

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 5825/20  
**Applicant:** Mark Turley  
**First Respondent:** Termax Pty Ltd  
**Second Respondent:** Ancor  
**Date of Determination:** 7 January 2021  
**Citation No:** [2021] NSWCC 7

The Commission determines:

1. By consent the applicant sustained injury arising out of or during the course of his employment with the first respondent on 6 December 1992, being injury sustained to both his knees and his right ankle together with consequential injury to his low back and right hip.
2. The applicant sustained injury arising out of or during the course of his employment with the second respondent, being injury sustained to his knees, right ankle, hips, low back, shoulders and neck with deemed date of injury of 20 September 2013. The applicant's employment with the respondent was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease injury the applicant suffered in his knees, right ankle, hips, low back, shoulders and neck.

The Commission orders:

3. By consent the applicant's claim against the first respondent for permanent impairment compensation resulting from the injuries he sustained on 6 December 1992 to his right leg, left leg and back is to be remitted to the Registrar for referral to an Approved Medical Specialist for purpose of assessment under the Table of Disabilities and also for the purpose of assessment of whole person impairment. Assessment under the Table of Disabilities is to be with reference to percentage loss of right leg at or above the knee, percentage loss of left leg at or above the knee, and percentage permanent impairment of the back. Assessment of whole person impairment is to be with reference to right lower extremity, left lower extremity and lumbar spine.
4. By consent the applicant's claim against the second respondent for permanent impairment compensation resulting from injuries he sustained to his neck, back, left shoulder, left knee, right shoulder and right knee, ankle and hip as determined by the Commission in the applicant's favour, with deemed date of injury of 25 September 2019 (being the date of the applicant's claim for permanent impairment compensation as against the second respondent) is to be remitted to the Registrar for referral to an Approved Medical Specialist for purpose of assessment of WPI. Assessment of whole person impairment is to be reference to the cervical spine, lumbar spine, left upper extremity, left lower extremity, right upper extremity and right lower extremity.
5. The following documents are admitted by consent and are to be forwarded to the Approved Medical Specialist:
  - (a) Application to Resolve a Dispute and attached documents;
  - (b) Reply and attached documents, and
  - (c) Application to Admit Late Documents dated 7 December 2020 and attached documents.

The Commission directs:

6. By consent the applicant's claim for weekly benefits as against both respondents is stood over until such time as the Medical Assessment Certificate has issued and the appeal period for that Medical Assessment Certificate has passed.
7. By consent the applicant's claim for medical or related treatment as against the second respondent is stood over until such time as the Medical Assessment Certificate has issued and the appeal period for that Medical Assessment Certificate has passed.

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

Jacqueline Snell  
**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 JACQUELINE SNELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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



## STATEMENT OF REASONS

### BACKGROUND

1. Mark Turley (Mr Turley) worked with Termax Pty Ltd (the first respondent) as a carpenter and manager of the Dubbo branch between February 1991 and August 1994. On 6 December 1992, Mr Turley sustained injury to his low back, right ankle, right knee and left knee during the course of his employment with the first respondent, when he fell from the roof of a house that had been loaded onto the rear of semi-trailer. Liability was accepted by the first respondent for these injuries. Liability was also accepted by the first respondent for the consequential injury Mr Turley sustained to his right hip and low back. In addition to any entitlement to compensation payable under ss 33 and 60 of the *Workers Compensation Act 1987* (1987 Act) resulting from these multiple injuries, Mr Turley has also been awarded by consent lump sum compensation payable under ss 66 and 67 of the 1987 Act as follows:
  - (a) On 22 August 1995: \$31,853.25 in respect of 33% loss of use of the right leg at or above the knee; \$9,652.50 in respect of 10% loss of use of the left leg at or above the knee, and \$16,000 in respect of pain and suffering.
  - (b) On 19 November 1997: \$11,583 in respect of a further 12% loss of use of the right leg at or above the knee and \$5,000 in respect of pain and suffering.
2. With the closure of the Dubbo branch, Mr Turley ceased working with the first respondent in August 1994, following which he purchased the business with two partners and worked as a manager and estimator until the business was sold in 2002. During 2003 Mr Turley worked for six - nine months with Beatty & McCullough Industries Pty Ltd as a carpenter and joiner. Later that same year Mr Turley commenced working with State Wide Sheds as an office manager, where he remained until 14 December 2010. Relevant to Mr Turley's entitlement to compensation payable under ss 33 and 40 of the 1987 Act during his period of employment with State Wide Sheds, on 6 August 2009 such entitlement was by consent reduced to nil from 1 July 2009 ongoing.
3. Between 3 October 2012 and 30 September 2013, Mr Turley was working with Jason Eisel and Kristie Eisel t/as Actiff Building Constructions (the second respondent) as a carpenter. Mr Turley said he ceased work with the second respondent because he was unable to cope with his duties due to his multiple physical disability.
4. The claim for compensation in these proceedings involves the following:
  - (a) As against both respondents, weekly benefits payable from 18 December 2010 to date and continuing;
  - (b) As against the second respondent, medical or related treatment payable under s 60 of the 1987 Act; and
  - (c) As against both respondents, permanent impairment compensation payable under s 66 of the 1987 Act.
5. The insurer for the first respondent (GIO) issued notice in accordance with former s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) on 12 July 2018<sup>1</sup>. GIO also issued notice in accordance with s 78 of the 1998 Act on 25 February 2020<sup>2</sup>.

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<sup>1</sup> Application to Resolve a Dispute (ARD) at page 29

<sup>2</sup> ARD at page 39

6. The insurer for the second respondent (EML) issued notice in accordance with s 74 of the 1998 Act on 19 September 2018<sup>3</sup>. EML also issued notice in accordance with s 78 of the 1998 Act on 2 April 2020<sup>4</sup>.
7. The matter proceeded to Arbitration hearing on 15 December 2020, conducted by telephone. Mr Phillip Perry of counsel appeared for Mr Turley, instructed by Mr Raymond McClenahan, solicitor. Mr Kimberly Becker, solicitor was also present. Mr Graham Barter of counsel appeared for the first and second respondent, instructed by Mr William Pardy. Ms Stephanie Small, iCare, was present.

## **ISSUES FOR DETERMINATION**

8. The parties agreed that the following issues were not disputed:
  - (a) As against the first respondent, on 6 December 1992 Mr Turley sustained injury to his right ankle, right knee and left knee. He also sustained consequential injury to his right hip and low back. While in these proceedings, Mr Turley alleged he sustained consequential injury to his neck, left hip and both shoulders, being alleged injury that was disputed by the first respondent, these alleged consequential injuries were not pressed by Mr Turley in these proceedings.
9. The parties agreed that the following issues remain in dispute:
  - (a) As against the second respondent, Mr Turley sustained injury to both knees, both hips, both shoulders, low back, neck and right ankle in the nature of an aggravation, acceleration, exacerbation or deterioration of a disease injury, with a deemed date of injury of 20 September 2013.
10. The parties agreed the disputed injuries are to be the subject of determination by me, with referral to an Approved Medical Specialist (AMS) of those body parts that are either agreed or determined by me, for assessment of permanent impairment. Those injuries that are determined or agreed to have been sustained by Mr Turley on 6 December 1992 are to be assessed under the Table of Maims and also with reference to whole person impairment (WPI). Those injuries that are determined or agreed to have been sustained by Mr Turley with a deemed date of injury of 25 September 2019 (being the date of Mr Turley's claim for permanent impairment compensation as against the second respondent) are to be assessed with reference to WPI.
11. The parties agreed that the claim for weekly benefits and medical or related treatment is stood over until such time as the Medical Assessment Certificate (MAC) has issued and the appeal period for that MAC has passed.

## **PROCEDURE BEFORE THE COMMISSION**

12. 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.

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<sup>3</sup> ARD at page 34

<sup>4</sup> ARD at page 43

## **EVIDENCE**

### **Documentary Evidence**

13. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application to Resolve a Dispute (ARD) and attached documents;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents (AALD – A) and attached documents received on 7 December 2020.

### **Oral Evidence**

14. Neither party sought leave to adduce oral evidence or cross examine any witnesses. Both counsel made oral submissions, and a copy of the recording is available to the parties.

## **FINDINGS AND REASONS**

### **Review of evidence**

15. A brief review of the evidence follows.

### **Mr Turley's statements**

16. In his statement dated 3 September 2020, Mr Turley said he is now in receipt of the Disability Support Pension. In his statement he also relevantly set out a history of injury and work with the respondents and State Wide Sheds.
17. Mr Turley said that between February 1991 and August 1994, he worked with the first respondent as a carpenter and branch manager. He said his duties included labouring as well as office and administrative tasks. He said that on 6 December 1992 he fell off the roof of a house that had been loaded onto the rear of a semi-trailer, sustained multiple injury, including fractures, and came under the orthopaedic specialist care of Dr Slater. Mr Turley came to surgical treatment of both knees and his right ankle under the care of Dr Slater. Liability for the injuries he sustained to his knees and his right ankle was accepted by GIO, and Mr Turley continued to consult with Dr Slater from time to time after ceasing work with the first respondent.
18. Mr Turley said that between late 2003 and mid-December 2010, he worked with State Wide Sheds as an office manager. He said his duties were mainly office based. He said that he spent about 75% of his time working in the office and 25% of his time undertaking manual work, which included site visits and foundation work "such as setting out, pouring concrete and placing hold down bolts". Mr Turley pointed out that as he was office manager, he could avoid physically demanding work that caused him pain. Mr Turley remained under the care of Dr Slater during this period of employment but came to total right knee replacement on 15 September 2008 under the care of Dr Wood. Liability for the cost of this total right knee replacement was accepted by GIO. Mr Turley said that in or about 2010, he ultimately found that he could no longer work at a fast pace due to pain and multiple injuries, "including my back, both shoulders and especially my right shoulder, both hips and both knees". Relevant to his right shoulder, Mr Turley said he first noticed problems with his right shoulder in 2006, which "became painful while working and when lifting items in my day to day life".

19. Prior to Mr Turley subsequently commencing work with the second respondent, he suffered a nervous breakdown and developed alcohol dependence. He received psychological treatment. His marriage broke down.
20. Mr Turley said he was approached by the second respondent “as they wanted help from a carpenter to erect shearing sheds” and between 3 October 2012 and 30 September 2013 Mr Turley worked with the second respondent as a carpenter. He described his duties in the following terms:
- “... setting out and placing foundations, erecting the structure, cladding the sheds and fitting out as required. I would also supervise the tasks of other workers on the site”.
- Mr Turley said that after about 12 months of work with the second respondent, it became apparent to him that he was unable to continue with this work as it caused him too much pain.
21. Mr Turley said he had not had any further employment since he ceased work with the second respondent but his symptoms continued to deteriorate. In about 2016 the pain in his right shoulder “had become more severe and debilitating” and he came under the orthopaedic care of Dr Duckworth, with ultrasound cortisone injection providing temporary relief. He was reviewed by Dr Laurent, rheumatologist, who noted a reduced movement in his neck, and in this regard Mr Turley accepted he had experienced pain in his neck over the years when using his arms above shoulder height. He came under the orthopaedic care of Dr Gooden relevant to his right hip, coming to total right hip replacement on 30 October 2018, the cost of which was met by Medicare. As at the time of providing his initial statement, Mr Turley said that the most significant source of pain resulted from the injuries he had sustained to his back, right knee and right ankle.
22. In his supplementary statement dated 6 December 2020<sup>5</sup>, Mr Turley said that in or about late 2015 or March 2016 his right shoulder was struck by a shop sliding door, following which he noticed an increase in right shoulder pain. He said he first experienced right shoulder symptoms in 2006 with increased pain in 2010. Mr Turley said too that his work with the second respondent primarily involved the construction of shearing and agricultural sheds, with other work including the building of an aircraft hangar and a veterinary facility, and the construction of a showroom fit out.

## **Invoices**

23. Mr Turley’s employment with the second respondent is not in issue but there are tax invoices he provided to the second respondent that outline the nature of his work duties with the second respondent during the period 3 October 2012 to 3 February 2014. It is fair to say that the work duties of Mr Turley during this period appear to be heavy in nature in that they include, but are not limited to, building and carpentry work associated with the construction of shearing sheds, an aircraft hangar and the fitting out of a showroom.

## **Treating medical evidence**

24. Following the incident occurring on 6 December 1992, Mr Turley principally came under the orthopaedic care of Dr Slater and came to surgical treatment of both knees and his right ankle under his care. Mr Turley remained under the care of Dr Slater for a number of years and in a report dated 25 January 2005<sup>6</sup> Dr Slater noted Mr Turley was at the time working as a manager with State Wide Sheds with 90% of his work described as sedentary “which suits him well”. At the time, Dr Slater considered Mr Turley was “managing better than one would have expected after the extent of his injuries” but accepted he would continue to experience problems. With a deterioration in Mr Turley’s right knee symptoms Dr Slater reported on

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<sup>5</sup> AALD – A page 1

<sup>6</sup> ARD at page 195

1 May 2008<sup>7</sup>, he had recommended Mr Turley seek orthopaedic opinion from Dr Wood regarding possible total knee replacement. Mr Turley came to total right knee replacement under the care of Dr Wood on 15 September 2008<sup>8</sup> with reported excellent result<sup>9</sup>, and in a report dated 21 July 2009<sup>10</sup>, in response to specific questioning Dr Wood in essence provided opinion Mr Turley's current right leg condition resulted from expected changes which would have occurred because of the injuries that he sustained in 1992. In a report dated 17 October 2016<sup>11</sup> in which Dr Slater discussed Mr Turley's problems with his legs, right ankle, right shoulder, hips, and low back, Dr Slater similarly provided opinion all of Mr Turley's "musculoskeletal problems relate directly to the fall described in 1992". Relevant to this report of Dr Slater however, it is apparent Dr Slater was unaware of Mr Turley's employment with the second respondent in that he provided comment "he has not worked since a breakdown requiring admission to Northside Clinic in Wentworthville in 2011".

25. Mr Turley was orthopaedically reviewed by Dr Duckworth relevant to his right shoulder. In his report dated 6 July 2015<sup>12</sup>, Dr Duckworth noted Mr Turley presented with a problem affecting his right shoulder in the absence of any specific injury, which had become particularly severe in the last four – five months. Cortisone injection reportedly provided significant relief and diagnostic imaging confirmed a degenerative cuff tear.
26. Mr Turley was reviewed by Dr Pal, Neurosurgical Registrar at the Royal North Shore Hospital on 15 June 2016 principally in relation to his low back injury. Dr Pal provided a report<sup>13</sup> in which he noted Mr Turley to be an ex-carpenter who had suffered work-related injury in 1992 but now presented "in quite a lot of pain from a recent right shoulder rotator cuff tear". Dr Pal noted Mr Turley was keen for review by a rheumatologist and recommended such referral be made. In a report dated 23 February 2017<sup>14</sup>, Dr Laurent, Senior Staff Specialist in Rheumatology at Royal North Shore Hospital described Mr Turley as having previously worked as a carpenter and reported "as a result of his work and other accidents he has had significant musculoskeletal injuries. These have resulted in persisting problems with his shoulders, low back, hips and knees". On examination, he also noted a restricted movement of Mr Turley's neck.
27. Mr Turley came under the orthopaedic care of Dr Gooden relevant to his right hip injury and in a report dated 2 February 2017<sup>15</sup>, Dr Gooden in essence provided opinion the arthritic condition Mr Turley suffered in his right hip was consequent on the injury he sustained to his right leg in 1992. In his further report dated 9 November 2017<sup>16</sup>, Dr Gooden confirmed this previously expressed opinion. Mr Turley came to total right hip replacement under the care of Dr Gooden on 30 October 2018, with a good result<sup>17</sup>. In a report dated 11 June 2019<sup>18</sup>, and in response to specific questioning Dr Gooden provided opinion that while the work Mr Turley did in 2013 may have contributed to the deterioration in the condition of his right hip "overall the reasons for the advanced arthritis in his hip are directly related to his initial work injury". In essence, Dr Gooden was of the view that Mr Turley's right hip arthritic condition had occurred "as the result of the alteration to his biomechanics due to his original work related injury".

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<sup>7</sup> ARD at page 199

<sup>8</sup> ARD at page 203

<sup>9</sup> ARD at page 205

<sup>10</sup> ARD at page 210

<sup>11</sup> ARD at page 237

<sup>12</sup> ARD at page 226

<sup>13</sup> ARD at page 224

<sup>14</sup> ARD at page 244

<sup>15</sup> ARD at page 242

<sup>16</sup> ARD at page 251

<sup>17</sup> ARD at page 270

<sup>18</sup> ARD at page 271

28. The patient summary relevant to the clinical records of Balmoral Street Medical Centre demonstrated an entry on 16 April 2010<sup>19</sup> (being a time when Mr Turley was working with State Wide Sheds) which describe him as having recently walked into steel beams, which resulted in a fractured nose, two black eyes, neck pain and pain in his right arm “worse at inner elbow but felt in shoulder and wrist”. On review on 19 April 2010 Mr Turley was noted to have said that his right arm pain “was probably exacerbated by a number of activities following the injury, including using a chainsaw and lifting his dog with his right arm” and relative rest is suggested for approximately four weeks with review if “problems arise”. There is no mention thereafter of right shoulder pain until Mr Turley consulted with Dr Park on 4 April 2016 with complaint of right shoulder pain “for many weeks getting worse”<sup>20</sup>. On 21 June 2016, Dr Park recorded persistent right shoulder pain and described Mr Turley as having been chopping wood with a chain saw<sup>21</sup> and when next reviewed on 5 July 2016, she described him as having been working hard on his farm land and having advised him not to do too much considering his medical conditions<sup>22</sup>.
29. In a report dated 30 September 2019<sup>23</sup> and in response to specific questioning, Dr Park confirmed Mr Turley had come under her general medical care in 2014 and provided opinion Mr Turley’s employment was the main contributing factor to the aggravation, exacerbation and deterioration of the multiple medical conditions he was currently suffering, with his “final employment” having contributed to “aggravation, deterioration and acceleration of the diseases affecting his knees, right ankle, lumbar spine and his shoulders”. Dr Park also accepted Mr Turley’s hip arthritic problem and total hip replacement (although she erroneously refers to the left hip rather than the right hip) had been aggravated by his past employment. She explained “this is because most of his employments involved heavy lifting, bending squatting and heavy physical work”. In a medical certificate dated 22 August 2020<sup>24</sup>, Dr Park confirmed her previously expressed opinion Mr Turley’s employment with the second respondent had been “the main contributing factor to the aggravation, deterioration and acceleration of diseases affecting his knees, right ankle, lumbar spine and his shoulders”.

### **Independent medical evidence**

30. Dr Clowes provided an independent medical examiner’s report dated 13 December 1994<sup>25</sup> relevant to the injuries Mr Turley sustained in the incident that occurred on 6 December 1992 in which he said prognosis must be guarded.
31. Dr Bornstein provided an independent medical examiner’s report dated 20 December 1994<sup>26</sup> relevant to the injuries Mr Turley sustained in the incident that occurred on 6 December 1992 in which he provided Mr Turley was permanently unfit to work “on the tools”.
32. Dr Benanzio provided an independent medical examiner’s report dated 23 May 1995<sup>27</sup> relevant to the injuries Mr Turley sustained in the incident that occurred on 6 December 1992 in which he said evolution of post traumatic changes in Mr Turley’s right knee, left knee and right subtalar joint must be expected as the fractures sustained in the incident “have entered the joints, disarranging the articular surfaces”. He considered Mr Turley was permanently unfit for his preinjury duties as a carpenter.

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<sup>19</sup> ARD at page 295

<sup>20</sup> ARD at page 285

<sup>21</sup> ARD at page 286

<sup>22</sup> ARD at page 286

<sup>23</sup> ARD at page 273

<sup>24</sup> ARD at page 283

<sup>25</sup> Reply at page 3

<sup>26</sup> Reply at page 11

<sup>27</sup> ARD at page 170



33. Dr Thomson provided an independent medical examiner's report dated 3 February 1997<sup>28</sup> relevant to the injuries Mr Turley sustained in the incident that occurred on 6 December 1992 in which he described prognosis in terms of "bad generally" and in which he provided opinion Mr Turley was "really only fit for duties which are predominantly or exclusively sedentary and preferably where he may be able to sit or stand at will". At that point in time Dr Thomson noted evidence of degenerative deterioration of the right knee and functional discomfort of the right hip due to a general disorganisation of the right leg.
34. Dr Evans provided an independent medical examiner's report dated 17 February 1999<sup>29</sup> relevant to the injuries Mr Turley sustained in the incident that occurred on 6 December 1992 at which time he considered Mr Turley fit for office duties only and prognosis for increasing problems with both knees. In a subsequent report dated 4 June 2001<sup>30</sup> Dr Evans recorded little change in Mr Turley's condition since the earlier assessment save for a gradual deterioration in his knees. Dr Evans noted too at the time that Mr Turley suffered chronic neck and shoulder problems, described as "fairly quiescent at the moment" which Mr Turley did not attribute to the incident that occurred on 6 December 1992 but rather to bike and car accidents "over the years". Diagnostic imaging on 1 December 2000 reportedly demonstrated some osteoporosis in the cervical spine, no abnormality of the left shoulder and some decrease in bone density in the lumbar spine and femoral necks. At the time Dr Evans again considered Mr Turley fit for office duties only and prognosis for deterioration in his knees.
35. Dr Giblin provided his initial independent medical examiner's report dated 28 March 2017<sup>31</sup> in which he noted a limited history of Mr Turley having sustained injury to his right knee and right ankle in the incident occurring on 6 December 1992. No history is provided of Mr Turley's work with the second respondent. Dr Giblin described these injuries as soft tissue injuries that were treated conservatively, which is of course erroneous. Dr Giblin described Mr Turley as sometime shortly afterwards experiencing pain in his back and both hips, and some years after that "his right shoulder gave out on him". Dr Giblin described Mr Turley as losing his job in 2010 and "that was the end of him", which too is erroneous as Mr Turley commenced employment with the second respondent after ceasing work with State Wide Sheds.
36. At the time of initial assessment, Dr Giblin noted Mr Turley's symptoms in order of severity in the following terms:

1. Chronic pain in his right foot, ankle and knee;
2. Pain and clicking and a feeling of burning and stiffness in his left knee;
3. Chronic low back with intermittent sharp stabbing pains and some pins and needles going down his right leg into his foot.

Both shoulders are sore and stiff and clicky, the right one much worse than the left."

Dr Giblin also noted Mr Turley's neck on clinical examination to be quite stiff and made reference to an MRI scan of his cervical spine dated 14 September 2011, which noted multi-level spondylitic changes. Dr Giblin described Mr Turley at that time as "a burnt out wreck of a man".

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<sup>28</sup> ARD at page 184

<sup>29</sup> Reply at page 19

<sup>30</sup> Reply at page 24

<sup>31</sup> ARD at page 135

37. In his subsequent independent medical examiner's report dated 17 October 2018<sup>32</sup> while Dr Giblin confirmed Mr Turley's complaints had not diminished since his initial assessment, he noted a correct history of Mr Turley having worked with the second respondent in 2013. Relevant to this work, Dr Giblin said:

"It is a physically demanding and difficult environment and the workers need to be fully fit without any significant underlying musculoskeletal restrictions.

In 2013, when he went back to the job, his symptoms rapidly deteriorated so that he was unable to last much past 2014.

In essence, his body was not up to the musculoskeletal requirements in modern shed building.

I would view all his pre-existing conditions and injuries from 1992 as undergoing material aggravation consequent up [sic] the work environment of 2013 as being the main contributing factor".

38. In a further subsequent independent medical examiner's report dated 17 July 2019<sup>33</sup> Dr Giblin noted Mr Turley remained unemployed with no new frank injuries and noted his symptoms in order of severity in the following terms:

1. Low back pain;
2. Pain and stiffness in his right foot and ankle;
3. Left hip burning and stiffness and pain;
4. Left knee aching and burning and stiffness;
5. Right hip aching and pain;
6. Right knee aching and pain;
7. Neck pain and stiffness."

39. Dr Giblin considered prognosis to be guarded in that Mr Turley's injuries would continue to deteriorate. He provides assessment of permanent impairment resulting from multiple injuries sustained by Mr Turley with reference to the Table of Disabilities and WPI.

40. Dr Stephenson provided an independent medical examiner's report dated 11 March 2020<sup>34</sup> relevant to Mr Turley's claim against the second respondent, being a claim for compensation resulting from alleged aggravation of pre-existing disease process in multiple body parts. At the time of reporting, Dr Stephenson had not been provided with a copy of Dr Giblin's reporting.

41. Dr Stephenson reported a history of injury sustained in the incident occurring on 6 December 1992 and made reference also to Mr Turley suffering an injury to his right shoulder that was not compensable when he was struck by an automatic door at a service station. In response to specific questioning Dr Stephenson accepted the injuries Mr Turley sustained to his knees and right ankle in the incident occurring on 6 December 1992 set in train a degenerative process which has progressed to the point where he suffered significant disabilities. Relevant to his work with the second respondent, Dr Stephenson reported Mr Turley explained to him he worked as a manager in shed construction and "had to handle roof purlins, which he said were like roof battens, 6 – 8 metres long. He said they were relatively light between 3.6, up to 5-7kg but the fact they were 6 – 9 metres long made them awkward. He was assisted by another worker". This noted, Dr Stephenson said he was not of the opinion the degenerative process which was caused by the incident occurring on 6 December 1992 was made worse on a permanent basis as a result of the nature and

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<sup>32</sup> ARD at page 142

<sup>33</sup> ARD at page 144

<sup>34</sup> Reply at page 41

conditions of Mr Turley's work with the second respondent. Dr Stephenson further said he was not of the opinion the degenerative process that troubled Mr Turley when he commenced working with the second respondent had been significantly worsened "or indeed worsened whatsoever" as a result of the nature of his duties with the second respondent.

### **Vocational assessment**

42. In a Section 40 Assessment Report dated 30 December 2003 prepared by Inergise Australia Pty Ltd following vocational assessment on 10 December 2003<sup>35</sup> Mr Turley is relevantly noted to have commenced work with State Wide Sheds, working as a general manager, with his duties described in include quotes, phone, fax and computer duties. Mr Turley is described to be physically coping with this work.

### **The respondents' submissions**

43. Mr Barter referred first to the opinion of Dr Stephenson, which he said was consistent with other medical evidence in that Mr Turley's work with the second respondent was a case of revelation rather than genesis. He said Mr Turley apparently struggled working with the second respondent because of the multiple injuries he had sustained with the first respondent in 1992, which by their own nature had deteriorated. Mr Barter explained that in the event Mr Turley suffered any permanent impairment resulting from injury, such permanent impairment did not result from any aggravation sustained while working with the second respondent, but rather resulted from the injuries sustained while working with the first respondent in 1992, being injury to his low back and both legs.
44. Relevant to alleged aggravating injury sustained by Mr Turley to both his shoulders and his neck while working with the second respondent, Mr Barter expressed concern State Wide Sheds, with whom Mr Turley worked between 2003 and 2010 was not a party to these proceedings. Mr Barter pointed out that in about 2009 Mr Turley had had an earlier award for weekly benefits reduced to nil as he was able to earn with State Wide Sheds an amount which he would have been able to earn had he remained working with the first respondent. On enquiry, Mr Barter said there was little evidence before the Commission as to the work duties that Mr Turley was undertaking for State Wide Sheds, other than comment from Dr Slater who noted in a report dated 25 January 2005 that Mr Turley was working as a manager with 90% of his work being sedentary, which suited him well. Dr Slater also noted at that time Mr Turley was managing better than he would have expected considering the extent of his injuries, and while Dr Slater said Mr Turley would continue to experience problems, he considered such problems should be manageable. Mr Barter referred next to clinical records with demonstrated entry on 15 April 2010 that recorded Mr Turley had walked into some concealed beams during the course of his employment with State Wide Sheds and sustained a fractured nose with two black eyes. Reference is made also to pain in his right arm, which remained present on 13 May 2010. Mr Barter submitted this was a significant injury. Mr Barter also made reference to an entry on 11 October 2010, with a tender left condyle and repetitive work noted. He noted too that in 2009 the award for weekly compensation that Mr Turley had benefitted from had been reduced to nil, on 13 December 2010 Mr Turley's employment was terminated and on 7 March 2011, Mr Turley was noted to be drinking, fighting with his wife and not motivated to be return to work. With Mr Turley noted to have had some osteoporotic problems and psychological problems between 2011 and when he commenced employment with the second respondent in late 2012, Mr Barter considered it significant State Wide Sheds was not a party to these proceedings. While Mr Barter accepted Mr Turley managed to get himself back to work with the second respondent, he said Mr Turley struggled because of the physical injuries he sustained while working with the first respondent and possibly because of the injuries he sustained during the course of his employment with an employer who is not a party to these proceedings.

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<sup>35</sup> Reply at page 28

45. In essence, Mr Barter submitted that to the extent Mr Turley suffered from pain while working with the second respondent, this resulted from injuries he sustained during the course of his employment with the first respondent or from the injuries he sustained during the course of his employment with an employer who was not a party to these proceedings.

### **Mr Turley's submissions**

46. While Mr Perry accepted Mr Barter's submission Mr Turley struggled with his work with the second respondent, particularly so towards the end of his time there, he said Mr Turley struggled because of the nature of the work he was required to do. Mr Perry accepted Mr Turley had issues when he worked with State Wide Sheds because of the very significant injuries he sustained in 1992 and that he complained of symptoms during this particular period of employment but pointed out that the real question was the nature of Mr Turley's duties with the second respondent. Mr Turley set out in his statement that he worked with the second respondent as a carpenter and Mr Perry submitted that it is this carpentry work that has been implicated as the aggravation, acceleration, exacerbation and deterioration of the disease that Mr Turley suffered in a number of parts of his body. In his statement Mr Turley described the nature of this carpentry work, which Dr Giblin referred to as physically demanding work which caused significant aggravation and acceleration of his pre-existing condition. The invoices submitted to the second respondent by Mr Turley describe the nature of the work that he was doing as physically demanding. It is evident that the end of Mr Turley's working life with the second respondent was in stark contrast with the end of his working life with State Wide Sheds. At the time Mr Turley ceased working with State Wide Sheds he was not in the terrible situation that he is in now, in that he is now completely unemployable.
47. Mr Perry accepted Mr Turley sought treatment for his shoulders after ceasing work with the second respondent and was referred to Dr Laurent, a specialist in rheumatology, who noted his previous employment as a carpenter and provided support for submission that this work aggravated the pre-existing condition he suffered in his shoulders. Dr Park, under whose general medical care Mr Turley came after ceasing work with the second respondent also provided support for submission Mr Turley's final employment, being his work with the second respondent, contributed to the aggravation of the pre-existing condition he suffered in his knees, right ankle, lumbar spine and shoulders.
48. In canvassing Dr Giblin's report following independent assessment on 28 March 2017, Mr Perry admitted the only account of injury which Dr Giblin had at that time was the dramatic event that occurred on 6 December 1992, but noted the import of reference to multilevel spondylitic changes in the cervical spine and also the symptoms recorded at the consultation:
- "Chronic pain in his right foot, ankle and knee. Pain and clicking and a feeling of burning and stiffness in the left knee. Chronic low back pain with intermittent sharp stabbing pains and some pins and needles going down his right foot. Both his shoulders are sore and stiff and clicky. The right one much worse than the left.
- .....
- His neck is quite stiff."
49. Mr Perry canvassed Mr Turley's further consultation with Dr Giblin on 17 October 2018 at which time Dr Giblin was provided with a full account of injury also occurring while working with the second respondent in 2013. With the support of Dr Giblin, the rheumatologist and the treating general practitioner who have looked after Mr Turley since 2014, Mr Perry said the evidence well and truly weighed down the balance of probabilities there had been an aggravation of Mr Turley's pre-existing condition. Mr Perry said that he relied on expert opinion provided by Dr Giblin that Mr Turley's work with the second respondent was the main contributing factor to the aggravating injury sustained by Mr Turley to his knees, hips, shoulders, low back, neck and right ankle.

50. Although accepted by Mr Perry that Dr Stephenson was against him, Mr Perry pointed out that Dr Stephenson is isolated and the only doctor on which the respondents relied. He also pointed out Dr Stephenson's report is not as persuasive as it might have been as it was evident that he had not been provided with the reporting of Dr Giblin, which is supported by other treating doctors, particularly the rheumatologist and the general practitioner.
51. In essence Mr Perry submitted the assertion of injury as defined by s 4(b)(ii) of the 1987 Act had been made out by Mr Turley and that being the case, his claim for permanent impairment should be remitted to the Registrar for referral to an AMS, with his claim for weekly benefits and medical or related treatment to be stood over for teleconference subsequent to the expiry of the 28 day appeal period following the issue of the MAC.

### **The respondents' submissions in reply**

52. In response to submission made by Mr Perry that Dr Stevenson was out on his own, Mr Barter pointed out that in his report dated 17 October 2015 Dr Slater who has been on the scene all the way through confirmed all of Mr Turley's musculoskeletal problems related directly to the fall he sustained in 1992. Mr Barter also pointed out that Mr Turley relied heavily on opinion provided by Dr Giblin, who only came on the scene in 2017.
53. Mr Barter articulated alleged injury to Mr Turley's shoulders was a real sticking point as there did not appear to be any evidence precisely identifying what happened in 2016 to cause the shoulder injury. In his statement, Mr Turley said that his right shoulder became symptomatic in 2016, which was three years after he ceased work with the second respondent, which is confirmed by Dr Duckworth in his report dated 6 July 2016. In his report dated 15 June 2016, Dr Park also noted Mr Turley was in quite a lot of pain from a recent right shoulder rotator cuff tear. Mr Barter reiterated that something happened in 2016 to Mr Turley's shoulders, but we don't know what, and that is one of the reasons why alleged injury to the shoulders is disputed.

### **Determination**

#### **Injury**

54. Section 4 of the 1987 Act relevantly defines injury as a personal injury arising out of or in the course of employment, including (a) a disease injury that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and (b) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease.
55. As against the first respondent, Mr Turley alleged he sustained frank injury to both his knees and his right ankle in the traumatic incident occurring on 6 December 1992. He also alleged consequential injury to his low back and right hip. Liability for these injuries is not disputed and with Mr Turley not pressing alleged consequential injury to his neck, left hip and shoulders it is not necessary for me to determine injury sustained by Mr Turley in the incident occurring on 6 December 1992.
56. As against the second respondent, Mr Turley alleged he sustained injury to his neck, low back, both shoulders, both knees, both hips and right ankle in the nature of an aggravation, acceleration, exacerbation or deterioration of a pre-existing disease injury. Liability for these injuries is disputed and it is necessary for me to determine injury sustained by Mr Turley during the course of or arising out of his employment with the second respondent.

57. Relevant to the issue of causation, in *Kooragang Cement Pty Ltd v Bates*<sup>36</sup>, Kirby J said:

“The result of the cases is that each case where causation is in issue in a workers compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase ‘results from’ is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death ‘results from’ a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation.”

58. As to what constitutes an aggravation of a disease process, in *Federal Broom Co Pty Ltd v Semlitch*<sup>37</sup> there is discussion by Windeyer J:

“The question that each poses is, it seems to me, whether the disease has been made worse in the sense of more grave, more grievous or more serious in its effects upon the patient”.

59. In *AV v AW*<sup>38</sup> the Commission considered the meaning of ‘main contributing factor’ and following analysis of the authorities relevantly concluded that the test of ‘main contributing factor’ is one of causation, which involved consideration of the evidence overall and in a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not the underlying disease process as a whole.

60. Mr Turley has the onus of proving that he has sustained injury while working with the second respondent. This is a question of fact and his matter and consideration of his statements and all of the medical evidence is required. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*<sup>39</sup> McDougall J stated:

“A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA; 91938) 60 CLR 336. His honour’s statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] 20; (1940) 63 CLR 691 at 712”.

61. It is evident and accepted Mr Turley sustained significant injury to both his knees and his right ankle in the incident occurring on 6 December 1992 during the course of his employment with the first respondent, which also resulted in accepted consequential injury to his low back and right hip. It is evident too that following injury, the nature of Mr Turley’s work duties changed in that his duties became predominately office based until he commenced working with the second respondent, with his duties once again becoming predominately physically demanding in nature.

62. In his statement Mr Turley relevantly described his duties as office manager with State Wide Sheds between 2003 and 2010 as being mostly office based, with an ability to avoid physically demanding work. During vocational assessment on 10 December 2003, Mr Turley is noted to be physically coping with his work with Statement Wide Sheds. Dr Slater also noted in his report dated 25 January 2005 that 90% of Mr Turley’s work with State Wide Sheds was sedentary in nature “which suits him well”. While clinical records noted Mr Turley walked into steel beams in or about April 2010 which was towards the end of his time

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<sup>36</sup> (1994) 35 NSWLR 452; 10 NSWCCR 796 at [463] (*Kooragang*)

<sup>37</sup> [1964] HCA 34; 110 CLR 626 at [369]

<sup>38</sup> [2020] NSWCCPD 9

<sup>39</sup> [2008] NSWCA 246

working with State Wide Sheds I do not accept the respondents' submission Mr Turley sustained significant injury in this incident as it is evident from the clinical records that any difficulties arising from the incident were short lived, with medical advice being in terms of relative rest for approximately four weeks. While in his statement Mr Turley said that in about 2010 he found he "could no longer work at a fast pace due to my pain and multiple injuries including my back, both shoulders and especially my right shoulder, both hips and both knees", which suggested perhaps this may have been the reasoning behind him ceasing work with State Wide Sheds, Mr Turley did not say this was the reason he ceased work with State Wide Sheds and the clinical records demonstrated Mr Turley was experiencing difficulties at work that were not related to any physical disabilities he was experiencing and he was sacked from his position with State Wide Sheds in early December 2010.

63. In his statement Mr Turley also relevantly said he had been approached by the second respondent for carpentry assistance in erecting shearing sheds and described his duties with the second respondent to include setting out placing foundations, erecting the structures, cladding the sheds and fitting out as required. Relevant to Mr Turley's work with the second respondent Dr Giblin described it as physically demanding, and while Dr Stephenson appeared to suggest this was not the case, I accept the nature of Mr Turley's duties with the second respondent were indeed physically demanding as evidenced by the invoices he provided to the second respondent during the period 3 October 2012 and 3 February 2014.
64. While there can be no doubt Mr Turley suffered musculoskeletal problems prior to him commencing work with the second respondent, Mr Turley said that after about 12 months of work with the second respondent, which I have accepted was physically demanding work, he realised he was unable to continue with this work as it caused it too much pain. It is apparent then there was a deterioration in Mr Turley's pre-existing musculoskeletal problems during the time he worked with the second respondent and I accept that at the time he ceased work with the second respondent Mr Turley's musculoskeletal problems were worse than they were at the time he commenced work with the second respondent.
65. As to whether Mr Turley's employment with the second respondent was the main contributing factor to such deterioration of his pre-existing musculoskeletal problems as required by s 4(b)(ii) of the 1987 Act, I accept opinion provided by Mr Turley's treating general practitioner Dr Park that Mr Turley's employment with the second respondent had been the main contributing factor to the deterioration of the pre-existing condition Mr Turley suffered in his knees, right ankle, right hip, lumbar spine and shoulders, and I accept independent medical expert opinion provided by Dr Giblin that Mr Turley's employment with the second respondent had been the main contributing factor to the deterioration of the pre-existing condition he suffered in his knees, right ankle, hips, low back, neck and shoulders. In accepting such opinions on causation I draw comfort from opinion also provided by Mr Turley's treating rheumatologist, Dr Laurent, who relevantly noted Mr Turley's work as a carpenter in part to have contributed to his significant musculoskeletal injuries. While specific historical reference is made by Dr Laurent to Mr Turley's knees, hips, lumbar spine and shoulders, on examination Dr Laurent also noted reduced movement of Mr Turley's neck.
66. While Mr Turley's long time treating orthopaedic surgeon, Dr Slater, provided opinion on review in 2016 that Mr Turley's musculoskeletal problems related to the incident occurring on 5 December 1992 it is evident Dr Slater was unaware Mr Turley had been working with the second respondent as a carpenter, and accordingly I do not accept his opinion as to causation. While Dr Stephenson provided independent medical expert opinion Mr Turley's musculoskeletal problems had not worsened while working with the second respondent, it is evident he was not aware of the physically demanding nature of Mr Turley's work with the second respondent and likewise I do not accept his opinion as to causation.

67. I am of the view Mr Turley provided a credible history regarding a deterioration of his musculoskeletal problems due to the physically demanding nature of his work with the second respondent and Mr Turley has the support of Dr Park and Dr Giblin. Mr Turley also has the support of Dr Laurent to some degree. Given the explanation given by Mr Turley as to the deterioration of his musculoskeletal problems while working with the second respondent and the support afforded by Dr Park, Dr Giblin and Dr Laurent, I am of the view Mr Turley's employment with the second respondent was the main contributing factor to the aggravating injury he has sustained to his knees, right ankle, hips, low back, shoulders and neck as alleged. In the circumstances I accept Mr Turley has discharged the onus of proof required of him and I accept Mr Turley suffered injury to his knees, right ankle, hips, low back, shoulders and neck arising out of or during the course of his employment with the second respondent, with a deemed date of injury of 20 September 2013. Such injury is in the nature of an aggravation, acceleration, exacerbation or deterioration of his pre-existing conditions.
68. The parties agreed the injuries which are the subject of Mr Turley's claim for permanent impairment compensation, which are agreed or determined by me in Mr Turley's favour, are to be remitted to the Registrar for referral to an AMS for assessment of permanent impairment.

### **Weekly benefits**

69. The parties agreed the claim for weekly benefits as against both respondents is stood over until such time as the MAC has issued and the appeal period for that MAC has passed.

### **Treatment**

70. The parties agreed the claim for medical or related treatment as against the second respondent is stood over until such time as the MAC has issued and the appeal period for that MAC has passed.

### **Permanent impairment**

71. Liability is not disputed for the injuries Mr Turley sustained in the incident occurring on 6 December 1992 while working with the first respondent, being injury sustained to both his knees and his right ankle together with consequential injury to his low back and right hip and Mr Turley does not press alleged injury sustained to his neck, left hip and both shoulders as a result of the same incident. The parties agreed Mr Turley's claim against the first respondent for permanent impairment compensation resulting from the injuries he sustained on 6 December 1992 to his knees and his right ankle, together with consequential injury to his low back and right hip is to be remitted to the Registrar for referral to an AMS for purpose of assessment under the Table of Disabilities and also for the purpose of assessment of WPI.
72. I have determined Mr Turley suffered injury to his knees, right ankle, hips, low back, shoulders and neck arising out of or during the course of his employment with the second respondent, such injuries being in the nature of an aggravation, acceleration, exacerbation or deterioration of his pre-existing conditions. The parties agreed Mr Turley's claim against the second respondent for permanent impairment compensation resulting from injuries he sustained to his knees, right ankle, hips, low back, shoulders and neck as determined by me in Mr Turley's favour, with deemed date of injury of 25 September 2019 (being the date of Mr Turley's claim for permanent impairment compensation as against the second respondent) is to be remitted to the Registrar for referral to an AMS for purpose of assessment of WPI.



## SUMMARY

73. Mr Turley sustained injury in an incident occurring on 6 December 1992 while working with the first respondent, being injury sustained to both his knees and his right ankle together with consequential injury to his low back and right hip.
74. Mr Turley suffered injury to his knees, right ankle, hips, low back, shoulders and neck arising out of or during the course of his employment with the second respondent, such injuries being in the nature of an aggravation, acceleration, exacerbation or deterioration of his pre-existing conditions, with deemed date of injury of 20 September 2013.
75. Mr Turley's claim against the first respondent for permanent impairment compensation resulting from the injuries he sustained on 6 December 1992 to his right leg, left leg and back is to be remitted to the Registrar for referral to an AMS for purpose of assessment under the Table of Disabilities and also for the purpose of assessment of WPI. Assessment under the Table of Disabilities is to be with reference to percentage loss of right leg at or above the knee, percentage loss of left leg at or above the knee, and percentage permanent impairment of the back. Assessment of WPI is to be with reference to right lower extremity, left lower extremity and lumbar spine.
76. Mr Turley's claim against the second respondent for permanent impairment compensation resulting from injuries he sustained to his neck, back, left shoulder, left knee, right shoulder and right knee, ankle and hip as determined by me in Mr Turley's favour, with deemed date of injury of 25 September 2019 (being the date of Mr Turley's claim for permanent impairment compensation as against the second respondent) is to be remitted to the Registrar for referral to an AMS for purpose of assessment of WPI. Assessment of WPI is to be reference to the cervical spine, lumbar spine, left upper extremity, left lower extremity, right upper extremity and right lower extremity.
77. Mr Turley's claim for weekly benefits as against both respondents is stood over until such time as the MAC has issued and the appeal period for that MAC has passed.
78. Mr Turley's claim for medical or related treatment as against the second respondent is stood over until such time as the MAC has issued and the appeal period for that MAC has passed.