WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5141/19**
Applicant: **Peter Sirijovski**
Respondent: **Bluescope Steel Limited**
Date of Determination: **15 January 2020**
CITATION: **[2020] NSWWCC 20**

The Commission determines:

1. Note that the applicant discontinues his claims for weekly benefits and medical expenses. Dispense with the requirement to lodge and serve a notice of discontinuance in respect of such claims.

2. Award for the respondent in respect of the claim for injury to the right lower limb and left lower limb on 16 April 2002.

3. Award for the respondent in respect of the claim for injury to the cervical spine on 30 April 2010 and 4 August 2010.

4. Award for the respondent in respect of the claim that the applicant suffered a condition in the right knee consequent upon injury to the left knee on 12 February 1999.

5. Award for the respondent in respect of the claim that the applicant has contracted in the course of his employment with the respondent from January 2002 to May 2013 any disease in the lumbar spine, the cervical spine, the right upper extremity (elbow and wrist) or the left upper extremity (elbow and wrist) which employment was the main contributing factor to contracting the disease.

6. Award for the respondent in respect of the claim that the applicant suffered in the course of his employment with the respondent from January 2002 to May 2013 aggravation, acceleration, exacerbation or deterioration of any disease in the lumbar spine, the cervical spine, the right upper extremity (elbow and wrist) or the left upper extremity (elbow and wrist) which employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of such disease.

7. The matter is remitted to the Registrar for referral to an Approved Medial Specialist for assessment of whole person impairment as a result of:

    (a) injury to the lumbar spine on:

        (i) 16 April 2002;
        (ii) 24 January 2005;
        (iii) 30 April 2010 and,
        (iv) 4 August 2010;

    (b) injury to the cervical spine on:

        (i) 24 January 2005, and
        (ii) 3 December 2008.

8. Each injury to the lumbar spine and cervical spine is to be assessed separately.

9. The documents to be referred to the Approved Medical Specialist are:

    (a) the Application to Resolve a Dispute and attached documents;
    (b) Reply and attached documents;
    (c) Application to Admit Late Documents dated 12 December 2019, 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.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Peter Sirijovski (the applicant/Mr Sirijovski) commenced work with Bluescope Steel Limited (the respondent) in about 1977 and worked there until his employment was terminated in May 2013. His work involved the heavy and repetitive lifting and moving of large pieces of scrap metal and other materials.

2. Over the course of that employment Mr Sirijovski suffered a number of injuries. He received lump sum compensation for three of these, namely:

    (a) left knee injury on or about 12 February 1992, when he hit his knee on the side of a scrap box, for which he received compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) for 10% permanent loss of efficient use of the left leg at or above the knee;

    (b) head injury on or about 14 March 1994 when he was struck behind the right ear by a piece of metal pipe, for which he received compensation pursuant to s 66 of the 1987 Act for 100% loss of sense of smell and taste, compensation for pain and suffering pursuant to s 67 of the 1987 Act plus weekly compensation, and

    (c) neck injury on or about 16 August 1999 when he was taking test pieces of steel off the test trolley, for which he received compensation pursuant to s 66 of the 1987 Act for 5% permanent impairment of the neck.

3. In addition to those injuries that applicant claims he suffered the following injuries:

    (a) injury to the back and lower limbs on or about 16 April 2002 when he slipped when walking down steps to his car after a shift;

    (b) injury to neck, back and shoulders on or about 24 January 2005 when he was using a crowbar to move scrap metal from the guillotine test pit area;

    (c) injury to the neck and shoulders on or about 3 December 2008 when he was using the controls on the plate/guillotine line;

    (d) injury to the neck and back on or about 30 April 2010 when removing scrap metal weighing between 5 and 25 kg from the floor into an industrial scrap bin;

    (e) injury to the neck and back on or about 4 August 2010 when operating a rotary end shear while sitting for a prolonged period on a seat which leant to one side;

    (f) injury to the left knee due to the nature and conditions of his employment, which originated with the left knee injury in 1992, and

    (g) injury to the right knee consequent upon injury to the left knee, as a result of over reliance on the right knee.

4. The applicant continued to work for the respondent after each of these injuries, often on normal duties, when he claims that he should have been on restricted duties. He says that he was pressured to return to normal duties, and that he wanted to keep his job. He goes on to describe in his statement dated 30 September 2019[1] the details of his work duties between 2002 and 2013. He says that at the time of his termination in May 2013 he had lost some feeling in the fingers of both hands, experienced weakness and stiffness in his shoulders, neck, back and legs, and had continuous pain in his lumbar spine which radiated down his legs.

5. Mr Sirijovski claims in Part 4 of the Application (registered 2 October 2019) that he suffered injury to the body parts claimed by him as a result of repeated stresses and "fatigue loading" on his cervical and lumbar spine "…including attrition injuries to this structure, the facet joints and also in chronic strain/sprain of the muscular ligamentous and fascial structures resulting in generalized degenerative changes." Additional "fatigue loading" is claimed to have placed strain on the musculoskeletal system of the upper body and lower limbs, particularly the joints. The applicant claims that the injury and disease was caused by, and/or aggravated, accelerated, exacerbated or deteriorated by his work duties.

6. Parts 5.1 and 5.3 of the Application contain claims for weekly benefits and medical expenses. However these claims were discontinued at the arbitration hearing, with the applicant electing to proceed with his claim for lump sum compensation only, particularised in Part 5.6 as a claim for compensation in respect of 27% whole person impairment (WPI) as a result of injury to the cervical spine, lumbar spine, left upper extremity and right upper extremity. The date of injury specified is "Numerous – nature and conditions".

7. The respondent had earlier issued to the applicant a notice dated 18 August 2017 pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)[2]. This was in response to the applicant's then claim for lump sum compensation for 31% WPI as a result of injury to the cervical spine, lumbar spine, left upper extremity, right upper extremity, left lower extremity and right lower extremity. The respondent denied injury and causation in relation to injury to the applicant's shoulders, elbows, wrists and right knee. It denied that the claimed consequential injury to the right knee was as a result of favouring the right side for weight bearing to minimise weight bearing on the left knee. It also denied that the characterisation and/or particularisation of injury as a single nature and conditions injury was permissible and/or reflective of the available evidence.

8. The respondent alleged that any assessment of WPI must be apportioned between the separate identifiable events and frank incidents which occurred in the course of the applicant's employment with it.

9. The respondent conceded in submissions that the only injuries that could be referred to an Approved Medical Specialist (AMS) for assessment are:

    (a) 16 April 2002 – back;
    (b) 24 January 2005 – back and neck;
    (c) 3 December 2008 – neck, and
    (d) 30 April 2010 – back.

10. This submission however overlooks the acknowledgement on the third page of the respondent's s 74 notice dated 18 August 2017 the applicant suffered an injury to his back in August 2010 when he was "…required to perform a sitting task at work"[3].

[1] Application to Resolve a Dispute (the Application) pp 13-14.
[2] Application p 30.
[3] Application p 32.

11. The applicant conceded that the date of injury referred to at [k) x.] in the "Injury description:" in Part 4 of the Application, 10 May 2010, was inserted in error and should be deleted. The applicant also sought to amend Part 5.6 of the Application to include reference to the left knee, and a condition in the right knee consequent upon injury to the left knee. These were assessed by the independent medical examiner retained by the applicant, Dr Medhat Guirgis in his report dated 28 October 2017[4], at 4% WPI for the left knee and 2% WPI for the right knee. The (deemed) date of injury originally nominated by the applicant for any referral of all injuries to an AMS was the date of the applicant's separation from his employment with the respondent, 10 May 2013.

12. The respondent did not oppose the amendment sought to Part 5.6 of the Application, and it was allowed. However, late in submissions the applicant amended the deemed date of injury to 27 February 2017, the date on which the applicant made his claim for compensation[5]. This further amendment, not opposed by the respondent, was in accordance with s 16(a)(ii) of the 1987 Act. The applicant had discontinued his claim for weekly benefits and conceded that there was no evidence of incapacity for work on the date of his separation from his employment with the respondent, 10 May 2013. The date of injury therefore had to be 27 February 2017.

ISSUES FOR DETERMINATION

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

    (a) Did the applicant suffer injury to his lower limbs on 16 April 2002 in addition to the conceded injury to the back?

    (b) Did the applicant suffer injury to his shoulders on 24 January 2005 in addition to the conceded injury to his back and neck on that day?

    (c) Did the applicant suffer injury to his shoulders on 3 December 2008 in addition to the conceded injury to his neck on that day?

    (d) Did the applicant suffer injury to his neck on 30 April 2010 in addition to the conceded injury to his back on that day?

    (e) Did the applicant suffer injury to his right upper extremity as a result of the "nature and conditions" of his employment with the respondent from January 2002 to May 2013?

    (f) Did the applicant suffer injury to his left upper extremity as a result of the "nature and conditions" of his employment with the respondent from January 2002 to May 2013?

    (g) Did the applicant suffer a condition in his right knee consequent upon injury to the left knee?

    (h) Has the applicant suffered injury to the body parts claimed by him to have been injured as a result of the "nature and conditions" of his employment with the respondent?

    (i) Has the applicant suffered aggravation, acceleration, exacerbation or deterioration in the course of his employment with the respondent of any disease, which employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease?

[4] Application p 43.
[5] Reply p 281.

(j) If the applicant's injury is classified as a disease injury, is the respondent the employer who last employed the applicant in employment that was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of such disease injury?

PROCEDURE BEFORE THE COMMISSION

14. 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.

15. The parties attended a conciliation conference/arbitration hearing on 18 December 2019. Mr H Halligan of counsel appeared for the applicant briefed by Mr J Govan. The applicant was present. Mr D Saul of counsel appeared for the respondent briefed by Mr P Lichaa. Mr J Webb of the respondent also attended.

EVIDENCE

Documentary evidence

16. 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 and attached documents, and

    (c) Application to Admit Late Documents dated 12 December 2019 with clinical records of the applicant produced under direction by Dr Emilija Sokolovska attached (the late documents).

Oral evidence

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

SUBMISSIONS

18. The submissions of the parties have been recorded and a transcript (T) is available. They will not be repeated in full, but in summary they are as follows.

Applicant

19. In support of his case the applicant relies upon the findings of Dr Peter E Giblin in his principal report dated 25 January 2007[6] (there are four supplementary reports of that date containing assessments of permanent impairment), and on the clinical records:

    (a) of Dr Sokolovska, annexed to the applicant's statement dated 30 September 2019[7], and attached to the Application to Admit Late Documents dated 12 December 2019, and

    (b) of the respondent employer's medical officer[8].

[6] Reply p 204.
[7] Application p 12.
[8] Application p 164.

20. The applicant refers to the report of Dr Medhat Guirgis dated 28 October 2017 in submissions, when seeking the amendment to Part 5.6 of the Application (see [11] and [12] above). The applicant relies on this report to quantify his claim for lump sum compensation in the current proceedings[9]. He also relies upon what Dr Guirgis says in the report dated 28 October 2017 that:

> "I attributed all the whole person impairment related to nature and conditions of employment from January 2002 to May of 2013 because arbitrarily speaking I considered that by January 2002 there would be enough subclinical changes to his injured body parts that would have rendered them more vulnerable to the effects of everyday use and abuse of the body parts in the course of performing his duties."[10]

21. I note that in that report Dr Guirgis refers to an earlier report of his dated 15 March 2017 which does not appear to be in evidence. At [5] on the second page of the report dated 28 October 2017 he extracts what he said on page 12 of that earlier report in respect of the right shoulder.

22. The applicant points out the "Disabilities And Complaints" recorded by Dr Giblin, of constant ache in the neck and back with sharp stabbing pains in his neck and back and pins and needles radiating towards his arms and legs, and the restrictions on physical activities as a result of the symptoms. He then refers to the doctor's diagnosis recorded as follows:

> "Based on his history and examination, this gentleman has the provisional diagnosis of a soft tissue injury to his neck and low back, reasonably causally related to his subject injuries, and consistent with the reported findings at C4/5 and C6/7 together with L4/5 and L5/S1, as noted in the MRI scans referred to in the body of this report.
>
> In addition, he has the diagnosis of a soft tissue injury to his upper limbs, as a result of the nature and conditions of his work environment as being the substantial contributing factor."[11]

23. Having regard to the care which must be exercised in relying on the clinical notes of treating doctors and the difficulty in deciphering many of the entries of Dr Sokolovska, the applicant nevertheless submits that the numerous references in the clinical notes all point

> "…to a diffuse chronology of pain inconsistent with frank injuries and are consistent with the nature and conditions of employment. In those circumstances the ARD [sic, AMS] should be instructed to look at the case from the point of view of an accumulated series of disease circumstances."[12]

24. The applicant relies on what Deputy President Michael Snell found in *Cathay Pacific Airways v Ralph (Ralph)*[13] at [36], namely:

> "The worker refers to *Semlitch*, correctly identifying that a worsening of symptoms is consistent with an injury involving the aggravation, etcetera of a disease, and that proof of such an injury does not necessarily involve a change of pathology. The Arbitrator approached proof of the alleged 'disease' injury, on the basis that the deemed date of injury was prior to commencement of the 2012 Amending Act. This approach was available, consistent with the reasoning in *Collingridge v IAMA Agribusiness Pty Ltd* and the authorities cited therein, and is one I agree with."

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[9] See T p 12.30–13.15.
[10] Application p 44.
[11] Reply p 207.
[12] T p 29.20.
[13] [2019] NSWWCCPD 21.

25. The applicant however acknowledges that, in relying on the disease provisions of the 1987 Act (as he did not finish work with the respondent until May 2013), he would have to show that his employment was the main contributing factor to the aggravation etcetera of a disease.

26. The applicant submits that, particularly to the extent that the specialists' opinions are deficient on the point, the serial entries in the notes of the general practitioner are replete with entries affecting body parts in such a way as to make it compelling that the evidence is insufficient to make a finding of frank injury to the body parts that are claimed. Injury to these body parts should be aggregated as a disease, and therefore the AMS is entitled to look at the body parts in a cumulative way.[14]

27. The applicant submits that, although the date of injury of 27 February 2017 post-dates his employment with the respondent and occurred during his part-time (20 hours per week) employment with Coles packing shelves, nevertheless his employment with the respondent, and not with Coles, was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of his disease condition.

Respondent

28. The respondent relies on the finding of the Court of Appeal in *Rail services Australia v Dimovski (Dimovski)*[15] to refute the applicant's reliance on his classification of injury as a disease. It submitted that, consistent with that decision, frank injuries that can be defined through a particular circumstance are to be assessed as injuries under the definition in s 4(a) of the 1987 Act. That is a personal injury arising out of or in the course of employment. If there is a frank injury aggravated by a disease, there are two injuries.

29. The respondent submits that the applicant suffered from a series of frank injuries and noted by way of example the injuries suffered on 16 April 2002 which is referred to among other places in the clinical notes of the respondent's medical officer and relied upon by the applicant, and the injury of 24 January 2005 when the applicant claims he injured his back, neck and shoulders using a crowbar to move scrap metal from a guillotine test pit. The respondent does not dispute the occurrence of these, and other, events referred to by the applicant in his evidence, but does not accept that he suffered injury to all the body parts claimed to have been injured.

30. The applicant submits that the deemed date of injury originally nominated by the applicant has no relevance at all, having regard to the discontinuance of the claim for weekly payments and the fact that there is no evidence that the applicant was incapacitated for work when he ceased work with the respondent.

31. The respondent submits that there is no evidence that the applicant has suffered injury in accordance with the definition in s 4(b)(i) or (ii) of the 1987 Act, that is that employment was the main contributing factor to the injury, or to the aggravation etcetera of the injury.

32. The respondent points to the assessments of Dr Giblin (in two of his supplementary reports dated 25 January 2007[16]) where he assesses 5% WPI in respect of the cervical spine to injury on 16 August 1999 and 24 January 2005, and 6% WPI in respect of the lumbar spine to injury on 16 April 2002.

[14] T p 31.25.
[15] [2004] NSWCA 267.
[16] Reply pp 212 and 214.

33. The respondent submits that there can be no referral to an AMS for injuries prior to 31 December 2001 (when assessment of permanent impairment pursuant to the Table of Disabilities was the method of assessment), but notice could still be taken of any such injuries as they will be relevant for the purpose of any deduction from assessment of WPI pursuant to s 323 of the 1998 Act.

34. The respondent refers to the caution which must be exercised in relying upon clinical records of treating doctors, and the illegibility of many of the notes in the current case. The respondent submits that cogent report(s) from expert doctors are required in this case, and that they are lacking. The respondent submits that no reliance can be placed on the two reports of Dr Guirgis, who makes some assessments in his first report (dated 16 June 2009[17]) then later re-characterises his assessments when his attention is drawn to the fact that his earlier assessments may not get the applicant over the relevant thresholds.

35. The respondent submits that the applicant's own evidence makes it clear that he suffered from a number of frank injuries in the course of his employment with the respondent, and further that there is no expert evidence to delineate what are the "nature and conditions" of the applicant's employment on which he seeks to rely.

36. The respondent submits that if the applicant's injury is classified as a disease injury, the date of injury should be 27 February 2017 (the date when the applicant made a claim for compensation with respect to the injury), and there is evidence that the applicant's employment with Coles at that time was employment similar to that in which he was engaged with the respondent. Therefore the respondent is not the last employer in employment that was the main contributing factor to the aggravation etcetera of a disease injury. The respondent rejects a submission by the applicant that there is an onus on it, as opposed to the applicant, to show that the employment with Coles was the last relevant employment. The evidence of the similarity in the applicant's employment between the respondent and Coles comes from a history recorded by Dr Thomas A Silva in his report dated 2 August 2017 where he is recorded as saying to the doctor that he "Does the same donkey work" at Coles as he did at BHP, stacking shelves, including overhead reaching[18]. The respondent submits that this is heavy work.

37. The respondent disputes injury to the right knee based upon the finding and opinion of Dr Silva, and also injury to the shoulders and arms, also based upon the opinion of Dr Silva. The doctor says that pain in the shoulders and down the arms is referable to the problems that the applicant has with his neck. Further, in relation to the elbows and wrists, the respondent submits that no radiological evidence to support injury in these body parts.

38. The respondent submits that there should be a referral to an AMS for assessment of whole person impairment in respect of four separate dates of injury for the body parts conceded by the respondent to have been injured on those dates[19].

39. The respondent relies upon on what Keating DCJ found in *Mannie v Bauer Media Pty Ltd*[20] at [77] dealing with disease injury, namely:

> "The appellant submits the test the Arbitrator should have applied to determine the causation question (wrongly referring to s 15 and s 16 of the 1987 Act) is 'whether the employment is capable of causing aggravation'. There was no authority or reasoned argument in support of that submission and I reject it."

[17] Reply p 226.
[18] Reply p 276.
[19] See T 41.30.
[20] [2016] NSWWCCPD 47.

40. The respondent submits that the applicant must show that the actual employment in which he was engaged was the main contributing factor to either the disease injury or the aggravation etcetera of such injury.

Applicant in response

41. Apart from submitting that, in the absence of the current employer (Coles) being joined in the proceedings there is an onus on the respondent to show that such employer was in a role sufficient to bring about an aggravation of the applicant's condition (see [36] above), the applicant submits that in any event the evidence from Dr Silva is insufficient to make such a finding. It is too simplistic to draw from the history recorded by Dr Silva as to the nature of the applicant's employment with Coles that it was work similar to the heavy work in which the applicant was engaged in a steel foundry with the respondent. The applicant submits that he is not in a position to give a trained legalistic assessment of his own position having regard to the provisions of s 16 of the 1987 Act. Looking at the clinical history of the applicant, there has not been a confinement of injury to one episode, and the history is clear that there has been one insult over the next, superimposed during the time he worked for the respondent. It is "…too neat in the interests of the respondent to single out one episode and say, well, that's a frank injury… and the case must fail."[21] That cannot be right according to the applicant.

42. As noted above at [12], the applicant did finally concede at the conclusion of his submissions that the date of injury should be 27 February 2017. However, he did not concede that Coles was the last employer who employed him in employment that was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of his disease injury.

FINDINGS AND REASONS

"Nature and conditions claim"

43. Hodgson JA stated at [68] in *Dimovski*:

> "68 In my opinion, the decision in Mecha is to be preferred. Section 16 applies only if the injury 'consists in' the aggravation etc of a disease. 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."

44. The reference to "Mecha" is to *Australian Conveyor Engineering Pty Ltd v Mecha Engineering Pty Ltd*[22]*.*

45. The applicant refers to a number of frank injuries affecting different parts of his body. On the basis of what Dr Guirgis and Dr Giblin say, the applicant claims that these frank injuries, taken together with the numerous complaints in respect of injury to various body parts recorded in the clinical notes of two general practitioners, constitute sufficient evidence to show that the "nature and conditions" of his heavy work in a foundry with the respondent was the main contributing factor to his injury and resulted in the WPI assessed by Dr Guirgis.

[21] T p 49.05.
[22] (1998) 45 NSWLR 606.

46. The Commission has on a number of occasions referred to the use of the term "nature and conditions", saying for example at [10] in *Raulston v Toll Pty Ltd*[23] that it is "meaningless and should not be used", citing *Toplis v Coles Group Ltd t/as Coles Logistics*[24], which in turn referred to what Neilson CCJ said in *Mitkovic v Davids Holdings Pty Ltd*[25]. His Honour said in that case that the term is used in the Compensation Court of NSW:

> "…as a shorthand way of alleging that, although no frank incident is relied upon, there was some aspect of the work carried out by a worker over a period of time, e.g. repeated lifting or bending, which caused some pathological condition or acted upon some underlying pathological condition to cause incapacity. Some classify such a period of work as a series of traumata or microtraumata, others classify it as causing a disease of gradual process within section 15 of the Act (where the pathology was caused by such work) or as the aggravation, acceleration, exacerbation or a deterioration of a disease within section 16."

47. As noted at [24] above the applicant relies upon what Deputy President Snell said at [36] in *Ralph.* He went on to say immediately after that quote that:

> "However, acceptance of worsening symptoms does not, without more, establish the occurrence of the alleged 'disease' injury."

48. There is no doubt the applicant made frequent complaints to his treating general practitioner, Dr Sokolovska, of injury to and symptoms in his back, neck, legs, shoulders and arms. Counsel for the applicant referred to these in some detail, commencing with attendances on Dr Sokolovska on 16 December 2006 (which appears to refer to left and right elbows), 17 February 2007 (which refers to sudden onset of left leg pain and left shoulder pain), and 17 April 2007 (which refers to back pain)[26]. Throughout his notes, Dr Solokovska's handwriting is difficult to decipher. Counsel's references to the doctor's notes appear in the transcript from pp 16 to 29. At p 21 it is acknowledged that the notes are incomplete, but the point is made that it is not a case of identifiable single instances of frank injuries, but it is clear from an amalgamation of these injuries that what is happening is the worker is subject to minor traumata, or an exacerbation of existing conditions which continue during the time he is working. A reference in the notes is made to an entry on 23 October 2010 where a "w/comp" case is mentioned, and the applicant "Feels as though pressured by employer to return to full duties despite symptoms."[27] The applicant submits that this is evidence of coercion.

49. The applicant also refers to a number of entries of continuing complaints to Dr Solokovska after the time he left the employ of the respondent and before he commenced with Coles in September 2014[28]. The point is made that although the applicant is in a period of non-physical activity of the sort that he is used to at work, the symptoms nevertheless persist.

50. The applicant also refers to the notes from the employer's medical officer referred to above at [19(b)]. That is to an entry dated 17 April 2002 recording quite severe lower back pain at times travelling to the tops of the legs. There is also an entry on the following day referring to "Back as above Pain mid lumbar – Slight". Other later entries in these notes are referred to.

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[23] [2011] NSWWCCPD 25.
[24] [2009] NSWWCCPD 70.
[25] (1995) NSWCCR 656.
[26] Application p 98.
[27] T p 22.10.
[28] T p 24.20.

51. On one view of the various entries in the clinical notes of Dr Solokovska and the employer's medical officer, such entries could be regarded as evidence of worsening of symptoms as a result of an earlier injury or condition. As such, those entries would, in accordance with what Deputy President Snell said in *Ralph*, be insufficient of themselves to establish the occurrence of a disease injury.

52. It is necessary to examine the available evidence in respect of injury to each body part which the applicant claims to have been injured arising out of or in the course of his employment with the respondent.

Lumbar spine

53. The applicant quite clearly injured his back on 16 April 2002. The respondent concedes this. Although he also claims injury to his legs on this occasion, asserts that there is insufficient evidence to find that the applicant also injured his legs. The applicant says in his statement that from that time onwards he experienced pain radiating from his lower back into his legs. That does not constitute a separate injury.

54. In his statement the applicant does not give any evidence of an earlier back injury. He says that after the injury on 16 April 2002 he was certified unfit for overtime, and that but for that injury he would have continued to perform the overtime that he was engaged in until then.

55. The applicant also claims that he injured his back:

    (a) on 24 January 2005 when using a crowbar to move scrap metal from the guillotine test pit area;

    (b) on 30 April 2010 when moving scrap metal weighing 5-25 kgs from the floor to an industrial scrap bin, and

    (c) on 4 August 2010 when operating a rotary end shear while sitting for a prolonged period on a seat which leant to one side.

56. Injury to the back on the four occasions referred to above is conceded by the respondent.

57. Dr Giblin in Table 1 to his report dated 25 January 2007[29] assess 6% WPI as a result of injury on 16 April 2002. Dr Guirgis in his report assesses 4% WPI due to injury to the lumbar spine which he attributes to the nature of the applicant's duties between 1 January 2002 till 2009. In his later report dated 28 October 2017 he assesses 0% WPI attributable to injury to the lumbar spine on 24 January 2005, 30 April 2010 and in August 2010 and 6% WPI due to the nature and conditions of employment from January 2002 to May 2013.

58. Dr Guirgis appears to have treated the applicant in the period 2010-2011. There is a report in evidence dated 7 February 2011 addressed to Dr Solokovska[30], and a further report from Dr Guirgis addressed to Bluescope dated 5 March 2011[31].

59. In the report dated 7 February 2011 Dr Guirgis records a history of the applicant being involved in a further incident at work on 30 April 2010 when he was picking up steel plates 5-25 kg each from the floor and overstretching to put them in the scrap box above his head. He developed severe pain and stiffness in his lower back with instantaneous radiation to the right buttock and down his leg. He was off work for two weeks and then certified fit for suitable duties while having treatment. He was sent for physiotherapy and Pilates treatment but found that the physiotherapy treatment was too intense, triggering severe pain after each session.

[29] Reply p 212.
[30] Reply p 263.
[31] Reply p 266.

60. Dr Guirgis diagnosed further post-traumatic mechanical derangement of the lumbar area of the spine which was caused by a musculoligamentous sprain/strain with intervertebral disc involvement. That had also triggered and aggravated the effects of the underlying spondylotic changes.

61. In the report to Bluescope dated 5 March 2011 Dr Guirgis disputes the assumption that, on the basis of Dr Wallace considering the applicant fit for full duties without restriction, meant that the pathology in the back related to the 30 April 2010 and 5 August 2010 had resolved. This dispute raised by Dr Guirgis is on the basis that the applicant could do his full duties while suffering from increased symptoms on stressing his injured back. Dr Guirgis says that his letter dated 7 February 2011 clearly discussed the presence of post-traumatic mechanical derangement of the lumbar area of the spine which would be productive of pain on stressing his injured back and hence the recommendation to have non-provocative physiotherapy on demand and the recommendation to have acupuncture. Dr Guirgis says that clearly the applicant's problem was that of chronic pain syndrome with a pain cycle initiated by the ongoing pathology and ending in impairment, disability and handicap. He says that the goal of management is to combat that cycle and minimise the effects of this chronic pain syndrome.

62. I do not find that the applicant suffered injury to his lumbar spine as a result of the "nature and conditions" of his employment from January 2002 to May 2013. He suffered frank injury on four occasions. After the injury dated 16 April 2002 Mr Sirijovski was certified unfit to do overtime, a matter confirmed by him in his statement. That appears to have been a significant injury, with the applicant complaining of pain radiating down his lower back and into his legs. Based on the history recorded by Dr Guirgis, the injury of 30 April 2010 also appears to have been a significant event.

63. The respondent has not submitted that the pathology of injury suffered on these four occasions differs. The applicant will be referred to an AMS for assessment of WPI as a result of injury on those four occasions.

Cervical spine

64. The respondent concedes that the applicant suffered injury to his neck:

    (a) on 18 August 1999 when taking test pieces of steel off a trolley;

    (b) on 24 January 2005 when using a crowbar to attempt to remove a piece of scrap from guillotine test pit, and

    (c) on 3 December 2008 when using controls in plate/guillotine line.

65. In Table 1 to his report dated 25 January 2007 Dr Giblin assess 5% WPI as a result of injury to the cervical spine on 16 August 1999 and 24 January 2005. In his later report dated 25 January 2017 he makes a provisional diagnosis of soft tissue injury to the neck reasonably causally related to his subject injuries and consistent with the reported findings at C4/5 and C6/7. The subject injuries to the neck are recorded earlier in the report as occurring on 16 August 1999, when the applicant turned his head and developed left sided neck pain, there being no previous history of these symptoms or injuries, and on 24 January 2005 when using a crowbar to try to move a piece of steel which had become caught in a conveyor belt.

66. I accept the opinion of Dr Giblin in his report that the applicant suffered injury to his cervical spine on the dates referred to in the report. I do not accept the opinion of Dr Guirgis that the injuries to the cervical spine of 16 August 1999, 24 January 2005 and in December 2008 (which injury post-dated Dr Giblin's report) resulted in no WPI, as opposed to his finding that it was the nature and conditions of employment from January 2002 to May 2013 resulted in a degree of WPI. I think that the references in the clinical notes to complaints in respect of the cervical spine were evidence of worsening symptoms as a result of the original injury to the neck which occurred on 16 August 1999 and for which the applicant received compensation for 5% permanent impairment of the neck in Compensation Court proceedings which were resolved on 27 May 2002[32]. The applicant refers to the receipt of lump sum compensation for this injury at [7 c.] of his statement dated 30 September 2019. It will be a matter for an AMS to determine what degree of WPI results from injury to the cervical spine after 1 January 2002.

67. The applicant also claims in his statement that he suffered injury to the neck on 30 April 2010 and 4 August 2010. The applicant suffered injury to his lumbar spine on these dates. I have not been taken to any evidence to show that he injured his cervical spine on these dates. Dr Steven Ng saw the applicant on 23 June 2010 in respect of the injury at work on 30 April 2010[33]. He found that the applicant sustained an episode of mechanical lower back pain with somatic referred symptoms to the right lower limb following two hours of moderately heavy manual handling tasks at work on 30 April 2010. There is no history of injury to the cervical spine.

68. The claim that the applicant suffered injury to his neck on 30 April 2010 is not supported by the medical evidence of Dr Guirgis who, as an orthopaedic surgeon, was treating him at that time (see [58]-[62] above).

69. Dr Guirgis in his report dated 28 October 2017 does not refer to an injury to the cervical spine on 4 August 2010, and earlier in the report agrees with Dr Silva's comments that there was no injury to the neck per se (meaning no single major traumatic insult).

70. Nevertheless the respondent concedes injury to the cervical spine on 18 August 1999, 24 January 2005 and 3 December 2008.

71. There will be an award in favour of the respondent for injury to the cervical spine on 30 April 2010 and 4 August 2010.

72. The applicant's claim in respect of the cervical spine will be referred to an AMS for assessment of WPI as a result of injury on 24 January 2005 and 3 December 2008. The injury of 16 August 1999 will be relevant to any deduction from the assessment pursuant to s 323 of the 1998 Act.

Shoulders

Right shoulder

73. In his report dated 25 January 2007 Dr Giblin diagnoses a soft tissue injury in the upper limbs, as a result of the nature and conditions of the applicant's work environment "as being the substantial contributing factor." The applicant acknowledges that, in respect of any allegation of a disease condition and having regard to the fact that he ceased employment with the respondent in May 2013 and commenced work with Coles stacking shelves in September 2014, he must show that his employment with the respondent was the main contributing factor to aggravation, acceleration exacerbation or deterioration of such condition.

[32] See Reply p 138 - Terms of Settlement Matter No. 43934/01.
[33] Reply p 240.

74. The applicant told Dr Silva on 26 July 2017 (as recorded in the report of 2 August 2017) that he was doing "the same donkey work" at Coles as he did at BHP, and that he continued to do this work stacking shelves including overhead reaching as well. Whilst I do not infer from that comment that all aspects of the applicant's work at Coles were equivalent to the heavy work he did with the respondent, the shelf stacking and overhead work is relevant to any shoulder problem claimed.

75. In his report dated 28 October 2017 Dr Guirgis refers to, and extracts part of, an earlier report of his dated 15 March 2017 (not in evidence). Dr Guirgis expresses the opinion that Mr Sirijovski did develop changes in his right shoulder as a result of the nature and conditions of his employment with Bluescope and these problems were aggravated further by the nature and conditions of his employment with Coles. I accept that opinion, with the result that the applicant cannot succeed in his claim against the respondent in respect of any injury to the right shoulder in the form of aggravation etcetera of a disease (s 16 of the 1987 Act).

76. In Part 4 of the Application the applicant claims in the alternative that "injury and disease …was caused by…his work duties referred to above." This is a reference to the definition of injury in s 4(b)(i) of the 1987 Act.

77. There is an Incident Report in evidence in respect of an injury on 24 January 2005 when the applicant describes injury to his upper back/shoulder area while attempting to remove a piece of scrap from the guillotine test pit[34]. The respondent denies liability for the right shoulder injury based on the assessment of Dr Silva, who says that there was no injury per se to the shoulders, with pain coming from the applicant's neck strain/s with the result that there is no current diagnosis for both shoulders, and are part of a DRE cervical category assessment.

78. Dr Guirgis does not give an assessment of WPI in respect of the right shoulder because, as at the date of his last report of 28 October 2017, he says it has not reached the stabilisation stage. There can therefore be no referral in respect of the right shoulder, and as the applicant's claim is for lump sum compensation only, it is not necessary to make a finding in respect of injury to this shoulder.

Left shoulder

79. Dr Guirgis has not given an assessment of WPI in respect of the left shoulder in his report dated 28 October 2017. There can therefore be no referral in respect of injury claimed to this shoulder.

Right and left upper extremities (excluding shoulders)

80. It appears that Dr Guirgis first saw the applicant on 16 June 2009 and prepared a report of that date to Schreuder Partners Lawyers (referred to above at [34]). He diagnoses ongoing symptoms and signs of left greater than right ulnar cubital tunnel syndrome and left greater than right carpal tunnel syndrome. He says that:

> "Such tunnel syndromes resulted from the combined effects of dynamic and static overloading of the involved soft tissue structures related to the nature of the duties performed as discussed earlier. Static overloading resulted from sustained contraction required of muscles to support and fix the limb in a position of function. Dynamic overloading resulted from repetitive movements required to execute the task."

[34] Reply p 186.

Dr Guirgis goes on to explain his view of the mechanism of injury which gave rise to the syndromes. He also discusses the role of occupational and non-occupational risk factors in the development of carpal tunnel syndromes. He says:

> "However, the current consensus of opinion is that occupational risk factors play a significant role in the development of carpal tunnel syndrome. The occupational risk factors in this case include highly repetitive work, bent wrist postures, extended duration of effort, and exposure to vibrations."

81. In his report dated 2 August 2017 Dr Silva recorded that he found no evidence to indicate sensory nerve ulnar entrapment at each elbow. He said that the pain on the lateral side of each elbow and the sensory symptoms the applicant experiences on the medial side of each elbow originate from the applicant's neck strain.

82. In respect of the wrists, Dr Silva did not find any evidence of De Quervain's tenosynovitis or carpal tunnel compressions and mobility of both wrists was full. There was no local tenderness. He was persuaded that the pain experienced by the applicant in both wrists was referred pain from the cervical strain or neck strain.

83. In his report dated 28 October 2017 Dr Guirgis begged to disagree with the opinion of Dr Silva, and also with the opinion of Dr Lyons. He referred to results of ultrasound studies on the left shoulder and left elbow arranged by Dr Wallace and performed on 29 June 2007, and electrophysiological studies arranged by Dr Nair and performed by Dr McGrath dated 3 December 2007. I could not find in the evidence the electrophysical studies performed by Dr McGrath.

84. I was not taken to a report from Dr Lyons, but note that there is one in evidence dated 5 March 2002[35] in which he refers to vague symptoms down both arms. He considers that he symptoms down the left arm and to a lesser extent down the right arm are cervical in origin and are due to minor degenerative changes in the applicant's cervical spine of constitutional origin.

85. The applicant was referred to Dr Raymond Wallace, orthopaedic surgeon, by Dr Sokolovska. The only reports that I can find from Dr Wallace are attached to the Reply dated 7 June 2001[36], 15 November 2010[37], 22 November 2010 and 21 December 2010[38]. In the first report (to a firm of solicitors) Dr Wallace expressed the opinion that the applicant suffered a musculoligamentous stain at his cervical spine and a rotator cuff strain at his right shoulder as a result of injuries at work in 1992 and 1999. In the second report (to Dr Sokolovska) Dr Wallace opined that the applicant's current cervical and lumbar spinal conditions were work related. In the third report dated 22 November 2010 Dr Wallace said that the applicant did not require operative intervention, and in the last report dated 21 December 2010 the doctor certified Mr Sirijovski fit for full time employment. I could not find any reference to carpal tunnel syndrome or cubital fossa syndrome in these reports.

86. In my view, having regard to the evidence that I have summarised, the applicant has not produced sufficient evidence to show that he has suffered disease injury in the form of cubital fossa syndrome or carpal tunnel syndrome arising out of or in the course of his employment, which employment was the main contributing factor to the contracting of such disease injury. There will be an award for the respondent in respect of injury to the left and right upper extremities (excluding shoulder injuries).

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[35] Reply p 160.
[36] Reply p 157.
[37] Reply p 256.
[38] Reply p 261.

Knees

Left knee

87. The applicant injured his left knee on 12 February 1992. He received lump sum compensation for this injury. He says at [8 f.] of his statement that:

> "Injury to my left knee - due to the nature & conditions of my employment, my left knee injury which originally occurred in 1992 continued to the point where by mid-2014 a CT scan showed a vertical tear in the meniscus & a knee specialist, Dr Warwick Bruce, subsequently performed repair surgery on or about 5 March 2015;"

88. There are two reports from Dr Warwick Bruce in evidence dated 3 February 2015[39] and operation report (in respect of surgery to the left knee) dated 5 March 2015[40]. The first report is addressed to Dr Guirgis (who, as noted above at [58], appears to have been a treating practitioner of the applicant – see report dated 7 February 2011 addressed to Sokolovska). Dr Bruce notes that the applicant reported medial joint line pain for 20 years on the left side, that he had an accident at work and that (the pain) had been getting worse recently. The applicant was not sure if the left knee "catches", but that it hurt "with bending." The right knee had medial joint line pain "…and it feels like it catches or locks on that side."

89. On examination Dr Bruce found acute tenderness over the medial joint line. There appeared to be more arthritis on the right than the left. The doctor's opinion was that Mr Sirijovski had medial meniscal tears on both sides. He was not sure of how much wear the applicant had in his knees. The right looked a bit worn. Arthroscopy of the left knee was recommended. This was carried out on 5 March 2015.

90. Dr Guirgis assesses 4% WPI in respect of injury to the left knee. He arrives at this by making an assessment of 20% Lower Extremity Impairment in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment Fifth Edition (AMA 5**)** – Table 17-31 then halving this to arrive at a figure to account for the role of nature and conditions of employment in the development of the documented chondral changes in the knee. He says that this is the fairest approach to the difficulty in this case of the apportionment of the post-traumatic changes and the evolving degenerative changes. Ten percent Lower Extremity Impairment equates to 4% WPI.

91. The applicant must show that what occurred in his employment with the respondent over the period January 2002 to May 2013 was the main contributing factor to the aggravation acceleration, exacerbation or deterioration of the condition in his left knee which was initiated by the original injury on 12 February 1992. The applicant's only evidence in his statement in respect of the left knee is set out above at [87]. He does not give a history of any "recurrent giving way attacks and falls on both knees" over the years referred to by Dr Guirgis. In my view there is insufficient evidence to find that the applicant's employment with the respondent from January 2002 until May 2013 was the main contributing factor either to the contraction of a disease injury in the left knee or to aggravation etcetera of the disease injury in the left knee.

92. There will be an award for the respondent in respect of injury to the left lower extremity (knee) as a result of the nature and conditions of employment over the period from January 2002 to May 2013.

[39] Application p 144.
[40] Application p 146.

93. If I am incorrect in this finding, I note that any disease injury found to have occurred in that period to which employment was the main contributing factor to the aggravation etcetera of such injury is to be regarded as a separate injury, in accordance with *Dimovski.* The assessment of 4% WPI is less than the threshold of 10% WPI required by s 66(1) of the 1987 Act for an entitlement for compensation for permanent impairment.

Right knee

94. Dr Guirgis refers the applicant favouring his right knee because of the left knee injury. He says that the changes in the contralateral right knee were triggered accelerated and aggravated by the abnormal mechanics of the injured left knee leading over the years to recurrent giving way attacks and falls on both knees. He says that "The subsequent biochemical changes in both knees had been extensively discussed in literature" to which he then refers.

95. The applicant says at [8 g.] of his statement:

> "Injury to my right knee - because of my injured left knee, I was over-reliant on my right knee which also developed problems & a CT scan in November 2014 showed an extensive tear & near complete disintegration of the medial meniscus. I have been reluctant to have remedial surgery because of the poor result from the procedure on my left knee."

96. For the applicant to succeed in respect of injury to, or condition in the right knee consequent upon the left knee injury of 12 February 1992, he must show in accordance with *Kooragang Cement Pty Ltd v Bates*[41] the right knee condition resulted from the left knee injury. What is required is "a commonsense appraisal of the causal chain" between the injury to the left knee and the emergence of the condition in the right knee.

97. Apart from the opinion of Dr Guirgis, based on a history of the applicant suffering recurrent giving way attacks and falls on both knees which is not corroborated by other evidence either from the applicant or other doctors, the only evidence of favouring of the right leg comes from the applicant himself in his statement dated 30 September 2019 quoted above at [95]. There is no evidence in respect of the "abnormal mechanics of the injured left knee" referred to by Dr Guirgis.

98. The history recorded in the medical evidence of Dr Bruce referred to above at [78], refers to the 20 year history of left sided medial knee joint pain, getting worse recently, and right medial joint line pain. There is nothing in that evidence to support a causal connection between favouring of the right knee as a result of the left knee injury. Dr Bruce records medial meniscus tears on both sides but is unsure how much wear the applicant has in his knees. He says that the right looks a bit worn.

99. The applicant continued to work for the respondent until termination of that employment in May 2013. There is no evidence that he was incapacitated for work at that time. He commenced work with Coles in September 2014 stacking shelves, a position that I infer requires him to be standing for at least a significant part of the 15-20 hours a week he is working. The recent worsening of the left knee pain recorded by Dr Bruce appears to have occurred after the applicant's departure from his employment from the respondent, although this is not completely clear. According to the applicant's evidence, the CT scan of the right knee was undertaken in November 2014. There is in evidence a report of CT arthrography of the right knee dated 7 November 2014[42], the Clinical Information in which records "? Medial meniscal injury." The "Impression" in that report is "Extensive tear of the medial meniscus with near complete disintegration. A small Baker's cyst is present."

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[41] (1994) 35 NSWLR 452.
[42] Application p 143.

100. There is also in evidence an Initial Workplace Assessment Report dated 12 August 2010 addressed to the respondent[43]. The purpose of the assessment was to assess the critical demands of the applicant's pre-injury duties and suitable duties. The injury history in the report refers to the injury to the applicant's lower back on 30 April 2010, and records symptoms in the lower back and bilateral upper limb discomfort. The reported tolerances were, relevantly, standing restricted to 30 minutes, no issues with negotiating stairs at the workplace and restricted squatting. There does not appear to be any reference in this report to problems with the right knee.

101. On the evidence I have summarised above and applying a commonsense evaluation to the causal chain of events from the time of the applicant's left knee injury until the assessment by Dr Guirgis in October 2017, I am not satisfied that the applicant has suffered a condition in his right knee consequent upon injury to the left knee on 12 February 1992. There will be an award for the respondent in respect of the condition in the applicant's right knee consequent upon injury to the left knee.

SUMMARY

102. The applicant did not suffer injury to his lower limbs on 16 April 2002 in addition to the conceded injury to the back on that day. He did experience pain radiating into his legs from his lower back, which does not constitute an injury as such. There will be an award for the respondent in respect of injury to the lower extremities on 16 April 2002.

103. There are no assessments of WPI made by Dr Guirgis in respect of the right and left shoulders (see [78] and [79] above). As the applicant's claim in now restricted to one for compensation for permanent impairment only, there is nothing to refer in respect of any claimed shoulder injury, and it is not therefore necessary to make a finding of injury to either shoulder.

104. The applicant did not suffer injury to his neck on 30 April 2010 and on 4 August 2010 in addition to injury to his back, conceded by the respondent. There will be an award for the respondent in respect of injury to the cervical spine on 30 April 2010 and 4 August 2010.

105. The applicant has not suffered a condition in his right knee consequent upon injury to the left knee on 12 February 1992. There will be an award for the respondent in respect of this claim.

106. The applicant has not contracted in the course of his employment with the respondent from January 2002 to May 2013 any disease in the lumbar spine, the cervical spine, the right upper extremity (elbow and wrist) or the left upper extremity (elbow and wrist) which employment was the main contributing factor to contracting the disease.

107. The applicant has not suffered in the course of his employment with the respondent from January 2002 to May 2013 aggravation, acceleration, exacerbation or deterioration of any disease in the lumbar spine, the cervical spine, the right upper extremity (elbow and wrist) or the left upper extremity (elbow and wrist) which employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of such disease.

108. The matter is remitted to the Registrar for referral to an AMS for assessment of WPI as a result of:

    (a) injury to the lumbar spine on:

        (i) 16 April 2002;
        (ii) 24 January 2005;
        (iii) 30 April 2010, and
        (iv) 4 August 2010;

[43] Application p 129.

(b) injury to the cervical spine on:

(i) 24 January 2005, and
(ii) 3 December 2008.

109. Each injury to the lumbar spine and the cervical spine is to be assessed separately.

110. The documents to be referred to the AMS are:

(a) the Application and attached documents;
(b) Reply and attached documents;
(c) Application to Admit Late Documents dated 12 December 2019, and
(d) this Certificate of Determination and Statement of Reasons.