

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5512/19
Applicant: Kathryn Ann Kratz
as executrix of the estate of the late Owen Beddall
Respondent: Qantas Airways Limited
Date of Determination: 7 February 2020
Citation: [2020] NSWCC 36

The Commission determines:

1. The worker, Owen Beddall (the deceased worker) died on 27 May 2016.
2. The deceased worker died as a result of an injury sustained on 8 August 2011.
3. There was no one dependent upon the deceased worker for support as at the date of his death.
4. The applicant, Kathryn Ann Kratz, is the executrix of the estate of the deceased worker and was granted probate by the Supreme Court of New South Wales on 21 December 2016.
5. The applicant is the legal personal representative of the deceased worker by way of the grant of probate made to her by the Supreme Court of New South Wales.
6. The lump sum benefit payable in accordance with section 25 of the *Workers Compensation Act 1987* at the date of death of the deceased worker is \$760,000.
7. There is no basis for an award of interest on the lump sum benefit as provided by section 109 of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Commission orders:

1. The respondent is to pay the applicant, Kathryn Ann Kratz, the sum of \$760,000 under section 25 (1)(a) and section 32 of the *Workers Compensation Act 1987*, in her capacity as the legal personal representative of the deceased worker.
2. The respondent is to pay Pamela Beddall the sum of \$3,735 for funeral expenses pursuant to section 26 of the *Workers Compensation Act 1987*.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker
Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Kathryn Ann Kratz, is the executrix of the estate of the late Owen Beddall (the deceased worker) who passed away on 27 May 2016.
2. The deceased worker sustained an injury to his lower back in the course of his employment as a flight attendant with the respondent, Qantas Airways Limited, on 8 August 2011. The respondent admitted liability for that injury.
3. As a result of that injury the deceased worker underwent five operations on his lower back, including a L5/S1 fusion on 16 June 2015 and a revision fusion on 22 June 2015.
4. The deceased worker had episodes of deep vein thrombosis in both legs and his left arm prior to his lower back injury. The deceased worker also had excessive weight prior to the lower back injury and had undergone gastric banding surgery on 19 August 2010.
5. On 27 May 2016, police responded to a welfare check to find that the deceased worker had passed away at his residence in Prahan in Melbourne, Victoria. An autopsy report from Dr Bradford dated 3 October 2016 found the cause of death to be pulmonary embolus. Coroner Paresa Spanos made a finding on 5 February 2018 that the deceased worker died at his home on or about 26 May 2016 from natural causes, namely pulmonary embolus, with morbid obesity noted as an indirect contributing factor.
6. The applicant claims a lump sum death benefit provided by section 25 of the *Workers Compensation Act 1987* (the 1987 Act) in her capacity as executrix of the estate of the deceased worker, and the payment of funeral expenses. The applicant claims that the death of the deceased worker results from the work injury in that the deceased worker gained excessive weight due to his immobility because of the lower back injury, which in turn contributed to the pulmonary emboli, which then caused the deceased worker to pass away.
7. Those claims are disputed by the respondent.

ISSUES FOR DETERMINATION

8. The parties agree that the following issue remains in dispute:
 - (a) Whether the death of the deceased worker results from an injury that the deceased worker sustained in the course of his employment with the respondent (section 25 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

9. The parties attended a conference and hearing on 31 January 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.
10. Mr Morgan appeared for the applicant, instructed by Mr Hyland. Mr Rickard appeared for the respondent, instructed by Mr Turner.

11. The respondent sought to rely upon a report from Dr Flecknoe-Brown, haematologist, dated 22 January 2020. The applicant objected to this. Mr Morgan submitted that the respondent had not given notice of an intention to obtain such a report at the telephone conferences conducted on 20 November 2019 and 4 December 2019 or in the section 74 notice dated 17 July 2018, and the report had only been served on 27 January 2020. Mr Morgan also submitted that it was in breach of Regulation 44 of the *Workers Compensation Regulation 2016* as the respondent was now seeking to rely upon two forensic medical reports, having already included Dr Slezak in the Reply.
12. Mr Rickard submitted that there was no new material in the report that had been not been addressed by other experts, and that the report was from a haematologist and the deceased worker had been treated by a haematologist in the past. Mr Rickard submitted that the report would be of assistance in a dispute that involved complex medical issues.
13. I did not allow the report into evidence. My primary reason was because the respondent had not previously indicated that it intended to obtain such a report, it had ample time in the past to do so, and the applicant's case should not be delayed or prejudiced by the late service of an entirely new medical report. The admission of the report would also offend Regulation 44 of the *Workers Compensation Regulation 2016*.
14. The applicant sought to amend the Application to Resolve a Dispute (ARD) to include a claim for interest pursuant to section 109 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) from either 26 October 2017 (when the claim was first made by the mother of the deceased worker), 11 December 2018 (when the claim was amended to have the claim brought by the applicant), or 23 October 2019 (when the ARD was filed). That was not opposed by the respondent.

EVIDENCE

Documentary evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply and attached documents, and
 - (c) Application to Admit Late Documents filed by the applicant on 23 January 2020.

Oral evidence

16. There was no application to cross examine the applicant or to adduce oral evidence.

FINDINGS AND REASONS

The evidence

17. The deceased worker sustained an injury to his lower back on 8 August 2011 when participating in a compulsory training exercise in the course of his employment with the respondent.
18. From my review of the material, the deceased worker underwent five operations on his lower back, all performed by Dr Steel, neurosurgeon, as follows:
 - (a) An urgent lumbar microdiscectomy on 8 August 2011;
 - (b) A further microdiscectomy on 18 June 2013;
 - (c) A further microdiscectomy on 12 March 2014;
 - (d) A fusion and repeat decompression on 16 June 2015;
 - (e) A revision fusion on 22 June 2015.

19. Dr Steel writes in a report dated 20 September 2017 that when the deceased worker first came under his care on 13 August 2011, the weight of the deceased worker was recorded as around 100 kilograms. Dr Steel then writes that the deceased worker self-reported a weight of 105 kilograms on 17 June 2013, and on 16 June 2015 the deceased worker was marked down as weighing 120 kilograms.
20. The weight of the deceased worker recorded in the Autopsy Report of Dr Bradford dated 3 October 2016 is 134 kilograms.
21. The medical evidence indicates that the deceased worker had problems with excessive weight prior to the work injury. There is an entry in the clinical notes from Victoria Harbour Medical Centre in June 2010 of the deceased worker gaining 25 kilograms in the past 10 years.
22. The applicant underwent gastric banding surgery in 2010 and there is a further entry in those notes on 8 September 2010: "lost 10kg since lap band; due for re-tightening in 2/52." In a referral letter dated 29 November 2010 from Dr Sgroi to Dr Ponnuthrai of the Epworth Hospital Victorian Heart Centre, it is noted that the deceased worker had lost 20 kilograms since his lap banding in August 2010.
23. The deceased worker had the gastric banding removed in January 2014 when he underwent surgery to treat severe diverticulitis.
24. In addition to problems with excessive weight, the deceased worker also had episodes of deep vein thrombosis prior to his lower back injury. Part of the background health of the deceased worker that is set out by Dr Slezak in a report dated 1 December 2017, and which is not disputed by the applicant, includes the following:
 - (a) Right lower limb deep vein thrombosis in 2006;
 - (b) Left upper limb deep vein thrombosis in 2010 (although on my review of the material it was the right upper limb);
 - (c) Further lower limb deep vein thrombosis in 2011.
25. The clinical notes from Victoria Harbour Medical Centre include several entries during 2010 of the deceased worker seeking treatment for deep vein thrombosis. Dr Sgroi issued Medical Certificates for Centrelink on 9 March 2011 and 11 June 2011 certifying that the deceased worker suffered right arm deep vein thrombosis.
26. There is a report in evidence from Dr Cole-Sinclair of the Haematology Department of St Vincent's Hospital in Melbourne dated 23 December 2010 which includes the following:

"Given his previous apparent history of lower limb thrombosis & this episode, he should have meticulous thromboprophylaxis with LMWH such as Clexane, 40 or 60 mg daily, with additional measures as appropriate at any time of increased thrombotic risk such as prolonged immobility, anything other than trivial surgery etc. If he has further thrombotic or thrombo-embolic episodes then lifelong prophylactic warfarin should be at least be considered."
27. The Autopsy Report of Dr Bradford dated 3 October 2016 states the cause of death of the deceased worker to be pulmonary embolus with a contributing factor of morbid obesity. That is followed by the following "Comment" which includes:

"The post-mortem examination has identified pulmonary emboli which have come from clots in the lower leg (deep vein thrombosis). This outcome is associated with morbid obesity and also often degrees of inactivity."

In addition, there is a marked fatty change of the liver and mild enlargement of the heart no significant injuries have been identified with acute death relating to clots in the lungs thus preventing the lungs oxygenating the blood to send the organs of the body.”

28. Dr Steel has provided a report dated 20 September 2017 at the request of the solicitors for the applicant. He writes that in regard to the deceased worker: “I have been asked to write a report regarding an expert opinion as to whether his work accident caused him to become morbidly obese and as a result sustain a pulmonary embolus.”
29. Dr Steel writes:

“There is no question that the pain restricted his activity levels and had to rest for prolonged periods of time which contributed to his deconditioning and weight gain. Owen reported significant pain throughout 2013 through to 2016. The decision for surgery was always difficult because of his size. Larger patients have considerably more complications following spine surgery than slim patients, they are more prone to sedentary complications such as deep venous thrombosis, pulmonary embolus, wound infection, wound dehiscence and so forth.”
30. Dr Steel concludes:

“It appears that as a result of the accident, Owen was required to undergo several surgical procedures and these injuries rendered him sedentary for long periods of time leading to an increase in his weight. When I first met Owen however, he was significantly overweight at the time of his original admission to St Vincent’s Hospital. Over the course of the subsequent 4 years, his weight increased 20kg.”
31. Dr Gorman, consultant general physician, has provided a report dated 27 August 2019 at the request of the solicitors for the applicant.
32. Dr Gorman notes the various medical problems that the deceased worker suffered from which have already been referred to in this decision. He also summarises the history of the treatment for the lower back injury sustained by the deceased worker and the autopsy report prepared for the Coroners Court of Victoria.
33. In answer to a question of the causal relationship between the spinal injuries of the deceased worker and his subsequent weight gain, and the pulmonary embolus which caused the death of the deceased worker, Dr Gorman answers:

“On this background of having had a previous deep venous thromboses, Mr Beddall gained a significant amount of weight due to his spinal injury and resultant inactivity. It seems that he had previously lost weight after his gastric banding surgery, but this weight loss did not continue after his spinal injury.

I believe that there is a causal relationship between his inactivity and obesity and the subsequent pulmonary embolus more likely because he had a history of deep venous thrombosis.”
34. Dr Gorman then writes:

“...whilst there was a history of deep venous thromboses, he had not previously had pulmonary emboli. I believe that the inactivity and resultant deconditioning and weight gain was substantial contributing factors to the occurrence of the pulmonary embolus, which resulted in his death. As well, if any of the medications found on toxicology contributed, they also were for treatment of his spinal condition following the work injury. Therefore, again the work injury was a substantial contributing factor to his pulmonary embolus and death.”

35. Dr Slezak, consultant physician, has provided a report dated 1 December 2017 at the request of the solicitors for the respondent.
36. Dr Slezak also sets out the various health problems which the deceased worker suffered from which have already been referred to in this decision but adds the following:
 - (a) A reference to obstructive sleep apnoea in July 2014;
 - (b) Suspected pulmonary embolus in 2014;
 - (c) A diagnosis of type 2 diabetes in February 2015.
37. Dr Slezak considers that the history of recurrent deep venous thrombosis and pulmonary embolus raises the very distinct possibility that the deceased worker suffered with an underlying thrombophilic syndrome which would predispose him to further thrombo-embolic disease.
38. Dr Slezak accepts that the deceased worker would have gained weight partly as a result from his enforced immobility due to the work injury and also due to the removal of the gastric band.
39. Dr Slezak also considers poorly controlled sleep-disordered breathing is associated with an increased risk of thrombo-embolic disease. He also considers concurrent use of benzodiazepines and narcotic analgesics may result in excessive drowsiness, further aggravating underlying sleep-disordered breathing and contribute to significantly reduced activity.
40. Dr Slezak concludes his opinion as follows:

“Importantly, lower limb deep vein thrombosis was noted at autopsy and it is likely, on the balance of probability, that the multiple pulmonary emboli noted at autopsy arose from the lower limb deep venous thrombosis (in turn secondary to recent immobility and/or underlying thrombophilia).

In summary, it is evident therefore that a number of factors would have contributed to the worker becoming morbidly obese, i.e., the aftermath of the injury/incapacity/sedentary lifestyle, though this would have occurred on a pre-morbid background of obesity.

The fatal multiple pulmonary emboli I believe on the evidence that is available to me would have arisen from an agonal lower limb deep venous thrombosis rather than the aftermath/incapacity following the work-related injury.”

The submissions of the parties to this dispute

41. Mr Morgan for the applicant submits that there is a clear causal chain of events from the lower back injury sustained by the deceased worker with a downward spiral in both his physical and psychological wellbeing which led to further weight gain and which in turn became a material contribution to the pulmonary emboli which unfortunately caused his death.
42. Mr Rickard points out that the deceased worker had a long history of deep vein thrombosis and the report from Dr Cole-Sinclair dated 23 December 2010 carried a clear warning of the ongoing risks that the deceased worker faced with this condition. Mr Rickard submits that it was the underlying deep vein thrombosis which caused the deceased worker to pass away and that his condition was such that it was “an accident waiting to happen”.

43. Mr Rickard submits that this is the opinion ultimately reached by Dr Slezak and his opinion should be accepted over those opinions of Dr Steel and Dr Gorman. Mr Rickard submits that the opinion of Dr Steel cannot be relied upon because he does not answer the very question put to him, namely whether the work injury caused the deceased worker to become morbidly obese and as a result sustain a pulmonary embolus. Mr Rickard submits that the opinion of Dr Gorman cannot be relied upon because he fails to take a full history of the deceased worker's prior medical conditions, including the removal of the lap band and the effect that may have had upon the weight gain of the deceased worker, or gives proper consideration to the past history of deep vein thrombosis.

Determination

Whether the death of the deceased worker results from the injury he sustained on 8 August 2011

44. It is the dicta of Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*) that is and remains the critical guide when determining whether the death of a worker results from a work injury. Kirby P said at [462]:
- “...it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act.”
45. Kirby P then said at [463-4]:
- “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. 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. In each case, the question whether the incapacity or death ‘results from’ the impugned work injury... is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions.”
46. The facts in *Kooragang* bear some similarity to the facts in this dispute. *Kooragang* also involved a claim for a lump sum death benefit where the deceased worker initially sustained a lower back injury, experienced prolonged pain, weight gain and anxiety and depression from that injury, and it was accepted by O’Meally CCJ in the Compensation Court of New South Wales and Kirby P (Sheller JA and Powell JA agreeing) in the Court of Appeal that a myocardial infarction which caused the death of the worker resulted from the stress caused by the work injury.
47. Mr Rickard argues that the circumstances in *Kooragang* were fundamentally different to this dispute because in *Kooragang* there was an entirely new set of events which took place following the work injury but which ultimately led to the death of the worker, whereas in this dispute there was a long history of an event which pre-dated the work injury and which caused the death of the deceased worker, namely the deep vein thrombosis.
48. However, the fundamental task remains to determine whether on the basis of the evidence, including the expert evidence, there is an unbroken causal chain between the work injury sustained by the deceased worker and his subsequent death, so that one can be satisfied that the death of the worker results from that work injury.

49. To that end, I have not found the expert opinions relied upon in this dispute to be entirely satisfactory. I agree with the submission made by Mr Rickard that Dr Steel does not answer the question put to him, namely whether the work injury sustained by the deceased worker caused him to become morbidly obese and as a result sustain a pulmonary embolus.
50. Dr Steel is helpful in providing a history of his treatment of the deceased worker and providing his own records of the increase in weight of the deceased worker after the work injury. He is also aware that the deceased worker had a history of deep vein thrombosis prior to his work injury, including being off work for 11 months due to that condition.
51. I accept that as the treating specialist of the deceased worker, Dr Steel is in a good position to opine that the weight of the deceased worker increased by some 20 kilograms due to the deceased worker being sedentary for long periods of time because of his lower back injury. That opinion might be compromised if Dr Steel was not aware of the gastric banding having been removed in 2014 but Dr Steel does write in a report dated 3 April 2015 that he suggested to the deceased worker that he have bariatric surgery prior to further decompression and fusion surgery, given the risks the deceased worker faced due to his size and weight. Although there are various types of bariatric surgery, one of which involves gastric banding, in my view the recommendation made by Dr Steel of bariatric surgery provides a reasonable inference that Dr Steel was aware in 2015 that the deceased worker no longer had the benefit of gastric banding.
52. There are records from Dr Steel before and after the removal of gastric banding in 2014 which confirm that the deceased worker was struggling with weight. In reports dated 30 August 2013 and 3 April 2015 Dr Steel writes that he encouraged the deceased worker to lose as much weight as possible. I therefore consider that the records from Dr Steel can be relied upon for me to accept his opinion that the pain experienced by the deceased worker due to his lower back injury caused a restriction in activity which in turn led to an increase in his weight following the work injury. However, Dr Steel ultimately does not answer the question asked of him, being whether he considers the increase in weight of the deceased worker was a cause of the pulmonary embolus.
53. I also consider there are deficiencies in the expert evidence provided by Dr Gorman. Although Dr Gorman is provided with the autopsy report of Dr Bradford, he makes no mention in his own report of the conclusion drawn by Dr Bradford that the pulmonary emboli came from clots in the lower leg of the deceased worker, which in turn were associated with morbid obesity. Dr Gorman opines that “there is a causal relationship between his inactivity and obesity and the subsequent pulmonary embolus more likely because he had a history of deep venous thrombosis” but does not identify the link between the pulmonary emboli and the morbid obesity of the deceased worker, which Dr Bradford identifies as the deep vein thrombosis found at autopsy. Dr Gorman does acknowledge the deceased worker’s history of deep vein thrombosis but not the actual deep vein thrombosis identified by Dr Bradford in the autopsy report which led to the pulmonary emboli.
54. It may be that Dr Gorman has assumed from the autopsy report that the pulmonary emboli were caused by the deep vein thrombosis in the lower leg but I do not consider that this has properly been explained by Dr Gorman. It is incumbent for an expert to provide a proper explanation for reaching an opinion. As McColl JA (Mason P and Beazley JA agreeing) said in *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42 (*Hevi Lift*) at [84]: “It has been long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it.”
55. Dr Slezak is the only expert to acknowledge that the deceased worker had the gastric banding removed after the work injury. While Dr Slezak opines that “undoubtedly” there would have been weight gain by the deceased worker following the removal of the gastric band, he also opines that there would also have been weight gain due to the enforced immobility of the deceased worker.

56. Dr Slezak then opines that based on the material from the autopsy it is likely, on the balance of probability, that the multiple pulmonary emboli suffered by the deceased worker arose from the lower limb deep venous thrombosis, which was “in turn secondary to recent immobility and/or underlying thrombophilia.” Dr Slezak’s ultimate conclusion is that the fatal multiple pulmonary emboli arose from the lower limb deep venous thrombosis, rather than the aftermath of the work injury, but he does not provide any reason or explanation for making that distinction nor does he reconcile his statement that the deep vein thrombosis was secondary to recent immobility and/or underlying thrombophilia.
57. I consider that Dr Slezak does draw a link between the lower back injury sustained by the deceased worker and his subsequent weight gain due to lack of mobility and the lower limb deep vein thrombosis found at the time of his death, which in turn led to the pulmonary emboli. He chooses not to implicate the effects of the work injury in the cause of death of the deceased but provides no adequate explanation for this.
58. However, when the link that is drawn by Dr Slezak is added to the opinion of Dr Steel, that the deceased worker did gain a significant amount of weight following his work injury due to his lack of activity caused by his lower back pain, and the conclusion made by Dr Bradford, that the excessive weight of the deceased worker contributed to the development of the lower limb deep vein thrombosis that was found at the time of his death, I consider there is a chain of events that allows me to be satisfied the death of the deceased worker did result from his work injury. The deceased did have an increase in weight following the work injury due to his inactivity and the weight gain did contribute to the deep vein thrombosis which caused the pulmonary emboli and the subsequent death of the deceased worker.
59. I disagree with the submission made by Mr Rickard that the deep vein thrombosis can be isolated and that it is unrelated to the work injury sustained by the deceased worker. It is well recognised that a medical condition can have multiple causes and what must be determined is whether the work injury is the cause of a condition which results in the death of the deceased worker.
60. There have been decisions since *Kooragang* which have addressed the application of the term ‘results from’. In *State of New South Wales v Rattenbury* [2015] NSWWCPCD 46 (*Rattenbury*) DP Roche addressed the term ‘results from’ in the context of section 33 of the 1987 Act, being a provision for the payment of weekly payments of compensation for total or partial incapacity, and said at [91]:
- “The attack on the Arbitrator’s conclusion at [116] fails to acknowledge one of the most fundamental principles of workers compensation law, namely, that a claimant only has to establish that his or her incapacity has resulted from the relevant injury (*Kooragang*) and, as the Arbitrator noted (at [117]), there can be multiple causes of an incapacity (*Calnan v Commissioner of Police* [1999] HCA 60; (1999) 73 ALJR 1609; *Conkey & Sons Ltd v Miller* (1977) 51 ALJR 583 at 585; *Cluff v Dorahy Bros. (Wholesale) Pty Ltd* [1979] 2 NSWLR 435).”
61. Roche DP also addressed the term ‘as a result of an injury received by a worker’ in the context of section 60 of the 1987 Act, being the provision for the payment of medical expenses, in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCPCD 49 (*Murphy*) and said 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; *Pymont 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] NSWCCPD 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)."

62. The deceased worker had a history of deep vein thrombosis prior to the work injury, but for reasons I have already given, I find that the weight gained by the deceased worker following his work injury materially contributed to, and was at least a cause of, the development of the deep vein thrombosis that was found at the time of his death and which in turn led to the pulmonary emboli.
63. I therefore find that there is an unbroken chain of events from the work injury sustained by the deceased worker to the pulmonary emboli which caused his death, which allows me to conclude that the death of the deceased worker on 27 May 2016 results from the work injury sustained on 8 August 2011.

Whether there was any person dependent on the deceased worker at the time of his death

64. The Death Certificate issued in respect of the deceased worker by the Registrar of Births, Deaths and Marriages in the state of Victoria states that he was never married and had no children. There is no evidence available which indicates that the deceased worker was in a de facto relationship at the time of his death.
65. Statutory declarations have been provided by the mother of the deceased worker, Pamela Beddall; the brother of the deceased worker, Daniel Beddall; and the sister of the deceased worker, Elizabeth McDonald, which declare that none of those were dependent upon the deceased worker.
66. Pamela Beddall has also provided a statutory declaration wherein she declares that she and her husband adopted the deceased worker when he was six weeks of age. Ms Beddall declares that the deceased worker was in his mid-teens when he made contact with his birth mother, Debra Stubbs, who Ms Beddall was able to identify from her correspondence with a government department in the Northern Territory, where the deceased worker had been born. Ms Beddall declares that the deceased worker told her that he subsequently had a falling out with Ms Stubbs. Ms Beddall declares the deceased worker had told her that his birth father had passed away but does not know any more details in regard to this.
67. The solicitors for the applicant sent letters regarding this claim to all addresses of 'D Stubbs' found in the Telstra white pages in the state of Queensland, being the State where the deceased worker made contact with his birth mother. Michael Hyland, special counsel, states that he received no positive reply from this correspondence.
68. I am satisfied from all of the evidence provided that there was no one dependent on the deceased worker at the date of his death.
69. The last will of the deceased worker dated 27 July 2007 names the applicant to these proceedings, Kathryn Ann Kratz, as the executor and trustee of his will and probate of that will was granted to the applicant by the Supreme Court of New South Wales on 21 December 2016.

70. Pursuant to section 25 (1)(a) of the 1987 Act, the lump sum death benefit of \$760,000 will be paid to the applicant, Kathryn Ann Kratz, as the legal personal representative of the deceased worker by way of the grant of probate made to her by the Supreme Court of New South Wales.

The claim for interest

71. The power to award interest is provided in section 109 of the 1998 Act, which relevantly provides:

“(1) In any proceedings before the Commission, the Commission may order that there is to be included, in any sum to be paid, interest at such rate as the Commission thinks fit on the whole or any part of the sum for the whole or any part of the period before the sum is payable, subject to the limitations imposed by this section.

(2) Interest cannot be ordered under this section:

- (a) ...
- (b) on any compensation payable under this Act for any period before a claim for the compensation was duly made, or
- (c) on any compensation payable under this Act for any period during which proceedings before the Commission were adjourned on the application of the claimant for the compensation or pursuant to section 102.

(3) ...”

72. In *Kaur v Thales Underwater Systems Pty Ltd* [2011] NSWCCPD 6 (*Kaur*), Keating P said at [139]:

“Section 109(2)(b) of the 1998 Act prohibits interest on any award of compensation payable under the Act for any period before a claim for the compensation was duly made. I accept the submission that the claim for compensation on behalf of the appellants was not duly made until the day of the arbitration. I therefore accept Thales’s submission that, as at the arbitration, the appellants could not be entitled to interest pursuant to s 109 of the 1998 Act.”

73. In a recent arbitral decision of *Shanika Cooper v G & W Mudge Concreting Pty Ltd & others* (WCC6411/18) Arbitrator Wynyard referred to the decision in *Kaur* to form the view that the phrase “duly made” refers to a date when an applicant’s claim is fully particularised. I agreed with that approach in a subsequent unpublished decision of *Lavelle v David Paul Browne & others* (WCC533/19).
74. Although the initial claim for a lump sum death benefit was made by Pamela Beddall by a letter from LHD Lawyers on 26 October 2017 (when she claimed to be the only dependent of the deceased worker), and was then amended by a letter dated 11 December 2018 to have the claim made by the applicant in her capacity as executrix of the estate, in my view the claim was not fully particularised until a matter of days before the arbitration hearing when the Application to Admit Late Documents was filed by the applicant on 23 January 2020. That Application included documents which addressed the issue of dependency and any possibility that the birth mother of the deceased worker might have a claim. Until those documents were provided the claim could not be regarded as fully particularised.
75. In those circumstances, I do not consider it appropriate to award interest for a period of no more than eight days between the filing of the Application to Admit Late Documents and the arbitration hearing on 31 January 2020.

Funeral expenses

76. The funeral expenses for the deceased worker which amounted to \$3,735 have been met by Pamela Beddall and there will be an order that the respondent pay Ms Beddall that amount of \$3,735 pursuant to section 26 of the 1987 Act.