

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 2040/19  
**Applicant:** Gail Caltabiano  
**Respondent:** Secretary, Department of Transport  
**Date of Determination:** 23 July 2019  
**Citation:** [2019] NSWCC 249

The Commission determines:

1. Pursuant to section 4(a) of the *Workers Compensation Act 1987* the applicant sustained injury to her lumbar spine in the course of her employment with the respondent due to the performance of her work duties, including heavy lifting, from 19 February 2015 to 24 April 2016.
2. Pursuant to section 60 of the *Workers Compensation Act 1987* the surgery proposed by Dr Hsu, being L4/5 decompression and fusion, is reasonably necessary treatment as a result of injury to the applicant's lumbar spine on 19 February 2015 and 24 April 2016 (deemed) sustained in the course of her employment with the respondent.
3. The respondent is to pay the costs of the abovementioned surgery and associated treatment expenses at the appropriated gazetted rates and subject to the provisions of the *Workers Compensation Act 1987*.
4. The respondent is to pay the claimed past section 60 expenses on production of accounts, receipts and/or Medicare Notice of Charge.

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 Reynolds

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



## STATEMENT OF REASONS

### BACKGROUND

1. The parties agreed at the Arbitration hearing that the name of the respondent had been incorrectly described in the Application to Resolve a Dispute (ARD) and they advised me the correct name should be Secretary, Department of Transport. The name of the respondent was amended accordingly.
2. Ms Caltabiano commenced work with Railcorp in June 2005 as a customer service assistant and then as a cleaner in 2009. On 19 February 2015 when she was working at Blacktown Station she fell backwards and landed on the floor. A paramedic attended her and she was taken to a medical centre. She alleges she sustained injuries to her back, hips, right wrist and coccyx in this fall, but did not take time off work. She performed light duties for three weeks.
3. In Part 4 of the ARD Ms Caltabiano relies on this date of injury and also 24 April 2016, being a deemed date of injury. The injury description in relation to this deemed date of injury refers to the nature and conditions of Ms Caltabiano's employment including heavy lifting, carrying and repetitive bending, pushing and pulling.
4. The claims for compensation made by Ms Caltabiano are confined to section 60 expenses comprised of \$687.40 for past expenses and the costs of proposed L4/5 decompression and fusion surgery. The respondent agreed at the arbitration hearing the claim for past expenses could be dealt with by a general order.
5. On 19 May 2017, the respondent issued a notice under section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) referring to a date of injury of 24 April 2016 and disputed liability from 19 May 2017 but stating weekly compensation would be paid until 1 June 2017. The reason for the declinature was said to be based on sections 4, 4(b), 9A, 33 and 60 of the *Workers Compensation Act 1987* (the 1987 Act) and the respondent stated, quoting Dr Anthony Smith:

“There is no back injury. She has lumbar degenerative disease.’ [page 4].  
Dr Smith also indicates the following with respect to both your hip and back that you have ‘a disease process in both hips and also the lumbosacral spine. Employment with Sydney Trains is not a substantial contributing factor to either of these conditions.’”<sup>1</sup>
6. On 27 September 2018, the respondent's solicitors wrote to Ms Caltabiano's solicitors acknowledging correspondence of the same date and confirming the “deemed date of injury is 24 April 2016” and serving an amended section 287A review notice dated 8 October 2018.
7. An Amended Review Notice under section 287A of the 1998 Act is in the Reply but is dated 8 August 2018. Confusingly on page 1 of this notice a deemed date of injury is stated as “4 April 2016” but further down the page (and on following pages) as “13 January 2017.”
8. On 13 December 2018, the parties settled prior proceedings, matter 5629/18, with them agreeing that the right hip surgery performed by Dr Graham on 29 September 2017 was not reasonably necessary as a result of Ms Caltabiano's work with the respondent. The respondent agreed to pay Ms Caltabiano weekly compensation from 21 May 2017 to 21 October 2017 and medical expenses on a voluntary basis.

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<sup>1</sup> Reply p2

9. On 10 January 2019, the respondent issued a review notice under section 287A of the 1998 Act in relation to the claim for the proposed lumbar surgery and declined liability for it. The reason for the declinature was that the respondent asserted that Ms Caltabiano did not continue to suffer from the effect of any injury to her low back and right hip arising from the general nature and conditions of her employment with a deemed date of injury of 24 April 2016. The respondent also asserted that the need for treatment does not result from any injury and is not considered reasonably necessary treatment<sup>2</sup>.
10. The ARD was filed on behalf of Ms Caltabiano on 30 April 2019 and pleads two dates of injury, being 19 February 2015 and a deemed date of injury of 24 April 2016 referring to the nature and conditions of her employment. There was discussion between both counsel at the Arbitration Hearing as to whether "24 April 2016" was the appropriate date for a deemed date and the upshot of that discussion was Ms Caltabiano relied on that date as the deemed date of injury as it was the last day she did heavy duties and after that she went onto selected duties. Her counsel stated it was the heavier duties which she alleges caused deterioration of her back condition. He also stated he was relying on section 4(a) of the 1987 Act in relation to this deemed date of injury.
11. Therefore, Ms Caltabiano is relying on the injury she sustained on 19 February 2015 in the fall and injury from performing heavy work in the period from 19 February 2015 to 24 April 2016, with the latter date as the deemed date of injury. Both injuries are being pressed as section 4(a) injuries.
12. The respondent's counsel initially stated the issues in dispute were whether the proposed surgery was reasonably necessary and whether it is as a result of any injury. Later the respondent's counsel added that it was also disputing injury by way of nature and conditions of employment. Notwithstanding this seemed contrary to the dispute notice dated 10 January 2019, which framed the dispute as to whether the effects of any such injury had ceased, Ms Caltabiano's counsel did not oppose the respondent pressing such a dispute. The matter proceeded on the basis that this alleged injury was in dispute.

## **PROCEDURE BEFORE THE COMMISSION**

13. This matter was listed for Conciliation Conference/Arbitration Hearing on 13 June 2019. Mr Bill Carney, of counsel, appeared for Ms Caltabiano instructed by Ms Milicevic. Mr David Saul, of counsel, appeared for the respondent.
14. 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**

15. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents;
  - (b) Reply and attached documents;

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<sup>2</sup> ARD p19

- (c) Application to Admit Late Documents filed by Ms Caltabiano dated 16 May 2019;
- (d) Application to Admit Late Documents filed by Ms Caltabiano dated 29 May 2019, and
- (e) Application to Admit Late Documents filed by the respondent dated 5 June 2019.

### **Oral evidence**

16. There was no oral evidence. Both parties made oral submissions which were sound recorded. A copy of the sound recording is available to the parties. A written transcript (T) has been made of the recording.

### **FINDINGS AND REASONS**

#### **Ms Caltabiano's statement**

17. Ms Caltabiano has made a statement dated 16 April 2019 in which she sets out her employment history and her duties with the respondent. She commenced work with Railcorp in June working as a customer service assistant and from 2009 as a cleaner. She says her duties comprised sweeping, mopping, hosing and cleaning. She also states that she had to empty garbage bins on platforms and concourse area into 240 litre Sulo bins and at the end of the shift empty at least 4 x 240 litre bins into an industrial size bin. Ms Caltabiano states that due to her height, 148 cms, she would have to swing the contents of the 240 litre bins full of rubbish over her head in order to reach the large waste bin's opening.
18. Ms Caltabiano also states that she used various devices such as a powered air blower and she assisted the supervisor with the setting up of an industrial sized high-pressure water blaster used to clean platforms and seats. She says they had to push the blaster into the lift and onto the platform where it was plugged into the power source, connected to the tap, and the hose was pulled along the platform to hose it and the seats down. She also used a Tenant machine which she guided from behind to clean the concourse. The machine required emptying of the dirty water and cleaning.
19. She states that on 19 February 2015 while she was cleaning the Duty Manager's office at Blacktown Station she was mopping the floor and she slipped and fell backwards on the wet floor, landing on her bottom. A paramedic attended, who she states arranged for her to attend a medical centre. She says she was given a certificate for light duty work for three weeks, but she does not recall taking any time off work. She says in this incident she injured her back, hips, right wrist and coccyx. Ms Caltabiano says after three weeks her right wrist and coccyx injuries resolved, but she continued to have pain in her back and hips. In her statement, she describes emptying the garbage bins and said every time she performed the manoeuvre of swinging the bin over her head she felt pain in her back, which increased in severity over time. She says she also started to feel pain in her right leg.
20. She describes feeling this back pain in February 2016, but she says she was too scared to report it as there was talk of jobs not being safe. She states on 24 April 2016 she had difficulty putting weight on her right leg and felt pain in her right hip and knee. She says she was unable to work for six weeks and then returned to work, having been certified by Dr Samaranayake as being fit for selected duties with restrictions. She says for the balance of that year she did this work, which comprised of sweeping, wiping down the barriers and customer service. She states that she took annual leave in January 2017 and the day before she was due to return to work her manager rang her and said she was not to come in to work as they did not have work duties to give her within her restrictions.

21. Ms Caltabiano describes the medical treatment she had thereafter and concludes her statement saying that since February 2015 she continued to suffer from back pain with the severity of her symptoms fluctuating with the work that she did on a particular day. However, she says that the heavier work that she did such as mopping, cleaning, emptying of garbage bins increased the pain in her back.
22. An injury call for 19 February 2015 is recorded in an email<sup>3</sup>. It is noted that “it is believed that McDonalds had an oil related spill on the concourse areas and the caller had to walk through it - getting oil on her shoes.” It seems that the “caller” was not Ms Caltabiano as it is also noted “Caller does not want her to continue her shift as she has been seen by an onsite paramedic”. The “notifier” is recorded as Mahamad Chamma, supervisor. This accords with Mr Chamma recording in the Level 5 Investigation Report<sup>4</sup> that he contacted the injury hotline on Gail’s behalf and reported the injury. Mr Chamma noted in this report that the Station Paramedic attended, provided First Aid and it was during that time that it was identified that Gail had pain in her lower back, hip, right wrist and bruising on her left arm.
23. This email says it was in the meal room at the back of the booking office where the injury occurred, whereas Ms Caltabiano’s statement says it occurred in the Duty Manager’s office. In the Level 5 Investigation Report it is noted that sales person Dhillon heard thud sounds and found Ms Caltabiano on the floor and unable to move, that she was carrying out cleaning duties in the Booking Office meal room, moping the tiled floor at the time of the fall. Nothing turns on the precise location of the fall as it is not disputed that it occurred.
24. A Safety Incident & Injury Hotline report was completed noting that on 22 April 2016 Ms Caltabiano hurt her back over the general course of the day emptying bins. It was recorded that she had back and right leg pain<sup>5</sup>.

#### **Dr Hsu**

25. Dr Hsu is Ms Caltabiano’s treating spinal surgeon. In a report to Dr Samaranayake dated 23 August 2018<sup>6</sup> he refers to his clinical examination of Ms Caltabiano and said she did demonstrate lumbar back pain and lower limb symptoms which are certainly related to the L4/5 spondylolisthesis and L2/3, L3/4 and L5/S1 loss of disc height as well as the spinal canal stenosis. Dr Hsu said he had discussed non-operative treatment options and he was aware she had trialled spinal injections in the past.
26. On 2 October 2018, Dr Hsu reported again to Dr Samaranayake, noting she had had an L4/5 epidural steroid injection, which gave her significant relief of her symptoms, but he said she was still quite significantly affected by her symptoms. Dr Hsu advised he was going to undertake surgery in the form of a L4/5 decompression and fusion<sup>7</sup>.
27. In his report dated 27 February 2019, he diagnosed that Ms Caltabiano suffers from discogenic back pain and leg pain due to the fall and disc injury<sup>8</sup>. Dr Hsu stated that her overall condition and symptoms have been ongoing since the fall. The doctor acknowledged that most people of Ms Caltabiano’s age would have some degree of degeneration seen on radiographs, but he stated that most people do not have symptoms such as hers. He concludes that her symptoms are due to her injury and that they have not ceased and so the injury has not resolved. In coming to his decision Dr Hsu took into account that Ms Caltabiano had not reported any injuries or back pain prior to the work-related injury.

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<sup>3</sup> ARD p14

<sup>4</sup> ARD p15ff

<sup>5</sup> ARD p18

<sup>6</sup> Reply p41

<sup>7</sup> Reply p44

<sup>8</sup> ARD p24

28. Dr Hsu opines that the reason he has requested surgery is that the non-operative treatment has been exhausted and that her symptoms have been ongoing for more than three years. The doctor attached to his report his estimate of fees for the L4/5 decompression and fusion procedure<sup>9</sup>. This was updated in his quote dated 26 March 2019 addressed to the respondent<sup>10</sup>.
29. Ms Caltabiano's solicitors wrote to Dr Hsu on 5 March 2019<sup>11</sup> noting that after the fall in February 2015 Ms Caltabiano returned to her pre-injury duties, and that in the course of her employment she was required to undertake heavy lifting and carrying, and repetitive bending, pushing and pulling and that she sustained injuries to her lumbar spine and right lower extremity. Dr Hsu was asked to express his opinion as to whether the need for surgery is related to the heavy nature of her work.
30. Dr Hsu in report dated 4 April 2019 relied "Yes. I agree that her symptoms are related to the heavy nature of her work"<sup>12</sup>.

### **Dr Guirgis**

31. Dr Guirgis has provided a medico-legal report dated 31 January 2018 for Ms Caltabiano<sup>13</sup>. He has a history consistent with her statement. Dr Guirgis notes that her treatment included various CT guided L4 and L5 perineural injections, with limited response. He notes that Ms Caltabiano underwent a right total hip replacement on 29 September 2017 by Dr Graham. Ms Caltabiano agreed in matter 5629-18 that the right hip surgery was not reasonably necessary as a result of her work<sup>14</sup>.
32. Dr Guirgis diagnosed that Ms Caltabiano sustained post-traumatic mechanical derangement of the lumbar area of the spine caused by musculo-ligamentous sprain/strain with possible intervertebral disc involvement. The doctor opined that this had triggered and aggravated the effects of underlying asymptomatic age appropriate degenerative changes. Dr Guirgis attributes her lumbar symptoms to both the fall and the nature and conditions of her employment thereafter. He states that it defies commonsense to attribute her current presentation to constitutional degenerative changes as that would obviate the effects of these injuries. Dr Guirgis, when assessing permanent impairment, attributed 10% to the February 2015 fall and 90% to the nature and conditions of her employment since the fall.
33. Dr Guirgis found that Ms Caltabiano's employment was a substantial contributing factor to her injuries. He stated that he found the following clinical features present at the time of his assessment, being muscle guarding/spasm, asymmetric loss of range of movement, localised tenderness and there was nonverifiable radicular complaints with no objective sign of radiculopathy.
34. Attached to Dr Guirgis's report are copies of the various radiological tests such as the right hip x-ray dated 29 September 2017, CT Guided Right L5 Perineural Steroid Injection dated 23 December 2016, CT Guided Right L4 Perineural Steroid Injection dated 28 December 2016, MRI Right Hip and Lumbar Spine dated 7 December 2016, CT Lumbosacral Spine dated 26 April 2016, 19 April 2016 right hip, pelvis and right knee x-ray dated 19 April 2016, and x-ray right hand, wrist and lumbar spine dated 19 February 2015.

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<sup>9</sup> ARD p27

<sup>10</sup> ARD p30

<sup>11</sup> ARD p28

<sup>12</sup> ARD p29

<sup>13</sup> Late documents dated 29 May 2019

<sup>14</sup> ARD p31

35. Dr Guirgis explains why, in his view, there has been abnormal loading on the intervertebral discs and on the facet joints accelerating the degenerative cascade. He states in the work environment accelerated disc and facet joint degeneration is thought to be associated with altered muscle recruitment pattern to pain.

### **Medical certificates**

36. In the Application to Admit Late Documents filed by Ms Caltabiano dated 16 May 2019 there are a number of medical certificates. There are several relating to a fall in the locker room at work on 3 April 2009, but no injury to the lumbar spine is recorded.

37. The certificate dated 19 February 2015 refers to Ms Caltabiano falling at work and hitting her buttocks on the floor and suffering from lumbar back and left glute pain, as well as other injuries. It is noted by Dr Samaranayake that she had no pre-existing back injury. By 12 March 2015, the doctor certified Ms Caltabiano as fit for pre-injury duties. But in certificate dated 7 July 2016 he noted on 24 April 2016 she noted gradual onset of worsening lower back pain after cleaning at work and she was afraid to report it to work and that she had been treated on Medicare thus far. In his management plan on this certificate, the doctor stated:

“Made a significant improvement in R leg pain, taking mobic only as required now.

No back pain.

P -advised postural change and avoidance of bending - squatting instead of forward flexion of spine, to focus on core strengthening.

Recommend swap from ASAP to Optimum Exercise physio for core strengthening and back rehab”

38. While the doctor certified Ms Caltabiano fit for normal hours he placed restrictions on her employment with a 13kg lifting maximum and a 15kg push/pull ability limit.
39. In a certificate dated 20 October 2016 the doctor noted he was waiting for an IME to be conducted to assess her fitness to work in an alternative station and restricted her lifting to 14kg with both arms and pushing/pulling to 15kg.
40. On 21 November 2016, the doctor noted over the last two months there had been worsening of lower back pain, radiating down to right hip and to the foot. On 29 November 2016, the doctor increased her restrictions to a 10kg limit. He sought approval for an urgent MRI scan, physiotherapy and increased the Lyrica medication. This was continued in the two certificates issued in December 2016 and a referral to Dr Graham was recommended. This certification was continued in January 2017.
41. In the certificate dated 22 February 2017 Dr Samaranayake increased the restrictions to 5 kg and was waiting for approval regarding the right hip replacement. This level of restrictions was continued throughout 2017, with a recommendation for further lumbar and hip physiotherapy to be approved. On 22 November 2017, the lifting restriction was eased slightly to 7.5 kg and the pushing/pulling to 10 kg. All of these certificates in 2017 state that Ms Caltabiano was not to do “butterflying of platform and ramps, sweeping, emptying bins, lifting bins or mopping.” On 5 September 2018, the doctor issued a similar certificate.

### **Clinical notes**

42. The respondent has placed before the Commission the clinical notes from Dr Samaranayake’s practice covering the period 31 October 2008 to 27 November 2018.<sup>15</sup> They are discussed when dealing with the parties’ submissions.

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<sup>15</sup> Late documents dated 5 June 2019

## **Dr Samaranayake's report**

43. Dr Samaranayake reported to Dr Mudbidri from Sonic Health Plus on 10 November 2016<sup>16</sup>. He advises that Ms Caltabiano presented on 24 April 2016 with a three to four-month history of gradual worsening lower back pain after lifting heavy bins and cleaning at work. He noted she had right sided hip and back pain radiating to her right leg along the L5/S1 dermatomal distribution and some intermittent numbness in her right foot and toes. The doctor advised that the x-ray of the right hip showed relatively benign changes. In relation to the back, the doctor diagnosed degenerative lumbosacral L4/5 and L5/S1 discogenic back pain with nerve root compression and facet joint arthropathy. The doctor noted her back pain subsequently improved significantly with a combination initially of physiotherapy, exercise physio and gym rehabilitation and was at the time of writing the report getting good relief with Lyrica and Panadol Osteo.
44. The doctor felt her current symptoms were likely due to the residual chronic degenerative changes in her facet joints and discs. He added at age 64 Ms Caltabiano was not going to improve much more and she would have ongoing stiffness and infrequent intermittent flares of her radicular symptoms. The doctor noted she was not keen for surgery. He said if her symptoms became severe there was the option of trialling cortisone injections under CT guidance. Dr Samaranayake stated that Ms Caltabiano was managing well with her current duties, being lifting/carrying to 14 kg max lifting with both arms, and 15 kg pushing/pulling with both arms. The doctor felt these restrictions were permanent to avoid risk of exacerbating her back condition. The doctor noted that she is aware to ask if there is anything heavy that needs lifting and he mentioned that previously she was too shy to ask. The doctor noted that she was keen to work another year or two before retirement.

## **Dr Anthony Smith**

45. Dr Smith is an orthopaedic surgeon qualified by the respondent and he has provided several reports. In his first report dated 13 July 2016 Dr Smith does not have a history about the fall on 19 February 2015. He refers to Ms Caltabiano suffering back pain about a week before 24 April 2016 and he refers to Dr Samaranayake's WorkCover certificate referring to lumbosacral discogenic back pain with radiculopathy.
46. In his history Dr Smith stated "She describes having improved quite a great deal. There were also some holidays that she undertook of some five weeks and she returned to work in early June and is continuing on light duties doing 14 hours a week."
47. Dr Smith diagnosed that she had lumbar degenerative disease and bilateral hip arthritis. He also opined,
- "She has largely recovered from the aggravation to these degenerative conditions at the time of writing and she is to see the GP in another week and I would have thought it is likely she would be able to go back to her normal work."
48. Dr Smith also expressed the view that he thought her symptoms were from her hip arthritis rather than her back, but he acknowledged it is difficult to be certain as there were positive signs of arthritis in both her lumbar spine and her hips.

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<sup>16</sup> Late Documents dated 5 June 2019 p84



49. The doctor noted Ms Caltabiano was aged 63 and he attributed her symptoms to the normal aging process and said her employment was not a substantial contributing factor to either the lumbar or hip degenerative disease. Somewhat confusingly Dr Smith then states

“It is a coincidence she developed symptoms for the first time from one or other of these, probably the hip arthritis on or around 18 April this year.

...

Her employment then is coincidentally a contributing factor to the aggravation but not the underlying pathology.”

50. Dr Smith then sets out a regime of treatment and states:

“I have described what possible treatments may be indicated in the future. Aggravations to degenerative disease in the lumbar spine with regard to hip arthritis can often can be assisted so that they settle down and become asymptomatic by a variety of different conservative treatments which I have outlined above.”

51. Dr Smith examined Ms Caltabiano again and provided a report dated 22 March 2017. He found:

“She also has lumbar degenerative disease that is fairly extensive.

All of these conditions have been present for some time and they were asymptomatic up until they began to become a problem in April or thereabouts of 2016. When I saw her, she was a great deal improved on what it was originally. I think any initial aggravation to her hip arthritis that occurred on or around 24 April 2016 has resolved of it’s [sic] own accord. I would think that she is having recurrent episodes of discomfort consequent to her hip arthritis in the main. She may have some symptoms emanating from her lumbar degenerative disease as well.”

52. In a further report dated 18 July 2018, after another examination, Dr Smith for the first time has a history of the fall on 19 February 2015. He refers to the report of Dr Guirgis dated 31 January 2018 relating the same. Dr Smith gives his diagnosis that Ms Caltabiano has

“lumbar degenerative disease, lumbar spondylosis, arthritis of the low back, whichever term one cares to use. She could have easily aggravated this pathology in the fall at work on 19 February 2015. She would have recovered after two or three days, two months at the most. It is more likely than not, that the right hip is not making much of a contribution to her current symptoms, which is pain in the low back and down the right leg. She attended her GP with this right leg pain on around 18 April 2016, which led to the diagnosis of hip arthritis. She continues with her right leg pain unaltered to the present, which is currently being treated by her general practitioner.

...

Exacerbations of lumbar degenerative disease and/or large joint osteoarthritis that can occur with employment activity, domestic activity or recreational activity do not cause these degenerative conditions becoming worse, a just cause [sic] and to be temporarily symptomatic from time to time. As stated above, in the event the work incident of 19 February 2015 caused an aggravation to her low back osteoarthritis, that would resolve after two months at the most and possibly only after a few weeks. Many people have such exacerbations resolve after a matter of minutes or hours.”

53. Dr Smith quotes various studies in his report, but I did not find them helpful. They deal with the incidence of degenerative disc disease. In Ms Caltabiano's case it is common ground she has a degenerative condition in her back, and it also seems conceded by Dr Smith she has suffered an aggravation of her low back osteoarthritis.
54. Dr Smith allows that the fall on 19 February 2015 could have aggravated her lumbar disease and opines any aggravation would have been temporary, but he does not in this conclusion consider the nature of Ms Caltabiano's work and whether it also could have caused an injury. He does not actually in any meaningful way consider all the work tasks she performed, such as lifting the bins. He does note she is of short stature at 4ft 10in, but does not consider what strain may have been placed on her back in heavy lifting from such a height.
55. The respondent's solicitors sought a further report from Dr Smith dated 5 December 2018 which really does not take his opinion further. He states that the operation proposed for her back is to treat the lumbar degenerative disease, which is a constitutional problem and is not treating any work injury in 2016.
56. A further report was sought from the doctor, which he provided on 6 December 2018. Dr Smith was asked:
- “3. Consider that Ms Caltabiano appears to have had no low back complaints until she reported symptoms linked to her duties. There appears not to have been any particular resolution of symptoms and in circumstances where surgery is now proposed would you still say that the effect of the work-related aggravation have ceased? If so please provide your detailed reasons”**  
(bold in original)
57. To my mind Dr Smith did not really answer the question. He responded:
- “If one consults with large numbers of patients suffering from symptomatic lumbar degenerative disease and enquires of them their age when they first started to have problems from that process, the most common answer is around the age of 30. There is no shortage of patients who have the onset of symptoms from their lumbar degenerative disease many years before the age of 30 and there is also no shortage of patients who do not develop symptoms from this degenerative process in their lumbar spine until many years after the age of 30. It is conceivable she could have had an initial episode of symptoms from her lumbar degenerative disease on 19 September 2015.”
58. Similarly, his answer regarding the proposed surgery was also not responsive to the question asked, nor is it of assistance to me.
59. A further supplementary report was obtained from Dr Smith dated 27 May 2019 after he was sent various reports of Dr Hsu. Dr Smith stated that he did not alter his past opinions. The respondent's solicitors asked Dr Smith various questions including about the relevance and appropriateness of the proposed surgery. He replied that it is improbable that the spondylolisthesis at L4/5 is of itself the cause of her symptoms. He stated that her symptoms are essentially from her osteoarthritic changes at L4/5 and L5/S1 in combination.
60. Dr Smith adds that it is improbable that Ms Caltabiano will get a good result from a fusion only at L4/5.

61. Dr Smith also expresses the view that there is no relationship between her low back osteoarthritis and her employment as a railway cleaner. He says she would be in the same position whether she worked or not.
62. In answer to the next question about the availability of alternative treatment and its potential effectiveness, Dr Smith allows there may have been aggravation of the osteoarthritis but he repeats his previously expressed view that “such aggravations resolve of their own accord after an hour or two, a day or two, one to two weeks, two to three months at the very most.”
63. However, as I have observed earlier in these reasons Dr Smith has not actually considered the nature of the tasks performed by Ms Caltabiano, nor the fact that her symptoms did not cease. His comments about the time expected for someone to recover from aggravations of osteoarthritis seem to be made generally. Dr Smith does add that there is no post-traumatic lesion seen in her investigations consequent to the fall in 2015 or from any bending/lifting activities at work in 2016.
64. In terms of alternate treatment, again Dr Smith answers generally stating, “most people get by...” He does not consider the treatment that Ms Caltabiano has undertaken. He refers to anti-inflammatory and analgesic medication, with manipulative physiotherapy and/or traction and swimming every day.
65. Dr Smith was asked about the cost of the proposed surgery and did not state it was excessive. He did not compare it to the cost of an alternate regime of treatment.
66. When asked about acceptance by medical experts of the proposed surgery as being appropriate and effective, Dr Smith says spinal fusion treating back osteoarthritis does not have the same good results as hip replacement surgery treating hip osteoarthritis. Needless to say, this does not answer the question posed to him.

### **Consideration of submissions**

67. The respondent’s counsel submitted that the injury in February 2015 was self-limiting in that a couple of weeks later there was a medical certification for normal duties. It was submitted that the radiology at the time revealed nothing of significance. Counsel referred to Dr Smith as finding there was no structural change and that even Dr Guirgis found the injury to be a musculoligamentous strain. Counsel criticised Dr Guirgis for referring to residual symptoms when the clinical notes do not show that.
68. The respondent submits that the applicant has the onus of proof, which is undoubtedly correct. Counsel submits that the way the case has been presented would not lead to the Commission being satisfied that a finding should be made that the proposed surgery is as a result of either the February 2015 injury or the period with a deemed date of 24 April 2016. Counsel submitted that Dr Smith does not accept that anything that Ms Caltabiano was doing in the so-called disputed period caused injury or led to the need for quite major surgical intervention.
69. The respondent’s counsel referred to the fact that Ms Caltabiano had osteoarthritis in the hip as supporting the conclusion by Dr Smith that she has advanced osteoarthritis throughout her body, and that it is the main cause for the suggested surgical intervention, if that is to be found as reasonably necessary.

70. Counsel submitted that Dr Smith's primary opinion was that the surgery was not reasonably necessary and that there are other alternatives that should be considered. Counsel referred to the cases of *Diab v NRMA Ltd (Diab)*<sup>17</sup>, which in turn deals with Judge Burke's decision in *Rose v Health Commission (NSW) (Rose)*<sup>18</sup>.
71. The respondent's counsel referred to various parts of the clinical notes from Dr Samaranayake's practice. He firstly referred to the entry on 1 April 2014 referring to pain in the left lower back area and makes the point that in the next entry that refers to back pain, on 19 February 2015 says, "no pre-existing back". Counsel stated that this was a credit issue and not factually correct. Ms Caltabiano's counsel submitted about this point that it could be read a number of ways, such as at the time she had the fall in February 2015 she was not complaining of back pain, so there was no existing back pain.
72. However, the entry does not actually say what the respondent's counsel says. It states, "No pre-existing back or R wrist *injuries*"<sup>19</sup> (my emphasis). This is correct, as there is no evidence of a prior back injury. Because, while the entry on 1 April 2014 does refer to pain in the left lower back, the doctor does not make a diagnosis then about the cause of the back pain. He notes she had some constipation. He did prescribe Panadol and Voltaren Gel and recorded "r/v in 1 week or prn", which I infer means "review in one week or as necessary". I find it is significant that Ms Caltabiano did not attend in a week and her next consultation was not until 28 June 2014 when she only complained of a flare up of diverticulitis.
73. So, I place no weight on the respondent's counsel's submissions in this regard and I am not persuaded that there is any credit issue in the case. In any event, Ms Caltabiano's counsel's interpretation of this comment is consistent with the clinical notes that there was no pre-existing back pain as at February 2015. Careful reading of the notes reveals that from 31 October 2008 until 19 February 2015 there is only one mention of back pain, being the entry on 1 April 2014. Furthermore, the respondent's counsel did not develop his submission regarding there being a credit issue.
74. Ms Caltabiano strikes me as a person who has done her best to tell the truth. She was not cross-examined and her written statement is consistent with the histories she has given to the doctor. The consistency in her evidence can also be found in other entries in the clinical notes which the respondent has tendered. For instance, in 2011<sup>20</sup> she informed her doctor about her work duties as involving pushing/pulling bins of 20 kg or more when full and pushing the same three to four times per shift and she had to wear a vacuum cleaner. Similarly, on 19 April 2012<sup>21</sup> she told the doctor that her usual work roster was to be altered and she was concerned this would up her work duties and that it would be too hard for her physically. These comments were not made in the context of her being concerned about her back, but in relation to another personal medical condition that is not relevant to these proceedings. However, they are significant because they provided contemporaneous evidence of the physical nature of the work duties performed by Ms Caltabiano over several years.

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<sup>17</sup> [2014] NSWCCPD 72

<sup>18</sup> (1986) 2 NSWCCR 32

<sup>19</sup> Late Documents 5 June 2019 p48

<sup>20</sup> Late Documents 5 June 2019 pp 66/67

<sup>21</sup> Late Documents 5 June 2019 p 62

75. I find that Ms Caltabiano does not lack credit, as these statements show that well before this case she has described her work duties in a way that is consistent with that contained in the statement upon which she now relies. She also has shown herself to be a person of admirable work ethic with the longevity of her employment with the respondent and by the fact that she kept working after the fall in February 2015. I place no particular weight upon the fact that Dr Samaranayake did not mention the isolated incident of prior back pain on 1 April 2014. He was not the doctor who saw her on 1 April 2014, it was Dr Kalaivani Shivakumaran and Dr Samaranayake was correct in noting that Ms Caltabiano had no pre-existing back *injury*.
76. The next point made by the respondent's counsel was that the clinical notes show by 12 March 2015 Ms Caltabiano's back pain had resolved and she had no spinal tenderness. He also referred to the entry on 27 April 2015, which I note refers to there being no abnormality in the back and glutes and that a final WorkCover certificate was to be given.
77. Ms Caltabiano's counsel referred to her statement which sets out her duties including emptying garbage bins into the industrial bins and that because of her height she had to swing the rubbish over her head into the bin. I note the respondent has not called any evidence to challenge Ms Caltabiano's description of her duties. Her counsel drew attention to her evidence that each time she performed this manoeuvre she felt pain in her back and that it increased in severity over time and that she started to feel pain in her right leg. Her counsel noted that she gave evidence in her statement that after the injury in February 2015 she stated that the issue with her right wrist and coccyx had resolved, but she said she continued to have pain in her back and hips. She acknowledges that she was certified fit for her pre-injury duties.
78. Her counsel referred to Dr Samaranayake's report and the history on 24 April 2016 that she complained of a three to four-month gradual onset of worsening back pain after lifting heavy bins at work. Counsel submitted this is consistent with her contention that after the fall in February 2015 she did experience back pain related to the tasks she was performing at work and by April 2016 it reached a level where she could not work.
79. Ms Caltabiano's counsel says that Dr Hsu's diagnosis of discogenic pain should be accepted because the epidural injections blocked the pain at L4/5 level.
80. The respondent's counsel attempted to draw a parallel between the parties having reached agreement previously that the right hip operation was not work related and "that the back is in the same category". Counsel then was critical of the way the back case has been run, and the fact that at the outset of the case Ms Caltabiano's counsel sought to rely on a section 4(a) personal injury for the period 19 February 2015 to 24 April 2016. He submitted that if there is an underlying osteoarthritic claim and aggravation of that, it is a disease and caught by section 16. However, section 16 does not create an entitlement to compensation as a worker must first establish injury under section 4 of the 1987 Act. Section 16 operates in a case of aggravation of a disease to set a deemed date of injury and to determine which employer is liable to pay compensation for the injury. In Ms Caltabiano's case there is just one employer.
81. In many cases the distinction between a section 4(a) injury and a section 4(b)(ii) injury does not really matter. Ms Caltabiano has alleged the second injury has arisen because of the nature and conditions of her work from 19 February 2015 (from the time of her fall) until 24 April 2016 (the time she ceased heavy work). Reliance has been placed on the "nature and conditions" of her employment in this period performing heavy work, such as the lifting of the bins. As has been commented in many cases before the Commission, the phrase "nature and conditions" is not used in the Act. Parties seem to use it as short hand when alleging that there has been repeated trauma by the performing work tasks in the course of employment. Ms Caltabiano has given evidence in her statement that whenever she lifted the bins after her fall she felt pain in her back.

82. Therefore, as I understand Ms Caltabiano's case she is alleging that there was injury in this period consisting of aggravation of the underlying degenerative condition as discussed in the case of *Rail Services Australia v Dimovski*<sup>22</sup>. Hodgson JA held in *Dimovski* at [68] that section 16 of the 1987 Act applies only if the injury "consists in" the aggravation of a disease. His Honour added that:

"If there is an event that satisfies paragraph (a) of the definition of injury, and if that is the injury relied on and proved, the circumstance that it aggravated the disease and thus could have supported a case under paragraph (b)(ii) does not mean that this injury 'consists in' the aggravation of a disease. One strange result of the contrary view would be that a frank injury relied on and proved would, if it happened to aggravate a disease, and if incapacity did not commence immediately, be deemed under s.16(1)(a) to have happened at some time other than when it in fact happened."

83. Justice Hodgson's reference above to paragraph (a) of the definition of injury was a reference to a "personal injury" in section 4(a) of the 1987 Act. The comments were in the context of the worker having suffered personal injuries (frank injury) to his back and/or knee in specific traumatic incidents, which also aggravated an underlying degenerative condition, namely, osteoarthritis.

84. The respondent's counsel was critical of Dr Hsu because counsel argued that until Dr Hsu was pressed by Ms Caltabiano's solicitor he had not given a report on causation. The respondent's counsel also submitted that Dr Hsu was not providing his opinion in an independent way on causation without severe prompting. This is a somewhat ironic submission given the respondent has obtained three supplementary reports from Dr Smith. It seems to me that both sides have endeavoured to have their respective doctors answer what they perceived were the relevant issues and questions. So, I reject this aspect of the respondent's submissions which cast aspersions on Dr Hsu's independence.

85. In his submissions in chief the respondent's counsel quoted various passages from Dr Smith's reports and submits that the doctor does not believe that the injury in February 2015 and the work has not caused or aggravated any of her prior problems, but as discussed previously in these reasons Dr Smith does allow in some parts of his reports that there has been aggravation by virtue of her work, albeit in his opinion of a short duration.

86. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*<sup>23</sup> where 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.

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<sup>22</sup> [2004] NSWCA 267 (*Dimovski*)

<sup>23</sup> [2008] NSWCA 246 (*Nguyen*)

87. Applying the test in relation to onus of proof in *Nguyen* I feel, on the balance of probabilities, an actual persuasion of the existence of the fact that Ms Caltabiano did not fully recover from the injury to her back sustained in the fall in February 2015, because even though there was a lessening of symptoms after that injury, I accept her evidence in her statement that she did continue to suffer back pain; particularly after lifting the bins. I also accept that such back pain did gradually worsen, becoming more acute in the months leading up to her attendance on Dr Samaranayake on 24 April 2016. Even though Ms Caltabiano had attended on the doctor for other matters from March/April 2015 to April 2016 and not mentioned back pain, I nonetheless find she has discharged her onus of proof that she did suffer from the same. I accept Ms Caltabiano's counsel's submission that she was a person who did not really complain until she was in a situation where she needed heavy pain killers. I also accept there was a reluctance on her part to complain to her employers about her back pain due to concerns about her job security.
88. Another reason why I accept Ms Caltabiano's evidence is because there is a consistency in her evidence in her statement and the histories she has given to Dr Samaranayake and Dr Hsu about the lifting of the bins causing her back pain every time she lifted them and it was worsening.
89. In terms of finding injury in relation to the deemed date of 24 April 2016, covering the period from 19 February 2015, I find that Ms Caltabiano performed the lifting of bins and other heavy work in the course of her employment with the respondent.
90. In terms of Dr Smith's opinion that there was aggravation of a short duration, I do not accept the same because he does not focus on Ms Caltabiano's evidence about the nature of her work. He gives general opinions based upon what he expects the populace generally experiences. I also find that Dr Smith has inconsistent passages in his reports, which I have discussed above, this leads me to have no faith in his conclusions. Dr Hsu has diagnosed discogenic back pain. I accept Ms Caltabiano's counsel's submission that this is consistent with the abatement of symptoms after the epidural injections. After the solicitors put a correct history to Dr Hsu, about Ms Caltabiano returning to work after the fall and performing heavy work, he does provide an opinion that her symptoms are related to the heavy work. While this opinion is not expressed in detail it is consistent with Ms Caltabiano's evidence.
91. Even though the respondent's counsel has been quite dismissive of Dr Guirgis's opinion, I find counsel has misstated it. Counsel submitted that Dr Guirgis found a musculoligamentous strain in the fall. But the doctor actually added "with possible intervertebral disc involvement" which he felt had triggered and aggravated the effects of the underlying degenerative changes. Dr Guirgis attributes Ms Caltabiano's symptoms to both the fall and the nature and conditions of her employment. He states it defies commonsense to attribute her symptoms to just the constitutional degenerative condition as that obviates the effects of these injuries. I agree with this comment. Dr Guirgis explains why the work has produced abnormal loading on the intervertebral discs and facet joints. Dr Smith does not in any meaningful way deal with the effects of heavy lifting on Ms Caltabiano and so I am left with Dr Guirgis's explanation, which is consistent with that of Dr Hsu. Therefore, I prefer those opinions to that of Dr Smith.
92. To the extent it was necessary because of how the case proceeded before me, I find that the applicant has discharged her onus of proof that she did sustain a personal injury in the period 19 February 2015 to 24 April 2016 from the repeated trauma to her lumbar spine in performing the heavy work, particularly lifting the bins. I accept that this type of injury can fall under the definition of personal injury in section 4(a) of the 1987 Act even though it consists in an aggravation of the underlying disease.

93. As to whether the proposed surgery is reasonably necessary as a result of that injury and/or the fall on 19 February 2015, that requires consideration of the balance of both counsels' submissions and the medical evidence. There are two aspects to consider when applying section 60 of the 1987 Act. They are whether the proposed treatment is "reasonably necessary" and whether it is "as a result of" the injury relied upon.

### ***Reasonably necessary***

94. 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 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."

95. 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.

[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'".



96. 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.”
97. There is a difference of opinion between Dr Smith and Drs Hsu whether the surgery is reasonably necessary. Dr Hsu justifies the surgery because he says non-operative treatment has been exhausted and that Ms Caltabiano’s symptoms have been ongoing for more than three years. I accept that the evidence supports such a conclusion. Ms Caltabiano has tried several injections into her spine and whilst some relief was obtained it was not long lasting. She also has been prescribed a raft of medications such as Mobic, Panadol Osteo and Lyrica.
98. Furthermore, Dr Hsu is her treating neurosurgeon and I find as such he has been in a better position to gauge the treatment regime which will be reasonably necessary for Ms Caltabiano. I consider that Dr Smith’s opinion has been coloured by his view that recovery from any injury would have occurred in a short duration, which I do not accept has occurred. I accept that Dr Hsu’s diagnosis that Ms Caltabiano is suffering from discogenic pain because as her counsel submitted the epidural injections at L4/5 blocked the pain at that level, and that Dr Hsu’s recommendation for surgery at this level is appropriate. The cost of the treatment is not been raised as an issue. I find that a consideration of the factors discussed in *Diab* and *Rose* leads to the conclusion that the proposed surgery is reasonably necessary treatment.

**As a result of**

99. Snell DP in *Kirunda v State of New South Wales (No 4)*<sup>24</sup> stated at [136]:

“In *Kooragang Cement Pty Ltd v Bates Kirby P* said that causation ‘is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions’. A finder of fact, dealing with issues of causation, is entitled to ‘have some recourse’ to ‘the sequence of events and commonsense’. However, where an ‘issue lies outside the realm of common knowledge and experience’ it ‘falls to be determined by reference to expert medical evidence’. In *Lithgow City Council v Jackson* the plurality said, of a finding on causation:

‘That proposition is not self-evident. To establish it would call for more than the application of ‘commonsense’ or the court’s experience of ordinary life. The proposition turns on an inference from the nature of the respondent’s injuries to their probable cause. That inference could only be drawn in the light of expert medical evidence.’” (footnotes omitted)

100. Applying the principle in *Jackson*, referred to above, Dr Guirgis, an orthopaedic surgeon, has given his expert opinion to establish the causal connection between the heavy work undertaken by Ms Caltabiano and her sustaining a lumbar injury in the form of aggravation of her underlying degenerative condition.
101. Dr Hsu, whose opinion I have preferred to Dr Smith, has related the need for the surgery to the performance of heavy work and in his earlier reports to the fall. Dr Guirgis does not consider the proposed surgery, but does attribute the back condition sustained by Ms Caltabiano to both the fall and the heavy work thereafter.

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<sup>24</sup> [2018] NSWCCPD 45

102. In terms of whether the proposed lumbar surgery is reasonably necessary as a result of the work-related injuries, the case of *Murphy v Allity Management Services Pty Ltd*<sup>25</sup> 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.
103. Dr Guirgis found 10% of her impairment related to the fall and 90% to the nature and conditions of employment doing heavy work. I consider that such assessments suggest that both injuries have materially contributed to Ms Caltabiano's sustaining a lumbar spine condition, which is superimposed on her underlying degenerative back. I find it significant that before the fall Ms Caltabiano had no prior injuries and one isolated back complaint. After the fall, she says her back did remain painful, albeit she was able to work, and the ongoing performance of heavy work has worsened her symptoms to a point where she faced significant restrictions. Therefore, I find that both the fall and heavy work have materially contributed to her current back condition and also to the need for surgery to alleviate it.
104. Dr Hsu has commented that most people of Ms Caltabiano's age would suffer from some degeneration on radiographs, but that most people do not have symptoms such as hers. I am not persuaded by Dr Smith's view that any aggravation she suffered from the fall and her work would have been short lived and that she only suffers from the underlying condition. I find that the effects of her work-related injuries are ongoing and have materially contributed to the need for the surgery proposed by Dr Hsu.
105. Therefore, I find that the proposed surgery is reasonably necessary as a result of both injuries.

## SUMMARY

106. Pursuant to section 4(a) of the 1987 Act Ms Caltabiano sustained injury to her lumbar spine in the course of her employment with the respondent due to the performance of her work duties, including heavy lifting, from 19 February 2015 to 24 April 2016.
107. Pursuant to section 60 of the 1987 Act the surgery proposed by Dr Hsu, being L4/5 decompression and fusion, is reasonably necessary treatment as a result of injury to Ms Caltabiano's lumbar spine on 19 February 2015 and 24 April 2016 (deemed) sustained in the course of her employment with the respondent.
108. The respondent is to pay the costs of the abovementioned surgery and associated treatment expenses at the appropriated gazetted rates and subject to the provisions of the 1987 Act.
109. The respondent is to pay the claimed past section 60 expenses on production of accounts, receipts and/or Medicare Notice of Charge.



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<sup>25</sup> [2015] NSWCCPD 49 (*Murphy*)