WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1871/20**
Applicant: **DAVID ALLAN**
Respondent: **COLES SUPERMARKETS AUSTRALIA PTY LIMITED**
Date of Determination: **20 July 2020**
Citation: **[2020] NSWWCC 247**

The Commission determines:

1. The need for the applicant's left total knee replacement surgery proposed by Dr Tan results from the work injury on 9 August 2017.

2. The respondent is to pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses including the above surgery proposed by Dr Tan and associated costs.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Allan (the applicant) left school in 1987. He commenced with Coles (the respondent) in approximately 2003 as a duty manager. His duties included managing team members and handling and moving goods.

2. Mr Allan had injured his left knee wakeboarding in 2008, involving a fracture of the tibia. Subsequently he developed symptoms in the right knee which he attributes to an altered gait from the left knee injury. Both knees deteriorated over the years and he underwent bilateral knee surgeries in May 2012 and March 2016, plus a right knee arthroscopy in April 2012.

3. In May 2016, he had bariatric surgery which reduced his weight from some 140 kg to 97 kg. Mr Allan felt after this his "knees improved substantially due to the reduced weight and pressure on them". He states that his "knees were finally back to normal" and that they "felt both strong and stable". He says he was at that time feeling fit and healthy and well up to the physical demands of his employment with the respondent and was not experiencing any pain from his knees.

4. On 9 August 2017, Mr Allan injured his right knee and left shoulder moving refrigerated goods on an electric pallet jack. He was walking in front of the jack holding its lever with his left arm when it stopped suddenly jarring his body and causing a tearing sensation in the left shoulder and twisting of the right knee causing it to ache. He iced his knee and shoulder and contacted the injury care nurse who advised him to go to hospital. He remained at work for the remaining two hours of his shift and filled out an incident report. At the end of the shift he drove himself to Sutherland Hospital where his right leg was placed in a brace from the thigh to the ankle.

5. He states that his left knee was injured because of the right knee injury. He consulted Dr Rizzuto on 24 August 2017 and told him that the right knee brace was placing stress on the left knee and caused him to limp with intermittent sharp pains in the left knee. Dr Rizzuto told him the left knee symptoms would improve when the right knee was back to normal. By September 2017 Mr Allan states that the left knee was becoming worse.

6. Mr Allan made a claim for s 60 of the *Workers Compensation Act 1987* (the 1987 Act) medical expenses for removal of plate and screws and total left knee replacement (TKR) surgery as proposed by Dr S P Tan. The respondent insurer denied the claim in Notices issued under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 9 August 2019 and 11 November 2019. This Application to Resolve a Dispute (Application) is for section 60 of the 1987 Act medical expenses in respect of the left knee surgery recommended by Dr Tan.

ISSUES FOR DETERMINATION

7. The following issue remains in dispute:

    (a) Does the need for removal of plate and screws and total left knee replacement (TKR) surgery as recommended by Dr S P Tan in his report dated 4 October 2019 result from the injury on 9 August 2017?

PROCEDURE BEFORE THE COMMISSION

8. The parties attended a conciliation conference and arbitration hearing on 18 June 2020. 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

Oral evidence

9. There was no oral evidence adduced.

Documentary evidence

10. The following documents were in evidence before the Commission and I have taken them into account in making this determination:

    (a) Application with annexed documents;
    (b) Reply with annexed documents;
    (c) Application to Admit Late Documents filed by the respondent comprising report of Associate Professor Miniter 5 May 2020;
    (d) Application to Admit Late Documents filed by the respondent comprising clinical records of Dr Rizzuto.

SUBMISSIONS

11. The representatives made oral submissions at the arbitration hearing. I have taken the submissions into account, and they are referred to in the discussion below.

Does the need for the left knee surgery proposed by Dr S P Tan result from the work injury on 9 August 2017?

Evidence

Mr Allan

12. Mr Allan's statement is referred to above under "Background". In the statement he outlines the wakeboarding injury to the left knee in 2008 involving a fractured tibia, and the subsequent development of symptoms in the right knee. He recounts the deterioration of both knees over the years with bilateral arthroscopies in May 2012 and March 2016 with an additional arthroscopy to the right knee in April 2012.

13. Mr Allan recounts the bariatric surgery in May 2016 which was successful in its objective of reducing his weight, which fell from some 140 kg to 97 kg. He states that following the bariatric surgery "my knees improved substantially" and he felt his "knees were finally back to normal" and that they "felt both strong and stable" prior to the work injury of 9 August 2017. He says that in the period after the weight loss he considered "myself to be fit, healthy and highly capable of meeting the physical demands of my employment" and he "did not experience any pain in my bilateral knees" leading up to the injury.

14. Mr Allen says that after the right knee and shoulder injury on 9 August 2017 he noticed “In or about September 2017” that pain in his left knee was increasing and that due to the knee brace he was more reliant on his left leg to weight bear. He says that he “would constantly feel it flare up throughout the day. Even small actions such as getting up in the morning to walk to the bathroom, would cause me an aching pain in my left knee.”

15. Mr Allan refers to the right knee x-ray of 15 September 2017 showing tibial plateau fracture as well as cartilage tears and degenerative changes. He says this was “incredibly disappointing” because he had felt prior to injury that his knees were “back to normal” following the bariatric surgery with the left knee in particular not causing any pain.

16. Mr Allan refers to the consultation with Dr Tan on 5 December 2017 at which Dr Tan thought a TKR would be required for the left knee in the future together with the removal of the plates and screws from the old surgery. The left knee symptoms continued to worsen and on 27 September 2018 Dr Tan again advised that TKR would be required but that it would be best given his relatively young age if it could be put off as long as possible, hopefully into his mid-fifties.

17. Mr Allan was keen to resume work due to financial pressures and in October 2018 began at reduced hours. He suffered pain in the knees as well his injured shoulder but pushed through due to financial necessity. He iced his knees after his shifts. An x-ray was taken on 22 February 2019 due to ongoing symptoms and on 7 March 2019 Dr Tan recommended left TKR with removal of plates and screws from the earlier surgery.

Dr Rizzuto

18. Unfortunately the clinical notes of Dr Rizzuto are of little assistance in the determination of the issue in dispute as they are almost wholly hand-written and illegible. It is possible to discern mention of the right knee immediately after the injury but little otherwise of use regarding the issue here. There is a reference by the applicant of the entry of 9 March 2017 which appears to include the note, “Knees stable”.

Dr Tan

19. As treating surgeon, Dr Tan’s reports are key elements of the evidence. His reports go back to just after the wakeboarding incident on 2 January 2008, with Dr Tan’s report of 17 January 2008 reporting the procedure carried out involving “open reduction internal fixation” and a plate. Other reports as to treatment and imaging follow. Dr Tan reports on a left knee arthroscopy on 9 July 2008 involving debridement of the medial meniscus. Problems continued into 2009 and beyond, with issues arising with the right knee by 2012 as well. Dr Tan reports an arthroscopy and chondroplasty for the right knee on 2 April 2012. Further procedures of arthroscopy were conducted bilaterally on 25 May 2012 with the degenerative pathology in each recorded. Further symptoms are recorded in reports in 2013 and 2014. Repeat bilateral arthroscopy and chondroplasty was performed on 7 March 2013. Dr Tan also referred Mr Allan to Dr Rigas and Dr Loi at the bariatric clinic where surgery was performed on 19 July 2016.

20. Dr Tan notes in his report of 29 September 2016 following the bariatric surgery that Mr Allan by that stage had lost 35 kg and was “looking great”. The right knee was free of problems but the left knee was still problematic and a plan to proceed with left TKR was made with the surgery to be on 23 January 2017.

21. On 29 August 2017, Dr Tan noted the consultation following the injury on 9 August to the right knee (and left shoulder) with fracture of the tibial plateau and the use of a brace for a month.

22. In another short treatment report of 21 September 2017, Dr Tan refers to the removal of the brace on the right leg, and the x-ray showing the tibial fracture had not further collapsed. He also noted referral for "physiotherapy for both his legs".

23. On 5 December 2017, Dr Tan records a further consultation noting pain in the left knee and the future need for TKR with removal of the previous hardware, with timing of that dependent on how Mr Allan was coping at work. By 27 September 2018 Dr Tan notes the left knee was further deteriorating, wth more pain present. Again TKR was mentioned as needed "once he cannot stand the pain any longer".

24. Dr Tan's report of 7 February 2019 was in response to the respondent insurer, in which he summarised the situation,

> "On 9/8/17 he had a work related injury, whereby he had a fracture of his right tibial plateau. He did not have any operation and the concentration was on his shoulders then. He walks with pain in his right knee and therefore is favouring his left knee. It has come to the stage where his left knee is giving him a lot of pain. The background of this is that he had some arthritic changes to his left knee many years ago and part of the treatment for that was weight loss. He went on with drastic measures for his weight loss programme and achieved it to a stage that he did not require any left knee replacement.
>
> He maintained his weight, however the condition of his right knee has tipped his left knee over the edge and he now has problems despite continuing to maintain his current weight. He has come to consider that he is unable to rehab adequately and function in his day to day activity because of his left knee pain. He has requested to have a left total knee replacement. He is now 48 years of age and would like to maintain his current fitness before it is too late in the future."

25. In another report addressed to the insurer after Dr Tan saw Mr Allen on 7 March 2019, he said,

> "He is still taking Naprosyn and Panadeine Forte and is only working 3 days a week because both his knees are sore. This is as much as he can work at the present moment compared to 5 days a week in the past. He is compensating by putting more weight on his left knee, therefore making his left knee sorer. Clinically and radiologically the left knee needs a knee replacement and there are plates and screws in the proximal tibia."

26. After liability was denied, Dr Tan wrote to the insurer on 6 June 2019 about the situation once more,

> "… David has worked very hard over the years to try and avoid having a total knee replacement as he is in the category of a very young age group. However, due to his recent right knee injury, he has overstressed his left knee, which he was coping with over the years without the need for a knee replacement. His right knee injury has accelerated the problems with his left knee and he is unable to cope with the pain in his left knee now, therefore impeding his daily lifestyle and his work capacity.

I strongly feel that the deterioration of his left knee is wholly due to the injury to his right knee and has predominantly caused his left knee to deteriorate. This is despite his effort to try to maintain his left knee before requiring a total knee replacement."

27. Dr Tan's report to Mr Allan's solicitors on 4 October 2019 and further discusses causation,

> "1. Causation
> Mr David Allan has been a patient of mine since 2008. Over the years he has been coping well with non-operative measures for his left knee, which has a background history of traumatic arthritis. He even had bariatric surgery to lose weight to help with his left knee pain. In response to this non-operative management he was coping very well and we had hoped to put off the requirement for a knee replacement until Mr Allan was in his seventh decade or so.
>
> Mr Allan has been employed as a manager at Coles in spite of the problems with his knees. Unfortunately, on 9 August 2017, he suffered an injury to his left shoulder and right knee. He did twist his right knee which was painful for a protracted period of time. Due to this he put more weight onto his left knee, causing aggravation of his left knee condition that had been doing very well, with no surgery being planned to the knee for many years. Due to his continuing left knee pain it has now been deemed that he will require a left total knee replacement to help with his rehabilitation and pain. Due to the plate and screws in his left knee, the procedure will need to be staged. The plate and screws will need to be removed and when this has healed, he will have a total knee replacement.
>
> The injury to Mr Allan's right knee and left shoulder in 2017 has been a sentinel event that has brought forward the prospect of his left total knee replacement and is therefore a major causative factor for his left knee condition."

Dr Loi and Dr Rigas – Bariatric Clinic

28. Dr Georgia Rigas in a report of 21 March 2016 refers to Mr Allan's desire to lose weight for general health reasons, but also "in particular he has been advised that if he were to lose a significant amount of weight, then he would be considered for a left total knee replacement to increase his mobility."

29. Dr Ken Loi's operation report records the Laparoscopic Sleeve Gastrectomy performed on 19 July 2016.

Dr James Bodel report 20 May 2019

30. Dr Bodel takes a correct history of the incident of injury. He goes on to say,

> "While recovering from these injuries he was favouring the left knee while the right knee was in the brace and this has aggravated the longstanding arthritic process in the left knee.
>
> Prior to this accident he had managed to reduce his weight after having gastric surgery. He was coping very well with the shoulders and knee point of view, until he had to favour the left side while recovering from the right knee injury."

31. Dr Bodel is of the opinion that as a result of the incident on 9 August 2017 there was aggravation of left knee disease which he notes goes back to the right tibial plateau fracture in 2008.

Associate Professor Paul Miniter

32. In his report of 1 April 2019 Associate Professor Miniter does not find there was aggravation of the left knee resulting form the August 2017 incident. He sees the need for the left TKR as being due to the 2008 injury.

33. In his supplementary report of 8 May 2020, Associate Professor Miniter, follows through Dr Tan's historical reports and the history of arthroscopies to the knees. He goes on to discuss Dr Bodel's opinion,

> "I always enjoy reading Dr Bodel's reports, as they seem to assume that anything that has happened in the workplace is the definitive cause of the current presentation. Fortunately, there is so much information in the case of Mr Allan to support the fact that there is long lasting pathology that it makes interesting reading to see Dr Bodel maintain his position in this capacity.
>
> You will note that I saw him in April 2019 and I noted that there was an x-ray taken in the standing position in February 2019 which seemed to show no evidence of osteoarthritic disease. This is interesting, as the investigative findings provided by Dr S.P. Tan in his previous arthroscopic procedures on multiple occasions had clearly identified the presence of advanced osteoarthritic change.
>
> It is also interesting that I felt that the right knee was normal to physical examination, which is somewhat remarkable when one considers the extent of the arthritic change identified by Dr Tan in his previous and well documented, arthroscopic procedures."

34. Associate Professor Miniter expresses the view that he is surprised the matter "has reached this point" given the long history of knee problems from 2008.

Discussion

35. The respondent submits that the need for the left TKR results from the wakeboarding injury in 2008, and not the work injury to the right knee on 9 August 2017.

36. The applicant does not dispute the significant injury to the left knee referable to the wakeboarding incident in 2008, but contends that the work injury in August 2017 was a material contribution to the need for surgery.

37. In the familiar case of *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452, cited by the respondent, the Court said, "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. … What is required is a common sense evaluation of the causal chain." As has since been indicated by the High Court the "common sense" concept does not operate at large. All the evidence must be considered, with the onus of proof on the applicant throughout.[1]

[1] *March v Stramare (E & M H) Pty Limited* [1991] HCA 12; (1991) 171 CLR 506; *Flounders v Millar* [2007] NSWCA 238

38. More relevantly for the purposes of this determination, Roche DP in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 (*Murphy*), noted the established authority[2] that there may be multiple causes of an injury, and also emphasised that the test with medical expenses is whether the injury was a "material contribution" to the need for the claimed treatment, in order for it to be accepted as a result of the injury.

39. There is extensive evidence relating to previous bilateral knee problems commencing in 2008 with the wakeboarding incident. The issue is whether the work incident on 9 August 2017 was a "material contribution" to the need for TKR surgery of the left knee. It is common ground that the left knee was enough of a problem for left TKR to be arranged by Dr Tan at the end of September 2016 to take place on 23 January 2017. The respondent submits that the need for the TKR had been the same since then, and the work incident on 9 August 2017 changed nothing. It is submitted that the TKR was postponed because Mr Allan was overweight. I do not accept this submission because of Mr Allan's evidence of improvement in the knees after his successful weight loss together with Dr Tan's opinion in the reports of 7 Febraury 2019 and 4 October 2019.

40. The respondent submits that Mr Allan's statement must be treated with caution because of omissions regarding the history of the left knee problems before the work injury and the statement that the knee was back to normal and there were no issues before the work injury.

41. Mr Allan outlines the history of knee problems from the 2008 injury. What he says about the situation prior to the work injury in relation to the knees must be put in the context of the bariatric surgery which had reduced his weight by some 43 kgs. There is nothing to dispute what Mr Allan says about the improvement in his knees after the weight loss. Dr Tan in the report of 7 February 2019 notes that the injury to the right knee in August 2017 including a fracture of the right tibial plateau caused pain in the right knee resulting in favouring of the left knee causing symptoms there. Dr Tan also refers to the weight loss after the bariatric procedure, and says this was the reason the left knee TKR proposed in September 206 for January 2017 was not required. This is consistent with Mr Allan's statement. Dr Tan says despite Mr Allan maintaining his weight the condition of the right leg "has tipped the left knee over the edge".

42. The respondent submits that Mr Allan says the right leg brace put strain on the left knee, but this should not be accepted because such braces are designed to allow weight to be placed on the braced knee as well; the brace was only worn for a total of 23 days when Mr Allan was off work; and the only pain mentioned in the statement relating to the brace is when getting out of bed in the morning to go to the toilet.

43. In my view the intended function of the leg brace does not mean that there was not additional stress put on the other knee causing pain. However, the effect of the right knee injury was broader than this. It is apparent from Dr Tan's reports between of 7 February 2019 and 4 October 2019 that the problems with the right knee were not confined to the time wearing the leg brace at home but had progressed to the stage that Mr Allan was unable to maintain his fitness due to the left knee pain. There was a fracture to the right knee and, as long as there was right knee pain on walking, additional pressure was put on the left. Dr Tan says the right knee "was painful for a protracted period of time". This is the obvious conclusion from the combination of Mr Allan's statement and the reports of Dr Tan discussed above. That Mr Allan was not at work when wearing the brace does not mean the additional pressure on the left knee was minimal. Because Mr Allan used the example of getting up to go to the toilet does not mean that was the only walking he did when at home.

[2] See *Comcare v Martin* [2016] HCA 43

44. For the above reasons I do not make any adverse finding as to Mr Allan's credit; nor do I find him to be an unreliable witness.

45. The respondent submits that Dr Bodel's report cannot be given any weight as it is confused about an arthroscopy supposedly carried out after the work incident, which in fact had occurred years earlier. Dr Bodel does not specify which knee he is referring to but as it was in the context of discussing the work injury and he had just before noted treatment of the left shoulder it seems to me that was referring to the right knee when he said "he has had an arthroscopy and a partial meniscectomy which has been helpful." While the last arthroscopy was years before the injury, this inaccuracy does not negate the rest of the report, or the opinion on the issue to be determined. The right knee did in fact improve after the injury with conservative treatment over time.

46. The respondent also submits that the history taken by Dr Bodel is not correct. However, Dr Bodel has the history of knee problems from 2008 and of the bariatric surgery. He also had Dr Tan's reports before him to which he refers. Dr Bodel's opinion is consistent with that of Dr Tan. Contrary to the respondent's submission in my view there is a "fair climate" for accepting Dr Bodel's opinion on the issue in dispute.[3] If I am wrong about that, Dr Tan's opinion as long-term treating surgeon is sufficient for the applicant to succeed.

47. The respondent submits that Dr Tan's opinion that the left knee was better after the weight loss is a "re-invention of history". In my view the evidence is clear as to improvement in both knees after the radical weight loss following bariatric surgery. Dr Tan's progress/treatment reports are brief and do not contradict what he says in the more comprehensive reports at the request of the insurer and Mr Allan's solicitors on 7 February 2019; 7 March 2019, 6 June 2019 and 4 October 2019. The explanation as to why the scheduled TKR was abandoned is inherent in the success of the bariatric surgery, which is supported by Mr Allan's statement and the report of Dr Tan, the treating specialist. I find Dr Tan's reports to be compelling given his insight into the knee issues over a long period of time.

48. The weight loss surgery was contemplated in early 2016 and took place on 19 July 2016. Dr Tan reports on 29 September 2016 that by that stage Mr Allan had lost some 35 kg. It seems that he lost even more weight subsequently. At the time of that report there were still problems in the left knee (but not in the right) and left TKR was then arranged for 23 January 2017. That the scheduled TKR of 23 January 2017 was abandoned subsequent to the plans made on 29 September 2016 is consistent with the chronology and further improvement in the left knee after experiencing the weight loss due to the bariatric surgery.

49. Associate Professor Miniter for the respondent only saw Mr Allan once and in the report of 1 April 2019 expressed the view that,

> "The question of where the responsibility for the left knee lies is important: this is clearly a pre-existing issue, and I do no believe that there is any evidence of serious issue to the right knee which has led to a worsening of the issues in relation to the left knee."

50. The problem with this opinion is that it does not accord with the evidence of the right knee damage and pain resulting from the work injury, with a fracture of the lateral tibial plateau, as shown in the MRI of 21 August 2017. The right knee symptoms following the injury were in my view more than sufficient to cause the worsening of the left knee on the background of much improved knees after the weight loss that obviated the need for the planned TKR. The test is whether there has been a "material contribution" to the need for surgery.

[3] Paric v John Holland (Constructions) Pty Ltd [1985] HCA 58

51. The respondent submits that because there was already a planned left TKR set for January 2017, the work incident has made no difference and is therefore not a material contribution to the need for surgery. However, this leaves aside the tangible improvement in the knees achieved from the radical weight loss before 23 January 2017 which saw the surgery abandoned, and Mr Allan able to continue at work without problems to the time of injury, feeling fit and able in relation to his left knee.

52. Associate Professor Miniter in his report of 8 May 2020 makes critical remarks about Dr Bodel's approach to work injuries generally. These pre-conceptions brought to bear undermine confidence in the objectivity of Associate Professor Miniter when addressing Dr Bodel's opinions in this particular case. Associate Professor Miniter does not directly address the specific issue in dispute in the remainder of his report, except to emphasise that there was significant pre-existing pathology in the left knee, which is plain to see and not in dispute.

53. Associate Professor Miniter does not take account of the improvement of both knees after the bariatric weight loss in 2016 and the fact that the scheduled TKR set for 23 January 2017 did not proceed due to those improvements. Given these features I prefer the opinions of Dr Tan as supported by Dr Bodel to that of Associate Professor Miniter on the issue in dispute, which Dr Tan directly addresses. As noted above Dr Tan, as treating specialist surgeon, has deep insight into the progress and relative significance of events affecting Mr Allan's knees. Associate Professor Miniter seems to imply that his view of an x-ray of Febrary 2019 together with his clinical findings somehow bring into question the multiple findings of Dr Tan at surgery. Associate Professor Miniter saw Mr Allan once, while Dr Tan has performed multiple arthroscopies on Mr Allan's knees. Dr Tan's opinion remains intact in the face of Associate Professor Miniter's speculation.

54. The respondent submits that the Sutherland Hospital Discharge Referral notes from the day of injury show left TKR was still planned at the date of injury. The Discharge form records the history of "left knee- multiple arthroscopy, awaiting TKR". This brief note does not accurately reflect the situation by August 2017 as the scheduled TKR of the previous January had been abandoned as unecessary, as discussed above. It would be unsafe to project from a brief hospital note, when the source of the comment is unknown, to a conclusion inconsistent with the other evidence. It is possible the comment refers to the fact that Mr Allan "had been" awaiting left TKR. The note of Dr Rizzuto of 9 March 2017 that appears to record "knees stable" is consistent with improvement, although most of Dr Risutto's notes are impossible to read and not other comment can be discerned.

55. The respondent submits that the Roads and Maritime parking certificates regarding the left knee indicate the continuation of the previous problems. In my view these certificates are not of any value on the issue. They go no further than being one element in the management of the pre-existing condition that had improved after the significant weight loss.

56. There is no doubt that at the time of the injury there was significant pathology in Mr Allan's left knee that had developed from the time of the 2008 wakeboarding incident. On 29 September 2016 left TKR surgery was set for January 2017. Mr Allan had a successful weight loss procudure in July 2016 which saw a significant weight loss over the second half of 2016 with improvement in the left knee symptoms. He found he was able to perform his work and other activities without knee pain.

57. I do not accept the respondent's central submission that the need for the left TKR is the injury in 2008. The situation by January 2017 was not the same as it had been on 29 September 2016 when the TKR was planned. The left knee improved with less weight on it to the extent that Mr Allan felt it was back to normal. I agree with the submisison for Mr Allan that the use of the expression "normal" means not what it was like in 2007, but that it was much improved and the planned TKR became redundant. That is the reference point when considering whether the the need for the left TKR results from the incident on 9 August 2017. I have accepted Dr Tan's opinion as the best informed, and he is of the view that the injury to the right knee aggravated the condition in the left knee. The rest of the evidence points in the same direction and a commonsense approach leads inevitably to the conclusion that there was aggravation of pre-exisitng degenerative change in the left knee in August 2017 resulting from the incident, and left TKR is now required. The injury is a material contribution to the need for left TKR.

58. For the above reasons I find that the need for the claimed left TKR surgery results from the injury of 9 August 2017; Mr Allan is entitled to s 60 of the 1987 Act expenses associated with the surgery proposed by Dr Tan.

SUMMARY

59. The need for the surgery proposed by Dr Tan results from the injury in the course of Mr Allan's employment with the respondent on 9 August 2017.