WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3896/19**
Applicant: **John Papadellis**
Respondent: **Tyree Industries Pty Ltd**
Date of Determination: **19 November 2019**
Citation: **[2019] NSWWCC 372**

The Commission determines:

1. The applicant sustained injury to cervical and thoracic spines arising out of or in the course of his employment with the respondent on 30 October 2012.

2. The applicant's employment was a substantial and the main contributing factor to his injury.

3. The applicant has not recovered from the injury sustained to his thoracic spine on 30 October 2012.

4. The applicant did not sustain an injury to his lumbar spine arising out of or in the course of his employment with the respondent on 30 October 2012.

The Commission orders:

5. Award for the respondent in respect of the allegation of injury to the applicant's lumbar spine on 30 October 2012.

6. I remit this matter to the Registrar for referral to an Approved Medical Specialist pursuant to section 321 of the *Workplace Injury Management and Workers Compensation Act 1998* for assessment of the whole person impairment of the applicant's cervical spine and thoracic spine due to injury sustained on 30 October 2012.

7. The documents to be reviewed by the Approved Medical Specialist are:

    (a) Application to Resolve a Dispute and attachments;
    (b) Reply with attached documents;
    (c) Application to Admit Late Documents received on 4 October 2019, and
    (d) Application to Admit Late Documents received on 16 October 2019.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. John Papadellis (the applicant) is 65 years old and commenced employment with Tyree Industries Ltd (the respondent) as a production worker on 18 October 2010. His services were terminated on 23 January 2015.

2. The applicant submitted a claim form to the respondent and QBE Workers Compensation (NSW) Ltd (QBE) on 12 January 2012. He alleged that he injured his "neck to left shoulder" on 31 October 2012 when lifting 3 mm steel cylinders. He reported his injury and ceased work on 1 November 2012. Liability was accepted by QBE and weekly payments and medical expenses were paid until 21 August 2015. The date of injury was identified by the respondent and QBE as 30 October 2012.

3. On 5 June 2015, the applicant's solicitor served a claim for work injury damages on QBE and the respondent. He also sought a concession regarding potential C7 surgery.

4. On 7 August 2015, QBE issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), alleging that the applicant had recovered from the effects of his injury and disputing that his employment was a substantial contributing factor to his condition. It alleged that the applicant was no longer incapacitated as a result of his work injury and disputed that it was liable for the payment of medical expenses. Finally, it denied that the applicant was entitled to lump sum compensation and work injury damages.

5. In the alternative, QBE indicated that the applicant's employment was not the main contributing factor to the contracting of any disease or any aggravation of a disease. It cited ss 4, 4(b), 9A, 33, 60, 66,151G, 151H and 314 of the *Workers Compensation Act 1987* (the 1987 Act).

6. On 14 August 2015, the applicant's solicitor served a claim for lump sum compensation in respect of the applicant's cervical and thoracic spines on QBE and the respondent.

7. Proceedings were issued in the Workers Compensation Commission (the Commission) on 14 September 2015 in matter no. 5726/15. The applicant claimed weekly compensation, future medical expenses and lump sum compensation in respect of injuries sustained to the applicant's thoracic and cervical spines.

8. The applicant's claim for proposed surgery on his cervical spine was referred to an Approved Medical Specialist (AMS), Dr Meakin, for a non-binding opinion. In his Medical Assessment Certificate (MAC) dated 10 November 2015, Dr Meakin advised that the surgery proposed by Dr McKechnie, namely a right C6/7 partial laminectomy, microdiscectomy and rhizolysis, and associated expenses, was reasonably necessary.

9. According to the Certificate of Determination (COD) dated 15 January 2016, the proceedings were discontinued. The respondent agreed to pay the applicant voluntary weekly payments pursuant to s 37 of the 1987 Act from 21 August 2015 to date and continuing, together with the cost of the proposed cervical surgery and associated expenses.

10. On 23 March 2017, the applicant's solicitor served a claim for lump sum compensation in respect of the applicant's cervical and thoracic spines. It seems that this claim was not pressed at that stage.

11. On 6 June 2017, Dr McKechnie sought approval from QBE to perform a L3/4 laminectomy, bilateral microdiscectomy and rhizolysis.

12. On 27 June 2017, QBE issued a notice pursuant to s 74 of the 1998 Act, disputing that the applicant injured his lumbar spine on 30 October 2012 and that his employment was a substantial contributing factor to his condition. It disputed that it was liable for the payment of medical expenses and that the applicant was entitled to lump sum compensation. It cited ss 4, 9A, 60 and 66 of the 1987 Act.

13. Curiously, on 4 August 2017, QBE approved and paid for the lumbar surgery which was carried out on 30 August 2017. Management of the applicant's claim was transferred to AAI Ltd t/as GIO (the insurer) in late 2017 or early 2018.

14. On 24 January 2018, the insurer issued a notice pursuant to s 74 of the 1998 Act, disputing that the applicant had injured his lumbar spine on 30 October 2012 and that his employment was a substantial contributing factor to his condition.

15. The insurer advised that it was declining liability in respect of the injury to the applicant's thoracic spine on the basis that he had recovered from this injury. It disputed that the applicant was incapacitated and it denied that it was liable for the payment of medical expenses and lump sum compensation in respect of his thoracic and lumbar spines. It cited ss 4, 9A, 33, 60 and 66 of the 1987 Act. Liability was not declined in respect of the injury to the applicant's cervical spine.

16. On 25 January 2018, the insurer's solicitor offered to resolve the claim for lump sum compensation for 14% whole person impairment of the cervical spine due to injury sustained on 30 October 2012. The applicant did not respond to this offer.

17. On 2 May 2019, the applicant's solicitor served a notice of claim for lump sum compensation on the respondent and the insurer.

18. On 19 July 2019, the insurer issued a notice pursuant to s 78 of the 1998 Act, disputing that the applicant had injured his lumbar spine on 30 October 2012 and disputing that he was entitled to lump sum compensation in respect of this thoracic and lumbar spines. It claimed that the decision made by QBE to pay for the lumbar surgery in 2017 was done in error.

19. By an Application to Resolve a Dispute (the Application) registered in the Commission on 5 August 2019, the applicant claims lump sum compensation pursuant to s 66 of the 1987 Act due to an injury sustained to his cervical, thoracic and lumbar spines on 30 October 2012.

PROCEDURE BEFORE THE COMMISSION

20. 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.

21. At the arbitration hearing on 15 October 2019, the applicant's counsel indicated that he wished to raise estoppel issues, but he was not in a position to provide detailed oral submissions. Accordingly, I directed that written submissions be filed.

22. The applicant filed submissions on 23 October 2019 and 15 November 2019, and the respondent filed written submissions on 7 November 2019. The parties were informed of my intention to determine the dispute without holding a further conciliation conference or arbitration hearing.

ISSUES FOR DETERMINATION

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

    (a) whether the insurer is estopped from disputing an injury to the applicant's lumbar spine on 30 October 2012;
    (b) whether the applicant injured his lumbar spine on 30 October 2012 – ss 4, 4(b)(i) and 4(b)(ii) and 9A of the 1987 Act;
    (c) whether the applicant's employment was a substantial and/or the main contributing factor to his condition – ss 4, 4(b)(i) and 4(b)(ii) and 9A of the 1987 Act;
    (d) whether the applicant has recovered from the effects of the injury to his thoracic spine, and
    (e) whether an Arbitrator can determine a lump sum claim or should the claim be referred to an AMS.

Documentary evidence

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

    (a) The Application with attached documents;
    (b) Reply with attached documents;
    (c) Application to Admit Late Documents received on 4 October 2019, and
    (d) Application to Admit Late Documents received on 16 October 2019.

Oral evidence

25. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statements

26. The applicant provided a statement on 4 September 2015. He advised that on 30 October 2012, he was required to lift and carry steel cylinders that weighed 50 kg each when he experienced pain in his neck and upper back, extending into his left shoulder and arm. He advised that although he performed suitable duties for his full pre-injury hours until January 2015, he had continued to experience significant and unremitting pain. His services were terminated because the respondent could no longer provide suitable duties.

27. The applicant denied that he had recovered from his injury as suggested by QBE in its dispute notice and he confirmed that he wanted to have the surgery that had been recommended by Dr McKechnie.

28. The applicant stated that he commenced a work trial with a host employer in February 2015 for six hours per day/ three days per week, but the constant driving and other activities aggravated his neck condition. He eventually ceased this work when his doctor downgraded his hours.

29. In his statement dated 14 August 2018, the applicant indicated that QBE had paid for his lumbar surgery and back treatment over a number of years. He stated that to the best of his recollection, he told his doctor at the Tahmoor Medical Centre that he had neck and back pain immediately following his work incident. He was told by his doctor that his back pain was coming from his neck. He did not understand how the insurer could deny that he had suffered a back injury.

30. The applicant agreed that initially most of the medical evidence referred to his neck, but this was because the neck injury was his main problem. He claimed that he had always complained about problems with his back. He conceded that he initially did not complain of back pain because he had severe pain in his neck and left shoulder. Once this pain and discomfort had begun to settle, he noticed discomfort in his back.

31. The applicant stated that he thought that he complained about his back within a matter of weeks of the injury. His solicitor had been unsuccessful in his attempts to obtain a report from Dr Makarious and copies of the clinical notes of his doctor and physiotherapist.

32. The applicant stated that a medical certificate in November 2012 referred to upper back pain. He indicated that he had told his doctor that his neck pain extended down his spine and this included his lower back. He often complained of flare ups in his neck and back in this period.

Clinical notes, medical certificates and reports of Dr Makarious

33. The clinical notes of the Tahmoor Medical Centre commence on 9 February 2006 and conclude on 14 October 2019. Dr Makarious first treated the applicant on 26 October 2012.

34. On 1 November 2012, Dr Makarious recorded that the applicant had suffered a sprain to his left shoulder when lifting heavy metal drums at work two days earlier. The applicant had tenderness in his left shoulder and AC joint, and there was pain on rotation. The doctor referred the applicant for physiotherapy.

35. At the consultation on 4 November 2012, Dr Forceville noted complaints of left shoulder pain. Dr Makarious diagnosed a left shoulder sprain on 6 November 2012.

36. On 9 November 2012, Dr Makarious recorded that the applicant still had tenderness in his upper back, intrascapular area, neck and left shoulder. On 19 November 2012 and 30 November 2012, the doctor referred to a flare up of left upper back and neck pain.

37. After 14 December 2012 and prior to the neck surgery in August 2015, there were regular reports of flare ups of neck and upper back pain. On 7 February 2013, the doctor referred to neck and back pain.

38. On 27 November 2015 and 12 January 2016, Dr Makarious recorded that the applicant had a lower back muscle sprain with pain extending into both buttocks. There was no history or comment on causation. Subsequent entries referred to a flare up in the applicant's neck and upper back pain.

39. On 18 March 2016 and 21 March 2016, Dr Makarious recorded that the applicant had back pain and bilateral sciatica. He organised scans and referred the applicant to Dr McKechnie. The applicant complained of low back pain and sciatica at a number of consultations in 2016 and 2017. At the consultation on 17 August 2017, it was noted that the insurer had approved the lumbar surgery. The remaining entries largely concerned other health issues, but there were still some entries concerning the applicant's lower back.

40. In his initial medical certificate dated 1 November 2012, Dr Makarious certified that the applicant has suffered a sprained left shoulder on 30 October 2012 and he was unfit for work from 1 November 2012 to 2 November 2012 and then fit for suitable duties until 9 November 2012. Subsequent certificates referred to the left shoulder tendonitis and acromioclavicular pain.

41. In the certificate dated 9 November 2012 and in the later certificates, Dr Makarious diagnosed a sprain to the applicant's upper back and neck muscles.

42. Dr Makarious referred the applicant for an MRI scan on 18 January 2013. The radiologist, Dr Gale, reported a history of neck pain extending into the applicant's left shoulder. The scan showed protrusions and stenosis at C4/5, C5/6 and C6/7.

43. Thereafter, Dr Makarious included a diagnosis of neck pain and multiple cervical disc prolapses in his certificates, but there was no reference to the applicant's upper back after 7 March 2013. The last certificate was issued on 11 June 2015.

44. Dr Makarious referred the applicant to Mr Kaustubh Chaubal for physiotherapy treatment on 15 September 2014. In the referral, the doctor recorded that the applicant had suffered a flare up of back and neck pain. On 28 November 2014, he referred the applicant to Dr Manohar. There are no reports from this doctor in evidence.

45. Dr Makarious referred the applicant for an MRI scan on 17 April 2015. This showed protrusions and stenosis at C4/5, C5/6 and C6/7, with potential impingement at C6/7.

46. A CT scan on 18 March 2016 revealed degenerative changes from L2 to S1, bulging at L2/3, L3/4 and L5/S1 with possible compression at L4.

47. Dr Makarious referred the applicant to Dr McKechnie on 13 April 2016 for an opinion regarding the applicant's right sciatica. There was no comment on causation.

Rehabilitation reports

48. There are a number of rehabilitation reports from IOH Rehabilitation in evidence. The initial report dated 20 December 2012 referred to injuries sustained to the applicant's left upper back and neck.

49. There was reference to a flare up of back and neck pain on 23 September 2014, but the precise location of the back pain was not identified. There was reference to the applicant's upper back in the report completed on 26 November 2014, but there was no reference in any of the reports to a low back injury or pain.

Reports of Dr McKechnie

50. Dr McKechnie reported on 14 March 2013 and 22 April 2013. He recorded that the applicant spent two weeks lifting large cylinders in late October 2012/early November 2012 when he developed pain radiating from his neck through his left shoulder and into his arm. He had continued to perform light duties. The doctor noted that an MRI scan revealed disc protrusions from C3 to C7 with stenosis. He prescribed Lyrica, which gave the applicant some relief.

51. On 2 July 2013, Dr McKechnie noted that the applicant was not receiving any benefit from Mobic. He still had neck pain and he also complained of mild low back pain. The doctor referred the applicant for a bone scan on 22 July 2013. This showed degenerative arthritis in the applicant's lower cervical spine and upper thoracic spine at C7/T1 and T3/4.

52. In a report dated 23 October 2013, Dr McKechnie recorded that the applicant had spent two weeks lifting large cylinders at work when he developed pain in his neck extending through his left shoulder and into his arm. He had some physiotherapy but this worsened his pain. He was still working on a fulltime basis. The doctor prescribed medication and referred the applicant for a bone scan.

53. Dr McKechnie diagnosed cervical disc protrusions that caused stenosis and neck and left arm pain. The doctor recommended conservative treatment including a gym based program and he stated that the applicant was fit for fulltime light duties as an electrician with a 5kg lifting restriction.

54. In his report dated 7 November 2013, Dr McKechnie advised that the applicant still had neck pain. The doctor encouraged him to continue with his gym program. It appears that the applicant ceased consulting the doctor at this stage.

55. The applicant returned to see Dr McKechnie on 19 May 2015. He noted that the applicant had returned to work but he had suffered an aggravation. The applicant complained of neck pain radiating into his right shoulder and arm, consistent with cervical radiculopathy. The doctor noted the MRI scan findings and he prescribed Lyrica.

56. On 28 July 2015, Dr McKechnie sought approval from QBE to perform a right C6/7 partial laminectomy, microdiscectomy and rhizolysis. The surgery was approved and the procedure was undertaken on 17 February 2016.

57. In his report dated 22 March 2016, Dr McKechnie recorded that the applicant had made a good recovery from his surgery. His right arm symptoms had subsided and he only had mild residual neck pain.

58. Dr McKechnie reported on 5 May 2016. The doctor noted that the applicant still had some residual neck pain and he had back pain extending down both legs with a partial right foot drop.

59. Dr McKechnie referred the applicant for an MRI scan of his lumbar spine on 4 May 2016. The radiologist reported a history of low back pain with bilateral leg radiation. The scan showed bulging, mild narrowing and facet joint degenerative hypertrophy at L2/3 and L4/5, a protrusion, stenosis and facet joint degenerative hypertrophy at L3/4 with probable impingement on the L4 nerve root, and bulging at L5/S1 with facet joint degenerative hypertrophy, narrowing and impingement on the L5 and S1 nerve roots.

60. In his reports dated 31 May 2016 and 20 July 2016, Dr McKechnie noted the MRI findings and he advised that the applicant was fit for suitable duties for four hours per day/ three days per week with a 5kg lifting restriction. He recommended that the applicant continue with conservative treatment.

61. On 17 August 2016, the doctor reported that there had been no significant improvement and the gym program was exacerbating his pain. On 14 September 2016, the doctor advised that he had referred the applicant for an L3/4 injection. This did not assist the applicant's pain.

62. On 20 October 2016, Dr McKechnie noted that the applicant still had neck and back pain. He referred the applicant for physiotherapy and hydrotherapy treatment. On 22 November 2016, the doctor reported that the applicant had not yet had this treatment, so he intended to contact QBE.

63. In report dated 7 December 2016 and 21 December 2016, Dr McKechnie advised QBE that the applicant had persistent back and leg pain. He recommended physiotherapy and hydrotherapy treatment and if this did not assist, the applicant might require an L3/4 laminectomy, microdiscectomy and rhizolysis. He stated that he was not aware of any non-work factors affecting the applicant's recovery. It seems that QBE provided its approval for this treatment.

64. On 28 March 2017, Dr McKechnie reported that the applicant had low back pain extending into his legs. He referred the applicant for physiotherapy treatment.

65. On 9 June 2017, the doctor advised that as all conservative measures had failed to provide the applicant with any relief, spinal surgery was indicated. Accordingly, he sought approval from QBE to perform this surgery. On 4 August 2017, QBE agreed to fund the procedure. The surgery was undertaken on 30 August 2017.

66. In reports dated 13 October 2017, 16 November 2017, 21 December 2017 and 21 February 2018, Dr McKechnie advised that the applicant was making good progress following his lumbar surgery. His leg pain had resolved and he only had mild back pain. He was receiving physiotherapy treatment that seems to have been funded by the insurer.

67. On 3 April 2018 and 15 May 2018, the doctor reported that the applicant had commenced hydrotherapy and it seems that this treatment had been approved by the insurer.

68. On 21 August 2018, the doctor noted that hydrotherapy treatment was continuing and the applicant was coping with his residual neck and back pain. He recommended a gym based strengthening program. It seems that this was approved in October 2018.

69. In his report dated 20 December 2018 and 21 February 2019, Dr McKechnie noted that the applicant was making slow but steady progress, but he still had persistent low back pain that extended to his left hip. He was attending a gym three times per week and he was doing a business course.

70. In his report dated 14 March 2019, Dr McKechnie noted that an ultrasound showed mild trochanteric bursitis, a condition that was often associated with lumbar pathology. He gave the applicant an injection.

Physiotherapy reports

71. In a report dated 11 November 2016, Mr Chaubal advised that the applicant was unable to upgrade his upper limb exercises. He reported that the applicant had nerve impingement and a neurological deficit due to lumbar disc pathology, although when last seen, the back symptoms were not as bad because he was taking Lyrica.

72. Although the insurer declined to pay for physiotherapy treatment after the lumbar surgery, Mr Chaubal treated the applicant early 2018. On 15 February 2018, he reported that there had been slight improvement. In April 2018, he reported that the applicant had commenced hydrotherapy treatment.

Report of Dr Drummond

73. Dr Drummond reported on 23 July 2015. He recorded that the applicant felt a tearing sensation in the base of his neck on the left side, with radiation into the left scapular region. He noted that the applicant had recently developed pain in the right side of his neck associated with tingling in his fingers.

74. The applicant complained of pain and some stiffness in his neck, paraesthesiae in his right arm and forearm and a buzzing sensation in his left hand. His symptoms impacted on his ability to perform household tasks.

75. Dr Drummond diagnosed spondylosis in the applicant's thoracic spine, disc degeneration and protrusions in the cervical spine and stenosis at C6/7. The doctor stated that the pathology was more likely constitutional in nature and was not due to trauma. The recent onset of symptoms in the right hand was more consistent with the progression of the degeneration. He stated that the applicant's employment was not a substantial contributing factor to his current condition and any incapacity was not work related.

Reports of Dr Patrick

76. Dr Patrick reported on 11 May 2015 and 10 June 2015. He recorded that the applicant experienced sharp acute pain in the left side of his neck radiating to his left scapular region after lifting heavy steel cylinders at work on 30 October 2012. The pain became more widespread in the upper-mid thoracic spine and he had discomfort in the left arm. The doctor noted that the applicant had experienced some low back pain which settled after three weeks. The applicant had seen Dr Makarious about his back pain in December 2014.

77. Dr Patrick diagnosed a significant cervical and thoracic spinal injury as a result of the incident on 30 October 2012 and he conspired that the applicant's employment was the main contributing factor. He stated that the applicant's condition could be described as a disease, namely cervicothoracic disc degeneration/ facet and uncovertebral arthrosis, which was either caused or aggravated by the work incident. He assessed 14% whole person impairment of the applicant's cervical spine and 5% whole person impairment of the thoracic spine, for a total of 18% whole person impairment. He stated that the applicant was unfit for work.

78. Dr Patrick reported on 7 March 2017. The doctor repeated the history and noted that the applicant had undergone cervical surgery that alleviated some of his left shoulder pain. He had also developed a degree of right foot drop. The applicant complained of low back pain radiating across his lumbar spine, buttocks and thighs.

79. On examination, the doctor observed stiffness and a restriction of movement in the lower back. The knee jerk was diminished in both legs and there was impairment of sensation in the right leg corresponding to the L5 nerve root distribution.

80. Dr Patrick advised that there had been a considerable deterioration in the applicant's condition. He stated that the applicant was totally incapacitated and he assessed 15% whole person impairment of the applicant's cervical spine and 5% whole person impairment of the thoracic spine, for a total of 19% whole person impairment.

81. In a supplementary report dated 13 March 2017, Dr Patrick stated that there was some settling of the applicant's low back symptoms within a month or so following the incident but they never disappeared completely. He considered that the mechanism of injury could have caused a lumbar spinal injury and he believed on the balance of probabilities that the heavy activities undertaken on 30 October 2012 caused injury to the discs and protrusions on the background of canal stenosis. He assessed 8% whole person impairment of the applicant's lumbar spine, and revised the combined impairment to 25% whole person impairment.

82. In his report dated 5 April 2019, Dr Patrick recorded that the applicant had undergone lumbar surgery and he had achieved a satisfactory outcome. He had continued to experience pain and stiffness in his neck and lower back.

83. Dr Patrick confirmed his previous opinion and assessed 15% whole person impairment of the applicant's cervical spine, 5% whole person impairment of the thoracic spine and 10% whole person impairment of the lumbar spine, for a total of 28% whole person impairment.

84. Finally, in his report dated 14 June 2019, Dr Patrick advised that the applicant sustained a significant injury to his lower back on 30 October 2012. The doctor noted that when he examined the applicant in February 2015, the applicant stated that he had significant low back pain and discomfort into the right thigh following the incident. The doctor felt that this history was important, even though there was a history that the low back discomfort settled somewhat by about three weeks. Most of the attention was being given to the thoracic and cervical spines. The applicant had also given a history that the low back symptoms had never completely disappeared. He told Dr Makarious about his low back, but that doctor suggested that his pain was coming from his neck.

85. Dr Patrick advised that the CT scan in March 2016 showed significant lumbar pathology consistent with the nature and conditions of employment over the years, culminating in a year or more when he was carrying out extremely heavy work on 30 October 2012. The pathology did not develop overnight and it was not inconsistent that there was some settling of the back symptoms which were overshadowed by the significant neck and thoracic spine symptoms.

Reports of Dr Powell

86. Dr Powell reported on 14 June 2017. He noted that the applicant experienced some neck pain radiating into the left shoulder and peri-scapular region when moving a cylinder into a machine on 30 October 2012. The applicant continued to work on light duties until his services were terminated in January 2015.

87. Dr Powell noted that the applicant continued to experience neck and right arm symptoms and eventually surgery was undertaken on 17 December 2016. This resulted in the resolution of his arm paraesthesiae and a reduction in his arm and neck pain.

88. Dr Powell reported that the applicant also complained of low back and right leg symptoms, but he observed that the only reference to low back symptoms in the medical evidence was contained in Dr Patrick's initial report. The applicant complained of intermittent pressure and aching in his neck extending to his left peri-scapular region and sharp pain in his lower back radiating down his legs. His back was stiff, but he had no paraesthesiae or pins and needles.

89. Dr Powell diagnosed a muscular-ligamentous injury to the applicant's cervical spine and an aggravation of underlying spondylosis and a disc lesion at C5/6 as a result of the incident on 30 October 2012. He considered that the multilevel degenerative changes in the applicant's lower back were likely to be constitutional in nature and there was insufficient evidence to conclude that the had been a direct injury to the applicant's lumbar spine.

90. Dr Powell advised that the tests undertaken in 2016 showed advanced degenerative changes in the applicant's lumbar spine. He confirmed that the applicant's employment was not a substantial contributing factor the development of the disease process in the lumbar spine. He assessed 14% whole person impairment of the applicant's cervical spine.

91. In his report dated 2 January 2018, Dr Powell indicated that there was no evidence that the applicant injured his thoracic spine in the incident or suffered an aggravation of any pre-existing pathology. The doctor advised that the applicant had a disease process in his lumbar spine, but there was insufficient evidence to suggest that the applicant's employment was the main contributing factor to the development or aggravation of that disease.

92. Dr Powell stated that the lumbar surgery performed by Dr McKechnie would be appropriate to address the underlying pathology, if there had been a deterioration in the applicant's condition since his examination in May 2017, but this was not related to any employment injury.

93. Finally, in his report dated 27 June 2019, Dr Powell noted that the applicant told him that he had back and right leg symptoms since the incident, although investigations were not undertaken until March 2016. The applicant indicated that there had been no significant change in his neck symptoms, and he had constant aching in his lower back without radiation into the legs, together with pins and needles in both feet.

94. Dr Powell confirmed his previous diagnosis and opinion. He stated that the applicant was only fit for modified duties due to his neck injury. He assessed 14% whole person impairment of the applicant's cervical spine due to the work incident, and 10% whole person impairment of the applicant's lumbar spine, but this was not work related.

Respondent's documents

95. A Report of Injury form was completed by Cynthia Winter, the Return to Work Co-Ordinator, on 2 November 2012. She noted that the applicant had suffered a left shoulder sprain when lifting a cylinder on 30 October 2012. The injury was reported to the supervisor, Mr Shah, on that date. This report is consistent with the notice of injury provided to QBE.

96. The incident report form dated 1 Novembers 2012[1] identified the injury as a back strain. This document is unsigned and the author of this document is unknown.

97. The respondent relies on a number of statements which were attached to a factual investigation.

98. According to Sunil Shah, the production supervisor, the applicant reported that he had injured his neck on 30 October 2012 when he lifted a cylinder. There were no witnesses to the incident. He stated that the applicant continued to work, but he complained about his neck. He thought that the applicant performed his normal duties until 7 November 2012, although he was unsure whether the applicant worked beyond 1 November 2012.

99. According to Ms Winter, the applicant returned to work on suitable duties on 5 November 2012. He certified fit for permanently modified duties on 12 December 2013. The performed such work with minimal time off until his services were terminated on 23 January 2015.

APPLICANT'S SUBMISSIONS

100. The applicant's counsel, Mr Parker, submits that there is no dispute in respect of injury to the applicant's cervical and thoracic spines. Dr Patrick thought that the mechanism of injury was significant and this was consistent with an injury sustained to the applicant's lumbar spine. The claim form and report of injury form referred to a left shoulder sprain, whereas the incident report form referred to a back strain.

101. Mr Parker submits that on 6 June 2017, Dr McKechnie requested approval from QBE to perform lumbar surgery. QBE denied liability for the procedure on 27 June 2017, but it then paid for the operation. According to the applicant, QBE had paid for his back treatment for many years. There was no evidence to contradict the applicant's evidence or that the payments were made by mistake.

102. Mr Parker submits that in its dispute notice dated 24 January 2018, the insurer admitted that the applicant had injured his thoracic spine, but it denied that he had injured his lumbar spine. The insurer indicated in its dispute notice dated 19 July 2019 that QBE had paid for the lumbar surgery, but it claimed that this was an error. There was no evidence to support this statement.

103. Mr Parker submits that the respondent is estopped from denying that the applicant injured his lumbar spine because it paid for the surgery. He relies on the principles of estoppel by conduct discussed by the High Court in *The Commonwealth of Australia v Verwayen*[2], and he submits that those principles have been applied in a number of cases in the Commission[3].

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[1] Reply, p 80.
[2] [1990] HCA 39, (*Verwayen*).
[3] *Manpower Pty Ltd v Harris* [2011] NSWWCCPD 10 (*Harris*); *Bouchmouni v Bakhos Matta tlas Western Red Services* [2013] NSWWCCPD 4 (*Bouchmouni*); *Lotos Concretors Pty Ltd v Mitchell* [2018] NSWWCCPD 16 (*Lotos Constructors*).

104. Mr Parker submits that QBE represented that the lumbar spine injury was caused by the applicant's employment and the treatment was reasonably necessary. It allowed the applicant to assume that this was the case. He undertook an invasive, risky and unsuccessful operation. He has been left without a job, he has required further treatment and he has a significant whole person impairment.

105. Mr Parker submits that as detrimental reliance has been established, the respondent is estopped from denying the effects of the surgery that it paid for and there can be no dispute regarding injury, causation and reasonably necessary treatment. It would be unconscionable for the respondent to now claim that the applicant's lumbar spine was not injured.

106. Mr Parker submits that the Court of Appeal decision in *Department of Education and Training v Sinclair*[4] does not support the submission that the payment of compensation could not constitute an admission[5]. The respondent paid for the lumbar surgery and treatment for a number of years after it had obtained the report of Dr Powell and had declined liability. It was not a case of mistake or a failure to properly investigate. There was a conscious decision made and an acceptance of an injury and the need for treatment.

107. In the alternative, Mr Parker submits that the evidence shows that the applicant complained about his lumbar spine at an early stage. The mechanism of injury was consistent with a lumbar injury being sustained and the respondent paid for the surgery.

108. Mr Parker submits that according to the applicant's evidence, he suffered a low back injury and he had pain in the area. He told his doctor about the injury shortly after the incident. His doctor was more concerned about treatment to the other parts of his body and largely ignored the applicant's concerns. The applicant also informed QBE, who paid for his treatment. There was no evidence adduced by the respondent, such as file notes or statements from claims officers, to challenge the applicant's evidence.

109. Mr Parker submits that the evidence of the applicant's doctor should not be preferred over the applicant's evidence and there is authority for this proposition[6]. The applicant was unable to obtain a report from Dr Makarious and there was no cross examination. The respondent bore the evidentiary onus. The applicant specifically indicated what he told Dr Makarious and this has not been contradicted.

110. Mr Parker submits that the clinical notes of Dr Makarious cannot be relied upon by the respondent. They show that the applicant's general health was not good and that he was being treated for pneumonia, diabetes, heart palpitations, bowel issues, finger fractures and cervical radiculopathy. The doctor also referred to other medical issues that were of concern in or around the date of injury.

111. Mr Parker submits that Dr Makarious referred to the applicant's "back" and "upper back" on in his notes and this could only be consistent with a distinction between the lower and upper back. The first recorded complaint in respect of the lumbar spine was on 7 February 2013.

112. Mr Parker submits that the clinical notes are not a complete recitation of what occurred. There is no detailed description of the injury and no reference to the back in the first entry. However, the applicant clearly complained about his back to the respondent as evidenced by contents of the notification of injury form. In the circumstances, the applicant's evidence should be preferred to the clinical notes.

113. Mr Parker submits that the applicant's back injury somewhat dissipated, as reported by Dr Patrick, and he consulted a variety of doctors for different health issues over the years.

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[4] [2005) NSWCA 465 (*Sinclair*).
[5] *Sinclair*, [91] and [93].
[6] *Palise v Australian and New Zealand Banking Group Limited* [2018] NSWWCCPD 1.

Therefore, the apparent failure by the applicant to report his lumbar injury is of little evidentiary value at the time that the statements were made.

114. Mr Parker submits that the respondent's experts did not properly consider whether the mechanism of the incident could have caused a back injury, whereas Dr Patrick addressed this in his reports. Dr Patrick accepted that the applicant injured his back, based on the history and radiological tests.

115. Mr Parker submits that it can be inferred that Dr McKechnie supported the causation issue, given that he sought approval for the lumbar surgery and it was paid for by QBE. It is illogical that the mechanism of injury was consistent with injuries to the cervical and thoracic spines, but not to the lumbar spine, which is only centimetres below the thoracic spine. The failure by the respondent's experts to engage with Dr Patrick's opinion, which was not inherently incredible or illogical, means that Dr Patrick's opinion should be preferred, consistent with the reasoning in *Arquero v Shannons Anti Corrosion Engineers Pty Ltd*[7].

116. Mr Parker submits that according to the applicant and the reports of Dr Patrick, there has not been a resolution of the applicant's thoracic injury. There is clearly a dispute between the experts and it is more appropriate that it be determined by an AMS.

117. Mr Parker submits that the claim only concerns lump sum compensation, and it is not an arbitrator's role to determine the effects of an injury[8]. He submits that *Peric v Chui Lee Hyuang Ho Shin Jong Lee and Mi Ran tlas Pure and Delicious Healthy &* Anor[9] and *Workcover NSW v Evans*[10]are inconsistent with *Jaffarie v Quality Castings Pty Limited*[11] and *Bindah v Carter Harvey Wood Products Australia Pty Limited*[12], and should not be overruled. The repeal of ss 321(3) and 321(4) of the 1998 Act does not provide an Arbitrator with the express authority to do so.

118. Mr Parker submits that the authorities confirm that in a case where the only question is one of impairment, the medical dispute is a matter solely for an AMS. The applicant's claim should be referred to an AMS to assess the whole person impairemnt in his cervical, thoracic and lumbar spines.

RESPONDENT'S SUBMISSIONS

119. The respondent's counsel, Mr Saul, submits that that the applicant's reliance on the principle of estoppel is misconceived and should be rejected. There was no contention of estoppel by conduct in *Sinclair*, where it was confirmed that payments of voluntary compensation did not amount to an admission, other than of "the slightest weight" in certain circumstances. Little weight can be given to an admission that is easily rebuttable by evidence that mitigates against such an admission.

120. Mr Saul submits that the acceptance of the contrary position would make the system unworkable as most cases in the Commission would have a threshold issue of estoppel where some voluntary payments had been made. The Court of Appeal advised that an insurer should be encouraged to make voluntary payments wherever practicable until such a time that it has evidence to dispute the claim. The Court of Appeal would have felt that it was bound by *Verwayen*, and raised the "admission" to the status of an "estoppel", but it did not do so. Accordingly, *Verwayen* is of no relevance in the Commission.

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[7] [2019] NSWWCCPD 3, [143] (*Arquero*).
[8] *Greater Taree City Council v Moore* [2010] NSWWCCPD 49 (*Moore*).
[9] [2009] NSWWCCPD 47 (*Peric*).
[10] [2009] NSWWCCPD 95 (*Evans*).
[11] [2014] NSWWCCPD 79 (*Jaffarie*).
[12] [2014] NSWCA 264 (*Bindah*).

121. Mr Saul submits that the matters of *Harris* and *Bouchmouni* concerned consent orders made by the Commission, and an insurer may be estopped from raising issues once orders have been made. The decision in *Lotos Constructors* is of no assistance as it involved a consideration of an estoppel of injury following a Complying Agreement.

122. Mr Saul submits that many cases in the Commission resolve by discontinuance involving an agreement to pay voluntary compensation by way of a notation, not an order. In such cases, no orders are made in order to preserve available defences into the future. An insurer is entitled to rely on its evidence and resile from any voluntary payments, consistent with *Sinclair*.

123. Mr Saul submits that the applicant bears the onus of proving that he suffered a frank injury to his lumbar spine on 30 October 2012. He submits that the applicant has failed to discharge that onus. The authorities confirm that the tribunal of fact "must feel an actual persuasion of the existence of that fact"[13] and if it is more probable than not, it is treated as a certainty[14].

124. Mr Saul submits that contrary to the applicant's statements, the contemporaneous medical and lay evidence does not support the applicant's version of injury to his lumbar spine. There were no complaints of symptoms in his lumbar spine. The early references to the "back" clearly were references to the "upper back/ thoracic spine".

125. Mr Saul submits that the first reference to any lower back complaints in any of the medical or lay evidence was in the report of Dr McKechnie dated 2 July 2013, some nine months after the incident. He noted in passing that the applicant had "some mild lower back pain" but there was no radiculopathy at that time. The gap in time regarding complaints is an important factor.

126. Mr Saul submits that there was no mention of the lower back injury in the applicant's claim form, the Medicare Notice or clinical notes. Lay evidence from the applicant's co-workers does not support complaints by the applicant of lower back symptoms. The AMS in November 2015 did not record a history of a lower back injury on 30 October 2012.

127. Mr Saul submits that Dr McKechnie did not express an opinion on causation of the applicant's lower back condition. The pathology shown in the radiological tests was inconsistent with an injury or aggravation five years earlier in October 2012.

128. Mr Saul submits that in May 2015, Dr Patrick recorded that the applicant's lower back symptoms resolved within three weeks, so he did not assess any whole person impairment. In March 2017, Dr Patrick reported that the applicant's lower back pain recurred, but the doctor did not provide an assessment. The doctor did not address causation in his report dated 5 April 2019.

129. Mr Saul submits that in his report dated 14 June 2019, Dr Patrick attempted to resile from his earlier reports and provided an unconvincing opinion on causation. The applicant's case rises or falls on the varying and inconsistent reports of Dr Patrick, and it was not until he was pressed by the applicant's solicitor that he revised his earlier opinion. There is no contemporaneous evidence to support the applicant's complaints of radiculopathy as reported by the doctor.

130. Mr Saul submits that Dr Patrick is not a reliable expert and his opinion on injury and causation should be given no weight in accordance with the principles in *Hancock v East Coast Timber Products Pty Ltd*[15]*.*

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[13] *Department of Education & Training v Ireland* [2008] NSWWCCPD 134 (*Ireland*)*; Nguyen v Cosmopolitan Homes* [2008] NSWCA 246, [44] – [48].
[14] *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, [642] – [642] (*Malec*).
[15] [2011] NSWCA 11 (*Hancock*).

131. Mr Saul submits that the opinions of Dr Powell have been entirely consistent. He diagnosed significant constitutional pathology in the applicant's lumbar spine that was not related to the incident on 30 October 2012, given the radiological investigations and the length of time between the incident and the complaints of low back pain. His views should be preferred to those of Dr Patrick. There should be an award in favour of the respondent in respect of the alleged injury to his lumbar spine on 30 October 2012.

132. Mr Saul submits that according to Dr Powell, the applicant has recovered from the effects of any injury to his thoracic spine. Any symptoms in the thoracic spine were negligible, such that there was no whole person impairment assessed by Drs Drummond and Powell. Dr Patrick assessed 5% whole person impairment without radiological reports or an appropriate examination.

133. Mr Saul submits that the Commission has jurisdiction to make findings of recovery for all purposes, including findings and orders for lump sum compensation claims. He submits that the applicant's submissions regarding the mandatory need to refer a lump sum claim to an AMS are misguided.

134. Mr Saul submits that the amendments made to the Acts on 1 January 2019, with the repeal of s 65(3) of the 1987 Act and s 322A of the 1998 Act, conferred jurisdiction on the Commission to deal with lump sum compensation. Accordingly, the authorities of *Jaffarie*, *Bindah* and *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine*[16] no longer apply.

135. Mr Saul submits that the rationale of Deputy President O'Grady in *Peric* is again sound law. If the Commission determines that a worker has recovered from an injury, there is nothing to refer to an AMS. This reasoning is supported in *Etherton v ISS Property Services Pty Limited* [17]. There should be a finding that the applicant has recovered from the injury to his thoracic spine and the matter should be remitted to the Registrar for referral to an AMS to assess the whole person impairment of the applicant's cervical spine.

APPLICANT'S SUBMISSIONS IN REPLY

136. Mr Parker submits that the applicant does not contend that the payment for surgery itself resulted in an estoppel. Rather, based on all the circumstances, an estoppel by conduct has been created, which prevents the respondent from denying that the applicant injured his lower back.

137. Mr Parker submits that in accordance with *Etherton*, an Arbitrator theoretically has the jurisdiction to determine the whole person impairment, but this should not be done in the present matter.

138. Mr Parker submits that given the competing medical opinions of Drs Patrick and Powell, assessment by an AMS would be the most appropriate, particularly as the remaining body parts have to be referred to an AMS. If an assessment is to be made by the Commission, the opinion of Dr Powell should be rejected because he has based his opinion on the false premise that the applicant's injury has resolved.

REASONS

Is the respondent estopped by its conduct from disputing the alleged injury to the lumbar spine?

[16] [2016] NSWCA 213 (*Hine*).
[17] [2019] NSWWCCPD 53 (*Etherton*).

139. Section 279(1) and s 280 of the 1998 Act deal with an insurer's obligations when a claim is made for medical expenses. They provide:

> "**279 Liability to be accepted within 21 days**
>
> (1) Within 21 days after a claim for medical expenses compensation is made the person on whom the claim is made must determine the claim by accepting or disputing liability.
> **Note.** Section 283 makes failure to comply with this section an offence. Section 78 requires notice of a dispute to be given",
>
> and
>
> "**280 Provisional acceptance of liability**
>
> (1) An insurer can accept liability for medical expenses compensation on the basis of the provisional acceptance of liability for an amount of up to $5,000 or such other amount as may be specified by the Workers Compensation Guidelines.
> (2) The acceptance of liability on a provisional basis does not constitute an admission of liability by the employer or insurer under this Act or independently of this Act."

140. It is true that the principles of estoppel have application in the Commission and estoppel by conduct has been addressed by the Commission and the Court of Appeal.

141. The matters of *Harris*, *Bouchmouni* and *Lotos Constructors,* where questions of res judicata estoppel and Anshun estoppel were raised, can be distinguished on the facts because they were not concerned with the voluntary payment of compensation as in the present case. The first two cases concerned insurers acting contrary to binding consent orders and *Lotos Constructors* related to estoppel arising from a Complying Agreement.

142. Mr Parker submits that the respondent is estopped from denying an injury to the applicant's lumbar spine because it paid for the surgery as well as other back treatment. Precise details of the treatment are unknown as I do not have the benefit of any relevant medical accounts, receipts or a list of payments.

143. Mr Parker submits that because QBE paid for the lumbar spine injury, it accepted that the applicant injured his lower back. The applicant had the surgery and had not achieved a good outcome. He had acted to his detriment.

144. In support of his submission, he relies on the principles discussed by the High Court in *Verwayen,* and the summary provided by Deane J. This was the subject of comment by Deputy President Roche in *Begnell v Super Start Batteries Pty Ltd*[18]*.*

145. In *Begnell*, the Deputy President confirmed that neither the legislation nor the authorities established that an insurer was estopped from disputing liability for an injury dispute merely because it had paid some compensation. He stated:

> "… I do not accept that the payment of compensation amounts to any more than an admission to be weighed with all the evidence in the case."[19]

[18] [2009] NSWWCCPD 19, (*Begnell*).
[19] *Begnell*, [77].

146. The Deputy President also commented on the potential for prejudice or detriment to a party:

> "However, I do not accept that the representation induced Mr Begnell to act, or fail to act, to his detriment. As in *Gabriel*, I am not satisfied that the passage of time has resulted in any or any significant prejudice or detriment to Mr Begnell. He has led no evidence that he has lost the opportunity to call evidence from relevant witnesses, or that the passage of time has prejudiced the preparation of his case. So far as I can determine, his solicitor has done very little to prepare the case and, unbelievably, has not even sought the production of CGU's file.
>
> The central principle of the doctrine of estoppel by conduct is that the law will not permit an unconscionable departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some course of conduct which would operate to that other party's detriment if the assumption were not adhered to for the purpose of the litigation (Deane J in *Verwayen* at 444). His Honour also observed (at 444) that:
>
> > 'Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party."
>
> Whether it would be unconscionable to allow a party to depart from the assumption or representation will depend on all the circumstances of the case. Each case will have to be considered on its merits. Whilst the insurer has not explained the reason for its change of mind in 2006, it is clear that additional relevant evidence (in particular, Mr Drummond's statement) came to light in the 2005 investigation and I infer that that evidence played a role in the decision to dispute liability. It has not been submitted that Mr Begnell has been deprived of the opportunity to test that additional evidence or to call evidence to rebut it. He did not seek to cross-examine any of Super Start's witness, but did tender evidence to rebut their allegations.
>
> The Commission has a statutory duty to act according to "equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms" (section 354(3)). That provision applies with equal force to employers as well as workers. Whilst CGU may have been tardy in its handling of the claim, Mr Begnell has called no evidence of any prejudice or detriment he will suffer if the case is now determined according to its substantial merits. Therefore, I do not believe there are any factors that would make it unconscionable to allow Super Start to dispute whether Mr Begnell sustained an injury in compensable circumstances.
>
> It follows that I am not satisfied that Mr Begnell has established an estoppel by representation or conduct. At best, consistent with the authority of *Sinclair*, the acceptance of liability and payment of compensation until February 2005 amounted to no more than an admission to be assessed and weighed with all the other evidence in the case and I reject Mr Begnell's argument that Super Start is not permitted to contest the issue of injury".[20]

[20] *Begnell*, [101] – [105].

147. In *Chase v State of New South Wales*[21], the Court of Appeal considered whether voluntary payments of workers compensation by insurer in a claim for common law damages amounted to an admission of liability. Giles JA (Tobias and Bryson JJA agreeing) stated:

> "In this Court the appellant submitted that the payment of workers compensation was an admission which stood unless explained away as made by mistake or for some other reason, and that the judge failed to consider whether the admission had been explained away. Asked whether he said that the admission must carry the day unless explained away, the appellant's counsel said no but it was 'part of the material that can be taken into account', and that her Honour had failed to take it into account.
>
> The judge appeared to accept that the admission could be found in the payment of workers compensation benefits. It is correct that she did not consider whether it had been explained away. She did not have to do so. The unexplained admission was plainly taken into account as part of a consideration of the whole of the evidence. Any admission is evidentiary only, to be weighed together with all other evidence, and in her Honour's view on the whole of the evidence the appellant had not established that the injury for which she claimed damages was work related. There was no error in her Honour's approach.
>
> The appellant's submission was really that the judge's causation finding was marred by giving insufficient weight to the admission. That depended on the weight it deserved. The evidence going to payment of workers compensation benefits, from which the weight would emerge, was scanty."[22]

148. Further, Giles JA confirmed that the trial judge was entitled to "attribute little significance to the admission when weighing it together with the other evidence."[23]

149. In *Sinclair*, the Court of Appeal again considered this issue. Spigelman CJ (Hodgson and Bryson JJA agreeing) stated:

> "The Respondent submitted that the Appellant, by not contesting liability between November 2001 and August 2003, has made an admission of some character that ought to bear upon this Court's assessment of the evidence.
>
> These is some authority for the proposition that payment of compensation is prima facie evidence of a compensable injury: see *Vergis v Brownbuilt Ltd* (1973) 5 SASR 591; *Christiansen v JW Simpson & Co Pty Ltd* [1971] SASR 412; *Nizich v Royal Prince Alfred Hospital* [1973] WCR 291; *Way v Penrikyber Navigation Colliery Co Ltd* [1940] 1 KB 517.
>
> Nevertheless, in my view, this submission should be rejected.
>
> First, it would involve a substantial stretch to apply these principles to the present circumstances that involve the complex interaction of statutory tests. While it might be appropriate to attach some small weight to such an admission in cases involving simple questions of fact (e.g. whether there was an employment injury), it would not be appropriate to develop that principle to cases of this complexity. In particular, it would be inappropriate to see such action as an admission that the statutory 'whole or predominant test' is established.
>
> Secondly, any weight that could be attached to such an admission must be of the slightest weight given that medical reports have been tendered.

[21] [2004] NSWCA 441(*Chase*).
[22] *Chase*, [69] – [71].
[23] *Chase*, [75].

> Finally, I would particularly reject any suggestion that an employer might adversely affect their position in the Commission by not fully investigating each possible defence prior to making their first payment. Such an outcome would have the effect of deterring precisely the kind of reasonable behaviour that beneficial legislation such as the workers compensation scheme seeks to encourage."[24]

150. Finally, in *Nominal Defendant v Gabriel & anor*[25], Campbell JA (Hodgson JA agreeing) made some relevant comments about admissions in a motor accidents case. He stated:

> "An admission made otherwise than in the course of a formal court process, is merely an item of evidence that the court might ultimately accept or reject. It is open to a party who has made such an admission to seek to demonstrate, through other evidence, that the admission was made under a misapprehension, or at a time when the person who made the admission did not have all the relevant information, or that there is some other reason why the court ought not accept that the admission states the truth about the matter admitted. In that way, an admission that is an item of evidence made outside court proceedings can be qualified or explained away…"[26]

151. Therefore, these authorities confirm that any admission resulting from the payment of compensation does not create an estoppel and it must be weighed up with the other evidence. Further, there is nothing in the terms of Chapter 7 that diminishes the weight of these authorities[27]. Therefore, there is a need to consider the evidence to determine if the insurer is estopped from denying that the applicant injured his lower back.

152. Dr McKechnie sought approval from QBE to perform the lumbar surgery on 6 June 2017. QBE determined the claim and disputed liability with respect to the alleged lower back injury and medical expenses in its Section 74 Notice dated 27 June 2017. It explained in its notice why liability had been declined, based on the report of Dr Powell dated 14 June 2017. It was a reasoned decision based on medical evidence. Therefore, it complied with s 279(1) of the 1998 Act.

153. QBE did not withdraw its dispute notice, but for some unexplained reason, it approved the lumbar surgery on 4 August 2017 and it paid for the procedure that was undertaken in late August 2017. Precise details are unknown. There was no suggestion that the insurer paid for the surgery on a provisional basis so as to invoke s 280(2) of the 1998 Act.

154. The insurer disputed liability in respect of the lumbar injury and medical expenses in its dispute notices dated 24 January 2018 and 19 July 2019, and it claimed that the decision made by QBE to pay for the lumbar surgery in 2017 was done in error. It provided a detailed explanation for its decision. Therefore, there is evidence from the insurer addressing QBE's error.

155. Although the applicant indicated in his statement that QBE had paid for his lower back surgery and it had been paying for his "back" treatment over many years, this evidence is in very general terms and is not corroborated by a list of payments, medical accounts, reports or requests to authorise lower back treatment. His use of the generic term "back" causes confusion, given that liability was accepted for the applicant's "upper back" injury. The applicant's evidence may in fact only refer to the cost of treatment for the accepted injury to his upper back/ thoracic spine.

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[24] *Sinclair*, [88] – [93].
[25] [2007] NSWCA 52 (*Gabriel*).
[26] *Gabriel*, [113].
[27] *Begnell*, [88].

156. Most of Dr McKechnie's pre-surgery reports were addressed to Dr Makarious, not QBE, suggesting that QBE was not paying any report fees. QBE was still paying medical expenses in respect of the thoracic and cervical spine injuries and it is unclear whether the accounts submitted by the clinicians differentiated between the different body parts. Therefore, one cannot draw any definite conclusion regarding the applicant's evidence of long term payment of the medical expenses that may have related to treatment on his lumbar spine.

157. Dr McKechnie reported on 5 May 2016 that the applicant should continue with physiotherapy treatment on his cervical spine. On 31 May 2016, the doctor recommended that the applicant have physiotherapy treatment on his lumbar spine. Whether a separate authorisation for lumbar physiotherapy and hydrotherapy treatment was submitted to QBE is unknown. Further, in the absence of accounts, receipts and a list of payments, it is unclear whether QBE paid for the medication, injections and radiological tests undertaken prior to the surgery.

158. On 7 December 2016, Dr McKechnie reported that the applicant had not yet commenced treatment, but on 21 December 2016, the doctor reported that the applicant had a few sessions of hydrotherapy. On 28 March 2017, the doctor advised that he had given the applicant a referral for physiotherapy, but whether this was authorised by QBE or whether the applicant had this treatment is unknown.

159. It seems likely that some of the physiotherapy and hydrotherapy treatment for the applicant's lumbar spine was paid for by QBE from late December 2017 until at least 24 January 2018, when the insurer issued a dispute notice. Mr Chaubal treated the applicant from about March 2018, but his reports do not identify the body parts that he treated, so it is not surprising that the insurer continued to pay for physiotherapy and hydrotherapy.

160. There is little merit in the submission that the applicant acted to his detriment by undergoing surgery. He was in severe pain and after exhausting conservative measures, so Dr McKechnie recommended lumbar surgery. It was not a rushed decision and the applicant was counselled about the nature of the operation and the potential risks and benefits. Dr McKechnie noted that the applicant achieved a good outcome with the resolution of his sciatica and he only had mild low back pain and neck pain. He cleared the applicant for restricted duties from 21 February 2018.

161. There is no evidence before the Commission that the insurer's decision to dispute liability resulted in any or any significant prejudice or detriment to the applicant in respect of his litigated claim.

162. There was ample explanation in the dispute notices issued by QBE in June 2017 and by the insurer in January 2018 as to the reasons why liability was declined in respect of the alleged lower back injury. What QBE did not do was explain why it paid for the back surgery in the first place. The applicant has had ample opportunity since January 2018 to address the liability dispute in respect of his lower back.

163. The insurer's decision to dispute liability for the lower back injury in June 2017 and January 2018 does not constitute unjust or oppressive conduct. The decision was based on an analysis of the evidence. The decision by QBE to pay for the lumbar surgery was made in error, and this was on the background of an acceptance of liability in respect of the injury to the cervical and thoracic spine and the need for treatment that flowed from those injuries.

164. When the insurer realised this error, it acted promptly and issued a further dispute notice on 24 January 2018. Such a decision was not unconscionable, and it would be unjust if the insurer was estopped from disputing that the applicant injured his lower back on 28 October 2012 without a consideration of the totality of the evidence.

165. Therefore, whilst QBE agreed to pay for the lumbar surgery in August 2017 and paid for some other medical expenses, which have not been properly particularised, this fact is merely an admission that needs to be weighed up with the evidence before me. This conclusion is consistent with the reasoning in *Begnell*, *Sinclair*, *Gabriel*, *Chase* and *Verwayen*.

Did the applicant sustain injury to his lumbar spine? – ss 4, 4(b)(i), 4(b)(ii) and 9A of the 1987 Act.

166. Section 4 of the 1987 Act defines injury as follows:

> "In this Act-
>
> ***Injury***-
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) 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, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined".

167. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change: *Castro v State Transit Authority (NSW)*[28], or as stated by Neilson CCJ in *Lyons v Master Builders Association of NSW Pty Ltd* [29], "the word 'injury' refers to both the event and the pathology arising from it".

168. The issue of causation must be determined based on the facts in each case. The accepted view regarding causation was set out in *Kooragang Cement Pty Ltd v Bates*[30] where Kirby J stated:

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

[28] [2000] NSWCC 12; 19 NSWCCR 496.
[29] (2003) 25 NSWCCR 422, [429].
[30] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*), [463].

169. Although the High Court in *Comcare v Martin*[31] raised some concerns about the common-sense evaluation of the causal chain in a matter that concerned Commonwealth legislation, the common-sense approach still has place in the application of the legislation to the facts of the case.

170. Dr McKechnie diagnosed cervical disc protrusions that caused cervical stenosis and left arm pain. Whether he considered that these disc protrusions were part of a disease process is unknown. The doctor also noted that the applicant had degenerative pathology in his lower back with a protrusion and impingement at L3/4 and L5/S1 that warranted surgery. Nevertheless, he did not comment on causation.

171. Dr Powell diagnosed advanced degenerative changes in the applicant's lumbar spine, but advised that this disease process was constitutional and it was not related to any employment injury.

172. According to Dr Patrick, the applicant has a disease in his lower back that was caused or aggravated by the work incident. Therefore, he supports a personal injury in terms of s 4(b)(i) of the 1987 Act and s 4(b)(ii) of the 1987 Act.

173. According to the applicant's initial statement dated 4 September 2015, he experienced pain in his neck, upper back, left shoulder and arm following the work incident. He did not refer to any lower back injury. Therefore, there is an inconsistency when compared to the applicant's more recent statement.

174. In his statement dated 14 August 2018, the applicant claimed that he told his doctor that he had neck and back pain immediately following his work incident. This is true to a degree, as the clinical notes of Dr Makarious show that the applicant complained of neck and "upper back" pain. The applicant then seemed to contradict himself when he conceded that he did not initially complain of back pain because he had severe pain in his neck and left shoulder and that he complained about his back within a matter of weeks of the injury. This evidence is internally inconsistent.

175. The applicant certainly does not suggest that he mentioned his lower back. He has merely used the generic term "back" in his statement. He claimed that he told Dr Makarious about his back pain, but the doctor advised that his back pain was simply coming from his neck. This is consistent with the applicant's earliest reported symptoms of neck pain extending into his left shoulder and inter-scapular region and the acceptance by QBE of an injury to the applicant's upper back. The use of the generic term "back" in his statement causes confusion. Therefore, I have concerns about the reliability of the applicant's evidence.

176. The contemporaneous documents completed at the time of the applicant's injury are not supportive of a lumbar spine injury. The respondent's Report of Injury form completed three days after the incident only referred to a left shoulder sprain.

177. According to Mr Shah, the applicant only complained about neck pain after the incident. Although the incident report form dated 1 Novembers 2012 referred to the injury as a back strain, the use of the generic term clouds the issue and lessens the weight that can be given to this document, even if one disregards the fact that it is unsigned.

178. The clinical notes confirm that the initial complaint only related to the left shoulder and the doctor focussed his examination on the shoulder. This would explain his initial diagnosis of a left shoulder sprain and the referral for left shoulder physiotherapy treatment. The first reference to upper back pain was on 9 November 2012.

[31] [2016] HCA 43, [42].

179. Thereafter, the applicant regularly complained about symptoms in his upper back, as opposed to his back or lower back. The notes do not substantiate the applicant's evidence that he had told his doctor that his neck pain extended down his spine to his lower back.

180. It is true that Dr Makarious referred to back pain at the consultation on 7 February 2013, but this was in the context of prior and subsequent entries that referred to upper back pain. Further, the certificate issued on 7 February 2013 referred to a "flare neck, upper back, pain, multiple cervical disc prolapses [sic]". In my view, one cannot infer that reference to "back" was in fact a reference to the applicant's "lower back".

181. The first complaint of low back pain was on 27 November 2015, but there was no history as to causation. However, on 12 January 2016, Dr Makarious recorded that the muscular low back pain and muscle spasm had arisen without any specific trauma. One would have thought that if this was an ongoing problem since the incident, the applicant would have given a history of his symptoms and the doctor would have made some comment.

182. The diagnoses contained in the medical certificates generally reflect the entries in the clinical notes. For example, the certificate dated 9 November 2012 and the certificates issued prior to 7 March 2013 referred to the applicant's neck and upper back. Thereafter, they referred to the applicant's neck.

183. The certificates issued from 22 September 2014 to 11 June 2015 referred to flare up of back and neck pain and identified a date of injury of 8 September 2014 when the applicant was doing repetitive work whilst using a crimper. This would seem to suggest the possibility of a further injurious event.

184. The applicant attended the surgery on 15 September 2014 and the entry on that date and on subsequent dates referred to a flare up of neck and upper back pain. Therefore, one can infer that the reference to the back in the certificates was in fact a reference to the applicant's upper back. This would also be consistent with the rehabilitation reports from late 2014.

185. The identification of a work incident on 8 September 2014 may also be relevant, but this has not been the subject of any comment in the medical evidence. The applicant was referred for physiotherapy treatment in September 2014, so perhaps the need for this treatment was related to the incident on 8 September 2014.

186. The notes confirm that by March 2016, the applicant was troubled by back pain and sciatica. The use of the generic term "back" on this occasion could only be interpreted as referring to the lower back, given the complaint of sciatica and the referral for tests and treatment by Dr McKechnie. However, there is no comment on causation, and I do not have the benefit of any medical certificates that might assist by way of comparison.

187. In *Palise*, President Keating indicated that the absence of a contemporaneous complaint of injury in the clinical notes of a treating doctor was not determinative of the existence of an injury and one needed to look at the evidence as a whole[32].

188. Further, in decisions such as *Davis v Council of the City of Wagga Wagga*[33], *Nominal Defendant v Clancy*[34], *King v Collins*[35] and *Mastronardi v State of New* South *Wales*[36], the Court of Appeal cautioned against placing too much weight on the clinical notes of treating doctors, given their primary concern was treatment. In the Court's view, the notes rarely, if ever, represent a complete record of the exchange between a busy doctor and the patient.

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[32] *Palise*, [109].
[33] [2004] NSWCA 34.
[34] [2007] NSWCA 349.
[35] [2007] NSWCA 122.
[36] [2009] NSWCA 270.

189. This also was confirmed in *Winter v NSW Police Force*[37], where Deputy President Roche noted:

> "It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349 at [54]; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 at [35]; *King v Collins* [2007] NSWCA 122 at [34]–[36])."[38]

190. Despite these concerns, I consider that the notes are sufficiently detailed and represent a reliable record of what transpired at the consultations when one has regard to the other contemporaneous evidence. In those circumstances, I believe that they are of considerable probative value.

191. When Dr McKechnie initially reported in March 2013, he recorded that the applicant developed pain radiating from his neck through his left shoulder and into his arm. There was no history of any low back symptoms. On 2 July 2013, the applicant complained of mild low back pain, but this was an isolated complaint and the doctor did not consider that there was any need to investigate this issue at that stage. Again, there was no history of causation.

192. The applicant returned to see Dr McKechnie in May 2015 and at that stage, he complained of neck pain radiating into his right shoulder and arm, but there was no record of any low back pain. It was not until May 2016 that the doctor reported low back and leg symptoms, but there was no history regarding causation. He referred the applicant for scans that showed disc and degenerative pathology in his lower back.

193. It seems from Dr McKechnie's reports that in late 2016, QBE approved physiotherapy and hydrotherapy treatment on the applicant's lower back. He eventually sought approval for surgery and this was provided in August 2017. At no stage did the doctor comment on causation in any of his reports.

194. The reports of Mr Chaubal and Dr Drummond are of little assistance. However, significantly Dr Drummond only recorded a history of neck pain with radiation into the left scapular region and tingling in the fingers of his right hand. There was no history of low back pain.

195. By the time that the applicant saw Dr Powell in June 2017, his low back complaints were well documented. The applicant told the doctor that he had back and right leg pain since the incident, but the doctor was mindful that there was a lack of complaints reported in the medical evidence. Dr Powell was not satisfied that the evidence supported an injury to the applicant's lower back. Given my comments above, such a conclusion is understandable.

196. In his last report Dr Powell noted that the applicant told him that he had back and right leg symptoms since the incident, although investigations were not undertaken until March 2016.

197. The applicant's main support in respect of his alleged low back injury is from Dr Patrick. In his initial report in May 2015, Dr Patrick recorded that the applicant had experienced some low back pain which settled after three weeks. Such a history has not been recorded anywhere else in the evidence.

198. The doctor reported that the back pain "seems to have settled somewhat". Given the record of the applicant's reported symptoms at this consultation, it would appear that he did not complain of persistent low back pain.

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[37] [2010] NSWWCCPD 12, (*Winter*).
[38] *Winter*, [183].

199. In his report dated 7 March 2017, Dr Patrick stated that there was some settling of the applicant's low back symptoms within three weeks or so following the incident but they never disappeared completely and they had recurred recently. This history has not been recorded elsewhere.

200. Dr Patrick reported on 13 March 2017 that the applicant had told Dr Makarious about his low back symptoms, but that doctor had dismissed his complaints and stated that his pain was probably coming from his neck. Such a history is not recorded in the doctor's earlier reports, so it unclear where this information came from.

201. In his final report, Dr Patrick advised that the applicant's lumbar symptoms were overshadowed by the injury to his thoracic and cervical spines. He stated that at his first consultation, the applicant had given a history that he had suffered significant low back pain extending into his right thigh.

202. However, when one reviews the history in the doctor's first report, the applicant gave a history of "some low back pain" and some discomfort in his right thigh. There was no suggestion that the applicant had experienced significant pain in his lower back at the time of the incident or shortly afterwards.

203. Dr Patrick stated that the CT scan in March 2016 showed significant lumbar pathology consistent with the nature and conditions of employment over the years. That may well be the case, but the applicant does not rely on the nature and conditions of employment in this matter. This raises some doubts regarding the impact of the incident on 30 October 2012.

204. Dr Patrick's opinion is dependent on the reliability of the history provided to him by the applicant and a proper analysis of the contemporaneous material. The doctor has referred to a history in his later reports that was not recorded at the time of his earlier reports. Given my comments about the reliability of the applicant's evidence and the contemporaneous medical and documentary evidence above, in my view, less weight can be given to Dr Patrick's opinion.

205. It is true that Dr Patrick indicated that the mechanism of injury could have caused a lumbar spinal injury, but it could also have caused injuries to other parts of the applicant's body. One would have thought that if the applicant had suffered any injury to his lower back in the incident, he would have reported this to his employer and to Dr Makarious, but that was not the case. According to the contemporaneous evidence, the applicant injured his neck, extending into his left shoulder region, and upper back.

206. The applicant bears the onus of proving that he sustained an injury to his lower back on 30 October 2012.

207. In *Ireland*, President Keating considered the principles regarding the discharge of the onus of proof. He stated:

> "The principles relevant to the discharge of the onus of proof were discussed in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 (16 October 2008) ('*Nguyen*') where McDougall J (McColl and Bell JJA agreeing) said at [44] – [48]:
>
> '44. A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* (1940) 63 CLR 691 at 712.

45. Dixon CJ put the matter in different words, although to similar effect, in *Jones v Dunkel* (1959) 101 CLR 298 at 305 where his Honour said that '[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'. Although his Honour dissented in the outcome of that case, the words that I have quoted were cited with approval by the majority (Stephen, Mason, Aickin and Wilson JJ) in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66. See also Stephen J in *Girlock (Sales) Pty Limited v Hurrell* (1982) 149 CLR 155 at 161–162, and Mason J (with whom Brennan J agreed) in the same case at 168.

46. It is clear, in particular from *West* and *Girlock*, that the requirement for actual satisfaction as to the occurrence or existence of a fact is one of general application, and not limited to cases where the fact in question, if found, might reflect adversely on the character of a party or witness.

47. In *Malec v JC Hutton Pty Limited* (1990) 169 CLR 638 Deane, Gaudron and McHugh JJ said at 642-643:

> 'A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred.'

48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours' approach, what is required is a determination of the respective probabilities of the event's having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.'"[39]

208. According to *Ireland*, in order for the applicant to discharge the onus that he sustained a low back injury on 30 October 2012, I "must feel an actual persuasion of the existence of that fact".

209. In *Arquero*, Deputy President Wood commented on the acceptance or otherwise of a medical opinion in the absence of evidence to the contrary. She stated:

> "The factual basis upon which his opinion rested was uncontroversial. Further, there was no evidence to contradict that of Dr Patrick. As a general proposition, a decision maker is not obliged to accept evidence on the basis that there is no evidence to the contrary. However, the evidence was consistent with the historical medical evidence and Mr Arquero's statement evidence. It was not inherently incredible, and it provided a logical basis on which the necessary causal connection could be established."

210. I have raised my concerns about the reliability of the applicant's evidence, the lack of corroboration of his allegations in the contemporaneous medical evidence and the inconsistencies in the opinions expressed by Dr Patrick. It could not be said that Dr Patrick's evidence was consistent with the historical medical evidence of the treating doctors and this raises doubt about his opinion. Further, the applicant's treating doctors have not expressed an opinion on causation of his lumbar symptoms.

[39] *Ireland*, [89].

211. Although, Mr Parker submits that the respondent's expert did not properly consider whether the mechanism of the incident could have caused a back injury, Dr Powell was given a reasonably consistent history of the incident and he was aware that there was an absence of complaints in the contemporaneous evidence. He was not satisfied that the applicant injured his lower back. Therefore, it could not be said that he did not address the circumstances of injury, so there is evidence that challenges the views of Dr Patrick, even though I have concerns regarding Dr Powell's opinion with respect to the applicant's thoracic spine. I will canvas these later.

212. In the circumstances, I am not satisfied that the applicant has discharged the onus of showing that he that he suffered an injury to his lumbar spine arising out of or in the course of his employment on 30 October 2012. Accordingly, there will be an award for the respondent in respect of this alleged injury.

Has the applicant recovered from the effects of the injury to his thoracic spine?

213. On 24 January 2018, the insurer issued a notice pursuant to s 74 of the 1998 Act, declining liability in respect of the injury to the applicant's thoracic spine on the basis that it "is not or is no longer causally related to any personal injury" sustained at the respondent.

214. Whilst the dispute notice seemed to place injury to the thoracic spine in issue, at the telephone conference before me on 31 October 2019, the respondent's solicitor, Mr Galea, confirmed that the respondent did not dispute an injury to the applicant's thoracic spine, but the issue related to whether he had recovered from its effects. Mr Saul also confirmed this at the conciliation conference and arbitration hearing. Such a concession was logical, given the plethora of medical evidence supporting an injury to the applicant's upper back.

215. Whilst it is true that I expressed some reservations about the applicant's evidence regarding his alleged low back injury, the same cannot be said about his evidence about the injury to his upper back/thoracic spine.

216. In his statements, the applicant advised that he experienced pain in his neck and upper back. This evidence is corroborated by the clinical notes from 9 November 2012 and the medical certificates of Dr Makarious until June 2015. The applicant received treatment from Mr Chaubal in 2014. Unfortunately, his most recent statement does not address his symptoms in January 2018, when liability was declined, or since that time.

217. Dr McKechnie has provided numerous reports that disclose on-going neck symptoms since 2013, however, there is no comment regarding the applicant's thoracic spine. The more recent focus was on the applicant's neck and lower back.

218. Dr Drummond's opinion is of no assistance given its age and because he disputed that the applicant had suffered any injury on 30 October 2012.

219. The reports of Dr Patrick are of assistance regarding the persistence of the applicant's cervical and thoracic spine symptoms, even though I have rejected his views regarding the alleged low back injury. He attributed the applicant's upper back pain to cervicothoracic disc degeneration/ facet and uncovertebral arthrosis that was either caused or aggravated by the work incident.

220. In March 2017, the doctor reported that the applicant was troubled by "on-going dragging type pain at upper-mid thoracic spine". Similar thoracic symptoms were reported in April 2019. The doctor expressed the view that there had been no change in the applicant's condition.

221. In its notices issued in 2018 and 2019, the insurer declined liability in respect of the applicant's thoracic spine, based on the views of Dr Powell in his brief supplementary report dated 2 January 2018.

222. In his report dated 14 June 2017, Dr Powell did not record a history of an injury to the applicant's upper back or thoracic spine. He merely noted that the applicant had neck pain radiating into the left shoulder and peri-scapular region. He did not examine the applicant's thoracic spine. Therefore, little assistance is provided by this report as he did not comment on the injury to the applicant's thoracic spine.

223. In his report dated 2 January 2018, Dr Powell indicated that there was no evidence that the applicant injured his thoracic spine in the incident or suffered an aggravation of any pre-existing pathology. How he came to that conclusion, given the contents of the contemporaneous medical evidence, is not entirely clear. In any event, injury to the thoracic spine has never been in issue.

224. Unfortunately, the doctor's report dated 27 June 2019 is in similar terms to his initial report and it suffers from the same problems. Notwithstanding his opinion regarding injury, the doctor advised that the applicant had no whole person impairment of his thoracic spine.

225. The authorities establish that an expert's explanation of his or her opinion will vary from case to case[40]. Further, the expert does not have to "offer chapter and verse in support of every opinion.[41]

226. It is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd*[42], *Makita (Australia) Pty Ltd v Sprowles*[43], *Hevi Lift (PNG) Ltd v Etherington*[44], South *Western Sydney Area Health Service v Edmonds*[45] and *Hancock v East Coast Timbers Products Pty Ltd*[46] that there must be a "fair climate" upon which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, one needs more than a mere "*ipse dixit*".

227. The insurer's decision to deny on-going liability in respect of the accepted injury to the applicant's thoracic spine was based on the opinion of Dr Powell, who disputed that the was any injury in the first place. His opinion was clouded by non-acceptance of an injury and in any event, at no stage did he suggest in the alternative that the applicant had recovered from his thoracic spine injury.

228. Therefore, bearing in mind the principles set out in *Kooragang*, and the lack of any persuasive evidence to the contrary, the common-sense evaluation of the causal chain supports the conclusion that the applicant has not recovered from the effects of the injury sustained to his thoracic spine on 30 October 2012.

Can an Arbitrator determine a lump sum claim or should the claim be referred to an AMS?

229. The issue as to whether an Arbitrator can determine a lump sum claim involves an analysis and interpretation of the legislation to determine whether there is a distinction between the determination of a claim and the assessment of a claim that results in an order for lump sum compensation.

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[40] *Adler v Australian Securities and Investments Commission* [2003] NSWCA 131, [631].
[41] *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157, [89].
[42] [1985] HCA 58.
[43] [2001] NSWCA 305; 52 NSWLR 705.
[44] [2005] NSWCA 42; 2 DDCR 271.
[45] [2007] NSWCA 16; 4 DDCR 421.
[46] [2011] NSWCA 11.

230. Mr Saul submits that the Commission has jurisdiction to make findings and orders for lump sum compensation claims and there is no need for a claim to be referred to an AMS. Mr Parker submits that as there is a medical dispute, a referral to an AMS is a necessary requirement under the legislation and in accordance with the authorities.

231. In order to understand the meaning of the legislation, one must interpret the ordinary and grammatical meaning of the text, language and structure of the legislation, the legal and historical context, and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application[47].

232. Section 65 of the 1987 Act in existence prior to the *Workers Compensation Amendment Act 2018* (the 2018 Amending act) provided:

> "**65 Determination of degree of permanent impairment**
>
> (1) For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.
>
> (2) If a worker receives more than one injury arising out of the same incident, those injuries are together to be treated as one injury for the purposes of this Division.
>
> Note.
> The injuries are to be compensated together, not as separate injuries. Section 322 of the 1998 Act requires the impairments that result from those injuries to be assessed together. Physical injuries and psychological/psychiatric injuries are not assessed together. See section 65A.
>
> (3) If there is a dispute about the degree of permanent impairment of an injured worker, the Commission may not award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist.
>
> (4) (Repealed)"

233. Section 321 of the 1998 Act in existence prior to the 2018 Amending act provided:

> "**321 Referral of medical dispute for assessment**
>
> (1) A medical dispute may be referred for assessment under this Part by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute. The Registrar is to give the parties notice of the referral.
>
> (2) The parties to the dispute may agree on the approved medical specialist who is to assess the dispute but if the parties have not agreed within 7 days after the dispute is referred, the Registrar is to choose the approved medical specialist who is to assess the dispute.
>
> (3) The Commission may not refer for assessment under this Part a medical dispute concerning permanent impairment (including hearing loss) of an injured worker.

[47] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, [69] – [71] (per McHugh, Gummow, Kirby and Hayne JJ); *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14, [43] – [44] (per Roche DP) and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; 239 CLR 27, [47] (per Hayne, Heydon, Crennan and Kiefel JJ).

(4) The Registrar may not refer for assessment under this Part:

(a) a medical dispute concerning permanent impairment (including hearing loss) of an injured worker where liability is in issue and has not been determined by the Commission, or

(b) a medical dispute other than a dispute concerning permanent impairment (including hearing loss) of an injured worker, except when dealing with the dispute under Part 5 (Expedited assessment)."

234. Section 65(3) of the 1987 Act and ss 321(3) and 321(4) of the 1998 Act were repealed by the 2018 Amending act. Given the removal of these sections, one might infer from the legislation that an Arbitrator has the power to enter an award of permanent impairment compensation without an assessment by an AMS. Such a practice has been adopted by Arbitrators when parties have resolved the medical disputes or in circumstances where there is only one assessment of whole person impairment.

235. However, whilst it is accepted that an Arbitrator now has the power to enter an award of lump sum compensation in circumstances referred to above, the 2018 amendments do not provide an Arbitrator with the power to assess the degree of permanent impairment arising from an injury. The reasons for this are twofold.

236. Firstly, the transitional provisions set out the requirements for the assessment of a medical dispute that concerns injuries sustained prior to 1 January 2002.

237. Clause 4 of Part 18C of Sch 6 of the 1987 Act provides:

"**4 Disputes concerning lump sum compensation claims**

(1) In the case of a new claim in respect of an injury received before the commencement of the lump sum compensation amendments, compensation under Division 4 of Part 3 (as in force before the commencement of those amendments) may not be awarded by the Commission if there is an impairment dispute unless the dispute has been assessed by an approved medical specialist under Part 7 of Chapter 7 of the 1998 Act.

(2) An assessment certified in a medical assessment certificate pursuant to the medical assessment of an impairment dispute is conclusively presumed to be correct as to the matters in dispute in any proceedings in respect of the claim for compensation concerned.

(3) For the purposes of this clause, Part 7 of Chapter 7 of the 1998 Act extends (with such modifications as may be prescribed by the regulations) to the assessment of an impairment dispute as if it were a medical dispute under that Part.

(4) In this clause, impairment dispute means a dispute about whether a loss or impairment exists and, if so, the nature and extent of the loss or impairment."

238. The wording of the clause is clear and unambiguous. The Commission cannot award lump sum compensation in respect of an injury sustained prior to 1 January 2002 unless the worker has been assessed by an AMS.

239. In the absence of any provision to the contrary, it would be incongruous if the power of the Commission to refer a medical dispute to an AMS was contingent on the date of injury of an injured worker.

240. Secondly, the provisions in Chapter 7 of the 1998 Act and in the *SIRA NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (4TH ed) (the Guidelines) make it mandatory for assessments of permanent impairment to be undertaken by properly qualified medical practitioners. Again, the ordinary and grammatical meaning of the text is clear.

241. Chapter 7 of the 1998 Act deals with medical assessment of permanent impairment where there is a medical dispute, which, according to s 319 (c) of the 1998 Act, includes the degree of any permanent impairment.

242. Section 322 of the 1998 Act sets out the requirements for assessment of permanent impairment. It provides:

> "**322 Assessment of impairment**
>
> (1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.
>
> (2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> (3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.
>
> Note.
> Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.
>
> (4) An approved medical specialist may decline to make an assessment of the degree of permanent impairment of an injured worker until the approved medical specialist is satisfied that the impairment is permanent, and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made."

243. Clauses 1.40 and 1.41 of Part 3 of the Guidelines sets out the requirements for an assessor of permanent impairment as follows:

> "**1.41 – 1.41 Medical assessors.**
>
> **1.40** An assessor will be a registered medical practitioner recognized as a medical specialist.
>
> - 'Medical practitioner' means a person registered in the medical profession under the Health Practitioner Regulation National Law (NSW) No. 86a, or equivalent Health Practitioner Regulation National Law in their jurisdiction with the Australian Health Practitioner Regulation Agency.
> - 'Medical specialist' means a medical practitioner recognised as a specialist in accordance with the Health Insurance Regulations 1975, Schedule 4, Part 1, who is remunerated at specialist rates under Medicare.

The assessor will have qualifications, training and experience relevant to the body system being assessed. The assessor will have successfully completed requisite training in using the Guidelines for each body system they intend on assessing. They will be listed as a trained assessor of permanent impairment for each relevant body system(s) on the SIRA website.

1.41 An assessor may be one of the claimant's treating practitioners or an assessor engaged to conduct an assessment for the purposes of determining the degree of permanent impairment."

244. A further matter to consider is whether there is any provision in the regulations that gives an Arbitrator the power to assess the degree of permanent impairment.

245. The 1998 Act was amended by the 2018 Amending Act to enable regulations to be made in respect of referrals of medical disputes with the inclusion of s 321A of the 1998 Act. It provides:

> "**321A Referral of medical dispute concerning permanent impairment**
>
> (1) The regulations may make provision for or with respect to—
>
> (a) the circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, required or not permitted to be referred for assessment under this Part, and
>
> (b) the giving of notice of a referral to the parties to the dispute.
>
> (2) Without limiting subsection (1), the regulations may provide that a medical dispute may not be referred for assessment under this Part if the dispute concerns permanent impairment of an injured worker where liability is in issue and has not been determined by the Commission.
>
> (3) A medical dispute concerning permanent impairment of an injured worker that is authorised or required by the regulations to be referred for assessment under this Part may be referred by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute."

246. At this time, no regulations have been enacted that deal with the referral of a medical dispute to an AMS.

247. It would seem that it was the intention of the legislators to give Arbitrators the power to enter awards for lump sum compensation in the absence of an assessment by an AMS, but not for the Arbitrators to undertake the actual assessment of impairment. Such an interpretation would be consistent with the legislation and the Guidelines. If that was not the case, then one would have expected appropriate amendments to Chapter 7 of the 1998 Act and the Guidelines.

248. Therefore, as the law currently stands, an Arbitrator does not have the power to assess the degree of permanent impairment. This constitutes a medical dispute, which is a matter for an AMS to determine.

249. The decision in *Etherton* can be distinguished because that matter concerned the effect of previous consent orders that provided for an award for the employer in respect of a right knee injury due to the nature and conditions of employment and an award in respect of the knee replacement surgery which was not reasonably necessary as a result of a pleaded frank injury.

250. President Philips upheld the decision of the Arbitrator, who determined that the applicant was not entitled to bring a claim for lump sum compensation. The Arbitrator did not assess the worker's whole person impairment, but he merely determined that his entitlement would be less than the threshold under s 66(1) of the 1987 Act when the consent orders were taken into account.

251. In this matter, the assessments of Dr Patrick in respect of the cervical and thoracic spines exceed the threshold in s 66(1) of the Act, so a referral to an AMS is appropriate.

252. In the circumstances, and despite the repeal of s 65(3) of the 1987 Act and ss 321(3) and 321(4) of the 1998 Act on 1 January 2019, the authorities of *Haroun v Rail Corporation New South Wales*[48], *Bindah, Jaffarie* and *Hine* still apply with respect to the assessment of whole person impairment and they take precedence over the decisions in *Peric* and *Evans*.

Quantification of whole person impairment

253. In the circumstances, I will remit this matter to the Registrar for referral to an AMS pursuant to s 321 of the 1998 Act for assessment of the whole person impairment of the applicant's cervical and thoracic spines due to injury on 30 October 2012.

FINDINGS

254. The applicant sustained injury to cervical and thoracic spines arising out of or in the course of his employment with the respondent on 30 October 2012.

255. The applicant's employment was a substantial and the main contributing factor to his injury.

256. The applicant has not recovered from the injury sustained to his thoracic spine on 30 October 2012.

257. The applicant did not sustain an injury to his lumbar spine arising out of or in the course of his employment with the respondent on 30 October 2012.

ORDERS

258. Award for the respondent in respect of the allegation of injury to the applicant's lumbar spine on 30 October 2012.

259. I remit this matter to the Registrar for referral to an AMS pursuant to s 321 of the 1998 Act for assessment of the whole person impairment of the applicant's cervical spine and thoracic spine due to injury sustained on 30 October 2012.

260. The documents to be reviewed by the AMS are:

    (a) Application and attachments;
    (b) Reply with attached documents;
    (c) Application to Admit Late Documents received on 4 October 2019, and
    (d) Application to Admit Late Documents received on 16 October 2019.

[48] [2008] NSWCA 192.