WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO: 003352/15
APPLICANT: David Fuller
RESPONDENT: NSW Police Force
DATE OF DETERMINATION: 9 February 2016
CITATION: [2016] NSWWCC 34

The Commission determines:

1. I am satisfied on the balance of probabilities that ongoing chiropractic treatment for up to six sessions per year is reasonably necessary as a result of the injury on 10 December 1991.
2. Award for the applicant pursuant to section 60 of the *Workers Compensation Act* 1987 in respect of chiropractic treatment.

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

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 JANE PEACOCK, ARBITRATOR, AND WORKERS COMPENSATION COMMISSION.

Abu Sufian
Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the application) filed 12 June 2015, the applicant, Mr Mr David Fuller (the applicant) seeks a determination that proposed chiropractic treatment is reasonably necessary as a result of injury to his neck on 10 December 1991.

2. The respondent is the New South Wales Police Force (the respondent). The respondent was insured at the relevant time by Employers Mutual, acting as agent for NSW SICorp (NSW TMF No 2) (the insurer) for the purposes of workers compensation.

3. The respondent denied liability for the claim for chiropractic treatment.

ISSUES IN DISPUTE

4. There is no dispute that the applicant suffered injury to his neck on 10 December 1991 when the police car he was travelling in was struck from behind. He was previously paid compensation in respect of the neck injury including lump sum compensation for 10% permanent impairment of the neck.

5. The applicant sought chiropractic treatment for his neck as needed and the respondent continued to pay the applicant's section 60 expenses in respect of ongoing chiropractic treatment up until 2008 when it denied liability for ongoing chiropractic treatment.

6. The respondent issued a section 74 notice dated 29 December 2008 denying liability for the claim for chiropractic treatment.

7. The section 74 notice dated 29 December 2008 declined liability for on the following basis:

   "Your employment is no longer a substantial contributing factor to your injury. Based upon independent medical examination report by orthopaedic surgeon Dr Richard Powel.

8. The manner in which the first part of the dispute notice expressed does not accord with the legislation. There is no dispute that the applicant suffered injury to his neck on 10 December 1991 and that his employment was a substantial contributing factor to that injury.

9. The question then becomes one of whether the need for medical treatment is reasonably necessary as a result of the injury.

10. The section 74 notice went on to describe, as follows, the issues relevant to the decision as follows which I note apart from the mention of section 9A in brackets more accurately characterises the dispute in accordance with the legislation:

    "Dr Powell's report dated 19 December 2008 opines that the effects of the MVA have resolved and his current symptoms are a result of his duties with his new employer. Dr Powell opines that Mr Fuller does not require further treatment or medical investigations.

    We say that the injury you sustained on the 10/12/1991 has resolved and that you have recovered from the effects of that injury and that your present condition is not a result of the injury (s33 Workers Compensation act 1987).

    We say that any need for medical or related treatment is not the result of injury on 10/12/191 (s60 Workers Compensation Act 1987)

We say that your current condition is a result of degenerative changes and your new employment with NSW Fire Brigades (s9 & s9A Workers Compensation Act 1987)."

11. Subsequent proceedings filed in the Commission were finalised by way of an interim payment direction dated 1 March 2012 where, by agreement, the respondent paid a sum for chiropractic treatment.

12. The applicant filed the present proceedings in the Commission after further chiropractic treatment expenses were declined by the respondent.

13. In accordance with the mandatory requirement under section 60 (5) of the 1987 Act, that was then in force, the matter was referred for opinion to an Approved Medical Specialist (AMS) as to whether the chiropractic treatment is reasonably necessary as a result of injury deemed to occur on 10 December 1991. A Medical Assessment Certificate (MAC) issued from AMS dr Mastroianni on 17 September 2015. This is a non-binding medical opinion that is evidence to be weighed in the balance with the other evidence in the proceedings.

14. The applicant seeks a finding that the chiropractic treatment is reasonably necessary as a result of injury deemed to occur on 10 December 1991. Neither counsel considered that this finding would need to be supported by a general order for the payment of section 60 expenses

PROCEDURE BEFORE THE COMMISSION

15. The parties attended a conciliation arbitration on 15 December 2015. The parties were both legally represented by counsel. Conciliation took place however the parties were unable to come to a resolution of the matter. I'm 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've 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 entire dispute.

EVIDENCE

Documentary evidence

16. The MAC of the AMS Dr Mastroianni dated 17 September 2015 is in evidence in these proceedings.

17. In addition, the following documents were admitted into evidence before the Commission by consent and taken into account in making this determination:

For the applicant

(a) Application to Resolve a Dispute and all documents attached.

(b) The late documents dated on 20 November 2015 being the report of Professor Ryan of 29 October 2015, the letter of instruction from Harris Wheeler Lawyers to Professor Ryan and the CV of Professor Ryan, which were marked exhibit "A" and dated 15 December 2015.

(c) The statement of the applicant dated 15 December 2015 and tendered at the arbitration and marked exhibit "C". I note that this represented a signed copy of an unsigned statement attached to the application.

For the respondent

(a) The Reply and all documents attached.

(b) The late documents filed by the respondent on 18 November 2015.

(c) A letter dated 14 December 2015 from the applicant's lawyers to the respondent lawyers tendered at the arbitration and marked exhibit "B" and dated 15 December 2015

Oral evidence

18. The applicant did not seek leave to adduce oral evidence. Counsel for the respondent did not seek leave to cross-examine the applicant.

FINDINGS AND REASONS

19. The applicant particularised in the application that he sought "chiropractic treatment @$45 per session currently to age 65 pursuant to s60(5) of the Workers Compensation Act 1987" as a result of a neck injury that occurred in the course of his employment as a police officer on 10 December 1991 when he was involved in a car crash.

20. There is, and can be, no dispute that the applicant suffered an injury to his neck on 10 December 1991 and that his employment was a substantial contributing factor to that injury. The applicant was paid compensation including lump sum compensation for the injury. Indeed the applicant has received chiropractic treatment, paid for by the respondent, over time up until 2008 when liability was denied for ongoing chiropractic treatment. The respondent later paid for some more chiropractic treatment in an agreed sum.

21. The question for determination is whether the proposed treatment in the form of ongoing chiropractic treatment is reasonably necessary as a result of the injury to the neck on 10 December 1991.

22. As per the mandatory legislative requirement that was in force at the time, this question was referred by the commission for opinion to an AMS who issued a MAC dated 17 September 2015. The AMS opined that the chiropractic treatment, whilst being reasonably necessary to treat the symptoms that the applicant experiences in his neck from time to time, is not reasonably necessary as a result of the injury ion 10 December 1991. This is a non-binding

opinion but is evidence that needs to be weighed in the balance with the other evidence in the case.

23. Deputy President Roche in Diab v NRMA [2014] NSWWCCPD 72 (*Diab*) provided a useful summary of the authorities dealing with whether medical expenses are "reasonably necessary" as a result of injury as required under section 60 and set out the approach that is to be adopted. I note that I provided counsel with a copy of the decision in *Diab* at the arbitration and they were invited to consider this authority and make any submissions in relation to its application. I intend to apply *Diab*.

24. Deputy President Roche in *Diab* said as follows:

> 76.The standard test adopted in determining if medical treatment is reasonably necessary as a result of a work injury is that stated by Burke CCJ in *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32 (*Rose*) where his Honour said, at 48A—C:
>
> > "3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
> >
> > 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
> >
> > 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."
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> 77. The Commission has applied this test in several cases (see, for example, *Ajay Fibreglass Industries Pty Ltd t/as Duraplas Industries v Yee* [2012] NSWWCCPD 41 at [67]).
>
> 78. In addition, the Commission has been guided by, and generally followed, the decision of Burke CCJ in *Bartolo v Western Sydney Area Health Service* [1997] NSWCC 1; 14 NSWCCR 233 (*Bartolo*), where his Honour said, at 238D:
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> "The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."

79. The Arbitrator quoted and applied these statements in the present matter. Subsequent appellate authority suggests that this approach may not be strictly correct.

80. The Court of Appeal considered the meaning of "reasonably necessary" in *Clampett v WorkCover Authority (NSW)* (2003) 25 NSWCCR 99 (*Clampett*). That case concerned whether proposed home modifications for a paraplegic were "reasonably necessary" having regard to the nature of the worker's incapacity. Grove J (Meagher and Santow JJA agreeing) noted that the trial judge had sought guidance from *Rose* and *Pelama Pty Ltd v Blake* (1988) 4 NSWCCR 264 (*Pelama*), another decision by Burke CCJ where his Honour applied the principles discussed in *Rose* and *Bartolo*.

81. Grove J referred to the dictionary definition of "necessary" as being "indispensable, requisite, needful, that cannot be done without" (Shorter Oxford English Dictionary, 3rd ed) and "that cannot be dispensed with" (Macquarie Dictionary).

82. His Honour added, at [23]–[24]:

> "23. The essential issue is what effect flows from conditioning such qualities as 'reasonably'. The consequence is to moderate any sense of the absolute which might otherwise be conveyed by the word 'necessary' if it stood alone. In order to contemplate such moderation it is apt to consider surrounding circumstances, but the question to be addressed is whether modification of a worker's home, having regard to the nature of the worker's incapacity, is reasonably necessary. In contemplation of what might be 'reasonably necessary' there is this statutory obligation specifically to have regard to the nature of the worker's incapacity. It provides emphasis towards moderating the meaning of 'necessary' in this context.
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> 24. The statute does not inhibit inquiry as to what may be thought reasonable in all, or in any particular, circumstances but its terms clearly point to predominant attention being paid to the nature of the worker's incapacity. In my opinion, to reject the appellant's proposal on the basis that expenditure is to be made on premises of which he is a weekly tenant is an elevation rather than a moderation of the meaning of 'necessary'."

83. It is important to remember that Grove J's reference in the above passages was in the context of a claim for home modifications under s 59(g). That subsection is restricted to claims for modification of the worker's home or vehicle directed by a medical practitioner "having regard to the nature of the worker's incapacity" (emphasis added). Apart from s 59(f), which deals with care (other than nursing care), there is no such restriction in the other subsections in s 59.

84. In *Wall v Moran Hospitals Pty Ltd t/as Annandale Nursing Home*, Burke CCJ, unreported, Compensation Court of NSW, 30 June 2003, Burke CCJ acknowledged (at [10]) that, contrary to *Rose* and *Pelama*, *Clampett* held that the word "reasonably" was "effectively used as a diminutive and moderated the effects of the word 'necessary'".

85. The approach in *Clampett* is consistent with the modern approach to statutory interpretation, which is to construe the language of the statute, not individual words (*Sea Shepherd Australia Limited v Commissioner of Taxation* [2013] FCAFC 68 per Gordon J (Besanko J agreeing)). Thus, "reasonably necessary" is a composite phrase in which necessity is qualified so that it must be a reasonable necessity (Giles JA (Campbell JA agreeing) in *ING Bank (Australia) Ltd v O'Shea* [2010] NSWCA 71 at [48] (*O'Shea*)). The Court, Bathurst CJ, Beazley and Meagher JJA, followed this approach in *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2012] NSWCA 445 at [113] (*Moorebank*).

86. Reasonably necessary does not mean "absolutely necessary" (*Moorebank* at [154]). If something is "necessary", in the sense of indispensable, it will be "reasonably necessary". That is because reasonably necessary is a lesser requirement than "necessary". Depending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish that the treatment claimed is one of those treatments. A worker certainly does not have to establish that the treatment is "reasonable and necessary", which is a significantly more demanding test that many insurers and doctors apply. Dr Bodel and Dr Meakin were both wrong to apply that test.

87. Giles JA added (at [49] in *O'Shea*) that the qualification whereby the necessity must be reasonable calls for an assessment of the necessity having regard to all relevant matters, according to the criteria of reasonableness. His Honour was talking in the context of whether an easement should be granted under s 88K of the *Conveyancing Act* 1919, which provides that "the Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement". However, his Honour's observations are applicable in the present matter and are clearly consistent with *Clampett*.

88. In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:

    a. the appropriateness of the particular treatment;

    b. the availability of alternative treatment, and its potential effectiveness;

    c. the cost of the treatment;

    d. the actual or potential effectiveness of the treatment, and

    e. the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

89. With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean

that the treatment was not reasonably necessary. As always, each case will depend on its facts.

90. While the above matters are "useful heads for consideration", the "essential question remains whether the treatment was reasonably necessary" (*Margaroff v Cordon Bleu Cookware Pty Ltd* (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression "no reasonable prospect" should be understood, "[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content".

25. Turning then to an examination of the evidence in this case.

26. The applicant gave evidence in a statement dated 15 December 2015. He was not cross-examined about this evidence.

27. In his statement, the applicant gave evidence about the motor vehicle accident on 10 December 1991 in which he was driving the police car when the car was hit from behind, and forced from the road and up an embankment. The applicant gave evidence about the force of the crash stating that "the driver's seat was now laying against the rear passenger seat, as the pivot point that holds the seat and back support had snapped from the impact."

28. The applicant gave evidence that he was treated at hospital for whiplash and discharged. On 12 December 1991 he had x-rays taken which showed no abnormality.

29. He gave evidence of the persistence of neck pain following the car accident as follows:

"22. For some time after the collision I was still suffering from soreness in the neck and back regions. I was subsequently referred to see a physiotherapist…The treatment provided went on for some months.

23. Over the next few years I had bouts of neck and shoulder pain and severe headaches, I treated this by way of heat pack, stretches that had been shown to me by my physiotherapist and anti-inflammatory medications.

30. The applicant gave evidence of the persisting symptoms and treatment that he sought as follows:

"24. I transferred with the police to Taree in 1997 and found again that the symptoms had again retuned. This may have been due to long hours sitting in the seat of police vehicle."

25. As a result I attended a local doctor. Dr Peter Norling attempted to alleviate some of this discomfort by using laser acupuncture to the neck region.

26. In May 2000 at the request of GIO I was seen by dr O'Keefe, orthopaedic surgeon at his Forster surgery. The assessment made by dr O'Keefe considered that I had 10% permanent impairment in my neck. Dr O'Keefe believed that I should have manipulative treatment for a period until my symptoms settle again.

27. Doctor Norling believed that I may benefit from some other form of manipulative therapy and suggested I consult a chiropractor, I attended a local chiropractor Camille Nelson. I was treated by her on numerous occasions for the previous described symptoms.

28. In 2005 I moved to Newcastle and attended the Dudley chiropractic clinic where I received a number of treatments..."

29. I again moved my residence to my current address...in 2006 and commenced treatment with chiropractor Peter Reilly of Lorn Chiropractic up until his death. I then took up treatment with Shane Moss of the same practice…"

31. The applicant gave evidence of the physical nature of his work in the police force:

> "30. Following my injury and during my time working with the NSW Police I was required to perform physical dirties including wrestling with offenders, standing for long periods of time, giving chase on foot patrols and more. I found the sitting in police vehicles the most painful… "

32. The applicant gave evidence that he joined the fire brigade full time in March 2001, having previously served part time from 1997.

33. He gave evidence that he is required to wear safely equipment in the fire brigade and that "on occasions I would feel discomfort from wearing this equipment. On such occasions I would go home and take an anti-inflammatory tablet. This did not occur often and I was never in so much discomfort that I required any time off work."

34. The applicant gave evidence that in July 2009 he moved into communications room which he said gave him discomfort in the back after sitting for lengthy periods of time. I note that he did not not give evidence about any impact of his neck. He was not cross-examined.

35. The applicant gave evidence about the obtaining chiropractic treatment on an as needed basis since the injury on 10 December 1991 to his neck and the benefit that he derives from it, as follows:

> "36. Following the injury I incurred in 1991, whilst in the NSW police force, I received on and off chiropractic treatment.
>
> 37. I attend my chiropractor when the symptomatology from my injury flares up. By this I mean when pain increased or I become stiff from pain or the muscles became stiff in and around the site of the original injury.
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> 38. Symptomology from my injury flares up at times when I am at home just doing nothing, whilst at other times it can flare up whilst I am at work at my new employment with the NSW fire brigade.
>
> 39. Since joining the NSW fire brigade I have not injured my neck in any way.
>
> 40. I find that the chiropractor assists me in maintaining my employment with the NSW fire brigade. Without it I would likely have days off with that employment due to neck pain, the chiropractor assists me to keep my neck and spine "fluid". I notice that when I am in static positions, such as on occasions when I sit for lengthy periods of time without being able to move, my spine begins to cause me pain.
>
> 41. I have questioned my general practitioner in the past about getting treatment as I needed it and they have simply agreed that I should seek treatment when I had flare ups.

42. I have lodged a worker's compensation claim previously and was paid for a number of my chiropractic treatments. Following that the insurer has not paid for any more.

43. Following a flare up, and after a couple of sessions of chiropractic treatment, I feel a great improvement in my neck pain and other symptoms.

44. My neck injury is something that I have learnt to put up with. I have coped with it, with the assistance of chiropractic treatment and have managed to maintain my career with the police firstly and now the news fire brigade.

45. I wish to continue chiropractic treatment as required as I know from past experience, that my neck will flare up again from time to time causing spasms and resulting in me being unable to work.

46. I find when my neck flares up, I have trouble sleeping, causing problems in my mood and affect if I am to access chiropractic treatment. This in turn causes problems with my wide and family. I get extremely grumpy and find it difficult from lack of sleep, to concentrate properly at work,'

47. I find that after chiropractic treatment, any symptoms that have flared up in my neck subside within days. This allows me to take less medication and sleep better, which is very important with my schedule including shift work. In addition, with chiropractic treatment, I am able to assist with some domestic duties and partake in mild leisure activities."

36. The applicant's chiropractor is Mr Shane Moss chiropractor from the Lorn Chiropractic clinic who he has been seeing since 2006.

37. Mr Moss provided a report dated 15 December 2011.

38. Mr Moss noted that he had been treating the applicant since 2006 having taken over his treatment when the applicant's former chiropractor died.

39. Consistent with the applicant's evidence Mr Moss noted the history given at the first consultation as follows:

"Mr Fuller attended the Lorn chiropractic clinic on 1 November 2006 complaining of neck pain with associated headaches and lower back pain radiating into the right buttock. He stated that he had first experienced these symptoms following the motor vehicle accident on 10 December 1991 when the car he was driving was hit from behind and that he had obtained relief from chiropractic treatment over the time since."

40. Mr Moss noted that the applicant "attends the clinic on a sporadic basis when the symptoms flare up".

41. Mr Moss considered that the symptoms experienced by the applicant were consistent with the mechanism of injury as follows:

"The symptoms that Mr Fuller is experiencing definitely seem consistent with the injury on the 10th December 1991. Normally when a car is hit from behind whiplash is a likely consequence. In this case two factors which make the situation worse is that Mr Fuller did not notice that the car behind was also not slowing down and so did not brace himself (which would have acted to reduce the severity of the injury) and also

that the force of impact was so great that the seat actually broke in two (which would normally help reduce the extension component of whiplash)."

42. Mr Moss noted as follows:

"Mr Fuller had x-rays of the neck taken just after the accident on the 12 December 1991 which are expected showed no abnormalities with a well preserved cervical lordosis but recent x-rays that I requested which were taken on 27 June 2011 showed some degeneration. Most notable was the loss of disc height and reversal of the lordosis with the apex at the C5/6 level. This level is the one that is usually damaged and takes most of the force in a whiplash injury."

43. Mr Moss pointed out that there is recognition that whip-lash associated disorders can develop into a chronic condition as follows:

"The Motor Accident Authority recognises in its guidelines that of the people who are still experiencing pain and disability from whip-lash associated disorders at three months, a majority are very likely to develop a chronic condition that can become very difficult to resolve completely. If severe enough, trauma to the sine always causes some damage to the ligaments and/or muscles to the surrounding area. Whiplash occurs when the body comes to a sudden stop followed by a sudden snap of an unsupported head and neck which can cause damage to neck muscles, ligaments, discs, blood vessels, nerves and osseous structures."

44. Mr Moss opined as follows:

"Mr Fuller has indeed suffered from an injury causing damage to the ligaments and surrounding soft tissues of his neck ad lower back. His signs and symptoms on presentation are consistent with this type of injury. Soft tissue has an elastic property, thus when stretched beyond its tensile capacity "creep" occurs and the ligaments and muscles may lose their ability to return to their original length and strength (much like stretch marks in skin) and therefore prone to further damage. Due to the traumatic nature of the injury early osteoarthritic changes may also occur as a result of the accident."

45. Attached to the application were two reports of Dr O'Keefe dated 30 May 2000. Dr O'Keefe saw the applicant back on 30 May 2000 as the IME for the respondent, which independent medical examination was undertaken when the applicant was still serving as a police officer. It was on the basis of Dr O'Keefe's assessment that the applicant suffered 10% permanent impairment of the neck as a result of the injury on 10 December 1991 that the respondent paid the applicant lump sum compensation for 10% permanent impairment of the neck as a result of the injury on 10 December 1991.

46. Dr O'Keefe noted a history consistent with the applicant's evidence in these proceedings about injury to his neck in the MVA on 10 December 1991

47. Dr O'Keefe recorded a consistent history that "x-rays at the time showed no bony abnormality and although he continued to have some difficulties the situation improved after the 18 month period". Dr O'Keefe went onto note

"He states that he was relatively asymptomatic until recently when he began to develop neck pain with associated headaches. He gets occasional radiation of pain into his right shoulder. These symptoms are similar to those which occurred after the incident. This has necessitated his visiting a local general practitioner in the area

Dr Norling who has an interst in this area. Dr Norling has treated him with laser acupuncture which has helped the situation."

48. Dr O'Keefe noted that under current symptoms that "his main problem is a recurrence of neck pain and headaches affecting hoes right eye socket and occasional pain radiating to his right shoulder. This is aggravated by driving in the car for long periods he is required to do on highway patrol duties."

49. Dr O'Keefe conducted a physical examination of which there were some positive signs as follows:

"Neck

He has a reasonably full and free range of movement although there was some low grade muscle spasm in the right trapezius muscle.

Grip strength was right greater than left as would be expected.

There were some tender trigger points in the trapezius muscle on the right side.

There was no abnormal upper limb neurological signs.

Reflexes and sensation were normal."

50. Dr O'Keefe noted that the flexion/extension cervical spine x-rays dated 12 December 1991 showed no abnormalities.

51. Dr O'Keefe's clinical diagnosis at that time was "exacerbation of persisting soft tissue whiplash type injury to his neck requiring treatment at this time."

52. I note that in 2000, some 9 years after the MVA, the respondent's own IME considered that the applicant had a persisting whiplash type injury which was subject to exacerbation.

53. When asked "Your opinion of what caused the current condition" Dr O'Keefe opined:

"There has been no specific incident to cause this problem and I wonder if there is some underlying problem that was generated by the initial incident on 10 December 1991. With that in mind I have recommended that he have some cervical spine x-rays including oblique's to assess whether or not he has any degenerative change as a result of the accident (subject to your approval)."

54. Dr O'Keefe gave the prognosis as:

"Prognosis is guarded in that without further information I am unable to state why this man's symptoms have recurred. He attributes it to long periods of driving. X-rays should clarify whether or not there is any persisting condition and I will comment on these once that are taken.

He may also benefit from manipulative treatment as this does in fact appear to help him. He has some doubts as to whether the laser acupuncture is actually efficacious as it always results in a "roaring" headache."

55. Dr O'Keefe summarised his opinion as follows:

"In summary I believe his current situation is a recurrence of his earlier injury in 1991 and he requires intermittent treatment in the form of either laser acupuncture or manipulative treatment for a time until it settles again."

56. Notwithstanding the suggestion about X-rays, Dr O'Keefe was satisfied that the applicant had a 10% permanent impairment of the neck which he assessed in a separate report of the same date, saying

"Based on today's assessment Mr David Fuller is considered to demonstrate a 10% permanent impairment of his neck".

57. As noted, the respondent paid the applicant lump sum compensation for 10% permanent impairment of the neck in accordance with the opinion of Dr O'Keefe.

58. The applicant obtained an IME report from Dr Sage, orthopaedic surgeon, dated 20 July 2009.

59. Dr Sage noted the present problems experienced by the applicant is his neck as follows:

"Neck

There is discomfort both sides, but more marked on the right associated with occipital headaches on the right. There is some radiation down the right arm as far as the elbow."

60. Dr Sage took a history consistent with the applicant's evidence in the proceedings.

61. Dr Sage noted the importance of the mechanism of injury, which I note is consistent with the view expressed by the treating chiropractor Mr Moss, as follows:

"On 10 December 1991 he was the driver of a vehicle, which had slowed down to make a turn, probably going about 20km/h, when it was hit by a following vehicle going at 60km/h causing the vehicle to veer off the road up an embankment. The vehicle was written off and importantly the hinges of his seat were broken by the impact with the upright of the seat ending up on the rear seat.

Neck discomfort came on shortly afterwards, but there was also discomfort in the shoulder areas, mainly on the right looking at the documentation."

62. Dr Sage noted the ongoing symptomatology in the neck since the injury on 10 December 1991:

"Neck

He has had ongoing neck discomfort since then with frequent headaches.

There was also stiffness of the neck for which he attended physiotherapy for about an eighteen month period.

He continues to have flare-ups, which may be more frequent in that he has found it necessary to go to the chiropractor just for one vast once a month, but before that perhaps three times per year.

There was significant aggravation when he transferred to Highway Patrol duties and I note Dr O'Keefe's assessment of May 2000."

63. Dr Sage noted the benefit that the applicant obtains from chiropractic treatment is an "immediate benefit, which will be maintained for weeks"

64. Dr Sage noted the present condition in the neck to be as follows:

> "Neck
>
> The discomfort is on both sides of the neck. It is more marked on the right. There is radiation into the right occipital area as a headache, which was present today, but he will get it once a week and it could last up to the whole day. There is also radiation into the *right arm* going as far as the elbow. It is especially noticeable with driving, especially if it is over an hour. He also gets some aggravation from his work, but this appears to be temporary.
>
> Function of the neck
>
> - Sedentary activities: With driving he seems to have a noticeable restriction of movement to the right.
>
> - Accustomed moderate activities. He is doing yard maintenance, SCUBA diving and was ion full duties as a fire fighter."

65. Dr Sage noted that the applicant had had no time off work as a firefighter.

66. Dr Sage conducted a clinical examination which he noted showed some asymmetrical loss of movement.

67. Dr Sage noted that the "x-ray of 12 Dec 1991 of the cervical spine was normal" explained this: "we know a cervical spine x-ray is a poor investigation for this type of injury."

68. Dr Sage made the following diagnosis:

> "Motor vehicle accident 10 December 1991
>
> Residual sensitivity
>
> Cervical degenerative changes as a result of the injury and of course age likely present."

69. Under the heading "correlation of disability and injury" Dr sage gave reasons why the effects of the injury on 10 December 1991 were continuing in relation to the cervical spine as follows:

> "The injury was highly significant with the hinges of the seat breaking.'
>
> He has had ongoing discomfort since then.
>
> Most whiplash strains of the cervical spine do settle. However if symptoms are significant greater than 6 months from the injury they remain significant in 30% at two years, but decreasing further to 8% at four years.
>
> With the hinges of the seat breaking there would of course be greater forces going on in the cervical spine. This may explain why his symptoms have persisted."

70. Dr Sage reiterated later in his report that he considered the force of the accident on 10 December 1991 illustrated by the breaking of the seat was significant in explaining the applicant's ongoing symptomatology in the neck.

71. Whilst Dr Sage considered that applicant's later employment with the NSW fire brigades had an impact on the lumbar spine and thoracic spine but in respect of the cervical spine, Dr Sage attributed causation to the original injury of 10 December 1991.

72. Dr Sage's prognosis for the applicant's cervical spine was that "symptoms would persist as they are" and that Dr Sage expected "the cervical spine to stay basically as it is."

73. As to future and present treatment in the form of chiropractic treatment, Dr Sage opined:

> "Mr Fuller gets good benefit from it and he only needs to attend once. He is not brought back on a regular basis and thus I feel it is reasonable to have manipulative therapy with an exacerbation.
>
> However, in people who do have a benefit eventually any benefit seems to phase out"

74. In other words, Dr Sage considered that the applicant's symptoms in the cervical spine would persist with exacerbation from time and that chiropractic treatment was reasonable therapy with an exacerbation.

75. Dr Sage was specifically asked: "Please provide your opinion as to whether you believe Mr Fuller's current employment with the NSW fire brigades has permanently aggravated his 1991 injury, previously accepted by the insurer, or whether these aggravation constitute an aggravation of symptomatology only as our client has suggested to us?" Dr Sage answered:

> "Going on the nature of the work you would certainly expect aggravation of a pre-existing condition of the thoracic and lumbar spine.
>
> However in talking to Mr Fuller I would agree there are no constant activities that would be expected to permanently aggravate the 1991 injury. There is no significant constant looking up that would aggravate it in his occupation in the fire brigades."

76. Dr Sage noted that his positive findings on clinical examination were different to the clinical examination by Dr Powell, the respondent's IME who saw the applicant on 11 December 2008 and found no positive signs on examination. Dr Sage explained why these findings might differ as follows:

> "It appears I am seeing Mr Fuller when he has some increase in symptoms (for example, the headaches are a little more marked today and another examiner [Dr Powell] saw him when there was no increase in symptoms. This might explain his finding a full range of motion of his cervical spine, whereas I found some loss of movement."

77. Dr Sage considered that the chiropractic treatment is reasonable for the applicant to have when the applicant experiences an exacerbation of his neck pain noting the immediate benefit in pain relief that the applicant derives from the chiropractic treatment noting that the applicant is not brought back for additional treatment unnecessarily. Dr Sage opined:

> "In talking to Mr Fuller he does get benefit from manipulative treatment an exacerbation and it is immediate and the chiropractor does not bring him back for

adjustments for which there is no good evidence for. Thus I consider it is reasonable to have manipulations with exacerbations, but knowing eventually there may be no benefit."

78. The applicant's evidence is that he continues to derive benefit from the chiropractic treatment.

79. Attached to the application is an opinion from Ms Jane Banting, Musculo-skeletal Physiotherapist in a report to his lawyers dated 24 March 2014. Ms Banting was not his treating physiotherapist and gives evidence as an IME.

80. Ms Banting records a history consistent with the evidence that the applicant has given about the MVA on 10 December 1991 including the force with which the car was hit from behind with no warning of the impact and the force such that it broke the applicant's seat, recording as follows:

"This gentleman was the driver of a police vehicle that was involved in a motor vehicle accident on 10.12.1991. His car was hit from behind by another vehicle travelling at 60km/h. There was no warning of the impact and he reported a heavy impact which resulted in the police car being forced from the road and up an embankment resulting in a second impact. At the time of the accident, he was working as a police officer. Both vehicles had to be towed after the accident and the police vehicle was written off. The hinges of the police vehicles driver's seat were broken and after the accident the driver's seat was lying back against the rear passenger seat."

81. Ms Banting noted the immediate development of headaches, neck pain and stiffness and the continuation of symptoms in the neck and treatment sought since that time.

82. As part of the recorded history, Ms Banting notes that :

"He resigned from the police force in March 2001 and joined the NSW fire brigade working as an active firefighter. In July 2009 he moved into operational communications in the radio room, which involved significant peeps of time performing sedentary work, this resulted in increased neck and back discomfort.

In 2012 he went back to working as a fire officer which involved less sedentary work."

83. Ms Banting that the applicant's current symptoms were bilateral cervical pain and bilateral occipital headaches with symptoms associated with neck pain.

84. Ms Banting noted activities causing neck pain including at work when carrying a heavy object upstairs he reports increased cervical pain and as well at work and home when driving for prolonged periods increased neck pain.

85. Ms Banting conducted a thorough physical examination of the applicant's cervical spine and noted the findings, which I note included positive signs, as followed:

Observation

- Flattened cervical lordosis, with a mild dowager's hump seen between C5 and C7.

Active movements, cervical spine

Flexion: end range (three quarters normal range, mild right lower cervical pain). With overpressure increased pain is noted.

Extension: end range (20 degree, pain free)

Left rotation: end range (75 degrees, pain-free). With overpressure no pain is noted.

Right rotation: end range 970 degree, mild stiffness0. With overpressure mild right lower cervical pain is noted.

Left lateral flexion: end range (30 degrees, mild pulling right cervical). With overpressure moderate pulling is noted in the right cervical region.

Right lateral flexion: end range (45 degrees pain free). With overpressure mild pulling left cervical is noted.

Palpation findings:

- Localised joint stiffness and tenderness centrally C2, C3 and C5.
- Localised joint stiffness and tenderness bilateral C2-C3, C3-C4 and C5-C6 apophyseal joints

Active muscle triggers

- Mild activation right upper trapezius.

86. Ms Banting's diagnosis was as follows:

> "Mr Fuller current condition is still directly related to the whiplash injury to the cervical spine.
>
> He has developed facet joint dysfunction in the cervical spine as noted by positive palpation findings, in addition to disc space narrowing at C5/C6. In addition he has also developed lower thoracic and lumbar facet joint dysfunction with mild restriction of passive straight leg raise. Abnormal postural loading is noted, with flattened lumbar and cervical lordosis and active muscle triggers in upper trapezius and gluteal muscles".

87. Ms Banting, consistent with the opinions of Mr Moss, the treating chiropractor and Dr Sage, orthopaedic surgeon, noted the significance of the impact that was involved in the car accident on 10 December 1991 as follows:

> "..,he was the driver of a police car that was hit from behind with significant impact, with the resultant force pushing the police car up at embankment resulting in a second significant impact. It was of significance that the police car was written off and that his car seat was broken as a result of the impact."

88. In a supplementary report dated 9 July 2014 Ms Banting opined that the applicant needs ongoing chiropractic treatment in future years noting he has responded very well to the chiropractic treatment and usually only requires one to two sessions for his condition to settle again.

89. The respondent relies in the opinion of Dr Powell, orthopaedic surgeon. Dr Powell saw the applicant on 11 December 2008 as the IME for the respondent. Dr Powell provided a report dated 19 December 2008 and it was on this report the declinature of liability was based.

90. Dr Powell took a history of the car accident on 10 December 1991. I note that Dr Powell recorded "they were slowing to turn left when they were struck from behind by another vehicle with an estimated speed of impact of 60km/h. Mr Fuller sustained a whiplash injury to the cervical spine". I note that Dr Powell, whilst noting the speed at which the applicant's slowing vehicle was hit, does not otherwise record the history that the police car was forced off the road up an embankment, that the car was written off, that they had no warning of the impact or that the force of the impact was so great that the applicant's seat was broken.

91. Dr Powell noted that the applicant reported intermittent symptoms in the neck since the injury: "between 1991 and 2008 he has reported intermittent cervical symptoms." He noted that he left the police in 2001 to join the fire brigade. He noted "Mr Fuller reports occasional symptoms affecting the neck though notion that nothing has required medical review or further investigation".

92. Dr Powell noted:

> His work both as a police officer and as a fire officer is physically demanding and in the course of completing his duties he has suffered numerous aggravations of his neck condition though noting nothing that has required attention".
>
> He indicated that inn his current work as a fire officer he is required to wear a helmet weighing 1.8 kgs and on occasions the breathing apparatus worn is in a backpack which weighs up to 14 kgs.
>
> During this period he has had occasional physiotherapy and remedial massage and chiropractic treatment. He esteems he attend his chiropractor 3-4 times a year.
>
> He has had no further investigations or specialist review."

93. Dr Powell recorded the following reported current symptoms as follows :

> "Mr Fuller reports occasional neck pain. This typically affects the right side of the neck radiating down to the posterior-superior aspect of the shoulder. There is no further involvement of the upper limbs. There is no parenthesis or pins and needles.
>
> He describes occasional neck stiffness particularly with periods of loving driving. This is most noticeable when looking to the right. He has occasional headaches. He is not aware of any subjective loss of strength.

94. Dr Powell noted current treatment to consist of chiropractic treatment, remedial massage, anti-inflammatory medications and home exercise program limited to stretches.

95. Dr Powell noted no restriction on activities of daily living including driving and that the applicant was currently performing his full duties without restriction in a physically demanding role.

96. Dr Powell conducted a clinical examination. Consistent with the other medical professionals whose reports are in evidence Dr Powell noted "Mr Fuller was a complaint and co-operative patient throughout the taking of the history and examination. There was no suggestion of overreaction or exaggeration."

97. Dr Powell noted that "he was not observed to be in any obvious discomfort during the examination, he moved freely between sitting and standing positions."

98. Dr Powell reported the results of his clinical examination of the applicant's cervical spine to be as follows:

> "Normal spontaneous movements of the head and neck were noted.
>
> There was no focal tenderness to palpation of the posterior bony elements of the cervical spine, there was no para spinal muscle spasm.
>
> He exhibited a full range of motion on all planes.
>
> Neurological examination of the upper limbs revealed normal tone, power and sensation. His deep tendon reflexes were present, equal and symmetrical. there was no wasting.

99. .Dr Powell viewed the radiology and notes that plain x-rays of the cervical spine dated 12 December 1991 were normal.

100. Dr Powell diagnosed the following:

> "Mr Fuller is a 39 year old right hand dominant gentleman who at the time of injury to the cervical spine on 10 December 2991 was employed by the NSW police Force as a police officer.,
>
> He sustained a musculo-ligamentous injury of the cervical spine.
>
> He reports mild intermittent neck symptoms.
>
> Today's examination was unremarkable."

101. Dr Powell considered the prognosis to be reasonable, but noted that the applicant's neck was likely to remain symptomatic:

> "His intermittent symptoms appear fairly mild and he has been able to continue performing physically demanding work in his capacity as a police officer and now as a fire brigade officer.
>
> Mr Fuller's neck is likely to remain intermittently symptomatic."

102. Dr Powell noted that "Mr Fuller's signs, symptoms and investigations are in concordance".

103. However Dr Powell considered that the effects of the injury on 10 December 1991 have resolved:

> "I do not believe Mr Fuller's employment with NSW police and more specifically the workplace incident in 1991 continues to be a contributor to his current condition, the effects of the workplace injury of the cervical spine would have settle long ago."

104. Dr Powell considered "Mr Fuller's current symptoms most likely represent some early negative changes within the cervical spine, this needs to be interpreted in the context of the physically demanding work je has undertaken for the past 20 years both as a police offer and as a fire brigade officer".

105. Dr Powell noted that the current work involved wearing a safety helmet weighing 8.1. kgs (this appears just to be an typographical error as earlier the report Dr Powell referred,

correctly, to the helmet weighing 1.8kgs and I note applicant's counsel considered nothing turned on this typo) as well as performing a variety of physically demanding tasks including wearing breathing apparatus, carrying hoses, climbing in and out of trucks etcetera.

106. Dr Powell considered that the applicant did not require further treatment or medical opinions.

107. In response to the specific question "the original injury occurred over 16 years ago, what specifically is responsible for the injured worker's continuing need for chiropractic treatment, dr Powell answered:

"Mr Fuller's clinical examination today was unremarkable thought the history would suggest he is suffering from some early degenerative change affecting the cervical spine."

108. In answer to the specific question of "what treatment would you consider reasonable and necessary" (which I note is the wrong question, as treatment does not have to reasonable and necessary, it must be reasonably necessary):

"I do not believe Mr Fuller requires any specific treatment in regards to his injury.

The continued use of analgesia and anti-inflammatories to control symptoms on a prn (per needs) basis is appropriate.

Mr Fuller should contine with his home based exercise program and may benefit form adding some postural muscle strengthening exercises.

109. I note that Dr Powell contemplates that the applicant will experience ongoing symptomology in the neck and that the applicant would need to control pain, when needed with medication. I note that the applicant gave evidence that one of the benefits he gets from the chiropractic treatment is that it lessens the need to take pain medication when he has an a flare up in his neck pain.

110. The matter was as referred to the AMS Dr Mastroianni as per the mandatory legislative requirement in existence at that time for opinion as to whether the proposed ongoing chiropractic treatment was reasonably necessary as a result of the injury on 10 December 1991.

111. The AMS saw the applicant on 8 September 2015 and issued a MAC on 17 September 2015. This is a non-binding opinion and is evidence to be weighed in the balance with the other evidence in the proceedings.

112. The AMS took the following history:

"Mr Fuller states that on 10 December 1991 he was driving a police vehicle and was following a vehicle. The vehicle turned left and as he slowed down to turn left his car was hit from behind by another car.

As a result of the rear-end collision his car was pushed forward and mounted the gutter, and then hit an embankment. Mr Fuller states that the driver's seat in the police car broke and lost its back support.

He was taken to hospital for assessment. He states that after the car accident he developed pain in the neck radiating to the right shoulder.

He states that the neck pain persisted. He attended physiotherapy for some 18 months. He was given exercises by the therapist.

He states that with physiotherapy the neck pain settled but not completely.

He states that he was left with discomfort and stiffness/tightness in the neck and headaches.

He put up with the pain and self-medicated and took Nurofen. He subsequently consulted his GP who gave him laser treatment. He states that this was of limited benefit.

The GP then recommended chiropractic treatment. With the chiropractic treatment the neck stiffness resolved.

He states that he continued to experience intermittent flare-ups and these depended on his workload and also driving. This occurred while he continued in the Police Force and in the subsequent job as a fire fighter.

He states that he would attend chiropractic treatment and usually one treatment would fix him up but sometimes he may have needed two treatments. He states that he usually attends chiropractic treatment about half a dozen times per year. This year he has had three or four treatments."

113. The AMS noted present treatment to be as follows:

"He self-medicates and takes Nurofen and over-the-counter Voltaren. He has chiropractic treatment on a needs-basis."

114. The AMS noted present symptoms to be as follows:

"He complains of intermittent neck pain.

He states that he gets neck pain which is usually associated with prolonged driving and the workload. (Presently he works as a fire fighter).

He states that he gets pain on the right side of the neck. The pain can radiate to the right shoulder.

He states that the pain also radiates down the back into the right buttock and leg."

115. The AMS conducted a physical examination, the findings of which were all noted to be normal as follows:

"He is a man of stated age of small to medium build. He walks with a normal gait. He sat comfortably whilst relaying the history. He relays the history in a straight forward manner. There is consistency in the history and examination.

Examination of the neck and back reveals normal spinal curve.

There is no muscle guarding or tenderness in the neck or back. There is no tenderness over the cervical, thoracic or lumbar spines.

Neck movements were normal in all planes and there is no associated discomfort.

Lower back movements were slightly restricted in flexion with fingertips reaching to just above ankle level.

The shoulders were not tender and he has a normal range of shoulder movements.

He has normal sensation and normal brisk reflexes in the arms (biceps, triceps and supinator jerks – right equals left). Power is normal in the arms."

116. The AMS reviewed a CT investigation dated 7 March 2015 and could detect no abnormality.

117. The AMS summarized the injury and diagnosis as follows:

"As a result of the motor vehicle accident in 1991 Mr Fuller sustained a soft tissue injury to the cervical spine (whiplash associated disorder).

In my opinion he has recovered from the injuries sustained in the motor vehicle accident in 1991.

The intermittent recurrences over the years is usually associated with activities albeit prolonged driving or the workload.

The intermittent symptoms are not true recurrences as they are associated with specific activities.

On today's examination I found no abnormality with his cervical spine."

118. The AMS noted that the applicant presented in genuine manner and that there were no inconsistencies.

119. The AMS noted that his opinion was "based on the clinical history obtained, my findings on clinical examination, examination of the investigations and reports thereof, as well as my review of the accompanying documents".

120. The AMS set out the reasons for his assessment as follows:

"Mr Fuller sustained soft tissue injuries to the neck as a result of the motor vehicle accident in 1991.

In my opinion he has recovered from that injury. He describes intermittent neck pain and stiffness associated with workload and prolonged driving.

Chiropractic treatment for his neck pain on a needs-basis is reasonable treatment, however the treatment in my opinion is not needed because of the injury on 10 December 1991."

121. The AMS referred to the other medical opinions in the case as follows:

> "I note the reports of **Ms Jane Banting** of 24/03/14 and 9/07/14. I agree with Ms Banting that chiropractic treatment is effective for his neck pain and that it is reasonable treatment.
>
> I note the report of **Dr John Sage** of 20/07/09. The doctor is of the opinion that the chiropractic treatment is reasonable for exacerbations.
>
> I agree with Dr Sage that when he has neck pain chiropractic treatment is reasonable.
>
> I note the report of **Dr Richard Powell** of 19/12/08. Dr Powell is of the opinion that Mr Fuller does not require any specific treatment in regard to his injury."

122. The AMS considered that the chiropractic treatment sought by the applicant is reasonably necessary but not as a result of the injury on 10 December 1991 as follows:

> "Mr Fuller was reviewed to assess proposed treatment i.e. chiropractic treatment.
>
> Based on the history and clinical examination I am of the opinion that he needs no treatment to his neck as a result of the injury sustained in the motor vehicle accident.
>
> In that regard I agree with the opinion of Dr Powell.
>
> He describes intermittent episodes of neck pain associated with workload and activities. He is asymptomatic in between those incidents. In my opinion the neck pain which he describes is a result of specific activities and not recurrences, and I am in agreement with Dr Powell's opinion regarding the need for medical treatment regarding the motor vehicle accident injury.
>
> I agree with Ms Banting and Dr Sage that when he has this episodes, chiropractic treatment is appropriate."

123. After the MAC, the applicant's lawyers sought an IME opinion. As Dr Sage was now deceased, the opinion was obtained from another IME Professor Ryan, clinical associate professor of surgery (orthopaedic and spinal surgery), Professor Ryan saw the applicant on 20 October 2015 and provided a report of the same date. Counsel for the respondent consented to the admission of the report of Professor Ryan.

124. Professor Ryan took a history of the car accident on 10 December 1991, noting the severity of the crash:

> "The circumstances of that injury was such that Mr Fuller was involved in a vehicle accident whereby he was in a police vehicle and was hit from behind by another vehicle travelling at approximately 60 kilometres per hour. The crash was severe enough to break the seat he was sitting on in two and as a result he injured his neck."

125. Professor Ryan noted that the applicant experienced immediate neck pain, noting "he attended hospital, was given 2 day so off and later 8 days off by his GP. He received

intermittent physiotherapy for 18 months. He also needed to take non-steroidal anti-inflammatory medication when his neck pain became intrusive."

126. Professor Ryan noted the history of occupational change where he worked with the police until resigning in 2001 "because of his symptoms". He joined the NSW fire brigade and worked as a firefighter from March 2011 to July 2009.

127. Professor Ryan notes that "in July 2009, Mr Fuller was transferred to a communications role in a radio room. This was essentially a sedentary occupation in which he found his neck pain and back discomfort increased and reduced his fitness because of minimal physical activity. In September 2012 therefore he resumed a full time role as an occupational firefighter."

128. Professor Ryan noted current symptoms were as follows:

> "Mr Fuller suffers from neck pain in varying degrees. If he drives a long distance his neck becomes stiff. After a four or five hour journey, his neck and low back are sore."

129. Professor Ryan noted "in the past Mr Fuller has sought chiropractic treatment. On average he required about six treatments a year which would predictably help his cervical spine. In between he did his best to remain as physically fit as possible".

130. Professor Ryan noted the applicant's occupational resume which included a transfer to port Macquarie where h in April 1997 where he was attached to the tare highway patrol. He notes "this resulted in greater periods sitting and driving long distance patrol vehicles. This led to an aggravation of neck and low back pain".

131. Professor Ryan used the pain disability questionaries' (PDQ) which he notes was "specifically developed for evaluating clinical outcomes in populations of patients with disabling musco-skeletal disorders primarily involving the spine". The focus of the PDQ is on function disability. Professor Ryan notes the applicant scored a mild disability.

132. Professor Ryan reviewed the radiology and noted:

> "I have viewed plain x-rays and a CT scan of Mr Fuller's cervical spine and lumbar spine, his cervical spine was quite straight. He appears to have degenerative change in his low cervical spine at C5/C6 and C6/C7. It is noteworthy that his cervical spine canal is quite large."

133. Professor Ryan conducted a physical examination noting the presence of a positive sign that was consistent on repeated observation:

> "Mr Fuller has a subtle but definite asymmetry of cervical spinal rotation. His range of rotation to the right is less than to the left. This is consistent on repeated observation"

134. Professor Ryan noted that there was no other clinical abnormality found.

135. Professor Ryan diagnosed that "Mr Fuller has somatic neck pain with restriction of motion". Somatic pain essentially means pain coming from the body.

136. Professor Ryan considered that "there is a clear nexus between Mr Fuller history of injury on 10.12.1991 and his long period of treatment afterwards and recurrences of neck pain and low back pain."

137. Professor Ryan was asked the specific question by the applicant's lawyers:

"5. Dr Powell and the AMS both opine that Mr Fuller suffered a soft tissue injury to his neck which has now ceased. Dr Sage opines contrary to that view. Mr Fuller advises us that the pain in his neck which he experiences began after the motor bevel accident and whistle it has abated at time it has never gone away, in your opinion has the applicant injuries sustained as a result of the motor vehicle accident ceased or otherwise. Pleas provide reasons for your answers".

138. Professor Ryan answered as follows:

"Mr Fuller has a permanent limitation of his neck especially when he has to turn to the right, this makes it difficult to enter a fast freeway particularly if he is entering at an oblique angle. This affects him both at work and in domestic circumstances.

This limitation is attributable to his work related injury. From time to time his neck pain builds up and becomes intrusive. This is in keeping with the natural history of neck pain following an injury. I am of the opinion that Mr Fuller is still suffering from a soft tissue injury which arose initially in the accident of 10.12.1991.

The genuine nature of his condition is emphasized by the lack of exaggeration and his level of physical fitness and what I belie is a very accurate measure of his citing limitations is documented by the pain disability score (see PDQ).

139. The applicant's lawyers go on ask:

"6. Mr Fuller instructs us that his employment with the fire service has not made his neck, in terms of the pain he experiences, any worse or more frequent than it was prior to join them fire service.

7. Any further comments you wish to make.

"I would qualify the statement above by saying Mr Fuller purposefully changed from working in the operations communications/radio room and went back to operational firefighting so that he could establish a higher level of fitness and reduce his neck pain.

In the past Mr Fuller has had access to chiropractic treatment which he estimates he requires about once a year. I accept the veracity of Mr Fuller's statement and I believe it is appropriate that he be provided with access to that treatment when he requires it. I estimate he would not require more than six treatments per annum."

140. In this case, the weight of the medical evidence is clearly that the chiropractic treatment that the applicant has from time to time when his neck pain flares up, is reasonably necessary. The applicant has given evidence about the benefit he obtains from the chiropractic treatment. He was not cross-examined about this evidence. I note that all of the medical professionals including Dr Powell (the respondent's IME) who have seen the applicant and provided reports comment on the applicant's consistent and genuine presentation and that he gives the history and undergoes examination without exaggeration. I note that all of the medical professionals in the case, with the exception of Dr Powell, consider that the chiropractic treatment is reasonably necessary including the AMS who considers it reasonably necessary but not as a result of the injury. The exception is Dr Powell in whose opinion the applicant requires no specific treatment other than pain medication when the pain flares up. Given that Dr Powell accepts that the applicant experiences the intermittent symptoms of pain in the neck about which he complains and acknowledges that pain medication is required, and also noting the applicant's evidence

that he gets benefit from the chiropractic treatment such that he has to take less medication, and given that every single other medical professional whose reports are in evidence consider that chiropractic treatment is reasonably necessary, I am satisfied, on balance of probabilities, that the chiropractic treatment is reasonably necessary.

141. The real issue in this case is whether the chiropractic treatment is reasonably necessary as a result of the injury on 10 December 1991.

142. As the learned Deputy President Roche said in *Diab*:

> "It is appropriate to recall the following statement by Glass JA in *Fernandez v Tubemakers of Australia* (1975) 2 NSWLR 190 at 197, though I have not relied on it in the present case:
>
> > "The issue of causation involves a question of fact upon which opinion evidence, provided it is expert, is receivable. But a finding of causal connection may be open without any medical evidence at all to support it: *Nicolia v Commissioner for Railways* (NSW) (1970) 45 ALJR 465 or when the expert evidence does not rise above the opinion that a causal connection is possible: *EMI (Australia) Ltd v Bes* [1970] 2 NSWR 238. The evidence will be sufficient if, but only if, the materials offered justify an inference of probable connection. This is the only principle of law. Whether its requirements are met depends upon the evaluation of the evidence."
>
> The drawing of an inference is "an exercise of the ordinary powers of human reason in the light of human experience" (*G v H* [1994] HCA 48; 181 CLR 387 at 390). In a civil case, "you need only circumstances raising a more probable inference in favour of what is alleged" (*Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5).
>
> Moreover, as explained by Spigelman CJ in *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; 19 NSWCCR 385; 49 NSWLR 262 at [91] "[c]ausation, like any other fact can be established by a process of inference which combines primary facts like 'strands in a cable' rather than 'links in a chain', to use Wigmore's simile: *Wigmore on Evidence*, 3rd ed (1981) vol 9 at 412-444 [2497] referred to in *Shepherd v The Queen* (1990) 170 CLR 573 at 579".

143. Counsel for the respondent submitted that the experts did not have a fair climate for the expression of their opinion because they did not have a history of the applicant's service in the army reserves where he is a specialist driver. However I note that all of the experts had a history that the applicant worked in physically demanding roles and they took this into account when forming their opinions.

144. The need for treatment has to result from the injury in question, the injury does not have to be a substantial contributing factor to the need for treatment. So for example, if the applicant is considered to have a persisting whiplash injury as a result of the injury on 10 December 1991 which can be aggravated by driving for example, then the need for treatment to relive pain could be said to result from the persisting whiplash injury and/or the driving aggravating the persisting whiplash injury. The persisting whiplash injury doesn't have to be the substantial contributing factor to the need for treatment for the treatment to be considered to result from the persisting whiplash injury.

145. When weighing all of the evidence in the case and taking into factors which include the following as well as other matters mentioned throughout the reasons above,:

- All of the medical experts, including dr Powell accept that the applicant gets the the intermittent symptoms in his neck about which he complains and that he has done so since the injury on 10 December 1991. The medical professionals variously make mention of the genuine nature of the applicant's presentation and his lack of exaggeration

- The evidence of the applicant, untraversed on cross-examination, and given as a consistent history to all of the medical professionals whose reports are in evidence, is that those symptoms have been experienced by the applicant from time to time since the injury ion 10 December 1991.

- The applicant has consistently sought this type of treatment, from time to time for his neck, when he has experienced exacerbation of his neck pain.

- That, in forming their expert opinion, Mr Moss (the treating chiropractor), Dr Sage, (orthopaedic surgeon), Ms Banting, (musco-skeletal physiotherapist), and Professor Ryan (clinical associate professor of surgery) have clearly then specific account of the mechanism of the injury and specifically taken account of the force of the crash that the applicant was involved in on – citing that the applicant's car seat was broken and ended up on the rear seat- as an example of the significance of the force of the impact to the applicant's cervical spine. These experts also variously refer to the fact that the vehicle was written off and that the impact was without warning so that the applicant didn't have the opportunity to brace himself. Whilst dr Powell mentions the speed at which the applicant's vehicle was hit, he otherwise records no other significant features of the crash.

- That positive findings on examination are reported by Mr Moss, Ms Banting, Dr Sage, Dr O'Keefe and Professor Ryan but not by Dr Powell or by the AMS. I note that Dr Powell and the AMS nonetheless accept that the applicant gets the symptoms in his neck from time to time of which he complains. Dr Sage gave an explanation as to why positive findings consistent with an exacerbation might be found by one examiner and not another.

- That Dr O'Keefe, the respondents original IME, whom back in 2000 considered that the applicant had a persisting whiplash injury, the effects of which would continue and that manipulative therapy was appropriate with exacerbations. He considered the applicant's neck to be permanently impaired as a result of the injury on 10 December 1991 and lump sum compensation was paid to the applicant by the respondent on the basis of his opinion. Dr O'Keefe had a history of increased driving in the highway patrol aggravating the whiplash symptoms but dr O'Keefe didn't consider that the applicant was suffering from an injury in the form of a disease or aggravation of a disease, he considered the permanent impairment of the neck to result from the persisting whiplash injury of 10 December 1991.

- Dr O'Keefe's opinion that the effects of the persisting whiplash injury would continue is borne out by the applicant's untraversed evidence that he continues to experience flare ups in his neck pain from time to time. Professor Ryan, a clinical associate professor of surgery, considers that these flares up in neck pain from time to time "where the neck pain builds up and becomes intrusive" is "in keeping with the natural history of neck pain following an injury". It was Dr Sage's opinion also that the ongoing symptoms that the applicant complained of in his cervical spine would persist and that the prognosis was that the cervical spine would remain as it

is. The applicant's unchallenged evidence is that indeed these problems have persisted.

- The applicant's unchallenged evidence that his symptoms have continued since the injury on 10 December 1991 and the weight of the medical evidence comprising the opinions of Mr Moss, Ms Banting, Dr O'Keefe, Dr Sage, Professor Ryan whose opinions I prefer for the reasons explained, supports the view that the applicant suffered a whiplash injury on 10 December 1991 the effects of which have persisted and that he has continued to experience symptoms from the time of the injury including flare ups in his neck pain, occipital headaches and referred pain into his right shoulder and down his arm.

- Through all of this, the applicant has remained in psychically demanding work without time lost from work and his attributes this in part to being able to access chiropractic treatment when he has a flare up and from which he gets immediate benefit that last for weeks.

146. Accordingly having weighed all of the evidence in the balance, I am satisfied on the balance of probabilities that ongoing chiropractic treatment for up to six sessions per year is reasonably necessary as a result of the injury on 10 December 1991.

147. As to the form of order which should flow from this finding, I will make an award for the applicant pursuant to section 60 of the Workers Compensation Act 1987 in respect of chiropractic treatment as I note in Watson's Culcairn Hotel Pty Ltd v Dwyer [2016] NSWWCCPD 5, Deputy President Roche upheld a finding in this form made by an arbitrator in respect of proposed treatment.