

# WORKERS COMPENSATION COMMISSION

## AMENDED CERTIFICATE OF DETERMINATION

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

**Matter Number:** 4950/19  
**Applicant:** John Grima  
**Respondent:** Bursons Automotive Pty Limited  
**Date of Determination:** 18 December 2019  
**Date of Amendment:** 20 December 2019  
**Citation:** [2019] NSWCC 418

The Commission determines:

1. The applicant has a consequential condition of morbid obesity as a result of the injury he sustained to his lower back on 10 July 2017.
2. A sleeve gastrectomy as proposed by Dr Khaleal is reasonably necessary as a result of the injury sustained by the applicant on 10 July 2017.

The Commission orders:

1. Pursuant to sections 60 (5) and 61 (4A) of the *Workers Compensation Act 1987*, the respondent is to pay the applicant's costs of the sleeve gastrectomy as proposed by Dr Khaleal.

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

John Isaksen  
**Arbitrator**

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

*A MacLeod*

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



## STATEMENT OF REASONS

### BACKGROUND

1. The applicant, John Grima, sustained an injury to his lower back on 10 July 2017 whilst employed as a sales person with the respondent, Bursons Automotive Pty Limited.
2. The respondent admitted liability for this injury to the lower back and the applicant continues to receive weekly payments of compensation for this injury.
3. The applicant claims that as a consequence of the resulting pain from this injury to the lower back he has become inactive and his weight has increased some 30 kilograms since the injury.
4. The applicant has been offered a sleeve gastrectomy by Dr Khaleal with the aim of having his excess weight reduced by up to 70%. The applicant seeks an order pursuant to section 60 (5) of the *Workers Compensation Act 1987* (the 1987 Act) that the respondent meets the costs of this proposed surgery.
5. The respondent issued dispute notices dated 16 May 2019 and 3 September 2019 wherein it declined liability for that surgery as not being reasonably necessary and not having resulted from the work injury.

### ISSUES FOR DETERMINATION

6. The parties agree that the following issues remain in dispute:
  - (a) whether the need for the proposed sleeve gastrectomy results from the injury the applicant sustained to his lower back on 10 July 2017, and
  - (b) whether the proposed sleeve gastrectomy is reasonably necessary.

### PROCEDURE BEFORE THE COMMISSION

7. The parties attended a conference and hearing at Penrith on 13 December 2019. 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.
8. Mr Ryan Brown appeared for the applicant, instructed by Ms Grant-Nilon. Mr Jak Callaway for the respondent.

### EVIDENCE

#### Documentary evidence

9. 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

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

## **FINDINGS AND REASONS**

### **The evidence of the applicant**

11. The applicant has provided a statement dated 18 September 2019. He states that he worked for about one week after he sustained injury to his lower back on 10 July 2017 but has not worked since due to ongoing pain in his lower back and down both legs, especially his left leg.
12. The applicant does not state how much he weighed at the time of his injury but estimates that he has gained 30 kilograms in weight since the injury due to being inactive because of ongoing pain.
13. The applicant states:

“I have been exercising daily by walking and I do hydrotherapy once a week. I previously underwent physiotherapy sessions and continue to complete exercises at home. I am also dieting however, I have been unable to lose much weight. It is difficult as when I exercise, even after taking pain killers, the movements still cause pain in my back and down my legs, causing me to need to stop as I am unable to cope with that pain.”
14. The applicant states that he has tried a number of diets but none are effective in maintaining weight loss. He states that he would only lose a few kilograms and then the weight loss would stop. He states that he cannot take weight loss tablets because these counteract with anti-depressant medication that he is taking.
15. The applicant states that his treating neurosurgeon, Dr Al Khawaja, has recommended he undergo weight loss surgery in an effort to avoid lower back surgery.
16. The applicant states that he wants to undergo the weight loss surgery proposed by Dr Khaleal as he wants to reduce his back pain and prevent the need to undergo lower back surgery.

### **The medical evidence**

17. There are clinical notes in evidence from Golden Cross Medical Centre in Prospect, where the applicant has usually seen Dr Alladin. Those notes only commence from 11 May 2018, some 10 months after the work injury. The first record of the applicant's weight that I could locate in those notes is on 6 July 2018, with a weight recorded of 126 kilograms. The last record of the applicant's weight that I could locate in those notes is on 26 August 2019, with a weight recorded of 133 kilograms.
18. The clinical notes contain multiple entries of the applicant being counselled about his weight and the need to undertake regular hydrotherapy and diet control.
19. The applicant states that he first attended Dr Al Khawaja, neurosurgeon, in April 2018 but there are only two reports in evidence from that doctor, dated 30 November 2018 and 4 February 2019.
20. In his report dated 30 November 2018, Dr Al Khawaja writes:

“Mr Grima is going through pain management and they recommend weight loss. I agree with them and highly recommend weight loss and weight loss surgery may be very helpful for his condition and it may help him to avoid surgery on his back as with his weight the risk of surgery will be higher. I would appreciate approving his weight loss surgery.”

21. In his report dated 4 February 2019, Dr Al Khawaja writes:
- “I would really appreciate approval of his weight loss surgery because it may save him from any further surgical treatment, otherwise he may require fusion of his lumbar spine and disc replacement.”
22. Dr Khaleal has recommended sleeve gastrectomy for the applicant and writes in a report dated 1 April 2019 that the applicant has had a long struggle with obesity for most of his life (the applicant being 25 years of age). He records that the applicant has gained significant weight since his back injury in July 2017 and has gained about 30 kilograms. Dr Khaleal recommends the applicant undergo a sleeve gastrectomy and that the procedure could cause the applicant to lose up to 70% of excess body weight.
23. In a further report to the applicant’s solicitors dated 18 June 2019, Dr Khaleal opines that the weight gain from the applicant’s existing spinal injury would be a contributing factor to his injury and that the applicant needs bariatric surgery before spinal surgery for a better outcome.
24. Dr Berry, specialist general surgeon, has provided a report dated 7 August 2019 at the request of the applicant’s solicitors. In that report Dr Berry takes a history that prior to the work injury the applicant’s weight was always between 101 and 105 kilograms. Dr Berry records a weight at the time of the applicant’s examination of 134.4 kilograms. Dr Berry records that since the work injury the applicant has not been able to interact physically with his children, has not done any household duties, and has paid for his lawns to be mowed.
25. Dr Berry opines that if the applicant’s history is accepted then as a result of the work injury impinging on the applicant’s level of activity, the applicant has gained nearly 30 kilograms in weight. Dr Berry further opines:
- “I would consider that Mr Grima’s increase in weight of between 20 and 30 kilograms is a consequence of his injury to the lumbar spine by virtue of limiting his daily activities and ability to be involved in weight control exercises.”
26. Dr Berry further opines that:
- “I note that he has seen Dr Fadil Khaleal who has advocated to a sleeve gastrectomy and while this is not without its risks as he has indicated, probably represents this patient’s best chance of losing significant weight. The benefit of losing weight would be twofold:
- 1) There is a very good chance that his level of back and leg symptoms would decrease;
  - 2) The risk if he were to undertake major spinal surgery would be decreased.”
27. Dr Berry also opines that had the applicant not had a marked increase in weight since the work injury, then he would not be a candidate for the proposed weight loss surgery.
28. Dr Kim Edwards, surgeon and medico-legal consultant, has provided a report at the request of the respondent dated 10 May 2019.
29. Dr Edwards records the applicant stating that before the work injury he weighed at most 110 kilograms and now weighs 130 kilograms. He records that the applicant does not do any work around the house. He records that the applicant tries to walk but gets a sharp pain going down his left leg. He records that the applicant might sit on the floor to play with his children as this is more comfortable.

30. Dr Edwards opines that with a BMI of 40, the applicant would be a good candidate for a bariatric surgical procedure. However, he also does not consider that the proposed surgery is reasonably necessary treatment for the applicant's workplace injury. Dr Edwards opines that the proposed surgery is for the treatment of morbid obesity and not treatment for back pain or as a precursor for possible future back surgery. He identifies type 2 diabetes, heart disease, osteoarthritis, sleep apnoea and depression as being associated with morbid obesity.

## Determination

### ***Whether the applicant's morbid obesity is a consequence of the injury he sustained to his lower back on 10 July 2017***

31. The determination of whether a pathological condition suffered by a worker is as a consequence of a work injury was considered by DP Roche in *Moon v Conmah Pty Limited* [2009] NSWCCPD 134 (*Moon*). In that matter the worker claimed whole person impairment from symptoms experienced in the left shoulder as a consequence of an accepted injury to the right shoulder. Deputy President Roche said at [45-46]:

"It is therefore not necessary for Mr Moon to establish that he suffered an 'injury' to his left shoulder within the meaning of that term in section 4 of the 1987 Act. All he has to establish is that the symptoms and restrictions in his left shoulder have resulted from his right shoulder injury. Therefore, to the extent that the Arbitrator and Dr Huntsdale approached the matter on the basis that Mr Moon had to establish that he sustained an 'injury' to his left shoulder in the course of his employment with Conmah they asked the wrong question.

The test of causation in a claim for lump sum compensation is the same as it is in a claim for weekly compensation, namely, has the loss 'resulted from' the relevant work injury (see *Sidiropoulos v Able Placements Pty Limited* [1998] NSWCC 7; (1998) 16 NSWCCR 123; *Rail Services Australia v Dimovski & Anor* [2004] NSWCA 267; (2004) 1 DDCR 648)."

32. Deputy President Roche then proceeded to state that the expression "results from" should be applied using the principles set out by Kirby P in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*). In *Kooragang* Kirby P said at [462]:

"It has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act".

33. Kirby P then said at [463-4]:

"...What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury... is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions".

34. The applicant does not state in his own evidence as to what his weight was at the time of the work injury in July 2017 but does state that since the work injury his weight has increased by about 30 kilograms. Dr Berry records that prior to the work injury the applicant's weight was always between 101 and 105 kilograms and that the applicant weighed 134.4 kilograms when the applicant was examined by Dr Berry in July 2019, some 12 months after the work injury. Dr Edwards records in May 2019 the applicant weighing no more than 110 kilograms at the time that he was injured and now weighs 130 kilograms. Dr Khaleal does not record in his reports what weight the applicant was when he was injured but does record the applicant gaining about 30 kilograms since his injury.
35. I have already noted that the clinical notes in evidence from treatment by general practitioners are only from 11 May 2018, some 10 months after the work injury, so that there are no clinical notes which may have contained some records of the applicant's weight prior to his injury.
36. However, there is nothing to cause me to doubt the applicant's evidence that his weight has increased by some 30 kilograms since the work injury. The applicant's own evidence on this point was not challenged and the applicant has given a consistent history to the doctors he has attended that his weight has increased by about 30 kilograms since the work injury. In his submissions, Mr Callaway for the respondent, quite fairly in my view, conceded that there was no reason to disbelieve the applicant. I therefore accept that the applicant's weight has increased by some 30 kilograms since he was injured on 10 July 2017.
37. I further accept that a cause of the applicant's increase in weight since 10 July 2017 has been his inability to exercise and the significant limitations placed on his daily activities due to chronic, ongoing lower back pain and pain extending down both legs. This is the opinion of Dr Berry, who comes to that conclusion after recording the changes to the applicant's lifestyle since the work injury. I also consider that it is an opinion arrived at by the applicant's specialist for the proposed bariatric surgery, Dr Khaleal, when he writes: "Opinion about Mr Grima's employment contributing to injury - Weight gain from an existing spinal injury would be a contributing factor to this injury."
38. I prefer the opinions of Dr Berry and Dr Khaleal on the issue of whether the applicant's increase in weight has been caused by his lower back injury because Dr Berry has given consideration to the changes to the applicant's lifestyle since the work injury, and Dr Khaleal has provided his opinion in the context of a treating specialist who carries the responsibility of determining the most appropriate treatment for this particular medical condition.
39. In contrast, there is little assistance provided by Dr Edwards on this issue because he fails to consider whether the applicant's lack of activity and sedentary lifestyle due to his lower back pain since the work injury has led to a significant increase in his body weight. Dr Edwards refers to a number of conditions associated with morbid obesity (type 2 diabetes, heart disease, osteoarthritis, sleep apnoea and depression) without investigating further what might be the actual cause or causes of the applicant's weight gain. Dr Edwards merely states: "I do not consider the proposed sleeve gastrectomy is a reasonably necessary treatment incurred by this workplace injury", without giving reasons for forming that opinion.
40. I therefore accept that the applicant's increase in weight since the work injury of 10 July 2017 is a consequence of that injury to his lower back and his resulting inactivity due to chronic, ongoing lower back pain and pain extending down both legs.

## Whether the applicant's need for bariatric surgery results from the injury of 10 July 2017

41. In *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 (*Murphy*), DP Roche considered the test to be applied in section 60 (1) of the 1987 Act for medical treatment to be reasonably necessary 'as a result of an injury received by a worker' and said at [57-58]:

"Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pymont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.

Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

42. I have already found that a cause of the applicant's increase in weight has been his inability to exercise and the significant limitations placed on his daily activities due to chronic, ongoing lower back pain and pain extending down both legs resulting from the work injury on 10 July 2017. The surgery proposed by Dr Khaleal is aimed at trying to reduce up to 70% of excess body weight, which includes weight gained by the applicant since his work injury. It follows that the injury sustained by the applicant, which includes consequent weight gain caused by lack of activity, materially contributes to the need for surgery.

## Whether the surgery proposed by Dr Khaleal is reasonably necessary

43. In *Rose v Health Commission (NSW)* [1986] NSWCC 2; (1986) 2 NSWCCR 32 (*Rose*) Burke CCJ said in regard to what was then section 10 of the 1926 Act, now section 60 of the 1987 Act:

- "1. *Prima facie*, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.
2. However, although falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the parties seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.
3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.

5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition.”
44. The applicant’s treating neurosurgeon, Dr Al Khawaja, identifies two reasons for the need for surgery in a report to one of the applicant’s general practitioners. Firstly, he states that the surgery would be “very helpful for his condition.” Dr Al Khawaja does not elaborate on this, but I consider it reasonable to infer that he means there would be some reduction in the pain the applicant is experiencing and an increase in the function and movement of his lower back. That is an opinion shared by Dr Berry, who considers there is a very good chance that the applicant’s lower back and leg symptoms would decrease following the proposed surgery.
45. Secondly, Dr Al Khawaja states that the proposed weight loss surgery might mean that the applicant can avoid lower back surgery. That is slightly different from the opinion of Dr Berry, who regards the weight loss surgery as decreasing the risks that are involved in spinal surgery.
46. I consider that the reasons advanced for weight loss surgery by Drs Al Khawaja and Berry fits the criteria of Burke CCJ in *Rose*, being that the proposed medical treatment aims to alleviate the consequences of the applicant’s injury by reducing weight that has been gained by the applicant as a result of the work injury, and attempting to reduce the pain being experienced by the applicant in his lower back and perhaps avoid the need for major spinal surgery.
47. Even Dr Edwards concedes that the applicant is a candidate for the proposed weight loss surgery because of his morbid obesity, although he does not consider the surgery is a reasonably necessary treatment for the applicant’s work injury.
48. Mr Callaway for the respondent submits that the proposed weight loss surgery does not meet the requirement of “the appropriateness of the particular treatment” referred to in *Rose* and later by DP Roche in *Diab v NRMA Ltd* [2014] NSWCCPD 72 at [88] because, according to Dr Edwards, the proposed surgery is for treatment for morbid obesity and not treatment for back pain or a precursor for possible future back surgery.
49. I have already set out the limitations in the opinions expressed by Dr Edwards and why I prefer the opinions of Dr Al Khawaja and Dr Berry. I have also set out my reasons as to why I have found the significant amount of weight gained by the applicant is a consequence of the applicant’s work injury and why this injury materially contributes to the need for the proposed weight loss surgery. The weight loss surgery is appropriate for the reasons provided by Dr Al Khawaja, who I consider to be in the best position to give those reasons because of his role as the applicant’s treating neurosurgeon.
50. The proposed sleeve gastrectomy as proposed by Dr Khaleal is reasonably necessary and there will be an order made that the respondent is to pay the applicant’s costs of that surgery.