

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2526/19
Applicant: Peter John Lang
Respondent: Davcote Pty Ltd
Date of Determination: 14 August 2019
Citation: [2019] NSWCC 275

The Commission determines:

1. The referral for assessment made on 27 April 2017 in proceedings 1584/17 by the Registrar to Approved Medical Specialist Dr David Lewington was invalidly made.
2. The Medical Assessment Certificate given by Approved Medical Specialist Dr David Lewington on 2 June 2017 in response to that referral is a nullity.
3. The applicant has a condition in his thoracic spine as a consequence of injuries he suffered to other body parts on 23 December 2013 and treatment for those other injuries.
4. The applicant suffered an injury to his left knee on 23 December 2013 arising out of or in the course of his employment.
5. There is a medical dispute with respect to the degree of permanent impairment of the applicant resulting from his injury on 23 December 2013.
6. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment of the degree of permanent impairment of the applicant resulting from his injury on 23 December 2013. The body parts to be specified in the referral for assessment are right and left lower extremities, right and upper extremities, thoracic spine and scarring.
7. The documents to be provided to the Approved Medical Specialist are those attached to the:
 - (a) Application to Resolve a Dispute, with the exception of the MAC of Dr David Lewington;
 - (b) Reply;
 - (c) Application to Admit Late Documents the applicant's solicitor signed on 11 July 2019; and
 - (d) Application to Admit Late Documents the respondent's solicitor signed on 20 July 2019.

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.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. These proceedings involve a disputed claim Peter John Lang has made against Davcote Pty Ltd for compensation of \$35,750 under s66 of the *Workers Compensation Act 1987* (the 1987 Act) for 22% whole person impairment. He claims that degree of permanent impairment results from injuries he suffered on 23 December 2013 when he fell 4 metres from a ladder while working for Davcote.
2. There is no controversy that, as a consequence of that fall, Mr Lang suffered a fracture to the distal right radius, rotator cuff injuries to both shoulders and a fracture of the left fibula and that he later developed plantar fasciitis.
3. Mr Lang initially claimed to have also suffered an injury to the interscapular region of his thoracic spine in the incident on 23 December 2013, which Davcote's then insurer, QBE, disputed. Mr Lang now no longer contends that he suffered such an injury to his thoracic spine but now claims that he developed back pain and asymmetry of movement in his back in the region of his thoracic spine due to the injuries he suffered to his shoulders and his right wrist in the incident. Davcote's present insurer, GIO, disputes that.
4. Mr Lang also claims to have suffered an injury to left knee in the incident on 23 December 2013. Both insurers of Davcote disputed that.
5. Mr Lang previously instituted proceedings in the Commission seeking determination of his claim for compensation under s66. Those proceedings were assigned matter number 1584/17. He discontinued those proceedings on 9 August 2017 without the Commission having determined his disputed claim. Prior to Mr Lang discontinuing those proceedings, a delegate of the Registrar referred a medical dispute to Approved Medical Specialist (AMS) Dr David Lewington relating to the degree of permanent impairment of Mr Lang from the injuries he suffered on 23 December 2013. The AMS provided a MAC with respect to that referral prior to Mr Lang discontinuing the earlier proceedings
6. An issue of controversy in the present proceedings is whether that referral was validly made. Mr Lang contends it was not, whereas Davcote contends it was. It is necessary, therefore to provide some detail of the terms of the referral and the background in which it was made.
7. In part 4 of the Application to Resolve a Dispute (ARD) that was registered to commence the earlier proceedings, Mr Lang detailed his injury to be "right & left lower extremities right & left upper extremities scarring" (verbatim). The Registrar's delegate who prepared the form by which the medical dispute arising from Mr Lang's disputed claim was referred to the AMS relied on the content of part 4 to complete the form of referral. She circulated to the parties' respective lawyers, by email on 27 April 2017, the form she had drafted, which identified the "body parts" being referred for assessment as "Right Upper Extremity, Left Upper Extremity, Right Lower Extremity, Left Lower Extremity". The delegate invited the parties' lawyers in her email of 27 April 2017 to lodge with her any objection they might have to the "referral as framed". Neither party did so. I infer that either three business days after 27 April 2017 or shortly after that, the delegate issued the referral to the AMS in the terms set out in the draft she had forwarded to the parties' lawyers.
8. The AMS issued a Medical Assessment Certificate (MAC) on 2 June 2017, in which he certified that he had assessed the degree of permanent impairment of Mr Lang from the injuries Mr Lang suffered on 23 December 2013 to be 10% whole person impairment. Importantly, with respect to the current proceedings, Mr Lang's thoracic spine was not examined and not assessed for impairment by the AMS and this, no doubt, was due to no mention being made of the thoracic spine in the referral that the Registrar's delegate issued to the AMS.

9. In the present proceedings Mr Lang contends that the MAC is a nullity because the referral the Registrar's delegate made to the AMS was invalid. He contends that the referral to the AMS was invalid for two reasons: Firstly, the referral did not specify his thoracic spine as a body part the AMS had to assess whereas his disputed claim for compensation that was the subject of the earlier proceedings included compensation for an impairment of his thoracic spine. Secondly, a dispute had arisen between the parties, prior to the AMS issuing the MAC, regarding whether he suffered an injury to his left knee on 23 December 2013. Because that dispute related to Davcote's liability to pay him compensation under s 66, insofar as his claim related to his left knee, Mr Lang contends the Registrar's delegate was consequently prevented by s 321(4)(a) of the *Work Place Injury Management and Workers Compensation Act 1998* (the 1998 Act), as then enacted, from referring the medical dispute to the AMS until the Commission had determined that issue.
10. Mr Lang contends that the Registrar, in the current proceedings, can refer the medical dispute regarding the degree of permanent impairment he has from his injury on 23 December 2013 to an AMS. Alternatively, in the event that the referral in the prior proceedings was valid, and the MAC stands, he contends that the Commission has a discretion under s329(1)(b) of the 1998 Act to refer the medical dispute for further assessment so that the permanent impairment relating to his thoracic spine can be assessed, and he seeks that the Commission exercise its discretion and do so. Mr Lang accepts that prior to any referral being made to an AMS by the Registrar under s293 or s321 of the 1998 Act or by the Commission under s329, the Commission must determine whether he developed a condition in his thoracic spine as a consequence of the injuries he suffered on 23 December 2013 and whether in the incident of 23 December 2013 he injured his left knee, given that those matters are disputed by Davcote.
11. Davcote contends that the referral made in the prior proceedings is valid and consequently the MAC is valid and the assessment of the AMS with respect to the degree of permanent impairment of Mr Lang resulting from his injuries on 23 December 2013 is conclusively presumed to be correct and binds both it and Mr Lang in the present proceedings. Davcote contends that the Commission is prevented, by force of s 322A of the 1998 Act, from referring the matter again to an AMS to assess the impairment of Mr Lang's thoracic spine. Davcote concedes that if the referral to the AMS in the prior proceedings was invalid, then the MAC is a nullity and the medical dispute between it and Mr Lang regarding the degree of his permanent impairment from his injury would have to be referred by the Registrar to an AMS to assess. Davcote acknowledges that that referral would occur after the Commission determines whether Mr Lang has a consequential condition in his thoracic spine from the injuries he suffered on 23 December 2013 and whether in the incident on 23 December 2013 he suffered an injury to his knee. Davcote disputes he suffered either.

PROCEDURE BEFORE THE COMMISSION

12. I am satisfied that the parties understand the nature of the application and the legal implications of any assertion made in the information supplied. I used my best endeavours to bring the parties to a settlement. I am satisfied that the parties had sufficient opportunity to explore settlement and that were unable to reach resolution of the dispute.

ISSUES FOR DETERMINATION

13. The parties agree that the following issues remain in dispute:
 - (a) Whether the referral to AMS Dr Lewington in proceedings 1584/17 was validly made. As mentioned, Davcote concedes that if the referral was not validly made, the MAC Dr Lewington issued is a nullity.

- (b) If the referral was validly made, whether the Commission has power under s329(1)(b) of the 1998 Act to refer the matter again to an AMS to assess the degree of permanent impairment of Mr Lang relating to his thoracic spine.
- (c) If the referral was not validly made, or if it was validly made and if the Commission has a discretion to refer the matter for further assessment under s329, whether Mr Lang suffered an injury to his left knee on 23 December 2013 and whether as a result of the injuries Mr Lang suffered on 23 December 2013 he developed a condition in his thoracic spine.

EVIDENCE

- 14. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply and attached documents;
 - (c) Documents attached to an Application to Admit Late Documents Mr Lang's solicitors signed on 11 July 2019;
 - (d) Documents attached to an Application to Admit Late Documents Davcote's solicitors signed on 20 July 2019.
- 15. No oral evidence was given.

FINDINGS AND REASONS

Was the referral valid?

- 16. As said above, Mr Lang contends that the referral to the AMS was not validly made, firstly, because it did not specify his thoracic spine as a body part the AMS had to assess and, secondly, because the Commission had not determined the dispute between him and Davcote regarding whether he injured his left knee in the incident on 23 December 2013. Davcote, through its counsel, Mr Graeme Barter, conceded during submissions that if Mr Lang's claim for compensation that was the subject of the ARD in the prior proceedings included compensation for permanent impairment relating to his thoracic spine then the referral would be invalid because that body part had not been specified in the referral. Mr Barter submitted however that because Mr Lang had not included within the materials he filed with the ARD in the earlier proceedings the Workcover Permanent Impairment Claim Form dated 19 December 2016 and because Mr Lang did not particularise in the ARD that his injury included his thoracic spine, his claim for compensation the subject of the earlier proceedings did not include a claim for compensation for permanent impairment relating to his thoracic spine. Mr Barter submitted, in the alternative, that the Commission could infer that in the earlier proceedings Mr Lang had abandoned his claim for compensation insofar as it related to his thoracic spine because he did not respond to the delegate's invitation in her email of 27 April 2017 to lodge an objection to the referral, which as mentioned, did not include a reference to Mr Lang's thoracic spine.
- 17. Mr Lang notified QBE of his claim for compensation by means of his solicitors posting a letter to QBE on 28 December 2016. His solicitors enclosed with that letter a copy of a report of orthopaedic surgeon Dr James Bodel dated 15 December 2016 and a Workcover Permanent Impairment Claim Form dated 19 December 2016. The Workcover Permanent Impairment Claim Form is not in evidence in these proceedings and, it seems, it was not in evidence in the earlier proceedings.

18. I note at this juncture that the index of the ARD that was filed in the prior proceedings is not in evidence before me. Counsel for Mr Lang, Mr Beran, said that the documents that were part of the ARD in the prior proceedings included Mr Lang's solicitors' letter of 28 December 2016, Dr Bodel's report dated 15 December 2016 and a letter QBE posted on 23 March 2017 to Mr Lang, in which QBE notified Mr Lang under s74 of the 1998 Act, as then enacted, that it denied liability for his claim. Mr Barter accepted that was the case.
19. Mr Lang's solicitors in their letter advised QBE that they were instructed to make a claim for 22% whole person impairment based upon "the abovementioned report", which was a reference to the report of Dr Bodel. They advised in their letter that the claim for 22% whole person impairment was "for the upper extremities (right & left), lower extremities (right & left) and shoulders". In other words, they did not mention thoracic spine. Dr Bodel in his report of 15 December 2016 revealed that he had assessed Mr Lang to have 22% whole person impairment from his injuries and he advised in his report that this was comprised of 6% whole person impairment relating to Mr Lang's thoracic spine, 5% whole person impairment relating to the left upper extremity, 8% whole person impairment relating to the right upper extremity, 2% whole person impairment relating to the left lower extremity and 3% whole person impairment relating to the right lower extremity.
20. It is apparent from the evidence that QBE, following receipt of Mr Lang's solicitors' letter of 28 December 2016, arranged for Mr Lang to be examined by orthopaedic surgeon Dr John Bentivoglio. Dr Bentivoglio provided QBE with a report on 2 March 2017. It is obvious both from that report and from the letter QBE posted Mr Lang on 23 March 2017, that QBE was aware that the claim Mr Lang had made against it for compensation under s66 of the 1987 Act included a claim for compensation for permanent impairment relating to his thoracic spine. This is obvious because Dr Bentivoglio in his report reveals that QBE specifically asked him to consider whether Mr Lang's thoracic spine symptoms related to the incident in which Mr Lang suffered injury. Further, QBE in its letter of 23 March 2017 observed that Dr Bodel had provided an assessment of whole person impairment relating to Mr Lang's thoracic spine and that the permanent impairment that Dr Bodel had assessed Mr Lang to have as a result of the injury Mr Lang suffered included a rating Dr Bodel had made for impairment of Mr Lang's thoracic spine. QBE had also advised Mr Lang in its letter of 23 March 2017 that Dr Bentivoglio had assessed him as having 0% whole person impairment with respect to his thoracic spine as a result of the injury.
21. It is not known from the evidence before me whether the Workcover Permanent Impairment Claim Form dated 19 December 2016 included the words "thoracic spine" in the description of injury the subject of Mr Lang's claim or, indeed, whether that form was part of the evidence before the Commission in the prior proceedings. But that is irrelevant in any event, as the letter of Mr Lang's solicitors, by which his claim was made, coupled with the report of Dr Bodel upon which Mr Lang relied and which formed part of his claim, made it clear that his claim for compensation included a claim for permanent impairment relating to this thoracic spine. QBE was aware of that. A claim for compensation that a worker makes is not confined to what is contained within a claim form.¹
22. In my view, the disputed claim for compensation that was the subject of the ARD in the earlier proceedings was the claim that Mr Lang made by way of his solicitors' letter of 28 December 2016. In understanding what that claim was, regard had to be paid to Dr Bodel's report, wherein it was articulated that the injury Mr Lang suffered included his thoracic spine and the impairments that resulted from that included an impairment of Mr Lang's thoracic spine. Davcote/QBE was under no misapprehension about this, given it had Dr Bentivoglio assess Mr Lang's thoracic spine and asked for Dr Bentivoglio's comment on whether there was any link between Mr Lang's thoracic spine symptoms and Mr Lang's fall on 23 December 2013.

¹ See *Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA244, *Tan v National Australia Bank Ltd* [2008] NSWCA198 and *Rinker Group Ltd v Mackell* [2008] NSWSC100

23. The Commission, which includes the Registrar², is not bound by pleadings when determining a disputed claim for compensation and must determine a matter based on the evidence.³ The Commission is required by s354(1) of the 1998 Act to operate with as little formality and technicality as proper consideration of a matter permits. The objectives of the legislation, as set out in s3, include providing injured workers with compensation for permanent impairment and require that be done efficiently and effectively. Given all that, it seems to me that the medical dispute that the Registrar in the prior proceedings was required to refer to the AMS to assess was the medical dispute that related to Mr Lang's disputed claim for compensation that was the subject of the earlier proceedings, which included permanent impairment relating to his thoracic spine. The fact that the safeguard the Commission had in place to ensure that occurred, which was to send a draft of the referral to the parties' lawyers and seek their comment prior to engrossing the referral and issuing it to the AMS, did not in this case work, does not change what the medical dispute was that had to be referred.
24. In short, the Registrar was required in the earlier proceedings to refer to the AMS the medical dispute that arose from the disputed claim for compensation that Mr Lang had made, and that included an impairment of his thoracic spine. The manner in which the medical dispute was to be expressed in the referral was not restricted to what Mr Lang had particularised with respect to his injury in Part 4 of the ARD in the earlier proceedings, but was to be discerned from the totality of the evidence filed. The Registrar's delegate was able to have regard to that evidence when formulating the dispute to be referred. It does not matter that the Registrar's delegate's endeavour to obtain the parties' assistance with respect to framing the former referral correctly did not work. The simple fact is that the correct medical dispute was not referred.
25. In terms of the alternative submission that Mr Barter put, that Mr Lang had abandoned his claim for compensation insofar as it related to his thoracic spine, there is no credible evidence before me that would enable me to infer that was the case. Indeed, an email from Mr Lang's solicitors of 28 June 2017 to the Registrar's delegate who had referred the matter to an AMS confirmed that it was "a genuine mistake" that the thoracic spine had not been particularised in the ARD in the prior proceedings. It seems to me that this is a proper explanation for what occurred, that is that it was a genuine mistake on the part of Mr Lang's solicitors that they did describe Mr Lang's injury in part 4 of the ARD to include his thoracic spine. As has been discussed above, Mr Lang's claim was premised on the report of Dr Bodel, and QBE was aware of that. That report was part of the evidence before the Commission in the earlier proceedings. The evidence in those proceedings revealed that the claim Mr Lang was prosecuting in the proceedings included permanent impairment relating to his thoracic spine. There is no evidence to suggest otherwise.
26. Accordingly, the referral to the AMS ought to have included Mr Lang's thoracic spine as a body part that the AMS had to assess when assessing the degree of permanent impairment of Mr Lang resulting from the injury on 23 December 2013. There was a medical dispute about that. Because the medical dispute that was referred to the AMS to assess did not specify Mr Lang's thoracic spine as a body part that the AMS was to assess, the referral was not validly made.
27. As mentioned, Mr Barter conceded that if the referral was not validly made then the MAC is a nullity. That was a proper concession to make, and accords with authority.⁴

² S368(1)(b) of the 1998 Act.

³ See *AP v NSW Police Force* [2013] NSWWCPCPD11 at [12], *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWWCPCPD35 at [54], *Mascaro v Inner West Council* [2018] NSWWCPCPD29 at [83]

⁴ See *Haydar Al-Nouri v Al-Nouri Pty Ltd* [2010] NSWWCPCPD85 cited with approval by DP Snell in *Pidcock Panel Beating Pty Ltd v Nicolai* [2017] NSWWCPCPD32 and *Matilda Cruises Pty Ltd v Sweeney* [2018] NSWWCPCPD37

28. Accordingly, the Commission finds that the MAC that AMS Dr Lewington gave on 2 July 2017 in response to that referral, pursuant s 325(1) of the 1998 Act, is a nullity and, consequently, the assessment to which that MAC related is a nullity.

Did s 321(4)(a) prevent the Registrar referring the medical dispute to the AMS?

29. Section 321(4), as enacted at the time the referral was made, reads:

“(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).”

30. As mentioned, it is Mr Lang’s case that the referral to the AMS was also invalid because there was a liability dispute between the parties that had not been determined by the Commission prior to the AMS assessing the degree of permanent impairment. That liability dispute related to whether he suffered an injury to his left knee in the incident on 23 December 2013. QBE notified Mr Lang that it disputed that element of his claim for compensation by means of a letter it posted to him on 10 May 2017, which was after the Registrar’s delegate had referred the medical dispute to the AMS, but before the AMS had assessed the dispute. In other words, the liability dispute regarding whether Mr Lang suffered an injury to his left knee arose subsequent to the date upon which the Registrar’s delegate referred the medical dispute to the AMS to assess.
31. Mr Beran submitted that the Registrar’s delegate’s referral to the AMS ought to be treated as a continual action until the time at which the AMS assessed the dispute. That is to say, Mr Beran’s submission was to the effect that because a liability dispute had arisen after the referral was issued but prior to the AMS assessing the medical dispute and because the Commission had not determined that liability dispute, the Registrar had to recall the referral.
32. The evidence before the Commission does not establish that QBE’s s 74 notice to Mr Lang of 10 May 2017 was lodged by either party in the earlier proceedings. The first mention that was made of it to the Commission was by Davcote’s solicitors in an email it sent to the Commission on 3 July 2017, which is after the MAC issued. In the circumstances, I infer that neither party had, under s288(1) of the 1998 Act, referred to the Registrar the dispute between them regarding whether Mr Lang had suffered an injury to his left knee of 23 December 2013 so as to enable the Commission to determine that dispute.
33. *Favetti Bricklaying Pty Ltd v Benedek & Anor*⁵ was a case that involved a work injuries damages claim in which the worker sought assessment by an AMS of permanent impairment for both the lumbar and thoracic spines for the purpose of satisfying s 151H of the 1987 Act. Justice Bellew held with respect to s 321(4)(a):

“Pursuant to s. 321(4)(a), the Registrar has no power to refer the matter for an assessment by an AMS where liability is in issue and has not been determined by the Commission. That necessarily presupposes that the Commission has the jurisdiction to resolve the issue of liability prior to the matter being referred to an AMS.”⁶

⁵ [2017] NSWSC417

⁶ *Ibid* at [89]

34. The work that s321(4) does is to prohibit the Registrar from taking certain action unless a precondition has been met. That precondition is the adjudication by the Commission of a liability dispute. As Justice Bellew said in Favetti's case the prohibition on the Registrar to take that action "necessarily presupposes that the Commission has jurisdiction to resolve" the liability issue. The Commission only has that jurisdiction if it is invoked. That requires one of the parties referring the dispute, in accordance with s288 of the 1998 Act, to the Registrar so that it can be determined by the Commission. That did not happen in this case either prior to the Registrar taking the action under s 321(4)(a) or prior to the AMS issuing the MAC.
35. Hence, to my mind, the Registrar was able to refer the medical dispute to the AMS to assess, notwithstanding that, as between the parties, there was a dispute regarding whether Mr Lang had injured his left knee in the accident. However, as indicated above, the referral that the Registrar did make was invalid for another reason.

Section 329

36. Given that I found that the referral to the AMS was invalid, and consequently the MAC a nullity and the assessment the subject of it also a nullity, this issue does not arise for determination. However, because it was the subject of submissions at the Arbitration I shall very briefly deal with it.
37. This issue would only arise if the referral had been validly made and the MAC was valid. Section 329(1) insofar as is relevant to this matter reads:

"(1) A matter referred for assessment under this Part may be referred again on one or more further occasions for assessment in accordance with this Part, but only by:

....

(b) a court or the Commission."

38. Section 322A(1) stipulates that only one assessment may be made for the degree of permanent impairment of an injured worker. Section 322A(3) clarifies that a medical dispute about the degree of permanent impairment of a worker as the result of an injury cannot be referred or be the subject of further assessment if a medical dispute about the matter has already been the subject of an assessment and a medical assessment certificate.
39. In obiter in *O'Callaghan v Energy World Corporation Ltd*⁷ Deputy President Roche held, without expressing a concluded view, that the reconsideration power of the Commission under s329 cannot work with s 322A which is the dominant provision. To my mind that is correct insofar as it relates a medical dispute about the degree of permanent impairment of a worker. In other words, because of s322A, the Commission no longer has power to refer back to an AMS for further assessment a medical dispute about the degree of permanent impairment of a worker resulting from an injury. That does not mean that section 329(1)(b) has been rendered otiose by s322A, because the Commission could refer back to an AMS for further assessment any medical dispute that is not a dispute about the degree of permanent impairment of an injured worker from an injury, being those disputes identified in s319(a), (b), (e), (f) and (g) of the 1998 Act. In other words, the two sections work harmoniously together. There is no inconsistency between them.
40. Given the express words of s322A prevent the matter involving an assessment of degree of permanent impairment of an injured worker being referred back to an AMS to reassess, had the MAC been valid, then s 329 could not have been invoked to allow me to send the matter back to an AMS to assess the degree of permanent impairment of Mr Lang relating to his thoracic spine.

⁷ [2016] NSWCCPD1

Consequential condition of thoracic spine

41. The claim that Mr Lang now presents with respect to his thoracic spine is, in substance, that as a result of the injuries he suffered to his wrist and shoulders in the incident of 23 December 2013 and the treatment for those injuries, he developed a condition in his thoracic spine, being pain and asymmetry of movement.
42. Mr Lang's claim, as he now presents it with respect to his thoracic spine, does not require him to prove that he suffered an injury. That is, he is not required to prove he has a pathological or physiological disturbance in his thoracic spine arising out of or in the course of his employment. What he must prove is that, more likely than not, he has one or both of the conditions he alleges in his thoracic spine, and that, more likely than not, the injuries he did suffer on 23 December 2013 or alternatively the treatment that he received for those injuries, or both, have materially contributed to the conditions he alleges he now has in his thoracic spine.⁸
43. The evidence establishes that Mr Lang's injury occurred when he fell 4 metres from a ladder while he was fixing a light to the top of a taut liner vehicle. He fell on "all fours". He was taken and admitted to the John Hunter Hospital, and then onto the Mater Hospital, where he had open reduction of a colles fracture of his right wrist. A few days later, an internal reduction and fixation of that fracture was done.
44. Dr Bodel in his report of 15 December 2016 expressed the view that Mr Lang had developed bursitis in his shoulders as a consequence of his injury. Dr Bentivoglio in his report of 2 March 2017 also expressed that opinion. Both doctors observed that Mr Lang had pain in his shoulders and had restricted range of motion of his shoulders due to the injury he suffered, although the doctors found differing degrees of restriction.
45. On 17 February 2014 Mr Lang consulted hand therapist Felicity Thorley for treatment. He did so on referral from a physio therapist practising out of the practice known as Sport and Spine Physiotherapy. Ms Thorley reported to Sport and Spine Physiotherapy that she had obtained a history of Mr Lang suffering from pain in his thoracic spine for three weeks.⁹
46. On 20 February 2014 physiotherapist Ben Mahon wrote to Mr Lang's GP. Mr Mahon noted that the GP had referred Mr Lang for physiotherapy for management of "right upper thoracic pain and stiffness". Mr Mahon said, "my impression is that Peter's symptoms are due to right lower cervical and upper thoracic facet joints. This is likely due to altered motor recruitment strategies and postures due to his wrist fracture".¹⁰
47. Dr Bodel in his report of 15 December 2016 expressed the view that Mr Lang had suffered an injury to his thoracic spine in the incident of 23 December 2013. He noted that when Mr Lang presented for examination on 2 November 2016 Mr Lang complained of tolerable pain in his thoracic spine but with the pain being aggravated with increased activity. Dr Bodel found that Mr Lang had restriction of lateral bending and rotation of his thoracic spine and tenderness in this mid-thoracic region. He found that Mr Lang had restriction of rotation to the left and asymmetry of movement in the region of his thoracic spine.
48. Dr Bodel provided Mr Lang's solicitors a further report on 5 March 2018, without further examining Mr Lang. Dr Bodel revised his opinion regarding the cause of Mr Lang's symptoms in his thoracic spine, and expressed the view that Mr Lang did not suffer an injury

⁸ See *Kumar v Royal Comfort Betting Pty Ltd* [2012] NSWCCPD8 at [35] – [49], [61], and *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* [2016] NSWCCPD23 at [100] – [101], [165] – [169]

⁹ ARD page 22

¹⁰ ARD page 156

to his thoracic spine in the incident on 23 December 2013, but rather developed symptoms subsequently as a consequence of “the effects of the injury and the recovery from the fractures of the wrist and the stiffness in the shoulders”. Dr Bodel also said this in his report:

“He does complain of back pain in the interscapular region of the thoracic spine and there was some asymmetry of back movement when I examined him. This can also be associated with the rotator cuff pathology in the shoulders which has occurred as a consequence of the injuries to the upper limbs. There has been aggravation, acceleration, exacerbation and deterioration of a disease process in the form of the bursitis in both shoulders caused by the injuries to the wrist. He had fairly lengthy periods of immobilisation. There is therefore no direct evidence to indicate that the thoracic spine injury is causally related to the fall but based on the history given and the clinical findings, I can accept that there is a causal link between the gradual onset of the asymmetry of back movement in the thoracic spine and the complications of his injuries in the fall.”

49. Dr Bentivoglio also provided a further report dated 12 February 2019, this time to Davcote’s solicitors rather than QBE. That report was also done without further examination of Mr Lang, but after Dr Bentivoglio had reviewed Dr Bodel’s reports of 15 December 2016 and 5 March 2018 and other clinical records relating to Mr Lang. Dr Bentivoglio disagreed with Dr Bodel’s opinion that Mr Lang’s symptoms in his thoracic spine were due to an aggravation, acceleration, exacerbation and deterioration of disease in the thoracic spine. Dr Bentivoglio said that there is very little movement in the thoracic spine and then only rotary movement. Dr Bentivoglio noted that there had been no investigations done so as to determine whether there is a degenerative disease in Mr Lang’s thoracic spine. Dr Bentivoglio expressed the view that there was no “causal link between the gradual onset of asymmetry of back movement in the thoracic spine caused by the complications of the fall”.
50. As mentioned above, it is not necessary, in terms of determining whether Mr Lang has a condition in his thoracic spine, that he substantiate the incident on 23 December 2013 resulted in a pathological or physiological disturbance to his thoracic spine. Rather, it is only necessary that I be satisfied that the injuries he did suffer to his other body parts in the incident of 23 December 2013 or the treatment of those injuries materially contributed to his having a condition in his thoracic spine.
51. Dr Bentivoglio does not cavil with the fact that Mr Lang has pain in the intrascapular region of his thoracic spine. He opined in his earlier report that these symptoms were “emanating from his neck”.
52. The situation is, in my view, that Dr Bentivoglio has approached the issue of whether Mr Lang has a condition in his thoracic spine from the perspective of whether there is an identifiable pathology in Mr Lang’s thoracic spine to explain the symptoms that Mr Lang has. That is not the correct test. Accordingly, I place little weight on Dr Bentivoglio’s opinion in terms of whether Mr Lang has a consequential condition in his thoracic spine as a result of the injuries he suffered on 23 December 2013.
53. Having regard to Dr Bodel’s opinion, as expressed in his report of 5 March 2018, insofar as he says that the symptoms are due to the effects of the injury Mr Lang suffered and the recovery from the fractures of his wrist and the stiffness in his shoulders, and having regard to what Mr Mahon said in his report to the GP on 20 February 2014, which is to the same effect as what Dr Bodel has said, I am satisfied that, in all likelihood, the injuries Mr Lang suffered on 23 December 2013, insofar as they resulted in the fracture of his wrist and bursitis and pain in his shoulders, have materially contributed to the condition he has in his thoracic spine in the form of pain and altered motion.

Injury to left knee

54. Mr Lang's case is that the incident on 23 December 2013 involved his falling 4 metres and landing on his "fours" which resulted in a "heavy blow to his left knee". He says that "the heavy blow" is the injury he suffered to his left knee.
55. What is required to substantiate that a personal injury has arisen out of or in the course of employment is that a worker has suffered an identifiable physiological or pathological change or disturbance to the worker's normal state.¹¹ To my mind, a "direct blow" is not a description of a physiological or pathological change to Mr Lang's body but rather a potential mechanism by which such a change may occur. In other words, insofar as the evidence establishes that he fell 4 metres from a ladder and landed on his hands and knees, that does not establish that he suffered an injury to his knee, but rather establishes a method by which he might have suffered an injury to his left knee.
56. Mr Lang's GP records on 16 January 2014 in the clinical notes he maintained relating to Mr Lang, that Mr Lang complained of "post knee muscle strain pain". There is no other record of Mr Lang seeking treatment in the aftermath of his injury or making complaint of left knee problems, other than his receiving treatment for the fracture of the left fibula neck.
57. Dr Bodel when he examined Mr Lang on 2 November 2016 found that Mr Lang had "painful retropatellar crepitus" in the region of the left knee. Dr Bodel took a history of Mr Lang having had a direct blow to his left knee when he fell from the top of the ladder. Though Dr Bodel does not say it explicitly, it is implicit, when his report of 15 December 2016 is read as a whole, that he considers that the physiological disturbance of the painful retropatellar crepitus in Mr Lang's left knee resulted from the direct blow to Mr Lang's left knee when he fell on 23 December 2013.
58. Dr Bentivoglio in his report to QBE of 2 March 2017 was asked specifically to answer whether he considered Mr Lang's "left knee complaints" were related to the incident in which Mr Lang fell on 23 December 2013. Dr Bentivoglio responded, "the answer is – I do not consider this gentleman's left knee complaint is as a result of the original fall". Nowhere within Dr Bentivoglio's report did he describe what constituted Mr Lang's "left knee complaint". There is no evidence before me by which I could ascertain what QBE was referring to by "left knee complaints" when it specifically asked Dr Bentivoglio for his opinion whether they were related to the incident. Necessarily, the complaint would seem to be something other than limited range of movement Mr Lang had of his left knee, as Dr Bentivoglio had obtained a history from Mr Lang of not having an issue with that and Dr Bentivoglio found Mr Lang had a full range of movement in his left knee. Further, it could not have been muscle wasting as Dr Bentivoglio also found that was normal with Mr Lang.
59. Implicit from the fact that Dr Bentivoglio was asked to address whether Mr Lang's left knee complaints related to the incident on 23 December 2013 and Dr Bentivoglio expressed an opinion they did not, Mr Lang when he presented for examination by Dr Bentivoglio was necessarily experiencing some "complaints" with respect to his left knee. Without Dr Bentivoglio detailing what those complaint were and providing a more cogent explanation that they were not the "result of the original fall", I can afford little weight to his opinion.
60. On the other hand, Dr Bodel has identified a particular physiological disturbance that Mr Lang has and has attributed that to the incident in which Mr Lang suffered injury. Bearing in mind too the nature of the incident that occurred on 23 December 2013, which involved Mr Lang falling directly on to his hands and knees from a height of 4 metres, Dr Bodel's opinion accords with common sense.

¹¹ *Military Rehabilitation Commission v May* [2016] HCA19, applied by Deputy President Snell in *KY v Blue Leaf Food Group Pty Ltd* [2016] NSWCCPD55

61. In the circumstances, I am satisfied that, in all likelihood, Mr Lang did suffer an injury to his left knee.

