# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** **5000/19**
**Applicant:** **Riki Meremere**
**Respondent:** **Symbion Health Limited**
**Date of Determination:** **26 November 2019**
**Citation:** **[2019] NSWWCC 377**

The Commission determines:

1. The applicant sustained injury to his left ankle arising out of or in the course of his employment with the respondent on 12 January 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 12 January 2018.

The Commission orders:

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

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

Carolyn Rimmer
**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 CAROLYN RIMMER, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
**As delegate of the Registrar**

## STATEMENT OF REASONS

## BACKGROUND

1. On 26 September 2019, Riki Meremere (Mr Meremere) lodged an Application to Resolve a Dispute (the Application) in the Workers Compensation Commission (the Commission). Mr Meremere's employer at the relevant time was Symbion Health Limited (the respondent). The respondent was insured by Employers Mutual Limited NSW Limited (the insurer) at the relevant time.

2. Mr Meremere claimed medical expenses for proposed medical treatment pursuant to s 60 of the *Workers Compensation Act 1987* (the1987 Act) due to injury sustained on 12 January 2018.

3. Mr Meremere, in the course of his employment with the respondent as a forklift driver, sustained an injury to his left ankle on 12 January 2018 when he stepped away from his forklift, walked around a pallet and rolled his left ankle. It is alleged that following the injury and his subsequent pain and functional restrictions, Mr Meremere sustained a consequential psychological injury in addition to significant weight gain due to immobility caused by the injury.

4. There is no dispute that Mr Meremere injured his left ankle on 12 January 2018. Liability was accepted by the insurer and weekly compensation and medical expenses paid.

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

6. On 9 April 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 Mr Meremere's injury on 12 January 2018.

## ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain 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 12 January 2018 (s 60 of the 1987 Act).

## PROCEDURE BEFORE THE COMMISSION

8. The parties attended a conciliation conference and arbitration hearing on 21 November 2019.The proceedings in the Commission were sound recorded and a copy of the recording is available to the parties. Mr Meremere was represented by Mr Perry, who was instructed by Ms Delaney of Turner Freeman Lawyers. The respondent was represented by Mr Stockley, who was instructed by Mr Murray of Stiles Lawyers.

9. 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

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

    (a) the Application and attached documents, and
    (b) Reply and attached documents.

## FINDINGS AND REASONS

### Mr Meremere's statement

11. In a statement dated 16 September 2019, Mr Meremere said that he sustained an injury to his left ankle on 12 January 2018. He stated that following the injury, he consulted his general practitioner and was later referred to Dr Rizkallah, Orthopaedic Surgeon. Mr Meremer said that on 24 May 2018 Dr Rizkallah performed an arthroscopic procedure on his left ankle. Following surgery, Mr Meremere was off work for around five weeks and eventually returned to work on suitable duties.

12. Mr Meremere said that he underwent a lot of physiotherapy of the ankle after surgery but despite having the surgery, his ankle was "not what it used to be" and he had difficulty walking, and experienced ongoing pain. He said that he was severely restricted in what he could and could not do. He said that he could only walk a short distance from 250 metres to approximately one kilometre, when the pain in his left ankle would then become unbearable and he would have to stop.

13. Mr Meremere stated that he would not be able to resume his pre-injury duties as a forklift driver unless his ankle improved. He said that he continued to experience a lot of pain in his left ankle as well as his right ankle.

14. Mr Meremere wrote:

    "11. Prior to my work injury, I was a very active person and enjoyed going to the gym regularly.

    12. I have always been a solid build and I am 172 centimetres tall. Prior to my work injury, my weight fluctuated slightly, between no more than 105-108 kilograms.

    13. Since the injury, I now weigh around 35 kilograms more than I did before my injury.

    14. I used to enjoy playing sports and this included table tennis, touch football, rugby league, rugby union and indoor netball. I always enjoyed playing all sorts of sports and my partner and I would enjoy these activities together and with friends."

15. Mr Meremere stated that he and his wife were trying to have a child with the assistance of IVF. He said that doctors advised him that he had a low sperm count and this made the IVF process difficult. He stated that one of the larger contributing factors to his low sperm count was his level of activity. He stated that the IVF doctors said there would be an increase in the likelihood of success if he was 34kg lighter, as he used to be.

16. Mr Meremere stated that he wanted to undergo bariatric surgery as recommended by Associate Professor Garett Smith and Dr Eric Lim. He said that he had been told that losing weight would also take pressure off his left ankle and that would relieve the current symptoms in the left ankle. Mr Meremere said that he also wanted to get back to pre-injury duties and feared that without the surgery, that would not be possible.

17. Mr Meremere stated that he was under the care of a dietician, Victoria Lee, and she had been supervising his eating and trying to help him lose weight. He said that the sessions with Victoria were not helping with his weight loss and he felt that the proposed surgery is his only option.

**Medical evidence**

18. In a report dated 17 January 2019, Associate Professor Garett Smith, noted that Mr Meremere had suffered an ankle injury and the forced period of immobility has led him to gain a good deal of weight. He reported that Mr Meremere currently weighed 136 kilograms. Associate Professor Smith noted that Mr Meremere was aware that the most predictable way for him to lose weight and maintain this loss was for him to undergo bariatric surgery. Associate Professor Smith expressed the view that this was likely to result in improvement of his ankle problems and a return to more productive work.

19. In a report dated 6 March 2019, Associate Professor Garett Smith, noted that non-surgical treatment for morbid obesity has a very low likelihood of success. He also stated that in order to optimise the results from surgery it was important Mr Meremere see a bariatric dietician in the long term and an appointment had been made with their dietician, Nazy Zarshenas for review.

20. In a report dated 3 July 2019, Associate Professor Garett Smith wrote:

> "Mr Meremere gave a history of ankle injury sustained during the course of work-related activities as a forklift driver. He had undergone a number of orthopaedic evaluations and interventions. At the time of consultation Mr Meremere weighed 136 kilograms. This places him in the severely obese category. He had been on light duties since his accident and his ankle pain persists. Mr Meremere's incapacity relates to his work injury. It is reasonable to conclude that his obesity could potentially compromise the results of any intervention to address his ankle injuries.
>
> It is broadly accepted within the medical community that the conservative (non-surgical) treatment of class 3 morbid obesity is very unlikely to be successful in the long term.
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> Mr Meremere's weight prior to his ankle injury was 103 kilograms. It would be reasonable to assume therefore that his enforced immobilisation due to his ankle injury contributed to his class 3 morbid obesity."

21. In a report dated 4 April 2019, Dr Kim Edwards, General Surgeon, noted that at the time of the injury in January 2018, Mr Meremere said that he weighed 108 kg and was now 135 kg. Dr Edwards noted that Mr Meremere said "prior to the injury on 12 January 2018, he would go to the gym. He was about 103 kg at that stage. He said that, in the past, he has tried dieting. He and his wife would like to have children."

22. Dr Edwards considered that Mr Meremere had put on weight but it was not clear that this was the result of his ankle injury. Dr Edwards wrote: "Most cases of obesity are related to behaviours such as a sedentary lifestyle and increased caloric intake. Enforced inactivity can be a contributing factor to weight gain."

23. Dr Edwards noted that there was a pattern of weight gain prior to the injury on 12 January 2018. Mr Meremere told him that he was about 103 kg when he suffered his first ankle injury three or four years ago, and 108 kg on 12 January 2018.

24. Dr Edwards wrote:

> "I am not convinced that Mr Meremere's weight gain post-surgery is due to the work-related injury. Weight gain is due to excessive caloric intake. He was obese prior to the injury. It is possible regular exercise may help him with weight reduction, but it did not appear to have any significant effect prior to the accident.
>
> Based on the information available, I consider it is more probable than not, that his pattern of weight gain would have occurred regardless of the ankle injury."

25. Dr Edwards described Mr Meremere as severely obese and expressed the opinion that if conservative treatment failed to cause him to lose weight, he would be a good candidate for the gastric sleeve procedure suggested. He noted that the literature indicated that at five years after a laparopscopic sleeve gastrectomy, the average patient loses 60% of excess body weight and achieves a BMI of 30 kg/m 2. However, Dr Edwards did not consider that bariatric surgery was reasonably necessary treatment resulting from the work-related ankle injury. He noted that alternative treatment options were of a conservative nature, namely, dietary.

26. In a report dated 6 June 2019, Dr Eric Lim, general practitioner, noted that Dr Kim Edwards in his report provided the opinion that Mr Meremere would have gained weight anyway. Dr Lim disagreed with Dr Edward's opinion, which he considered was inconsistent with Mr Meremere's weight history. Dr Lim noted that Mr Meremere had been stable for a few years prior to the injury at about 112kgs.

27. Dr Lim wrote:

> "He is now 138kgs and has gained weight as a result of increased inactivity consequential to his ankle injury, surgery for his ankle injury, and not being provided with work for a substantial period. Gastric surgery is reasonably necessary to treat his weight gain from his ankle injury and will alleviate the load on the injured ankle. The decreased weight will result in a reduction of the pain symptoms in his ankle. He reports that when he had hydrotherapy, his pain was reduced whilst he was in the pool due to the load reduction."

28. In a report dated 16 July 2019, Dr Anthony Greenberg, general and gastrointestinal surgeon, noted that when he reviewed Mr Meremere, he weighed 141 kg. He is 172 cm tall and had a waist size of 142 cm. Dr Greenberg calculated the BMI at 47.7 kg/m2 noting that Mr Meremere would be classified as being morbidly obese. Mr Meremere told Dr Greenberg that at the time of the injury in January 2018 his weight varied between 105 to 108 kg. Using the average of 106.5 kg, Dr Greenberg calculated BMI prior to the injury at 35.8 kg/m2, which would be regarded as being obese. Dr Greenberg noted that weight gain following the injury was 34.5 kg, which was a weight gain of approximately 32.3%.

29. Dr Greenberg also commented that Mr Meremere was of Polynesian heritage and it was recognised that Polynesians were of a heavy build and may have a different weight distribution when compared to the general Australian population.

30. Dr Greenberg wrote:

> "Mr Meremere had a good recollection of his weight as a young boy and as he grew through the various decades of his life.
>
> - When he was 12-13 years old he weighed 57 kg.
> - When he was a teenager, he weighed 60 kg.
> - At 20 years of age he was 82 kg.
> - At 30 years of age he was 90 kg.
> - In 2018 prior to the injury he varied between 105-107 kg.
> - On today's examination in July 2019 he weighs 104 kg."

31. I am satisfied that the reference in paragraph 20 above by Dr Greenberg to Mr Meremere's weight being 104 kg on "todays examination" was a typographical error. It was contradicted by the earlier reference in his report stating that when he reviewed Mr Meremere that day, he weighed 141 kg. Further, a 141 kg weight was broadly consistent with the weight recorded in other medical reports.

32. Dr Greenberg noted that Mr Meremere was under the care of a dietician, Victoria Lee, who is supervising his eating and trying to help him lose weight. Dr Greenberg reported that Mr Meremere has been under her care for six weeks and at this stage had not had any significant weight loss.

33. Dr Greenberg noted that Mr Meremere also described his lifestyle prior to the injury involving his left ankle in January 2018. He wrote:

> "He was previously a very active man. He had many sporting pursuits, played table tennis, touch football (with his wife), played rugby league and rugby union and indoor netball. He considered himself very sporty and enjoyed the combined activity with his partner."

34. Dr Greenberg noted Mr Meremere said that following the injury to his left ankle, he has found his ability to walk has been significantly affected. Mr Meremere had said:

> "I can only walk a short distance, approximately a quarter to half a kilometre, before the pain in my ankle forces me to stop. Because I have to compensate for my ankle and walk in an odd position and I get pain in my lower back (lumbar spine). My back then aggravates my ankle and makes everything worse."

35. Dr Greenberg expressed the opinion that Mr Meremere is a suitable candidate for bariatric surgery. He considered that Mr Meremere has given a clear history of his change in lifestyle and his inability to be as active as he was before the injury to his left ankle. Dr Greenberg expressed the opinion that, Mr Meremere's change in lifestyle has been a significant factor in his weight gain of 34.5 kg.

36. Dr Greenberg considered that it was possible that Mr Meremere's low sperm count may be related to his obesity and stress and might affect his ability to have a successful IVF procedure although this would best be assessed by a urologist with expertise in that area.

37. Dr Greenberg was of the opinion that if Mr Meremere's weight could not be controlled with a conservative management such as dietary control and increased exercise program then bariatric surgery would be a reasonable option. He noted that Drs Garett Smith and Edwards were of the opinion conservative treatment was unlikely to be successful and had recommended bariatric surgery. Dr Greenberg noted that gastric sleeve surgery was currently regarded as the most effective operative procedure used to treat morbid obesity with the lowest risk profile.

38. In answer to the question:

> "Taking into consideration Employer's Mutual Section 78 Notice dated 9 April 2019 and the medical report of Dr Kim Edwards dated 4 April 2019, are you of the medical opinion the proposed treatment by way of bariatric surgery as recommended by Associate Professor Garett Smith is reasonably necessary?"

Dr Greenberg answered: "Yes; in my opinion the recommendation for bariatric surgery by A/Prof Garett Smith is reasonable."

39. Dr Greenberg stated that it was his understanding Mr Meremere's weight gain was a consequence following on his left ankle injury and in particular his immobility and agreed that the need for the surgery wholly and/or predominantly arose as a consequence of his work-related injury. He noted that the purpose of bariatric surgery was to reduce the patient's weight and avoid the recognised morbidity and mortality recognised to be associated with patients who are morbidly obese.

40. Dr Richa Rastogi, psychiatrist, in a report dated 29 August 2019, noted that Mr Meremere sustained a left ankle injury at work on 12 January 2018 and had arthroscopic repair. Dr Rastogi reported that Mr Meremere was off work for six months and then resumed light duties. He noted that since the injury Mr Meremere had not been able to pursue his sporting activities and stopped table tennis, football and rugby. Mr Meremere was also unable to do home maintenance and was reliant on his partner who has had to take over domestic chores. Dr Rastogi noted that since the injury and decreased mobilization and inability to pursue his sporting passion, Mr Meremere had put on 29 kg due to prolonged inactivity.

41. Dr Rastogi made a diagnosis of adjustment disorder with depressed mood, chronic pain disorder and morbid obesity. He noted that Mr Meremere had gained excessive weight due to his lifestyle changes and stopping his sports and this was also impacting his self-esteem, confidence and intimacy. Dr Rastogi considered that his excessive weight gain with functional impairments post injury resulted in a depressive episode with feelings of hopelessness, worthlessness, poor self-esteem, social avoidance and lack of adaptation. He noted that the limited mobility and inability to play sports has resulted in significant weight gain impacting his energy levels, motivation and social anxiety. Dr Rastogi considered that the weight loss would improve his psychological prognosis and result in better outcomes functionally and socially. Dr Rastogi concluded that the psychological injury stemmed from work related physical injury and subsequent morbid obesity and failed conservative treatment with significant impact on his functioning.

42. In a supplementary report dated 10 September 2019, Dr Rastogi expressed the view that Mr Meremere's current psychological condition has contributed to his poor self-esteem and self-worth stemming from excessive weight gain due to marked immobility associated with left foot and left ankle injury.

43. Dr Rastogi wrote:

> "The weight gain is from anxiety with comfort eating, poor ability to do physical exercises and lack of motivation and drive from inactivity. The inability to remain intimate due to weight gain and negative self-awareness as well as shame and embarrassment is perpetuating his depression and causing relationship strain and causing social inadequacy. He has significant social anxiety and perceived fear of being scrutinised due to his weight gain and fear of being rejected in his relationship. I am of the opinion that the bariatric surgery will have a direct and positive impact on his psychological wellbeing and improve his personal and social connectedness as well as his motivation to make lifestyle changes thus cause a good psychological prognosis."

44. Dr Rastogi concluded that the proposed bariatric surgery would enable physical and psychological functioning with improvement in motivation and self confidence that will have a direct bearing on positive social, vocational and personal functioning and a good psychological prognosis.

45. In a report dated 15 July 2019, Mr Eu-Kin Lek, Exercise Physiologist, noted that Mr Meremere was limited in his movements, due to pain in his ankles as well as excess body weight that he was carrying. Mr Lek wrote: "I would attribute a lot of the pain he feels is due to this reason, as well as why progress is slow, as he is pulling so much extra unnecessary pressure on his foot." He noted that Mr Meremere was to continue supervised exercise sessions and was to continue to see a dietician to help get his eating "on track".

46. In a report dated 12 August 2019, Nazy Zarshenas, dietician, noted that Mr Meremere had been referred for morbid obesity and weighs 140 kg having lost 1.6 kg so far. Mr Meremere reported that he was more motivated and together with his partner was preparing and planning better meals. Ms Zarshenas reported that Mr Meremere had reduced portion size and stopped fast food. She noted that his activity was still very limited due to his injury, but he was seeing an exercise physiologist and going to the gym.

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

47. Mr Meremere's counsel, Mr Perry, submitted that the issue to be determined was whether the surgery recommended by Dr Greenberg, Dr Lim and Associate Professor Smith was reasonably necessary as a result of Mr Meremere's work injury.

48. Mr Perry submitted that Mr Meremere needed to show 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* [2015] NSWWCCPD 49 (*Murphy*).

49. The respondent's counsel, Mr Stockley, submitted that Mr Meremere needed to show that his heel injury materially contributed to the need for bariatric surgery.

50. 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)* (1986) 2 NSWCCR 32 (*Rose*), Burke CCJ stated at [42]:

> "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."

51. Further, His Honour added at [47]:

> "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.

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.

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."

52. 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* (1997) 14 NSWCCR 233 (*Bartolo*) and stated:

> "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."

53. In *Diab v NRMA Ltd* [2014] NSWWCCPD 72 (*Diab*), Deputy President Roche 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:
>
> (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 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'".

54. 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 Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang)* where Kirby J stated at [463]:

> "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."

55. 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 at [57-58]:

> "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 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' 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)."

**Discussion**

56. Mr Meremere gave evidence that despite having the surgery, his left ankle was "not what it used to be" and he had difficulty walking, and experienced ongoing pain. He described being severely restricted in what he could and could not do. Mr Meremere said that prior to the injury he was a very active person and went to the gym regularly and used to enjoy playing sports including table tennis, touch football, rugby league, rugby union and indoor netball. He said that he always had a solid build but prior to the work injury, his weight fluctuated slightly, between no more than 105-108 kilograms. Mr Meremere said that he now weighed around 35 kilograms more than he did before his injury.

57. Mr Meremere stated that he wanted to undergo bariatric surgery as recommended by Associate Professor Garett Smith and Dr Eric Lim. He said that he had been told that losing weight would relieve the current symptoms in the left ankle. Mr Meremere also feared that without the surgery, it would not be possible to get back to his pre-injury duties.

58. Mr Meremere said that he was under the care of a dietician, Ms Lee, and she had been supervising his eating and trying to help him lose weight but the sessions with her were not helping with weight loss and he felt that the proposed surgery was his only option.

59. Mr Meremere's evidence was not challenged and I accept his evidence. In particular, I am satisfied that prior to the injury on 12 January 2018 he was very active and went to gym regularly and played sports including table tennis, touch football, rugby league, rugby union and indoor netball. I accept that Mr Meremere now has difficulties walking and has gained about 35 kg in weight since the injury.

60. The treating surgeon, Associate Professor Garett Smith, noted that Mr Meremere had a forced period of immobility after the ankle injury which led him to gain a good deal of weight. He reported that non-surgical treatment for morbid obesity had a very low likelihood of success and that weight loss through bariatric surgery was likely to result in improvement of the ankle problems and a return to more productive work. Associate Professor Garett Smith concluded that it would be reasonable to assume that the enforced immobilisation due to his ankle injury contributed to his class 3 morbid obesity.

61. I note that Associate Professor Garett Smith specialises in laparoscopic upper GI, hernia, general and gallbladder surgery and weight loss surgery and therefore I have placed considerable weight on his opinions, given his expertise in this area.

62. Dr Greenberg noted that when he reviewed Mr Meremere on 16 July 2019, he weighed 141 kg, with a BMI at 47.7 kg/m2 and classified him as being morbidly obese. Using the average of 106.5 kg, Dr Greenberg calculated BMI prior to the injury at 35.8 kg/m2, which would be regarded as being obese. Dr Greenberg noted that weight gain following the injury was 34.5 kg, which was a weight gain of approximately 32.3%.

63. Dr Greenberg obtained a history of Mr Meremere's weight through various decades of his life, noting that at 20 years of age he was 82 kg, at 30 years of age he was 90 kg, in 2018 prior to the injury he varied between 105-107 kg and on examination in July 2019 he was 141 kg.

64. Dr Greenberg reported that Mr Meremere described a very active lifestyle prior to the injury in January 2018. He wrote; "He had many sporting pursuits, played table tennis, touch football (with his wife), played rugby league and rugby union and indoor netball. He considered himself very sporty and enjoyed the combined activity with his partner."

65. Dr Greenberg noted that following the injury to his left ankle, Mr Meremere found his ability to walk has been significantly affected and there was a clear history of a change in lifestyle and an inability to be as active as he was before the injury to his left ankle. Dr Greenberg expressed the opinion that Mr Meremere's change in lifestyle had been a significant factor in his weight gain of 34.5 kg. He was of the view that that Mr Meremere was a suitable candidate for bariatric surgery.

66. Dr Greenberg was of the opinion that if Mr Meremere's weight could not be controlled with a conservative management such as dietary control and increased exercise program then bariatric surgery would be a reasonable option. I note that Dr Greenberg is a general and gastrointestinal surgeon and therefore have placed considerable weight on his opinions, given his expertise in this area.

67. Dr Rastogi took a similar history of an active pre-injury lifestyle and noted that since the injury Mr Meremere had been unable to pursue his sporting activities and stopped table tennis, football and rugby. Dr Rastogi noted that Mr Meremere had gained excessive weight due to his lifestyle changes and stopping his sports. He considered that the limited mobility and inability to play sports resulted in significant weight gain impacting his energy levels, motivation and social anxiety. Dr Rastogi considered that the weight gain was from anxiety with comfort eating, poor ability to do physical exercises and lack of motivation and drive from inactivity. He was of the opinion that the bariatric surgery would have a direct and positive impact on his psychological wellbeing and physical and psychological functioning with improvement in motivation and self confidence that would have a direct bearing on positive social, vocational and personal functioning.

68. Dr Lim, who as the treating general practitioner had the benefit of seeing Mr Meremere on a regular basis, disagreed with Dr Edwards' opinion that Mr Meremere would have gained weight anyway. Dr Lim noted that Dr Edwards' opinion was inconsistent with Mr Meremere's weight history and that Mr Meremere's weight had been stable for a few years prior to the injury. Dr Lim, noted that Mr Meremere had gained weight as a result of increased inactivity consequential to his ankle injury, surgery for his ankle injury, and not being provided with work for a substantial period. Dr Lim was of the view that gastric surgery was reasonably necessary to treat his weight gain from his ankle injury and would alleviate the load on the injured ankle, resulting in a reduction of the pain symptoms in his ankle. Dr Lim noted that during hydrotherapy, Mr Meremere's pain was reduced whilst he was in the pool due to the load reduction.

69. Ms Zarshenas noted that Mr Meremere had been referred for morbid obesity and weighed 140 kg having lost 1.6 kg so far. Ms Zarshenas reported that Mr Meremere had reduced portion size and stopped fast food. She noted that his activity was still very limited due to his injury, but he was seeing an exercise physiologist and going to the gym.

70. The respondent relied on the opinion of Dr Edwards. Dr Edwards noted (paragraph 2, page 3) that at the time of the injury in January 2018, Mr Meremere said that he weighed 108 kg and weighed 135 kg in April 2019. However, Dr Edwards also reported (second last paragraph, page 2) that Mr Meremere said "prior to the injury on 12 January 2018, he would go to the gym. He was about 103kg at that stage." It was also noticeable that Dr Edwards did not take a history of the other sporting activities that Mr Meremere engaged in before the injury in January 2018.

71. Dr Edwards accepted that Mr Meremere had put on weight but said that it was not clear that this was the result of his ankle injury. Dr Edwards did consider that most cases of obesity were related to behaviours such as a sedentary lifestyle and increased caloric intake and that enforced inactivity could be a contributing factor to weight gain.

72. Dr Edwards noted that there was a pattern of weight gain prior to the injury on 12 January 2018 and Mr Meremere was obese prior to the injury. Dr Edwards was not convinced that Mr Meremere's weight gain post-surgery was due to the work-related injury. He noted that weight gain was due to excessive caloric intake.

73. Dr Edwards considered it was possible that regular exercise might help Mr Meremere with weight reduction but thought that this did not appear to have had any significant effect prior to the accident. Dr Edwards expressed the opinion that it was more probable than not that the pattern of weight gain would have occurred regardless of the ankle injury.

74. Drs Greenberg, Rastogi, Lim and Associate Professor Garret Smith all expressed the view that Mr Meremere had gained weight as a result of increased inactivity consequential to his ankle injury. Associate Professor Garett Smith, Dr Greenberg and Dr Lim were of the view that gastric surgery was reasonably necessary to treat his weight gain from his ankle injury. Dr Lim and Associate Professor Garett Smith were of the view that weight loss from bariatric surgery would alleviate the load on the injured ankle resulting in a reduction of the pain symptoms in his ankle.

75. Dr Edwards was the only doctor to express the opinion that Mr Meremere would have gained weight anyway and that the weight gain was due to excessive caloric intake. However, I considered that not only did Dr Edwards fail to take an adequate history of the changes in Mr Meremere's lifestyle and sporting activities, but he also failed to properly address the underlying facts and properly consider whether sedentary lifestyle and enforced inactivity could be a contributing factor to weight gain in this case. For these reasons, I did not find Dr Edwards' opinion persuasive.

76. Mr Meremere gained a significant amount of weight, about 34-35 kg following the left ankle injury on 12 January 2018. Dr Greenberg obtained the most detailed history of weight gain over the last decades. This history was not challenged and there was no evidence to the contrary. I accept that at 20 years of age Mr Meremere was 82 kg, at 30 years of age, he was 90 kg, in 2018 prior to the injury he varied between 105-107 kg and on examination in July 2019 he was 141 kg. It appears that Mr Meremere gained 8 kg in the decade after he turned 20, which is less than 1 kg per annum. Mr Meremere gained a further 15-17 kgs in the period between when he turned 30 and injury on 12 January 2018, that being approximately a 13-year period, which would average about 1.23kg per annum. Dr Greenberg on 16 July 2019 calculated a weight gain post injury of 34.5 kg. Such a significant gain in weight over about a period of 18 months was quite different to the pattern of weight gain pre-injury.

77. I am satisfied that conservative treatment measures have been tried, such as dietary control and increased exercise program, but Mr Meremere's weight has not been controlled with conservative management. The doctors agree that Mr Meremere is a suitable candidate for bariatric surgery.

78. 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. The medical evidence establishes that Mr Meremere was obese before the injury but his BMI has increased since the injury so that he is now classified as morbidly obese. Morbid obesity is defined as a state of being overweight such that the obesity prevents normal activity or bodily function and will likely cause a serious or life-threatening disorder.

79. According to Mr Meremere's evidence and that of Drs Greenburg, Rastogi and Lim and Associate Professor Garett Smith, he has put on weight as a result of inactivity caused by his work injury. Drs Greenburg, Rastogi and Lim and Associate Professor Garett Smith have recommended that Mr Meremere have bariatric surgery to reduce weight to improve the left ankle problems. I accept the opinions of Drs Greenburg, Rastogi and Lim and Associate Professor Garett Smith. Therefore, I am satisfied that the applicant's injury has materially contributed to the need for surgery.

80. The next question to consider is whether the surgery is reasonably necessary as a result of the work injury. I am satisfied that weight loss could help alleviate the pressure and strain on Mr Meremere's left ankle. The evidence from Dr Lim, Dr Greenberg and Associate Professor Garett Smith supports this conclusion. In particular, Dr Lim noted that when Mr Meremere had hydrotherapy, his pain was reduced while he was in the pool due to the load reduction. In addition, Dr Rastogi considered that the weight loss would improve his psychological prognosis and result in better outcomes functionally and socially.

81. Associate Professor Garett Smith noted that the most predictable way for Mr Meremere to lose weight and maintain this loss was for him to undergo bariatric surgery. Associate Professor Garett Smith considered that this was likely to result in improvement of his ankle problems and a return to more productive work.

82. Associate Professor Garett Smith noted that it was broadly accepted within the medical community that the conservative (non-surgical) treatment of class 3 morbid obesity was very unlikely to be successful in the long term. Dr Edwards noted that that the literature indicated that at five years after a laparopscopic sleeve gastrectomy, the average patient loses 60% of excess body weight and achieves a BMI of 30 kg/m 2. Dr Greenberg noted that gastric sleeve surgery was currently regarded as the most effective operative procedure used to treat morbid obesity with the lowest risk profile. The cost of the surgery for the sleeve gastrectomy appeared to be in the vicinity of $30,000 according to Dr Greenberg.

83. I must be satisfied that all alternative and cost-effective alternatives have been exhausted. Conservative measures such as exercise and dieting have been explored and not resulted in any significant weight loss. According to Ms Zarshenas, Mr Meremere lost 1.6kg as at 12 August 2019 even though he was preparing and planning better meals, had reduced portion size and stopped fast food. She noted that his activity was still very limited due to his injury but he was seeing an exercise physiologist and going to the gym. I consider that this conservative treatment not been successful in achieving the required reduction in body weight. I also note that Associate Professor Garett Smith said that it was broadly accepted within the medical community that the conservative (non-surgical) treatment of class 3 morbid obesity was very unlikely to be successful in the long term.

84. I am satisfied that the medical evidence clearly supported the need for surgery. Even Dr Edwards was of the opinion that if conservative treatment failed to cause him to lose weight, Mr Meremere would be a good candidate for the gastric sleeve procedure suggested.

85. I am satisfied on the balance of probabilities that the treatment proposed by Associate Professor Smith, 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 Mr Meremere's employment with the respondent on 12 January 2018.

**FINDINGS**

86. The applicant sustained injury to his left ankle arising out of or in the course of his employment with the respondent on 12 January 2018.

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

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

89. 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 12 January 2018.

**ORDERS**

90. The respondent to pay the applicant's reasonably necessary medical expenses with respect to the proposed bariatric surgery as outlined by Associate Professor Garett Smith, in the form of a sleeve gastrectomy, and associated expenses, pursuant to s 60 of the *Workers Compensation Act 1987*.