

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1486/19  
**Applicant:** Guy Falzon  
**Respondent:** Downer EDI Works Pty Ltd  
**Date of Determination:** 23 July 2019  
**Citation:** [2019] NSWCC 250

The Commission determines:

1. I remit this matter to the Registrar for referral to an AMS on the following bases:
  - (a) Date of injury: 12 November 2018 (deemed).
  - (b) Matters for assessment: both upper extremities (thumbs), both lower extremities (knees), lumbar spine.
  - (c) Evidence:
    - (i) Application to Resolve a Dispute and attached documents;
    - (ii) Reply by EML and attached documents;
    - (iii) Application to Admit Late Document containing the Reply of EML-DSS.

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

John Wynyard  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Reynolds*

Antony Reynolds  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Guy Falzon (the applicant) brings a claim for lump sum compensation for injuries originally pleaded as being to both upper and lower extremities. Downer EDI Works Pty Ltd (the respondent) resists the claim on the basis that although the orthopaedic injuries have been sustained, employment was not the main contributing factor.
2. A s 78 notice issued on 22 March 2019. Initially a Reply was lodged by an insurer to both this action and a simultaneous action brought in relation to herniae injuries. The s 78 notice was issued by the same insurer.
3. However, on 23 May 2019 the herniae injuries were referred (along with scarring) to an Approved Medical Specialist (AMS).<sup>1</sup> The present action was unable to progress because the present insurer, namely "EML RT WSS," maintained it was not the same insurer, namely "Employers Mutual NSW Limited," as had put on both a s 78 notice and the Reply in relation to the matters that are the subject of the present action. I accordingly referred the matter to an AMS for the herniae injury and stood the matter over to a telephone conference and directed the current insurer to put on a Reply.
4. That Reply in Part 3 sought leave to raise the issues that had already been raised by "Employers Mutual NSW Limited" in its Reply.

### ISSUES FOR DETERMINATION

5. The parties agree that the following issue remains in dispute:
  - (a) Was Mr Falzon's employment the main contributing factor to his injuries?

### PROCEDURE BEFORE THE COMMISSION

6. This matter was heard at Penrith on 25 June 2019. Mr Bill Nicholson of counsel appeared for the applicant and Mr Paul Rickard of counsel appeared for the respondent. 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.
7. The matter was originally listed at Penrith on 23 May 2019, as indicated above. On 30 May 2019, I issued Amended Consent Orders following amendments to the Application to Resolve a Dispute (ARD) made during that hearing. They were, relevantly:

"By and with the consent of the parties, the determination of the Commission in this matter is as follows:

1. I grant leave to the applicant to amend Part 4 of the Application to Resolve a Dispute by deleting what appears after 'Date of injury' and substituting therefor the following:
  - (a) ....
  - (b) 12/11/2018 (deemed) in relation to the claim for injuries to both upper and lower extremities and the back.

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<sup>1</sup> Certificate of Determination 23 May 2019.

2. I grant leave to the applicant to amend Part 5.6 of the Application to Resolve a Dispute to add:
  - (a) after the word extremities, the back and
  - (b) ...”

## **EVIDENCE**

### **Documentary evidence**

8. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents;
  - (b) Reply put on by EML and attached documents;
  - (c) Application to Admit Late Document containing the Reply of EML RTWSS.

### **Oral evidence**

9. No application was made in respect of oral evidence.

## **FINDINGS AND REASONS**

10. Mr Falzon made a statement on 2 February 2018. He said began work with the respondent in 1985, although he had been working for other entities between 1977 and 1982 which became the respondent. Mr Falzon said:<sup>2</sup>

“... My duties included labouring, machine operating, Jack-hammering, levelling, racking, heavy lifting and manual labouring using my hands.

I would work up to 7 days per week, 15 – 17 hours per day for more than 10 years.”

11. Mr Falzon complained of the onset of a number of symptoms, including to the lungs and those of a psychological nature. He also described the onset of his herniae problems. With regard to the subject injuries he said that he suffered from pain in both his hands, particularly in his left thumb. He said:

“31. I have wear and tear of the cartilage in both hands which I think is caused by the gripping movement from the shovelling as well as the constant Jack-hammering.

32. I had surgery on my left hand on 9 February 2017.

33. My right hand continued to worsen and I had surgery on my right hand on 24 August 2017.”

12. He said that both knees are also painful and that they ached constantly. He said:

“It is due to the constant standing which is part of my job, as well as the squatting and stooping involved in all of my duties.”

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<sup>2</sup> ARD 1

13. Mr Falzon retained the services of Dr Peter Giblin as his medico-legal referee regarding his orthopaedic injuries. In his report of 19 July 2018, Dr Giblin took a more detailed history. He said:

“Since 1977 he has worked as a labourer and an asphalter with road working. This entails plant operating as well as shovelling, raking and jack hammering.

Ten years ago, in the course of his duties he developed low back pain as well as bilateral knee pain. He sought medical advice and he was treated conservatively with physiotherapy, hydrotherapy and tablets.

About 5 years ago, he developed bilateral thumb pain and he sought medical advice.

He had a left thumb CMCJ excision arthroplasty on 9 February 2017 with another right thumb excision arthroplasty CMCJ on 24 August 2017.

He has been off work since September 2016 and remains off work currently.

At the present time, he is still having hydrotherapy twice a week, takes medication such as Cymbalta and Neurontin and he sees his GP once a month.

He has had no new injuries.

He says he has no previous history of these symptoms or injuries.”

14. With regard to causation, Dr Giblin said:

“Based upon his history and examination, he has the provisional diagnosis of work related injuries to both his thumbs, low back and knees, his work environment being the main contributing factor.”

15. Dr Millons was retained as the respondent’s medico-legal referee, reporting on 25 October 2018 and 21 November 2018.

16. In his report of 25 November 2018, Dr Millons took a consistent history of the onset of Mr Falzon’s problems. He said:<sup>3</sup>

“In 1985, he started back at work with Emoleum which underwent through various name changes, CSR, Readymix and then Downer EDI. The work he was doing was the same all the way through. He worked as a labourer.

In the course of his duties as a paver operator, he would be involved in raking, shovelling hot mix, operating jackhammers, operating a road roller, operating the paving machine and he also did some tar spraying from a truck. He also drove trucks, driving men and materials to various sites. He did some bobcat work. He never did any dozer work.

He worked long hours and, for perhaps the first 10 years, he was working 18 hours per day, 7 days per week. There was a lot of night work involved in the road repaving operation.”

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<sup>3</sup> Reply 1

17. With regard to Mr Falzon's back symptoms, Dr Millons recorded:

"Mr Falzon states that he has had backache for some years. He could not recall any particular date of onset of symptoms but symptoms were there as he went about his daily labours.

His work does appear to have been fairly heavy and demanding. I am not sure if he sought much attention in those early days."

18. In his opinion regarding Mr Falzon's back, Dr Millons said:<sup>4</sup>

"He appears to have had his *back* X-rayed in April 2014 so, presumably, there was some complaint of back pain at that time. That noted a developmental abnormality with defects in L5 and a Grade I slip of L5 on S1 along with some changes in the lumbar region.

The underlying problem is developmental with secondary degenerate changes at the lumbosacral level which may have been aggravated as he went about his daily labours which do appear to have been quite heavy and demanding."

19. Dr Millons noted in respect of the knee symptoms:

"Mr Falzon has had some problems with pain in *both knees* which, again appears to have come on over the years, he states, aggravated by the nature and conditions of his work. His work would entail bending, kneeling, squatting, climbing up and down into the paving machine and trucks."

20. In giving his opinion, Dr Millons said:<sup>5</sup>

"The knees do not appear to have been investigated until after he had gone off work with his hernia issues. Serial investigations of the knees since then have really not demonstrated anything particularly much."

21. Mr Falzon's thumb difficulties Dr Millons described in the following terms:

"Mr Falzon has had problems with the carpometacarpal joints of *both thumbs*. He states that he developed some pain in the thumbs over his years, aggravated by his work, shovelling and raking hot-mix and also by jackhammering. He appears to have put up with that until he went off work with his hernia problems in 2016.

He was subsequently referred through to see Dr Yee, Hand Surgeon, and he has come to excision arthroplasties of the carpometacarpal joints, the *left* in February 2017 and the *right* in August 2017. Mr Falzon self-funded those surgical procedures through his health fund.

The pain may have been reduced as a result of the surgical procedures but his grips remain somewhat weak and he feels that he has lost dexterity."

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<sup>4</sup> Reply 9

<sup>5</sup> Reply 10

22. Further, later in his report he said:<sup>6</sup>

“He had *both thumbs* X-rayed in November 2015 not long prior to him going into hospital for surgery on his groins. That showed clear evidence of degenerate changes in the carpometacarpal joints.

The problem is almost certainly constitutionally based but may have been aggravated by the nature and conditions of his work over the years. The work was clearly quite heavy and demanding.” Dr Millons’ opinion as to causation was that:<sup>7</sup>

“While the underlying problems in his back, thumbs and possibly knees are constitutionally based, there may have been some input from the nature and conditions of his work. The question, of course, is whether the nature and conditions of his work were the *main contributing factor* to the state of his back, hands and knees.

Certainly, as far as his *back* is concerned, there is an underlying developmental issue with secondary degenerate change which would have been symptomatic at some stage in life, whether or not he had been working. I think there may be grounds to state that while work was a *potentially aggravating factor* to the underlying condition, it may not be the *main contributing factor*.

Similarly, with the *thumbs*, the underlying problem is almost certainly constitutionally based. It may have been aggravated by the nature and conditions of his work but, on the balance of probabilities, he would probably have had issues with his thumbs at this stage in life whether or not he had been involved in heavy manual activity.

While his work may have caused some aggravation of the underlying, constitutionally based attritional change, there may be grounds to question whether it was the *main contributing factor*.

The situation in regard to the *knees* is even more obscure because there does not appear to be a great deal untoward going on in either knee. There may have been some aching in the lower limb joints as a result of the nature and conditions of his work but that does not appear to be the *main contributing factor* to the minor discomfort that Mr Falzon now feels in the knees which probably reflects the normal activities of daily living and his weight playing on some possible minor changes in the knees.

Finally, I refer to *Dr Giblin's report dated 19/07/18*. I have no difficulty with the general thrust of his report. In his 'Diagnosis', Dr Giblin notes a provisional diagnosis of work related injuries to the thumbs, low back and knees, his work environment being the main contributing factor. I would perhaps draw issue with that and note again that any work-related aggravation of the underlying problems does not rate as the *main contributing factor* to his condition.”

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<sup>6</sup> Reply 10

<sup>7</sup> Reply 10-11

23. Dr Bain Shenstone was Mr Falzon's treating Rheumatologist. In his report of 11 December 2016, he said: <sup>8</sup>

"In summary, his joint symptoms are mechanical in nature and do not relate to a connective tissue disorder. There is lumbar spondylosis, CMC joint osteoarthritis, patellofemoral syndrome in both knees with patellar mal-tracking and mild degenerative changes involving the PIPs, wrists, bilateral lateral epicondylitis and mild impingement in the shoulders. In addition, he has sleep apnoea and possibly a mild pain windup phenomenon related to sleep deprivation. There was no evidence of a connective tissue disorder and I don't believe he has fibromyalgia around the accumulation of the mechanical symptoms causing his problems."

24. On 6 April 2018 Dr Shenstone provided a report to Mr Falzon's solicitors. He said:<sup>9</sup>

"5. Employment as a contributing factor to current condition.

It is difficult to be definitive as to degree of contribution of his employment to his current condition. It is highly likely that his employment has contributed to the CIC joint osteoarthritis in both hands, bilateral lateral epicondylitis and impingement syndrome. It may also have contributed to the degree of lumbar spondylosis although would not be the only precipitating factor. His work activities have historically contributed to his patellofemoral syndrome in both knees. All of these contributions however have been significant exacerbated by associated deconditioning following his inguinal surgery and development of neuropathic pain interfering with him being able to undertake rehabilitation and adequately recondition." (As written).

## **SUBMISSIONS AND DISCUSSION**

25. Mr Rickard submitted that Dr Giblin's opinion was so truncated and so general in its history that I should prefer the more measured approach in Dr Millons' opinion. Mr Nicholson referred to the evidence not only from Mr Falzon himself but from the other medical practitioners who have been treating him, particularly Dr Shenstone who specifically addressed the question of the contributing factor employment had to play in the causation of the injuries.
26. Dr Shenstone spoke in terms of a contributing factor, or a significant contributing factor, without attempting to address the relevant test. He spoke of the employment being "highly likely" to have contributed to the CIC joint arthritis in the hands, and the epicondylitis in the elbows. He had some reservations as to the condition of the spine, and also expressed some reservations as to the effect of Mr Falzon's deconditioning as a result of his herniae condition.
27. There was unanimity in the medical evidence that the nature of the injury was the aggravation of Mr Falzon's underlying conditions. Dr Millons accepted that diagnosis but said that nonetheless because of the extent of the underlying degenerative conditions, it could not be said that the employment was the main contributing factor. The respondent submitted that Dr Shenstone's opinion was perhaps valid if the test was whether employment was a substantial contributing factor. However, he argued that the evidence did not establish that it was the main contributing factor. No authority was cited.

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<sup>8</sup> ARD 112

<sup>9</sup> ARD 155

28. I disagree, with respect. The working life of Mr Falzon as an asphalter and labourer on the roads has been attended by long hours, 15 - 17 hours per day, 7 days per week, for more than 10 years, Mr Falzon said. This evidence was not challenged and I accept this somewhat unusually arduous work history.
29. The protracted duration of the heavy and repetitive work described in Mr Falzon's statement and to the medical experts was of such a nature that it is difficult to accept Dr Millons' opinion that the various degenerative conditions would have become symptomatic in any event. Dr Millons' opinion that Mr Falzon would have had issues with his thumbs regardless of the heavy manual activity I do not accept to be a finding available on the balance of probabilities, as Dr Millons suggested. Such an opinion as to alternative hypothetical scenarios in the face of the evidence I find to be speculative.
30. Similarly, and for the same reasons, I do not accept Dr Millons' opinion that the developmental spondylolysis and degenerative changes in Mr Falzon's lumbar spine "would" have become symptomatic "at some stage in [Mr Falzon's] life". I accept that they could have, and I accept that, later in life, they may have become symptomatic, but the opinion falls far short of establishing on the balance of probabilities that they would have become symptomatic when they did regardless of the nature of the work that Mr Falzon actually did.
31. Similarly, I accept Dr Millons' concession that the heavy nature of Mr Falzon's work was an aggravating factor, but in the face of the detail of the hours, days and years worked, I do not accept that the underlying developmental condition in the spine and secondary degenerative changes were the main contributing factor – a conclusion that must necessarily follow from Dr Millons' reasons.
32. Section 4(b)(ii) of the *Workers Compensation Act 1987* (the 1987 Act) requires relevantly that the description of 'injury':
- (b) includes a **"disease injury"**, which means:
    - (i) ...
    - (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.. (Emphasis added).
33. The underlined phrase has been interpreted as meaning the chief or principal contributing factor, and that "mainly" was more than substantially but less than totally or wholly.<sup>10</sup>
34. The medical evidence regarding the condition of Mr Falzon's knees was that there was a patellofemoral syndrome in both knees, which Dr Shenstone thought had been contributed to by work activities. Dr Millons was of the view that there was not "a great deal untoward going on." The list of investigations compiled by Dr Giblin<sup>11</sup> show that the knees were the subject of radiology in 2016, 2017 and 2018. Such investigative attention is indicative of bilateral knee symptomatology. It does not support Dr Millons' view, and I accept the evidence of Dr Shenstone, whose diagnosis was supported by the examination by Dr Giblin. Patellofemoral irritability was remarked on in respect of both knees by Dr Giblin.

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<sup>10</sup> See *Hawkesbury Race Club Limited v Leggett* [2018] NSWWCPCD 24 (*Leggett*) per DP Wood, citing Senior Arbitrator Capel at [150]

<sup>11</sup> at ARD 32



35. The opinions as to the degree of contribution by Mr Falzon's employment to his various injuries were varied. Dr Giblin thought that employment was the main contributing factor, Dr Shenstone said that the degree of contribution was difficult to define, and Dr Millons thought that whilst employment had aggravated the various degenerative (and developmental, in the case of the lumbar spine) conditions, such employment could not be classified as the main contributing factor.
36. It is not surprising that medical experts have different opinions as to what is, in the final analysis, a legal question.
37. Applying the definition referred to in *Leggett* it can be seen that the definition applied by Dr Millons appeared to incorporate the concept that a main contributing factor was one that was totally or wholly the cause of the aggravation. He acknowledged the contribution of the degenerative conditions but approached this question on the basis that either the nature of the work done or the existence of the pre-existing conditions had to be the main contributing factor.
38. In the present circumstances, the medical evidence is of one mind that the pre-existing conditions were a factor in causing the subject injuries, and I am satisfied that Mr Falzon's injuries consist in the aggravation of those pre-existing conditions. I am not satisfied, however, that the pre-existing conditions are a more substantial cause than the nature of Mr Falzon's quite unusually arduous employment. It cannot be said that his employment was totally or wholly the principal or chief contributing factor, but I am satisfied that his employment was more than substantially the cause of his injuries.
39. Dr Giblin's opinion was criticised as lacking the essential facts and circumstances upon which to form his opinion which itself was said to be deficient, as it only consisted of three lines.
40. When considered against the background of the evidence before me, the opinion is supported by the facts and circumstances as established by both the applicant, Dr Shenstone and Dr Millons. I am accordingly satisfied that Dr Giblin's opinion was given within a fair climate of the facts and circumstances that have led Mr Falzon to his present situation. The arduous work he was doing and the long hours for which he was doing it were the aggravating factors that led to his injury.
41. Accordingly, there will be an award in favour of the applicant.
42. I remit this matter to the Registrar for referral to an AMS on the following bases:
  - (a) Date of injury: 12 November 2018 (deemed)
  - (b) Matters for assessment: both upper extremities (Thumbs); both lower extremities (knees); lumbar spine
  - (c) Evidence
    - (i) ARD and attached documents;
    - (ii) Reply by EML and attached documents;
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