WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**006048/16**
APPLICANT:	**MARK BELLAMY**
RESPONDENT:	**WATERTECH RESOURCES PTY LIMITED**
DATE OF DETERMINATION:	**22 AUGUST 2017**
CITATION:	**[2017] NSWWCC 195**

The Commission determines:

1. Pursuant to section 60AA (1) of the *Workers Compensation Act* 1987 respondent to pay the sum of $12,727 being the cost of house painting.

2. That the applicant has not established that he is entitled to compensation pursuant to section 60AA (1) in respect of swimming pool maintenance.

3. Balance of claim for domestic assistance discontinued by consent.

4. Liberty to apply to the Commission under the same matter number in respect of the permanent impairment claim when the applicant has reached maximum medical improvement.

5. Liberty to apply in respect of the above orders.

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

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 PAUL SWEENEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

REGISTRAR

Issued by

Tina Ng
By the Delegation of the Registrar

STATEMENT OF REASONS

THE CLAIM

1. By an Application to Resolve a Dispute (the Application) Mark Bellamy (the applicant) claimed compensation for permanent impairment and for domestic assistance from Watertech Resources Pty Limited (the respondent). The claim for permanent impairment compensation has been assessed by an Approved Medical Specialist and is no longer in issue between the parties. The respondent has also agreed to pay for much of the domestic assistance sought by the applicant in the Application.

2. There are two specific aspects of domestic assistance which remain in issue. First, the Application claims an indemnity in the sum of $12,727 in respect of house painting at the applicant's then home at Bradbury. Secondly, by the agreement of the parties, the Application has been amended to claim the cost of pool maintenance at the applicant's present property in Harrington Park.

3. It is alleged that the need for painting and pool maintenance results from injuries the applicant sustained in a motor vehicle accident on 22 February 2001. On that day, he was driving a pantechnicon vehicle, in the course of his employment, when it collided with another vehicle. It is not disputed that as a consequence of the accident, the applicant suffered serious injuries to his back and neck.

PROCEDURE BEFORE THE COMMISSION

4. When the matter came on for arbitration at Penrith on 24 July 2017, Mr Graham of counsel appeared for the applicant and Mr Barnes of counsel appeared for the respondent. I was informed by counsel that the parties had been unable to resolve the legal and factual issues arising from the outstanding claim for domestic assistance.

5. I am satisfied that the parties had ample opportunity to explore settlement and that they have been unable to reach a settlement of the matters remaining in dispute. In reaching that conclusion, I bear in mind the fact that the parties have engaged in extensive discussions during the course of the matter, which has led to the resolution of most of the issues that were initially in dispute.

EVIDENCE

Documentary Evidence

6. The following documents were in admitted into evidence by the Commission:

    (a) The Application and attached documents;
    (b) Reply and attached documents;
    (c) Applications to Admit Late Documents which bear date 5 May 2017, 5 June 2017, 6 July 2017, and 10 July 2017;
    (d) The supplementary statement of the applicant dated 10 July 2017, and
    (e) Medical Assessment Certificates of Tommasino Mastroianni dated 2 March 2017 and 24 May 2017.

Oral Evidence

7. Neither counsel objected to the documentary evidence outlined above. Mr Graham, however, sought leave to adduce short oral evidence from the applicant. As Mr Barnes did not object to this course of action and as any elucidation of the factual circumstances surrounding the claim for domestic assistance was in the interests of justice, I acceded to Mr Graham's application. I will address the content of the applicant's oral evidence briefly below.

8. The applicant gave short oral evidence of the circumstances in which he had brought his need for house painting at his premises in Bradbury to the attention of the respondent's insurer. He also gave evidence as to the circumstances in which he subsequently sold the Bradbury premises and purchased another residence at Harrington Park, some three to four months prior to the arbitration hearing. He stated that when he arranged for the painting of his former premises at Bradbury, he had not considered relocating to other premises.

9. In cross-examination, he conceded that he had no note of any conversation with the claims officer of the respondent's insurer concerning the painting of the premises. He stated that he had not personally forwarded a copy of the quotation for painting work at Harrington Park to the insurer.

The Dispute

10. The section 74 notice addressing the issue of domestic assistance is dated 4 October 2016. It asserts that the domestic assistance claimed by the applicant was not "reasonably necessary" as a result of the injury. In relation to the painting, the section 74 notice stated:

> "Finally, in relation to the painting costs, we maintain this is not reasonable necessary [sic] and does not fall within the scope of 'domestic assistance'."

11. This was the specific issue which was discussed at the telephone conference in relation to the claim for the cost of painting performed at the applicant's Bradbury premises. At the time leave was granted to the applicant to add a further claim for domestic assistance to his Application, namely the claim for the cost of pool maintenance, the respondent specifically asserted that the applicant was not entitled to such assistance as he had not "provided the domestic assistance before the injury" as required by section 60AA(1)(b) of the *Workers Compensation Act* 1987 (the 1987 Act).

12. At the arbitration hearing, the dispute was put on a wider basis, as Mr Barnes argued that the applicant had not given appropriate notice of his alleged need for house painting or assistance with swimming pool maintenance to the respondent's insurer. It followed that the insurer was unable to formulate a care plan, determine whether the need for assistance was reasonably necessary as a result of the injury and whether the cost was reasonable.

13. The submissions of the parties addressing the issues in dispute set out above are recorded and I do not propose to reiterate those submissions in these short reasons. I will, however, briefly refer to the arguments of the parties in resolving the issues in dispute below. Prior to embarking on that process, however, I will set out the salient historical matters. This brief review of the history is not intended to be exhaustive.

BACKGROUND

14. The applicant sustained a low back injury in 1995 when pulling up a tree at home. There is no contemporaneous medical history addressing this incident, but it is recorded in the report

of Dr Ellis, a general surgeon, dated 1 November 2005. He records that the applicant developed low back pain radiating to the back of both legs following this incident. Dr Ellis also records that the applicant experienced "numbness and paresthesia in the soles of each foot, particularly the left", following this incident. He opined that this gave rise to a "neurological deficit".

15. Following the work injury on 22 February 2001, the applicant was admitted to Auburn District Hospital with severe neck pain. Subsequently, he saw Dr Papatheodorakis, a general practitioner, and possibly, Dr Barnsley, a rheumatologist. After a period of conservative treatment, he returned to work, initially to selected duties, and then to full duties. He was retrenched in early 2004. He continued to complain of neck pain.

16. In June 2004, the applicant obtained employment as a project officer with Holroyd Council. He has remained in that employment to the present. He is engaged in road construction work. A proportion of this work is clerical and the balance supervisory.

17. In 2007 and 2009, the applicant suffered injuries to his right knee (possibly in the course of his employment). The medical histories record that the applicant experienced continuing symptoms in his knee. He has undergone multiple surgical procedures, culminating in a total knee replacement in May 2016.

18. According to Dr Ellis, the applicant experienced difficulty walking distances and could not kneel or run following the injuries. Dr Ellis states, in his report of 27 March 2015, that the applicant has also:

> "developed pain in his right hip, and has been told that right knee and right hip replacements will be required in the future. His low back pain and disability have been aggravated by the impairments in the right knee and hip."

There is, however, no medical evidence which addresses the applicant's post-surgical knee symptoms, other than a brief medical history, which suggests that he obtained a satisfactory outcome from the knee replacement.

19. On 13 January 2012, the applicant underwent a C6/7 discectomy and spinal fusion under Dr Darwish, a neurosurgeon and spinal surgeon. Although, he initially made a reasonable recovery from the surgery, he experienced a recurrence of severe neck pain in 2013.

20. On 7 February 2014, the applicant underwent a second discectomy and spinal fusion. On this occasion, Dr Darwish performed surgery at C5/6, the level below the earlier fusion. The respondent indemnified the applicant in respect of the cost of the surgery in January 2012 and 27 March 2015.

21. On 12 October 2015, the applicant's general practitioner, Dr Lucy Nguyen, issued a WorkCover medical certificate which noted that the applicant was fit for his pre-injury duties, but required continuing treatment from Dr Darwish. It also stated that the applicant required "assessment for domestic and general house maintenance assistance".

22. At about this time, the applicant obtained a quotation for the internal and external painting of his premises in Bradbury from Can NSW Services Pty Ltd (Can). The applicant states that the quotation, which is dated 15 October 2015, was forward to the respondent's insurer as an annexure to Dr Nguyen's certificate requesting that the applicant be assessed for domestic and house maintenance assistance. The insurer disputes that it received this quotation.

23. After the certificate was forwarded to the respondent's insurer, the applicant spoke with his case manager who advised him that he intended to establish a "care plan". The applicant also states that he had a telephone conversation with his case manager around this time, who informed him that the respondent would not meet the cost of house painting. The respondent does not concede that this telephone conversation place.

24. On or about 8 December 2015, Mr Joshua Cooney, an occupational therapist, visited the applicant at his Bradbury home, for the purpose of providing a recommendation to the insurer in respect of the applicant's need for domestic assistance.

25. By his report, which was issued on 17 December 2015, Mr Cooney accepted that the applicant lacked the physical capacity to perform the task of internal and external house painting. He contemplated that some "aspects of this task are able to be completed by Mr Bellamy's wife. However, he concluded that:

> "painting assistance is unfortunately not a task that is necessary to engage in ongoing activities of daily living with regards to self-care or ongoing domestic living activities."

It is not clear whether Mr Cooney's opinion, reflected the view of the respondent's insurer, QBE, or whether he had reached that view independently.

26. In late December 2015 or early January 2016, the applicant accepted the quotation of Can to paint his then home. On 11 January 2016, Can issued an invoice in the sum of $12,727 for the work carried out and completed in accordance with their earlier quotation. The applicant paid the outstanding sum on 15 January 2016.

27. On 23 February 2017, an Approved Medical Specialist (AMS) certified that the applicant suffered 32 per cent whole person impairment as a result of the injury in 2001. As subsequent medical evidence suggested that the applicant has not reached maximum medical improvement in respect of the condition of his low back and lower limbs, the certification of the AMS has not been incorporated in an award of the Commission. Nonetheless, it must be accepted that the applicant has significant impairment of his lumbar and cervical spine.

28. In or about April 2017, the applicant sold the premises in Bradbury and purchased his current home in Harrington Park. That home has a salt water swimming pool. The applicant, through his solicitor, claimed the cost of maintenance of the pool from the respondent. When the respondent declined to meet this cost, he arranged for Swimart to carry out maintenance at a cost of $97 per month.

29. On 27 April 2017, the applicant consulted with his current orthopaedic surgeon, Dr Randolph Gray, who advised that he should undergo a "left 4-5 lateral recess decompression". He sought approval from the insurer for this operative procedure.

30. On 10 May 2017, Ms Kimberly Brown, an occupational therapist reviewed the premises at Harrington Park at the request of QBE and made recommendations in respect of the applicant's present and future care needs. While the balance of Ms Browns opinion is no longer relevant, she stated that:

> "whilst Mr Bellamy is having difficulty with cleaning his pool, he is recommended to continue utilising services from Swimart as he only recently moved in to a house with a pool."

THE EVIDENCE OF THE APPLICANT

31. Except for his brief oral evidence, the applicant's evidence is largely in writing. I have no reason to doubt the greater part of the applicant's evidence. Much of his initial statement, which is dated to 20 November 2014, is concerned with the course of his treatment over the years since the work injury, and I do not propose to repeat this history, which is not contested by the respondent.

32. By his first supplementary statement of 8 March 2016, the applicant addresses historical matters relevant to the question of domestic assistance. He states that he lived at the premises in Bradbury at the time of his injury in 2001. In 2005 or 2006, he built a second home on this block of land. His mother continued to live on the original home, and he moved in to the new home with his family. He states that he performed all the general maintenance around the house such as changing light bulbs and painting. In respect of the latter, he says this:

> "I used to paint the interior regularly, every five years or so, and at the same time I would paint the external eaves which are fibro or some similar material. The eaves are subject to strong sun on occasions and had to be painted. Otherwise, the pain [sic] peels off and the material is affected by the sun. To do the painting I had to access high areas using a ladder or paint above my head."

33. The applicant states that in 2016 he decided to "go ahead and get the house painted because it was desperately in need of a paint, and I wasn't sure what was happening with QBE".

34. By his statement of 22 June 2017, the applicant states that he has paid for monthly pool maintenance and he proposes to continue that regime as he "can't physically clean the pool and look after the filter." The applicant also says that he finds that swimming is that the only exercise that he can undertake given his disability. He says that he has installed solar heating at the pool so that he can continue to swim during the winter.

RELEVANT LEGISLATION AND GUIDELINES

35. In so far as it is relevant, section 60AA of the 1987 Act, which governs the provision of domestic assistance, is as follows:

> "(1) If, as a result of an injury received by a worker, it is reasonably necessary that any domestic assistance is provided for an injured worker, the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that assistance if:
>
> (a) a medical practitioner has certified, on the basis of a functional assessment of the worker, that it is reasonably necessary that the assistance be provided and that the necessity for the assistance to be provided arises as a direct result of the injury, and
> (b) the assistance would not be provided for the worker but for the injury (because the worker provided the domestic assistance before the injury), and
> (c) the injury to the worker has resulted in a degree of permanent impairment of the worker of at least 15% or the assistance is to be provided on a temporary basis as provided by subsection (2), and
> (d) the assistance is provided in accordance with a care plan established by the insurer in accordance with the Workers Compensation Guidelines.

(2) Assistance is provided on a temporary basis if it is provided in accordance with each of the following requirements:

(a) it is provided for not more than 6 hours per week,
(b) it is provided during a period that is not longer than, or during periods that together are not longer than, 3 months,
(c) it is provided pursuant to the requirements of the relevant injury management plan.

(3) Compensation is not payable under this section for gratuitous domestic assistance unless the person who provides the assistance has lost income or forgone employment as a result of providing the assistance.

(4) Compensation payable under this section for gratuitous domestic assistance is payable as if the cost of that assistance were such sum as may be applicable under section 61 (2) in respect of the assistance concerned.

(5) The following requirements apply in respect of payments under this section:

(a) payments are to be made as the costs are incurred or, in the case of gratuitous domestic assistance, as the services are provided,
(b) payments are only to be made if those costs and the provision of the assistance is properly verified (and the Workers Compensation Guidelines may make provision for how the performance of those services is to be verified),
(c) payments for gratuitous domestic assistance are to be made to the provider of the assistance"

36. New *Guidelines for Claiming Workers Compensation* (the 2016 Guidelines), which replaced the *WorkCover Guidelines for Claiming Compensation Benefits* from 2004 (the 2004 Guidelines), were issued by the State Insurance Regulatory Authority on 1 August 2016. Relevantly they state:

"Domestic assistance

About this section

Workers can claim the cost of domestic assistance for tasks such as:

- household cleaning and laundry
- lawn or garden care
- transport not otherwise covered as a medical, hospital and rehabilitation expense.

Section 60AA of the 1987 Act

This section sets out:

- what assistance the worker can receive
- when a worker may be eligible for domestic assistance
- when the insurer will determine liability and how it should design a care plan

- how providers of gratuitous domestic assistance can claim reimbursement.

Understanding eligibility

A worker can receive domestic assistance where:

- a medical practitioner has certified, based on a functional assessment, that the assistance is reasonably necessary and that the necessity arises directly from the worker's injury, and
- the worker did the domestic tasks before the injury happened, and
- the injury to the worker has resulted in a permanent impairment of at least 15 per cent or if the assistance is temporary, up to six hours a week for up to a total period of three months (whether or not consecutive), and it follows a care plan the insurer has set up in line with this section."

37. The parties accepted that the claim for domestic assistance in respect of house painting was governed by the previous *WorkCover Guidelines for Claiming Compensation Benefits* which were introduced in 2004. Those guidelines are more elaborate than the 2016 Guidelines. I do not propose to set out the guidelines in full. They include the following:

> "ELIGIBILITY FOR DOMESTIC ASSISTANCE
>
> An injured worker is eligible to receive domestic assistance where a medical practitioner has certified that it is reasonably necessary for the worker to receive the assistance and that the necessity arises as a direct result of the worker's injury.
>
> The type and amount of assistance is to be determined by a functional assessment, and the worker must have undertaken the domestic tasks with which assistance is to be provided."

FINDINGS AND REASONS

38. The statutory scheme for the provision of domestic assistance has been discussed in several presidential decisions of the Commission, including *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14 (*Hesam*i), *Cleland v Carter* [2016] NSWWCCPD 29 (*Cleland v Carter*) and *Kajic v Hawker De Havilland Aerospace Pty Ltd* [2009] NSWWCCPD 136. These decisions were not referred to in the submissions made by counsel at the arbitration.

39. In *Hesami*, Roche DP observed that each of the four requirements in section 60AA (1) of the 1987 Act must be established before an employer is liable to pay a worker compensation for domestic assistance. Nonetheless, he concluded that the section should be construed beneficially. He continued:

> "Parliament introduced s 60AA as part of a range of sweeping changes that commenced on 1 January 2002. The section appears in Div 3 of Pt 3 of the 1987 Act (which deals with compensation for medical, hospital and rehabilitation expenses) under the heading 'Compensation for domestic assistance'… Prior to the introduction of s 60AA, the legislation provided no compensation for gratuitous domestic assistance and the cost of 'care (other than nursing care) of a worker in the worker's home' could only be recovered if provided by a commercial agency as 'directed by a medical practitioner having regard to the nature of the worker's incapacity' (s 59(f) of the 1987 Act). Section 60AA represents (on one view) a significant extension of the

benefits payable and it is appropriate that claimants for benefits should establish their entitlement in accordance with the legislation."

40. I should add that the background to the enactment of section 60AA includes the decision of the New South Wales Court of Appeal in *Western Suburbs Leagues Club v Everill* [2001] NSWCA 56, where it was held that domestic assistance, including cleaning and vacuuming of the worker's house did not fall within the definition of medical and related treatment. It was not "care of the worker" in her home as that term is used in section 59(f) of the 1987 Act.

41. If the applicant was put to strict proof of each of the four pre-conditions for receipt of compensation for the cost of domestic assistance, he would probably not succeed on his claim. However, neither the section 74 Notice nor the respondent's argument at the arbitration put in issue whether the applicant had complied with section 60AA(1)(a) or (d).

42. The parties seemed content to assume that the reports of occupational therapists obtained by the respondent constituted "care plans" for the purposes of the Act. Notwithstanding his submission in relation to notice of the claims, Mr Barnes implicitly accepted that these reports were relevant care plans. I have previously expressed some doubt whether that approach is correct. In the circumstances, however, I accept that the reports of Mr Cooney and Ms Brown are care plans in accordance with section 60AA (1) (d). It was not suggested by Mr Barnes that these care plans were immune from review by the Commission: cf *Hesami*.

43. The first issue raised by the respondent is whether the need for painting and pool maintenance are reasonably necessary as a result of the injury. There is ample authority that the phrase "as a result of" denotes that the injury materially contributed to the need for services. The phrase "reasonably necessary" has been discussed at length by Burke J in *Rose v Health Commission (NSW)* [1986] NSWCC 2; (1986) 2 NSWCCR 32 and other cases, all of which have recently been considered by Deputy President Roche in *Diab v NRMA Ltd* [2014] NSWWCCPD 72 (*Diab*). *Diab* points out that the treatment or service does not have to be absolutely necessary as the word "reasonably" is used as a diminutive and the service only has to be reasonably necessary. In determining whether domestic assistance is reasonably necessary, the Commission must employ good sense and prudence in considering all the evidence in a particular case.

44. In my opinion, the evidence, taken as a whole, satisfactorily establishes that the need for painting and pool maintenance result from the injury. The applicant has undergone two cervical fusions as a consequence of the injury. In addition he sustained a lumbar spine injury. He says that he is unable to perform house painting or pool maintenance by reason of his residual symptomatology. Mr Cooney unhesitatingly accepts that the applicant is unable to perform house painting. Ms Brown appears to accept that he could not perform the pool maintenance. There is no evidence to the contrary.

45. By its section 74 notice, QBE raised the issue of the applicant's supervening knee condition. It raised the possibility that the applicant's need for domestic assistance may have resulted from his knee injury. But this argument was not pursued at the arbitration. The recent evidence in respect of the applicant's knee is scant. It does not impede a finding that the need for domestic assistance in this case results from the subject injury. I will return to the issue of "reasonably necessary" after considering the specific arguments raised by the respondent.

46. The respondent argues that house painting does not fall within the ambit of the phrase "domestic assistance". The 1987 Act does not define this term. The 2004 Guidelines give

some examples of what falls within the term but explicitly sate that the list of tasks, which include lawn and garden care and simple essential home maintenance, is not exhaustive.

47. It is common ground that some periodic painting tasks might be construed as domestic assistance. Such tasks are "essential home maintenance". Provided the other preconditions in section 60 AA were met, periodic painting of woodwork for preservation might be an example of a cost that is compensable. The distinction between painting of part of the home and the periodic painting of the entire home is not easy to understand in the context of the statutory language.

48. The primary meaning of "domestic" - relating to the home or the running of the home -is probably sufficiently wide to encompass periodic painting of a worker's home. If a worker previously performed such a task himself, assistance to perform it is probably caught by section 60AA. I understand there is one other arbitral decision to this effect. As I have been unable to find it, I am unaware of the arbitrator's reasons. But I see no good reason not to reach the same conclusion.

49. The next discrete argument put by the respondent related to pool maintenance. It submitted that because the applicant had not provided that particular domestic assistance before the injury, the precondition stated in paragraph 60AA (1) (b) had not been met. There is no doubt, as Roche DP held that this must be established, if the applicant is to succeed. There is doubt, however, as to precisely what the subsection means. The language and structure of the subsection is awkward. In particular, it is difficult to determine what the legislature intended by the parentheses employed in subsection.

50. Obviously, the subsection incorporates a second test of causation into section 60AA (1). The second reading speech and the 2004 Guidelines both refer to the necessity for the assistance to arise as a "direct result" of the injury. Not only must the need for the assistance result from the injury but it must be established that the assistance would not be provided "but for the injury (because the worker provided the assistance himself prior to the injury)". As the history of tort law reform makes clear, the "but for" test is fundamentally different to a test of causation whereby only a material contribution has to be established to enable a positive finding to be made of causal nexus.

51. Mr Graham submitted that there is ambiguity in the language of section 60AA (1) (b). He also argued that, if read literally, the words in parentheses would deprive s 60AA of much of its intended beneficial effect. It would preclude payment of compensation under the section to any worker, who had not performed the domestic task for which he required assistance prior to the injury.

52. The obvious example of the injustice which could arise from such an interpretation is that of a young worker, who lived with his parents at their home and performed no domestic chores prior to his injury. He would never be able to satisfy the words in parentheses in s60AA (1) (b), irrespective of the seriousness of his injuries and his need for domestic assistance. That would be so even if, subsequent to the injury, he became a home owner, and required assistance with maintenance of his home.

53. Mr Graham argued that the words in parentheses were simply an afterthought or an aside that should not curtail the meaning of balance of the subsection.

54. The 2004 Guidelines may recognize the problem addressed by Mr Graham. They direct insurers to consider whether the injured worker usually undertook the domestic tasks for

which compensation was claimed pursuant to s 60AA prior to the injury. However, they also say this:

> "If the worker did not usually undertake the domestic tasks prior to their injury, but their social circumstances have changed as a result of the injury so they are now required to, assistance for these additional tasks may be considered."

55. This direction to insurers may mitigate some of the perceived harshness flowing from the construction of the subsection propounded by the respondent. However, the 2004 Guidelines do not apply to the claim for the cost of pool cleaning. The current guidelines do not contain a similar provision.

56. In any event, it is not permissible to utilize the language of the Guidelines for the purpose of construing the Act. In *Cleland v Carter*, Deputy President Snell expressed the opinion that the 2004 Guidelines were probably directory, rather than mandatory. Guidelines can, of course, be mandatory or directory depending upon the language of the Act and the relevant Guidelines. In *Strbac v QBE Insurance* (*Australia) Limited* [2010] NSWSC 602, Harrison AsJ, considering the *WorkCover Guides for the Evaluation of Permanent Impairment*, stated:

> "Guidelines in general have varying legal effects. Some guidelines amount to delegated legislation and are inflexible. Others exhibit no legislative intention to create precise or inflexible rules: see *Riddell v Secretary, Department of Social Security* [1993] FCA 261; (1993) 42 FCR 443 and *Apthorpe v Repatriation Commission* (1987) 77 ALR 412 that are instructive."

57. It is true that the use of parentheses must be considered when construing the subsection. Parentheses are often used to set out examples or lists that elucidate the section of the Act in which they appear. They may be words of expansion or exclusion, depending upon language and context. In this instance, however, they seem to me to limit or restrict the balance of the subsection. They restrict the factual circumstances in which it can be held that the domestic assistance would not be provided but for the injury to circumstances where the worker provided the domestic assistance prior to the injury. While I accept unreservedly that the subsection must be given a beneficial construction, to accede to Mr Graham's argument would effectively render the words in parentheses in 60AA(1)(b) otiose or, alternatively, radically alter its literal meaning.

58. At the arbitration hearing, I wondered whether the domestic assistance for which a worker seeks compensation pursuant to section 60AA, must be identical to the assistance which he has provided prior to the injury. For instance, if the applicant performed some aspects of domestic assistance prior to the injury, is it appropriate to compensate him for all domestic assistance which is reasonably necessary as a result of the injury? While this approach has some lingering attraction, I have concluded that it is not consistent with the language of the subsection. On my reading of the subsection, there must be some rough equivalence between the assistance that is to be provided and the assistance which "the worker provided prior to the injury".

59. The fact that the applicant did painting and other domestic chores before the injury is insufficient to permit a finding that the need for assistance with swimming pool maintenance results from the injury. Obviously, a consideration of this issue may give rise to issues of fact and degree. But in the circumstances of this case, I have concluded that the applicant has not established that swimming pool maintenance would not be provided to him but for the injury; because he did not provide the assistance himself prior to the injury.

60. While the language of 60AA (1) (b) is difficult, all the words of the subsection must be given due weight. My construction of the meaning of the subsection does cut down the width of the scheme for domestic assistance. However, it does not produce an arbitrary or capricious result. The subsection, in the context of the entirety of the section, appears to restrict compensation for domestic assistance to that category of workers who provided the domestic assistance before the injury.

61. The third discrete point which was argued at the arbitration related to the failure of the applicant to put the insurer on notice of the claim. It was put by Mr Barnes thus:

> [The scheme for domestic assistance] "is predicated on the basis that there would be a consideration in almost a contractual sense, between the parties. So in other words, I am a worker, I'm injured, I wish to seek domestic assistance, I will provide you with a request, an appropriately formatted request. If it needs an expenditure of a certain amount of money, contractually I feel I would be obliged to give you a quote for that in order that you could either provide that service directly to me, because the Act speaks of that, or I can go and get that service provided through me, financially, for which I would be reimbursed."

62. He continued:

> "Where these procedures are adopted, particularly with the SIRA guidelines and the earlier WorkCover guidelines, the onus is on those that seek the services to prove the need. The same can be said with respect to the swimming pool cleaning and the costs associated with that and the SIRA guidelines provide a barring mechanism, as it were, for where people haven't done that sort of thing prior to the injury."

63. In short, Mr Barnes argued that absent proof that the insurer had been provided with a quotation for the house painting prior to the injury, the respondent was in position to carry out its statutory function and assess whether the need for the painting was reasonably necessary. Mr Graham, of course summited that the evidence established that a quotation for the painting work had been forwarded to the insurer under cover of the certificate of Dr Nguyen dated 12 October 2015.

64. I have some considerable doubt, as to whether a quotation from Can for the house painting was forwarded to the insurer under cover of the medical certificate of Dr Nguyen. Certainly, there is nothing from the doctor which establishes that she forwarded the quotation. There is nothing on the face of the certificate which suggests that a copy of the quotation for house painting was attached to it. Importantly, the quotation is dated several days after the date of the medical certificate. On this one issue, I doubt that the evidence of the applicant is persuasive.

65. Nonetheless, I accept the oral evidence of the applicant that he spoke to his case manager at QBE and specifically requested that his proposed house painting be funded by the insurer. The insurer was in possession of the medical certificate of the doctor that recommended assessment of the applicant's need for general house maintenance. Mr Barnes established in cross-examination that the applicant did not personally forward a quotation for the painting work to QBE.

66. However, in my opinion, that concession by the applicant does not detract from the balance of his written or oral evidence. He said, of course, that his case manager specifically informed him that the insurer would not meet the cost of painting his house, as it was not

compensable. He was not asked to provide a quotation at the time. Patently, such a quotation existed and could have been provided to the insurer.

67. Probably, prompted by the medical certificate of Dr Nguyen or, possibly by the applicant's telephone call, QBE arranged for Mr Cooney to visit the premises and prepare a report which is dated 17 December 2015. As I indicated above, the respondent accepts that this report of the occupational therapist is a care plan for the purpose of section 60AA(1)(d). That document specifically addressed the need for house painting and concluded that the applicant could not perform the task.

68. In addressing house painting, Mr Cooney opined that "aspects of this task are able to be completed by Mr Bellamy's wife." It was not argued at the arbitration that I should accept this proposition. Given the evidence in this matter, it seems lightly ludicrous. Mr Cooney also concluded that house painting did not form part of "ongoing domestic living activities." It was not compensable under s60AA of the 1987 Act.

69. The insurer clearly contemplated whether or not house painting assistance should be provided to the applicant, determined that it did not fall within section 60AA and communicated this to the applicant. It established what is agreed to be a care plan to address the applicant's claim supported by his doctor for compensation for domestic assistance. Upon receiving advice that the insurer would not meet the cost of painting, the applicant went ahead and had the home painted in accordance with the quotation.

70. As Mr Graham submitted, the insurer could have sought the quotation, had the occupational therapist or a painter assess the applicant's home and provide an opinion whether the need for painting was "reasonably necessary". Alternatively, it could have informed the applicant that it would not make a decision on liability until it had the opportunity to consider whether the painting was necessary and quotation was reasonable.

71. The section 74 notice in the matter did not directly address the reasonableness of the quotation for house painting. The quote was forwarded to the insurer's solicitor during the course of the matter. While I appreciate that the applicant had moved premises by the time of the second telephone conference in the matter, it was always open to the insurer to obtain evidence in relation to the reasonableness of the quotation, and seek leave to litigate this issue at the arbitration.

72. It was not submitted that the Commission is precluded from considering the putative care plan in this matter. I have no doubt that the Commission has jurisdiction to determine whether house painting falls within the statutory term "domestic assistance". I have determined that it does. Having also determined that the other issues raised by the respondent do not preclude the payment of compensation for house painting, I can readily conclude that the need for house painting is reasonably necessary as a result of the injury.

73. The applicant stated in his evidence that his home was in need of painting. He was not challenged on this issue. There is no evidence which refutes the reasonableness of the quote which he obtained. In the peculiar circumstances of this case, it is appropriate, in my opinion, to make an award for the applicant for the cost of the house painting in accordance with the quotation.

74. I propose to find that the applicant is not entitled to the cost of pool maintenance as he has not established that such assistance would not be provided but for the injury. That is because he did not perform this domestic task prior to the injury. There is no evidence that the need for such assistance is compensable on another statutory basis.