WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1332/19**
Applicant:	**Robert John Threlfo**
Respondent:	**JA Crockett Pty Ltd**
Date of Determination:	**18 July 2019**
Citation:	**[2019] NSWWCC 245**

The Commission determines:

1. The applicant has leave by consent to amend the Application to Resolve a Dispute as follows:

    (a) To discontinue the claim for lump sum compensation;
    (b) To amend the claim for compensation for section 60 expenses to seek a general order for section 60 expenses.

2. Award for the respondent in respect of the claim for compensation based on an allegation of injury to the back on 7 February 2004.

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

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
A/Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application), as amended, Mr Robert John Threlfo seeks a general order for the payment of section 60 expenses as a result of injury alleged to the lumbar spine on 7 February 2004.

2. The respondent is J A Crockett Pty Ltd (JA Crockett). J A Crockett was insured at the relevant time for the purposes of workers compensation by AAI Ltd trading as GIO (the insurer).

ISSUES FOR DETERMINATION

3. There is no dispute that Threlfo injured his right lower extremity at work on 7 February 2004, when he fell from a ladder and jumped trying to miss a drain. There is no dispute that he fractured his right tibia.

4. Mr Threlfo alleges that he also injured his lumbar spine on 7 February 2004. The allegation of injury is "pleaded" in the "Injury Description" at Part 4 of the Application as follows:

> "Injury to lumbar spine, right and left lower extremities.
> The Applicant fell from a ladder and jumped to try and miss a drain, causing fracture of the right tibia and also aggravating pre-existing back condition as well as aggravating the pre-existing right ankle condition".

5. JA Crockett disputes that Mr Threlfo injured his lumbar spine on 7 February 2004. This is the dispute that requires determination by me. That is, the question for determination is whether Mr Threlfo suffered an injury to his lumbar spine on 7 February 2004 that arose out of or in the course of his employment by JA Crockett.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation arbitration in Newcastle. Both parties were represented by counsel with Mr McMahon appearing for Mr Threlfo and Mr Parker appearing for JA Crockett. 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.

EVIDENCE

Documentary evidence

7. The following documents were in evidence before the Commission being admitted by consent, and taken into account in making this determination:

   For Mr Threlfo:

   (a) Application and attached documents subject to (b) below:
   (b) The reports of Dr Pillemer dated 9 March 2005 and Dr Collins dated 7 February 2005 admitted as to history only.

For J A Crockett:

(a) The Reply and attached documents

Oral evidence

8. Mr Threlfo did not seek leave to adduce further oral evidence and counsel for JA Crockett did not seek leave to cross-examine Mr Threlfo.

FINDINGS AND REASONS

9. There is no dispute that Mr Threlfo injured his right lower extremity at work on 7 February 2004.

10. JA Crockett disputes that Mr Threlfo also injured his lumbar spine at the time of the undisputed injury to the right lower extremity on 7 February 2004.

11. I must make a determination on the balance of probabilities on the evidence in this case in accordance with the law.

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

13. Mr Threlfo gave evidence in a statement dated 14 March 2016.

14. Mr Threlfo gave evidence that he was employed by JA Crockett from 6 June 1978 until he retired on 30 July 2005.

15. He began employment as a fitter and moved into a supervisory role.

16. He gave evidence about the heavy nature of his duties as follows:

> "the duties that I was required to perform included climbing, lifting heavy objects such as steel beams, wood etc, constant bending, continually getting in and out of trucks especially when doing supervisory work, working on uneven surfaces, crawling in and out of ceilings and many other conditions within the building industry."

17. I note the injury alleged by Mr Threlfo in these proceedings is not the onset or aggravation of a disease over time by reason of the heavy conditions of the work but rather that he injured his back when he fell at work on 7 February 2004. The injury could be an injury simpliciter or a disease injury by way of aggravation of disease on that day.

18. Mr Threlfo gave evidence about a prior back injury at work in about 1985 when he fell from a roof. He injured his back and JA Crockett paid for his treatment.

19. Mr Threlfo gave evidence that whilst he returned to work he had ongoing problems with his back. He states:

> "5. I was incapacitated for work for approximately two weeks and then I went back to work even though I had ongoing symptoms."

20. Mr Threlfo says that prior to this incident in 1985 he had back pain from the heavy nature of his work. He gave evidence:

> "6. Prior to this incident, I was feeling back pain at the end of each day and during the day because of the nature of my work, but I didn't attend for any treatment at the time as I just continued on with my work as required."

21. Mr Threlfo went onto give evidence about the subject injury on 7 February 2004. This statement of evidence is the first piece of evidence about an injury to the back being sustained on 7 February 2004. There is no evidence of a report being made that he injured his back on 7 February 2004 to any of the doctors who treated him, his treating general practitioner, or even the Independent Medical Experts (IMEs) (Dr Collins and Dr Pillemer) who saw him in early 2005 for his right leg claim resulting from the 7 February 2004 injury. Mr Threlfo's evidence in his statement dated 14 March 2016 is the first disclosure by Mr Threlfo about his back being injured on 7 February 2004. I note that this evidence is given some 12 years after the event. Mr Threlfo gave evidence as follows:

> "7. I then had a fall off a ladder at work and, as I was falling, I jumped to try to miss a drain and I fractured the top of my right tibia and, at the same time, I severely aggravated my back because of the jarring. I was taken to Gosford Hospital and then transferred for treatment to Maitland Hospital, and I was under the treatment by the hospital in respect of this fracture. I don't remember having to attend a general practitioner at that time."

22. Mr Threlfo went onto give evidence about why he didn't mention that he injured his back at the time of injury. He states:

> "8. The incident significantly made by back worse, however at the time, I don't know that I mentioned much about my back because of the pain in my leg due to the fracture and subsequent complications, I was off approximately 5 and a half weeks. Then I returned to work and continued with my duties with ongoing back pain until I retired on 13 July 2005 at which time I was aged 64."

23. Mr Threlfo gave evidence that his ongoing back pain was in part responsible for his decision to retire aged 64. He states:

> "9. Apart from the work itself changing, my continued back pain also led me to retire at the age of 64."

24. Mr Threlfo in fact went onto claim lump sum compensation for the right leg injury on 7 February 2004. Mr Threlfo gave evidence that appears to be an attempt to explain why no claim for compensation was made in respect of the alleged injury to the back. He gave evidence:

> "10. Being a conscientious worker, I just continued all of my duties with pain. I was not aware that I could bring a worker's compensation claim for just the general nature of my work only if you had a specific injury."
>
> 11. With the injury in the late 1980's, because my employer was paying my treatment, I was not advised by them that I had to complete any workers compensation claim form, as I didn't have any loss of wages.
>
> 12. The injury in 2004 when I fell of the ladder was paid by the workers compensation insurer.
>
> 13. My solicitors at that time made a claim for impairment to my right leg."

25. Again, I note that the allegation of injury in these proceedings is that Mr Threlfo injured his back (this could be by way of injury simpliciter or aggravation of a disease injury) on 7 February 2004. The allegation of injury in these proceedings is not an allegation of a disease injury or aggravation of a disease injury as a result of the heavy nature of his work over time. Given the allegation of injury relied on in these proceedings, his explanation given above does not assist him in context of the dispute that is before me.

26. Mr Threlfo gave evidence that he ultimately underwent surgery on his back performed by Dr Kuru at Lake Macquarie Private Hospital. No claim for workers compensation was made and the surgery was funded by his private health insurance. The evidence shows, as set out below, that Mr Threlfo underwent significant spinal surgery performed by Dr Kuru in 2013 and then again in 2016.

27. I note that Mr Threlfo did not report an injury to his back in the notice of injury/claim form completed in respect of the 7 February 2004 injury.

28. I note that Mr Threlfo did not report an injury to his back when he was admitted to hospital.

29. I note that Mr Threlfo went onto claim lump sum compensation for the injury to his leg on 7 February 2004 and he was paid lump sum compensation. He was legally represented in respect of that claim. At that time, there was no claim for compensation made in respect of any alleged injury to the back on 7 February 2004.

30. I note that spinal surgery was performed on 4 September 2013. There is an operation report of this date in evidence. Dr Kuru's pre-operative diagnosis is recorded as "degenerative scoliosis, spinal stenosis". On 4 September 2013, he performed the following:

> "1). L2/3, L3/4 oblique lumbar interbody fusion
> 2) L3-5 instrumented posterolateral fusion, L3-S1 decompression/neurolysis, L4/5 posterior lumbar interbody fusion"

31. Three years later Dr Kuru performed further surgery on 28 September 2016. There is an operation report from Dr Kuru of this date in evidence. Dr Kuru's pre-operative diagnosis is recorded as "Adjacent segment degeneration, previous L3-S1 fusion".
On 28 September 2016, he performed the following:

> "1. L2/3 direct lateral interbody fusion.
> 2. Removal L3/4 instrumentation.
> 3. Revision L2.
> 4. Instrumentation posterolateral fusion L2/3, L2/3 decompression neurolysis."

32. I note that Dr Kuru was treating Mr Threlfo for his back condition prior to the subject injury. Dr Threlfo was referred to Dr Kuru by his treating general practitioner Dr Melville. Dr Kuru saw Mr Threlfo on this referral and provided a report back to the general practitioner dated 1 September 2003. I note that this was approximately five months before the subject injury. Dr Kuri recorded a history of gradually deteriorating back pain:

> "Thanks very much for asking me to see Robert Threlfo with degenerative spondylosis of his lumbar spine. He has had problems with pain in his back for a few years now and it is gradually deteriorating. He had an injury to his back in 1992 when he felt as though his back collapsed while working on a roof. He has since had intermittent symptoms. Over the last three months he has started getting some pain in his buttock radiating down to the anterior portions of his thighs to his knees. His back pain is situated in the mid-point of his lower back radiating down to his buttock. It alternates from side to side with respect to severity. He says it is exacerbated by regular movement and by standing or walking slowly. He is able to walk at a quicker pace without any pain. It is generally his back that stops. He gets some relief lying down. He has not yet had any anti-inflammatories or analgesics. He has not had any physiotherapy or hydrotherapy. He has got some paratheisia in his anterior thigh. He has had no bladder or bowel symptoms."

33. Dr Kuru conducted a physical examination which had positive findings. Dr Kuru reviewed the radiology of which he noted as follows:

> "I was able to review x-rays of his lumbar spine, which demonstrates generalised degenerative change particularly at his lower facet joint. He has got calcification and anterior enthesopathy at multiple levels. There is small degenerative spondylothesis at L4/5. These findings are confirmed on a CT scan, which demonstrates some central stensosis at L4/5. He also has some foraminal stenosis at multiple levels and relevantly at L3."

34. Dr Kuru opined:

> "I think at this stage he is symptomatic more from his degenerative spondylosis than perhaps his foraminal stenosis at L3 rather than his central L4/5 stenosis"

35. Dr Kuru recommended conservative treatment in the first instance and he wanted to review Mr Threlfo in eight weeks' time.

36. I note the consultation with Dr Kuru on 1 September 2003 was five months before the subject injury on 7 February 2004.

37. According to the reports that have been placed in evidence before me Mr Threlfo does not see Dr Kuru again until 18 January 2005, some 11 months after the subject injury. Dr Kuru provides a report of the same date as follows:

> "I reviewed Robert today. He has had an acute deterioration of his back pain radiating from his left buttock around his lateral hip, into his anterior thigh, down to the level of the knee. This has been associated with some thigh numbness.
>
> On examination, his reflexes are equal and symmetrical. Straight leg arise is to 80 degrees causing him some back pain. Hip range of motion and Faber's test are non-irritable. peripheral pulses are present. Femoral stretch test is positive.
>
> He has been on panadeine forte and an anti-inflammatory without success. He tells me he has had about 6 hours sleep in the last 4 months. I have given him a prescription for Oxycotin 10 mg, twice daily with a further prescription for panadeine forte. I have referred him for an MRI of his lumbar spine. I will also try and get him a left sided L3/4 epidural steroid injection to see if this will settle down his acute exacerbation. I will review him with the results of his MRI".

38. This consultation on 18 January 2005 appears to be the first time Mr Threlfo saw his treating orthopaedic surgeon in respect of his back after the subject injury. There is no record of any history given to Dr Kuru that Mr Threlfo jarred or otherwise injured his back in the fall on 7 February 2004. Mr McMahon submitted that Dr Kuru's record of an acute exacerbation supports Mr Threlfo's case that he hurt his back on 7 February 2004. He said that I can take notice that busy doctors don't always record a full history. However, Mr McMahon cannot make a case on submissions that is not supported by evidence. Mr Threlfo did not give evidence that he told Dr Kuru he hurt his back on 7 February 2004 and Dr Kuru did not record it. There is simply no evidence to this effect. Dr Kuru records an acute exacerbation of back pain and that Mr Threlfo has had difficulty sleeping for four months, that is since about September 2004. Dr Kuru does not record that he was told Mr Threlfo hurt his back on 7 February 2004 and Mr Threlfo does not give evidence that he told Dr Kuru that he hurt his back on 7 February 2004. Dr Kuru is the neurosurgeon who was treating Mr Threlfo for his back pain and had been since before the subject injury. In fact, he is the surgeon who ultimately performs 2 lots of major spinal surgery, in 2013 and then again in 2016. It would beimportant for Mr Threlfo to tell his treating doctors of any injury or incident that impacted his back. There is no evidence from Dr Kuru that supports that on 18 January 2005 he was

told of the injury on 7 February 2004 and there is no evidence from Mr Threlfo telling me that he did disclose the injury to Dr Kuru either at that first consultation after the subject injury or indeed at any of the multiple reviews undertaken by Dr Kuru since that time. Dr Kuru records on 18 January 2005 an acute exacerbation of back pain – a history taken some 11 months after the subject injury that is not temporally linked to the subject injury and the history records sleeping difficulties because of back pain since about the September 2004 (some seven months after injury).

39. Dr Kuru is the neurosurgeon who was treating Mr Threlfo for his back pain and had been since before the subject injury. In fact, he is the surgeon who ultimately performs major spinal surgery on 4 September 2013 and then again three years later on 28 September 2016. Given the important role Dr Kuru is playing in the treatment of Mr Threlfo's spine, it would be important for Mr Threlfo to tell Dr Kuru of any injury or incident that impacted his back condition. However, there is not one scintilla of evidence from Dr Kuru that he was ever told by Mr Threlfo that he hurt, injured or jarred his back in the injury on 7 February 2004. Mr Threlfo does not give evidence that he ever told Dr Kuru about the injury on 7 February 2004.

40. Mr Threlfo has given an explanation in his statement dated 14 March 2016 as to why he did not disclose the injury to his back. He stated:

> "The incident significantly made by back worse, however at the time I don't know that I mentioned much about my back because of the pain in my leg due to the fracture and subsequent complications, I was off approximately 5 and a half weeks. Then I returned to work and continued with my duties with ongoing back pain until I retired on 13 July 2005 at which time I was aged 64."

41. Whilst this can be accepted, even readily accepted, as an explanation for why Mr Threlfo did not disclose the back injury on the claim form, at the hospital or to the surgeon treating his leg, Dr Osborne, it cannot easily be accepted as an explanation for non-disclosure to Dr Kuru the treating specialist who did not see him for his leg but saw him purely for his back.

42. There is no evidence that Mr Threlfo ever disclosed to his treating general practitioner that he injured his back on 7 February 2004 and while this can be explained when the consultations are in respect of the leg injury, it cannot be so easily accepted when the consultations are in respect of the back.

43. Mr Threlfo claimed lump sum compensation for his leg as a result of the injury on 7 February 2004. He was legally represented for that claim. There was no claim made in respect of a back injury on 7 February 2004 until the claim made which is the subject of these proceedings.

44. Mr Threlfo's explanation was as follows:

> "10. Being a conscientious worker, I just continued all of my duties with pain. I was not aware that I could bring a worker's compensation claim for just the general nature of my work only if you had a specific injury."
>
> 11. With the injury in the late 1980's, because my employer was paying my treatment, I was not advised by them that I had to complete any workers compensation claim form, as I didn't have any loss of wages.
>
> 12. The injury in 2004 when I fell of the ladder was paid by the worker's compensation insurer.
>
> 13. My solicitors at that time made a claim for impairment to my right leg."

45. As I stated above, the difficulty of course with accepting that explanation in the context of these proceedings is that the allegation of injury in these proceedings is that he injured his back on 7 February 2004, whether that be by way of injury simpliciter or aggravation of disease injury. The allegation is not one of injury over the course of time resulting in disease or aggravation of disease.

46. In the context of his claim for lump sum compensation for his right leg as a result of injury on 7 February 2004, Mr Threlfo saw various IMEs. Dr Collins' and Dr Pillemer's reports are in evidence as to history only. The histories recorded by them are instructive, particularly as they are relatively contemporaneous to the subject injury.

47. Dr Collins saw Mr Threlfo exactly one year after the subject injury on 7 February 2005.

48. Dr Collins recorded a history of the injury on 7 February 2004 as follows:

> "The patient was a supervisor for a company that was doing a job for Energy Australia. They were doing an asbestos roof removal. He was carrying a pipe down a ladder and he was nearly at the bottom when the pipe overbalanced and carried him backwards so that he fell off the ladder. As he fell backwards, he fell into an open drain and fractured his right tibia. He was taken to Gosford outpatients where he had an X-ray and his leg was immobilised with a strap. He went home and a week later when the swelling settled down, he was referred to Dr Hammond at Maitland Hospital. Dr Hammond carried out an internal fixation with a screw. Ten days later the leg was very painful and red and began to discharge pus. He returned to hospital and was treated with antibiotics. The infection settled down but a week later the knee became red and sore again and began to discharge pus. Dr Osborne admitted him to Maitland private hospital and carried out an arthrotomy and lavage and debridement at the screw head and removal of the screw. He was in hospital for 8 or 9 days. In Dr Osborne's final report on 10 June 2004, he stated that as he had explained to the patient there was post traumatic and post infective early osteoarthritis and that he may in the long term require arthroplasty surgery. About a week later he was allowed to return to his work as a supervisor."

49. Dr Collins records the history taken of the "present condition" as follows:

> "He is off work at the present time but not because of his knee. He has a painful back with a prolapse disc and changes to other discs. The back condition is not the subject of the present claim. He has aching in the knee which occurs of he has a full day at work. There is limitation of movement…. As mentioned, he has lumbar disc disease and left sided sciatic. He has had cortisone injections in the back."

50. Dr Collins conducted a physical examination. He examined the knee. He also examined the back and reported his findings as follows:

> "I examined the patient's back as well There was partial loss of lumbar lordosis. The back was not tender. Forward flexion was slightly reduced. Backward extension lateral bending and rotation were within normal limits. Straight leg arising was 90 degrees left and right but there was back discomfort on raising the left leg. The hip joints were normal. The left knee jerk was normal, but the right knee jerk was absent. Both ankle jerks were normal and equal."

51. Mr Threlfo saw Dr Pillemer on behalf of the insurer on 8 March 2005, some 13 months after the subject injury. Dr Pillemer provided a report on 9 March 2005.

52. Dr Pillemer recorded a history of injury on 7 February 2004 as follows:

> "Mr Threlfo informs me that on 7 February 2004, some 13 months ago, he was coming down a ladder holding a down pipe in his hand, and he was near the bottom of the ladder when he overbalanced, as a result of which he stepped back into an open drain, injuring his right knee. I note that he was taken by truck to Gosford hospital where he was X-rayed and put into a back-slab and sent home with a view to allow the swelling to settle down before he had an operation on his knee carried out."

53. Dr Pillemer recorded the history taken of "injuries sustained" as follows:

> "It would seem that Mr Threlfo sustained a fracture of the lateral tibial plateau of his right knee."

54. Dr Pillemer recorded a treatment history of the knee consistent with the evidence before me.

55. Dr Pillemer recorded a "work history" taken as follows:

> "Mr Threlfo was off work for some four and half months and returned to work in June 2004on restricted duties initially, but then went back to normal duties, but he is not able to do any heavy work and he says he cannot do roof work anymore. He is a supervisor and he organises quotes, but he also does measurements on site for asbestos removal. He has not had to take any further time off because of his knee since he returned in June, but he has had to take time off for a longstanding low back problem. He is back working at the present time."

56. I am satisfied that Dr Pillemer has recorded the history he has been given. Certainly, Mr Threlfo has not given any evidence that he told Dr Pillemer anything different to what Dr Pillemer records as the history. He told Dr Pillemer he had a back problem and it was long standing and stopped him from working for a time, even after he returned to work after the knee injury. In other words, his back problems are being disclosed to Dr Pillemer but he did not tell Dr Pillemer in March 2005 that he hurt his back in the injury on 7 February 2004. Similarly, I am satisfied that Dr Collins was told of Mr Threlfo's back problems but was not told that Mr Threlfo injured his back on 7 February 2004.

57. Mr McMahon said that I could not be greatly assisted by the histories recorded by Dr Collins and Dr Pillemer.

58. I do not agree. The significance of the histories recorded is that both doctors saw Mr Threlfo about a year after the injury. Both doctors record the detail of what Mr Threlfo told them happened on the day of 7 February 2004. They are both told that Mr Threlfo is suffering from a back problem. They both take a history of a long standing back condition and that history taken by them does not attribute any injury to the back to the incident on 7 February 2004. Both doctors record the detail of what Mr Threlfo told them happened on the day of 7 February 2004. Mr Threlfo has not given evidence that he told Dr Collins or Dr Pillemer anything different to what the doctors recorded in their respective histories.

59. This evidence has to be weighed in the balance with the other evidence in this case in making a determination as to whether Mr Threlfo injured his back on 7 February 2004.

60. The very first report to a medical professional of any injury to the back on 7 February 2004 is to the IME Dr Hopkins, qualified on behalf of Mr Threlfo. Dr Hopkins saw Mr Threlfo on 16 March 2017. This is first time a report is made to a doctor of any injury to the back suffered on 7 February 2004. I note that this report of injury to the back on 7 February 2004 is made some 13 years after the subject injury.

61. Dr Hopkins records a history as follows:

> "He ceased work on 30 July 2005 due to advancing and severe lumbar pain and bilateral and significant advancing identifiable radiculopathies.
>
> During his employment as a fitter, although he ultimately ended in a supervisory position, he performed heavy manual work, climbing and lifting heavy objects such as steel beams and timbers, and that involved repetitive bending and lifting, climbing in and out of trucks, working on uneven surfaces, working in confined spaces, and many other heavy manual activities in the building industry.
>
> He recalls his first major back injury to have occurred in the early 1990s when he was removing asbestos and adding an extension on the roof and he bent over to pick up some heavy object, developing marked severe low back pain which was of such severity that it caused him to collapse. He was unable to get down from the roof and had to be carried down by his fellow workers, and he required walking sticks to move home, such was the degree of the problem. It was also associated with significant pain radiating into both legs.
>
> He recalls that occurred on a Saturday, and when he presented to work three days after using walking sticks his employer Mr Phillip Crockett, referred him on to the chiropractor, Ms Catherine Elkin at Glebe Road Merewether. He had regular daily treatments by that chiropractor, paid for by his employer, and he struggled back to work after about 2 -3 weeks, but with ongoing back pain, restriction in movement, and ongoing and significant parathesia and numbness into his legs.
>
> He found his ability to mobilise was often limited to about 60 metres and he would develop dense numbness of both lower limbs and weakness of both limbs thereafter. These problems gradually got worse and he ultimately underwent an X-ray and CT scan of his lumbar spine on 13 August 2003 by the general practitioner Dr Hilary Melville at Dungog…
>
> He was treated conservatively for some time but finally was reviewed the neurosurgeon Dr Rob Kuru on 27 January 2005 who undertook MRY scanning of the patient's spine…
>
> The patient was put on notice that he may ultimately require neurosurgical intervention but with the problem deteriorating rapidly he was forced to cease work on 30 July 2005. His general practitioner of many years standing Dr Duncan Dew organised for progress x-rays of his lumbar spine and MRI scanning on 2 July 2013…
>
> The surgery finally went forward in 4 September 2013."

62. Dr Hopkins does not record the injury on 7 February 2004 in the extensive history he has taken above. He does however make mention of it under "Past Medical History" amidst the references to various other medical conditions. He records:

> "The patient has been an extremely active sportsman throughout his life, suffering a fracture of his nose when playing football…

It was his great interest in being physically fit at all times that he delayed significantly any complaint of work related pain and compromised function which led to the significant time delay in his formal medical care.

He suffered an injury to the tendons of his right index and long fingers when employed by Goninans…

He suffered an injury to his right tibia when he fell from a ladder in February 2004. In trying to miss a drain, he aggravated his back pain problems because of the jarring that was incurred. He had been taken to the Gosford Hospital and transferred for treatment to the Maitland Hospital regarding the fracture to his upper tibia. As the treatment to his fracture dominated the clinical picture at that time, the aggravation that occurred to his lumbar spine did not become an issue of interest and treatment."

63. As I said above while I can accept that treatment of the fracture dominated the initial clinical presentation, it does not explain why Mr Threlfo did not disclose any injury or aggravation to his back that occurred on 7 February 2004 to Dr Kuru who was treating him solely for his back.

64. Dr Hopkins goes onto set out his "Diagnosis Opinion and Prognosis" as follows:

"This patient suffered serious injuries to his back in the course of his employment in the early 19902 and then in 2004, which led to his requirement to undergo there neurosurgical procedures, with his surgical plans now competed.

I believe the condition found is consistent with the history given and the treatment, including the operation and clinical investigations undertaken have been both reasonable and necessary, complicated and expertly achieved.

There is a direct relationship between the patient's work and the incidents and the nature and conditions of his work described.

The patient has been rendered totally unfit to contemplate a return to any form of remunerative work and struggles now with simple procedures of personal hygiene due to the rigid stiffness of his spine and the ongoing and significant compromise in the function of how lower limbs and upper limbs.

I believe the injuries/conditions suffered this patient to his back and right and left legs is a disease of gradual process arising from the nature and condition of his employment, including the incidents described in detail that contributed significantly to his spinal deterioration.

I believe the patient's work and the nature of his duties undertaken over many years has aggravated and accelerated his spinal condition.

I believe the client's employment and the incidents of the early 1990s and February 2004 have, on the balance of probabilities, been the main contributing factor to his condition.

This man's prognosis is grim as the additional strains applied to his L1/2 intervertebral disc where he already exhibits significant radiologically proven posttraumatic arthritic change, he will exhibit an increasing problem of pain in his back with an ongoing restriction his ability to rotate and flex in any direction.

He may also see gradual increase in the dermatomal deficit symptoms from which he already suffers from changes to the left L2 nerve root."

65. Dr Hopkin's opinion that Mr Threlfo suffered serious injury to his back in 2004 is based on the history given to him by Mr Threlfo in March 2017, some 13 years after the subject injury. There is no contemporaneous support for this history of injury to the back on 7 February 2004 in the general practitioner's notes or in the various review reports of Dr Kuru, his treating neurosurgeon who saw him on 18 January 2005 and on and off until he performed major spinal surgeries in 2013 and 2016.

66. Mr Threlfo also saw Dr Powell, the IME qualified on behalf of JA Crockett on 1 August 2017 and Dr Powell provided a report of the same date.

67. Dr Powell took a history of the onset of back pain when he collapsed on the roof in the early 1990s. He took a history that he was able to return to work albeit with ongoing back pain since that incident.

68. Dr Powell records:

> "He found over the years up until 2004 that he continued to suffer from back ache, radiating into the legs particularly the left, aggravated by movement, lifting and bending and so on. He found that accessing areas that were awkward in roof spaces and so on and lifting and bending would tend to aggravate his pain. He used analgesics but did not have any other specific treatment."

69. Dr Powell records under the heading "second incident";

> "In 2004 Mr Threlfo was working on a site clearing roofs and the other members of the team had moved on.
>
> He was a supervisor at the time. He bought down a piece of pipe that had been left by the other worker and as he was coming down the ladder the weight of the pipe caused him to twist. He jumped from the ladder. He was not sure how far he came down, but he landed awkwardly in a ditch, injuring the right knee and low back.
>
> He had very severe pain.
>
> (Dr Pillemer, orthopaedic surgeon, in his report dated 8 March 2005 indicated that Mr Threlfo was at the bottom of the ladder when he overbalanced and stepped back into an open drain, injuring his right knee, following which he was taken to Gosford Hospital.
>
> Dr Pillemer noted in his report that post-operative X-ray of the right knee showed the tibial plateau fracture had been satisfactorily reduced…No mention was made of a back injury nor symptoms. He was noted to have straight leg raising of 80 degrees on both sides and no neurological deficit in the lower limbs in Dr Pillemers' examination."

70. Under "subsequent history" Dr Powell goes onto record:

> "Mr Threlfo was taken to Gosford Hospital and was found to have a split in the knee. No specific injury was found in the back but he had increase of his back pain symptoms that he had previously suffered from.
>
> He went back to his home at Dungog and then was seen at Maitland Hospital."

71. Dr Powell then records a history under “operative management- right knee” consistent with the other evidence before me, including an operation on the knee and subsequent infection. He notes that in June 2004 Dr Osborne cleared, in respect of the knee injury, Mr Threlfo for return to work. Dr Powell goes onto record:

> “Gradually he was able to get back to his work but to light work until his retirement shortly afterward.
>
> Following retirement Mr Threlfo found that his back pain with radiation to the legs continued with him and he lived around these symptoms.
>
> Around 2001 or so, Mr Threlfo found that there was an increase in his symptoms with the back becoming more stiff and he developed pain going down both legs and was experiencing difficulty walking with a steady decrease in his walking distance. He was seen by Dr Kuru, orthopaedic surgeon, previously because of his back pain but did not have any specific intervention.
>
> In view of his increasing symptoms and decreasing mobility, Mr Threlfo saw Dr Kuru again. Investigations were undertaken and Dr Kuru suggested an operation”.

72. Dr Powell detailed the operative procedures performed by Dr Kuru.

73. Dr Powell recorded the current symptoms in the lumbar spine.

74. Dr Powell recorded “previous history- lumbar spine” as follows:

> “Prior to the incident in the early 1990s Mr Threlfo had not previous injuries or difficulties in the lumbar region.”

75. Dr Powell noted under “work history”:

> “At the time of development of back pain, Mr Threlfo worked in asbestos clearing in roofing, working all over the Hunter region.
>
> He became a supervisor in this trade up until the time of his second accident, and he continued until his retirement, having got back to work following the second accident though on lighter duties which were not as strenuous.
>
> Prior to that, he had been a fitter, turner and toolmaker.”

76. Dr Powell undertook a physical examination of which there were positive findings.

77. Dr Powell reviewed the radiological investigations.

78. Dr Powell wrote under the heading “summary”

> “Mr Threlfo has a long history of back difficulties arising initially from a bending incident in his work in the early 1990s, an aggravation in a fall in his work in 2004, coming to spinal claudication symptoms associated with multilevel stenosis.
>
> He came to several procedures for wide decompression and stabilisation of the lumbar spine with some improvement of pain symptoms.”

79. Dr Powell was asked to answer a series of specific question. Before doing so, he paused to highlight the following:

> "In attempting to answer your multiple questions it is important to appreciate that there a number of difficulties.
>
> Mr Threlfo was seen at a one hour appointment on a fully booked day offsite on location in Newcastle, with considerable travel time incorporated into the day. Time was limited.
>
> Mr Threlfo was not a particularly good historian.
>
> He has a number of areas of musculoskeletal pathology acquired over his lifetime. In some situations of work related incident there is a specific structural injury that can be identified through imaging and clinical examination, and the effects of such injury and subsequent management reasonably easy to assess.
>
> It is vastly more difficult to determine the effect of a work incident on the natural history of an otherwise unrelated disease process.
>
> There is always considerable interpretation required in these types of cases frequently leading to considerable contention.
>
> There was minimal contemporaneous clinical information and Mr Threlfo only bought investigations of the more later stages of his lumbar spine difficulties and surgical management."

80. Dr Powell went onto the answer the specific questions as follows:

> "1. Please take a history of injury from the worker in relation to his lumbar spine.
>
> As outlined above, Mr Threlfo indicated that he developed pain in the lower back in the early 19902 (from correspondence perhaps 1993) when he bent over to pick something up on a roof where he was working. He was unable to pick the object up because of the severity of the pain and was unable to straighten himself up and in subsequent days because of his bent position he had to use walking sticks to support his upper body weight on his lumbar spine.
>
> From that time on he had chronic fluctuating back pain.
>
> Mr Threlfo described a second incident in 2004, when he steeped into a drain coming down a ladder in the course of his work, injuring his right knee and increasing his back symptoms.
>
> (no mention of involvement of his lumbar spine was made by the treating orthopaedic surgeons Dr Issacs and Dr Osborne, at the time of managing his knee injury and a comprehensive assessment by Dr Pillemer the following year in relation to this incident made no mention of involvement of the lumbar spine.)
>
> Mr Threlfo denied any other episodes that might be considered 'injury' to the lumbar spine, neither prior to 1993 nor subsequent to 2004."

81. Dr Powell was asked to "please provide your diagnosis in relation to the worker's lumbar spine." He answered:

> "Mr Threlfo has post-operative stiffness…
>
> His history of symptoms developing over a number of years are indicative of lumbar spondylosis progressing to multi-level involvement and the symptoms that drove him to operative management would suggest spinal claudication secondary to multi-level degenerative disease with stenotic features as noted in his pre-operative and subsequent scans.
>
> This is on the background of widespread osteoarthritis…
>
> This wide spread involvement and symmetricity are indicative of a primary disease process not the effect of a specific injury.
>
> Mr Threflo's initial incident of developing back pain going into flexion would suggest a mechanical stimulus producing acute back pain and reactive muscle spasm. Given his subsequent history it is likely that he was in the early stages of lumbar spondylosis and the mechanical stimulus produced lumbar back pain. This incident is not of sufficient power to have any effect on the natural history of the degenerative disease nor would it have any influence upon degenerative disease in the appendicular skeleton. Mr Threlfo's history of recurrent back pain following this incident is likely to represent mechanical aggravation in the context of developing and advancing lumbar spondylosis up to the paint that he came to further investigation as his disease process proceeded, which identified multilevel changes at that stage in 2004 confined to his lower lumbar region, but advancing upwards over subsequent years.
>
> The second incident described could well have caused mechanical aggravation of his developing spondylosis but does not appear to have been of sufficient clinical involvement to attract the attention of those treating him. It is unlikely that the second event has had any influence on his fairly aggressive disease process."

82. The second incident referred to of course is the 7 February 2004 incident.

83. Dr Powell goes onto opine further about the February 2004 incident later in his report as follows:

> "The incident of 2004 may have resulted in aggravation of back pain symptoms along the course of the deterioration of Mr Threlfo's spine, but was not sufficient to attract attention of those treating him and no imaging taken closer to that time indicates any specific injury but does show the early stages of the disease process that led to his subsequent surgery.
>
> This incident has not resulted in impairment nor has it had any influence upon the natural history of the disease process which eventually led to his surgical procedures and current clinical status."

84. Mr McMahon placed heavy reliance on Dr Powell's opinion as being supportive of a finding that Mr Threlfo suffered an injury to his back on 7 February 2004. Of course, that injury can be an aggravation of the disease process. Whilst I take into account Dr Powell's opinion that Mr Threlfo may well have aggravated his back on 7 February 2004 I also note he immediately qualified that opinion by noting that it "does not appear to have been of sufficient clinical involvement to attract the attention of those treating him. It is unlikely that the second event has had any influence on his fairly aggressive disease process". It is also reliant on the

history that Mr Threlfo gave Dr Powell that he aggravated his back on 7 February 2004 when in fact the first reporting to a medical professional of that aggravation occurring is to the IME Dr Hopkins some 13 year after the event and then of course to Dr Powell which was also some 13 years after the event.

85. I have to weigh all the evidence in the balance when making a determination as to whether Mr Threlfo suffered injury to his back on 7 February 2004. I take into account that Mr Threlfo was not cross-examined about his evidence. I also take into account Dr Powell's opinion the 2004 incident "could well have caused mechanical aggravation of his developing spondlysosis". I note however that Dr Powell immediately qualified this opinion by noting that any such aggravation was "not of sufficient clinical involvement to attract the attention of those treating him". Against this, I weigh the fact that the first piece of evidence that Mr Threlfo injured his back on 7 February 204 is contained in his statement given in 2016, that is some 12 years after the injury. There is no contemporaneous support for the allegation of injury that is the subject of these proceedings. As I have set out in considerable detail above, Mr Threlfo did not report the injury to his general practitioner nor his treating neurosurgeon Dr Kuru. Whilst the explanation for the non-reporting of the injury on the claim form, and to the hospital, and to the doctors treating him for his knee, can be accepted because the focus was on treatment of the fracture, it cannot be accepted as an explanation for why he did not disclose the injury to Dr Kuru who was treating him only in respect of his back complaints. Nor did he disclose that he injured his back on 7 February 2004 to the IMEs Dr Collins and Dr Pillemer who saw him in the context of his claim for the knee injury on 7 February 2004. Dr Collins and Dr Pillemer were also given a history of back problems but were not told the back was aggravated in the fall on 7 February 2004. They were the IMEs who saw him approximately one year after the injury. The IMEs Dr Hopkins and Dr Powell have been given the history that he hurt his back on 7 February 2004 but this is a history given some 13 years after the event, with no contemporaneous support. Their opinions are to a material degree reliant on the history given. When all of the evidence is weighed in the balance, I am not satisfied on the balance of probabilities that Mr Threlfo injured his back on 7 February 2004 in the course of or arising out of his employment with JA Crockett. Accordingly, I will make an award for the respondent in respect of the claim for compensation based on an allegation of injury to the back on 7 February 2004.