WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**4627/19**
Applicant:	**Moussa Karam**
Respondent:	**Amaca Pty Ltd (previously called James Hardie and Co Pty Ltd) (in liquidation)**
Date of Determination:	**6 November 2019**
Citation:	**[2019] NSWWCC 357**

The Commission determines:

1. I am not satisfied that the applicant suffered a consequential condition in his thoracic spine or legs as a result of the injury to his lumbar spine on 18 November 1993.

2. No order

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Moussa Karam was employed by Amaca Pty Ltd (previously called James Hardie and Co Pty Ltd) (James Hardie) as a labourer. On 18 November 1993, he suffered an injury to his back while lifting.

2. As a result of findings in the compensation Court, there is no dispute that Mr Karam suffered a back injury. He has been paid his entitlements under s 66 of the *Workers Compensation Act 1987* (the 1987 Act).

3. In these proceedings, Mr Karam seeks an assessment of whole person impairment (WPI) to determine if the degree of permanent impairment is more than 20% so that s 39 of the 1987 Act will not apply and payments of weekly compensation can continue. Mr Karam asserts that he suffers 5% WPI in respect of his thoracic spine, 12% in respect of his lumbar spine and 4% in respect of each of his right and left lower extremities. He alleges that the condition in his thoracic spine and his legs are consequential conditions as a result of obesity, caused by inactivity which, in turn, is a result of his lumbar spine injury.

4. James Hardie does not dispute that Mr Karam suffered an injury to his lumbar spine but disputes that Mr Karam suffers consequential conditions in his thoracic spine and legs.

PROCEDURE BEFORE THE COMMISSION

5. The proceedings were listed for conciliation conference and arbitration hearing on 11 October 2019 when Ms Compton of counsel appeared for Mr Karam and Mr Perry of counsel appeared for James Hardie.

6. 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

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

    (a) Application for Assessment by an Approved Medical Specialist and attached documents (the Application);

    (b) Response.

Previous proceedings

8. In his statement dated 18 March 2015, Mr Karam described his injury by reference to the decisions of the Compensation Court and the Approved Medical Specialists described below. He did not describe the circumstances of the injury or the onset of pain.

9. Mr Karam described his then current condition in which he compared his condition with respect to that at the time of an examination by Dr J Scougall as an Approved Medical Specialist (AMS) in 2005. He said that in 2005 he suffered low back pain and that his pain was more severe in 2015. His weight had increased from 150 kg to 190 kg because he was unable to exercise. In 1993, his weight was 90 to 95 kg. In 2005 he suffered pain at the front and back of the thigh and calf and in the toes of both legs but in 2015 he suffered cramping in both legs and pain in his right knee. He outlined other issues not relevant to this application.

10. A further statement dated 2 February 2017 is the most recent evidence from Mr Karam in the file. His back pain is worse and his body weight has increased. He suffers pain and cramping in both legs and pain in his right knee.

11. Mr Karam did not describe thoracic pain in either of those statements. In the 2017 statement he said:

> "I have in the last 2 years noticed incidents of swelling just above the ankle into the ankle joint and into my right foot.
> …
> I also have swelling in the left ankle associated with pain in the left leg."

12. He described knee pain but he does not claim compensation in respect of his knees.

13. Mr Karam first brought proceedings against James Hardie in 1994 and they were the subject of a decision by Commissioner Ashford (as her Honour then was) on 13 September 1995. She noted that Mr Karam noticed a feeling of coldness in his legs about a week after the injury. Commissioner Ashford was satisfied that Mr Karam suffered an injury to his back on 18 November 1993. She assessed 15% permanent impairment of the back and was not satisfied that he suffered any permanent loss of use of either leg.

14. Mr Karam's claim for weekly compensation was determined by his Honour Judge Walker on 22 May 1998. His Honour noted that the claim for permanent impairment compensation had been determined. He noted that Mr Karam had suffered injury on 18 November 1993 when he suffered back and leg pain. From 1994 the pain radiated into his legs. His Honour found that Mr Karam was able to do light work but that his labour was unsaleable in the labour market reasonably accessible to him.

15. The reports which were considered by Commissioner Ashford and Judge Walker did not form part of the evidence in these proceedings. With one exception, there are no reports from the practitioners who treated Mr Karam before those decisions were made. The one exception is a reference to a report of Dr A J Sanki in 1998 in Judge Walker's judgment where His Honour noted that Dr Sanki was the treating surgeon who had manipulated Mr Karam's back some time before 1998.

16. Dr J Scougall examined Mr Karam as an AMS and prepared a Medical Assessment Certificate (MAC) dated 7 March 2005. Dr Scougall considered that Mr Karam had chronic soft tissue lesions in his back which may be related to the cause for his bilateral leg complaints. Dr Scougall assessed 12% permanent impairment of the back, reduced by one-tenth under s 323 of the *Workplace Injury Management and Workers Compensation Act 1998*. He assessed 5% loss of use of the right legs at or above the knee and 5% loss of sexual organs. A Certificate of Determination dated 9 May 2005 shows that Mr Karam was compensated for those impairments.

17. Dr Tim Anderson prepared a MAC dated 28 June 2016. He noted that Mr Karam's back pain was located in his lower lumbar spine. Dr Anderson was asked to assess only Mr Karam's legs and sexual organs. He was not persuaded that there was any additional loss of use of either leg. He considered that the majority of Mr Karam's loss of sexual function was due to gross excess weight, raised blood pressure and type 2 diabetes. He assessed 30% loss of sexual organs as a result of the 1993 injury.

Dr Patrick

18. Mr Karam's case is based on the reports of Dr WGD Patrick. His first report is dated 28 May 2018, based on an examination on 28 May 2017. Dr Patrick noted that Mr Karam had ongoing back pain and stiffness and pain "from high up at the thoracic region between the shoulder blades with some intermittent spasms extending inferiorly." troublesome low back pain and stiffness and numbness and pins and needles in his legs. He developed swelling/oedema in the lower legs toward the end of the day. Dr Patrick recorded that Mr Karam has been "troubled by inexorable weight gain ever since his work injury. The maximum he had ever weighed up until 1993 was 100kg. He understands he now weighs about 180kg." Dr Patrick noted that Mr Karam suffered some knee pain.

19. On examination, Dr Patrick said that there was gross adipose tissue but there appeared to be evidence of spasm or guarding in the mid to lower thoracic spine as well as the lumbar spine. There was some swelling of both lower legs with pitting oedema. He considered that Mr Karam has suffered

> "mid/low lumbar facet joint injuries and with disc protrusions at L4/5 and L5/SI levels, and also likely some degree of thoracic spinal facet injury with both spinal regions deteriorating, contributed to by his inexorable weight gain since these work-related injuries and limitations to his mobility."

20. Dr Patrick observed "oedema/swelling both lower legs distal to mid-calf with some pitting oedema." He noted that peripheral arterial pulses were present. He assessed Mr Karam's legs in terms of peripheral vascular disorder, being at the upper level of class 1 of Table 17-38 of *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed for only transient oedema.

21. Dr Patrick assessed WPI in respect of the lumbar and thoracic spines. He said there was significant complaint of symptoms in the thoracic spine.

22. On 7 August 2018, James Hardie's insurer wrote to Mr Karam and said that it was not satisfied that he had suffered an injury to his thoracic spine as diagnosed by Dr Patrick. The insurer noted that he had not made those complaints to doctors who had examined him on its behalf and that a recent report from Mr Karam's current general practitioner, Dr Vago, had referred only to the lumbar spine. Based on the medical evidence held, the insurer said that Mr Karam's level of impairment was less than 20%. It said that it would arrange a further medical examination.

23. Dr Patrick prepared a further report dated 10 October 2018 in response to the insurer's letter. He stood by his assessment of permanent impairment stating that even though imaging showed disc protrusions in the lumbar spine, the previous assessments were made under the "Table of Maims" which made no distinction between the thoracic and lumbar spines. He said that most workers would not be aware where the thoracic spine ends and lumbar spine begins. He said that Mr Karam's girth put enormous strain on the thoracic and lumbar spines and there

> "did appear to be evidence for spasm and guarding at mid/lower thoracic spine as well as lumbar spine. I do believe that his thoracic spinal pain and problems (of which he is very much aware) is reasonably regarded as a consequential injury."

24. Dr Patrick's third report dated 14 May 2019 commented on the reports of Dr P Robinson and Dr P Truskett. Dr Patrick said that he considered that Mr Karam's spinal symptomatology as genuine and that his morbid obesity was a consequence of the effects of his work injury. He disagreed with Dr Robinson who said that any thoracic problems are related to weight rather than the injury and said that the weight gain was a result of the injury. He said:

> "there is evidence for spasm particularly at mid/lower thoracic spine and lumbar spine, and with two handed technique with stretching the adipose tissue and palpation of underlying paravertebral musculature can indicate guarding."

25. He appended, without discussing it, an article entitled "Functional Pain severity and Mobility in Overweight Older Men and Women with Chronic Low Back Pain: Part 1" in *American Journal of Medical Rehabilitation* in May 2013.

26. Dr Patrick disagreed with Dr Truskett's opinion and said "I believe it is not unusual that there is no early contemporaneous evidence for thoracic spinal injury. Mr Karam I believe does have marked consequential symptoms arising at thoracic spine. He has significant complaint of spasm."

27. Dr Patrick relied on his qualifications as a general, vascular and trauma surgeon to say that the oedema in Mr Karam's legs was "largely as a consequence of his inexorable weight gain and with likely disturbance with lymphatic drainage."

Treating doctors

28. The bulk of the evidence in the Application comprises a bundle of notes from Cheso Family Medicine Practice at Chester Hill, produced under direction. Neither the notes nor the attached reports are in chronological order. The earliest report to which counsel referred me was a report of Dr Teychenne dated 19 September 1994 setting out the results of nerve conduction studies.

29. The earliest report from Dr Sanki is dated 11 November 1997, addressed to Mr Karam's former general practitioner. He reported that Mr Karam had undergone a manipulation of the lumbar spine on 1 October 1997.

30. On 27 February 2001, Dr A J Sanki reported to one of Mr Karam's former solicitors, reporting on treatment since July 1997 with respect to his lumbar spine injury and carpal tunnel syndrome. He noted that Mr Karam complained of pain in the dorsal spine region on 14 October 1997. Dr Sanki said:

> "Patient started to put on weight when seen on the 10th November 1998 and he was noted to be weighing 137 kgs. He was asked to go on a diet and he was successful in reducing his weight to 122 kgs on the 18th May 1999.
> …
> Unfortunately the patient gained too much weight later on and he weighed more than 150 kgs in July 2000. He was again advised to loose weight and his weight dropped to 142 kgs in December 2000."

31. Apart from the one reference to the dorsal spine, Dr Sanki's report focussed on Mr Karam's lumber spine.

32. Ms Compton took me to a series of references with respect to Mr Karam's weight in the order which they appear in the file. For ease of reference I have tabulated those references in chronological order. Mr Karam saw Dr Shnoudi and Dr Sanki at Cheso Family Medical Practice and the handwritten notes do not indicate who wrote which notes.

Doctor	*Date*	*Comment*
Dr Sanki or Dr Shnoudi	25 July 2000	150 kg
Dr Sanki or Dr Shnoudi	22 August 2000	152 kg
Dr Sanki or Dr Shnoudi	7 September 2000	150 kg “eats a lot and doesn’t move.”
Dr Sanki or Dr Shnoudi	7 November 2000	148 kg
Dr Sanki or Dr Shnoudi	12 December 2000	142 kg
Dr Sanki or Dr Shnoudi	6 February 2002	153 kg
Dr Sanki	4 June 2002	“Mr Karam’s condition has deteriorated since September 1995 because he has put on a large amount of weight. Apparently he used to weigh about 90kgs at that time, and I now find that he weighs about 150 kgs plus. This is due to the fact that he has severe low back pain with weakness in his legs which prevented him from doing enough walking, exercises, or enough activity to help spend energy in his metabolism.”
Dr Sanki	19 December 2002	His weight has increased from 90 kgs apparently to 183 kgs.
Margo Doctor, vocational consultant	5 June 2003	“he states that he was 95 kg and now weighs 155 kgs”
Dr Malouf, Diabetes Centre	21 October 2004	167.3 kg
Dr Sanki or Dr Shnoudi	17 May 2005	147 kg
Dr Sanki or Dr Shnoudi	5 July 2005	150 kg
Dr Sanki	11 October 2005	“Patient was seen by me today. His condition with his back pain is slightly improved because he has lost roughly 13 kgs in weight. He is now 138 kgs. Patient has been encouraged to loose more weight and the best program be has found is to walk. He walks in the park and he rests whenever his knee given him trouble. I advised him to keep going on and

Doctor	*Date*	*Comment*
		encouraged him to strive to drop down to approximately 100 kgs."
Dr Sanki or Dr Shnoudi	10 November 2005	138 kg
Dr Sanki	17 January 2006	"as a result of the dieting programme that he was put on at Prince of Wales Hospital he has now lost approximately 30 kgs, He now weights 132 kgs."
Dr Sanki or Dr Shnoudi	3 April 2007	149 kg

33. On 20 November 2008, Dr Shnoudi wrote:

> "Mr. Karam claims that his morbid obesity is due to his injury, which left him sick at home. In fact it is not easy to examine him clinically due to having an injury to his back and extra eighty kilos of weight on the lower back and limbs would cause pain to anyone.
>
> His examination showed severe reduction in the range of movement of his back mostly for the anterior flexion (always consider the obesity factor) there was no obvious tenderness over his lumbar spine and I was unable to elicit knee jerks even with distraction, but ankle reflexes were present. There was no muscle wasting and power was apparently reduced over the left thigh, but not the leg. The straight leg-raising test was difficult due to the body habitus.
>
> He has pitting edema up to the knee probably due to his ongoing intake of NSAID-he buys Nurofen plus over the counter-his blood pressure was normal, his chest was clear, and he has mouth breathing due to nasal obstruction.
>
> I advised him to use Paracetamol with or without codeine for pain and reduce or cease completely the non-steroidal anti-inflammatory drugs."

34. On 28 November 2008, Dr Shnoudi referred Mr Karam to Dr Nashed noted that he had pitting oedema over the legs.

Dr Truskett

35. Dr P Truskett, a general surgeon with interests in upper gastrointestinal surgery, hepatopancreaticobiliary surgery and emergency surgery, undertook a file review at the request of James Hardie on 18 April 2019. Having reviewed the material set out in the report he said:

> "It would appear that the postulates that deterioration is based on massive weight gain. It is· presumed that this massive weight gain is a consequence· of lack of exercise. As an example, I have attached a paper by Carla E. Cox, *Spectrum Diabetics* journal, Vol.30, No.2017. This paper points out that weight loss or maintenance has virtually no correlation with physical activity. The literature would support that exercise is important for well-being but has marginal impact on weight acquisition. In reality, more than 80% of weight gain relates to food ingestion and not lack of exercise. The concept of activity and weight gain as a cause of musculoskeletal deterioration cannot be supported by the literature."

36. With respect to the thoracic spine condition, he said:

> "Dr Patrick has provided no data to support thoracic spine injury. He seems to indicate that the patient cannot tell the difference between the thoracic and lumbar region, which I find difficult. There is no documented evidence that he had a thoracic spine injury, and the notion that weight gain is responsible for thoracic pain cannot be supported by the literature that I have described. In addition, there is no contemporaneous evidence of thoracic injury based on documentation provided. On these bases, I cannot support Dr Patrick's contention that thoracic spine injury occurred."

37. Dr Truskett said:

> "Given the extraordinary weight of this gentleman, it would be impossible to palpate muscle guarding on any form of physical examination. As this is the basis of Dr Patrick's assessment, I do not support that DRE Thoracic Category II could be established on this physical sign."

38. With respect to oedema, Dr Truskett said:

> "This gentleman has an extremely large body habitus. As I have stated, this weight gain was not contributed to in any way by his initial lumbar spine injury. Obese people do tend to get some venous stasis as a result of their impediment to their muscle pump. Any oedema that he may have is a consequence of obesity, and there is no relationship to his lumbar spine injury."

39. Dr Truskett said that no examiner other than Dr Patrick noted oedema.

40. Dr Truskett's second report was prepared after his examination of Mr Karam on 24 June 2019. He obtained the following history with respect to Mr Karam's weight:

> "He states because of his inactivity he gained weight. He stated at the time of his injury he weighed 97kg and at the time he ceased work he was 107kg. He put further weight on from that time. He stated in 2017 he weighed 198kg and believes he was developing swelling of his lower limbs from the time of the accident.
>
> Of interest, he now weighs 130kg. He has lost in excess of 68kg by dieting alone as he states he cannot exercise."

41. With respect to the article cited by Dr Patrick, Dr Truskett said:

> "He also stated that his weight gain was solely due to the lack of exercise and if this was so, it is difficult to explain how Mr Karam has lost 60kg without improvement of exercise tolerance when assessed by Dr Patrick in May 2018 that weight loss in the space of 14 months. He provides paper to support his hypothesis by HK Vincent *et al*, The American Journal of Medical Rehabilitation 2013, this essentially states that mobility is reduced in patients with chronic back pain in relation to varying body mass. This may well be true, but it makes no comment on the acquisition of weight as a result of back pain, it simply compares obese people to non-obese people. Weight gain is not considered as the aetiology of the pain."

42. Dr Truskett noted that Mr Karam was extremely aggressive and emotionally labile. That is consistent with my observation of his presentation at the conciliation conference and arbitration hearing. Dr Truskett also noted "extreme exaggeration and abnormal illness behaviour in relation to his assessment."

43. Dr Truskett said that Mr Karam did not provide a history of thoracic pain. He said:

> "He demonstrates full rotation of his back which is the predominant function of the thoracic spine. There is no muscle guarding, no complaint of pain in that region and no dysmetria."

44. Dr Truskett observed minimal pitting oedema at the level of the ankle but not above. He said:

> "He states that there has been oedema from the time of the injury. I find this to be somewhat unusual. There is minimal pitting of his lower limbs. As noted, he gives no history of lower limb claudication."

45. Dr Truskett said:

> "He also has been taking Sevikar HCT for his blood pressure for the past 4 years. This is combination of a mild diuretic and angiotensin II inhibitor. This medication is recognised as a cause of mild swelling of the lower limb of the nature that Mr Karam demonstrates."

46. There are other reports in the file to which I was not taken by counsel in submissions. I have therefore not considered them.

SUBMISSIONS

47. The submissions made by counsel were recorded and I will summarise them briefly.

48. Ms Compton took me through the evidence in the file, seeking to show that Mr Karam suffered conditions in his thoracic spine and legs which were the result of obesity, occasioned by his lumbar spine injury. She said that there was a plethora of evidence from Mr Karam's treating doctors to show that Mr Karam had suffered a significant increase in weight and had been on blood pressure medication for "incredible periods". She took me to a number of references which showed that medical practitioners were unable to locate "knee jerks" but did not take me to any medical evidence which explained the relevance of that finding.

49. Ms Compton said that Mr Karam mentioned his thoracic spine to his general practitioner on a few occasions which was sufficient for me to find that he had suffered a condition in his thoracic spine which is consequential on his lumbar spine. The increase in weight led to a significant reduction in movement and the reports from the treating doctors show that Mr Karam struggled with rehabilitation providers to increase his level of activity and tolerances for walking and exercise. Ms Compton said that I would accept the opinion of Dr Patrick who considered that the thoracic spine and leg conditions were consequent on the lumbar spine injury.

50. Ms Compton said that Mr Karam accepted that, if I did not find that he suffered a consequential condition in his thoracic spine and legs, I would not remit the matter to the Registrar for referral to an AMS because the assessment of the lumbar spine alone did not meet the threshold for s 39 of the 1987 Act.

51. Mr Perry said that I would be guided by the observations in *Murphy v Allity Management Services Pty Ltd*[1]*(Murphy)* and the reference to *Kooragang Cement Pty Ltd v Bates*[2] *(Kooragang).* He conceded that the relevant test is whether an injury made a material contribution to the development of a consequential condition but that it was necessary to find a chain of causation. Mr Karam bears the onus of establishing that chain which Mr Perry said the reports of Dr Patrick did not do, particularly when his report was read in the context of Dr Truskett's reports.

52. Mr Perry noted Ms Compton's careful analysis about Mr Karam's weight showed that the highest was 183 kg but the earliest record was dated 10 November 1998 and there was no evidence of his weight in 1993. Mr Karam said in his statement dated 18 March 2005 that he weighed 190 but he weighed 130 kg when seen by Dr Truskett on 24 June 2019, thus losing 60 kg during the period when he said he was immobile. There was nothing inconsistent with the proposition that Mr Karam had always been overweight.

53. Mr Perry also noted that Dr Sanki recorded on 11 October 2005 that Mr Karam had lost 13 kg and that he walked in the park but rested when his knee gave him trouble. He said there was no evidence of a knee injury.

54. Mr Perry said that there were other reasons why Mr Karam had been immobile during the relevant period, including the removal of a kidney because of cancer in 2012 and a further period of radiotherapy in 2014.

55. Dr Patrick considered that Mr Karam suffered pitting oedema in his legs which was a consequence of inexorable weight gain. Mr Perry noted that "gain" was an interesting word choice because the evidence was that his weight fluctuated. Dr Patrick had not considered the effect of medication taken for blood pressure which Dr Truskett said is a recognised cause of mild swelling such as that suffered by Mr Karam.

56. Dr Patrick's statement that Mr Karam's thoracic spinal pain was "largely a consequence" of weight gain did not disclose his reasoning process and did not comply with Court of Appeal statements with respect to the requirements of expert evidence in cases such as *Hevi Lift (PNG) Ltd v Etherington*[3]*(Etherington).* Mr Perry said that I would prefer the evidence of Dr Truskett.

57. Mr Perry said that there was no dispute that Mr Karam suffered pain in his legs but the evidence is the pain was radiating pain, noticed very soon after the injury and evidenced by the previous awards of the Compensation Court and the report of Dr Anderson, the AMS. That radiating pain was not a result of weight gain and was consistent with a lumbar spine injury. That evidence was not sufficient to find a consequential condition in his lower legs.

58. In reply, Ms Compton submitted that the first reference to Mr Karam's weight was in 1998. There was no reference in the judgments of Commissioner Ashford and Judge Walker to his being overweight nor in the report of Dr Teychenne in 1994. Mr Karam was able to undertake heavy manual work. She said it was open to me to find that he was not overweight while working for James Hardie because he would not have been able to perform that work if he was overweight. She noted that Mr Karam was not cross-examined as he was in the Compensation Court and submitted that I should accept his evidence as truthful.

[1] [2015] NSWWCCPD 49.
[2] (1994) 35 NSWLR 452; 10 NSWCCR 796.
[3] [2005] NSWCA 42.

FINDINGS AND REASONS

59. The statements of principle to which Mr Perry referred me are set out below. In *Kooragang* Kirby P said:

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent death of injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned."

60. Roche DP said in *Murphy*:

> "Ms Murphy only has to establish, applying the commonsense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 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)."

61. In *Etherington*, McColl JA said[4]:

> "It is not, in my view, necessary to consider for present purposes whether Heydon JA's judgment in *Makita* set too high a standard for the admissibility of expert opinion evidence. The critical parts of Doctor Selby Brown and Doctor Khoo's reports fell short, even by pre-Makita standards, of the standard required for admissibility. It has long been the case that a court cannot be expected to, and should not, act upon an expert opinion the basis for which is not explained by the witness expressing it: see Cross on Evidence at [29065]; *R v Jenkins; Ex parte Morrison* (No 2) [1949] VLR 277 at 303; *R v Hally* [1962] Qd R 214; *Steffen v Ruban* [1966] 2 NSWR 622; *Perry v R* (1990) 49 A Crim R 243 and, of course, the principal authorities examined by Heydon JA in *Makita* (at 729 - 741 [59] - [82]). Nothing in *Brown v Iontask Pty Ltd* should be understood as warranting departure from those principles.

[4] At [84].

62. Her Honour referred to that decision in *South Western Sydney Area Health Service v Edmonds*[5] *(Edmonds)* and said:

> "In *Hevi Lift (PNG) Ltd v Etherington* at [84] I said (Mason P and Beazley JA agreeing) that '[a] court should not act upon an expert opinion the basis for which is not explained by the witness expressing it*'.* In so saying, I referred with approval (inter alia) to Heydon JA's analysis of the admissibility of expert evidence in *Makita (Australia) Pty Limited v Sprowles* (at [59] – [82]). In that case (at [59]) Heydon JA cited with apparent approval Lord President Cooper's statement in *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh* (1953) SC 34 at 39-40 that:
>
> > '… the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'
>
> This statement is apposite in the context of Commission hearings, and, indeed, is implicitly recognised in r 70. While it must be recognised that '[t]here is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission and decisions whether to allow cross-examination or to limit it are discretionary' (*Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng* [2006] NSWCA 34 at [37]), the fact that cross-examination of an expert witness may be permitted indicates the desirability of expert reports conforming as far as possible to common law standards of admissibility designed to ensure they have probative value. Even if that is too stringent an approach in the face of s 354, as the rules recognise, evidence must be 'logical and probative' and 'unqualified opinions are unacceptable'.
>
> In my view Dr Rivett's statement that 'in general all the problems are work-related' which the Arbitrator accepted in concluding that the respondent's duties were sufficient to cause her injury (apparently within the meaning of s 16) amounted to a bare ipse dixit. It was not probative of the issue before the Arbitrator."

Weight gain

63. Mr Perry is correct to say that the evidence shows that Mr Karam's weight has fluctuated. However, Mr Karam said in his statement that he weighed only 90 to 100 kg at the time of the injury. That is consistent with the history he provided to medical practitioners including Dr Truskett.

64. Dr Patrick described the weight gain as "inexorable". The evidence shows that it was not unrelenting or impossible to stop because it has fluctuated and diet has had some effect. The most recent report is that of Dr Truskett who said that Mr Karam weighed 130 kg in June 2019. He has therefore lost considerable weight from the heaviest assessment of 183 kg.

65. Mr Karam's general practitioners support the connection between his inactivity and weight gain. The most persuasive evidence is that of Dr Sanki who has treated Mr Karam from at least 1997 when he undertook a lumbar spinal manipulation. In his report dated 27 February 2001 he said that Mr Karam had started to put on weight. That suggests that the comment was made as a result of Dr Sanki's own observations over time. It is consistent with the note on 7 September 2000 that Mr Karam eats a lot and doesn't move. Those notes were made before the diagnosis of intercurrent medical conditions such as kidney cancer.

66. Mr Karam did heavy work before the injury and, as a result of his back pain, has done little since. I am satisfied that he has gained weight as a result of the injury.

[5] [2007] NSWCA 16 at [130 to [132]

67. I am not satisfied that there is a chain of causation between the weight gain and the conditions which Mr Karam says are a consequence of it for the reasons set out below.

Thoracic spine

68. Mr Karam's case as presented at arbitration was that he suffered a consequential condition in his thoracic spine as a result of weight gain. Apart from one reference in Dr Sanki's 2001 report, there are no other references to thoracic spine pain before Dr Patrick's report.

69. An examination of Dr Patrick's report dated 28 May 2018 shows that it does not fulfil the requirements of probative expert evidence set out in *Etherington* and *Edmonds.*

70. Dr Patrick said that despite gross adipose tissue "there does appear to be evidence for spasm/guarding at mid/lower thoracic spine as well as lumbar spine." That statement is speculative and based on Dr Patrick's findings. In his Opinion, Dr Patrick said there was likely to be "some degree of thoracic spinal facet injury… contributed to by his inexorable weight gain". Dr Patrick did not explain how his observation on examination led to that conclusion. Dr Patrick defended his opinion in his subsequent reports.

71. Dr Patrick did not disclose his reasoning. His report is unclear as to whether he considered that Mr Karam suffered an injury or a consequential condition. His report suggests both.

72. There is one reference in Dr Sanki's report in 1997 to dorsal pain and nothing in Mr Karam's statements nor in the history provided to other doctors. He did not complain of thoracic spine pain to Dr Truskett in June 2019 nor did Dr Truskett observe muscle guarding. Mr Karam demonstrated full rotation of the back which Dr Truskett said was the predominant function of the thoracic spine. It does not appear that Dr Patrick assessed spinal rotation because his report refers only to flexion, extension and lateral flexion.

73. I prefer the evidence of Dr Truskett supported by the lack of complaints about thoracic spine pain to other practitioners. I do not accept that Mr Karam has suffered a condition in his thoracic spine as a consequence of the injury to his lumbar spine.

Lower extremities

74. It is important to observe the differences between the losses assessed under the Table of Disabilities for injuries suffered before 1 January 2002 and those after. Mr Karam was compensated for loss of use of his legs as a result of radiculopathy from his low back injury as well as loss of sexual organs. Under the method of assessment set out in the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* 4th edition 1 April 2016 (and its predecessors) the effects of radiculopathy and impact on sexual function is comprised in the assessment of permanent impairment resulting from the lumbar spine injury. If Mr Karam is to be assessed in respect of his legs, it must be as a result of another condition.

75. Pitting oedema is not explained in any of the medical reports but I understand it to be swelling due to fluid accumulation which can be demonstrated by applying pressure to the area.

76. Dr Patrick's reasoning with respect to oedema was also speculative being a consequence of weight gain and likely disturbance with lymphatic drainage. He did not explain his reasoning and he did not record any examination findings on which he based his opinion. His reference to his qualification as a vascular surgeon is insufficient to raise his opinion beyond a "bare ipse dixit."

77. Dr Truskett was not correct to say in his file review that no doctor beside had noted pitting oedema. Dr Shnoudi said in November 2008 that Mr Karam had pitting oedema which he attributed to his ingestion of non-steroidal anti-inflammatory drugs. Dr Shnoudi asked Mr Karam to cease taking those drugs.

78. Dr Truskett said in his first report that any oedema was likely to be a consequence of weight gain. Once he had the opportunity to examine Mr Karam he accepted that there was minimal pitting oedema at the level of the ankle. He noted that all pulses in the lower leg were normal and there were no varicose veins or evidence of venous hypertension. No similar examination was recorded by Dr Patrick.

79. Dr Truskett noted that mild swelling of the legs is a recognised side effect of the blood pressure medication which Mr Karam has been taking for four years or since about 2015. That is consistent with Mr Karam's statement in 2017 that he had noticed swelling in his right foot in the previous two years.

80. I prefer the evidence of Dr Truskett in his second report to that of Dr Patrick.

81. For those reasons, I am not satisfied that Mr Karam has suffered a consequential condition in his thoracic spine or legs as a result of his lumbar spine injury in 1993. Ms Compton said that if I came to that conclusion it would not be appropriate to remit the matter for referral to an AMS. I therefore make no order