WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**4158/19**
Applicant:	**Mark Aliprad**
Respondent:	**Abbey Manufacturing Group Pty Ltd**
Date of Determination:	**22 October 2019**
Citation:	**[2019] NSWWCC 342**

The Commission determines:

1. The applicant sustained injury to his right heel and developed a consequential condition in his lower back arising out of or in the course of his employment with the respondent on 28 February 2018.

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

3. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses.

4. The proposed bariatric surgery, in the form of a sleeve gastrectomy, and associated expenses, 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 28 February 2018.

The Commission orders:

5. The respondent to pay the applicant's reasonably necessary medical expenses with respect to the proposed bariatric surgery, in the form of a sleeve gastrectomy, and associated expenses, pursuant to section 60 of the *Workers Compensation Act 1987*.

6. No order as to costs.

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

Glenn Capel
Senior Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mark Aliprad (the applicant) is 52 years old and was employed by Abbey Manufacturing Group Pty Ltd (the respondent) as a guillotine operator in November 2017. His services were terminated in early 2018. Since his termination, he has secured suitable employment and he is currently working for 30 hours per week.

2. There is no dispute that the applicant injured his right heel and developed a consequential condition in his lower back on 28 February 2018. Liability was accepted by Employers Mutual Ltd (the insurer) and weekly compensation and medical expenses have been paid to date.

3. On 4 February 2019, the applicant's served a notice of claim on the insurer in respect of weekly compensation and on 17 April 2019, a claim was made for weekly compensation and medical expenses, which included a claim for proposed bariatric surgery.

4. On 4 September 2019, the insurer issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that it was liable for the payment of medical expenses on the basis that the proposed bariatric surgery was not reasonably necessary as a result of the applicant's injury on 28 February 2018. It cited s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

5. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 15 August 2019, and amended during the conciliation conference, the applicant claims medical expenses for proposed medical treatment pursuant to s 60 of the 1987 Act due to injury sustained on 28 February 2018.

ISSUES FOR DETERMINATION

6. The parties agree that the following issue remains in dispute:

   (a) whether the proposed bariatric surgery, in the form of a sleeve gastrectomy is reasonably necessary as a result of the injury sustained on 28 February 2018 – s 60 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

7. 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.

EVIDENCE

Documentary evidence

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

   (a) The Application and attached documents;
   (b) Reply and attached documents;
   (c) Application to Admit Late Documents received on 16 September 2019, and
   (d) Application to Admit Late Documents received on 20 September 2019.

Oral evidence

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

REVIEW OF EVIDENCE

Applicant's statements

10. The applicant provided a statement on 25 February 2019. He described the circumstances of his right heel injury and the development of his consequential back condition. By September 2018, the heel wound had finally healed but he still had difficulty wearing shoes. He was forced to cease work around that time due to severe low back pain.

11. The applicant stated that he was referred to Dr Singh on 27 November 2018. The doctor recommended that he continue to have physiotherapy, exercise and lose weight. The doctor suggested that he consider having bariatric surgery to assist him weight loss which in turn would improve his low back pain.

12. The applicant stated that he sought a second opinion from his general practitioner, Dr Hamd, who agreed that he needed to lose weight. A similar opinion was provided Dr Lai.

13. The applicant stated that he had constant low back pain and an altered gait and stiffness and a restricted range of movement in his right ankle. He could only walk for about six minutes before he needed to rest due to his back pain. Stranding for more than 20 minutes and sitting for more than 30 minutes aggravated his back pain. Prolonged walking and walking up hills and stairs caused back pain. The applicant stated that he had not worked since 7 September 2018 but he had been certified fit for suitable duties for four hours per day/ three days per week.

14. The applicant stated that his injury had caused him to put on 13 kg. He had been unable to exercise because he had difficulty wearing shoes and because of his back pain. He had been intensely physical prior to his injury. He hoped that the surgery will relieve his back pain and allow him to return to work.

15. The applicant stated that the only other option was dieting and exercise, but this was a slow process and it would take years to achieve the same result as the surgery. If he had the time, physical ability and finances, he would attend a gymnasium every day, because he was motivated to lose weight and improve his low back pain. He had lost some weight through exercise and he had felt some minor relief of his low back pain. He expected that following surgery, he would be able to engage in more vigorous exercise.

Clinical notes, reports and certificates of the Woodcroft Medical Practice

16. The clinical notes of the Woodcroft Medical Practice commence on 19 July 2006 and conclude on 4 September 2019.

17. On 24 March 2010, Dr Amin recorded that the applicant weighed 134 kg and had a Body Mass Index (BMI) of 42.3. On that date, the applicant was diagnosed with diabetes. On 24 September 2010, the applicant weighed 129 kg. On 29 March 2012, he weighed 125 kg and complained about low back pain.

18. On 31 October 2012, the applicant weighed 119.6 kg and had a BMI of 37.7. At the consultation on 7 December 2013, Dr Amin counselled the applicant with respect to weight loss. Over the next two years, the applicant's weight slightly increased. On 9 February 2015, he weighed 129 kg.

19. On 25 March 2015, a dietician, Freya Grove, recorded that the applicant had put on 6 kg in one year due to eating lots of carbohydrates and not participating in enough high intensity exercise. He had resumed eating junk food and the like since his wedding and he was doing no exercise. He ceased playing cricket four years earlier due to his bad knees. The dietician recorded details of the applicant's food intake and devised a diet for him to follow. At that stage, he weighed 128.7 kg and he complained of a sore back caused by his work duties.

20. The applicant saw the dietician again on 22 April 2015. Ms Grove recorded that the applicant had cut out carbohydrates and junk food and was eating more fish and vegetables. He was advised to swim or walk in water as a backup exercise plan. He weighed 126.6 kg.

21. On 1 August 2015, the applicant weighed 122 kg and had a BMI of 38.5. At the consultation on 5 January 2016, it was noted that the applicant had an ulcer on his left leg that had become infected. He was treated for this condition for a month.

22. Dr Amin did not weigh the applicant again until 3 June 2016, when he weighed 133 kg with a BMI of 42. The next record of the applicant's weight was on 20 May 2017, when he weighed 128 kg.

23. On 7 March 2018, shortly after the applicant's right heel injury, the applicant weighed 120 kg and he had a BMI of 37.9. Over the course of the next few consultations, Dr Amin recorded details of the applicant's heel injury and treatment. He noted that the wound had become infected and was taking time to heal. Dr Hamd took over as the applicant's treating doctor and he continued to dress the applicant's wound from March to May 2018.

24. On 27 June 2018, Dr Hamd recorded that the applicant weighed 131 kg with a BMI of 41.3. He counselled the applicant about weight loss. There are no further entries with details of the applicant's weight.

25. On 20 August 2018, Dr Hamd recorded that the applicant had engaged in a trial of his pre-injury duties and he had tried to wear shoes for four hours. He noted that this was "mostly tolerated". The balance on the entries in 2018 relate to the applicant's back. On 6 December 2018, the doctor referred the applicant to Dr Brancatisano.

26. On 8 February 2019, Dr Hand recoded that the applicant's ankle wound had become infected. On 14 February 2019, he noted that the applicant needed to modify his lifestyle. It seems that the applicant's work hours were upgraded to 20 hours per week on 28 February 2019 with a view to commencing a work trial in April 2019.

27. On 5 March 2019, the doctor noted that the applicant had left plantar fasciitis, but this settled within three weeks. It seems that the applicant had issues with an ulcer on his right shin and this was rubbing on gym equipment. The applicant's hours were again upgraded on 16 May 2019.

28. On 26 July 2019, Dr Hamd reported that the applicant was progressing well and was continuing to perform his current duties.

29. Dr Hamd provided a brief report on 3 December 2018.He advised that the applicant had back and ankle pain as a result of his work injury and this had resulted in a reduced level of physical activity and a resultant weight increase of 10 kg. He stated that the applicant needed to lose weight to alleviate his symptoms. The doctor referred the applicant to Dr Brancatisano.

30. Dr Hamd certified that the applicant had the capacity to perform some restricted work for 12 hours per week from 31 January 2019 to 28 February 2019. He increased the applicant's hours to 20 hours per week from 28 February 2019 to 14 May 2019 and to 30 hours per week from 15 May 2019 to 12 September 2019. The only restriction was that he should work within his pain tolerance.

Reports of Dr Singh and Dr Kam

31. Dr Singh reported on 20 November 2018 and 27 November 2018. He recorded that the applicant had been troubled by low back pain for the past seven months and he weighed 133 kg. The doctor organised a bone scan that confirmed the presence of degenerative changes and scoliosis.

32. Dr Singh advised that the applicant's work over the years had led to his present condition and had been aggravated by his heel injury. He recommended that the applicant do some exercise to improve his back muscles and that he consider having bariatric surgery to lose some weight, because this was likely to improve his back pain. The doctor did not comment on the causal nexus between the need for surgery and his work injury.

33. Dr Kam provided a report on 12 October 2018. He recorded that the applicant had developed low back pain and could only walk for 300 meters. An MRI scan showed significant degenerative changes in the applicant's thoracolumbar spine with osteophytes at L3/4 and L4/5 with potential impact on the L3 nerve. The doctor doubted that there was any radiculopathy and made no recommendations as to treatment.

Reports of Dr Brancatisano

34. Dr Brancatisano reported on 9 April 2019. He noted that the applicant had tried supervised diets and drug treatment with limited success and weight gain. He noted that the applicant weighed 132.3 kg and had a BMI of 42.71.

35. Dr Brancatisano confirmed that he discussed the options with the applicant and he believed that the applicant was a suitable candidate. The applicant would have to undergo an ultrasound, ECG, and blood tests and have a pre-operative protein diet to facilitate the surgery. He would then be assessed at the pre-operative clinic, where a decision would be made as to the appropriate surgery.

36. At the same time, the doctor provided the applicant with an information sheet about the "Circle of Care" program that described the all-inclusive cost of the clinic treatment that included the services of the administrative team, a dietician, a psychologist, a physiotherapist, an obesity physician, the operating surgeon, the assistant operating surgeon and an anaesthetist. The document indicated that a schedule of the cost of the "Circle of Care" program was attached, but this schedule is not in evidence.

37. In the Consent Form dated 14 April 2019, the applicant agreed that he had been advised by Dr Brancatisano about the nature of obesity and surgery, and the benefits to be gained. It seems that a gastric sleeve procedure had been recommended. The applicant agreed that it was not possible to predict how much weight would be lost or the difficulties that he might encounter in adjusting his eating pattern and lifestyle.

38. In a letter dated 7 May 2019, Dr Brancatisano provided a quote for the services in the sum of $7,850 plus the hospital costs. No quote was obtained from the Norwest Private Hospital.

39. According to the "Circle of Care" website, the cost of the weight loss program is $7,500 plus $13,300 to $16,905 for hospital costs and a Medicare rebate of approximately $1,200.

Report of Dr Lai

40. Dr Lai reported on 22 January 2019. He recorded a consistent history and noted that the applicant had low back pain and right ankle stiffness. The doctor noted that applicant was 175 cm (3 cm shorter than recorded by Dr Amin), weighed 124 kg and had a BMI of 40, which meant that the applicant was morbidly obese.

41. Dr Lai diagnosed a laceration of the applicant's posterior ankle with scarring and stiffness, together with a consequential low back injury with radiculopathy. He stated that the applicant's weight had increased by 13 kg due to a lack of exercise and this had placed extra pressure of his lower back.

42. Dr Lai agreed that bariatric surgery was reasonably necessary as this would result in a significant weight loss which in turn would reduce the pressure on the applicant's back and it had the potential of relieving other symptoms that had resulted from his right ankle injury. The only alternative was dieting under the supervision of a dietician, but this was a slow process and may take up to two years to achieve the same result as would be gained by bariatric surgery.

43. Dr Lai estimated that the cost of the procedure would be in the order of $40,000 plus GST, but plastic surgery might also be required that could cost $50,000 to $80,000.

Reports of Exercise Therapy

44. The applicant was assessed by an exercise therapist, Mark Hills, on 21 January 2019. He reported that the applicant had a reduced lifting tolerance of 10 kg, and reduced walking tolerance limited to 300 metres, standing for 30 minutes, sitting for 30 minutes and driving ability for 45 minutes.

45. On 26 February 2019, Mr Hills reported that the applicant had symptoms in his back and right leg. Supervised exercise sessions had progressed and it was recommended that the applicant perform daily cardiovascular exercise to promote weight loss and improve his general fitness.

46. On 22 March 2019, Mr Hills reported that the applicant had a reduced lifting tolerance of 20 kg, and reduced walking tolerance for 10 minutes, standing for 45 minutes, sitting for 60 minutes and driving ability for 90 minutes.

47. Mr Hills reported that the applicant had low back and foot discomfort and he was being treated for left plantar fasciitis. He was not doing any recreational walking and could only walk for 10 minutes because of his left foot. It was noted that he was to commence a work trial for 20 hours per week in April 2019.

48. Mr Hills recommended a supervised gym program, a three-month gym membership, a reduction in calorie intake and daily cardiovascular exercise to lose weight and improve his ability to undertake household chores.

49. On 21 May 2019, Mr Hills reported that the applicant was coping with his current duties as a driver and he had minimal symptoms during supervised exercise. His walking tolerance was 15 to 20 minutes due to his low back symptoms. It was noted that Dr Hamd had agreed to upgrade the applicant's hours to 30 hours per week.

Reports of Central West Orthopaedic & Sports Physiotherapy

50. In a report dated 6 February 2018 [sic 2019], a physiotherapist, Jeffrey Yuen, advised that the applicant was progressing with his overall strength since commencing a gym-based exercise program, but he could walk for no longer than five minutes due to his back pain. The applicant was also involved in a home exercises.

51. On 20 February 2019, Mr Yuen advised that the applicant could only walk for 300 metres. Om 25 March 2019, Mr Yuen reported that the applicant had left plantar fasciitis, but he had remained diligent with his gym strengthening program. He had not planned to review the applicant.

Report of Dr Edwards

52. Dr Edwards reported on 30 July 2019. He did not examine the applicant but merely provided a report based on a file review.

53. Dr Edwards advised that the applicant suffered a right heel laceration that later may have become infected, but it seemed that he was no longer suffering any on-going symptoms. He was unable to determine the applicant's weight and BMI from the medical file.

54. Dr Edwards stated that there was no causal link between the applicant's injury and the proposed bariatric surgery and the surgery was not reasonably necessary, but he acknowledged that the procedure should result in a significant weight loss.

APPLICANT'S SUBMISSIONS

55. The applicant's counsel, Mr Morgan, submits that the issue to be determined was whether the surgery recommended by Dr Hamd, Dr Brancatisano and Dr Singh was reasonably necessary as a result of the applicant's work injury.

56. Mr Morgan submits that all the applicant needed to show was that the injury materially contributed to his morbid obesity and the need for bariatric surgery in accordance with the principles in *Murphy v Allity Management Services Pty Ltd*[1]. The authorities confirm that there can be other potential contributors and it was not necessary for the injury to be the sole reason. The common-sense evaluation of the causal chain in *Kooragang Cement Pty Ltd v Bates*[2] applied.

57. Mr Morgan submits that there was no dispute that the applicant weighted 120kg when he saw Dr Amin on 7 March 2018, but his weight increased to 131 kg by 27 June 2018. This weight increase was consistent with the observations of Dr Amin.

58. Mr Morgan submits that Dr Singh advised that the applicant should have physiotherapy, exercise and lose weight to improve his back pain. It was clear from the applicant's statement that he needs to lose weight in order to return to work, because he is unable to stay of his feet. He has difficulties wearing shoes and he is unable to walk due to his low back pain.

59. Mr Morgan submits that the applicant acknowledged that the alternatives were dieting and exercise, but this was a slow process and weight loss would assist his diabetes. He could not exercise because of his right foot and he has difficulty standing due to his back condition. He needed to lose weight and increase his activity. These factors satisfy the need for bariatric surgery.

60. Mr Morgan submits that according to the Central West Orthopaedic & Sports Physiotherapy report dated 9 August 2018, the applicant 's right ankle condition was aggravated by prolonged standing and walking. In the report dated 19 September 2018, it was recorded that the applicant had experienced back pain due to an altered gait that was aggravated after walking for 10 minutes. He was motivated and diligent with his home exercises and physiotherapy. These reports confirm that the applicant as unable to walk for more than 10 minutes due to his back pain.

61. Mr Morgan submits that in the physiotherapy report dated 6 February 2018 [sic 2019], it was noted that the applicant was having physiotherapy and gym based exercises and he was progressing with his strength. Similar progress was noted in the reports dated 6 February 2019 and 25 March 2019.

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[1] [2015] NSWWCCPD 49 (*Murphy*).

[2] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*).

62. Mr Morgan submits that in his report dated 27 November 2018, Dr Hamd advised that the first form of treatment was physiotherapy and exercises to improve the applicant's back muscles. He noted that the applicant had an increased BMI and he recommended bariatric surgery which would help the applicant lose weight and likely improve his back pain. In his report dated 3 December 2018, the doctor confirmed that the applicant's level of physical activity was greatly reduced and he had gained in excess of 10 kg. He required weight loss to alleviate his back pain.

63. Mr Morgan submits that Dr Brancatisano provided a report on 9 April 2019 regarding the bariatric surgery and the applicant consented to having the surgery.

64. Mr Morgan submits that the evidence shows that over a period of three months following the applicant's work injury, his weight increased and this had led to significant low back pain. The applicant lost weight in the past with diet and exercise, but he was unable to exercise. The applicant did not feel that diet alone would provide relief. The applicant had seen a dietician, but not in the last 18 months, and he has given reasons.

65. Mr Morgan submits that Dr Lai recorded a consistent history and he expressed the view that the applicant would lose significant weight, which would lessen the strain on his lower back and relieve other work-related symptoms as well as his diabetes. He stated that dieting under a dietician was an option, but this may take up to two years to achieve the same result that bariatric surgery.

66. Mr Morgan submits that Dr Edwards did not examine the applicant and he did not have access to all of the clinical material. He stated that the need for surgery did not result from the applicant's heel injury, but he did not look at the overall picture.

67. Mr Morgan submits that Drs Hamd, Kam, Singh and Brancatisano have not suggested any realistic alternative to bariatric surgery and the applicant has exhausted all options. Even Dr Edwards felt that surgery would assist with significant weight loss. The evidence was all one way and satisfied all the relevant tests.

68. In reply, Mr Morgan submits that the applicant indicated in his statement that he had already lost weight through exercise and he felt some minor improvement in his low back pain. Absent the surgery, weight loss was unlikely and his symptoms prevented him from engaging in vigorous exercise. All of the medical reports state that weight loss is critical and this will lead to some improvement. The applicant has always had a problem with his weight and now is unable to cope with his low back pain. Dr Lai provided a quote for the procedure, but the cost of alternative forms of treatment will overshadow the cost of surgery.

RESPONDENT'S SUBMISSIONS

69. The respondent's counsel, Mr Stockley, submits that the applicant needs to show that his heel injury materially contributed to the need for bariatric surgery. The respondent accepts that the applicant developed an altered gait and this resulted in consequential back symptoms. The proposed treatment is to alleviate pain, not to treat the work-related condition.

70. Mr Stockley submits that it would be helpful to know whether the applicant experienced any symptomatic relief when his weight was 124 kg in January 2019, but the applicant's evidence does not address this. The applicant's weight has fluctuated since 2010 and only once was it lower than 120 kg. One could conclude that there had been a weight increase since his injury, but it was less apparent when one examined how his weight had varied. Therefore, one could not accept that the applicant's weight gain had resulted from his injury.

71. Mr Stockley submits that the respondent acknowledged that weight loss was medically warranted to address a number of significant medical conditions. The clinical notes show that the applicant had episodes of low back pain in March 2012 and August 2013, and there was a history of reporting low back pain often associated with activity.

72. Mr Stockley submits that Dr Lai had no history of prior back symptoms and whilst he noted that the applicant was unable to play cricket, this was due to his problems with his knees. On 1 August 2015, the applicant weighed 122 kg and when he weighed 133 kg on 3 June 2016, he was troubled by an ulcer on his left leg. This was a major medical problem that contributed to his weight increase. There were few references to low back pain in the clinical notes and the applicant was also troubled by left plantar fasciitis in March 2019.Therefore there were other medical conditions contributing to the applicant's altered gait.

73. Mr Stockley submits that Dr Lai recorded the applicant's weight was 124 kg on 22 January 2019, and after a would infection, the applicant weighed 132.3 kg. This fluctuation could be explained by the effects of the infection and none of the doctors have addressed this proposition. This could be attributed to inactivity caused by the heel injury or the back pain.

74. Mr Stockley submits that according to Dr Singh, the applicant's work over the years had led to his back condition and the need for surgery. The doctor did not suggest that the increase in the applicant's weight was a consequence of his injury.

75. Mr Stockley submits that in his report dated 12 November 2018, Dr Hamd advised that the key issue was the applicant's pain, not paraesthesia and in his referral to Dr Singh, the doctor only mentioned the onset of back pain as a result of a compensatory gait. He did not refer to any weight gain.

76. Mr Stockley submits that there is no evidence that a loss of weight would cause any relief of the applicant's back symptoms. The applicant has lost weight in the past, but there was no evidence that this had resulted in a reduction of his back pain. When one considered the relevant tests prescribed in the authorities such as alternative forms of treatment and cost, the applicant has not made out a case.

77. Mr Stockley submits that Dr Lai has provided a costing of $40,000 to $80,000, but this is a broad-brush approach and not a cheap form of treatment when compared to the alternatives. It was surprising that a surgical procedure of this magnitude would be considered appropriate on a background of the applicant's history of health issues and the complications associated with the surgery. The time frame suggested by Dr Lai is not dissimilar to the 18 to 24 months to gain the benefits of bariatric surgery. The accepted injury did not materially contribute to the need for surgery, even though the applicant has low back pain. In any event, it was not reasonably necessary.

REASONS

Is the proposed treatment reasonably necessary as a result of the injury sustained during the course of the applicant's employment?

78. 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
> (b) any hospital treatment be given, or
> (c) any ambulance service be provided, or

(d) any workplace rehabilitation service be provided,

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)".

79. What constitutes reasonably necessary treatment was considered in the context of s 10 of the *Workers Compensation Act 1926* in *Rose v Health Commission (NSW)*[3], Burke CCJ stated:

> "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."[4]

80. Further, 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.
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> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
>
> 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.
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> 5. 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."[5]

81. His Honour considered the relevant factors relating to reasonably necessary treatment under s 60 of the 1987 Act in *Bartolo v Western Sydney Area Health Service*[6] and stated:

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[3] (1986) 2 NSWCCR 32 (*Rose*)
[4] *Rose*, [42].
[5] *Rose*, [47].
[6](1997) 14 NSWCCR 233 (*Bartolo*).

> "The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."[7]

82. In *Diab v NRMA Ltd*[8], Deputy President Roche questioned this approach and cited *Rose* with approval. He 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* (see [76] above), namely:
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> (a) the appropriateness of the particular treatment;
> (b) the availability of alternative treatment, and its potential effectiveness;
> (c) the cost of the treatment;
> (d) the actual or potential effectiveness of the treatment, and
> (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
>
> 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
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> 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.
>
> While the above matters are 'useful heads for consideration', the 'essential question remains whether the treatment was reasonably necessary' (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression 'no reasonable prospect' should be understood, '[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content'".[9]

83. 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. The accepted view regarding causation was set out in *Kooragang* where Kirby J stated:

> "The result of the cases is that each case where causation is in issue in a worker's compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from' is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation."[10]

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[7] *Bartolo*, [238].
[8] [2014] NSWWCCPD 72 (*Diab*).
[9] *Diab*, [88] to [90]
[10] *Kooragang* [463].

84. It is accepted that a condition can have multiple causes, but the applicant must establish that the injury materially contributed to the need for surgery. This was confirmed by Deputy President Roche in *Murphy*, 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 28 at [25] and [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.
>
> Ms Murphy only has to establish, applying the commonsense 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’ 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 the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716).”[11]

85. There is no dispute that the applicant has had longstanding issues with his weight and one can infer from the clinical notes that he has not maintained a healthy lifestyle. He developed high blood pressure in 2006 at the relatively young age of 39 years and he was diagnosed with diabetes in 2010, at a time when he weighed 134 kg.

86. In his statement, the applicant claimed that his injury had caused him to put on 13 kg. He had been unable to exercise because he had difficulty wearing shoes and because of his back pain. He acknowledged that the only other option was dieting and exercise, but this would take time. He conceded that he had lost some weight through exercise and this had provided some relief from his back pain. He stated that if he had the time, finances and physical ability, he would attend a gymnasium on a daily basis.

87. The clinical notes of Drs Amin and Hamd disclose that the applicant’s weight has varied over the years, but he has never weighed less than 119.6 kg. For most of the time his weight has hovered around 125 kg to 129 kg. His weight has exceeded a BMI of 40, consistent with morbid obesity.

88. The applicant’s evidence does not address any consultations with a dietician. He consulted a dietician in March 2015 when he weighed 128.7 kg. It was noted that his diet included carbohydrates and junk food, he was not participating in any strenuous exercise or for that matter any exercise, and he had put on 6 kg. Ms Grove devised a diet and when she weighed him in April 2015, he weighed 126.6 kg, so there were some positive results from the improved diet.

89. On August 2015, he weighed 122 kg, so there was a further loss of 4.6 kg. He had a left leg ulcer that troubled him in early 2016. On 3 June 2016, he weighed 133 kg, so it would seem that he may have been inactive or strayed from his healthy diet whilst he was recuperating from the leg ulcer.

90. The focus of this dispute concerns the impact that the applicant’s injury in February 2018 has had on his weight. There is some substance to the applicant’s claim that he has put on weight following his right heel injury as he weighed 120 kg in March 2018 and 131 kg on 27 June 2018, only three months later.

[11] *Murphy*, [57] to [58].

91. The reports from the exercise therapist in early 2019 confirm that the applicant was not engaged in any cardiovascular exercise and the gym programs focussed on building up the applicant's strength with a view to a return to work. Recommendations were made regarding daily cardiovascular exercise to lose weight and improve the applicant's ability to undertake household chores.

92. Dr Singh reported that the applicant weighed 133 kg in November 2018 and Dr Lai recorded a weight of 124 kg on 22 January 2019, which was only 4 kg more than his pre-injury weight. There is no explanation in the evidence for this dramatic reduction in the applicant's weight. In any event, on 9 April 2019, Dr Brancatisano reported that the applicant weighed 132.3 kg and had a BMI of 42.71. Therefore, the clinical notes support the applicant's evidence that he has put on weight since his injury and he claims that this is due to an inability to exercise.

93. The clinical notes confirm that the applicant was unable to wear shoes and he was troubled by back pain. Nevertheless, his work hours were upgraded to 20 hours per week for a work trial in April 2019 and they were upgraded to 30 hours per week, on 16 May 2019.

94. In late July 2019, Dr Hamd reported that the applicant was progressing well and was continuing to work. Therefore, since at least April 2019, the applicant has been far more active and since May 2019, he has been working for 30 hours per week as a driver.

95. Significantly, in May 2019, it was reported that the applicant had minimal symptoms during supervised exercise and his walking tolerance had increased to15 to 20 minutes. This was a marked improvement since January 2019.

96. The applicant's current weight is unknown and it is surprising that a further statement was not obtained regarding his current status, given that this was something that I raised at the telephone conference.

97. Dr Edwards is the only doctor to take issue with the procedure, but he did not examine the applicant. He did not have all of the information available to him and he merely stated that the need for surgery was unrelated to the applicant's right ankle injury. He gave no reasons for his opinion and made no comment regarding the need for the procedure arising from the accepted consequential back condition. Nevertheless, he agreed that such surgery should result in a significant weight loss. Given the issues that I have identified in the doctor's report, little weight can be given to his opinion.

98. According to *Murphy*, a condition can have many causes, and all that the applicant needs to show is that the injury materially contributed to the need for surgery. According to the Circle of Care website, anyone with a BMI over 40 is a candidate for surgery and those with a BMI of 35 to 40 with other health issues are also suitable candidates. Therefore, the applicant was a suitable candidate well before his injury.

99. The evidence shows that the applicant has suffered from a number of health issues over the years, such as the prior back pain in 2012 and 2013, his knee problems that forced him to stop playing cricket, the left leg ulcer and the recent left plantar fasciitis. Therefore, there is merit in Mr Stockley's submission that a number of these problems could have contributed to an altered gait and weight increase.

100. It is true that Dr Singh suggested that the applicant's back condition could be attributed to his work over the years, but there is no dispute regarding the onset of a consequential back condition as a result of the accepted heel injury.

101. According to the applicant's evidence and that of Drs Hamd and Lai, he has put on weight as a result of inactivity caused by his work injury. This evidence is unchallenged and is corroborated in the clinical notes.

102. Drs Hamd, Lai, Singh and Dr Brancatisano have recommended that the applicant have bariatric surgery to reduce weight in order to alleviate some of his back pain. It seems that the surgery is not required to alleviate the applicant's right ankle problems. Dr Edwards' opinion is of little assistance.

103. Therefore, in the absence of any persuasive evidence to the contrary, I am satisfied that the applicant's injury has materially contributed to the need for surgery. The next question to consider is whether the surgery is reasonably necessary as a result of the work injury.

104. There is no doubt that weight loss can help to alleviate the strain on the applicant's back. The medical evidence supports this contention. The applicant also indicated in his statement that he had experienced some minor relief of his back symptoms when he lost some weight.

105. Dr Brancatisano indicated that patients can lose between 50% to 70% of their excess body weight over a period of 18 to 24 months. According to the Circle of Care website, the ideal weight for the applicant is 80 kg, so the potential weight loss would equate to 26 kg to 36.4 kg. The timeframe for weight loss post-surgery is not dissimilar to the two-year estimation to achieve the equivalent weight loss through successful dieting and exercise. I am aware that the major weight loss following bariatric surgery occurs in the first six months and then plateaus, so there can be some major improvement in the short term.

106. Bariatric surgery is an accepted form of treatment to reduce weight and is known for its effectiveness. This is consistent with the principles discussed in *Rose* and *Diab.* The cost of the surgery seems to be in the order of $21,000 to $25,000, excluding the potential body contouring surgery. The estimate of $40,000 for the sleeve gastrectomy provided by Dr Lai seems excessive.

107. Whether cosmetic surgery would be reasonably necessary following any weight loss would be questionable. There is also no guarantee that the insurer will be liable to pay for the full cost of the bariatric surgery and associated expenses if the fees exceed the relevant gazetted fees, and the applicant may well have to pay the balance himself.

108. Finally, one must be satisfied that all alternative and cost-effective alternatives have been exhausted. The applicant's evidence is largely silent as to whether other conservative measures such as exercise, health style changes and dieting have been fully explored. This is another matter that I raised at the telephone conference, but remains largely unaddressed.

109. The applicant was able to lose 6 kg or more with the assistance of a dietician in 2015/2016, but it seems he only saw her on two occasions and it appears that he attended under duress. He suggested in his evidence that he had been unable to exercise because of his back condition and because he was unable to wear shoes. The only gym work has been back strengthening rather than any cardiovascular exercises. The medical evidence discloses that there has been an improvement in his symptoms since April 2019, but how he has fared in recent times is not the subject of any evidence.

110. If Dr Lai's report was the most recent report in evidence, the applicant may well have failed in his claim, given that he only weighted 4 kg more than his pre-injury weight in January 2019. However, the report of Dr Brancatisano dated 9 April 2019 is of significant force and addresses some of the issues that have not been addressed in the applicant's statement.

111. Dr Brancatisano obtained a history that the applicant had tried supervised diets and drug treatment with limited success and he had gained weight. This seems consistent with the changes in the applicant's weight as disclosed in the clinical notes, particularly after he consulted the dietician in 2015. Whether the applicant has been motivated to lose weight is another question.

112. Dr Brancatisano also confirmed that he had discussed the procedures with the applicant and he had formed the view that he was a suitable candidate. It is doubtful that the doctor would proceed with the operation if the risks were too great.

113. Bariatric surgery is an extremely invasive procedure and a gastric sleeve operation is irreversible. The Circle of Care website identifies the risks and complications from the procedure such as bleeding from the staple line, infection, slow healing of wounds, gallstones, deep venous thrombosis, nutritional deficiencies and even death. I understand that the liver can also be damaged in the procedure. These complications are of more concern for someone like the applicant because of his diabetes and other health issues. These factors certainly need to be seriously considered by the applicant before any procedure is undertaken.

114. The evidence is silent as to whether the applicant has in fact had the pre-operative radiological tests or whether he has been assessed by a dietician, psychologist and an obesity physician to determine whether he is a suitable candidate who will be able to adjust his markedly changed lifestyle after the procedure. Therefore, there is still a chance that the surgery will not be undertaken. Surgery alone will not be the answer, as there will still be a need to exercise and to adopt a healthier lifestyle. Nevertheless, I accept that the medical evidence supports the need for surgery.

115. Accordingly, I am satisfied on the balance of probabilities that the treatment proposed by Dr Brancatisano, namely a sleeve gastrectomy, and associated expenses, 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 28 February 2018.

Costs

116. There will be no order as to costs.

FINDINGS

117. The applicant sustained injury to his right heel and developed a consequential condition in his lower back arising out of or in the course of his employment with the respondent on 28 February 2018.

118. The applicant's employment was a substantial contributing factor to his injury.

119. The applicant requires medical treatment as a consequence of his injury and the respondent is liable to pay reasonably necessary medical expenses.

120. The proposed bariatric surgery, in the form of a sleeve gastrectomy, and associated expenses, 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 28 February 2018.

ORDERS

121. The respondent to pay the applicant's reasonably necessary medical expenses with respect to the proposed bariatric surgery, in the form of sleeve gastrectomy, and associated expenses, pursuant to s 60 of the 1987 Act.

122. No order as to costs.