

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6584/20
Applicant: Anthony Mark Perin
Respondent: Concrete Pty Limited
Date of Determination: 8 February 2021
Citation No: [2021] NSWCC 43

The Commission determines:

1. Award for the respondent in the interests of GIO and Boral in respect of injury to the cervical spine.
2. Award for the respondent in the interests of GIO and Boral in respect of condition in the cervical spine consequent upon injury to the left upper extremity (shoulder) and right upper extremity (shoulder) on 11 March 2015.
3. The applicant sustained injury in accordance with s 4(a) of the *Workers Compensation Act 1987* to his left upper extremity (shoulder) and right upper extremity (shoulder) on 11 March 2015 within the period or risk of GIO.
4. The injury of 11 March 2015 caused aggravation of the left and right rotator cuff tears in the applicant's shoulders.
5. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment as a result of injury to the left upper extremity (shoulder) and right upper extremity (shoulder) on 11 March 2015 and scarring.
6. The documents to be referred to the Approved Medical Specialist are:
 - (a) Application to Resolve a Dispute and attachments;
 - (b) Reply of Concrete Pty Limited and attachments;
 - (c) Reply of Boral (lodged as a late document) and attachments, and
 - (d) this Certificate of Determination and Statement of Reasons.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Anthony Mark Perin (the applicant/Mr Perin) seeks lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of injury to his left and right upper extremities (shoulders) and cervical spine as a result of injury arising out of or in the course of his employment as concrete tester with Concrete Pty Ltd (Concrete/the respondent). The respondent employed the applicant from 1998 until 31 July 2019, when Mr Perin was terminated due to redundancy.
2. The respondent was insured by AAI Limited t/as GIO (GIO) until 30 September 2017. From 1 October 2017, Boral Limited (Boral), a self-insurer, assumed the respondent's workers compensation liability.
3. The applicant described his duties as a concrete tester as involving him in lifting heavy concrete moulds, lifting and carrying heavy items to and from a work vehicle and over long distances, and repeated heavy lifting of items above shoulder height or below knee height.
4. Whilst carrying out such duties in about September 2009, the applicant claims that he noticed gradual onset of pain in his left shoulder. He consulted his general practitioner who diagnosed tendonitis and was referred for physiotherapy. Symptoms settled over several weeks. The applicant says that he reported the injury to his employer but did not lodge a workers compensation claim or take time off work.
5. On about 3 September 2013, the applicant consulted his general practitioner reporting pain in his right shoulder and difficulty lifting his arm, which he says had developed gradually at work over several weeks. He was referred for an ultrasound and underwent physiotherapy treatment.
6. From October 2013, the applicant reported pain in his left shoulder which he says had developed gradually over several weeks at work. From this time until 11 March 2015 the applicant underwent treatment for symptoms in his left shoulder and right shoulder which he said settled with such treatment.
7. On 11 March 2015, Mr Perin was lifting a shrinkage mould weighing approximately 20 kg from the ground to the table-top of a work utility vehicle when he experienced sudden severe pain in both shoulders. The incident was reported to the respondent and a claim was lodged with GIO which accepted liability.
8. The applicant says he consulted his general practitioner, Dr Jill Richardson who referred him to Dr Vera Kinzel, orthopaedic surgeon. Dr Kinzel recommended surgery at that time which the applicant declined because of the impending birth of his son.
9. Dr Kinzel operated on the applicant's left shoulder on 13 October 2017 and the right shoulder on 18 May 2018. GIO accepted liability for the cost of these surgical interventions.
10. After the injury, the applicant returned to work on suitable duties, normal hours. Following the surgery on the left and right shoulders, after a period of time off work in each case, the applicant returned to work on suitable duties for reduced hours. He gradually upgraded his capacity and by about February 2019 was performing suitable duties, normal hours.
11. After the termination of his employment by the respondent on 31 July 2019, Mr Perin participated in a work trial with another employer as a concrete field technician. He was however unable to perform the repetitive heavy lifting that the position required. He has been unable to secure suitable alternative employment.

12. On 24 September 2019, the applicant underwent an independent medical examination by Dr J G Bodel, orthopaedic surgeon, at the request of his solicitor. In a report of that date¹ Dr Bodel diagnosed that the applicant had sustained an injury to both shoulders on 11 March 2015 when he was lifting a shrinkage mould from the ground up on to the tabletop of his work utility. He noted that Mr Perin had done that manoeuvre many times before but that on that particular occasion, he felt pain in both shoulders. Dr Bodel noted the subsequent treatment of the applicant, including surgery, and also expressed the opinion that he had suffered rotator cuff pathology in both shoulders and a soft tissue injury to the cervical spine "...with disc pathology in the cervical region as a consequence of the nature and conditions of his work as a concrete tester." In a separate report of the same date², Dr Bodel assessed whole person impairment (WPI) as a result of injury to the cervical spine of 7%, as a result of injury to the left shoulder of 10% and the right shoulder of 4%. Scarring was assessed at 1% resulting in a final level of WPI of 20%.
13. On the basis of Dr Bodel's reports dated 24 September 2019 the applicant's solicitor forwarded a letter of claim to GIO dated 1 November 2019 claiming \$30,250 compensation for permanent impairment on behalf of the applicant pursuant to s 66 of the 1987 Act³.
14. The applicant was independently medically examined on behalf of Concrete by Dr Paul Hitchen, orthopaedic surgeon, on 27 November 2019. In a report dated 28 November 2019⁴ Dr Hitchen expressed the belief that Mr Perin did not sustain an objective significant injury to either shoulder on 15 March 2015. He also opined that he did not continue to suffer from the effects of injury on that date. On 17 January 2020 GIO issued to the applicant a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)⁵ in which it denied liability for the applicant's claim for lump sum compensation, and put in issue the nature and extent of injuries to the left and right shoulder and that Mr Perin had suffered a work related injury to his cervical spine.
15. Dr Bodel issued a supplementary report dated 13 March 2020⁶ in which he disagreed with the opinion and assessment of Dr Hitchen. This report together with his earlier reports, a permanent impairment claim form dated 31 October 2019⁷ and the applicant's statement dated 23 April 2020⁸ were forwarded to "Boral Limited Workers Compensation Insurance" on 9 June 2020 with a claim for lump sum compensation in respect of 20% WPI assessed by Dr Bodel⁹.
16. On 5 August 2020, the applicant was independently medically assessed by Dr Andrew Keller, occupational physician, at the request of the solicitor for Boral. Dr Keller issued a report dated 7 August 2020 and supplementary reports dated 24 and 28 September 2020¹⁰. Dr Keller expressed the opinion that it was likely that the applicant suffered workplace aggravation of left and right rotator cuff tears on 15 March 2015. He assessed 0% WPI in respect of injury to the right shoulder and 10% in respect of injury to the left shoulder. He noted that Mr Perin had significant pre-existing shoulder complaints and suffered a significant incident in March 2015 aggravating his condition. From the information available to him, Dr Keller attributed one half of the WPI in the applicant's left shoulder to the work incident (of 11 March 2015) and half to pre-existing shoulder complaints. Dr Keller also said that the nature of the applicant's work after March 2015 had added little to his shoulder problems or treatment needs.

¹ Application to Resolve a Dispute (the Application) p 34.

² Application p 40.

³ Application p 30.

⁴ Reply lodged by Concrete (Reply of Concrete) p 2.

⁵ Application p 12.

⁶ Application p 43.

⁷ Application p 27.

⁸ Application p 3.

⁹ Application p 31.

¹⁰ Reply lodged by Boral (Reply of Boral) pp 18, 25 & 30.

17. On 2 October 2020, Boral issued to the applicant a s 78 notice denying liability for the applicant's claim¹¹.

ISSUES FOR DETERMINATION

18. The parties agree that the following issues remain in dispute:

- (a) Did the applicant suffer injury to his cervical spine as a result of the 'nature and conditions' of his employment with the respondent?
- (b) Did the applicant suffer a condition in his cervical spine consequent upon injury to his left and right upper extremities (shoulders) on 15 March 2015?
- (c) Is the applicant entitled to rely on a deemed date of injury of 31 July 2019 in respect of the applicant's claim for injury to the cervical spine?
- (d) Did the applicant suffer injury to his left and right shoulders as a result of the 'nature and conditions' of his employment with the respondent?
- (e) Was either GIO or Boral the last insurer on risk in respect of the injuries claimed by the applicant to his cervical spine and left and right shoulders as a result of the 'nature and conditions' of his employment?
- (f) Having regard to the date of injury nominated by the applicant in respect of injury to the cervical spine, is it necessary that there be a finding of injury to the cervical spine?
- (g) What injury/injuries should be referred to an Approved Medical Specialist (AMS) for assessment of WPI?

PROCEDURE BEFORE THE COMMISSION

19. 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.

20. The parties attended a conciliation/arbitration hearing on 25 January 2021 conducted via telephone conference. Mr G Niven of counsel appeared for the applicant instructed by Ms A Barlow. The applicant attended on a separate line. Mr P Barnes of counsel appeared for Concrete instructed by Ms E Scott. Mr D Saul of counsel appeared for Boral instructed by Mr C Tomkins.

EVIDENCE

Documentary evidence

21. The following documents were in evidence before the Commission and taken into account in making this determination:

- (a) the Application and attached documents;
- (b) Reply of Concrete and attachments, and
- (c) Reply of Boral (lodged as a late document) and attachments.

¹¹ Reply of Boral p 4.

Oral evidence

22. There was no application to adduce oral evidence or to cross-examine the applicant.

SUBMISSIONS

23. The submissions of the parties were recorded and are available on the transcript (T). I will not repeat them in full. In summary, they are as follows.

Applicant

24. The applicant bases his case "...in their entirety essentially on the reports of Dr Bodel,"¹² and the doctor's reliance on the nature and conditions of his employment with the respondent, involving heavy lifting, together with the frank injury to his bilateral shoulders conceded by Concite. These conditions and frank injury resulted in substantial impairment to his shoulders. The applicant notes that Concite disputes injury to the cervical spine and scarring.
25. The applicant refers to Dr Bodel's report of 13 March 2020 in which the doctor comments on the report of Dr Hitchen dated 28 November 2019. The applicant emphasises the heavy nature of the work in which he was involved in the course of his duties with the respondent commencing 20 years previously, namely heavy labouring orientated work, selecting hardened concrete samples and taking them for testing. Dr Bodel refers to the gradual onset of pain which had been notified to the employer and the further significant event on 11 March 2015. Dr Bodel expresses the view that the applicant's bilateral rotator cuff pathology, which had an underlying constitutional basis, was aggravated, accelerated and exacerbated over many years by the heavy nature of Mr Perin's work for the respondent. He says that the specific event of 11 March 2015 probably caused some additional damage to the rotator cuff in addition to the existing disease process.
26. The applicant submits that the Commission would be comfortably satisfied that the assessment of Dr Bodel is entirely in keeping with the applicant's statement and that the Commission should make awards in accordance with the doctor's assessments of WPI.
27. For the purpose of a referral of the matter to an AMS for assessment of WPI, the applicant submits that the date of injury specified for injury to both shoulders is 11 March 2015 and for injury to the cervical spine, 31 July 2019. This submission was forthcoming from counsel for the applicant after he had conferred with his client during a short break in the hearing.

Respondent - Concite

28. Concite submits that, noting the decisions made by the applicant in respect of injury, it is clear that the applicant is not now able to aggregate WPIs due to different dates of injury, and the "first respondent, GIO,"¹³ must deal with the injury to the cervical spine alleged by the applicant.
29. GIO submits that the pain in the applicant's neck of which he complains in [30] of his statement dated 23 April 2020¹⁴ did not occur until a considerable time after Mr Perin ceased work. The MRI scan of the neck was not carried out until 24 March 2020¹⁵. There was no evidence given by the applicant in regarding the cervical spine by way of injury or disease alleged, or frank incident, other than referred pain. There is no evidence from the applicant in respect of consequential loss in the neck recorded in Dr Bodel's reports. There is no history of prior complaints by Mr Perin concerning overuse of the neck or any other condition relating

¹² T p 4.10.

¹³ T p 16.30.

¹⁴ Application p 6.

¹⁵ Application p 141.

to the neck. When Dr Bodel records current complaints in his report dated 24 September 2019, there is no reference to the cervical spine¹⁶. For this reason, the assessment by Dr Bodel that that applicant has sustained 7% WPI as a result of injury to the cervical spine lacks credibility.

30. GIO notes that while Dr Bodel in his report dated 16 June 2020 refers to the MRI scan of the cervical spine and the clinical assessment of Dr Mobbs (reports dated 27 May 2020 and 24 September 2020¹⁷), the lack of any opinion or finding in respect of a causal nexus between the applicant's condition in his cervical spine and his employment would cause the Commission to reject the opinion of the doctor.
31. GIO submits that there is no reference to neck pain in the clinical notes produced by Mittagong HealthCare Centre covering the period from June 2009 until August 2017¹⁸. Similarly there is no reference to neck pain or referred pain in the shoulders in the reports of Dr Kinzel, the treating orthopaedic surgeon, from 21 May 2015 to 4 October 2018¹⁹. There was no such reference in the reports of Dr Goldberg (an orthopaedic surgeon from whom the applicant sought a second opinion) dated 13 November 2018, 24 January 2019 and 25 February 2019²⁰.
32. GIO relies on the report of Dr Hitchen dated 28 November 2019 in respect of the claim of injury to the cervical spine. Dr Hitchen notes that there is no record of neck injury or complaints of neck pain despite very regular attendances by the applicant with his general practitioner around the time of his injury until the end of the records provided in September 2017. There is no temporal or other reference to neck injury during the period that GIO was on risk for the respondent. Dr Hitchen provides an assessment of 0% WPI (diagnosis-related estimate 'DRE' 1) in respect of injury to the neck.
33. GIO notes that while there is reference to complaints of pain in both shoulders recorded in the reports of Dr A Keller dated 7 August 2020, 24 September 2020 and 28 August 2020 attached to the Reply of Boral, there is no reference to complaints of neck pain. GIO also refers to the clinical notes of Dr Jill Richardson (Wintergarden Medical Practice) attached to the Reply of Boral²¹, and the entry of 28 August 2019 when there is reference for the first time to decrease in range of motion in the cervical spine²².
34. The WorkCover certificates of capacity also attached to the Reply of Boral do not contain any reference to any neck injury or complaint (according to GIO) until about June 2020²³.
35. GIO submits that there should be an award in favour of the respondent in the interests of GIO in respect of any injury to the cervical spine, or condition in the cervical spine consequent upon injury to the shoulders.

Respondent - Boral

36. Boral supports the submissions of GIO, and notes that a result of the dates of injury nominated by the applicant, injury to the shoulders is squarely within the period of risk of the GIO, and Boral has no liability for such injury. Therefore the only allegation of injury against Boral is in respect of the cervical spine due to the nature and conditions of work. Further, because of the separate dates of injury for the shoulders of 11 March 2015 and the cervical spine of 31 July 2019, there can be no aggregation of assessments of WPI for the purpose of an award of lump sum compensation pursuant to s 66 of the 1987 Act.

¹⁶ Application p 36.

¹⁷ Application pp 142 & 146.

¹⁸ Application pp 48-64.

¹⁹ Application pp 110-132.

²⁰ Application pp136-139.

²¹ Reply of Boral p 32.

²² Reply of Boral p 38.

²³ T p 19.05.

37. In this circumstance, Boral submits that the applicant's claim in respect of injury to the cervical spine fails completely because of the assessment of 7% WPI by Dr Bodel. This is below the threshold of 10% required by s 66 and for this reason alone, before there is any consideration of liability of the respondent for injury to the cervical spine, no claim can be pursued for lump sum compensation as a result of any such injury. There is simply no basis for any such claim.
38. By way of ancillary submissions, Boral adopts the submissions of GIO in respect of the injury claimed by the applicant to the cervical spine. Boral submits that Dr Bodel's report is deficient in so far as the doctor attributes any WPI in respect of the cervical spine to a consequential condition that is not pleaded, and that condition can only arise from the injury of 11 March 2015. That is not one that Boral can respond to in respect of the claim, nor is it one that is being alleged. Any proportion of the 7% WPI that Dr Bodel has attributed to the consequential condition lowers the percentage even further in respect of the primary injury to the cervical spine alleged to have arisen as a result of the nature and conditions of employment.
39. Boral submits that "...there is no date in law that (the Commission) can refer to an AMS, even if (the Commission) were minded to do so for the cervical spine, that can be attributed to the 31st July 2019."²⁴ The date nominated by the applicant, 31 July 2019, is the last date of employment of the applicant by the respondent but having regard to ss 15 and 16 of the 1987 Act this is not a deemed date of injury.
40. Boral submits that there is no evidence from the applicant of any problem with his neck during the course of his employment with the respondent, during both the periods of risk of GIO and Boral, up to and including 31 July 2019. The first entry of complaint of neck pain appears on 28 August 2019, and some restriction of rotation noted on 4 September 2019, both of which dates post-date the applicant's employment with the respondent. Having regard to the applicant's evidence in his statement, these two dates occurred when the applicant was employed for a short time with a subsequent employer called Construction Sciences. This employment seemed to involve complaints of heavy lifting and complaints of neck pain seemed to follow thereafter. Dr Bodel does not record any history of that employment; that history does not appear to have been supplied to the doctor on the occasion on which the applicant was referred to him.
41. Although Boral submits that it does not have any liability for compensation for the applicant's bilateral shoulder injury, it notes that Dr Bodel does not record any history of shoulder problems that pre-dated the frank injury on 11 March 2015, although these are recorded by Dr Hitchen. These earlier shoulder problems are quite well documented, noting that there were scans and ultrasounds of both shoulders in existence.
42. Boral submits that the Commission can place no weight on Dr Bodel's opinion about the nature and conditions of the applicant's employment giving rise to injury. Neither Dr Hitchen nor Dr Keller supports such a claim. Boral submits that it is not enough to say that a person's work is capable of giving rise to injury. The onus is on an applicant for compensation to establish his employment was in the kind of work that was the main contributing factor to the aggravation acceleration etcetera of a disease. In support of this submissions Boral relies on what was said by Keating P (as he then was) in *Mannie v Bauer Media Pty Ltd*²⁵.

²⁴ T p 22.05.

²⁵ NSWCCPD 47 at [87].

Applicant in response

43. In response to the submissions of GIO and Boral, the applicant refers to improvement in the condition in his shoulders after surgery, specifically from [29] onwards in his statement dated 23 April 2020, the development of radicular type pain in his neck which referred to the left shoulder, and the continuance of pain and restriction of mobility in the left shoulder and neck. This is the symptomatology referred to by Dr Bodel in his report and assessment of the neck. The temporal complaints of neck pain "...seeded in the basis of the applicant's neck problems, are related to his left shoulder injury,..."²⁶
44. The applicant submits that, notwithstanding the lack of prior complaint of neck pain or problems, using common sense it would be expected that somebody who is involved in repeated heavy lifting over a period of time, resulting in bilateral shoulder issues and ultimately neck problems as a consequence of an operation which was carried out in relation to his left shoulder would cause that person to have symptomatology in his neck.
45. The applicant refers to and relies upon the findings of Dr Mobbs who examined the applicant on 27 May and 24 September 2020 to support his claim of a condition in the neck consequent upon the injury to the left shoulder. The neck injury or condition is clearly consequent upon the left shoulder injury and surgery thereon.
46. The applicant submits that the Commission would be quite comfortable in relying on what is clearly a lengthy period of the applicant's heavy labouring work throughout the whole period of his employment with the respondent, and that there would be no difficulty in aggregating those complaints of injury in the referral to an AMS.

FINDINGS AND REASONS

Injury to the cervical spine

47. The applicant specified details of his injury in the Application in the following terms:

"Frank injury to left and right shoulder on 11 March 2015 whilst lifting a shrinkage mold [sic] from the back of a table-top truck. Further and in the alternative, the application injured his left and right shoulder and cervical spine as a result of the nature and conditions of his work and relies upon the disease provisions for the deemed date of injury being the last day of employment - 31 July 2019."
48. The applicant's case as finally presented at the arbitration hearing is that the date in respect of injury to both shoulders is 11 March 2015 and for injury to the cervical spine, 31 July 2019. The condition in the cervical spine is alleged to be consequent upon injury to both shoulders on 11 March 2015, and surgery on the left shoulder²⁷. GIO, as insurer of the respondent on risk until 30 September 2017, therefore addresses the issue of injury to, or consequential condition in, the cervical spine in detail. Boral, on risk from 1 October 2017, adopts the submissions of GIO notwithstanding the observation that if the condition in the cervical spine was consequent upon injury to the applicant's shoulders on 11 March 2015, it is absolved of any liability in respect of the applicant's cervical spine.

²⁶ T p 26.10.

²⁷ T p 26.20 – 27.30.

49. Boral also submits that, having regard to ss 15 and 16 of the 1987 Act, the date of injury relied upon by the applicant in respect of injury to the cervical spine as a result of the nature and conditions of the applicant's employment cannot be correct in law. These sections apply once a worker has shown that he or she has suffered an "injury" in accordance with s 4 of the 1987 Act. In the case of s 15, the worker must show that the injury was a disease injury contracted in the course of employment but only if the employment was the main contributing factor to contracting the disease. In the case of s 16, the worker must show that the injury was 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.
50. Section 15 states that if an injury is a disease which is of such nature as to be contracted by gradual process, the injury shall, for the purposes of the 1987 Act, be deemed to have happened:
- (a) at the time of the worker's death or incapacity, or
 - (b) if death or incapacity has not resulted from the injury – at the time that worker makes a claim for compensation with respect to the injury.
51. Section 16 states that if an injury consists in the aggravation etcetera of a disease, the injury shall for the purposes of the 1987 Act be deemed to have happened:
- (a) at the time of the worker's death or incapacity, or
 - (b) if death or incapacity has not resulted from the injury – at the time that worker makes a claim for compensation with respect to the injury.
52. In this case the applicant is not claiming weekly compensation, he is claiming compensation for permanent impairment. Neither ss 15 nor 16 therefore fix a date on which the impairment injury happened. There can be more than one date of injury²⁸, and in this case, if the applicant can show that he suffered an injury as defined in s 4(b)(i) or (ii) of the 1987 Act, the deemed date of injury is when he made his claim for compensation with respect to the injury. As noted above at [13], the first date on which the applicant made a claim for lump sum compensation was 1 November 2019.
53. I accept the submission of Boral that the date of injury of 31 July 2019, the last date of employment of the applicant by the respondent, cannot be correct.
54. GIO submits that the applicant neither suffered an injury to his cervical spine as a result of the nature and conditions of his employment, nor did he suffer a condition in his cervical spine consequent upon injury to both shoulders and surgery on the left shoulder. It submits that there should be an award in its favour in respect of injury to, or consequential condition in, the cervical spine²⁹.
55. At [30] in his statement the applicant gives evidence of developing radicular type pain in his neck which referred to the left shoulder. This was after the two lots of surgery carried out by Dr Kinzel on the left shoulder on 13 October 2017 and the right shoulder on 18 May 2018. Dr Kinzel's treating reports dated from 21 May 2015 to 23 May 2019 are in evidence. Dr Kinzel was dealing with the problems in Mr Perin's shoulders, however there is no reference in any of these reports to neck pain or problems with the cervical spine. The applicant saw Dr Jerome Goldberg, shoulder surgeon, for a second opinion in respect of his shoulder injuries on 13 November 2018 and 25 February 2019. In his reports dated

²⁸ *Stone v Stannard Brothers Launch Services Pty Ltd* (2004) 1 DDCR 701; [2004] NSWCA 277.

²⁹ T p 19.10.

13 November 2018, 24 January 2019 and 25 February 2019 Dr Goldberg makes no reference to any problems the applicant was experiencing with his neck. Similarly there is no reference to neck problems in the clinical notes of Mittagong HealthCare Centre over the period June 2009 until August 2017.

56. The applicant received treatment from doctors at the Wintergarden Medical Practice over the period from 2004 until, on the evidence, July 2020³⁰. The first reference to the cervical spine, decrease in range of motion, is in a note of a consultation with Dr Jill Richardson on 28 August 2019, two days after Mr Perin started a new position in Wollongong on 26 August 2019.
57. The applicant saw Dr Ralph Mobbs on 27 May 2020 presenting with bilateral shoulder pain, worse on the left side, with nerve pain radiating down his left arm. The most bothersome issue at that time was left sided shoulder and arm pain. Dr Mobbs requested an MRI scan of the cervical spine, carried out on 24 March 2020³¹ and saw Mr Perin again on 24 September 2020. He noted bulging discs at C4/5 and C5/6 with quite bad C5 radiculopathy and recommended non-surgical treatment. There is no reference in the reports of Dr Mobbs to any work related causation of the cervical spinal problems.
58. When the applicant saw Dr Bodel on 24 September 2019 he summarised Mr Perin's injuries as to both shoulders on 11 March 2015 and did not record any current complaint in respect of the cervical spine. On examination Dr Bodel did record of the applicant:

"He has tenderness in the trapezius muscles at the base of the neck on the left side and a reduced range of neck flexion, extension and rotation in all directions. This is most restricted on rotation to the left. He has asymmetry of neck movement."

When giving details of the injuries sustained, Dr Bodel said:

"This gentleman suffered rotator cuff pathology in both shoulders and a soft tissue injury to the cervical spine with disc pathology in the cervical region as a consequence of the nature and conditions of his work as a concrete tester."

59. In his report dated 13 March 2020 Dr Bodel said:

"I am also satisfied that he does have a consequential condition in the neck and he has assessable impairment in the neck because of the clinical findings seen here today."

Dr Bodel assessed the applicant as having sustained 7% WPI as a result of injury to the cervical spine. He justified his DRE Cervical Category II rating by saying that a plain x-ray would probably show some degenerative change and the MRI may well show significant disc pathology which would verify such rating.

60. When Dr Hitchen examined the applicant on 27 November 2019 he recorded that the applicant in recent times had also suffered from twinges of neck pain radiating towards the left trapezial region, that he had no radicular symptoms in his left arm and had no tests or treatment for his neck. Examination of the neck revealed a range of motion to 50% normal in all directions. Dr Hitchen noted that there was no record of neck injury or complaints of neck pain despite very regular attendances with the general practitioner around the time of injury up until the end of records provided in September 2017. He found no record of workplace injury to the neck. He assessed the neck at DRE Cervical Category I (Table 15-5 AMA V) giving 0% WPI.

³⁰ Reply of Boral p 32.

³¹ Application p 141.

61. When Dr Keller examined Mr Perin on 5 August 2020, he reported pain from the left shoulder radiating to the left side of the neck. On examination of the cervical spine, rotation to the left was limited to 60 degrees and movements were otherwise normal. In his File Review report dated 24 September 2020 Dr Keller recorded no history of any neck injury attributable to the employment incident. Dr Keller was here referring to the incident of 11 March 2015, referred to earlier in the report where he expressed the opinion that it is likely that Mr Perin suffered a workplace aggravation of left and right rotator cuff tears on that day.
62. In my view the applicant has failed to discharge the onus of proof on him to show that he suffered an injury to his cervical spine arising out of or in the course of his employment with the respondent, or a condition in the cervical spine consequent upon injury to the left and right shoulder. Dr Bodel is the only doctor to relate an injury to or condition in the cervical spine to Mr Perin's employment, notwithstanding his failure to record any current complaints in respect of the neck when he examined Mr Perin on 24 September 2019 or provide any reason that the condition in the neck was consequent upon injury to the applicant's shoulders. He did find a reduced range of neck flexion, extension and rotation in all directions, most restricted to the left, a finding confirmed to some extent by other doctors who examined the applicant. However he does not causally link the applicant's neck problems to his employment apart from saying that the applicant has a soft tissue injury to the cervical spine with disc pathology in the cervical region as a consequence of the nature and conditions of Mr Perin's work as a concrete tester.
63. The applicant in his evidence first records the development of radicular type pain in his neck referred to the left shoulder after the two lots of surgery carried out by Dr Kinzel. When the applicant returned to work after time off following each surgery, he was not engaged in heavy work, but engaged in suitable duties, eventually returning to normal hours performing these duties by about February 2019. These continued until his redundancy on 31 July 2109.
64. The injury to both shoulders on 11 March 2015 occurred when Mr Perin was lifting a shrinkage mould weighing about 20 kg from the ground to the table-top tray of the work utility vehicle. He experienced sudden severe pain in both shoulders. He finished his shift without difficulty and reported the injury to his employer. The Early Notification Form dated 11 March 2015 in which the applicant reported the injury³² confirms the manner in which Mr Perin says that he injured both shoulders. The applicant presented to Dr Nathan Cooney of the Wintergarden Medical Centre on 28 April 2015 complaining of ongoing left shoulder pain³³. He did not complain of any problem with his neck until he consulted Dr Jill Richardson in the same practice on 28 August 2019.
65. I do not accept the applicant's submissions referred to in [44]-[46] above. The applicant clearly, reliant on the opinion of Dr Bodel, asserts that he suffered injury to, or condition in, the cervical spine consequent upon injury to the left and right shoulders on 11 March 2015.
66. There will be an award in favour of the respondent in the interests of GIO in respect of the applicant's claim for injury to the cervical spine and for a condition in the cervical spine consequent upon injury the applicant's shoulders on 11 March 2015.
67. There will be an award for the respondent in the interests of Boral in respect of injury to the cervical spine. Boral cannot be liable for any condition in the cervical spine claimed to be consequent upon injury to the applicant's shoulders on 11 March 2015. There will be an award in favour of the respondent in the interests of Boral for a condition in the cervical spine consequent upon injury the applicant's shoulders on 11 March 2015.

³² Application p 8.

³³ Reply of Boral p 51.

68. I note the submissions of Boral referred to at [38]-[39] above. As the applicant relies on a separate date of injury in respect of injury to the cervical spine (albeit that I have found that this is not a correct date of injury in the circumstances of the case) and having regard to the assessment of Dr Bodel of 7% WPI in respect of injury to the cervical spine, I agree that in any event there is nothing to refer to the AMS in respect of such injury. I have however made a finding in favour of Boral in respect of injury to the cervical spine.

Injury to the left and right shoulders

69. In his statement the applicant sets out his pre-accident medical history at [6]-[20]³⁴. In summary it is as follows:

- (a) in about September 2009 he noticed gradual onset of pain in his left shoulder whilst at work, aggravated by his usual work duties. He consulted his general practitioner, was diagnosed with rotator cuff tendinitis and referred for physiotherapy. His symptoms settled over several weeks. He reported the injury to his employer but did not lodge a workers compensation claim;
- (b) in early 2010, he noticed gradual onset of pain in his right elbow whilst at work;
- (c) in about May 2010, he consulted his general practitioner and was referred for an ultrasound which revealed lateral epicondylitis. A cortisone injection provided temporary pain relief and symptoms settled after several months. The injury was reported to the employer, but no workers compensation claim was lodged nor was time off work taken;
- (d) in September 2013, Mr Perin reported pain in his right shoulder to his general practitioner which had developed gradually over several weeks at work. He was referred for an ultrasound and was referred for physiotherapy which he undertook at his own expense;
- (e) in October 2013, he returned to his doctor reporting pain in his left shoulder. He had an ultrasound guided injection in the left subacromial bursa which provided excellent pain relief and symptoms settled. Later that month a similar injection into the right subacromial bursa provided excellent pain relief and the symptoms settled;
- (f) in August 2014, the applicant reported pain in his left shoulder to the Mittagong Healthcare Centre, and was prescribed Mobic, and
- (g) in December 2014, he returned to that Centre reporting pain in his left shoulder and was sent for an ultrasound. He was referred for a cortisone injection, after which he reported that his shoulder was feeling much better.

70. The attendances of the applicant on his general practitioners referred to above are corroborated by the clinical notes of Mittagong HealthCare Centre and Wintergarden Medical Practice in evidence.

³⁴ Application p 3.

71. The accident the subject of the current proceedings occurred on 11 March 2105. Mr Perin experienced sudden severe pain in both shoulders and said he sought treatment from Dr Jill Richardson at Wintergarden Medical Centre. He underwent an MRI scan of both shoulders. When referred to orthopaedic surgeon Dr Vera Kinzel, he was advised to undergo a rotator cuff reconstruction. He chose not to have it at that time because of the impending birth of his son. The applicant returned to see Dr Kinzel in September 2016 and underwent surgery on his left shoulder on 13 October 2017 and right shoulder on 18 May 2018, funded by GIO.
72. The Early Notification Form dated 11 March 2015 is in evidence³⁵. It is signed by Mr Perin and describes injury to left and right shoulders as occurring on 11 March 2015 while the applicant was lifting a concrete shrinkage mould and cylinders onto a ute tray.
73. The reports of Dr Kinzel are in evidence³⁶. In her initial report dated 21 May 2015, the doctor refers to the commencement of problems with the left shoulder "...a few months ago whilst trying to do overhead activities at work" and said that the applicant's presentation was directly related to manual work in keeping with rotator cuff damage. He was sent for an MRI of both shoulders, which Dr Andrew Leicester (in the same practice as Dr Kinzel) confirmed in a report dated 18 June 2015, a full thickness tear of his supraspinatus on the left with a 1 cm dimension and a slightly smaller one on the right. The doctor noted that the applicant was a fairly young patient to have a full thickness rotator cuff tear and would require surgery to return him to full working capacity.
74. On 31 August 2017, Dr Kinzel sought approval of the insurer to the proposed surgery and in due course it was carried out to both shoulders as indicated above.
75. On 30 August 2018, Dr Kinzel reported to Dr Richardson that the applicant had re-torn his left rotator cuff repair and proposed further surgery. After obtaining a second opinion from Dr Goldberg, Mr Perin decided not to proceed with this but continued with non-operative treatment. However, GIO did on 6 September 2018 forward to Dr Kinzel a Surgery Questionnaire³⁷ to which the doctor responded on 4 October 2018. When asked to indicate whether the applicant's employment with the respondent was a substantial contributing factor to the need for surgery, Dr Kinzel replied:
- "Yes, the initial injury was caused whilst lifting a shrinkage mould during work hours. The weight place [sic] substantial strain on the rotator cuff causing a tear of the supraspinatus tendon."
76. This opinion is consistent with that of Dr Keller who reported to the solicitor for Boral on 24 September 2020 that (referring to the specific incident of 11 March 2015) "In my opinion, it is likely that (the applicant) suffered workplace aggravation of left and right rotator cuff tears." In his later report when asked to what extent he attributed his global impairment assessment to the workplace incident on 11 March 2015 he said:
- "Mr Perin had significant pre-existing shoulder complaints. He suffered a significant incident in March 2015 aggravating (making worse) his condition.
- From the information available to me, the best guess of attribution I can make would be half to the work incident and half to his pre-existing shoulder complaints. There is insufficient information available to be more specific than this."
- The doctor also said that in his opinion, the nature of the work after the March 2015 incident had added little to the applicant's shoulder problems or treatment needs.

³⁵ Application p 8.

³⁶ Application pp 110-132.

³⁷ Application p 132.

77. The past medical history recorded by Dr Bodel in his principal report dated 24 September 2019 is of the applicant being "...otherwise quite well and not being treated for other illnesses." When referring to previous claims he did record a back injury in 1993 for which Mr Perin had been off work briefly. The "Current Complaints" list problems with the left shoulder and a reasonable function in the region of the right shoulder. Later the doctor noted continuing disabilities as including ongoing pain and stiffness in the neck. Dr Bodel did note under occupational history in his report that the applicant had to take samples of concrete which were collected on large industrial concrete pours, and that the hardened concrete samples were then taken for testing. The work was always very physical and required a lot of driving. Dr Bodel then goes on to give the history relating to the injury on 11 March 2015 which is uncontroversial.

78. Dr Bodel said of the applicant:

"This gentleman suffered rotator cuff pathology in both shoulders and a soft tissue injury to the cervical spine with disc pathology in the cervical region as a consequence of the nature and conditions of his work as a concrete tester."

When asked for an opinion as to whether the applicant's employment was a substantial contributing factor to his injury, Dr Bodel said that "The work injury and the nature and conditions of work in general are a substantial contributing factor to his ongoing complaints." When asked to provide an opinion on whether the nature and conditions of employment could be said to be the main contributing factor in either causing, aggravating, accelerating, exacerbating or deteriorating a degenerative condition if the applicant was said to be suffering from such condition, Dr Bodel said:

"In part, the underlying pathology is a disease process of gradual onset which has been aggravated, accelerated, exacerbated and deteriorated by the nature and conditions of work in general."

79. Dr Hitchen's report dated 28 November 2019 contains a summary of relevant entries in the records of the applicant's general practitioner records from June 2009 onwards. These include reference to radiological investigations of the applicant's shoulders in September and October 2013 and an ultrasound on the left shoulder performed on 11 December 2014 requested by Dr Yousuf which Dr Hitchen said reported a full thickness tear of the supraspinatus with bursitis.³⁸ Later in the report Dr Hitchen describes this ultrasound as showing "...a high grade partial thickness or incipient a full thickness tear of the supraspinatus"³⁹. When faced with this history by Dr Hitchen, the applicant recalled, contrary to his earlier medical history given to the doctor, that he had been treated for bilateral shoulder pain on and off for the preceding couple of years but stated that his employer was aware of it and that the employer asked him not to put it through as compensation.

80. It appears from the letter to the applicant from the respondent dated 24 April 2009⁴⁰, in relation to the ability of Mr Perin to perform the inherent requirements of his role as a Tester and his ongoing employment with the respondent, that the respondent was aware of a diagnosis of left rotator cuff tendonitis in September 2009 and bilateral epicondylitis (tennis elbow) in September 2010. The next reference to injury in that letter is:

"March 2015

- You sustained bilateral rotator cuff tears, with 11 March 2015 stated as the date of injury."

³⁸ Reply of GIO p 4.

³⁹ Reply of GIO p 6.

⁴⁰ Application p 24.

81. Dr Hitchen expressed the opinion, based in his history, examination and review of documentation in his possession, that the applicant had a pre-existing problem with both shoulders, did not seek immediate medical attention after the alleged event in March 2015 and saw a surgeon some months later at which stage he already had an ultrasound performed prior to his work injury showing a rotator cuff tear.
82. In its s 78 notice dated 17 January 2020 GIO disputed the nature and extent of the applicant's left and right shoulder injuries sustained on 11 March 2015 in addition to putting in issue injury to the neck/cervical spine. In this regard, GIO took issue with the opinion of Dr Bodel that the applicant suffered rotator cuff pathology in both shoulders and a soft tissue injury to the cervical spine with disc pathology as a consequence of the nature and conditions of the applicant's work as a concrete tester.
83. In his report dated 13 March 2020 Dr Bodel said:
- "I am still satisfied that the specific event on 11 March 2015 has probably caused some additional damage to the rotator cuff in each shoulder as an additional frank injury on top of the disease process which is present in this circumstance. For those reasons, I disagree with the assessment given by Dr Hitchen."⁴¹
84. The records of two of the general practitioner medical practices visited by the applicant are in evidence. Attached to the Application are those of Mittagong HealthCare Centre which contain entries dated 9 and 15 December 2014⁴². On 9 December Dr Yousuf requested an ultrasound of the right shoulder ("u/s rt shoulder" [sic]). However an ultrasound of the left shoulder was carried out on 11 December 2014, and the report addressed to Dr Yousuf of that date⁴³ revealed a partial width, almost full thickness tear of the supraspinatus with associated bursitis. Dr Yousuf reviewed this ultrasound on 15 December 2014 (" u/s explained supraspinatus tear").
85. The other practice visited by the applicant was the Wintergarden Medical Practice, the clinical notes of which are attached to the Reply of Boral. It appears from these notes that Mr Perin consulted Dr Nathan Cooney on 28 April 2015⁴⁴ in respect of a nodule noted on his lung in the previous year and also ongoing left shoulder pain. The treatment plan of Dr Cooney was to send a letter to Dr Andrew Leicester "for ortho review regarding shoulder".
86. The report of Dr Kinzel dated 21 May 2015 addressed to Dr Cooney, on the letterhead of Dr Leicester, is referred to above at [73]. In the subsequent report from Dr Leicester dated 18 June 2015, following an MRI scan (the report of which I have been unable to locate in the evidence), the doctor notes that the MRI confirms a full thickness tear of the supraspinatus on the left with a 1 cm dimension and a slightly smaller one on the right. Insurance approval was sought for rotator cuff reconstruction.
87. There is in evidence a report of an earlier left shoulder ultrasound dated 8 October 2013⁴⁵ and a right shoulder ultrasound dated 5 September 2013⁴⁶. The left shoulder ultrasound reveals no rotator cuff tear. The right shoulder ultrasound reveals a small tear of the teres minor tendons with the rest of the tendons of the rotator cuff shown as intact.
88. Whilst I acknowledge that it is for the medical experts to interpret radiological evidence, and also my understanding that an MRI scan is for the most part, a more accurate or precise radiological investigation than an ultrasound, it does appear from the reports of these investigations and the reports of Dr Kinzel and Dr Leicester that Mr Perin suffered a

⁴¹ Application p 44.

⁴² Application p 52.

⁴³ Application p 109.

⁴⁴ Reply of Boral p 51.

⁴⁵ Application p 106.

⁴⁶ Application p 105.

significant injury to both shoulders on 11 March 2015. His evidence is that he experienced sudden severe pain in both shoulders. He first consulted Dr Cooney at the Wintergarden Medical Centre on 28 April 2015 complaining of ongoing left shoulder pain and was referred to Dr Leicester. I think that as such, whilst the applicant did not seek immediate medical advice following 11 March 2015, that was a consultation that was reasonably contemporaneous to that event.

89. Both Dr Bodel and Dr Keller are of the opinion that Mr Perin suffered a significant injury to both shoulders on 11 March 2015. This accords with the opinion of the treating surgeon Dr Kinzel. I accept those opinions in preference to the opinion of Dr Hitchen that the applicant did not suffer injury to his left and right shoulder on 11 March 2015. The applicant suffered workplace aggravation of left and right rotator cuff tears on that date. This is the “additional damage to the rotator cuff in each shoulder” referred to by Dr Bodel. It was sufficient damage to result in the necessity for the bilateral rotator cuff surgery carried out by Dr Kinzel on the left shoulder 13 October 2017 and right shoulder on 18 May 2018. That was the consequence of the injury on 11 March 2015.
90. GIO accepts that the applicant suffered injury to both shoulders on 11 March 2015 but based on the opinion of Dr Hitchen, does not accept the severity of the injury alleged by the applicant. I do not accept that contention. It was the frank injury, rather than the ‘nature and conditions’ of the applicant’s employment that caused the aggravation of the left and right rotator cuff tears in the applicant’s shoulders. Notwithstanding its contention in the s 78 notice, GIO funded the cost of the surgery to the applicant’s left and right shoulders.
91. This finding is analogous to what the Court of Appeal said in *Rail Services Australia v Dimovski*⁴⁷, referred to by Roche DP in *New South Wales Police Force v Gurnhill*⁴⁸, namely:

“If there is an event that satisfies paragraph (a) of the definition of injury, and if that is the injury relied on and proved, the circumstance that it aggravated the disease and thus could have supported a case under paragraph (b)(ii) does not mean that this injury ‘consists in’ the aggravation of a disease. One strange result of the contrary view would be that a frank injury relied on and proved would, if it happened to aggravate a disease, and if incapacity did not commence immediately, be deemed under s.16(1)(a) to have happened at some time other than when it in fact happened.”

92. At [62] in *Gurnhill*, Roche DP said of this finding in *Dimovski*:

“His Honour’s reference to paragraph (a) of the definition of injury was a reference to a ‘personal injury’ in s 4(a) of the 1987 Act. The comments were in the context of the worker having suffered personal injuries (frank injury) to his back and/or knee in specific traumatic incidents, which also aggravated an underlying degenerative condition, namely, osteoarthritis. There is no comparison between the facts in *Dimovski* and the present matter.”

93. Roche DP explained at [253] in *Jaffarie v Quality Castings Pty Ltd*⁴⁹ that:

“In other words, an ‘incident’ (an injurious event) is only a mechanism for suffering an injury and is not itself a s 4 injury. The relevant ‘injury’ in s 4 is the pathology that has arisen out of or in the course of the employment.”

⁴⁷ [2004] NSWCA 267 at [68] (*Dimovski*).

⁴⁸ [2014] NSWCCPD 12 at [60]-[62] (*Gurnhill*).

⁴⁹ [2014] NSWCCPD 79.

The decision of Roche DP in that case was overturned by the Court of Appeal on grounds not relevant to this statement. I have explained what in my view is the pathology that has arisen as a result of the frank incident in which the applicant was involved on 11 March 2015.

94. The matter will be referred to an AMS for assessment of WPI as a result of injury to the left upper extremity (shoulder) and right upper extremity (shoulder) on 11 March 2015. All documents in evidence before the Commission and this Statement of Reasons and Certificate of Determination will be referred to the AMS.

Last Insurer on risk

95. In view of my findings in respect of injury to, or consequential condition in, the cervical spine and injury to the left and right shoulders, it is unnecessary to make a finding as to the last insurer on risk in respect of any nature and conditions claim.

SUMMARY

96. Award for the respondent in the interests of GIO and Boral in respect of injury to the cervical spine.
97. Award for the respondent in the interests of GIO and Boral in respect of condition in the cervical spine consequent upon injury to the left upper extremity (shoulder) and right upper extremity (shoulder) on 11 March 2015.
98. The applicant sustained injury in accordance with s 4(a) of the 1987 Act to his left upper extremity (shoulder) and right upper extremity (shoulder) on 11 March 2015 within the period of risk of GIO.
99. The injury of 11 March 2015 caused aggravation of the left and right rotator cuff tears in the applicant's shoulders.
100. The matter is remitted to the Registrar for referral to an AMS for assessment of WPI as a result of injury to the left upper extremity (shoulder) and right upper extremity (shoulder) on 11 March 2015 and scarring.
101. The documents to be referred to the AMS are:
- (a) the Application and attached documents;
 - (b) Reply of Concreate and attachments;
 - (c) Reply of Boral (lodged as a late document) and attachments, and
 - (d) this Certificate of Determination and Statement of Reasons.