

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 6673/19  
**Applicant:** David Mowczan  
**First Respondent:** Asplundah Tree Expert (Australia) Pty Ltd  
**Second Respondent:** Ausgrid Management Pty Ltd  
**Date of Determination:** 12 May 2020  
**Citation:** [2020] NSWCC 148

The Commission determines:

1. The second respondent's application that pursuant to s 289A(4) of the *Workplace Injury Management and Workers Compensation Act 1998* the Commission deal with the unnotified issue of whether the applicant suffered an injury on 18 February 2016 to his thoracic spine arising out of or in the course of his employment with the second respondent is refused.
2. The report of Dr Roger Pillemer dated 9 March 2020 is admitted into these proceedings.
3. The Application to Resolve a Dispute is amended such that the words and numerals "March 2014 and" are omitted from part 5.6 of Part B of the Application.
4. The matter is remitted to the Registrar so that the following medical dispute between the applicant and the second respondent can be referred to an Approved Medical Specialist to assess:
  - (a) the degree of permanent impairment of the applicant as a result of the injury;
  - (b) whether any proportion of the applicant's permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion;
  - (c) whether the applicant's impairment is permanent, and
  - (d) whether the degree of permanent impairment of the applicant is fully ascertainable.

Date of injury:	18 February 2016
Body parts referred:	Left Lower Extremity (knee) Lumbar spine Thoracic spine
5. The matter is to be placed in the medical assessment pending list.
6. The determination by the Commission of the applicant's disputed claim against the first respondent for weekly payments of compensation and the applicant's disputed claims against the second respondent for weekly payments of compensation, compensation for the costs of medical treatment and compensation for permanent impairment is deferred pending the outcome of the assessment by the Approved Medical Specialist of the medical dispute that the Registrar will refer to an Approved Medical Specialist in accordance with order 3.
7. The Approved Medical Specialist is to be provided with:
  - (a) the documents attached to the Application to Resolve a Dispute;
  - (b) the documents attached to the Reply of the first respondent;

- (c) the documents attached to the Reply of the second respondent;
- (d) the report of Dr Pillemer dated 9 March 2020.

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

Marshal Douglas  
**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 MARSHAL DOUGLAS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*S Naiker*

Sarojini Naiker  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. On 18 December 2019, David Mowczan registered with the Commission an Application to Resolve a Dispute (ARD) seeking determination by the Commission of claims for compensation he made against Asplundah Tree Expert (Australia) Pty Ltd and Ausgrid Property Management Pty Ltd.
2. His claim against Asplundah is for weekly payments of compensation from 18 February 2016. That claim relates to an agreed injury he suffered to his back while working for Asplundah on 13 July 2005. Asplundah disputes that Mr Mowczan has an incapacity for work resulting from the injury he suffered on 13 July 2005.
3. Against Ausgrid, Mr Mowczan claims:
  - (a) weekly payments of compensation, also from 18 February 2016 for an incapacity he says he has from both an injury he suffered to his back in March 2014 and injuries he suffered on 18 February 2016 to his left knee and back while working for Ausgrid;
  - (b) compensation for costs he incurred to treat those injuries; and
  - (c) compensation for permanent impairment from the injury he suffered on 18 February 2016.
4. This matter is to be referred by the Registrar to an Approved Medical Specialist (AMS) to assess medical disputes between Mr Mowczan and Ausgrid prior to Mr Mowczan's claims for compensation against both respondents being determined. The medical disputes between Mr Mowczan and Ausgrid involve the degree of permanent impairment Mr Mowczan has from his injury on 18 February 2016 and whether any proportion of his permanent impairment is due to an earlier injury or pre-existing condition or abnormality. In a circumstance where there is both those types of medical disputes and a dispute between the parties regarding whether Mr Mowczan has any incapacity from his injuries, it is appropriate that an AMS firstly assess the medical disputes before the Commission determines Mr Mowczan's claims against both respondents. This is to minimise the potential of the Commission making findings that might conflict with those an AMS may make when assessing Mr Mowczan's permanent impairment from the injury on 18 February 2016.<sup>1</sup> Further, the AMS's reasons for the assessment the AMS makes may potentially be germane to the factual controversies the Commission will need to determine regarding Mr Mowczan's claim for weekly payments of compensation.
5. Preliminary issues have arisen between Mr Mowczan and Ausgrid that must be determined before the Registrar can refer the matter to an AMS so as to assess the medical disputes. The first issue is whether a report of Dr Roger Pillemer dated 9 March 2020 should be admitted into these proceedings. The second issue is whether the Commission should, pursuant to s289A(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), deal with a matter upon which Ausgrid seeks to dispute an aspect of Mr Mowczan's claim and in regards to which Ausgrid did not notify Mr Mowczan in a notice issued under s78 of the 1998 Act. That unnotified matter is whether Mr Mowczan suffered an injury to his thoracic spine on 18 February 2016.
6. Ausgrid does not dispute that Mr Mowczan suffered an injury to his back in March 2014 or to his left knee and lumbar spine on 18 February 2016.

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<sup>1</sup> See *Jaffarie v Quality Castings Pty Ltd* [2014] NSWCCPD79 at [265]-[269]

## PROCEDURE BEFORE THE COMMISSION

7. A conciliation conference was held by telephone in this matter on 3 April 2020. Mr Mowczan was represented by Ms Grotte of Counsel instructed by Mr Carmine Santone. Asplundah was represented by Mr Stockley of Counsel instructed by Ms Ebonie Wilcox. Ausgrid was represented by Mr Simon McMahon of Counsel instructed by Ms Laura Beattie. I used my best endeavours at that conciliation conference to attempt to bring the parties to a settlement. They were unable to reach a settlement of Mr Mowczan's disputed claims.
8. At the conclusion of the conciliation conference the matter proceeded directly to an arbitration hearing that was recorded. A transcript has been created from that recording. At the arbitration, I directed Mr Mowczan and Ausgrid to provide written submissions on whether the Commission should deal with the unnotified matter regarding whether Mr Mowczan suffered an injury to his thoracic spine. Asplundah indicated it did not wish to make submissions on that matter. I subsequently recorded in writing, in the following terms, the directions I made as well as a further direction to all parties relating to whether the Commission should receive into evidence a report of Dr Pillemer dated 9 March 2020:
  - “1. The second respondent is to file and serve by 4pm 10 April 2020 written submissions regarding its application for the Commission to deal pursuant to s289A(4) of the 1998 Act with the unnotified issue of whether the applicant suffered an injury on 18 February 2016 to his thoracic spine arising out of or in the course of his employment with the second respondent.
  2. The applicant is to file and serve by 4 pm 17 April 2020 written submissions in response.
  3. The parties are to confer with each other by telephone by no later than 4pm 6 April 2020 on whether the report of Dr Pillemer dated 9 March 2020 can be admitted as evidence in these proceedings, and in the event that a party objects, that party (the objecting party) must notify the Commission and the other parties by email by 12.00pm 7 April 2020 that the objecting party objects, in which event the second respondent is to file written submissions by 4pm 17 April 2020 why the Commission should receive the report into evidence.
  3. The objecting party is to file written submissions by no later than 4pm 17 April 2020 on why Dr Pillemer's report should not be received into evidence.”
9. Following receipt of Ausgrid's submissions, I issued further directions in these terms:
  - “1. The time by which the applicant is to file and serve written submissions in response to the second respondent's submissions is extended to 4pm on 29 April 2020 and the applicant's submissions are also to address any further submissions the second respondent makes pursuant to the direction below.
  2. The second respondent is to file and serve by 4pm 22 April 2020 written submissions regarding the following matters:
    - a. Are not the details of the injury the applicant suffered on 18 February 2016 to be understood having regard to both the applicant's solicitor's letter of 1 April 2019 to the second respondent and the report of Dr Patrick attached to that letter;
    - b. If so, cannot the Commission find that the injury that is the subject of the claim the applicant has made against the second respondent for compensation under s66 of the Workers Compensation Act 1987 consists of an injury to the applicant's left knee and lumbar spine and a consequential condition in his thoracic spine;
    - c. Any further issue arising from the above two matters.”

10. Ausgrid's submissions in response to the further direction were not received by the Commission until 27 April 2020. Mr Mowczan's written submissions were received on 29 April 2020. No party made submissions regarding the admission of Dr Pillemer's report into evidence in these proceedings.

## **EVIDENCE**

11. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) The ARD and attached documents;
  - (b) Reply of Asplundah and attached documents;
  - (c) Reply of Ausgrid and attached documents;
  - (d) Report of Dr Roger Pillemer dated 9 March 2020.

## **FINDINGS AND REASONS**

### **Dr Pillemer's report**

12. As mentioned above no party made any submissions regarding the Commission receiving Dr Pillemer's report of 9 March 2020 into evidence.
13. Ausgrid's reply is dated 20 January 2020 and the Commission's electronic database reveals that Ausgrid lodged its reply with the Commission on that date. Dr Pillemer produced his report following his examination of Mr Mowczan on 9 March 2020. His report therefore did not exist at the time Ausgrid filed its reply. The report of Dr Pillemer contains his opinion regarding aspects of the injury Mr Mowczan suffered on 18 February 2016 and his assessment of Mr Mowczan's permanent impairment from that injury.
14. The report of Dr Pillemer is relevant to the issues that are raised in these proceedings including the medical disputes between Mr Mowczan and Ausgrid. I infer from the fact that neither Mr Mowczan nor Asplundah made any submissions indicating they object to the admission of the report that neither considers they will suffer prejudice if the report is admitted. Given that, and having regard to the fact that the report is relevant to the issues raised in these proceedings, I will admit into evidence the report of Dr Pillemer dated 9 March 2020.

### **Thoracic Spine Injury**

#### ***Background facts and chronology***

15. As mentioned above, Mr Mowczan's claims against Ausgrid relate to injuries he suffered to his back in March 2014 and to his left knee and back on 18 February 2016. There is no controversy that Mr Mowczan suffered an injury to his back in March 2014.
16. Mr Mowczan completed on 12 November 2016 a Workers Injury Claim Form relating to the injury he suffered on 18 February 2016. In that, the only injury he detailed that he suffered on 18 February 2016 was an injury to his left knee. In response to that, Ausgrid notified Mr Mowczan on 8 February 2017 under the former s74 of the 1998 Act that it denied liability with respect to Mr Mowczan's claim relating to that injury on the basis that he did not suffer such an injury. As mentioned, at the conciliation conference hearing and arbitration held on 3 April 2020, Ausgrid conceded that Mr Mowczan suffered an injury to his left knee.

17. Ms Grotte in her written submissions of 29 April 2020 on behalf of Mr Mowczan said that “the back injury was accepted by the insurer as a compensable injury, but the left knee was denied (notice under s74 dated 8 February 2017, ARD 64) until the conciliation/arbitration hearing on 3 April 2020”. This reference by Ms Grotte to “back injury” in her submissions is a reference to an injury occurring on 18 February 2016, and not the back injury Mr Mowczan suffered in March 2014.
18. The material before the Commission does not disclose that prior to Mr Mowczan’s solicitors writing to Ausgrid on 30 April 2019, Mr Mowczan had made any claim for compensation relating to a back injury he suffered on 18 February 2016. Ausgrid’s letter of 8 February 2017 related only to a claim Mr Mowczan had made for an injury to his left knee. Because Mr Mowczan had not made a claim for compensation involving a back injury on 18 February 2016, prior to 30 April 2019, Ausgrid could not have notified Mr Mowczan in its s74 notice of 8 February 2017 that it accepted he had suffered such an injury.
19. Based on the material before the Commission, the Commission is satisfied that Mr Mowczan first made a claim on 30 April 2019 for compensation relating to an injury on 18 February 2016 to his back, and that occurred when his solicitors wrote to Ausgrid on 30 April 2019.
20. Mr Mowczan’s solicitors in their letter of 30 April 2019 advised Mr Mowczan was making a claim “for lump sum compensation arising from injuries sustained to his left knee and back on 18 February 2016”. The only other particulars they provided in their letter to Ausgrid, in terms of the nature of the injury Mr Mowczan suffered, related to the circumstances in which Mr Mowczan’s injury had occurred. They attached to their letter however, a report of Dr W G D Patrick dated 1 April 2019 in support of Mr Mowczan’s claim.
21. Dr Patrick is a general and vascular surgeon and trauma surgeon whom Mr Mowczan’s lawyers qualified to provide a forensic medical report. He examined Mr Mowczan on 8 February 2019 and produced his report on 1 April 2019. He noted in his report that the date of injury for which he was providing an opinion and assessment occurred on 18 February 2016 and that the nature of the injury was “work related injuries to left lower extremity, mainly left knee and also back”. He noted that he had seen a statement Mr Mowczan signed on 24 November 2016. That statement is in evidence before the Commission. Dr Patrick noted the circumstances in which Mr Mowczan suffered his injury were that Mr Mowczan fell from the tilted tray of the truck, landing heavily and resulting in Mr Mowczan sustaining a significant twisting injury predominantly to left knee and also back pain.
22. Dr Patrick noted that subsequent to Mr Mowczan suffering his injury, and after seeking treatment from general practitioners and being referred for MRI investigation to his left knee, Mr Mowczan became “aware of more wide spread back pain – with pain and stiffness at the mid back and low back and into the buttocks”. Dr Patrick noted that Mr Mowczan was referred for CT scan of the lumbar spine which was done on 14 September 2018. Dr Patrick had regard to the findings from that investigation. Dr Patrick noted that Mr Mowczan came under the care of orthopaedic and spinal surgeon Professor Peter Papantoniou and Dr Patrick had regard to a report that Professor Papantoniou provided on 30 October 2018 to Mr Mowczan’s then GP.
23. Dr Patrick noted that at the time he examined Mr Mowczan that Mr Mowczan had “ongoing persisting and easily aggravated lower back pain of the lumbar region of the spine” and that Mr Mowczan was “also aware of some pain and tenderness higher up (indicates lower thoracic spine extending somewhat above level of umbilicus inferiorly)”.
24. Dr Patrick noted from his examination of Mr Mowczan that Mr Mowczan exhibited “marked muscle guarding evident at mid/lower thoracic spine and also lumbar spine”.

25. Dr Patrick advised that his opinion was based on the history he obtained that included detail from “very considerable commentary in David Mowczan’s comprehensive statement dated 24 November 2016”, his findings from clinical examination and the findings as revealed in the imaging studies that he had been provided and which he said he had attached to his report. Insofar as his opinion related to Mr Mowczan’s back Dr Patrick opined:
- “He has also I believe sustained significant spinal injury with lumbar spinal injury particularly at *L4/5* level and to some extent at *L2/3* level above. The *L4/5* disc is partially calcified. He has had significant symptomatology going into left lower extremity but he now does satisfy criteria for a lumbar radiculopathy affecting right leg with 1cm right calf muscular atrophy compared to left, and with diminished straight leg raise on the right - with positive sciatic stretch and also diminution of sensation over dermatomal distribution at *L5* at right leg below knee laterally. There is also significant facet arthrosis evident and foraminal narrowing. He also has significant complaint of mid/lower thoracic spinal pain now and there do appear to be radicular symptoms radiating around to anterior abdomen from about *T9* down. In this setting quality MRI thoracic and lumbar spine are indicated (not trawling for pathology, but to optimise clinical management going forwards). It is of note that the MRI of lumbar spine of 30 September 2005 was completely normal.”
26. He said that he believed Mr Mowczan’s “employment/work is a substantial contributing factor to his injuries on 18 February 2016 and his ongoing significant symptomatology”. He said that “based on this occasion of examination that David Mowczan’s thoracic spine, lumbar spine and left lower extremity (knee) are all rateable for assessment”.
27. Upon receiving Mr Mowczan’s solicitor’s letter of 30 April 2019, by which Mr Mowczan made his claim for compensation for permanent impairment resulting from his injury of 18 February 2016, Ausgrid was required under s281(1) of the 1998 Act to either accept liability for Mr Mowczan’s claim and make a reasonable offer of settlement or to dispute liability “under Division 3 of Part 2 of Chapter 4” of the 1998 Act. The time within which Ausgrid was required to do that was, in accordance with s281(2), two months after Mr Mowczan had provided Ausgrid all relevant particulars about the claim.
28. Subsection 282(1) of the 1998 Act stipulates what constitutes the “relevant particulars about a claim”. They include full details of “the injury received by the claimant” and “all impairments arising from the injury” “sufficient to enable the insurer, as far as practicable, to make an assessment of a claimant’s entitlement on the claim”. Subsection 282(3) prohibits an insurer from delaying determination of a claim for compensation for permanent impairment on the ground that any particulars about the claim were insufficient unless the insurer requested further particulars within two weeks after a claimant had provided those particulars. An insurer is defined in s250 as including a self-insurer, such as Ausgrid.
29. After receiving Mr Mowczan’s solicitors’ letter of 30 April 2019, Ausgrid did not seek any further particulars about Mr Mowczan’s claim. Accordingly, given that Ausgrid was intending to deny his claim, Ausgrid was required under s78(1) of the 1998 Act to provide Mr Mowczan within two months of receiving Mr Mowczan’s solicitors’ letter notice disputing liability in respect of his claim. Section 79(2) required that notice to contain “a concise and readily understandable statement of the reasons for the insurer’s decision and of the issues relevant to the decision”.
30. As said, Ausgrid lodged its reply to the ARD on 20 January 2020. In it Ausgrid indicated that it sought leave for the Commission to deal with the issue of whether Mr Mowczan suffered “an injury to the thoracic spine as assessed by Dr Patrick pursuant to s4 and s9A of the Workers Compensation Act 1987 and with reference to the claim forms provided”. The material that is before the Commission does not reveal that Ausgrid sought any earlier than 20 January 2020 to notify Mr Mowczan that it was seeking to dispute his claims for

compensation on the basis that he did not suffer an injury to his thoracic spine. The Commission infers from the lack of any such evidence, that Ausgrid did not before 20 January 2020 put Mr Mowczan on notice of this matter.

31. Further, although Ausgrid first notified Mr Mowczan in its reply that it sought to put this matter in issue, it did not in its reply provide Mr Mowczan with a “concise and readily understandable statement of the reasons” for its decision to deny liability to pay him compensation due to that issue. There is nothing within the material before the Commission that indicates Ausgrid provided Mr Mowczan with any statement of its reasons prior to the conciliation conference and arbitration hearing on 3 April 2020, and the Commission infers from the lack of such evidence within the material before it of that having occurred before 3 April 2020, that it did not occur before then.
32. On 3 April 2020, Mr McMahon, Ausgrid’s counsel, indicated that Ausgrid’s reasons for disputing Mr Mowczan suffered an injury to his thoracic spine were firstly, that there was no evidence that Mr Mowczan had reported any symptoms with respect to his thoracic spine until he was examined by Dr Patrick and, secondly, that Dr Patrick’s report did not provide persuasive evidence that Mr Mowczan suffered injury to his thoracic spine. Mr McMahon expanded on those reasons in his written submissions for Ausgrid, which I will summarise shortly.
33. The upshot of this background is that Mr Mowczan through his solicitors’ letter of 30 April 2019 notified Ausgrid that he was claiming compensation for permanent impairment from his injury on 18 February 2016. Ausgrid would have become aware in early May 2019 of Mr Mowczan’s claim for lump sum compensation. Ausgrid did not seek further details of Mr Mowczan’s injury the subject of his claim. Ausgrid did not notify Mr Mowczan that it disputed liability for his claim on the basis that he did not suffer an injury to his thoracic spine until it served Mr Mowczan with its reply on 20 January 2020. Ausgrid did not until 3 April 2020 provide Mr Mowczan with a concise and readily understandable statement of the reasons for its decision to deny liability to pay him compensation for permanent impairment.

### ***Mateus factors***

34. By virtue of s289A(1) of the 1998 Act the Commission must when determining Mr Mowczan’s claims against Ausgrid consider only those matters about which Ausgrid notified Mr Mowczan, under s78 of the 1998 Act, it disputed, unless the Commission determines, in accordance with s289A(4), that it is in the interests of justice to deal with other unnotified matters.
35. Deputy President Roche in *Mateus v Zodune Pty Ltd t/a Tempo Cleaning Services*<sup>2</sup> (*Mateus*) listed at [38] and [48] the factors that the Commission ought to consider when determining whether it is in the interest of justice for previously unnotified matters to be dealt with in proceedings before the Commission. They are as follows:

“[38]

- a. the degree of difficulty and complexity to which the unnotified issues give rise;
- b. when the insurer notified that it wished to contest any unnotified issue/s;
- c. the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability;
- d. any prejudice that may be occasioned to the worker;
- e. any other relevant matters arising from the particular circumstances of the case

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<sup>2</sup> [2007] NSWCCPD 227



[48]

- a. a decision by an insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues resolved;
- b. any insurer seeking to dispute an unnotified matter is seeking to have a discretion exercised in its favour and accordingly must act promptly to bring the matter to the attention of the Commission and all other parties;
- c. any unreasonable or unexplained delay in giving notice of an unnotified matter will be relevant to the exercise of the discretion.
- d. in exercising its discretion the Commission may have regard to the merit and substance of the issue that is sought to be raised;
- e. in assessing prejudice to the worker it will be significant to consider when and in what circumstances the worker was first made aware of the unnotified issue that is sought to be raised;
- f. though it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to equity, good conscience and the substantial merits of the case, those matters will not be determinative;
- g. the general conduct of the parties in the proceedings will also be relevant to the exercise of the discretion.”

### ***Submissions***

36. The following is a summary of Ausgrid’s submissions with respect to whether it is in the interest of justice for the Commission to deal with the issue of whether Mr Mowczan suffered an injury to his thoracic spine on 18 February 2016:
- (a) The first notice that Ausgrid had that Mr Mowczan was claiming injuries to his thoracic spine was in the report of Dr Patrick dated 1 April 2019 that was enclosed with Mr Mowczan’s solicitor’s letter of 30 April 2019;
  - (b) Ausgrid acted “properly” by filing a reply on 19 December 2019 seeking to put into issue the question of whether Mr Mowczan suffered injury to his thoracic spine. Ausgrid’s action in seeking to put this matter into issue was done “relatively quickly”;
  - (c) Prior to 30 April 2019 Mr Mowczan had only advanced a claim for compensation in relation to his left knee and lumbar spine arising from the incident on 18 February 2016;
  - (d) The clinical notes in evidence make no reference to an injury to the thoracic spine or symptoms involving the thoracic spine. Mr Mowczan in his statement of 24 November 2016 revealed that he suffered injury to his lower back in the incident on 18 February 2016 and that he felt sharp pain in his lower back and shooting pain down the rear of his left buttock and left thigh and did not make mention of mid-back pain. Mr Mowczan in the claim form dated 12 November 2016 stated he injured his left knee and suffered sharp pain and did not mention any complaint of mid-back pain. His GP made a record on 24 February 2016 that Mr Mowczan had left hip and lower back pain and there was no complaint recorded of injury to the thoracic spine. Throughout extensive treatment Mr Mowczan received there is no record of any complaint to the mid-back or thoracic spine but there is a record of him making a complaint regarding his lower back and referred pain into the legs. Professor Papantoniou did not record a history of complaint in the thoracic spine when Mr Mowczan consulted the professor on 30 October 2018. Dr Pillemer when he examined Mr Mowczan did not record Mr Mowczan making a complaint concerning the thoracic spine;

- (e) Dr Patrick recorded the nature of the injury on 18 February 2016 as being “a work related injury to the left lower extremity, mainly left knee and also back”. Dr Patrick took a history that Mr Mowczan on 18 February 2016 stepped and fell heavily sustaining a twisting injury to his left knee and also back pain. The reference by Dr Patrick to back pain must, when considered in light of the contemporaneous accounts, be considered a reference to lower back pain. Dr Patrick noted that Mr Mowczan suffered from lower back pain but Dr Patrick did not refer to thoracic spine pain;
- (f) Dr Patrick identified Mr Mowczan had marked muscle guarding at the mid lower thoracic spine and lumbar spine and had significant complaint of mid lower thoracic spinal pain and radicular symptoms radiating to interior abdomen from about T9 down. Dr Patrick’s reference to Mr Mowczan now suffering that pain must be “an indication that that pain had developed some time following the subject accident and more likely rather contemporaneous to his assessment in April 2019 as opposed to pain occurring at the time of the original report of the incident on 18 February 2016”;
- (g) Dr Patrick provides no explanation at all as to why Mr Mowczan might suffer a complaint in relation to the thoracic spine that was either suffered in the incident of 18 February 2016 or suffered by way of consequential condition. Dr Patrick’s reasoning process is lacking in that he does not explain how he comes to his conclusion and consequently Dr Patrick’s reasoning “offends the general rule concerning expert evidence in *Makita v Sprowles*”;
- (h) There is merit and substance in the issue of whether Mr Mowczan suffered an injury to his thoracic spine because the allegation of injury is “unfounded on the evidence”;
- (i) Mr Mowczan may suffer prejudice if the Commission allows the issue of whether he suffered injury to his thoracic spine being dealt with in the present proceedings. However, that prejudice is outweighed by the prejudice Ausgrid would suffer if it were required to pay Mr Mowczan compensation for an injury he did not receive. That would not be in accordance with “equity, good conscience and the substantial merits of the case”.

37. Mr Mowczan’s submissions were, in summary:

- (a) Ausgrid has not advanced any explanation for its failure to notify Mr Mowczan at any stage prior to it filing its reply that it wished to dispute that Mr Mowczan suffered injury to his thoracic spine. That delay is unreasonable and unexplained;
- (b) The letter by which Mr Mowczan made his claim did not refer specifically to the thoracic spine but rather referred to the back. The attached report of Dr Patrick clearly assessed the thoracic spine;
- (c) Dr Patrick’s opinion is based on the history he obtained from Mr Mowczan, his clinical examination of Mr Mowczan and his clinical expertise, skill and judgement. Dr Patrick’s opinion is to be given weight and in the absence of a countervailing expert opinion Dr Patrick’s opinion ought to be accepted;
- (d) Mr Mowczan would suffer significant and incurable prejudice if the Commission were to deal with the issue of whether Mr Mowczan has suffered an injury to his thoracic spine in that had Ausgrid notified Mr Mowczan it disputed liability to pay compensation to him on that basis then he would have had the opportunity of producing evidence including a further report from Dr Patrick and a further statement with respect to this issue. That opportunity has now passed;
- (e) Ausgrid did not act promptly in notifying Mr Mowczan that it disputed that he suffered injury to his lumbar spine and in the absence of any explanation from Ausgrid regarding this delay the Commission ought not to exercise its discretion to allow the issue to be dealt with in the present proceedings.

## **Consideration**

38. As already said, there is nothing within the evidence that reveals that prior to Mr Mowczan's solicitor's letter of 30 April 2019, Mr Mowczan made any claim for compensation with respect to a back injury on 18 February 2016. The evidence reveals that the only claim for compensation he made, preceding his solicitor's letter of 30 April 2019, with respect to the incident on 18 February 2016 related to an injury to his left knee on that date.
39. Saying that another way, the evidence reveals that the first time Mr Mowczan made a claim for compensation regarding an injury to his back on 18 February 2016 was when his solicitors forwarded their letter of 30 April 2019 to Ausgrid. The only details Ausgrid was provided by means of that letter, of itself, regarding Mr Mowczan's back injury were that he sustained a back injury whilst climbing down a ladder on the back of a tip truck when his foot slipped causing him to fall awkwardly in a twisted position. That letter however, as has been mentioned repeatedly above, had attached to it the report of Dr Patrick dated 1 April 2019. Accordingly, the details that Dr Patrick set out within his report regarding Mr Mowczan's back injury on 18 February 2016 are also to be treated as details that Mr Mowczan provided Ausgrid with respect to his injury so as to enable Ausgrid to make a proper assessment of the compensation to which he claimed to be entitled.
40. The relevant passages from Dr Patrick's report with respect to the details of Mr Mowczan's injury, insofar as it related to his back, have been either extracted or summarised at [21] to [26] above. To repeat, those details included a spinal injury at L4/5 level and L2/3 level that resulted in lumbar radiculopathy. They included a "significant complaint of mid/lower thoracic spinal pain" with "radicular symptoms radiating down to the anterior abdomen from about T9 down". Dr Patrick said that the incident on 18 February 2016 was "a substantial contributing factor to ... ongoing significant symptomology now". He said that based on his examination of Mr Mowczan, which included a finding of muscle guarding of the thoracic spine, Mr Mowczan's "thoracic spine ... [is] rateable for assessment".
41. Dr Patrick noted that Mr Mowczan had reported becoming aware of more widespread back pain with pain and stiffness at the mid-back and low-back into the buttocks. In the context within his report in which Dr Patrick noted that, it would seem that Mr Mowczan's experience of that particular pain was in the period preceding his having an MRI on 19 October 2016. Dr Patrick when providing his explanation for Mr Mowczan's thoracic spine symptoms noted that Mr Mowczan now had a more significant complaint of mid/lower thoracic spine pain. To my mind, that reference to a more significant complaint of pain is to be read as Mr Mowczan having developed more severe symptoms subsequent to 2016.
42. Dr Patrick did not identify in any precise way the pathology comprising Mr Mowczan's injury to his thoracic spine. However, in my view, Dr Patrick's opinion, when read as a whole, is to be interpreted that there was a physiological disturbance of Mr Mowczan's thoracic spine from the incident on 18 February 2016 that resulted in symptoms in Mr Mowczan's thoracic spine, which Dr Patrick noted to be radicular symptoms radiating from the T9 down to the interior abdomen.
43. In short, the details Mr Mowczan provided Ausgrid with respect to the claim for compensation he was making for permanent impairment from the injury he suffered on 18 February 2016 included an injury to his thoracic spine.
44. As has been said repeatedly above, Ausgrid did not until 19 December 2019 indicate to Mr Mowczan that it disputed he suffered such an injury. Further, Ausgrid did not until 3 April 2020 indicate to Mr Mowczan the reasons why it disputed he suffered such an injury.
45. Ausgrid has provided no explanation, either to Mr Mowczan or the Commission, for its delay in notifying Mr Mowczan that it seeks to dispute he suffered an injury to his thoracic spine. It has also provided no explanation for its further delay in notifying him of its reasons for seeking to do so.

46. I reject Ausgrid's submission to the effect that it "acted properly" upon the ARD being filed, by seeking then to put into issue, by means of filing and serving its reply, the question of injury to the thoracic spine. Acting properly would have involved Ausgrid notifying Mr Mowczan within three weeks of receiving his claim that it disputed liability to pay him compensation for permanent impairment with respect to his thoracic spine. Further, acting properly would have involved Ausgrid providing Mr Mowczan with a concise and readily understandable statement of its reasons for doing so, those reasons being that there is no record of his having reported to his treating clinicians experiencing thoracic spine symptoms and the evidence he presented in support of his claim, namely Dr Patrick's report, does not, in Ausgrid's view, establish he had suffered an injury to his thoracic spine.
47. Acting properly, would also have involved Ausgrid providing some explanation to Mr Mowczan, and to the Commission, why it did not until 19 December 2019 notify Mr Mowczan that it disputed liability for his claim. It would also have involved Ausgrid providing the Commission and Mr Mowczan some explanation as to why it did not until 3 April 2020 provide Mr Mowczan with a concise and readily understandable statement of its reasons for why it sought to dispute that he suffered an injury to his thoracic spine.
48. These failures of Ausgrid weigh heavily against the Commission forming the opinion that it is in the interest of justice to deal with the issue of whether Mr Mowczan suffered an injury to his thoracic spine.
49. The Commission accepts Mr Mowczan's submission that were the issue to be dealt with in these proceedings he would be at a disadvantage and thereby prejudiced in that he has lost the opportunity of obtaining further evidence regarding the issue, such as a further statement from him regarding his symptoms and a further report from Dr Patrick in which Dr Patrick could explain more fully and cogently the reasons why he formed the opinion that Mr Mowczan suffered an injury to his thoracic spine in the event on 18 February 2016. The fact that Mr Mowczan will be so prejudiced weighs heavily against the Commission forming the opinion that it is in the interest of justice to do deal with the issue of whether Mr Mowczan suffered an injury to his thoracic spine.
50. In terms of there being merit in Ausgrid's position that Mr Mowczan did not suffer an injury to his thoracic spine on 18 February 2016, the Commission observes that there is no opinion from any expert that contradicts Dr Patrick's opinion.
51. Relevant to this matter, is firstly that Dr Pillemer, whom Ausgrid qualified to provide a forensic medical report, and who had to hand Dr Patrick's report of 1 April 2019 when preparing and producing his report of 9 March 2020, did not deal with the issue of whether Mr Mowczan suffered an injury to his thoracic spine on 18 February 2016.
52. Secondly, there is uncontradicted expert evidence, in the form of Dr Patrick's opinion, that Mr Mowczan did suffer such an injury. The Commission rejects Ausgrid's submission that "the issue concerning injury to the thoracic spine on 18 February 2016 is unfounded on the evidence", and this is simply because there is evidence to support it, in the form of Dr Patrick's opinion. There is also Mr Mowczan's report to Dr Patrick of experiencing symptoms in his mid-back around the period of October 2016.
53. It is of no consequence that Dr Patrick's report does not comply with all the features set out in *Makita (Australia) Pty Ltd v Sprowle*<sup>3</sup>. What is required for an expert's opinion to be accepted as evidence is for the expert to set out in his or her report the facts observed, the assumed facts including those from other sources such as the history provided by a worker and information from x-rays and other tests.<sup>4</sup> What is required by way of the explanation the

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<sup>3</sup> [2001] NSWCA305

<sup>4</sup> *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA11 at [82] and [85] per Beazley JA (Giles and Tobias JJA agreeing).

expert provides for his or her opinion will depend upon the circumstances of the case.<sup>5</sup> Experts are allowed to use their general experience and knowledge as experts as a basis for forming an opinion.<sup>6</sup>

54. As said above, Dr Patrick's opinion is to be interpreted, in my view, as Mr Mowczan having suffered a physiological disturbance to his thoracic spine in the incident on 18 February 2016 that subsequently caused him by April 2019 to have a significant complaint of mid lower thoracic spinal pain with radicular symptoms. Dr Patrick's explanation for his opinion is somewhat sparse, nevertheless he provides a scientific basis for his opinion being the complaint that Mr Mowczan makes of now suffering significant complaint of mid/lower thoracic spinal pain. His opinion is based on the history he obtained and his findings from his examination of Mr Mowczan. He formed his clinical judgment with respect to Mr Mowczan's thoracic spine based upon those matters and hence his opinion is evidence that the Commission is able to accept that Mr Mowczan suffered an injury to his thoracic spine.
55. True it is that there is nothing within the evidence that indicates Mr Mowczan made any complaint of thoracic symptoms to the clinicians whom he consulted for treatment. Because of that, there is some basis for Ausgrid to argue, and therefore persuade the Commission, that Mr Mowczan did not suffer an injury to his thoracic spine on 18 February 2016. That would involve however rejecting the opinion of Dr Patrick. Because of that, there is some merit in Ausgrid's position.
56. However, in terms of determining whether there is substantial merit in the case Ausgrid seeks to put, regard must also be had to Dr Patrick's opinion and the fact that there is no countervailing expert opinion. In that circumstance the Commission is not persuaded that there is substantial merit in the case that Ausgrid seeks to put. Even if there were, it seems to the Commission that that matter would not outweigh the fact that:
- (a) Ausgrid did not act promptly to notify Mr Mowczan that it sought to dispute he had suffered injury to his thoracic spine,
  - (b) Ausgrid has not provided an explanation for its delay in so doing,
  - (c) Ausgrid has not provided an explanation for its delay in providing a concise and readily understandable statement of its reasons for seeking to do so,
  - (d) prejudice would befall Mr Mowczan were the matter now to be agitated,

such that the Commission could come to the opinion that is in the interest of justice for the matter to be dealt with in the present proceedings. In my view, when all factors are weighed, it would be contrary to equity and good conscience for the matter to be dealt with by the Commission.

57. Accordingly, the Commission declines to deal with that matter in the present proceedings.
58. I note that in Part 5.6 of Part B of the ARD Mr Mowczan indicated that the medical dispute between him and Ausgrid also included the degree of permanent impairment resulting from the injury to his back in March 2014. At the arbitration hearing his counsel and solicitor informed me that his claim for compensation for permanent impairment relates only to the injury he suffered on 18 February 2016.<sup>7</sup> That is appropriate given that there is no evidence that Mr Mowczan has made any claim against Ausgrid for permanent impairment resulting from the injury he suffered in March 2014. Accordingly, the ARD should be amended so as to reflect that.

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<sup>5</sup> Adler v Australian Security & Investments Commission [2003] NSWCA131 at [631]

<sup>6</sup> Australian Security & Investments Commission v Rich [2005] per Spigelman CJ (Giles and Ipp JJA agreeing)

1. <sup>7</sup> Transcript page 25 – lines pages 20, 25