WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5763/20**
Applicant: **Anna Callus**
Respondent: **Binettes Pty Ltd**
Date of Determination: **23 December 2020**
Citation No: **[2020] NSWWCC 421**

The Commission determines:

1. The applicant sustained injury to her left shoulder arising out of or in the course of her employment with the respondent on 24 October 2017. The applicant's employment was the main contributing factor to injury.

2. The applicant requires medical and related treatment as a consequence of the injury she sustained to her left shoulder on 24 October 2017 and the respondent is liable to pay reasonably necessary medical and related treatment expenses.

3. The surgical treatment proposed by Dr Durmush in the nature of sleeve gastrectomy and loop bipartition gastric bypass is reasonably necessary treatment as a result of the injury arising out of or in the course of the applicant's employment with the respondent on 24 October 2017.

The Commission orders:

4. The respondent is pay the applicant's reasonably necessary medical and related treatment with respect to the proposed sleeve gastrectomy and loop bipartition gastric bypass, and associated expenses, under s 60 of the *Workers Compensation Act 1987*.

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

Jacqueline Snell
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 JACQUELINE SNELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

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

STATEMENT OF REASONS

BACKGROUND

1. Anna Callus (Ms Callus) was employed by Binettes Pty Ltd (the respondent) as a delivery driver. On 24 October 2017, Ms Callus sustained injury to her left shoulder during the course of her employment with the respondent. On 7 March 2018, Ms Callus came to surgical treatment for the injury she sustained to her left shoulder as a result of which she sustained consequential injury in the nature of right thigh meralgia paresthetica.

2. The claim for compensation in these proceedings involves medical or related treatment payable under s 60 of the *Workers Compensation Act 1987* (1987 Act), specifically costs associated with proposed surgery in the nature of sleeve gastrectomy and loop bipartition gastric bypass (weight loss surgery).

3. The respondent issued a notice in accordance with s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 28 August 2019 [1]. It was conceded Ms Callus sustained injury to her left shoulder on 24 October 2017 and it was also conceded Ms Callus sustained consequential injury in the nature of right thigh meralgia paresthetica. It was disputed the morbid obesity suffered by Ms Callus resulted from the injury she sustained to her left shoulder on 24 October 2017. It was also disputed the weight loss surgery is reasonably necessary as a result of the injury she sustained to her left shoulder on 24 October 2017 as prescribed by s 60 of the 1987 Act. Following a request for review under s 287A of the 1987 Act the respondent issued notice dated 24 February 2020 [2]. It was disputed the injury sustained by Ms Callus to her left shoulder on 24 October 2017 materially contributed to the need for the weight loss surgery and it was disputed the weight loss surgery was reasonably necessary as a result of the injury.

4. The matter proceeded to Arbitration hearing on 27 November 2020, conducted by telephone. Mr Howard Halligan of counsel appeared for Ms Callus instructed by Ms Megg Ross, solicitor. Mr Paul Stockley of counsel appeared for the respondent instructed by Mr Martin Thorne. Ms Callus, and Ms Jenny Doyle (EML) were present.

ISSUES FOR DETERMINATION

5. The following issue were disputed:

    (a) the respondent did not accept the morbid obesity suffered by Ms Callus was as a result of the left shoulder injury;

    (b) the respondent did not accept there had been any aggravation of the right knee condition Ms Callus suffered as a result of the left shoulder injury, and

    (c) the respondent did not accept the proposed weight loss surgery, in the nature of sleeve gastrectomy and loop bipartition gastric bypass, was reasonably necessary as a result of the injury to the left shoulder.

PROCEDURE BEFORE THE COMMISSION

6. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

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[1] Application to Resolve a Dispute (ARD) page 8.
[2] ARD page 15.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents (AALD – R1) and attached documents received on 24 November 2020, and

    (d) Application to Admit Late Documents (AALD – R2) and attached documents received on 27 November 2020.

Oral evidence

8. Neither party sought leave to adduce oral evidence or cross examine any witnesses. Both counsel made oral submissions, and a copy of the recording is available to the parties.

FINDINGS AND REASONS

Review of evidence

9. A brief summary of the evidence follows.

Ms Callus's statements

10. Ms Callus relied on statements dated 30 September 2019 and 9 April 2020 [3]. The respondent objected to paragraphs 19, 22, 25 and 26 of her latter statement and these paragraphs were not pressed.

11. Ms Callus accepted that prior to injury sustained on 24 October 2017 she "was by no means "skinny"" but she had no trouble with her knees or right thigh and she had no issues walking. She had no difficulty performing her work duties with the respondent. She explained that just prior to injury she had lost 16.5 kgs and intended to lose more weight. She said that prior to injury there had been no indication from a doctor that she would benefit from weight loss surgery.

12. Ms Callus initially consulted Dr Nabavi in or about December 2017. At that time she weighed 115kg and it was not until her weight had increased to 130 - 140kg that it was suggested she would benefit from weight loss surgery. Ms Callus said that after she sustained injury on 24 October 2017 she was not as physically active as before due to pain and she said following surgery in March 2018 her weight "drastically increased" as she was unable to walk properly because of the meralgia paresthetica and also the right knee arthritis. She said that as a result of the meralgia paresthetica she had started to use a walking stick. Ms Callus said she had put on 50 kg since she sustained injury on 24 October 2017.

13. Relevant to a report dated 30 July 2019 prepared by Dr Sethi[4] Ms Callus explained that since injury she has experienced severe stress and anxiety and accepted she will overeat "as a coping mechanism". Relevant to a report dated 30 August 2018 prepared by Workfocus Australia[5], Ms Callus did not recall the author measuring either weight or her height.

[3] ARD page 1.
[4] Reply page 5.
[5] Reply page 18.

Fairfield District Medical Centre

14. The clinical records of Fairfield District Medical Centre confirmed Ms Callus suffered morbid obesity prior to the incident occurring on 24 October 2017. She has been counselled about diet from time to time and a care plan summary in 2011 identified needs that included weight control and weight loss.

15. An entry as early as 24 January 1998 described Ms Callus as losing weight over the past month on a low fat diet with her weight on that occasion noted at 88 kg. Subsequently, on 3 April 2000 her weight is again noted at 88 kg, on 10 February 2003 it is noted at 96 kg, on 9 May 2005 it is noted at 95 kg, on 2 December 2007 it is noted at 111 kg, on 12 March 2008 it is noted at 110 kg, on 9 February 2011 it is noted at 110 kg, on 28 March 2011 it is noted at 118 kg.

Dr Thomson

16. Dr Thomson provided an independent medical consultant's report dated 4 October 2006 relevant to an onset of low back pain on 29 March 2006 [6]. As at 4 October 2006, Ms Callus' weight is recorded at 110 kg. She reportedly told Dr Thomson that when she commenced employment with SGS Australia she had weighed 120 kg.

Dr Conrad

17. Dr Conrad provided an independent medical examiner's report dated 30 January 2008[7] relevant to the onset of low back pain in March 2006 and again on 28 June 2007. As at 29 January 2008 Ms Callus' weight is recorded at 115 kg.

Infinity Medical Centre

18. Although the clinical records of Infinity Medical Centre, under whose general medical care Ms Callus appeared to have come in or about late 2016 do not note any recorded weight of Ms Callus, on 15 June 2018, being some months after the incident occurring 24 October 2017 and subsequent surgery in March 2018, a reduced ability to walk and do regular activities is noted.

Workfocus Australia

19. In a report dated 30 January 2018 [8] Workfocus Australia reported that at assessment on 22 January 2018 Ms Callus reported she weighed 130 kg and explained she had put on more weight after injury due to pain and reduction in physical activities. In an email dated 11 August 2020[9] the author of the report accepted Ms Callus was not weighed during assessment.

Dr Nabavi

20. In a letter dated 18 March 2019[10] Dr Nabavi reported that he was "quite happy" with the recovery of Ms Callus' left shoulder following surgical treatment but noted Ms Callus had developed significant pain and discomfort in her right knee, which worsened with physical activity. Dr Nabavi recommended total right knee replacement. He reported Ms Callus' belief her right knee injury was consequential to the injury she sustained on 24 October 2017.

[6] Reply page 1.
[7] Reply page 12.
[8] Reply page 18.
[9] Reply page 204.
[10] ARD page 26.

21. In response to specific questioning, in a short report dated 21 June 2019 [11] Dr Nabavi provided opinion Ms Callus' right knee became symptomatic while recovering from her shoulder surgery "as a result of inactivity and weight gain following work injury".

22. In a subsequent report dated 25 November 2019 addressed to Ms Callus' solicitors[12], Dr Nabavi confirmed his previously expressed opinion:

> "During the recovery phase of her left shoulder and the thigh nerve injury, she noticed increasing pain in the right knee. This corresponded to a period where she put on a significant amount of weight; between 30 and 40kg. This was due to forced inactivity as a combination of the shoulder surgery and the recovery from the shoulder surgery.
>
> I believe that in the absence of any other aggravating factor at the time, the weight gain would have been a trigger for the onset of pain in the right knee".

23. Dr Nabavi considered the weight loss surgery would be of benefit to the injury Ms Callus sustained on 24 October 2017.

Dr Lieu

24. In a letter dated 1 May 2019[13] Dr Lieu, to who Ms Callus was referred with her right knee problem, noted Ms Callus presented with pain and numbness in her right leg for the past two years following surgical treatment, which was treated as meralgia paraesthetica. He noted Ms Callus' poor response to corticosteroid injections, with pain persisting and "now localised more around her knee". He considered Ms Callus suffered significant arthritis and while he said she would eventually benefit from right total knee replacement, Dr Lieu described Ms Callus as morbidly obese, which increased risk.

25. Dr Lieu noted Ms Callus had put on further weight following surgical treatment and in essence provided opinion that the best outcome for Ms Callus, whether or not she ultimately came to knee replacement, was weight loss. He made specific reference to weight loss by Ms Callus possibly alleviating the need for any total knee replacement and possibly having a positive effect on her meralgia paraesthetica.

Dr Durmush

26. In his letter dated 3 June 2019[14], Dr Durmush accepted Ms Callus had "struggled with her weight for many years" and was an emotional eater "particularly since her accident in 2017". Dr Durmush reported Ms Callus had consequently gained 50 kg, which stopped her exercising. Although she had tried to lose weight in the past, she had not been successful with any permanent weight loss. She had a number of health issues, including weight bearing joint pain. As at the date of consultation, Ms Callus weighed 140 kg and Dr Durmush discussed weight loss surgery with her.

[11] ARD page 27.
[12] ARD page 28.
[13] ARD page 32.
[14] ARD page 33.

Dr Sethi

27. Dr Sethi provided an independent medical examiner's report dated 1 August 2019[15] in which he noted Ms Callus' mobility had reportedly been restricted following surgical treatment and the development of meralgia paresthetica, with Ms Callus having gained significant weight. Dr Sethi understood Ms Callus to have been obese for most of her life with her weight reported to have been steady at around 100 kg for several years. As at 30 July 2019 Ms Callus' weight was recorded at 136 kg. While at total knee replacement had been recommended for Ms Callus, further surgical opinion cautioned of high risk because of her obesity. Dr Sethi reported Ms Callus' "food intake has significantly increased and she admits to binge eating". He noted her review by Dr Durmush and the recommended weight loss surgery.

28. Dr Sethi recorded Ms Callus had gained 36 kg since the incident occurring on 24 October 2017 but provided opinion her reduced physical activity "would have only played a relatively small role in causing her weight gain". He said her significant weight gain "resulted mainly from overeating rather than reduced physical activity" and the incident occurring on 24 October 2017 and resulting surgery played almost no role in the weight gain.

29. While Dr Sethi accepted the weight loss surgery will likely lead to sustained weight loss by Ms Callus, he did not accept the need for weight loss surgery was related to her right thigh pain and said Ms Callus would have been a good candidate for weight loss surgery before the incident occurring on 24 October 2017. He provided opinion the weight loss surgery was entirely unrelated to the injury sustained by Ms Callus to her left shoulder in the incident occurring on 24 October 2017.

Dr Machart

30. Dr Machart provided an independent medical report dated 28 October 2020[16] and a supplementary report dated 11 November 2020[17] following his assessment of Ms Callus on 15 October 2020. He noted a history of Ms Callus experiencing numbness on the outer aspect of her right thigh "straight after" surgical treatment that was accompanied by pain within two weeks, soon after which she developed a locking sensation and pain in her right knee. Ms Callus was referred for nerve conduction study, consulted Dr Nabavi and sought second opinion. While a total right knee replacement was recommended, being proposed treatment with which Dr Machart agreed, weight loss surgery first was recommended.

31. Dr Machart noted Ms Callus reported no symptoms in her right leg or right knee prior to the incident occurring on 24 October 2017 and reported the symptoms in her right leg developed after surgical treatment. Ms Callus was reported as having told Dr Machart she had put on weight since she started to experience pain in her right leg, apparently having had earlier weighed 115 kg but currently weighed 134 kg.

32. Following clinical examination, review of diagnostic imaging and medical information made available to him, which included the report from Dr Nabavi dated 21 June 2019 in which Dr Nabavi reported "the knee became symptomatic while recovering from shoulder surgery, as a result of inactivity and weight gain following work injury", Dr Machart grappled with the reported timeline and formed the view there was no reason why Ms Callus' mobility should have been impaired as a result of the injury she sustained to her left shoulder in the incident occurring on 24 October 2017.

[15] Reply page 5.
[16] AALD – R2 – page 1.
[17] AALD – R1 page 1.

33. While Dr Machart acknowledged Ms Callus' right leg was problematic and he accepted Ms Callus in all probability had suffered meralgia paraesthetica as a result of surgery, which "is an unpleasant condition", he did not accept the meralgia paraesthetica had an impact on her walking capacity and could not "be blamed for lack of mobility".

34. Although Dr Machart provided opinion Ms Callus suffered a constitutional arthritic condition in her right knee that became symptomatic following surgery, he said this condition bore no relationship to the incident occurring on 24 October 2017 or subsequent surgery. He accepted however that this arthritic condition caused diminished capacity for walking and said "this may have been more apparent with weight gain". While Dr Machart said there was nothing about the surgery that could have caused or aggravated this arthritic condition, he accepted it "was expected to be symptomatic, particularly given morbid obesity".

35. Dr Machart acknowledged Ms Callus' morbid obesity, which had been present before the incident occurring on 24 October 2017 but said he could not understand how the injury Ms Callus sustained on that occasion contributed to her morbid obesity.

Respondent's submissions

36. Mr Stockley said that although the injury Ms Callus sustained to her left shoulder in the incident occurring on 24 October 2017 was not disputed and Dr Machart was of the opinion the meralgia paraesthetica had a causal connection to the surgery, the consequential condition of morbid obesity due to Ms Callus' reduced physical capabilities following injury was in issue as was any aggravation of her right knee condition.

37. Dealing with the proposition that the condition of morbid obesity resulted from the injury Ms Callus sustained to her left shoulder on 24 October 2017, he said this was probably incorrect in that Ms Callus had met the criteria for morbid obesity for at least 20 years. The proposition that Ms Callus wished to advance then is that her pre-existing morbid obesity had been made worse by the injury she sustained to her left shoulder on 24 October 2017 and as a consequence she now required weight loss surgery.

38. What change had there been in the condition of morbid obesity? The clinical records demonstrated a history of earlier diagnosis of morbid obesity and also an earlier right knee problem. Ms Callus in her statement said that when she consulted with Dr Nabavi about her left shoulder injury, she weighed 115 kg but had recently intentionally lost 16.5 kg, which suggested that prior to that time she must have weighed 125 - 130 kg. Relevant to her claim before the Commission there was not a great deal of data about Ms Callus' weight. Dr Durmush's recorded weight and Dr Seth's recorded weight were more or less consistent and reflected a high point in Ms Callus' weight in more recent times. One must treat with care the history Ms Callus provided to Dr Durmush of a weight gain of 50 kg as this was inconsistent with the recorded weights.

39. Dr Sethi who was qualified as an independent medical expert for the respondent reported Ms Callus said that pre-accident she weighed 100 kg for several years (but in reality her recorded weight is closer to 115 kg) and post-accident she now weighed 135 kg. Although any assumption Dr Sethi made about Ms Callus' reported weight gain may not be supported by the evidence and may well be overestimated, this didn't affect the opinion provided that Ms Callus' weight gain, significant or otherwise, mainly resulted from overeating rather than lack of activity. Although in her statement Ms Callus' accepted she will overeat as a coping mechanism, this was in response to Dr Sethi's expressed opinion and there was no reference in the medical evidence before the Commission that Ms Callus was emotionally overeating.

40. Dr Sethi accepted the weight loss surgery will likely lead to weight loss but said Ms Callus had been a good candidate for weight loss surgery prior to the incident occurring on 24 October 2017, because her pre-existing BMI was 40. In this matter Mr Stockley said, we have an injured worker who was in need of weight loss surgery prior to injury and who remained so.

41. There was no evidence to support Ms Callus' weight gain resulted from the injury she sustained to her left shoulder on 24 October 2017. There was an assumption by Dr Nabavi and others that reported inactivity by Ms Callus resulted in weight gain. While there is an entitlement to pay attention to this, with Dr Sethi being a gastroenterologist and hepatologist, he was in a better position to express opinion than Dr Nabavi and others.

42. As to any nexus between the onset of pain Ms Callus suffered to her right knee and the surgery, the answer was in the opinion of Dr Machart. Dr Machart recorded a history of an awareness of numbness of the right thigh after the surgery that was accompanied sometime later by a locking sensation and pain in the right knee. Dr Machart concluded that the onset of symptoms within such a short timeframe after surgery negated the proposition that the onset of knee symptoms was in any way related to the weight gain following surgery. It was not a medical theory that held water.

43. The position adopted by the respondent was that the allegation of consequential injury in the nature of morbid obesity was misconceived because Ms Callus had for a long time suffered from morbid obesity. Careful examination of the evidence did not support the slightly extravagant proposition of a 50 kg weight gain following surgery. The failure of Ms Callus to put before the Commission objective evidence of weight gain at various junctions throughout the chronology was an evidentiary problem for Ms Callus and not the respondent. Although Dr Sethi expressed opinion Ms Callus' weight gain was a result of overeating and one might hypothesise that a person who sustained a work injury and came outside their normal work patterns might succumb to psychological decomposition and illness, this was not the case presented here. Although Dr Ly noted on 15 June 2018 that Ms Callus was getting depressed due to her reduced ability to walk and do regular activities and is referred for counselling, there was no reference to weight gain or overeating, and there was no psychological report before the Commission despite the suggestion of one noted by Dr Ly on 10 August 2018.

44. In reply to Ms Callus' submissions referred below Mr Stockley did not believe Dr Nabavi was in any different position to Dr Machart to provide opinion. While he confirmed too Dr Sethi's opinion Ms Callus was a candidate for weight loss surgery and would benefit from the weight loss surgery, he again noted Dr Seth's opinion she had been a candidate for the weight loss surgery prior to sustaining injury to her left shoulder on 24 October 2017 and remained to be one.

45. Mr Stockley cautioned that *Grima v Bursons Automotive Pty Ltd* [18] required consideration with care as in that matter the injured worker's low back injury was an accepted primary injury and the gastric banding surgery was required to alleviate his low back pain. It was timely however to consider the principles enunciated in *Moon v Conmah Pty Limited*[19] and reference made in particular to comment by Kirby J in *Kooragang Cement Pty Ltd v Bates*[20] regarding the common sense evaluation of the causal chain. Mr Stockley said whether Ms Callus' need for weight loss surgery resulted from the injury she sustained to her left shoulder on 24 October 2017 was a question of fact to be determined on the evidence before the Commission, including expert opinion, and the only expert opinion in this matter on this issue was Dr Sethi who had provided opinion she needed the surgery and had done so prior to the incident occurring on 24 October 2017.

[18] Reply – 36, [2019] NSWWCC 418 (*Grima*).
[19] [2009] NSWWCCPD134 (*Moon*).
[20] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*).

Ms Callus' submissions

46. Mr Halligan pointed out a number of documents speak of Ms Callus' recorded weight over time and made specific reference to her weight recorded by Dr Durmush, who he said as an obesity specialist had experience and training in the area of weight control. He also made reference to Dr Nabavi's observation regarding Ms Callus' weight gain and her own comments. There was no doubt there had been an increase in Ms Callus' weight since the incident occurring on 24 October 2017 and the respondent is unable to shy away from that fact.

47. Dr Nabavi who was the surgeon under whose care Ms Callus came to surgery noted an increase in pain in Ms Callus' right knee during the surgery recovery phase due to reduced mobility and forced inactivity. Dr Nabavi had the opportunity to review Ms Callus over time and was in the best possible position to evaluate her shoulder and knee problems, viz a viz her weight. Dr Machart had the opportunity to review Ms Callus once relevant to the question of causation of her right knee symptoms, and concluded the surgery bore no relationship to her right knee symptoms, without a full story of the surgery. Dr Machart's opinion cannot be preferred over that of Dr Nabavi who has expressed his opinion in simple and straight forward terms.

48. Ms Callus is an obese woman whose weight had fluctuated from time to time and increased since the incident occurring on 24 October 2017 and consequent surgery. Despite her obesity, prior to the incident occurring on 24 October 2017 she worked okay. Her weight had now increased in response to right knee pain and decreased activity and total right knee replacement was recommended. Dr Machart accepted the arthritic condition of Ms Callus' right knee was sufficiently severe so as to consider total knee replacement. Although Dr Lieu also considered Ms Callus would benefit from total right knee replacement, he considered a number of comorbid factors increased the risk of successful outcome, including her morbid obesity. Dr Lieu recommended a focus on weight reduction, with the best chance for Ms Callus' right knee being significant weight loss, both in relation to possible reduction in pain and successful outcome should she come to right knee replacement. Dr Sethi noted Ms Callus had been advised to undergo total right knee replacement, with second opinion as to the unacceptable risk given her morbid obesity, and although he accepted the weight loss surgery was reasonably necessary he did not accept the weight loss surgery was reasonably necessary treatment for a work injury.

49. Dr Durmush discussed the weight loss surgery in detail.

50. Mr Halligan referred to the Arbitral decision of *Grima*, which was a decision in which gastric banding surgery was considered appropriate for obesity. In the matter of *Grima* the Arbitrator considered *Moon* and Mr Halligan submitted that all Ms Callus is required to do in her matter was to establish that the left shoulder surgery has had the effect of causing symptomology in her right leg that has affected the pre-existing right knee condition, which in turn required knee replacement. In the matter of *Grima*, the Arbitrator identified two reasons the gastric banding surgery was recommended by the treating doctor; the surgery would be "very helpful for his condition" and the surgery might mean the injured worker could avoid lower back surgery. Similar scenarios apply in Ms Callus' matter.

Determination

Is the proposed treatment in the nature of sleeve gastrectomy and loop bipartition gastric bypass reasonably necessary as a result of injury sustained by Ms Callus to her left shoulder on 24 October 2017 during the course of her employment with the respondent?

51. Section 60 of the 1987 Act provides:

> "60 (1) If, as a result of an injury received by a worker, it is reasonably necessary that:
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> (a) any medical or related treatment (other than domestic assistance) be given, or
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> (b) any hospital treatment be given, or
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> (c) any ambulance service be provided, or
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> (d) any workplace rehabilitation service be provided,
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> the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)".

52. What constitutes reasonably necessary treatment was considered in the context of what is now s 60 of the *Workers Compensation Act 1926* in *Rose v Health Commission (NSW)*[21]. Burke CCJ said:

> "Treatment, in the medical or therapeutic context, relates to the management of disease, illness or injury by the provision of medication, surgery or other medical service designed to arrest or abate the progress of the condition or to alleviate, cure or remedy the condition. It is the provision of such services for the purpose of limiting the deleterious effects of a condition and restoring health. If the particular 'treatment' cannot, in reason, be found to have that purpose or be competent to achieve that purpose, then it is certainly not reasonable treatment of the condition and is really not treatment at all. In that sense, an employer can only be liable for the cost of reasonable treatment."

53. His Honour added:

> "1. Prima facie, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.
>
> 2. However, although falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the parties seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.
>
> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.

[21] (1986) 2 NSWCCR 32 (*Rose*).

4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.

   In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."

54. In *Diab v NRMA Ltd* [22], Deputy President Roche cited *Rose* with approval and provided a summary of the principles as follows:

> "In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose*, namely:
>
> (a) the appropriateness of the particular treatment;
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> (b) the availability of alternative treatment, and its potential effectiveness;
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> (c) the cost of the treatment;
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> (d) the actual or potential effectiveness of the treatment, and
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> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
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> With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts".

55. Whether the need for reasonably necessary treatment arises from an injury is a question of causation and must be determined based on the facts in each case as discussed in *Kooragang* and in this matter Ms Callus must establish that the injury she sustained to her left shoulder in the incident occurring on 24 October 2017 materially contributed to the need for the proposed weight loss surgery. This was confirmed by former Deputy Roche in *Murphy v Allity Management Services Pty Ltd* [23] where he stated:

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA at [25] – [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.

[22] [2014] NSWWCCPD 72 *(Diab).*
[23] [2015] NSWWCCPD 49.

> Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' of the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40] – [55]). That is, she has to establish that the injury materially contributed to the need for surgery (see discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716."

56. There is no dispute Ms Callus has had longstanding issues with her weight and suffered morbid obesity prior to the incident occurring on 24 October 2017. In her statement Ms Callus accepted that prior to the incident occurring on 24 October 2017 she "was by no means skinny" but relevantly said prior to the incident occurring on 24 October 2017 she had been provided with no medical opinion she would benefit from weight loss surgery.

57. Ms Callus said that when she consulted with Dr Nabavi in or about December 2017 she weighed 115 kg and she said that after surgery in March 2018 her weight "dramatically increased" as she was unable to walk properly. This is consistent with the medical evidence canvassed. Clinical records provided by Fairfield District Medical Centre demonstrated that although in January 1998 Ms Callus' weight had reduced to 88 kg as a result of diet, by March 2011 it had increased to 118 kg. Ms Callus' weight was recorded by the medical centre over time and the recorded weights are roughly in keeping with those recorded by Dr Thomson and Dr Conrad at assessment. Although clinical records provided by Infinity Medical Centre fail to note any recorded weight for Ms Callus, on 15 June 2018 (being a date relatively close in time to the surgery in March 2018) Ms Callus' reduced ability to walk and do regular activities is noted. When Ms Callus subsequently consulted with Dr Durmush on 3 June 2019 her weight is recorded at 140 kg. When she was assessed by Dr Sethi on 30 July 2019 her weight is recorded at 136 kg and when she was assessed by Dr Machart on 15 October 2020 her weight is reported to be 134 kg.

58. Ms Callus said that prior to the incident occurring on 24 October 2017 she had lost 16.5 kg. She also said that when she consulted with Dr Nabavi a couple of months later she weighed 115 kg. While this suggests that at some point prior to the incident occurring on 24 October 2017 Ms Callus weighed rather more than 115 kg, it is evident that after the surgical treatment her weight again increased to more than 115 kg. There may be some debate about exactly how much Ms Callus' weight had increased since the incident occurring on 24 October 2017 and consequent surgery, but it cannot be argued such weight gain is of no significance. When Ms Callus consulted with Dr Nabavi she weighed 115 kg and when she consulted with Dr Durmush she weighed 140 kg, being a weight gain of 25 kg.

59. Dr Nabavi accepted Ms Callus' right knee became symptomatic while recovering from surgery and provided opinion that in the absence of any aggravating factor at the time, her inactivity and weight gain following surgery "would have been a trigger for the onset of pain in the right knee". Dr Machart also accepted Ms Callus' right knee became symptomatic while recovering from surgery and said it "was expected to be symptomatic, particularly given morbid obesity". Dr Machart accepted too that the arthritic condition Ms Callus suffered in her right knee diminished her ability to walk and said "this may have been more apparent with weight gain".

60. Dr Machart said however that the arthritic condition in Ms Callus' right knee bears no relationship to her left shoulder injury or subsequent surgery, making specific reference to the fact that her left shoulder injury and the meralgia paresthetica would not account for decreased mobility with increased weight gain and the onset of right knee symptoms. He also made specific reference to the very short time frame relevant to the surgery with increased weight gain resulting in the onset of right knee symptoms.

61. Ms Callus said however that the meralgia paresthetica did affect her capacity to walk, so much so that she had started to use a walking stick. Although Ms Callus said that prior to the incident she had had no trouble with her right knee I am mindful the clinical records of Fairfield District Medical Centre demonstrated early medical advice provided to Ms Callus regarding weight loss and right leg/knee symptoms and Dr Durmush noted Ms Callus suffered a number of health issues, including weight bearing joint pain.

62. Although Dr Machart concluded the onset of right knee symptoms within such a short timeframe after surgery negated the proposition the onset of right knee symptoms in any way related to the weight gain following surgery and I accept I do not know Ms Callus' recorded weight at the time she came to surgery on 7 March 2018, I understand meralgia paraesthetica symptoms to include pain that might intensify with walking and I am satisfied Ms Callus' capacity to walk following surgery was initially affected by the meralgia paresthetica with weight gain. I am also satisfied her capacity to walk was further affected by her arthritic right knee becoming symptomatic by this weight gain, which resulted in further weight gain, which in turn ultimately prompted Dr Durmush to recommend weight loss surgery prior to total knee replacement. I prefer the opinion provided by Dr Nabavi over that provided by Dr Machart as it is under Dr Nabavi's care Ms Callus has come for treatment of her left shoulder and symptomatic right knee, and accept submission that as her treating orthopaedic surgeon he is better placed than Dr Machart to provide opinion regarding the reasoning behind the onset of Ms Callus' right knee symptoms.

63. While it may be true Ms Callus was a suitable candidate for weight loss surgery prior to the incident occurring on 24 October 2017 as Dr Sethi points out, it was not until she consulted with Dr Durmush after the incident and with a significant increase in weight following surgery, that weight loss surgery was ever recommended to her. While Ms Callus' admits to "binge eating" I do not accept that her significant weight gain resulted from purely overeating rather than loss of mobility as suggested by Dr Sethi. In any event, Ms Callus said that her "binge eating" was a way of coping with the change in her life that has been brought about by the incident occurring on 24 October 2017 and Dr Durmush accepted Ms Callus was an emotional eater, particularly so since the incident.

64. I am satisfied the injury Ms Callus sustained to her left shoulder during the course of her employment with the respondent and subsequent surgery has materially contributed to her need for weight loss surgery, and I must now consider whether the weight loss surgery is reasonably necessary as a result of that injury.

65. Ms Callus' right knee became symptomatic following surgery for injury sustained to her left shoulder in the incident occurring on 24 October 2017 and while Dr Nabavi, Dr Lieu and Dr Machart are of the view Ms Callus would benefit from total right knee replacement, Dr Lieu cautioned her morbid obesity carried increased risk. Dr Lieu provided opinion the best outcome for Ms Callus (whether or not she ultimately came to knee replacement) was weight loss and suggested too that weight loss may have a positive effect on her meralgia paraesthetica. Dr Durmush relevantly noted Ms Callus suffered weight bearing joint pain and clearly considered Ms Callus would benefit from weight loss surgery. Although Dr Sethi expressed opinion the proposed weight loss surgery is entirely unrelated to the incident occurring on 24 October 2017, being opinion with which I do not agree for reasons discussed, he accepted the weight loss surgery will likely lead to sustained weight loss with associated benefit for Ms Callus.

66. I am satisfied the weight loss surgery proposed by Dr Durmush, namely sleeve gastrectomy and loop bipartition gastric bypass, is reasonably necessary treatment as a result of the injury Ms Callus sustained to her left shoulder during the course of her employment with the respondent on 24 October 2017 and subsequent surgery.

SUMMARY

67. Ms Callus sustained injury to her left shoulder in an incident occurring on 24 October 2017 for which she came to surgical treatment on 7 March 2018 and developed meralgia paraesthetica as a consequential condition. During recovery from this surgery the pre-existing arthritic condition in Ms Callus' right knee became symptomatic due to a weight increase that resulted from reduced mobility during recovery.

68. While medical opinion had been provided that Ms Callus would benefit from a total right knee replacement, her morbid obesity condition carries risk and medical opinion has been provided that Ms Callus would benefit from weight loss prior to such surgery.

69. Weight loss surgery in the nature of sleeve gastrectomy and loop bipartition gastric bypass is recommended and this treatment is reasonably necessary treatment as a result of the injury Ms Callus sustained to her left shoulder in the incident occurring on 24 October 2017 and subsequent surgery.