WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**1568/20**
Applicant:	**Afshin Behnampour**
Respondent:	**Shein Painting Pty Ltd**
Date of Determination:	**10 June 2020**
Citation:	**[2020] NSWWCC 191**

The Commission determines:

1. The applicant sustained a lumbar spine condition, psychological symptoms and weight gain as a consequence of the agreed injury to his right knee in the course of his employment with the respondent on 14 April 2017.

2. The proposed gastric bypass surgery recommended by Dr Manni is reasonably necessary medical treatment as a result of the right knee injury on 14 April 2017 and the consequential conditions including weight gain, psychological symptoms and to the lumbar spine.

3. The respondent is to pay the cost of the laparoscopic single anastomosis gastric bypass surgery, hospital fees, anaesthetists fees and rehabilitation/recovery pursuant to section 60 of the *Workers Compensation Act 1987* at the applicable gazetted rates.

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

Josephine Bamber
Senior Arbitrator

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

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Afshin Behnampour was employed by the respondent, Shein Painting Pty Ltd, as a painter. On 14 April 2017, he sustained an injury to his right knee. He underwent meniscectomy surgery on 26 July 2018, and he alleges sustained a consequential lower back condition. On 2 September 2018, he underwent further surgery to his right knee. He alleges due to the injury and its sequelae he has sustained a psychological condition, significant weight gain due to immobility and heavy reliance on medication prescribed for his right knee.

2. Mr Behnampour's treating specialist, Dr Manni, has recommended that he undergo laparoscopic single anastomosis gastric bypass surgery. In these proceedings Mr Behnampour's claim for compensation is confined to the cost of this proposed surgery together with the associated hospital fees, anaesthetist's fees and rehabilitation/recovery.

3. The respondent's insurer has issued dispute notices dated 14 May 2019, 25 June 2019 and 28 February 2020. In the notice of 25 June 2019, the insurer advised "The claimed injury to your lumbar spine and your weight concern are not considered consequential injuries as a result of the workplace incident to the right knee." The insurer also noted that a request for review was made, as Mr Behnampour believed that his increase in weight is a direct result of the workplace injury and psychological condition, which GIO did not admit liability for. The insurer declined liability quoting from various medical reports and the clinical notes from Dr Osman from the Priority Medical Centre.

4. However, in the insurer's notice dated 28 February 2020 the injury was described as "right knee and secondary anxiety and depression" and the issue in dispute was described as "Liability-lower back injury". Reference is made in the body of this notice to a second internal review on 2 October 2019 (which is not before the Commission) maintaining the declinature for the proposed gastric bypass surgery.

5. At the arbitration hearing, the respondent's counsel confirmed the issues in dispute were whether the lumbar spine condition was consequential to the right knee injury and whether the claim for the proposed bariatric surgery was reasonably necessary as a result of the injury on 14 April 2017.

PROCEDURE BEFORE THE COMMISSION

6. A conciliation conference/arbitration hearing was conducted by telephone on 13 May 2020. Mr Luke Morgan, counsel, instructed by Basema El Masri, solicitor, appeared for Mr Behnampour. Mr Behnampour was also in attendance together with Ms Shadan Seeifollahi, interpreter. Mr Andrew Combe, counsel, instructed by Mr Robbie Elder, solicitor, appeared for the respondent.

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

EVIDENCE

Documentary evidence

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

   (a) Application to Resolve a Dispute (ARD) and attached documents, and
   (b) Reply and attached documents.

Oral evidence

9. There was no oral evidence. Both counsel made oral submissions which were sound recorded. A copy of the recording is available to the parties.

FINDINGS AND REASONS

Mr Behnampour's statement

10. Mr Behnampour has provided a statement dated 12 March 2020. He is aged 45. He migrated to Australia from Iran in 2012. Upon his arrival he worked for a number of companies as a painter before starting the respondent company in 2016. He states on 14 April 2017 he was painting at a property in Neutral Bay when he sustained an injury to his right knee.

11. He outlines the treatment he has undertaken including physiotherapy, hydrotherapy as well as anti-depressant medication. Mr Behnampour says he experienced extremely low mood, low motivation and excessive sleeping and that the pain and restriction of movement was preventing him from doing any exercise. He was prescribed Zoloft, an anti-depressant. He said he began to rely on pain medication, and he began to gain more weight due to lack of exercise[1].

12. Mr Behnampour states that after the meniscectomy surgery performed on his right knee on 26 July 2018 he continued to experience pain and restriction of movement in his knee which made it difficult to walk properly because he felt severe pain when he placed pressure and weight on his right knee. He adds that there was a change in his gait because he was trying to relieve the pressure from his right knee, and he says he developed lower back pain. He refers to the treatment he had for the back pain, including two cortisone injections at St George Hospital. He says these failed to improve his symptoms. He said the back pain would fluctuate in intensity and occasionally the pain would travel down his legs, mostly on the left side.

13. He relates that he underwent the further surgery to his right knee on 2 September 2018 performed by Dr Pavitir Sunner, but that did not help his condition.

14. Mr Behnampour says due to the restriction of movement and pain in both his back and right knee his ability to do any exercise was significantly reduced. He also describes experiencing constipation. He states that prior to his injury he weighed 85 kilograms and after the injury his weight increased to 126 kilograms.

15. He says in October 2018, Dr Ghahreman suggested he consult a bariatric surgeon, Dr Manni, for possible weight reduction surgery. Mr Behnampour says he saw Dr Manni on 11 December 2018 to discuss the weight loss options and he was recommended to undergo laparoscopic single anastomosis gastric bypass surgery. Mr Behnampour says he wishes to undergo this procedure. He says prior to the injury he was a happy active man and now he

[1] ARD p 2 at [11].

does not do much as he is in constant pain and is heavily reliant on pain medication. He speaks of his depression.

Dr Osman

16. Dr Osman is Mr Behnampour's general practitioner. His clinical notes for 10 July 2017 refer to the right knee injury at work[2]. Further details are recorded in the entry on 28 July 2017 including that Mr Behnampour went to a general practitioner the next day. Dr Osman observed that he had a limp in the right leg, and he was not fully flexing the right knee and was favouring the left leg. On examination there was limited flexion and some mild swelling and tenderness and that he was unable to squat fully.

17. On 26 August 2017, there is reference to Mr Behnampour's knee being aggravated by prolonged standing more than 20 minutes, prolonged walking, squatting/bending, stair climbing and that it is always painful, increasing throughout the day with activity. On 14 November 2017, Dr Osman noted that Mr Behnampour felt physiotherapy had been helping, however, he was still complaining of knee pain. Mr Knapman, physiotherapist, reported to Dr Osman on 13 December 2017 noting the right knee with treatment had some reduction in swelling by 1 cm and there was 8 degrees more of active range of motion[3].

18. On 5 February 2018, it was noted that he had more pain after the physiotherapy exercises the prior week and he had to take Panadeine Forte tablets. He also was feeling down and wanted to see a psychiatrist. A referral was given to Dr Benjamin, psychiatrist. However, due to delay in him being able to obtain an appointment with Dr Benjamin, a referral was given for him to see Dr Mayur and he was prescribed Mirtanza. The referrals to both Drs Benjamin and Dr Mayur are briefly expressed just stating that Mr Behnampour has a workers compensation injury for which he was being treated by physiotherapy and rehabilitation and he felt down[4].

19. On 10 February 2018, Mr Behnampour's weight was recorded at 118.8 kg[5]. On 19 February 2018, Mr Behnampour saw Dr Reza Pishyar, psychologist, at the same practice as Dr Osman and he records details about Mr Behnampour's personal life and that Mr Behnampour told him because of the accident he has stayed indoors and was losing all of his social and interpersonal connections. He also lost his driver's licence due to a drink driving offence. It was noted he was feeling depressed. The doctor diagnosed reactive depression due to his physical issues[6].

20. On 27 March 2018, Dr Mayur has a clinical note about Mr Behnampour's psychological state and records that he "has gained 20kgs of weight this year"[7]. It is noted that he feels very sad, has lost interest in singing, swimming and sport and that he loses his appetite for two days and he binges and vomits, he is ashamed about this. Mirtazapine was stopped and he was commenced on Sertraline and a diagnosis of Major Depression and OCD is noted.

21. On 29 March 2018, Mr Knapman, physiotherapist, reported to Dr Osman that Mr Behnampour was progressing slowly, and the main concern was his attendance to physiotherapy and compliance completing his home exercise program[8]. Dr Osman noted in his clinical notes for that day that Mr Behnampour was complaining of pain after physiotherapy, but he thought it was helping and he was doing exercises at home, with the bike as well. This was also noted on 26 April 2018 and Dr Osman added "C/o Back pain now more so…" On examination he recorded that the range of movement in the lower back was

[2] ARD P 83.
[3] ARD p 249.
[4] ARD pp203 and 207.
[5] ARD p 96.
[6] ARD p 98.
[7] ARD p 100.
[8] ARD p 252.

reasonable, with some pain on flexion. He noted that Mr Behnampour wanted to gain a forklift licence but had issues with the theory component. He was going to try another course starting in May. He was referred to Dr John Harrison[9] and prescribed Panadeine Extra and Panadol Oesteo but told not to take them together[10].

22. On 1 May 2018, Dr Mayur noted he had developed alcohol dependence and started outpatient detox. Valium and Sertraline were prescribed. He was also taking Mobic.

23. On 11 May 2018, Dr Kaur recorded that Mr Behnampour had worsening back pain for two to three months. The pain was radiating down his right leg. On the Workers Compensation Medical Certificate of the same date, while Dr Kaur does not refer to back pain, there is a reference to "MRI Lumbar spine" in the management plan[11]. On 15 May 2018, he saw Dr Mayur and complained about his back and knee. It is noted that his alcohol use had reduced. Mr Behnampour also saw Dr Osman on the same day, and he complained of a lot of pain in his right knee. He was prescribed Lyrica and Panadeine Extra. Dr Osman gave him the results of his lumbar MRI scan which revealed a disc bulge at L4/5[12]. On 17 and 18 May 2018, there are entries about suicidal thoughts.

24. On 18 May 2018, the insurer sent Dr Osman and the treating psychiatrist a lengthy email setting out the concerns of the rehabilitation provider about Mr Behnampour's suicide ideation and they had removed a knife from his premises[13].

25. On 24 May 2018, Dr Osman recorded that Mr Behnampour complained of right knee pain and low back pain and low mood. On the Workers Compensation Medical Certificate of the same day, Dr Osman has added to the diagnosis section "low back pain (likely secondary to knee pain)."[14] In the section of the certificate about factors delaying recovery, the doctor has written "back pain radiating down right leg last 2 months". A referral was given to the dietician Geeta Khurana referring to the work injury and "increase in weight" and that he was depressed.[15]

26. On 5 June 2018, it is recorded that the orthopaedic surgeon had advised him to give up smoking and to lose weight. He was given a Champix starter pack and a leaflet about losing weight. On 31 July 2018, Dr Osman recorded that Mr Behnampour had undergone a right knee operation on 26 July 2018 and had some pain. Panadeine Forte, Tramadol and Palexia were prescribed[16].

27. On 25 August 2018, Ms Geeta Khurana, dietician, notes that Mr Behnampour weighs 126kg, and that he had an accident 18 months back and had gained about 26kg. It was noted that he wanted a prescription for Duromine[17]. That day he saw Dr Mohmand who prescribed the Duromine. The Sertraline medication was ceased. He was warned about side effects of Duromine and to return if his mental health deteriorated. On 28 August 2018, Dr Osman saw Mr Behnampour regarding sleep issues. He had been biting his tongue in his sleep and having nightmares and suicidal thoughts. He was taking Sertraline and an appointment was made with a psychiatrist to review his medication.

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[9] ARD p 217.
[10] ARD p 102.
[11] ARD p 222.
[12] ARD p 104.
[13] ARD p 254.
[14] ARD p 225.
[15] ARD p 229.
[16] ARD p 109.
[17] ARD p 112.

28. On 29 August 2018, Dr Osman completed a questionnaire from the insurer[18]. He was asked to give a diagnosis regarding the back pain, and he advised:

> "He has been complaining of his back pain for a while now. Back pain is likely related to his knee injury. Perhaps back injury is related to the fall. Refer to MRI dated 14/5/18."

29. In response to further questions, Dr Osman advised the insurer he had referred Mr Behnampour to Dr Rao who had provided treatment for his back.

30. On 30 August 2018, Mr Behnampour saw Dr Mayur who noted he had stopped taking the Sertraline and was feeling low and depressed. He was losing weight with the Duromine and eating less and reduced his alcohol consumption. However, his sleep wake cycle was disrupted, and he was having nightmares. On 11 September 2018 Dr Mayur recorded that Mr Behnampour had re-started using 200-300ml of vodka every day. There is also mention of him taking Duromine and the prior week going to the swimming pool three times[19]. On 19 September 2018, Dr Osman noted that Mr Behnampour complained of back pain being severe 7-8/10 and he was given prescriptions for Lyrica and Mobic.

31. In the St George Hospital notes for 11 October 2018 in relation to the lumbar injection, Mr Behnampour's weight is given as 126kgs[20].

32. On 17 October 2018, Dr Osman records that Mr Behnampour has had the L4/5 injection but does not feel much difference[21]. A referral for physiotherapy was given. Ms Cecilia Mizzi, physiotherapist at Mr Knapman's practice reported to Dr Osman on 29 October 2018, noting the treatment she had given for the lumbar spine and right knee. Ms Mizzi noted that Mr Behnampour had a moderate loss of lumbar range especially in flexion and extension[22].

33. On 16 November 2018, Dr Osman noted that the insurance company had approved the bariatric surgery and that Mr Behnampour was keen to do it. It was also noted that he had had a low back steroid injection the previous day and that hydrotherapy and physiotherapy was helping him, but he was still complaining of low back pain[23]. On 12 December 2018, Dr Osman noted that Mr Behnampour had seen Dr Manni who wanted him to lose 3-4 kilos before the bariatric surgery and he was to be referred to a dietician. On 15 January 2019 Dr Osman recorded the bariatric surgery was to take place at the end of the month and on 19 January 2019, he weighed 124kgs. On 31 January 2019, Dr Osman noted the surgery was booked for 7 March 2019[24]. On 19 February 2019 Dr Osman recorded that Mr Behnampour needed to separate his drinking from driving and he was going on the interlock program for a drink driving offence. His weight at that stage was 123kg[25].

34. On 13 March 2019, Dr Osman held a case conference with Mr Behnampour, the rehabilitation provider and a representative of the insurer. It was noted that Mr Behnampour's mood was worsening, he had tried to end his life and he had back pain. It was noted his case manager had changed and his operation was cancelled. The doctor noted "feels Afshin not focussed on his goals after surgery was cancelled". It is not clear if this is what the case manager thought.

[18] ARD p 270.
[19] ARD p 116.
[20] ARD p 335.
[21] ARD p 118.
[22] ARD p 282.
[23] ARD pp 119-120.
[24] ARD p 126.
[25] ARD pp 128-129.

35. On 22 March 2019, his weight was recorded at 123.1kgs[26]. Thereafter, various other attendances are recorded including on 13 May 2019 when Mr Behnampour complained of severe back pain and his mood was low. It is noted he said he was unable to walk for more than 100m without difficulty and pain[27]. The insurer denied the claim for the back condition and for the bariatric surgery. On 12 June 2019, Dr Osman was contacted by the occupational therapist who advised that Mr Behnampour was speaking of suicide. Dr Osman saw him the same day and gave him a referral to the psychiatrist. It is noted that his right knee was painful on walking. On examination, Dr Osman noted his flexion was reduced to about 100 degrees, extension was full[28].

36. On 18 June 2019, Dr Osman conducted another case conference with the same participants as previously. He noted that he needed to add to the certificates the anxiety/depression diagnosis as he had overlooked listing them, even though such treatment was being provided by the insurer. It was agreed Mr Behnampour would see a dietician and explore weight watchers and be reviewed by the psychologist and psychiatrist[29].

Dr Nagamori

37. Dr Nagamori is the orthopaedic surgeon who operated on Mr Behnampour's right knee. He reported to Dr Osman on 11 September 2018, that it was two and a half months post the knee surgery and Mr Behnampour now had little knee pain and was walking normally. He adds "He has been having more issues with his back and I understand he has had another MRI scan recently. He needs to continue with strengthening.[30]"

38. On 6 November 2018, Dr Nagamori advised Dr Osman that Mr Behnampour now had full range of motion in his knee which was no longer painful. He said the main problem is the ongoing issue with his back which has not resolved with injections. He adds "I understand there is talk of bariatric surgery which will be beneficial to his knee in the long term."[31]

Dr Rao

39. Dr Prashanth Rao is a neurosurgeon who has treated Mr Behnampour and reported to Dr Osman on 3 September 2018[32]. Dr Rao refers to the incident at work on 14 April 2017, with the skip bins and Mr Behnampour hurting his right knee. Some of the facts related do seem, in part, at variance with the histories given by Mr Behnampour elsewhere. Dr Rao also states, "Since then he has had back pain." Dr Rao then refers to the surgery for the right knee performed by Dr Nagamori and states that "Since then the lower back pain has worsened and he has also developed right sided sciatica at the back of the thigh and leg, stopping at the calf." He refers to tingling in the leg, including just below where the knee surgery was performed.

40. Dr Rao notes that Mr Behnampour was still on crutches and the back and leg pain is present when walking, standing and sitting but is relieved by lying down. Dr Rao notes he has trialled physiotherapy, medication, bed rest, massage and pool therapy which all gave him temporary relief. Dr Rao noted that his gait was antalgic due to the right knee issues. Dr Rao advised Mr Behnampour to take Lyrica regularly at night until he was reviewed by the pain team that Dr Rao was referring him to.

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[26] ARD p 130.
[27] ARD p 135.
[28] ARD p 138.
[29] ARD pp140-141.
[30] ARD p 275.
[31] ARD p 283.
[32] ARD p 272.

41. On 24 September 2018[33], Dr Rao reports to Dr Osman and relates the contents of the MRI scan findings and says that Mr Behnampour's radicular symptoms have significantly improved and he was no longer using a walking stick. Dr Rao states that Mr Behnampour still had pain and was struggling to participate in physiotherapy and activities of daily living. He proposed undertaking L4/5 facet joint injections to evaluate the source of the back pain.

42. On 9 October 2018[34], Dr Rao reports that the insurer had approved for the facet joint injections to proceed. However, Dr Rao notes that Mr Behnampour wanted to obtain a further opinion.

Dr Ghahreman

43. Dr Ghahreman, neurosurgeon, reported to Dr Osman on 9 October 2018[35]. He has a history that Mr Behnampour had lower back pain from the outset after his injury on 14 April 2017, and that it deteriorated after the knee surgery and became gradually worse. Dr Ghahreman notes that Mr Behnampour has developed immobility and has gained weight from 86 to 126 kg. Dr Ghahreman sets out his examination findings and records that the MRI scan reveals a L4/5 disc bulge which he says is in keeping with a single level disc injury at this level and that there is some encroachment on the exiting L4/5 foramina statically in the supine positions and no drastic nerve root compression.

44. Dr Ghahreman states that he supports Dr Rao's suggestion to proceed with L4/5 injection therapy. He states that he agrees that Mr Behnampour's weight gain has been entirely after his work related injury and he recommended to Dr Osman that he supervise a gradual reduction in the Lyrica as Dr Ghahreman says this may be contributing to his weight gain[36].

45. On 9 October 2018, Dr Ghahreman advised Dr Manni that he had requested the insurer to provide approval for bariatric surgery for his severe weight gain following his right knee and spinal injury[37].

46. On 12 November 2018, Dr Ghahreman reported to Dr Osman that there had been some improvement in pain following the facet joint injections, but it was transient and incomplete. He recommended diagnostic, and hopefully therapeutic, facet radiofrequency. He noted that Mr Behnampour is waiting to hear about the bariatric surgery for obesity which has followed his work injury. He says this may substantially help him. The doctor adds that, in the meantime, he will increase his hydrotherapy to two sessions per week and continue with physiotherapy twice a week and Tramadol and perform the radio frequency treatment[38]. On 15 November 2018, the radio frequency with ablation was undertaken.

Dr Manni

47. Dr Manni is a surgeon who specialises in bariatric surgery. He provided several reports to Dr Khaled Osman including dated 22 January 2019[39] and to Dr Ghahreman dated 11 December 2018[40]. Dr Manni records the history of the weight gain since the knee injury which he said was exacerbated by Lyrica and Panadeine Forte as he says these are known to stimulate appetite. He states that Mr Behnampour has tried extensive dieting to reduce his weight including taking Duromine with limited effect. Dr Manni discusses the types of bariatric surgery and their pros and cons. He notes Mr Behnampour wishes to undertake the gastric bypass surgery as it will give the most weight loss.

[33] ARD p 69.
[34] ARD p 68.
[35] ARD p 66.
[36] ARD p 67.
[37] ARD p 382.
[38] ARD p 389.
[39] ARD p 63.
[40] ARD p 64.

Dr Gehr

48. Dr Gehr, orthopaedic surgeon, provided a medico-legal report for Mr Behnampour dated 12 February 2020. Dr Gehr has reviewed all the medical evidence and thoroughly summarises the same. He noted that Mr Behnampour weighed 125 kg with an abdominal circumference of 129 cm and that he showed the doctor a photograph of himself taken in 2017 before the injury and Dr Gehr states it shows him to have a slim build.

49. Dr Gehr sets out his history and examination findings and concludes that Mr Behnampour at the same time that he injured his right knee, he sustained injury to his lumbar spine with pain radiating down the left leg. He found that Mr Behnampour had a positive nerve tension test, left calf muscle wasting and decreased sensation on the right side. Dr Gehr was of the opinion that because of these findings Mr Behnampour's symptoms fulfilled the criteria for radiculopathy and he noted that the MRI imaging revealed an L4/5 disc prolapse and he referred to Dr Rao's report dated 3 September 2018 that this disc prolapse could be catching the right L4 nerve root.

50. Notwithstanding expressing the opinion that Mr Behnampour had suffered the lumbar injury at the same time as the knee injury, at point 17 of his report he said he is of the opinion that Mr Behnampour suffered a consequential condition to the lower back. In the next sentence there is an obvious typographical error, leaving out the word "not". The doctor states "But had it [not] been for the right knee injuries it would have been highly unlikely developed the problem of his back." Dr Gehr adds "Prior to [the] subject accident, he was working full-time and participating in a large range of sporting activities.[41]"

51. Dr Gehr considered that Mr Behnampour had gained significant weight of 40 kg and that there were no clear constitutional factors to account for his weight gain. He states that he felt taking Lyrica was unlikely to have caused weight gain and he agreed with Dr Breit in that regard. He opined that it was most likely that the weight gain was due to reduced mobility over this period. He also found that the right knee was left with residual pain and stiffness.

52. Dr Gehr expressed the opinion that Mr Behnampour required the bariatric surgery within 12 months. He expresses the view that such surgery is reasonable and necessary.

Dr Greenberg

53. Dr Greenberg is a general and gastrointestinal surgeon who has provided a medico-legal report dated 7 August 2019 for Mr Behnampour. It is noted at that time Mr Behnampour weighed 126 kg, had a waist size of 134 cm and height of 178 cm. He lists the weights of Mr Behnampour at various stages through his life noting at 40 years he weighed 80 kg and before the injury 85 kg. The doctor also lists the weights and heights of Mr Behnampour's parents and siblings all of whom weigh less than 86 kg.

54. Dr Greenberg says he assumes the cause of the weight gain is multifactorial and a simple response to his orthopaedic injuries, noting that Mr Behnampour said his ability to move around had led him to be more sedentary. Dr Greenberg states that it is unlikely that long term use of Lyrica would account for the weight gain.

55. The doctor says bariatric surgery is a reasonable option and notes the contents of Dr Manni's reports. Dr Greenberg also refers to Dr Ghahreman's report dated 9 October 2018 wherein he stated that unless Mr Behnampour could reduce his weight it is unlikely his spinal problem will resolve. It was also noted that Dr Ghahreman would not contemplate any spinal surgery unless Mr Behnampour had a significant weight loss.

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[41] ARD p 41.

56. Dr Greenberg discusses the types of bariatric surgery and says either gastric sleeve or bypass would be regarded as reasonable practice and that bariatric surgery would give Mr Behnampour the best chance of rehabilitation from his lumbar spine and right knee injuries. He noted that Mr Behnampour would require extensive dietary support following the surgery for 12 to 24 months.

Dr Breit

57. Dr Breit is an orthopaedic surgeon who has been qualified by the respondent and has issued reports dated 27 June 2018, 29 June 2018, 26 March 2019 and 6 May 2019.

58. In his first report, Dr Breit records the history of the injury to Mr Behnampour's right knee on 14 April 2017. He noted that Dr Nagamori recorded an increase in Mr Behnampour's weight by 22 kg. Dr Breit said he was told this was because he was unemployed, at home and became depressed, and at that time he started to have back problems. Dr Breit records under the heading "present complaints" symptoms being experienced in the right knee and that walking is limited by his back.

59. Dr Breit weighed Mr Behnampour at 122 kg. He found the right arthroscopic medial meniscal repair to have been reasonably necessary. In this, and his next supplementary report, Dr Breit did not demur that the surgery was reasonably necessary as a result of the work injury.

60. Dr Breit re-examined Mr Behnampour on 21 March 2019 and thereafter issued his report. He noted that Mr Behnampour said that he had back pain for a few months prior to the knee surgery and post the surgery it got worse. Dr Breit states that Mr Behnampour told him that two spinal injections performed by Dr Ghahreman only gave him two to three days benefit and that his general practitioner started him on Lyrica medication and advised him that it would lead to increased weight gain, so the dosage was reduced to 75 mg.

61. Dr Breit records the back complaints as follows:

> "There is said to be pain in the low back radiating into the left buttock and upper thigh posteriorly. He does not have any sensory symptoms and claims that he can only walk for 3 to 4 minutes because of buttock and back pain. He is able to sit for 10 to 20 minutes. The other day he helped a friend lift a 10kg coffee table after which he was said to have had marked back pain."

62. Dr Breit's examination findings with respect to the back were as follows:

> "He was tender in the low back and extremely tender over the entire left buttock, iliac crest and greater trochanter as well as the low back. Flexion was to mid tibia with a smooth rhythm of recovery and negligible extension which is expected in someone of this age, occupation and body habitus. In a seated position he could fully extend both legs but formal straight leg raising on the right was 60° and on the left 30° with a complaint of hip and back pain but no evidence of sciatic nerve root irritability. It was eased with hip and knee flexion.
>
> Neurologically there was no abnormality."

63. The doctor refers to the MRI scan dated 14 May 2018 as showing a broad based disc bulge at L4/5 without any central or foraminal stenosis. In terms of Mr Behnampour's weight, there was some lack of clarity because Dr Breit had different scales to previously, but he noted that Mr Behnampour said 40 days earlier he weighed 127 kg and that he telephoned after the appointment to say he now weighed 122 kg.

64. Dr Breit was asked various questions by the insurer about the lower back condition, which he diagnosed as some minor lumbar spondylosis. He said that the presence of a disc bulge does not equal symptomatology and stated that the Guides point out that 30% of non-symptomatic people will have lumbar disc pathology. He was also asked the following:

> **"2. Has work been a substantial contributing factor to the diagnosis and if so how? In particular, is the diagnosis causally related to the injury of 14 April 2017? Please outline the reasons for your opinion.**
>
> No, he has not had a traumatic event and as you will see from my previous report, he had a somewhat abducted gait pattern, that is not an antalgic component but related to his obesity. Therefore to claim that the knee resulted in the low back pain is not in my opinion reasonable. As far as I can see he has had facet injections with the only investigation available an MRI that did not show any facet arthritis and there was no bone scan (as far as I am aware) to show there was inflammation at that level.
>
> Any back symptoms are related to his age and chronic weight problems."

65. Dr Breit was asked about Mr Behnampour's weight gain, from 85 kg to 127.9 kg since the time of the injury and whether it was causally related to the knee injury and/or the lumbar condition. Dr Breit answered:

> "The contention is that the weight was gained because of the medication. In simplistic terms weight gain is a formula of calories in and calories out. The literature shows that there are significant psychological issues in a very large number of people who are obese and that the results of bariatric surgery improve with long term psychological support. The medication, particularly Lyrica (whose use in this situation should be condemned) does increase appetite.
>
> On the other hand, over the last 40 days only eating one meal a day he appears to be losing at least some weight. In my opinion the only work related factor that may contribute to his weight increase would be Lyrica but of course it is impossible to tell whether or not it has actually increased his appetite. Most people with weight problems will blame factors other than their lack of self-control."

66. In a supplementary report, Dr Breit addressed further questions about the use of medication and weight gain. He stated that on the balance of probabilities weight gain is not causally related to the use of Lyrica and he added "certainly increase in weight is one of the recognised side effects but in my experience a rare complaint…"

67. Dr Breit opined that weight problems are multifactorial and often associated with some psychological issues. He said there is a tendency to rationalise weight gain as being due to external factors, such as drugs. He then conceded that he is not an expert in the area but said his opinion is based on his years of experience.

68. Dr Breit found that the gastric bypass surgery as recommended by Dr Manni was not reasonably necessary because he said the weight gain was not related to Mr Behnampour's injury. He says the back symptoms are a combination of age, degeneration and obesity.

Mr Behnampour's submissions

69. Mr Behnampour's counsel confirmed that the claim for the proposed surgery was based upon the recommendation and reports from Dr Manni. He submitted that the surgery is supported by all doctors, excepting Dr Breit. However, he qualified this by noting that Dr Breit does accept that Mr Behnampour needs to lose significant weight. He noted that Dr Breit did not accept that there was a need for surgery to accomplish the weight loss and also he did not accept the weight gain was due to the workplace injury. Counsel submitted that Dr Breit's opinion should not be accepted given the unanimity of opinion from the other doctors to the contrary.

70. Counsel also acknowledged that there is an issue as to whether Mr Behnampour has developed a consequential back condition. He submitted this is a sideshow in terms of his overall condition, however he submitted that the treating orthopaedic surgeon says he needs to lose weight to take pressure off his knee. He noted various doctors have also identified co-morbidities as being significantly aggravated by the weight gain, such as diabetes, fatty liver and hypertension.

71. It was submitted the legal test to apply is that set out in *Murphy v Allity Management Services Pty Ltd*[42], whether there has been a material contribution to the need for the surgery by the knee injury. It was submitted that it is evident from the clinical notes and treating material that Mr Behnampour has not had a good response from the surgeries and he has also developed a reactive depressive condition, that has contributed to binge-eating and the like which has contributed to the weight gain.

72. It was submitted that the issue about the back plays a minor role with respect to the claim being made in relation to the bariatric surgery.

73. Counsel then related the evidence that is before the Commission. In relation to Mr Behnampour's statement, it was submitted it is consistent with the general practitioner's notes. Counsel referred to the passages dealing with the ongoing pain in the right knee after the surgeries, low mood, weight gain and the development of back symptoms. It was submitted that the adiposity carried by Mr Behnampour has been commented on by all of the doctors and that he needs to have his weight gain dealt with.

74. It was submitted that Mr Behnampour since he arrived in Australia was physically active and accordingly he was able to keep his weight under control, and that has been what has been taken from him by virtue of the work related right knee injury.

75. Counsel referred to the treatment of the right knee, including the report from the physiotherapist who at 13 December 2017 noted Mr Behnampour had significant restrictions with range of motion and swelling[43]. Reference was made to the subsequent report dated 29 March 2018 of the physiotherapist who referred to problems of non-compliance by Mr Behnampour in completing his exercise program.

76. Mr Behnampour's counsel drew attention to the treating medical material referring to the onset of low back pain, including that an MRI scan was performed on 14 May 2018 of the lumbar spine[44]. Counsel also noted that Dr Osman answered a questionnaire of the insurer on 29 August 2018 in which he noted that Mr Behnampour had been complaining of back pain for a while and that it was likely related to his knee injury and referred to the MRI scan dated 14 May 2018[45].

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[42] [2015] NSWWCCPD 49, *Murphy.*
[43] ARD p 249.
[44] ARD p 72.
[45] ARD p 270.

77. Counsel noted that Dr Rao in the report dated 3 September 2018 had a history of back pain since the knee injury, however it was submitted that this is not Mr Behnampour's case. He submitted that the medical material and Mr Behnampour's statement says the back pain came on later. It was also submitted that Dr Nagamori had noted Mr Behnampour had more issues with his back in September 2018, being two and half months after his knee surgery[46]. The doctor stated that he needed to continue with strengthening. Counsel drew attention to Dr Rao's examination finding that Nr Behnampour had antalgic gait due to the right knee issues and that in the back the straight leg raising was positive at 30 degrees on the right and that Dr Rao thought there could be some catching of the L4 nerve root in the foramen[47].

78. It was submitted that it was Dr Ghahreman, neurosurgeon, who referred Mr Behnampour to Dr Manni in relation to having bariatric surgery. It was noted in the report of 9 October 2018, that while Dr Ghahreman had a history of back pain initially, he does record a worsening after the right knee surgery. Counsel submits that it is relevant that Dr Ghahreman records that Mr Behnampour developed immobility, lost his occupation and he cannot sit, bend, twist or perform other activities related to work. It was also submitted that the doctor notes he has pain radiating to the lower back and buttock on the right and Dr Ghahreman records that Mr Behnampour has gained weight increasing from 86 to 126 kgs[48]. Counsel submits that the doctor supports the relationship of the weight gain and the work injury and need for bariatric surgery.

79. It was also submitted that Dr Nagamori felt the bariatric surgery would be beneficial from point of view of the knee.

80. In addition to these submissions about the treating specialists' opinions, counsel referred to the clinical notes of the general practice. I will not repeat these references as I have summarised them above. Counsel submits these notes show a consistent history of problems with the right knee, and that Mr Behnampour developed low back pain and psychological symptoms. It was noted by July 2018 his weight was 123 kg and by 25 August 2018 he weighed 126 kg. It was submitted that Mr Behnampour had made efforts to ameliorate his weight by eating less and taking Duromine, but by January 2019 he still weighed 124 kg.

81. Counsel also made submissions regarding Dr Greenberg's report, at which time Mr Behnampour weighed 126 kg. Counsel submitted the doctor's report is excellent in that it is thorough and gives the opinion that the bariatric surgery is a reasonable option. Counsel submitted Dr Greenberg's opinion should be preferred to Dr Breit, whose opinion by comparison can be described as cursory. Counsel submitted Dr Breit's opinion was out on his own and is not as considered as Dr Greenberg. Counsel submitted that Dr Gehr's report was not as helpful as Dr Greenberg in dealing with the issues requiring determination.

82. Mr Behnampour's submissions concluded with reference to the factors set out in the cases of *Diab v NRMA Ltd* [49], which in turn deals with Judge Burke's decision in *Rose v Health Commission (NSW)* [50]. Counsel submitted the need for the surgery and the reasonableness are demonstrated in Mr Behnampour's case because the doctors have considered the types of surgery, the cost is not unreasonable and Dr Manni has canvassed the risks of the surgery.

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46 ARD p 275.
47 ARD p 273.
48 ARD p 66.
49 [2014] NSWWCCPD 72.
50 (1986) 2 NSWCCR 32.

83. It was submitted that *Murphy* provides the basis for acceptance of the causal connection with the work injury and, even though there can be multifactorial matters in relation to weight gain, the evidence is persuasive that it was triggered by the work injury. The principles in *Kooragang Cement Pty Ltd v Bates*[51] were also relied upon. The significant impact that the weight gain has had on the co-morbidities such as fatty liver, diabetes and hypertension and the impact on the knee were argued by counsel to give rise to more than enough evidence to establish a causal relationship, regardless of any decision that the Commission might make about whether there was a consequential back condition.

Respondent's submissions

84. The respondent submitted that it disagrees with Mr Behnampour's counsel's submission that the back allegation is just a sideshow with respect to the determination of the bariatric surgery issue. Attention was drawn to the report of Dr Manni dated 11 December 2018[52]. It was noted that this referred to the increase of weight at the time of the injury of 85 kg to 126 kg. Counsel submitted there is no evidence of Mr Behnampour's weight at the time of the injury, as there are no contemporaneous clinical records at that time, although there is evidence of increase in weight.

85. Counsel submitted that Dr Manni in his history refers to the work injury leaving him with a meniscal tear in his knee and subsequent disc prolapse. Counsel submits that a determination about the alleged back condition is required and it is significant that Dr Manni says that Mr Behnampour requires the bariatric surgery because he needs to lose a significant amount of weight prior to surgery for his disc prolapse as per his neurosurgeon. Counsel said this refers to the opinion of Dr Ghahreman, neurosurgeon.

86. The report of Dr Manni dated 22 January 2019 was referenced by counsel noting that the doctor said he had asked Mr Behnampour to see his dietitian and explained the pros and cons of surgery as well as how to best achieve long term weight loss maintenance. Counsel submitted this flows on from the need for Mr Behnampour to lose weight before the back surgery can take place.

87. Counsel submitted it is therefore necessary for the Commission to make a finding as to whether Mr Behnampour does suffer from a consequential back condition as a result of his right knee work injury, because the basis that Dr Manni is wishing to perform the bariatric surgery is so that back surgery can take place.

88. It was submitted that without clear evidence of an onset of symptoms close in time to the knee injury the Commission could not be satisfied as to the existence of a consequential back condition. Counsel submitted that Mr Behnampour's evidence is inconsistent as he has given histories that it came on at the same time as the knee injury and there is no mention to onset of back pain until 24 May 2018. Counsel noted the first medical certificate was issued on 13 July 2017 and the first consultation date was 10 July 2017 and there is no mention of the back in that certificate. It was submitted that the first medical certificate referring to the back is in the certificate on 24 May 2018[53] where Dr Osman adds to his diagnosis "Low back pain (likely secondary to knee pain)".

89. Counsel submitted that there is not enough evidence that the back is related to the knee, especially because there is this delay.

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[51] (1994) 35 NSWLR; (1994) NSWCCR 796, *Kooragang.*
[52] ARD p 64.
[53] ARD p 225.

90. On the issue of reasonable necessity, counsel relies on Dr Breit's opinion that weight loss can occur by simply reducing calorie intake. It was noted that Dr Breit referred to Mr Behnampour in the last 40 days achieving some weight loss by eating one meal a day. It was also submitted that there is evidence on 20 August 2018 that Mr Behnampour lost some weight while taking Duromine[54] and was eating less and alcohol consumption was reduced.

91. It was noted that Mr Behnampour had re-started drinking alcohol, vodka, which would contribute to weight gain. It was also submitted that Mr Behnampour could have exercised by going swimming, as the entry on 11 September 2018 indicates when he went three times that week.

92. Counsel submitted that there are entries referring to the low back that do not also refer to right knee pain.

93. Therefore, it was submitted there are other ways to lose weight such as eating less, taking Duromine and exercising. It was argued that the Commission would not be satisfied that the proposed bariatric surgery was reasonably necessary.

94. The upshot of the respondent's submissions was that Mr Behnampour had not discharged his legal onus of proof.

Mr Behnampour's submissions in reply

95. Counsel notes that Dr Manni does not link the need for bariatric surgery to the back because he identifies in his report dated 11 December 2018 other matters such as hypertension, depression and that Mr Behnampour takes Tramadol and Mobic for his back pain. Dr Manni also notes that Mr Behnampour has tried extensive dieting to reduce his weight as well as Duromine with limited effect.

96. Counsel submitted that if one was to assume the back was not work-related, but that back surgery was recommended to Mr Behnampour and the reason he could not have it was because of weight gain due to the right knee injury, then he would be entitled to have bariatric surgery to reduce his weight gain. Counsel submitted that the associated depressive condition and other cascading conditions, flowing from the knee injury and inactivity would mean the insurer on that scenario would be responsible for the weight loss surgery.

Determination

97. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [55] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712."

98. The respondent's counsel submitted that there is no evidence of Mr Behnampour's weight before the right knee injury on 14 April 2017. While it is correct that there is no document before the Commission that has a record of Mr Behnampour's weight before 14 April 2017, I am satisfied to the standard discussed in *Nguyen* that he has gained substantial weight since that time.

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[54] ARD p 114.
[55] [2008] NSWCA 246.

99. Firstly, the weight measurements that are available show weight gain during 2018. For instance, on 10 February 2018 Mr Behnampour's weight was recorded at 118.8kg[56], on 27 June 2018 Dr Breit recorded it at 122kg[57], on 25 August 2018 it was 126kg[58], on 11 October 2018 it was 126kg[59]. Mr Behnampour lost some weight in early 2019 however, regained the weight a few months later. On 19 January 2019 he was 124kg[60], on 19 March 2019 he was 123kg, on 22 March 2019 he was 123.1kg[61], on 7 August 2019 Dr Greenberg recorded he was 126kg and on 12 February 2020 Dr Gehr recorded he was 125kg.

100. Secondly, there is Mr Behnampour's evidence about his weight gain in his statement and histories to the doctors, that before his injury on 14 April 2017 he weighed 85 kg. The respondent did not submit that Mr Behnampour should not be believed that weight gain over the period since the injury had occurred. I have formed the view that Mr Behnampour is a witness of truth because his statement is supported in many respects by the notes from the practice of Dr Osman.

101. The notes reveal that the work injury has presented Mr Behnampour with many challenges in dealing with the right knee injury and its sequelae. The notes from the first doctor that Mr Behnampour saw following his injury are not before the Commission. However, when Dr Osman first began to treat Mr Behnampour in July 2017 the doctor observed that he had a limp in the right leg, he could not fully flex the knee, there was swelling, tenderness and he was unable to squat fully. This, and the following evidence about the right knee, supports the contention by Mr Behnampour that because of the right knee injury he became less physically mobile leading him to be unable to continue to work in his painting business.

102. I accept Mr Behnampour's evidence that before the injury to his right knee he was an active man. It should be borne in mind that Mr Behnampour showed some enterprise in that having migrated to Australia from Iran in 2012 by 2016, after being employed, he commenced his own painting company.

103. Dr Greenberg also has details about the heights and weights of Mr Behnampour's parents and siblings, and none weigh more than 86 kg. Dr Gehr was shown a photograph of Mr Behnampour taken in 2017 before his injury and he said it revealed he had a slim build.

104. The above facts lead me to conclude that Mr Behnampour has established that after the injury to his right knee on 14 April 2017 he gained a significant amount of weight. However, the cause of the weight gain is an issue between the parties.

105. Dr Breit for the respondent concentrated on whether the weight gain was due to Mr Behnampour taking Lyrica. He conceded that Lyrica does increase appetite, but he says it is impossible to know if it did in Mr Behnampour's case. He adds that his view is that it would be rare to occur. The doctor states that weight gain is multifactorial and is often associated with psychological issues. However, Dr Breit does not take in to account the evidence which reveals since his knee injury Mr Behnampour has psychological issues such that he has needed treatment from a psychologist and psychiatrist and takes various anti-depressant medications. Dr Breit refers to a lack of self-control, and rather simplistically, in my view, to weight management being a matter of calories in and calories out. While he acknowledges he is not an expert in the area, he says he bases his decision on his experience.

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56 ARD p 96.
57 Reply p 3.
58 ARD p 112.
59 ARD p 335.
60 ARD p 126.
61 ARD p 130.

106. Even more fundamentally, in my view, Dr Breit does not seem to take into account that exercise is an important part of “calories out”. He does not really consider in any meaningful way the effect of the right knee injury on Mr Behnampour’s ability to exercise. He says that Mr Behnampour does not have an antalgic gait, but he says he has a “somewhat abducted gait pattern” which he attributes to Mr Behnampour’s obesity. However, as noted above and submitted by Mr Behnampour’s counsel, Dr Osman in July 2017 found Mr Behnampour had an antalgic gait. Dr Rao on 3 September 2018 noted the presence on an antalgic gait due to the right knee issues. Dr Breit does not show any awareness of such findings. Also, he does not consider, before the surgeries to Mr Behnampour’s right knee on 26 July 2018 and 2 September 2018, whether Mr Behnampour would have been more inactive because of the symptoms in his right knee.

107. At one point, Dr Breit opined that the back symptoms are related to Mr Behnampour’s age and chronic weight problems. But, as I have explained, the doctor does not really consider if the right knee injury contributed to inactivity on Mr Behnampour’s part and thereafter weight gain.

108. Mr Behnampour’s counsel submitted that it is evident from the clinical notes that Mr Behnampour has not had a good response from the knee surgeries, and he has also developed a reactive depressive condition that has contributed to binge eating and the like which has contributed to weight gain. This is a reference to Dr Mayur’s note on 27 March 2018 that Mr Behnampour has gained weight and feels very sad and he loses his appetite and binges and vomits and this makes him feel ashamed and he was commenced on anti-depressant medication. In the months that follow, Dr Mayur notes alcoholic dependence, loss of motivation and suicidal ideation. The psychological symptoms became so much of a concern that the insurer wrote to Dr Osman on 18 May 2018 advising of the concerns held by the rehabilitation provider.

109. Dr Greenberg stated that,

> “It is recognised that loss of mobility and a reduction in activity is a significant factor in patients who have been injured and who have gained excessive weight.[62]”

110. Dr Greenberg advised that Dr Ghahreman is of the view that the excessive weight gain is aggravating his lumbar spine and is the explanation for chronic back pain. Dr Greenberg also noted that Mr Behnampour has required treatment for his mood disorder and chronic depression. He opined that Lyrica is known to be associated with an increase in appetite and weight gain and may be a factor, but he believed that alone Lyrica would be unlikely to account for weight gain of 41 kg. Dr Greenberg expressed the view that the injury to the right knee appears to have been the precipitating event that has ultimately led to Mr Behnampour becoming morbidly obese[63]. He later refers to the cause of the weight gain being multifactorial, and he refers to a cycle where various symptoms, including the psyche, can be interrelated and breaking the cycle can be very difficult. I accept the opinion of Dr Greenberg and prefer it to that of Dr Breit as it is more thoroughly reasoned and balanced.

111. The respondent rejected the submission of Mr Behnampour’s counsel that the back condition is a “sideshow”. The respondent submitted that the reason Dr Manni has proposed the bariatric surgery is because Dr Ghahreman wants to undertake lumbar surgery and Mr Behnampour needs to lose weight first. Mr Behnampour’s counsel responds that once the weight gain is found to be caused by the right knee injury, it does not matter whether the back is causally related because Mr Behnampour would be entitled to receive compensation for the proposed bariatric surgery, noting in these proceedings that is all he seeks.

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[62] ARD p 53.
[63] ARD p 58.

112. I accept that the submission made by Mr Behnampour's counsel on this point is correct in law. However, I am also persuaded that Mr Behnampour has developed a consequential condition in his back because of the sequelae of the right knee injury. Dr Breit's opinion in my view has many shortcomings. He found the right knee surgeries were reasonably necessary. He accepted that Mr Behnampour had back symptoms and on his examination he found that Mr Behnampour was tender in the low back and extremely tender over the entire left buttock, iliac crest and greater trochanter. He noted the MRI scan finding of a broad based disc bulge at L4/5. The only reason that he seems to discount that the back symptoms could have been related to the right knee injury was that Mr Behnampour did not have an antalgic gait. As I have observed above, Dr Osman in July 2017 found Mr Behnampour had an antalgic gait and Dr Breit seems to be unaware of this. Therefore, I do not place weight on Dr Breit's opinion in this regard.

113. Ironically, Dr Breit goes on to attribute the back problems to his age and chronic weight problems. I have found that the right knee injury led to a loss of activity on part of Mr Behnampour, and this resulted in him putting on weight. So, whether he has developed back symptoms as a result of altered gait or to the weight gain, or a combination of both, supports a finding of a causal connection with the right knee injury.

114. The legal test of causation is that discussed by the Court of Appeal in *Kooragang* wherein Kirby P (as his Honour then was) said (at 461G) (Sheller and Powell JJA agreeing) that "[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at 462E):

> "Since that time, 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."

115. His Honour said at [463]- [464]:

> "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 commonsense 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 (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a *novus actus*. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

116. Deputy President Roche's decision in *Kumar v Royal Comfort Bedding Pty Ltd* [64] is authority for the proposition that *Kooragang* is the test to determine if a consequential condition arises from a work injury. As Kirby P stated in *Kooragang,* an injury can set in train a series of events. I find that is what has happened in Mr Behnampour's case. He sustained the work related right knee injury, he became inactive and could not work. He put on weight and developed psychological symptoms and by May 2018 the doctors were documenting he had back complaints.

117. I find there was no other intervening event to account for the back symptoms and as Dr Greenberg puts it, a cycle was created, with Mr Behnampour's presentation being multifactorial. I accept his counsel's description of Dr Breit's opinion as being "dismissive" of Mr Behnampour. To say that weight loss at Mr Behnampour's size is simply a matter of calories in and out is dismissive. The issue of weight loss is complicated.

118. Applying the principles in *Kooragang* and *Kumar*, I am satisfied that the work-related injury to the right knee and the subsequent surgeries have set in train a series of events, one being that Mr Behnampour became inactive and suffering psychological symptoms all of which have contributed to his weight gain. All of these in turn have contributed to back symptoms, and the back symptoms have compounded matters because they also contribute to inactivity and weight gain.

Reasonably necessary

119. The legal test to be applied when determining whether proposed treatment is reasonably necessary as a result of a work place injury as required by section 60 of the *Workers Compensation Act 1987* (the 1987 Act) was considered in *Diab* wherein Roche DP stated at [86]:

> "Reasonably necessary does not mean 'absolutely necessary' (*Moorebank* at [154]). If something is 'necessary', in the sense of indispensable, it will be 'reasonably necessary'. That is because reasonably necessary is a lesser requirement than 'necessary'. Depending on the circumstances, a range of different treatments may qualify as 'reasonably necessary' and a worker only has to establish that the treatment claimed is one of those treatments. A worker certainly does not have to establish that the treatment is 'reasonable and necessary', which is a significantly more demanding test that many insurers and doctors apply."

120. In *Diab* Deputy President Roche cited the decision of Judge Burke in *Rose* with approval and stated:

> "[88] 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.

[64] [2012] NSWWCCPD 8, *Kumar*.

> [89] 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.
>
> [90] 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'".

121. In *Diab* at [89] Roche DP stated, "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."

122. I find that the preponderance of the medical evidence supports that the proposed surgery by Dr Manni is reasonably necessary to address Mr Behnampour's weight. The respondent suggested he could just diet and swim and continue to take Duromine. However, the combination of such measures has not resulted in sustained weight loss. The type of bariatric surgery proposed by Dr Manni is supported before and after the surgery by access to dieticians and other professionals to assist in providing a good outcome. Dr Manni is an expert in the field, and he has recommended it. His opinion is supported by Dr Greenberg who also is a specialist in gastrointestinal issues, and Dr Breit has stated he is not an expert in this field. Therefore, I reject the opinion of Dr Breit and prefer those of Dr Manni and Dr Greenberg, in particular.

123. The factors discussed in *Rose* and *Diab* in my view have been met. Dr Manni discusses in some detail the appropriateness of the particular treatment. The alternative non-surgical treatments have been tried and not proved to be effective, as is evident from Dr Osman's records. The cost of the proposed surgery is not excessive, and Dr Manni speaks of the potential effectiveness of the treatment. The majority of the treating medical specialists agree with the proposed surgery. Dr Nagamori states that it should help Mr Behnampour's knee.

124. In terms of whether the proposed surgery is reasonably necessary as a result of the work-related injury, *Murphy* is authority for the proposition that a condition can have multiple causes and the work injury does not have to be the only, or even a substantial cause, before the treatment is recoverable under section 60 of the 1987 Act. Deputy President Roche stated in *Murphy* that a worker only has to establish that the treatment is reasonably necessary as a result of the injury; that is, did the work-injury materially contribute to the need for surgery. I find that the injury to the right knee and its sequelae, as explained above, have materially contributed to the need for the bariatric surgery because it caused Mr Behnampour to gain significant weight.

SUMMARY

125. I find that Mr Behnampour sustained a lumbar spine condition, psychological symptoms and weight gain as a consequence of the agreed injury to his right knee in the course of his employment with the respondent on 14 April 2017.

126. The proposed gastric bypass surgery recommended by Dr Manni is reasonably necessary medical treatment as a result of the right knee injury on 14 April 2017 and the consequential conditions including weight gain, psychological symptoms and to the lumbar spine.

127. The respondent is to pay the cost of the laparoscopic single anastomosis gastric bypass surgery, hospital fees, anaesthetists fees and rehabilitation/recovery pursuant to section 60 of the 1987 Act at the applicable gazetted rates.