discrepancy might be considered of little consequence in many cases. But in this case, the applicant previously suffered from shoulder pain as the note of Dr Shirky and the St George Hospital notes confirm. The development of arm pain signifies a progression in her condition, and may assist in identifying the time of onset of her nerve root compression.

85. Despite their significance, there was no application made to cross examine the applicant on these discrepancies at the arbitration hearing. Rather, the respondent asserted that the Commission would prefer the history recorded in the Discharge Referral Note of the St George Hospital to the applicant's evidence. In circumstances of this case, I am not persuaded that the contents of those notes completely undermine the applicant's reliability so that one would not accept her evidence save when it was corroborated by other evidence.

I have therefore attempted to resolve the remaining issues in dispute on all the evidence in the case, but exercising caution when considering the applicant's evidence. I have given the clinical record, and the medical opinion based on it, primary importance in reaching my conclusions on injury, causation and incapacity.

The nature of the injury on 1 January 2018

86. Mr Beran submitted that the applicant saw Dr Shirky on 2 January 2018 for a shoulder injury. That injury was unrelated to the cervical disc lesion which occurred a week later while the applicant and her son were driving Sydney. He submitted that pain in the shoulder was not in the distribution of the C6 radiculopathy to which the medical evidence attributes the applicant's arm pain. There is no medical evidence which addresses this latter point and for that reason I do not accept the submission. It is also contrary to my experience as an arbitrator, although that is not a proper basis for deciding a medical issue.

87. As a good deal turns on the consultation of 2 January 2018, it appropriate to reiterate the content of Dr Shirky's note. It records:

> "Right shoulder pain
> Upper right back pain - massages and muscle spasm
> worked last night - transferred 150 kg pt with slide sheet last night but did not pull/lift
> panadol/neurofen not effective took some panadeine forte last night - nil effect no massage for 2 weeks initially sore shoulder 2 weeks ago"

88. Patently, the note records shoulder pain and upper right back pain with muscle spasm and that the applicant initially experienced a sore shoulder two weeks previously. There is no mention in the note of neck pain or symptoms in the applicant's right arm below the shoulder.

89. Standing alone, that evidence might support Mr Beran's submission that the applicant suffered a shoulder injury at work on 1 January 2018. But the note does not stand alone in the evidence in this case. Both Dr Bodel and Dr Dan had access to the notes of the Associate Medical Practice at Moree and it is evident that they both considered the note in expressing their opinion as to injury and causation of the applicant's neck and right arm pain.

    Dr Bodel states:

> "The local doctors continuation notes confirm this lady's injury and ongoing treatment".

    Dr Dan recordrd that:

> "On 2. I .18, Dr Shirkey noted the right shoulder pain but also noted that there was initially a sore shoulder two weeks before. At that time, she was hyperalgesic over the right scapula."

90. Having examined the documentary evidence both doctors accepted that the applicant suffered a lesion in her neck on 1 January 2018 when manoeuvring a patient. It is true that both Dr Bodel and Dr Dan recorded a history that the applicant had neck pain at the time and on her primary statement and the contemporaneous note that seems unlikely. Clearly, however, the doctors did not think that the different account in Dr Shirky's note detracted from the case that the applicant suffered a cervical injury at the time of the incident.

91. If Dr Bodel and Dr Dan did not have access to the clinical notes of the Associate Medical Practice, I would be inclined to find that they did not have an accurate history of the development of the applicant's symptoms in accordance with the principle in *Paric v John Holland (Constructions) Pty Ltd* 59 ALJR 844 (19 September 1985). It is not appropriate to make such a finding, however, when those doctors had access to, and considered, much of the relevant medical record tendered in the case and there is no contrary evidence from the respondent's medical practitioner addressing that evidence.

92. The submission that I should find that the applicant suffered a shoulder injury is tantamount to an invitation to substitute my opinion for that of Dr Dan and Dr Bodel. It is not a case, where there is an alternative medical hypothesis to accept.

93. On the basis of the entirety of the evidence in the case, I propose accept the opinions of Dr Dan and Dr Bodel and find that the applicant suffered an injury to her cervical spine, probably a disc lesion or further lesion at the C5/6 level on the background of degenerative disc disease on 1 January 2018.

Causation

94. It is the respondent's case, of course, that the applicant's cervical condition developed on a constitutional basis and that she suffered a cervical disc lesion a week after the accident when she was driving to Sydney. Again, this submission is largely founded on the notes of the St George Hospital following the applicant's admission on 10 January 2018, although the applicant's failure to report the injury of 1 Jan 2018 when speaking with her supervisors is also relevant. While I accept, that the clinical material suggests that possibility, the opinions of both Dr Bodel and Dr Dan are to the contrary. Both attribute the extension of symptoms to the applicant's right arm to the lesion which she suffered at work on 1 January 2018. Once again, there is no medical opinion evidence to the contrary.

95. The notes recorded at the St George Hospital certainly suggest that the applicant had experienced shoulder/neck pain for some time prior to the incident at work, and that the pain deteriorated and spread to her right arm during her car journey from Moree to Sydney. The notes do not record the history of an incident at work on 1 January 2018 or at any time.

96. Both the Court of Appeal and the Presidential Unit have cautioned against the use of clinical notes and hospital records to undermine the credibility of a witness, although the ratio of such cases as *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 (26 February 2004) also goes to the failure to put such inconsistencies to the opposing party in proceedings where oral testimony is usual. Plainly, the notes standing alone are inconsistent with the applicant's case.

97. It must be borne in mind, however, that the applicant's trip to Sydney and her admission to hospital occurred during the period in which Dr Shirky had either certified or suggested that the applicant remain off work because of the injury on 1 January 2018. Clearly, the doctor did not issue a WorkCover certificate of incapacity in respect of that period, although I infer from the discussion in the notes that the doctor provided the applicant with an ordinary medical certificate. That document was not in evidence.

98. While a number of entries in the notes of the St George Hospital are not consistent with the applicant's case, the medical opinion evidence attributes the applicant's incapacity after 10 January 2018 to the injury alleged. It seems likely that Dr Bodel had access to the notes of the St George Hospital as he comments on the discharge summary in his report. Dr Dan may not have had that does material, but, as I have stated above, he had access to the notes of the applicant's treating general practitioners when he assessed her.

99. As I have accepted the opinions of these doctors that the applicant suffered a disc lesion at C6 on the evening of 1 January 2018, there is no good reason why I should not accept their opinions on causation of the applicant's symptomatology after 10 January 2018. Dr Bodel expresses the opinion that the disc lesion suffered by the applicant on 1 January 2018 "appears to have progressed" to a larger disc lesion during the trip to Sydney.

100. That view may be based upon a misunderstanding of the dates of the radiological evidence, but the concept of the gradual progression of the lesion does provide an acceptable hypothesis to explain the worsening of the applicant's right arm symptoms several days after the injury of 1 January 2018. Such a sequence of events is not uncommon. I reiterate that the respondent's medical evidence on this issue is unpersuasive as Dr Coroneos states that he was unable to offer an opinion without sighting the applicant's clinical notes. In determining an issue on the balance of probabilities tenuous evidence on an issue may be accepted in the absence of evidence to the contrary.

101. Before leaving this issue I should deal with the submission made by the respondent on the basis of the Fercom case. I unreservedly accept that an adverse inference may be drawn against a party who bears the onus on an issue does not adduce critical evidence in its case. I do not accept, however, that the applicant's application for benefits under a sickness and accident policy is critical evidence relevant to the issues of injury or causation. Importantly, the evidence was available to both parties. The respondent could have that required the applicant to produce the application or sought leave to issue a direction to the relevant insurer for the document.

102. The contents of the document and whether they support or detract from the applicant's case remains in the realms of speculation. In the circumstances, it is inappropriate to draw any inference adverse or otherwise from the applicant's failure to tender the documents.

Section 254

103. The applicant reported her injury to Ms Coleman orally on 31 July 2018 and gave a report of injury form to the respondent on the same day. Clearly, she did not give notice of injury to the respondent as soon as possible after its occurrence. Mr Beran argued that the respondent was prejudiced by this failure. Neither party called evidence which specifically addressed the issue of prejudice. But Mr Beran submitted that the respondent's inability the obtain a medical report shortly after the alleged injury and to conduct timely enquiries to establish the identity of the Indian nurse.

104. In my opinion the evidence does not establish prejudice. I was not referred to case law on the section. I accept that it is the applicant's onus to establish the absence of prejudice on all the relevant evidence in the case.

105. I have discussed the issue of the presence of the Indian nurse above the in the context of injury. I doubt that she was present at the time of the incident. The evidence suggests that Ms Blight and Mr Ham were the nurses on duty at the hospital on the evening of the applicant's injury. Neither is likely to be the witness indicated by the applicant.

106. It, therefore, seems plausible that the applicant's recollection of her co-workers at the time of the injury is entirely erroneous. There is, however, no reason why the respondent could not have obtained statements from Ms Blight or Mr Ham, or any other witnesses, once they were identified from the roster/pay record. In the absence of specific evidence on the point it is difficult to identify prejudice.

107. I reiterate the applicant does not say that she told the Indian nurse that she suffered an injury while performing her work on the evening of 1 January 2018. It is difficult to envisage any evidence which the witness might give which would be relevant to the applicant's claim.

108. Similarly, I have difficulty in understanding what forensic advantage the respondent may have obtained from an earlier medical examination. It is not the case where there is no medical record of the applicant's treatment before and after the injury. That record was available to both parties. For reasons which are unexplained, it was not put to the respondent's qualified doctor.

109. Plainly, the primary purpose of s 254 is to protect an employer from stale claims. These claims diminish the employer's ability to efficaciously manage an injury. One of the detriments arising from such claims is that an employer is precluded from investigating and contesting an alleged injury. In other jurisdictions this is referred to as the right to a "fair trial". I don't believe the delay in this case precludes a fair trial in this case.

110. It is not a case where presumptive prejudice exists of the kind discussed in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 54 nor is it a case of "inordinate delay". When analysed in the context of the evidence, neither of the matters identified by Mr Beran give rise to prejudice. In those circumstances, I find that the evidence establishes that the respondent is not prejudiced by the applicant's delay in giving notice of injury.

Section 261

111. As Mr Beran submitted at the arbitration hearing, it is necessary for the applicant to establish "reasonable cause", otherwise s 261 precludes her from recovering compensation for the injury. Mr Beran submitted that the evidence did not establish "reasonable cause" and Mr Hickey submitted to the contrary. Neither counsel elaborated on their submission on this issue.

112. The phrase "other reasonable cause" in subsection 261 (4) requires a consideration of whether the explanation of the delay in bringing the claim is consistent with the actions of a reasonable worker in the applicant's position. In addressing the phrase "reasonable cause" in a Victorian statute in *Black v City of South Melbourne* [1963] VicRp7, the Full Court stated:

> "The enquiry here appears to be of a much wider kind justifying a more liberal attitude. The expression "reasonable cause" appears to us to mean some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable."

113. Essentially, the applicant gives two reasons for not giving notice of injury. First, there had been adverse comment when she had previously missed shifts and, secondly, she had thoughtthat her condition would improve, as it had apparently done in the past, and permit her to return to work. In her initial statement, the applicant says this:

> "I did not report the incident to my employer. I was only employed as a casual and I had previously been disciplined for missing two shifts. I had not been informed of these shifts and that is the reason I missed them but I felt I was on thin ice with the employer, so I did not report the incident. I thought that the pain would settle down at least I hoped it would."

114. As recounted above, the applicant decided to report the injury in July 2018, when it became apparent to her that she would not be able to resume her preinjury occupation, at least, not without radical surgical intervention.

115. I find the first limb of this explanation difficult to accept. The evidence establishes that the applicant rang Ms Coleman and Ms Cosh from Sydney following her admission to the St George Hospital and told them that she suffered from a painful neck and arm condition and, presumably, that she would not be able to avail herself of the casual duties for the foreseeable future. It is a difficult to understand on any logical analysis why the applicant did not inform Ms Coleman and Ms Cosh that she suffered an injury at work at this time. After all, she was going to be unavailable for work as an enrolled nurse for a period, irrespective of whether this was caused by a work injury or otherwise.

116. On the other hand, it is not unreasonable for a worker to refrain from bringing a compensation claim against her employer at the earliest possible time. A reasonable man surely would not form a view that delaying a claim in the hope of recovering and returning to work was unreasonable. In my opinion, this explanation for a failure to bring the claim within the time required by s 261 (4) constitutes "other reasonable cause". In reaching this conclusion, I have attempted to approach the matter on the basis suggested by Sholl J in *Quinlivan v Portland Harbour Trust* [1963] VR 25 at 28 where he stated that the phrase reasonable cause "means to refer to cause which a reasonable man would regard as sufficient, because consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the giving of notice by a reasonable man".

Disease injury

117. It is the applicant's alternative case that she suffered injury by reason of the arduous nature of her employment between May 2017 when she recommenced work as an enrolled nurse at the Moree Hospital and the cessation of that employment on 3 July 2020. The clinical records of the Associate Medical Practice record complaints of increasing symptoms in the applicant's neck and right arm during the period after she returned to work in late April 2018 and her cessation of work on 3 July 2018.

118. Although the respondent has not adduced medical evidence on this issue, I am not satisfied that the applicant has established that she suffered an injury or an aggravation of her pre-existing injury or disease by reason of the nature of her work. Certainly, the applicant experienced some increased symptomatology after she returned to work in April 2018. This is unsurprising given the fact that she had been diagnosed with a disc lesion causing a florid radiculopathy in her right arm.The increased symptomatology, however, is probably no more than a manifestation of the disc lesion which had kept off work for more than three months 1 April 2018. The increased symptoms on return to work are revelation and not genesis.

119. Even if, contrary to my opinion, the applicant had some modest additional pathology or symptomatology by reason of the nature of the work, it is not that which has caused her incapacity. Her incapacity and need for treatment patently result from the disc lesion which was diagnosed at the St George Hospital following her admission on 10 January 2018.

120. It is true that Dr Bodel offers some limited support for an aggravation of the lesion caused by the nature of the work. In my opinion that hypothesis is both laboured and a highly speculative. Dr Dan expresses the view that the degenerative changes in the applicant's spine would not necessarily be explained on the basis of the nature of her work although it "could not be excluded" as a cause. That is hardly an appropriate basis to find for the applicant on the balance of probabilities. More so, when there is little in the way of precise evidence as to the hours that the applicant worked after 1 April 2018.

121. Conversely, Dr Dan accepts that the applicant's disc lesion relates to lifting in the course of the applicant's work. While it is not entirely clear I have read this to be a reference to the injury of 1 January 2018.

122. There is another difficulty with this aspect of the applicant's case. Her evidence as to the extent of her neck/shoulder pain before she commenced work with the respondent is, as I have pointed out, inconsistent. In view of the material from the St George Hospital, it is likely that the applicant experienced such symptoms before she commenced employment. As her evidence on this issue is not entirely reliable, it is difficult to measure the impact of the applicant's work on her cervical spondylosis.

Incapacity

123. When Dr Dan saw the applicant on 8 November 2019, he expressed the view that she had no residual earning capacity. She was at that time awaiting operative intervention by Dr Ferch. That intervention took place quite recently. There is no report from Dr Ferch, but I would infer that the applicant remains totally incapacitated by reason of the medical treatment at the time of writing, although that might not persist for many more weeks.

124. Dr Bodel did not opine that the applicant was totally incapacitated when he saw her earlier in 2019. He did, however, express the view that she was unfit for work as an enrolled nurse and placed significant restrictions upon her employability.

125. Mr Beran argued that I should find that the applicant had an earning capacity in the period prior to the surgery. Bearing in mind the admittedly spasmodic evidence of the medical practitioners at the Associate Medical practice on the issue of incapacity it is probable that the applicant had no residual earning capacity during the period between 3 July 2018 and her surgery. I accept that the applicant was not a cripple during this period, but it is difficult to imagine any employment that she could undertake that would not exacerbate her symptoms. Once again, the respondent has not adduced evidence on this issue.

126. The applicant has established an entitlement to weekly compensation and to an order pursuant to s 60. I do not propose to make a specific order in relation to the applicant's recent surgery as there is no documentary evidence which addresses the nature of the surgery before the Commission. It is likely that the part parties will agree on the nature of the surgery when documentary evidence becomes available. I will, however, grant liberty to apply if an issue arises in respect of this matter.

127. I propose to make the following findings and orders:

(a) The applicant suffered injury arising out of and in the course of her employment namely a cervical disc lesion on the background of degenerative disc disease on the evening of 1 January 2018.

(b) The applicant's employment was a substantial contributing factor to the injury.

(c) The applicant did not give notice of injury as soon as possible after the injury happened in accordance with s 254 of the 1998 Act but the respondent has not been prejudiced in these proceedings by late notice.

(d) The applicant failed to make the claim within the time limited by s 261 of the 1998 Act, but her failure is not a bar to recovery as she has demonstrated reasonable cause for this failure.

(e) As a result of her injury the applicant has had no current earning capacity from 4 January 2018 to date.

(f) At all material times the applicant's PIAWE was $701.40.

(g) Award for the applicant at the rate of $666.33 per week from 4 July 2018 to 3 October 2018 and at the rate of $561.12 per week from 4 October 2018 to date and continuing pursuant to ss 36 and 37 until such payments are suspended varied or terminated in accordance with the provisions of *Workers Compensation Act 1987*.

(h) Respondent to pay the applicant's medical and hospital expenses pursuant to s 60.

(i) Liberty to apply in respect of the calculations above and in respect of any issue arising under s 60.