WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5195/19**
Applicant: **Peter Johnstone**
Respondent: **Tammy Schmetzer**
Date of Determination: **16 March 2020**
Citation: **[2020] NSWWCC 78**

The Commission determines:

1. The left triple arthrodesis and bone grafting surgery proposed by Dr Anthony Bradshaw is reasonably necessary treatment as a result of the injury sustained by the applicant in the course of his employment with the respondent on 15 February 2007 within the meaning of section 60 of the *Workers Compensation Act 1987*.

Anthony Scarcella
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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Peter Johnstone, is a 35-year-old man who was employed by Tammy Schmetzer (the respondent) as a track rider in Griffith.

2. On 15 February 2007, whilst riding track work for the respondent at Griffith Racecourse, Mr Johnstone alleged that he was injured when the horse he was riding unexpectedly bucked and tossed him from his mount. The horse ran over him and trod on his left ankle. Injury is not in dispute.

3. On 18 February 2007, Mr Johnstone underwent an open reduction and internal fixation of left ankle by Dr Andrew Redgment, Orthopaedic Surgeon.

4. On 20 August 2007, Mr Johnstone underwent further surgery by Dr Redgment to remove the hardware inserted during the 18 February 2007 left ankle surgery.

5. On 29 October 2009, Mr Johnstone underwent an arthroscopic debridement of the left ankle and tibial ostectomy by Dr Peter Lam, Orthopaedic Surgeon.

6. On 10 December 2009, Mr Johnstone underwent a left ankle arthroscopy and fusion by Dr Lam.

7. On 24 March 2011, Mr Johnstone underwent a left tibial ostectomy and removal of hardware by Dr Lam.

8. On 2 July 2012, Mr Johnstone underwent a left lateral hip repair by Dr Alexander Burns, Orthopaedic Surgeon.

9. On 10 April 2014, Racing NSW issued a Work Capacity Decision (WCD) under section 43 of the *Workers Compensation Act 1987* (the 1987 Act) and gave notice of its intention to cease payments of weekly compensation on 17 July 2014.[1] The WCD referred to a Complying Agreement signed by Mr Johnstone on 23 May 2011, agreeing to a 17% whole person impairment under section 66 of the 1987 Act.

10. Mr Johnstone sought a review of the WCD. Mr Johnstone stated:

> "On 4 June 2014, a WorkCover Merit Review found that I did not meet the criteria of entitlement to weekly compensation after end of second period due to ability to work in suitable employment under s.38(3)."[2]

11. On 25 July 2014, WIRO dismissed Mr Johnstone's application for procedural review of the WCD.

12. On 28 July 2017, Dr Anthony Bradshaw, the treating Orthopaedic Surgeon, recommended that Mr Johnstone undergo a left triple fusion and calcaneal bone grafting on the left foot. In accordance with section 60 of the 1987 Act, Dr Bradshaw made a written request to the respondent's insurer, Racing NSW Insurance Fund (Racing NSW), seeking approval to proceed with the surgery.[3]

13. On 8 September 2017, Racing NSW issued a Dispute Notice under section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing liability for the left triple fusion and calcaneal bone grafting on the left foot proposed

[1] Reply at pages 26-32.
[2] Application to Resolve a Dispute at page 12 at [168].
[3] Application to Resolve a Dispute at page 790.

by Dr Bradshaw on 28 July 2017.[4] Racing NSW did not specifically raise section 59A of the 1987 Act as an issue in its Dispute Notice. Essentially, the reasons for its decision were based on Mr Johnstone's consultation with Dr Anthony Smith, Orthopaedic Surgeon on 1 September 2017. There is no report by Dr Smith dated on or about 1 September 2017 in evidence.

14. On 18 April 2019, Dr Bradshaw again made a written request to Racing NSW seeking approval to proceed with the proposed left triple arthrodesis and bone grafting.[5] On 24 April 2019, Dr Bradshaw issued Racing NSW with a quotation of the cost of the proposed surgery.[6]

15. On 5 July 2019, Racing NSW issued a Dispute Notice under section 78 of the 1998 Act again disputing liability for the left triple arthrodesis and bone grafting proposed by Dr Bradshaw on 18 April 2019.[7] Racing NSW did not specifically raise section 59A of the 1987 Act as an issue in its Dispute Notice. Essentially, the reasons for its decision were based on a more recent report of Dr Smith dated 14 June 2019. However, on this occasion the Dispute Notice added:

> "The issues which are relevant to this decision are those which are set out above and the Sections of the legislation on which we rely in disputing liability include Sections 4, 9, 9A, 32A and following 60 of the *Worker's Compensation Act 1987* and Sections 4 and 78 of the *Workplace* Injury *Management and Workers* Compensation *Act 1998.*"[8]

16. On 20 August 2019, Mr Johnstone requested a review of the decision conveyed in the Racing NSW Dispute Notice dated 5 July 2019.[9]

17. On 6 September 2019, Racing NSW maintained its decision to decline liability for Mr Johnstone's proposed left ankle surgery.[10]

18. Mr Johnstone lodged an Application to Resolve a Dispute (ARD) dated 1 October 2019 in the Workers Compensation Commission (the Commission) seeking a determination that the surgery proposed by Dr Bradshaw is reasonably necessary treatment as a result of the injury sustained by Mr Johnstone within the meaning of section 60 of the 1987 Act and seeking an order that the respondent pay the cost of such surgery.

19. The respondent lodged an Application to Admit Late Documents dated 31 October 2019 and attached a Reply dated 31 October 2019 and supporting documents. The Reply noted under the heading "Matters in Dispute" in Part 3 that the compensation sought was also excluded by operation of section 59A of the 1987 Act.

ISSUES FOR DETERMINATION

Matters previously notified as disputed

20. The issues in dispute were notified in the Dispute Notices referred to above.

Matters not previously notified

21. Section 59A of the 1987 Act was raised in the Reply but not specifically raised in the Dispute Notices.

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[4] Reply at pages 24-25.
[5] Application to Resolve a Dispute at pages 30-31.
[6] Application to Resolve a Dispute at page 32.
[7] Reply at pages 22-23.
[8] Reply at page 22.
[9] Application to Resolve a Dispute at page 33.
[10] Application to Resolve a Dispute at page 34.

22. The following issues remained for determination following receipt of the written submissions referred to below:

    (a) Is Mr Johnstone in breach of clause 44 of the Workers Compensation Regulation 2016?

    (b) Is the respondent entitled to raise section 59A of the 1987 Act as an issue in dispute?

    (c) Is the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw reasonably necessary treatment as a result of the injury sustained by Mr Johnstone on 15 February 2007 within the meaning of section 60 of the 1987 Act?

    (d) Is Mr Johnstone precluded from compensation for the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw by operation of section 59A of the 1987 Act?

PROCEDURE BEFORE THE COMMISSION

23. Mr Johnstone attended a conciliation conference/arbitration in Wagga Wagga on 17 December 2019. Mr John Wilson of counsel appeared for Mr Johnstone. Due to an administrative error, the respondent's legal representative, Mr Paul Macken, solicitor, was unaware that the matter had been listed for conciliation/arbitration in Wagga Wagga on 17 December 2019. Mr Macken eventually joined the proceedings by telephone. I invited Mr Macken to provide oral submissions by telephone. However, he submitted that documents that were the subject of a Direction for Production Order made on 4 November 2019 had not been produced to the Commission. After checking with the Commission, I confirmed the submission to be correct. In the circumstances, it was agreed that the matter could not proceed to oral submissions. Rather than adjourn the matter, I made the following directions for submissions:

    "1. The respondent is to enquire of the Commission registry by 20 December 2019, as to the status of the Directions for Production Orders issued to Dr G Saleeb and Dr A Bradshaw and communicate the outcome of that enquiry to the applicant.

    2. The applicant is to lodge and serve by 20 January 2020 written submissions, including submissions in relation to clause 44 of the Workers Compensation Regulation 2016 arising from the inclusion of the reports by Dr Raymond Wallace and Dr James Bodel in the Application to Resolve a Dispute.

    3. The respondent is to lodge and serve by 3 February 2020 written submissions in reply, including submissions in relation to clause 44 of the Workers Compensation Regulation 2016 arising from the inclusion of the reports by Dr Raymond Wallace and Dr James Bodel in the Application to Resolve a Dispute.

    4. The applicant is to lodge and serve by 10 February 2020 any written submissions in reply.

    5. At the conclusion of the time allowed for submissions the dispute will be determined 'on the papers'."

24. On 20 January 2020, Mr Johnstone requested and was granted an extension of time within to file his written submission to 22 January 2020. Consequently, the date for the respondent's submission was extended to 5 February 2020 and the date for Mr Johnstone's written submissions in reply was extended to 12 February 2020.

25. Mr Johnstone's written submissions dated 21 January 2020; the respondent's written submissions dated 3 February 2020; and Mr Johnstone's written submissions in reply dated 11 February 2020 were lodged with the Commission.

26. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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

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

    (a) ARD dated 1 October 2019 and attached documents;

    (b) respondent's Application to Admit Late Documents dated 31 October 2019 and attached Reply dated 31 October 2019 and supporting documents.

Oral evidence

28. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

FINDINGS AND REASONS

Is Mr Johnstone in breach of clause 44 of the Workers Compensation Regulation 2016?

29. I did not preside over the teleconference in this matter. This interlocutory issue would normally have been dealt with at the teleconference, but it was not.

30. Clause 44(1) of the Workers Compensation Regulation 2016 provides that only one forensic medical report may be admitted on behalf of a party to proceedings. Clause 45 provides that supplementary reports are admissible where the purpose is to clarify the original report; update the original report; addressing issues omitted from the original report; or addressing an opinion in the other party's medical report.

31. Clause 44(2) provides that the forensic medical report must be from a specialist medical practitioner with qualifications relevant to the treatment of the injured worker's injury. Clause 44(3) provides that where the injury has involved treatment by more than one specialist medical practitioner, with different qualifications, then additional forensic medical report may be admitted from a medical practitioner with qualifications in that specialty.

32. Clause 44(4) defines a "forensic medical report" as a report from a specialist medical practitioner who has not treated the worker and that has been obtained for the purpose of proving or disproving an entitlement, or the extent of an entitlement, in respect of the claim or dispute;[11] and includes a report under section 119 of the 1998 Act relating to a medical examination of a worker at the direction of an employer;[12] but does not include a report that has been obtained for the purpose of proving or disproving an entitlement, or the extent of an entitlement, in respect of another claim or dispute.[13]

[11] Clause 44(4)(a) of the Workers Compensation Regulation 2016.
[12] Clause 44(4)(b) of the Workers Compensation Regulation 2016.
[13] Clause 44(4)(c) of the Workers Compensation Regulation 2016.

33. Included in the supporting documents attached to the ARD is a forensic medical report by Dr Smith dated 14 June 2019 (also attached to the supporting documents in the Reply); forensic medical reports by Dr Wallace dated 1 October 2008 and 28 October 2010; and forensic medical reports by Dr Bodel dated 14 July 2019 and 18 August 2019.

34. The respondent submitted that as the ARD contains forensic medical reports from three different orthopaedic surgeons, it objects to the admission into evidence of the reports of Dr Wallace and Dr Bodel.

35. Mr Johnstone submitted that the reports of Dr Wallace do not breach clause 44 because his reports predate the current dispute before the Commission and do not deal with the issue currently before the Commission. Dr Wallace's reports deal with Mr Johnstone's previous surgery and his medical condition and Dr Wallace's opinion at the time of the reports. Mr Johnstone further submitted that the report of Dr Smith was commissioned by the respondent and is attached to the Reply.

36. In relation to the respondent's submission, it is not for the respondent to object to a particular forensic medical report. The objecting party essentially takes issue with the number of reports. The party responding to the objection, will be asked which report is to be relied on in the event that the arbitrator rules that more than one forensic medical report has been lodged. Alternatively, the arbitrator may direct the affected party to make an election.

37. In this matter, Dr Smith's reports dated 14 June 2019 was commissioned by the respondent and is relied upon by the respondent as a supporting document attached to its Reply. The report is already in evidence in the respondent's case. Accordingly, I find that Dr Smith's report dated 14 June 2019 does not breach clause 44 of the Workers Compensation Regulation 2016.

38. I accept Mr Johnstone's submission that Dr Wallace's reports deal with his previous surgery and his medical condition at the time of consultation. The reports do not deal with the issues in dispute before me. I am satisfied that the reports were obtained for the purpose of proving or disproving an entitlement, or the extent of an entitlement, in respect of another claim or dispute by Mr Johnstone and fall within the exception provided in clause 44(4)(c). Further, Dr Wallace's reports provide me with a useful background. Accordingly, I find that Dr Wallace's reports dated 1 October 2008 and 28 October 2010 do not breach clause 44 of the Workers Compensation Regulation 2016 and should remain in evidence.

Is the respondent entitled to raise section 59A of the 1987 Act as an issue in dispute?

39. This interlocutory issue would also normally have been dealt with at the teleconference, but it was not for reasons unknown to me.

40. In dealing with this issue, I have considered the chronology of events referred to in [9] to [19] referred to above.

41. The respondent maintained its entitlement to raise section 59A of the 1987 Act as an issue in dispute.

42. Mr Johnstone submitted that the respondent had not raised all issues relevant to the dispute, namely, section 59A of the 1987 Act, in the Dispute Notices dated 8 September 2017 (under section 74 of the 1998 Act) and 5 July 2019 (under section 78 of the 1998 Act). Mr Johnstone referred to section 289A of the 1998 Act and a series of cases supporting his principal submission that the respondent should be restricted to the issues raised in its Dispute Notices. The cases referred to by Mr Johnstone referred to the requirement for Dispute Notices to be properly prepared and fully and clearly state in plain language the issues in dispute. The cases also referred to the reference of multiple sections of the relevant legislation, regardless of their relevance and without clearly articulating the issues in dispute, as being unacceptable. Accordingly, he submitted that the respondent was prevented from relying upon section 59A.

43. In the respondent's Dispute Notice dated 5 July 2019, there was an oblique reference to section 59A by the use of the words:

> "… the Sections of the legislation on which we rely in disputing liability include Sections 4, 9, 9A, 32A ***and following*** 60 of the *Worker's Compensation Act 1987* ..." (emphasis added)

44. The respondent clearly articulated its intention to rely on section 59A of the 1987 Act in Part 3 of the Reply dated 31 October 2019.

45. The respondent's Dispute Notices dated 8 September 2017 and 5 July 2019 fell short of complying with section 74, as it was and section 78 of the 1998 Act, as it now is.

46. Section 289A(4) of the 1998 Act provides that where the respondent has failed to meet the notice requirements, or has failed to put all relevant issues in dispute, the arbitrator may exercise his or her discretion to allow issues to be raised where they are of the opinion that it is in the interests of justice to do so.

47. I have taken into account the principles set out in *Mateus v Zodune Pty Limited t/as Tempo Cleaning Services*[14] (*Mateus*) in considering the exercise of my discretion under section 289A(4) of the 1998 Act. I have considered the difficulties or complexities to which the section 59A issue gives rise and I am satisfied that allowing the issue to be relied on would not prejudice Mr Johnstone. Mr Johnstone provided detailed and well considered written submissions in relation to the issue. The respondent clearly articulated its intention to rely on section 59A in Part 3 of the Reply dated 31 October 2019. In this regard, it can be said that the respondent's lawyers moved promptly to clearly articulate the issue after having been served with the ARD. Mr Johnstone had been on notice since 31 October 2019. In exercising my discretion, I have had regard to the merit and substance of the issue that is sought to be raised. Section 59A of the 1987 Act is a disentitling provision. It is an issue that ought to be ventilated if I am to act according to equity, good conscience and the substantial merits of the case.

48. In the circumstances, I exercise my discretion to allow the respondent to raise the section 59A issue because I am of the opinion that it is in the interests of justice to do so. Accordingly, under section 289A(4) of the 1998 Act, leave is granted to the respondent to rely upon the previously unnotified dispute as referred to in Part 3 of the Reply.

Is the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw reasonably necessary treatment as a result of the injury sustained by Mr Johnstone on 15 February 2007 within the meaning of section 60 of the 1987 Act?

49. Section 60(1) of the 1987 Act relevantly provides:

> "If as a result of an injury received by a worker, it is reasonably necessary that:
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> (a) any medical or related treatment (other than domestic assistance) be given, or
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> (b) any hospital treatment be given, or
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> (c) any ambulance service be provided, or
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> (d) any workplace rehabilitation service be provided,
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> the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)."

[14] *Mateus v Zodune Pty Limited t/as Tempo Cleaning Services* [2007] NSWWCCPD 227.

50. Section 60(5) of the 1987 Act relevantly provides:

> "The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute may be referred by the Registrar for assessment under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act."

51. There are two elements to section 60(1) of the 1987 Act that must be considered. The first element is "as a result of an injury received by a worker". The second element is that of "reasonably necessary".

52. Dealing with the first element, namely, "as a result of injury received by a worker", I am required to conduct a commonsense evaluation of the causal chain to determine whether the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw is reasonably necessary "as a result of" the injuries Mr Johnstone sustained in the course of his employment with the respondent on 15 February 2007.

53. The issue of causation must be based and determined on the facts in each case and requires a commonsense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*[15] (*Kooragang*). As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*[16] (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.

54. *Murphy v Allity Management Services Pty Ltd*[17] referred to *Kooragang* and is authority for the proposition that an injured worker must establish that the injury materially contributed to the need for the treatment or the surgery. The need for surgery can arise from multiple causes.

55. The respondent relied on the report of Dr Smith dated 14 June 2019 on the issue of causation. The respondent submitted that Dr Smith comprehensively and persuasively dealt with the relationship between Mr Johnstone's current complaints and the proposed surgical treatment. Dr Smith carried out a careful analysis of the history and the various investigations undergone by Mr Johnstone and came to the clear conclusion that there was no injury to the left mid tarsal joint or subtalar joint. He opined that Mr Johnstone likely had bilateral midfoot osteoarthritis, which is very common and that in his opinion, there was no relationship between the fractured tibia in 2007 and the subsequent development of symptomatic osteoarthritic change in the midfoot.

56. Mr Johnstone relied on Dr Bradshaw's report dated 18 April 2019 and Dr Bodel's report dated 14 July 2019 on the issue of causation. Mr Johnstone submitted that, according to the Dispute Notice dated 3 September 2017, he was examined by Dr Smith on 1 September 2017, who opined that employment was not a substantial contributing factor to his subtalar arthritis or his mid tarsal joint arthritis or bilateral hip arthritis. Dr Smith did not express an opinion that the subtalar arthritis or the mid tarsal joint arthritis or bilateral hip arthritis were not caused by the injury. He failed to express the reasoning behind reaching his opinion. In his subsequent report dated 14 June 2019, Dr Smith did not address the opinions expressed by Dr Bradshaw. The opinions expressed by Dr Bradshaw and Dr Bodel should be preferred over those expressed by Dr Smith.

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[15] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796.
[16] *Kirunda v State of New South Wales (No 4)* [2018] NSWWCCPD 45 at [136].
[17] *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49.

57. On 13 April 2013, Mr Johnstone consulted Dr Smith at the request of Racing NSW. In evidence, there is a report by Dr Smith dated 30 April 2013.[18] Dr Smith reviewed in detail Mr Johnstone's investigative history, which was largely consistent with the evidence. Dr Smith reported that in February 2007, Mr Johnstone had suffered a comminuted fracture to his left ankle, involving the left ankle joint and went on to develop a degree of post-traumatic osteoarthritis. The post-traumatic osteoarthritis was successfully treated by way of arthrodesis of the ankle joint in late 2009 by Dr Lam. Subsequent x-rays suggested subtalar joint involvement and evidence of a degenerative mid tarsal joint. It was not clear to Dr Smith how the latter related to the fracture of the ankle in 2007. He observed that mid tarsal joint arthritis was not uncommon in people without injury. He opined that Mr Johnstone had the beginnings of degenerative changes in the subtalar joint and that he could have mid tarsal osteoarthritic changes as a constitutional malady. Dr Smith opined that the left ankle joint was solid and required no further treatment. He further opined that it was likely that the arthritic change in the subtalar joint and in the mid tarsal joint between the talus and the navicular were a constitutional malady. Dr Smith did not adequately explain his reasoning behind the conclusion that the degenerative changes referred to were not related to the left ankle fracture in 2007.

58. In evidence, there is a report by Dr Smith dated 18 January 2017 responding to an enquiry made by Racing NSW.[19] There was no consultation with Mr Johnstone related to the preparation of this report. In relation to Mr Johnstone's left ankle, Dr Smith opined:

> "With regard to his left ankle and the subsequent osteoarthritic change in the ankle joint treated successfully by an ankle fusion, he also has arthritic change affecting the midfoot and in my opinion, the subtalar joint, which I alluded to in my letter. The relationship between these and the ankle injury is unclear, but could not be completely denied."[20]

Dr Smith went on to say:

> "There is in my opinion, no requirement for any treatment regarding his ankle, however there are two pathologies affecting the left foot that might require treatment as I have outlined above as well as his hip pathology."[21]

In this report, Dr Smith maintained that the causal relationship between the arthritic changes in Mr Johnstone's midfoot and subtalar joint were unclear but conceded that it could not be completely denied.

59. On 14 June 2019, Mr Johnstone consulted Dr Smith at the request of Racing NSW. In evidence, there is a report by Dr Smith dated 14 June 2019.[22] Dr Smith opined that there was no likelihood of any relationship between the ankle arthrodesis on the left and his development of osteoarthritic change in the joint between the head of the talus and the adjacent anterior calcaneus. Further, he opined that there was no relationship between the fractured tibia in 2007 and the subsequent development of symptomatic osteoarthritic change in the midfoot. He reported that the midfoot osteoarthritis is probably present bilaterally. He did not explain the reasoning behind the firming-up of his opinion relating to the causal relationship after acknowledging in his second report that, whilst unclear, it could not be denied. He simply stated that there was "no relationship" and offered the opinion that the midfoot osteoarthritis was probably bilaterally present, without any diagnostic evidence to support that opinion. I find Dr Smith's opinions unpersuasive for the reasons referred to above.

[18] Reply at pages 15-21.
[19] Reply at pages 11-14.
[20] Reply at pages 11-12.
[21] Reply at page 12.
[22] Reply at pages 6-10.

60. Rule 15.2(3) of the Workers Compensation Commission Rules 2011 provides that "evidence based on speculation or unsubstantiated assumptions is unacceptable."

61. Further, it is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd*[23] (*Paric*); *Makita (Australia) Pty Ltd v Sprowles*[24] (*Makita*); *South Western Sydney Area Health Service v Edmonds*[25] (*Edmonds*); and *Hancock v East Coast Timbers Products Pty Ltd*[26] (*Hancock*); that there must be a "fair climate" upon which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, more than a mere "ipse dixit" (an assertion without proof) is required and the latter seems to be precisely what Dr Smith has done in this matter.

62. In evidence, there is a report by Dr Bradshaw dated 18 April 2019 addressed to Racing NSW.[27] The report was prepared following Dr Bradshaw's consultation with Mr Johnstone on 18 April 2019. Dr Bradshaw referred to reviewing Mr Johnstone in relation to his left ankle and hind foot pain, which had deteriorated. He reported that Mr Johnstone was working as a forklift driver but now felt that he could not put up with the pain as it was becoming severe. He was wearing an ankle brace at work and having trouble with the pain affecting his lifestyle and stress levels.

63. Dr Bradshaw referred to his correspondence with Racing NSW in 2017 seeking approval to proceed with the same surgery. He referred to the fact that he had conditionally booked Mr Johnstone to undergo a left triple fusion in that year. Dr Bradshaw understood that a medical assessor expressed the opinion that the proposed surgical procedure was not work-related. He disagreed with this opinion and went on to provide his reasoning in this regard to which I will refer below.

64. Dr Bradshaw summarised Mr Johnstone's history as including a left ankle fracture treated by another surgeon initially and, due to failure of union in healing, a left ankle fusion which consolidated. However, complications arose, in that, the screws were potentially causing damage to the subtalar joint and required secondary surgery for removal. At that time, Mr Johnstone already had signs and symptoms of subtalar degeneration related to his initial trauma and management and it was raised with him that he was likely to require further surgery down the track.

65. Dr Bradshaw opined that Mr Johnstone had done everything he could to preserve the joints for as long as possible and continue in the workforce. A bone scan demonstrated deterioration in the subtalar joint and the talonavicular joint as expected. The ankle joint was fully consolidated. On examination, Dr Bradshaw observed that Mr Johnstone was tender throughout the subtalar joint; there was calcaneal fibula ligament laxity; there was pain in the posterior aspect of the Achilles; the talonavicular joint was quite stiff and sore, particularly with dorsi flexion; and the ankle joint was rigid.

66. Dr Bradshaw further opined:

> "Any young person with an ankle fusion it is quite expected that the other joints will suffer in the longer term. This often requires further surgery. I think particularly with the note that during the time of his ankle surgery there was potentially damage to the subtalar joint requiring secondary operations and that he already had symptoms of chondral change in those articulations. This has been accelerated and there is no evidence of Peter having pre-existing ankle subtalar or talar navicular arthritis or change or injury prior to his fracture which was work related."[28]

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[23] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA.
[24] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705.
[25] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421.
[26] *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43.
[27] ARD at pages 30-31.
[28] ARD at page 30.

67. Dr Bradshaw repeated his request to Racing NSW for approval of the procedure he previously outlined in 2017,[29] being a triple fusion with bone grafting.

68. Mr Johnstone consulted Dr Bodel at the request of his lawyers on 29 April 2019. In evidence, there is a report by Dr Bodel dated 14 July 2019.[30] Dr Bodel took a history from Mr Johnstone which was largely consistent with the evidence. Dr Bodel referred to Dr Smith's report dated 13 April 2013 and the latter's opinion that he could not see much of a connection between the midtarsal joint arthritis and the work accident. Dr Bodel disagreed with Dr Smith's opinion and provided the following reasons:

> "This gentleman suffered a very serious injury to the ankle joint which was surgically fused. This put a much greater load on the midtarsal region that led to the posttraumatic osteoarthritis in that region by way of aggravation, acceleration, exacerbation and deterioration of a disease process. All of the pathology in the region of the left foot and ankle is directly attributable back to the original injury."[31]

69. In relation to Mr Johnstone's left ankle, Dr Bodel concluded that the fusion of the ankle had put undue stress on the midtarsal region and the subtalar region, leading to the post traumatic osteoarthritis in that area.

70. Unlike Dr Smith, both Dr Bradshaw and Dr Bodel provided explanations for the conclusions they reached. I prefer the expert opinions of Dr Bradshaw and Dr Bodel over the opinions expressed by Dr Smith for the reasons stated above. In particular, I am persuaded by the opinions expressed by Dr Bradshaw as the treating orthopaedic surgeon. Mr Johnstone has been under Dr Bradshaw's care since about June 2017. I am satisfied, on the balance of probabilities, that Mr Johnstone's injury on 15 February 2007 materially contributed to the need for the proposed surgery.

71. Having regard to the whole of the evidence, applying a common sense test and for the reasons referred to above, I am satisfied that Mr Johnstone has discharged the onus of proving on the balance of probabilities that there is a sufficient causal chain connecting the condition of his left ankle and left foot to the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw and I find accordingly.

72. Turning to the "reasonably necessary" element, Roche DP in *Diab v NRMA Ltd*[32] (*Diab*) set out the "standard" test adopted for determining if medical treatment is reasonably necessary in *Rose v Health Commission (NSW)*[33] (*Rose*):

> "3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of the injury.
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> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgement and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
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> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."

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[29] ARD at page 790.
[30] ARD at pages 47-53.
[31] ARD at page 51.
[32] *Diab v NRMA Ltd* [2014] NSWWCCPD 72.
[33] *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32.

73. Roche DP noted subsequent appellate authority with respect to the use of the words "reasonably necessary" and said:

> "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. …
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> 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.
>
> 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'".

74. The respondent submitted that based on the views expressed by Dr Smith, it could not be properly said that the proposed surgical treatment is reasonably necessary as a result of injury.

75. Mr Johnstone relied on Dr Bradshaw's report dated 18 April 2019 and Dr Bodel's reports dated 14 July 2019 and 18 August 2019 in the relation to the "reasonably necessary" element.

76. In evidence, there is a statement by Mr Johnstone dated 19 September 2019.[34]
Mr Johnstone provided a detailed history of the subject injury and a detailed history of the treatment he had undergone thereafter to date, which was largely consistent with the medical evidence. He stated that he was currently experiencing considerable difficulty with his left ankle. He was suffering from continuous pain and stiffness in the left ankle. He is very restricted in his movements, which limit his activities at home, with the children and during leisure time.

[34] ARD at pages 1-15.

77. I accept Mr Johnstone as a witness of truth, who did his best to provide a history of his injuries, his treatment and his complaints to his various treating doctors and the forensic medical specialists. The histories he provided of injury, treatment and complaints of symptoms were, in the main, consistent over a long period of time.

78. Whilst Dr Smith did not express a view as to whether the proposed surgical procedure is reasonably necessary because of his opinion on causation. He did opine that fusion operations have a failure rate, in part, depending on how they are done. He was of the opinion that if the operation was successful, Mr Johnstone would require no other treatment apart from perhaps, having the internal fixation device removed sometime in the future.

79. Dr Bradshaw explained to Mr Johnstone that the proposed surgery was one of last resort and that he would be reliant on rocker sole shoes and arches.[35] As Mr Johnstone's function was deteriorating and as he was in daily pain, Dr Bradshaw felt that it had reached the stage where he could offer him the proposed surgery.[36]

80. Mr Johnstone is keen to proceed with the proposed surgery and has expressed his wish to go ahead in his evidentiary statement[37] and to Dr Bradshaw.[38]

81. Dr Bodel opined that the recommendation for the proposed surgery is to reduce pain and is reasonably necessary treatment.[39]

82. For the reasons stated above, I prefer the expert opinions of Dr Bradshaw and Dr Bodel over those of Dr Smith.

83. Applying the principles referred to in *Diab* above, different treatments may qualify as 'reasonably necessary' and Mr Johnstone only has to establish that the treatment claimed is one of those treatments. The proposed left triple arthrodesis and bone grafting surgery is one of those treatments and I find as follows:

    (a) The alternative treatment by way of conservative management, pain relieving medication and steroid injections, which have failed since the left ankle arthroscopy and fusion in 2009 and more recently, the wearing of an ankle brace, are unlikely to be effective. On the balance of probabilities, without the proposed surgery, Mr Johnstone will continue to suffer a deterioration in his symptoms and the pain and the restrictions in his left ankle and foot referred to in the evidence.

    (b) There was no issue raised by the respondent as to the cost of the proposed surgery.

    (c) The potential effectiveness of the proposed surgery is the best chance Mr Johnstone has of improving his current and longstanding symptoms, improving his quality of life and remaining in suitable employment.

    (d) The purpose and potential effect of the proposed surgery is to alleviate the consequences of the injury as far as possible.

    (e) The expert evidence of Dr Bradshaw and Dr Bodel support the proposed surgery as being reasonably necessary and likely to be beneficial in the circumstances of this case.

[35] ARD at page 288.
[36] ARD at page 790.
[37] ARD at page 15 at [211].
[38] ARD at pages 30 and 790.
[39] ARD at page 55.

84. Accordingly, I find that Mr Johnstone has discharged the onus of proving that the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw is reasonably necessary treatment as a result of the injury sustained by Mr Johnstone in the course of his employment with the respondent on 15 February 2007 within the meaning of section 60 of the 1987 Act.

Is Mr Johnstone precluded from compensation for the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw by operation of section 59A of the 1987 Act?

85. Section 59A of the 1987 Act provides:

> "(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker.
>
> (2) The compensation period in respect of an injured worker is:
>
> (a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, or the degree of permanent impairment has not been assessed as provided by that section, the period of 2 years commencing on:
>
> (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
>
> (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker), or
>
> (b) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be more than 10% but not more than 20%, the period of 5 years commencing on:
>
> (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
> (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker).
>
> (3) If weekly payments of compensation become payable to a worker after compensation under this Division ceases to be payable to the worker, compensation under this Division is once again payable to the worker but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.
>
> (4) For the avoidance of doubt, weekly payments of compensation are payable to a worker for the purposes of this section only while the worker satisfies the requirement of incapacity for work and all other requirements of Division 2 that the worker must satisfy in order to be entitled to weekly payments of compensation.
>
> (5) This section does not apply to a worker with high needs (as defined in Division 2).
>
> (6) This section does not apply to compensation in respect of any of the following kinds of medical or related treatment:

(a) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries),

(b) the modification of a worker's home or vehicle,

(c) secondary surgery.

(7) Surgery is **'secondary surgery'** if:

(a) the surgery is directly consequential on earlier surgery and affects a part of the body affected by the earlier surgery, and

(b) the surgery is approved by the insurer within 2 years after the earlier surgery was approved (or is approved later than that pursuant to the determination of a dispute that arose within that 2 years).

(8) This section does not affect the requirements of section 60 (including, for example, the requirement for the prior approval of the insurer for secondary surgery)."

86. The respondent submitted that Mr Johnstone had been paid lump sum compensation for a 17% whole person impairment. Under section 59A(2)(b) of the 1987 Act, the period during which he was entitled to recover the cost of medical and treatment expenses was within five years from the date on which weekly payments of compensation ceased to be payable to him. Weekly payments of compensation ceased to be payable to Mr Johnstone in July 2014. In these circumstances, by operation of section 59A, Mr Johnstone ceased to be entitled to the payment of medical and treatment expenses in July 2019. The operation of section 59A precludes the recovery of medical and treatment expenses as compensation.

87. Mr Johnstone submitted that the respondent had failed to prove that the five year compensation period had expired. Further, the respondent had failed to prove the precise date on which Mr Johnstone last received weekly compensation benefits. There was no evidence as to when such payments ceased. They may have ceased, or they may have continued to the present time as far as the evidence is concerned. Therefore, it may well be that Mr Johnstone had made a claim for surgery within the five year compensation period. Further, the respondent has not proven the precise date on which Mr Johnstone's claim for surgery was made and it may well be that such claim was made within the five year compensation period.

88. I reject Mr Johnstone's above submissions for the following reasons. On 10 April 2014, Racing NSW issued a WCD under section 43 of the 1987 Act and gave notice of its intention to cease payments of weekly compensation on 17 July 2014.[40] Mr Johnstone's evidentiary statement under the heading "Weekly payments terminated" acknowledged receipt of the WCD;[41] stated that on 4 June 2014, his application for merit review in relation to the WCD was unsuccessful;[42] and stated that on 25 July 2014, WIRO dismissed his application for procedural review of the WCD.[43] I am satisfied on the abovementioned evidence and I find that Mr Johnstone's weekly payments of compensation ceased on or about 25 July 2014 and that the compensation period referred to in section 59A(2)(b)(ii) of the 1987 Act ceased on or about 25 July 2019. Further, it is not correct to say that the respondent has not proven when the claim for the proposed surgery was made. On 18 April 2019, Dr Bradshaw again made a written request to Racing NSW seeking approval to proceed with the proposed left triple arthrodesis and bone grafting.[44] On 24 April 2019, Dr Bradshaw issued Racing NSW with a

[40] Reply at pages 26-32.
[41] ARD at page 12 at [162].
[42] ARD at page 12 at [168].
[43] ARD at page 12 at [171].
[44] Application to Resolve a Dispute at pages 30-31.

quotation of the cost of the proposed surgery.[45] The other difficulty with Mr Johnstone's submissions is that they are based on the claim for the proposed surgery having been made within the compensation period. The date the claim for the proposed surgery was made is of no relevance. Section 59A(1) of the 1987 Act states that compensation is not payable to an injured worker in respect of any treatment, service or assistance given or provided after the expiry of the compensation period. Clearly, the proposed surgery will be provided well after the expiry of the compensation period.

89. In the alternative, Mr Johnstone submitted that section 59A(6) of the 1987 Act applied, that is, the "secondary surgery" exemption. Mr Johnstone submitted that the dispute with respect to the proposed surgery arose within the period of two years of the first series of surgery.

90. I reject Mr Johnstone's above submissions for the following reasons. Section 59A(7) defines "secondary surgery" as surgery that is directly consequential on earlier surgery and affects a part of the body affected by the earlier surgery; and the surgery is approved by the insurer within two years after the earlier surgery was approved; or is approved later than that pursuant to the determination of the dispute that arose within that two years. In this case, I am satisfied for the reasons stated above that the proposed surgery is directly consequential on earlier surgical procedures and affects the same part of the body affected by the earlier surgery. The proposed surgery was not approved by Racing NSW at any stage. It has not been approved at a later stage pursuant to the determination of the dispute that arose within two years after the earlier surgery had been approved. The last surgical procedure performed on Mr Johnstone's left ankle/foot took place on 24 March 2011, when he underwent a left tibial ostectomy and removal of hardware by Dr Lam. Accordingly, I find that section 59A(6) does not apply to Mr Johnstone.

91. In the further alternative, Mr Johnstone submitted that his claim is an "existing claim" and that his right to recover compensation under Division 3 of Part 3 of the 1987 Act is governed by Clause 27 of Part 2 of Schedule 8 – Special Provisions for Existing Claims – 2012 Amendments of the Workers Compensation Regulation 2016 (referred to by Mr Johnstone in his written submissions as Clause 28 of Part 2 of Schedule 8 of the Workers Compensation Regulation 2010). In particular Clause 27(2)(b) exempts Mr Johnstone from the operation of section 59A of the 1987 Act. Mr Johnstone submitted that *BlueScope Steel Limited v Jovanovski* (*Jovanovski*)[46] is authority for the proposition that an arbitrator is permitted to determine whether a worker's injury has resulted in permanent impairment without referral of the issue to an Approved Medical Specialist (AMS). Workers who, initially made a claim for compensation prior to 1 October 2012, and whose injury is not fully ascertainable for assessment of permanent impairment, could bring claims for future medical expenses despite not being in receipt of any weekly payments. Mr Johnstone's impairment is not ascertainable and accordingly, Clause 27(2)(b) applies. The respondent's submission that Mr Johnstone has been assessed at 17% whole person impairment is not supported by the evidence. There is an assessment of 17% whole person impairment by Dr Wallace in his report dated 28 October 2010, but this is not a Medical Assessment Certificate (MAC) as required in the note to Clause 27(2)(b).

92. I reject Mr Johnstone's above submissions for the following reasons. The respondent did not submit that Mr Johnstone had been assessed at 17% whole person impairment. The respondent submitted that Mr Johnstone had been paid a lump sum compensation for a 17% whole person impairment. The WCD referred to a Complying Agreement signed by Mr Johnstone on 23 May 2011, agreeing to a 17% whole person impairment under section 66 of the 1987 Act.[47] Mr Johnstone did not deny that he entered into the Complying Agreement with the respondent and received payment for 17% whole person impairment but rather submitted that there had been no assessment of whole person impairment. I am satisfied that the parties entered into the Complying Agreement referred to in the WCD and find accordingly.

[45] Application to Resolve a Dispute at page 32.
[46] *BlueScope Steel Limited v Jovanovski* [2015] NSW WCCPD 44.
[47] Reply at page 30.

93. The relevant parts of Clause 27(1) of Part 2 of Schedule 8 provide that an existing claim is exempt from the operation of section 59A of the 1987 Act until the injured worker reaches retiring age in respect of compensation payable to him/her under Division 3 of Part 3 of the 1987 Act, if the worker's injury has resulted in permanent impairment of greater than 20%. The relevant parts of Clause 27(2) provide that a worker's injury is considered to have resulted in permanent impairment of greater than 20% only if the injury has resulted in permanent impairment and an assessment of the degree of permanent impairment is pending and has not been made because an AMS has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable. However, it no longer applies once the degree of permanent impairment has been assessed.

94. In *Jovanovski*, the relevant facts were as follows. In proceedings commenced in the Commission on 26 September 2012, the worker claimed permanent impairment compensation in respect of a 3% whole person impairment. The Commission referred that claim for assessment by an AMS, Dr Kumar. On 31 October 2012, Dr Kumar issued a MAC in which he diagnosed the worker to have, as a direct result of the incident on 25 February 2011, bilateral inguinal hernias and a traumatic right hydrocele. However, he said that the worker's hernias were still in the process of progression and development and that the relevant body parts/systems had not stabilised or reached maximum medical improvement. He expected that to occur after adequate repair of both the hernias and cure of the worker's hydrocele. Without any complications from the operation, he expected the worker's maximum medical improvement to occur six months after surgery. On 27 November 2012, the worker sought the employer's approval to have the surgery recommended by Dr Kumar. The employer disputed liability for the proposed surgery. On 10 July 2013, the worker claimed the cost of the proposed surgery. The Commission referred the question of whether the surgery was reasonably necessary to a second AMS, Dr Berry. Meanwhile, on 6 December 2012, acting on the MAC issued by Dr Kumar, the Commission issued a Certificate of Determination in the 2012 proceedings in which it determined that the degree of permanent impairment resulting from injury to the worker on 25 February 2011 was not fully ascertainable. The Determination added that either party could apply to restore proceedings when the worker had attained maximum medical improvement. After an examination on 4 March 2014, Dr Berry issued a MAC on 13 March 2014 concluding that the proposed treatment for those conditions (surgery) was reasonably necessary as a result of the injury on 25 February 2011. Notwithstanding this report, the appellant continued to dispute liability.

95. *Jovanovski* can be distinguished on the facts of this case. In Mr Johnstone's case, Clause 27(2)(b) of Part 2 of Schedule 8 has not been satisfied. Unlike *Jovanovski's* case, an assessment of the degree of permanent impairment is not pending and an AMS has not declined to make an assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable. Clause 27(2)(b) contemplates that an assessment by an AMS of the degree of whole person impairment is pending and has not been made. It does so in very specific circumstances, namely, where the degree of permanent impairment has not been assessed because an AMS has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable.

96. Mr Johnstone's final alternative submission relied on section 59A(3) of the 1987 Act and referred to Roche DP's decision in *Flying Solo Properties Pty Ltd t/as Artee Signs v Colette* (*Colette*)[48]. Mr Johnstone submitted that if he were to proceed to have the proposed surgery at his own expense, require time off work for the treatment and, if medical certificates were submitted at that time in support of a claim for weekly compensation, then compensation would once again become payable to him and the insurer would be obliged to meet the cost of the treatment if it were found to be reasonably necessary.

[48] *Flying Solo Properties Pty Ltd t/as Artee Signs v Colette* [2015] NSWWCCPD 14.

97. In *Colette*, Roche DP explained the operation of section 59A of the 1987 Act. Relevant to Mr Johnstone's case, Roche DP held that workers will cease to be entitled to weekly compensation if having previously been entitled to such compensation, their right to receive actual weekly compensation comes to an end. That can occur because of the application of the legislation, as in Mr Johnstone's case, or because the worker has recovered from the effects of the injury. That is so, even though the right to receive actual weekly compensation may revive at a later time, as is dealt with in section 59A(3).[49] In relation to section 59A(3), Roche DP explained that, if by operation of either section 59A(1) or (2), a worker has ceased to be entitled to compensation under Division 3 of Part 3, their rights to such compensation is revived during a period when weekly compensation is again payable, but only in respect of any treatment, service or assistance given or provided during the period when weekly compensation is payable to the worker.[50] Section 59A(4) clarifies that weekly payments of compensation are payable to a worker for the purposes of the section only while the worker satisfies the requirement of incapacity for work and all other requirements of Division 2 that the worker must satisfy in order to be entitled to weekly payments of compensation.

98. Following the decision in *Colette*, section 59A underwent amendment, particularly in relation to the issue of the "compensation period."

99. For the reasons stated above, the Commission does not have the power to order the respondent to pay the cost of the left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw at this time due to the operation of section 59A of the 1987 Act. As envisaged by section 59A(3), liability for the payment of the expense of the surgery would occur once Mr Johnstone enters hospital to undergo the treatment proposed and his entitlement to weekly payments is revived whilst he has no current work capacity (that is, whilst he is having and recovering from the surgery).

CONCLUSION

100. The left triple arthrodesis and bone grafting surgery proposed by Dr Bradshaw is reasonably necessary treatment as a result of the injury sustained by Mr Johnstone in the course of his employment with the respondent on 15 February 2007 within the meaning of section 60 of the 1987 Act.

[49] *Flying Solo Properties Pty Ltd t/as Artee Signs v Colette* [2015] NSWWCCPD 14 at [70].
[50] *Flying Solo Properties Pty Ltd t/as Artee Signs v Colette* [2015] NSWWCCPD 14 at [76(f)].