

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2493/19
Applicant: Douglas Dries
Respondent: GGA Glass & Aluminium Pty Ltd
Date of Determination: 14 October 2019
Citation: [2019] NSWCC 329

The Commission determines:

1. The respondent is to pay the applicant's expenses under section 60 of the *Workers Compensation Act 1987* on production of accounts and/or receipts in respect of the supply to the applicant of a Hyundai MY20 TQA IMAX ACTIVE 2.5D Auto including the cost of ramp fit-out less the trade in value of the applicant's Mazda 3 motor vehicle.

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

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application) Mr Dries (the applicant) seeks compensation under section 60 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of injury on 14 February 2014 to his spine. Mr Dries seeks compensation for expenses for the supply of a replacement motor vehicle, namely a Hyundai IMAX including ramp fit-out less the trade in value of his current motor vehicle, a Mazda 3.
2. The respondent is GGA Glass & Aluminium Pty Ltd (GGA). The relevant insurer for the purposes of workers compensation is EML as Agent for NSW Worker's Insurance Scheme (the insurer).

ISSUES FOR DETERMINATION

3. There is no dispute that Mr Dries injured his spine at work in February 2014. He has come to surgery as a result of that injury including a multi-level spinal fusion in May 2016 which have been paid for by the insurer. He has received weekly compensation. Mr Dries has received mobility aids paid for by the insurer.
4. Mr Dries now seeks a replacement motor vehicle on the basis his current motor vehicle is inadequate to the task of conveying his mobility aids required as a result of injury.
5. Specifically, Mr Dries seeks an order under section 60 that GGA pay his expenses in respect of the supply of a Hyundai IMAX motor vehicle including the cost of ramp fit-out less the trade in value of his current motor vehicle a Mazda 3.
6. GGA disputes that a replacement motor vehicle is reasonably necessary as a result of the undisputed work injury. As per dispute notice dated the insurer advised:

“We do not believe that the claimed medical or related treatment is reasonably necessary as a result of an injury as required by sections 59 and section 60 of the *Worker Compensation Act 1987*.”
7. Counsel for GGA sought to argue at the arbitration that the motor vehicle sought by Mr Dries did not fall within the definition of curative apparatus in section 59. At his own election, counsel for Mr Dries conceded that, notwithstanding the lack of particularity in the dispute notice about this aspect of the dispute, this matter was properly raised as a dispute and that he was in a position to meet that argument at the arbitration. The matter proceeded on this basis.
8. Counsel for GGA seeks an award for the respondent.
9. In the event Mr Dries was successful it was agreed by the parties that the form of order would be as follows: The respondent is to pay the applicant's expenses under section 60 of the 1987 Act on production of accounts and/or receipts in respect of the supply to the applicant of a Hyundai MY20 TQA IMAX ACTIVE 2.5D Auto including the cost of ramp fit-out less the trade in value of the applicant's Mazda 3 motor vehicle.

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a conciliation arbitration in Newcastle. Both parties were represented by counsel with Mr Hart appearing for Mr Dries and Mr Williams appearing for GGA. 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

11. The following documents were in evidence before the Commission being admitted by consent, and taken into account in making this determination:

For Mr Dries:

- (a) Application and all attached documents.

For GGA:

- (a) The Reply and all attached documents
- (b) Late documents tendered at the arbitration and admitted by consent being NSW Home & Activities of Daily Living (ADL) Assessment report authored by IPAR Rehabilitation and dated 12 July 2019.

Oral evidence

12. Mr Dries did not seek leave to adduce further oral evidence and counsel for GGA did not seek leave to cross-examine Mr Dries.

FINDINGS AND REASONS

13. There is no dispute that Mr Dries injured his spine at work on 14 February 2014.
14. He has come to surgery on his spine including a multilevel spinal fusion performed in May 2016 which was paid for by the insurer.
15. There is no dispute that Mr Dries has restrictions on his mobility as a result of his injury and subsequent surgeries. There is no dispute that these restrictions are significant.
16. There is no dispute that Mr Dries requires the use of mobility aids. He has mobility aids which have been paid for by the insurer.
17. Mr Dries now seeks a replacement motor vehicle on the basis his current motor vehicle is inadequate to the task of conveying his mobility aids required as a result of injury.
18. Specifically, Mr Dries seeks an order under section 60 that GGA pay his expenses in respect of the supply of a Hyundai IMAX motor vehicle including the cost of ramp fit-out less the trade in value of his current motor vehicle a Mazda 3. A Hyundai IMAX is a van.

19. The principal argument put forth by counsel for GGA is that GGA disputes that a replacement motor vehicle, as sought by Mr Dries, is curative apparatus within the meaning of section 59 in the circumstances of Mr Dries' case. This is because Mr Dries no longer drives as a result of the injury and his wife, Mrs Dries, who is now his carer (funded by the insurer), will be the person driving the motor vehicle. Counsel for GGA argued that there is no direct benefit to be conferred upon the injured worker by the proposed vehicle but rather it will directly benefit Mrs Dries, a person not entitled to be compensated and hence the new vehicle cannot be considered curative apparatus and the application must fail. Counsel for GGA further argued that, if Mrs Dries cannot transport the mobility aids, she should not be the carer for Mr Dries. It is not disputed that Mr Dries needs domestic assistance or a carer. It is not disputed that the insurer pays Mrs Dries to be her husband's carer, that is the insurer pays for the provision of domestic assistance to Mr Dries as rendered by Mrs Dries. Counsel for GGA also argued that Mr Dries should have proposed alternatives to the purchase of a new vehicle, such as alternate mobility aids.
20. GGA also disputes a replacement motor vehicle is reasonably necessary as a result of injury. Counsel for GGA submitted that he was instructed to make this submission but he had nothing further to put in support other than what he submitted concerning Mrs Dries (that if she can't manage the mobility aids then she should not be Mr Dries' carer) and also that alternatives to the purchase of a new car should have been proposed by Mr Dries.
21. I must make a determination on the balance of probabilities on the evidence in this case in accordance with the law.
22. The applicable law is set out in sections 59 and 60 of the 1987 Act which provide as follows:

“59 Definitions

(cf former s 10 (2))
In this Division:

‘ambulance service’ includes any conveyance of an injured worker to or from a medical practitioner or hospital.

‘hospital treatment’ means treatment (including treatment by way of rehabilitation) at any hospital or at any rehabilitation centre conducted by a hospital and includes:

- (a) the maintenance of the worker as a patient at the hospital or rehabilitation centre,
- (b) the provision or supply by the hospital, at the hospital or rehabilitation centre, of nursing attendance, medicines, medical or surgical supplies, or other curative apparatus, and
- (c) any other ancillary service,

but does not include ambulance service.

‘medical or related treatment’ includes:

- (a) treatment by a medical practitioner, a registered dentist, a dental prosthetist, a registered physiotherapist, a chiropractor, an osteopath, a masseur, a remedial medical gymnast or a speech therapist,
- (b) therapeutic treatment given by direction of a medical practitioner,
- (c) (Repealed)

- (d) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles,
- (e) any nursing, medicines, medical or surgical supplies or curative apparatus, supplied or provided for the worker otherwise than as hospital treatment,
- (f) care (other than nursing care) of a worker in the worker's home directed by a medical practitioner having regard to the nature of the worker's incapacity,
- (f1) domestic assistance services,
- (g) the modification of a worker's home or vehicle directed by a medical practitioner having regard to the nature of the worker's incapacity, and
- (h) treatment or other thing prescribed by the regulations as medical or related treatment,

but does not include ambulance service, hospital treatment or workplace rehabilitation service.

'public hospital' means:

- (a) a public hospital within the meaning of the *Health Services Act 1997* controlled by a local health district or the Crown,
- (b) a statutory health corporation or affiliated health organisation within the meaning of the *Health Services Act 1997*,
- (c) (Repealed)
- (d) a hospital or other institution (whether in this State or in another State or a Territory of the Commonwealth) that:
 - (i) is prescribed by the regulations, or
 - (ii) belongs to a class of hospitals or institutions prescribed by the regulations,

for the purposes of this definition.

'workplace rehabilitation service' means any service provided as a workplace rehabilitation service by or on behalf of a provider of rehabilitation services approved under section 52 of the 1998 Act.

[Note: For the meaning of references in this Division to health practitioners see section 21D of the *Interpretation Act 1987* and the *Health Practitioner Regulation National Law (NSW)*.]

60 Compensation for cost of medical or hospital treatment and rehabilitation etc

(1) If, as a result of an injury received by a worker, it is reasonably necessary that:

- (a) any medical or related treatment (other than domestic assistance) be given, or
- (b) any hospital treatment be given, or

- (c) any ambulance service be provided, or
- (d) any workplace rehabilitation service be provided,

the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2).

[Note: Compensation for domestic assistance is provided for by section 60AA.]

- (2) If it is necessary for a worker to travel in order to receive any such treatment or service (except any treatment or service excluded from this subsection by the regulations), the related travel expenses the employer is liable to pay are:
 - (a) the cost to the worker of any fares, travelling expenses and maintenance necessarily and reasonably incurred by the worker in obtaining the treatment or being provided with the service, and
 - (b) if the worker is not reasonably able to travel unescorted—the amount of the fares, travelling expenses and maintenance necessarily and reasonably incurred by an escort provided to enable the worker to be given the treatment or provided with the service.
- (2A) The worker's employer is not liable under this section to pay the cost of any treatment or service (or related travel expenses) if:
 - (a) the treatment or service is given or provided without the prior approval of the insurer (not including treatment provided within 48 hours of the injury happening and not including treatment or service that is exempt under the Workers Compensation Guidelines from the requirement for prior insurer approval), or
 - (b) the treatment or service is given or provided by a person who is not appropriately qualified to give or provide the treatment or service, or
 - (c) the treatment or service is not given or provided in accordance with any conditions imposed by the Workers Compensation Guidelines on the giving or providing of the treatment or service, or
 - (d) the treatment is given or provided by a health practitioner whose registration as a health practitioner under any relevant law is limited or subject to any condition imposed as a result of a disciplinary process, or who is suspended or disqualified from practice.
- (2B) The worker's employer is not liable under this section to pay travel expenses related to any treatment or service if the treatment or service is given or provided at a location that necessitates more travel than is reasonably necessary to obtain the treatment or service.
- (2C) The Workers Compensation Guidelines may make provision for or with respect to the following:
 - (a) establishing rules to be applied in determining whether it is reasonably necessary for a treatment or service to be given or provided,
 - (b) limiting the kinds of treatment and service (and related travel expenses) that an employer is liable to pay the cost of under this section,

- (c) limiting the amount for which an employer is liable to pay under this section for any particular treatment or service,
 - (d) establishing standard treatment plans for the treatment of particular injuries or classes of injury,
 - (e) specifying the qualifications or experience that a person requires to be **'appropriately qualified'** for the purposes of this section to give or provide a treatment or service to an injured worker (including by providing that a person is not appropriately qualified unless approved or accredited by the Authority).
- (3) Payments under this section are to be made as the costs are incurred, but only if properly verified.
 - (4) The fact that a worker is a contributor to a medical, hospital or other benefit fund, and is therefore entitled to any treatment or service either at some special rate or free or entitled to a refund, does not affect the liability of an employer under this section.
 - (5) The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute may be referred by the Registrar for assessment by an approved medical specialist under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.

23. Counsel for GGA referred me to the case of *Coomber v Red Funnel Fisheries Newcastle Pty Ltd, (Coomber)* [1998] NSWCC 27 a decision of Truss J in the Compensation Court. In that case the worker sought an order under section 60 of the 1987 Act. He injured his back at work and subsequently came to spinal surgery including a fusion. His car had a manual transmission and no power steering. He had difficulty managing these two aspects of his car after injury and the resultant surgery. He bought a replacement vehicle second-hand specifically a Toyota Camry with automatic transmission and power steering and traded his Mitsubishi Colt to do so. The respondent employer paid him the cost equivalent to converting the manual transmission of his original car (the Mitsubishi) to an automatic. The worker sought an order for the difference to be paid up to the purchase price of the Camry. In that case the applicant worker relied upon part (g) of the definition of medical and related treatment which refers to modification of a worker's home or vehicle. The applicant relied upon the Court of Appeal authority of *Bresmac Pty Ltd v Starr* (1992) 8 NSWCCR 601 (*Starr*).

24. Truss J said:

“For the applicant to succeed it is necessary that he establish that as a result of the injury it is reasonably necessary that any medical or related treatment be given. He relies upon par(g) of the definition of ‘medical and related treatment’ in s59 which is expressed to include ‘the modification of a worker’s home or vehicle directed by a medical practitioner having regard to the nature of the worker’s incapacity’.”

25. Truss J reviewed the authorities and ultimately held, on the evidence before her, that the worker was not entitled to the replacement cost of the Camry as follows:

“The paragraph of the definition relied upon refers to ‘modification of a vehicle’. The Macquarie Dictionary defines ‘modify’ as ‘to change somewhat from the form or qualities of’ and one of the definitions of ‘modification’ is ‘partial alteration’. Counsel for

the applicant relied upon the Court of Appeal authority of *Bresmac Pty Ltd v Starr* (1992) 8 NSWCCR 601. In that case the trial Judge had awarded the worker, a quadriplegic, the cost of purchasing a new vehicle on two bases: firstly, it fell within the meaning of 'medical or related treatment' and secondly, it was a curative apparatus within par(e) of the definition. The Court of Appeal considered that his Honour's decision was correct on the second ground at least so that it was unnecessary to come to any decision on the first.

10. In my view, the decision in *Starr* does not entitle a worker to ask the Court to ignore the specific and clear wording of par(g) and to seek the cost of a new car. Each case depends upon its facts. In *Starr*, the worker was a quadriplegic and the trial Judge had concluded that the car was of therapeutic assistance to him and his entitlement was determined pursuant to par(e) of the definition and not to par(g).

11. The applicant also relied upon a statement by Judge Neilson in *Woollahra Council v Beck* (1996) 14 NSWCCR 179. In that case the worker, who was a double amputee, was awarded the cost of taxi travel as a curative apparatus within par(e) of the definition. The statement relied upon by the applicant, which is *obiter*, appears at 181 where his Honour said:

"The employer would probably also be liable to supply and modify a motor vehicle as a curative apparatus within par(e) as decided in Bresmac Pty Ltd v Starr but the worker does not want one."

12. Having regard to the evidence as to the significant problems which the applicant has with his left leg resulting in a consent award for 20 per cent loss, in my view it was clearly reasonably necessary that the respondent pay the cost of converting his manual car to one with automatic transmission. Whilst I accept that the Camry is more satisfactory for the applicant from the viewpoint of increased size and greater height from the ground, in my view the evidence in this case falls well short of that which would entitle the Court to impose upon the respondent a liability on the basis that the Camry constituted a curative apparatus within par(e).

13. For these reasons, I have come to the conclusion that the respondent has discharged its liability under s60 in respect of the applicant's motor vehicle and there will be an award for the respondent."

26. Each case will depend on its own facts. In *Coomber*, Truss J held that the evidence in that case fell short of establishing that the proposed Camry motor vehicle constituted a curative apparatus.

27. Counsel for Mr Dries referred me to the Commission case of Newcastle Regional Public Tenants Council Incorporated v Grant [2005] NSWCC PD2 (*Grant*), a decision of Deputy President Byron. The Deputy President conducted a review of the authorities including the decision of Truss J in *Coomber*.

28. *Grant* was an appeal from an award of an arbitrator who awarded the worker a cost of the new vehicle (Toyota Tarago). The employer appealed. Whilst the order for the new vehicle was confirmed on appeal, the order was amended to deduct the cost of the trade in value of the worker's original vehicle.

29. In that case the worker suffered a fall, injured her spine and underwent a spinal fusion as a result. She remained in constant pain. She required domestic assistance with the completion of most day to day tasks. Her husband routinely assisted her. Her husband had his own health problems.

30. At first instance, the arbitrator ordered under section 60 that the employer pay for the cost of a new vehicle. The employer appealed on a number of grounds including that there was insufficient evidence for the arbitrator to conclude the Toyota Tarago was a curative apparatus. The appellant employer argued, among other things, that the benefit from the new car would not accrue to the worker but because it had a significant physical benefit for the worker's husband who was a person not entitled to be compensated. In that case the worker's husband was in declining health and the provision of the Tarago would assist him in transferring the worker to and from her wheelchair into the van.
31. Deputy President Byron reviewed the authorities as follows:

"40. In *Harbison*, Armitage CCJ, citing *Thomas*, referred to the following comments of Hutley JA in that case, at 219-220:

'This [the supply and use of a special hydrotherapy pool] treatment maintains her state of health and slows, or perhaps prevents, its deterioration. Two attacks were made on this reasoning – first it was said that this was not curative, and second, it was not apparatus. As to the first, the argument was that to keep an incapacitated person in the same state was not to cure him, and an apparatus which did not cure was not curative. This is a pettifogging argument – the process of dealing with an incapacitated person may involve a continual war with disease, atrophy of the muscles by lack of use, and even psychological decay by reason of lack of something to do. Any apparatus which helps in this way is a curative apparatus.'

41. His Honour Judge Armitage stated:

'What I glean from this case [*Thomas*] is that apparatus may be "curative" even if it does not "cure" the condition suffered by an injured worker, in the sense of alleviating it totally, and that it may still be so if it assists in the "*continual war with disease, atrophy of the muscles by lack of use, and even psychological decay by reason of lack of something to do*". Those last remarks seem to me to have particular application to the equipment sought in this case, and indeed to fit it perfectly. *Thomas* also seems to indicate that if something is a "*mechanical contrivance*", it may be "apparatus".'

42. The provision of a heated swimming pool to the injured worker was held in *Thomas* to fall within the definition of 'medical treatment', as the particular treatment in this case, was amongst other things, of therapeutic assistance to the worker.
43. His Honour Judge Armitage also referred to *Beck* where Neilson J held that provision of taxi travel for social purposes for a worker who was legless as a result of work injury in order that he may attend, amongst other places, a local hotel to enjoy an active social life, and thus ameliorate his psychological, if not his physical condition, was provision of 'curative apparatus'. He also noted that *Bresmac Pty Ltd v Starr* (1992) 29 NSWLR 318, appears to be clear authority for the proposition that a modified or alternative vehicle may be 'curative apparatus'. Finally, His Honour noted that Truss J in *Sinanian v WorkCover Authority (NSW)* (1999) 19 NSWCCR 83 held that a computer could be a 'curative apparatus' on the authority of *Thomas*, and said that the evidence suggested that the computer was undoubtedly contributing positively to the injured worker's 'cognitive linguistic rehabilitation program and ... the use of the keyboard and mouse have benefited his co-ordination and control of movement.' On the evidence before her, Her Honour was satisfied that the use of a computer 'has and will alleviate or mitigate the effects of his injury.'

44. In *Beck*, it was held that providing a worker with social activities was, in the special circumstances of that case, therapeutic or curative and conveying him to such activities could be seen as part and parcel of the same process. The Court said that the use of the words 'treatment given' indicate that the worker is essentially the passive recipient of some other person's ministrations, which would extend to treatment by a psychologist, counsellor, acupuncturist 'and so on'. While the provision of conveyance by taxi could not be regarded as therapeutic treatment as such under paragraph (b) of the definition in section 59 of the 1987 Act, taxi travel to and from necessary social activities, in the special circumstances of that case, was 'curative apparatus' within paragraph (e) of the definition of 'medical and related treatment'. It was also pointed out in that case that a specially purchased Mitsubishi Star Wagon, modified for use by the injured worker was held in *Thomas* to be a 'curative apparatus'.
45. In *Coomber v Red Funnell Fisheries Newcastle Pty Ltd* (1998) 16 NSWCCR 558 the provision of a new motor vehicle with power steering and automatic transmission was held, on the facts in that case, not to be a curative apparatus. The injured worker had suffered permanent impairment of the back and a loss of the efficient use of his left leg. His old car was low to the ground and had manual transmission. The injured worker said that he had difficulty in operating his old car because of its small size and the manual transmission. In rejecting the claim for the new car, the Court awarded what it would have cost to install automatic transmission in the workers current motor vehicle.
46. In each of these cases, the question as to whether the items could be regarded as 'curative apparatus' was decided on its own particular facts and circumstances. An item itself is not necessarily, an inherently 'curative apparatus'. The authorities indicate that in order for an item to fall within the definition of 'medical or related treatment' in section 59 of the 1987 Act, there must be a 'curative' or therapeutic element offered by the item to an injured worker, in his or her particular circumstances, that deals with and assists in some therapeutic way, the management of his or her physical or psychological condition. Notwithstanding that an item may be personally preferable to another item, or is considered to be convenient or desirable, will not qualify, unless it can have some therapeutic impact.
47. In *Harbison*, Armitage J said that the fact that someone other than the injured worker may benefit from the provision of a curative apparatus is irrelevant to the determination as to whether the provision of the items are reasonably necessary within the meaning of section 60(1) of the 1987 Act. Nevertheless, if the benefit accrues only to some other person and there is no benefit to the injured worker, the item cannot be said to offer therapeutic assistance to the injured worker. In these circumstances, it can be neither a curative apparatus nor reasonably necessary. In the instant case, there is evidence of Mr Grant's diminishing ability, by reason of his declining health, to assist Mrs Grant generally, including getting her from her wheelchair to the car and back again."
32. Deputy President Byron held the Toyota Tarago to be a curative apparatus within the meaning of the Act. He said:
- "52. It is clear and uncontested that Mrs Grant has suffered a serious injury and is in a state of constant pain and discomfort. In terms of the provision of the Toyota Tarago the Appellant Employer argued before the Arbitrator that Mrs Grant's evidence did not 'equate to any great therapeutic assistance'. It was not argued that there was none. On Mrs Grant's evidence alone, which stands largely uncontradicted, both items provide a degree of assistance to her in dealing with and alleviating her symptoms. On the authorities cited, and having regard to

Mr Seo Grant's circumstances, the items provide the necessary therapeutic impact, in order to qualify as a curative apparatus. The Toyota Tarago provides some alleviation of pain and allows Mrs Grant to participate more actively in the routine and normal pursuits of life, as well as pursuing as far as she is able, a reasonable social life outside of her home. Mrs Grant spends some 75% of her time in bed and the therapeutic impact of the bed sought, having regard to her injury and symptoms, is clear.

53. On the evidence and having regard to the cases cited, the Toyota Tarago and the deluxe single king size bed, each qualify as a 'curative apparatus', in the circumstances of this particular case, particularly when viewed in the context of the 'continual war' as described in *Thomas*. In my view, the Arbitrator was entitled to arrive at this conclusion and I find no error in this regard. Whether these items were reasonably necessary is another matter."

33. The Deputy President went onto note as follows:

"The Arbitrator was required to make his decision on the evidence that was before him. No alternatives were put to him in relation to the bed claimed by Mrs Grant, and other than the modifications to her current vehicle that were adjudged to be ineffective, no other alternatives were put to the Arbitrator by the Appellant Employer with regard to the Tarago. It was open to the Appellant Employer to propose viable alternatives, but it did not do so. In my view, the evidence of and on behalf of Mrs Grant is sufficient in the circumstances, to enable the Arbitrator to arrive at his decision, in the absence of any such viable alternative."

34. What is clear from the cases to which both parties have referred is that each case will turn on its own facts. It is clear from the authorities that a new vehicle can be a curative apparatus but it will depend on the evidence in each case. It is also clear from the authorities that a new vehicle can be a curative apparatus even if it confers a benefit on someone other than the injured worker. However, if the benefit accrues only to the other person, Mrs Dries, and there is no benefit to the injured worker, the item cannot be said to offer therapeutic assistance to the injured worker Mr Dries. In these circumstances, it would be neither a curative apparatus nor reasonably necessary. Counsel for GGA argued that there is an indirect benefit only which will accrue to Mr Dries and not a direct benefit and that therefore it could not be held to be a curative apparatus. He did not argue that there would be no benefit to Mr Dries.
35. I must make a determination on the evidence that is before me. Turning then to an examination of the evidence in this case.
36. Mr Dries has given evidence in a statement dated 20 May 2019. He was not cross-examined about his evidence.
37. Mr Dries gave evidence of the deleterious effect his injury and subsequent surgeries has had on him leading him to become depressed and socially reclusive.
38. He gave evidence as follows:
 2. I was injured in the workplace on Friday, 14 February 2014. I have been in receipt of workers compensation since that date.
 3. I have undergone 3 major surgeries on my lumbar spine. I have been left with residual weakness in my legs. I find it extremely difficult to walk even a few steps without some form of aid to assist me. This is because I do not have great control over my legs anymore and sometimes they will give way on me without any notice. It scares me.

4. As a result, I had become socially reclusive. I didn't want to go out because it was too difficult to get me there and even if I was able to get there, I didn't feel safe. This caused me to become quite depressed.
5. I have consulted my general practitioner since injuring my back. He (Dr Harvey) has been there all along to see the impact that my condition is having on my life. He has been extremely supportive, including diagnosing my depression and referring me to psychologist for support."

39. Mr Dries gave evidence that in about 2017 his wife became his full-time carer and gave up her job to do so. Mr Dries gave evidence as follows:

"At some time between my injury and now, I think sometime in 2017, my wife became my full-time carer.

She had to quit her job to look after me because it was too dangerous for me to be left in the house alone all the time. Dangerous because of the likelihood that I would fall and also because of my worsening mental health.

There have been numerous occasions where I have nearly fallen and hurt myself quite badly whilst we have been out. If that were to happen, my wife is too small to prevent my fall or to help me back up. It is a serious risk to her.

In around mid to late-2018, my GP and psychologist requested that EML approve major house modifications to my home to install a bedroom and bathroom on the lower (living) level of the house. I attach the statement that I gave in relation to that claim and the medical reports of Dr Harvey and my psychologist.

Unfortunately, EML denied liability for that claim on the basis that it was too expensive. My solicitor informs me that he sought funding from WIRO to obtain a report from an architect as to the cost of those modifications but that WIRO denied that funding. This left me in the relatively helpless position of needing something that nobody would pay for.

My solicitor told me that WIRO discussed my claim with EML which resulted in EML arranging to sit down with me and my solicitor at my house to discuss options moving forward. That discussion took place on 25 February 2019. I recall that Ms Hudson (EML) and Ms Battese (OT) came to my house and discussed the matter with myself, my wife and my solicitor.

Arising out of that discussion, Ms Hudson and Ms Battese agreed that it would be reasonable and necessary to provide me with an arm-rest walker and a mobile scooter (to go with the wheelchair and walking sticks that I had already been provided). They also approved many other items such as handrails in my house and adult diapers etc.

I came away from the meeting feeling as if the attitude of the insurer was not 'what is best to meet my needs' but rather 'what is cheapest'.

Whilst I was relatively unsatisfied with the outcome, my solicitor convinced me to accept these items and try them out. He said that if they helped, we would keep them and if they weren't, we would come back and ask again for the modifications again. He told me that he knew of someone who would do the architect report whether WIRO would pay for it or not.

Since my wife became my carer she has encouraged me, and physically aided me, to get out of the house more often. This has been very good for me mentally. Physically it was still a great challenge."

40. Mr Dries went onto give evidence about the limitations of his current Mazda 3 motor vehicle as follows:

"I recall thinking at the time that my car, a Mazda 3, would not be able to fit the walker or scooter. I raised this issue with Ms Hudson and Ms Battese. I recall Ms Battese trying to manage my hesitation by saying words to the effect of; 'many of these scooters fold down quite small.' As discussed above, I decided to try it out in the knowledge that if it didn't work, we would come back.

Ms Battese was present at the time that we purchased the scooter and walker. The sales representative guaranteed us that the items would fit in our car, but, at no time did anybody measure or try to put any of the in-store models into the car. The items were home delivered. Ms Battese was not present. She has not ever seen the items in close proximity. When being delivered, the delivery girl (who worked at the store) said, 'you're going to need a bigger car.' My wife burst into tears.

The items themselves, once we can get them to where we require them, have been wonderful in providing me with a whole new level of independence. The problem has been getting them to where we need them. They simply do not fit properly in my car.

We were quite content to put up with this because we are not the type of people to complain when we are being given things to try and assist us but it has now gotten to the point where my wife is injuring herself trying to lift, bend and twist these quite heavy items into a space in the car that simply doesn't allow for it.

A few weeks ago, my wife was trying to put the scooter in the boot of the car. I require to take 2 of the 4 items (walking sticks, walker, wheelchair or scooter) with me at all time because of changes in the surface or gradient or the weather i.e. rain etc. I also cannot be sitting or standing all day. In trying to get the mobility scooter into a space that was too small for it, my wife hurt her back. I heard her cry out in pain and I felt immediate anger because this was such an avoidable injury. EML knew that this was going to happen, and they simply wanted to take the cheap way out.

We have obtained a quote for a vehicle that will fit any combination of 2 of the 4 items. The total cost of the vehicle, less the value of our trade-in, is \$40,990.00. If my wife continues to injure her back, she may require major spinal surgery like I had. This will cost much more than \$40,000.00.

I am aware that EML have suggested that a larger vehicle would be unsuitable for me as it will be dangerous for me to have to climb into and out of the vehicle. When we went to obtain the quote for the Hyundai IMAX - I took particular note of how easy it was to get into and out of the vehicle. It is actually much easier than having to get into my Mazda 3 because the Mazda is actually too low. The vehicle also has access ramps via the back door. The scooter can be driven straight into the car and it can be left assembled without any need for someone to have to pick it up or pull it apart.

The quote that I have obtained does not include the cost of ramps.

EML/IPAR did not ever assess my getting into or out of a vehicle that is any higher than my Mazda 3, so they would have no real idea as to how easy/difficult/dangerous it is.

I am aware that EML have suggested, in their s78 notice, that IPAR assessed me on 25 February 2019 for my alternate mobility options. This is totally incorrect. On that day, I did not move more than 6 feet from my chair during the entire discussion. I do not know how it is said that IPAR assessed my alternate mobility options without assessing my ability to mobilise.

Presently, my neck is causing me such difficulty that Dr Maloney has suggested that I should not be using my walking sticks as I do not have the strength in my arms. Because my vehicle is too small to fit either the walker, scooter or wheelchair, I am having to rely on the walking sticks.
I would not be asking for a new vehicle unless it was necessary.”

41. Mr Dries was not cross-examined about his evidence.
42. Mrs Dries has given evidence in the form of a signed handwritten letter. This was attached to the Application. There was no objection to the form of this evidence, and it was admitted by consent.
43. Mrs Dries details the practical difficulties that Mr Dries and her face trying to negotiate trips away from the house with the mobility aids that have been paid for by the insurer on the recommendation of the rehabilitation experts. I note that their home has been described by the rehabilitation experts whose reports are in evidence as a split-level home, the front door of which is accessed by a steep driveway. It was assessed by the rehabilitation experts as necessary for the insurer to pay for the removal of rails on the front verandah so that Mr Dries could actually get in the motor vehicle. It has also been assessed by the rehabilitation experts that Mr Dries can no longer access the yard of his home.
44. Mrs Dries writes as follows:

“We have a mobility scooter and a walker that need to be with us at all times.

Our current car (Mazda 3) can only accommodate the mobility scooter which has to be totally disassembled leaving us with 2 seats.

The weight of the battery is 15.5kg. If assembled the total weight is 55KG. Because this is the only mobility device we can fit in the car at one time I might have to assemble and disassemble up to 6 times per day.

The problem with the scooter besides the disassembles and reassemble is also that we haven't anywhere to store it. We live in a split-level house without a garage so therefore it has to be stored in our car.

Unfortunately, the walker does not fit in the car. The walker is an important part of Doug's rehab- it has never been out of the house. It just doesn't fit in our car. The walker is very high and wide. Doug can lean his arms on it and keeps him straight and he has a good control on it unlike the lower models that he feels unsafe on. He just doesn't have the strength to hold the lower ones. The importance of using his legs is immeasurable- he has to use his legs whenever possible.

I am constantly injuring myself trying to get his scooter in and out of the car.

In a perfect world, there would be enough disable parking for everyone who requires on but this is not the case. So, we might have to park so far away then if it is raining the scooter can't be used so then I am struggling with a man twice my size in the rain on unsafe walking sticks. In other circumstances, I will get a close park but then I have no choice I still have to get the scoter out.

If you could possibly understand what Doug goes through every day you would understand why this is so important. He is never out of pain and anything that makes his day to day existence easier is worth fighting for.

When we purchased our car, we did not foresee the future, We both had good jobs and we were financially secure. We now find ourselves in a position where we can't borrow money and are reliant on compassion.

Please consider this request. I fear only things may get worse with Doug going in for yet another operation."

45. Mrs Dries was not cross-examined about her evidence.
46. It is undisputed that Mr Dries has significant restrictions on his mobility and hence his independence.
47. Mr Dries has been repeatedly assessed over time by Ms Battese, occupational therapist (OTT) and there are various reports from her in evidence dated 12 July 2018, 3 May 2019 and 12 July 2019.
48. Ms Battese has noted Mr Dries' significant ongoing physical restrictions as justification for the various recommendations that she has made over time. She stated in her report dated 12 July 2018 that Mr Dries continues to experience physical limitations and difficulties as follows:

"Mr Dries previously underwent multilevel spinal surgery and continues to experience a significant reduction in capacity in range, mobility, strength and flexibility.

Mr Dries presents as unsteady on his feet despite the use of walking sticks to assist with movement throughout the house and external areas. Mr Dries is unable to navigate up/down stairs without support, has difficulty holding onto items /completing task with the use of one hand when standing without support."

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49. As part of the home assessment it was noted that the front door of the home of Mr and Mrs Dries is accessed via a steep driveway and that Mr Dries is unable to navigate/access his yard.
50. Dr Harvey is Mr Dries' long time treating general practitioner. In support of Mr Dries' case, Dr Harvey provided a report dated 26 March 2019 after examination of Mr Dries as follows:

"Due to his spinal injuries and subsequent surgery and resultant disability this gentleman requires both a 4-wheel walker, wheelchair and motorised scooter.

These are unable to be carried in their present car. This restricts all his out of home activity.

They therefore require a motor vehicle that can accommodate the above accessory transports."

51. Dr Harvey has also treated Mrs Dries. There is a report in evidence from Dr Harvey dated 16 May 2019 certifying that he examined Mrs Dries on that day. He reports:

"Due to having to lift a heavy mobility scooter and 4-wheel walker that her husband requires because of his spinal and other injuries, Mrs Dries has injured her lower lumbar spine and pelvis.

She is to have x-rays etc to confirm her injury status.

The scooter, 4WW and car are incompatible. They require a vehicle suited for this arrangement.

Mr Dries is completely dependent on his wife and her injury is now causing her health to be parlous.

Could you review their situation?"

52. As set out above Mr Dries gave evidence that he became depressed as a result of his injury and subsequent surgeries and the consequential ongoing restrictions on his independence and mobility.
53. IPAR is the rehabilitation provider who was tasked by the insurer with assessing Mr Dries capacity and rehabilitation needs. Ms Keira Battese is the occupational therapist who has authored the various IPR reports that are in evidence before me.
54. Ms Battese authored an IPAR report dated 3 May 2019 which dealt with the request for the purchase of an alternate motor vehicle. This report sets out the history of how Mr Dries came to be assessed for the provision of the mobility aids he has issued with by the insurer. Ms Battese reported as follows:

“Purpose of Report

On 29 April 2019 IPAR was requested to complete a supplementary home assessment report for consideration of the following request:

- Purchase of an alternate vehicle that would enable transport of a forearm support frame, wheelchair and motorised scooter concurrently.”

Justification

Mr Dries sustained a compensable Back injury sustained in February 2014 whilst completing his pre-injury duties at work. As a result of his injury Mr Dries requires the use of mobility aids. Mr Dries utilises two walking sticks for household mobility and when mobilising short distances outside of the home. Mr Dries was utilising a wheelchair for longer distance. This wheelchair was reported to be difficult for Mr Dries’ wife to manoeuvre the wheelchair in and out of their vehicle and Mr Dries was reportedly dependant on his wife to push the wheelchair.

Following an assessment completed on 25 February 2019 Mr Dries attended an equipment supplier with IPAR to investigate alternate mobility options: Following this appointment Mr Dries was supplied with a forearm support walking frame and a mobility scooter to allow increased independence and safety. Discussion at the time of assessment on 25 February 2019 and at the equipment supplier meeting was that Mr Dries would be able to use the mobility scooter for longer distances instead of the wheelchair as this would enable increased independence and reduced strain on his wife. Mr Dries was provided with a forearm support walking frame to enable increased safety during walking tasks outside of the home.

Since provision of the above equipment, Mr Dries and his wife have requested provision of an alternate vehicle (a van) to allow transport of the wheelchair, walking frame and mobility scooter at all times. IPAR notes that at the time of report Mr Dries does not complete driving tasks due to experiencing intermittent spasms in his lower limbs. As Mr Dries does not currently drive, an alternate vehicle would not be for his use, rather he would be travelling as a passenger. The request for alternate vehicle has been submitted due to the perceived need for all equipment to be transported at one time. It is the opinion of the IPAR assessor that this is not reasonably necessary as Mr Dries would not be required to utilise all equipment items at one time. It is the opinion of the assessor that individual assessment of the equipment required for activities outside the home should be taken on each occasion and the required equipment placed in the vehicle.

Mr Dries has demonstrated the ability to safely complete vehicle transfers in the current vehicle. The provision of an alternate vehicle would therefore not be related to the current vehicle being deemed unsuitable for access by Mr Dries. Furthermore, the assessor would be concerned that should a van (as requested) be provided, this may be unsuitable for Mr Dries' needs due to altered configuration of the vehicle and increased access height of most vehicles of this type (higher seat height when entering into vehicle}. It is the recommendation of the assessor that should Mr Dries wish to consider returning to driving tasks with use of an alternate vehicle that formal assessment be completed by a suitably qualified Occupational Therapy Driving Assessor.

Recommendations

- Consideration of equipment needs should be undertaken by Mr Dries and his wife prior to leaving home and the appropriate equipment should be placed into the vehicle.
Should Mr Dries wish to consider returning to driving tasks with use of in alternate, suitably modified vehicle, a formal assessment should be completed by a suitably qualified Occupational Therapy Driving Assessor.”

55. The insurer then requested that Ms Battese “complete a supplementary home assessment report for consideration of the following request: Clarification regarding Mr Dries equipment needs, including the forearm support frame, wheelchair and motorised scooter.” Ms Battese provided that assessment in a report dated 12 July 2019.
56. Ms Battese noted that Mr Dries requires the use of mobility aids as a result of his injury. He was using two walking sticks and a wheelchair. He was assessed by IPAR to require additional mobility aids in the form of a forearm support walking frame and a mobility scooter. The intended aim of these mobility aids was to allow Mr Dries increased independence and safety.
57. Ms Battese summarises the assessed need for these aids as follows:

“Mr Dries sustained a compensable back injury sustained in February 2014 whilst completing his pre-injury duties at work. As a result of his injury Mr Dries requires the use of mobility aids. Mr Dries utilises two walking sticks for household mobility and when mobilising short distances outside of the home. Mr Dries was utilising a wheelchair for longer distance. This wheelchair was reported to be difficult for Mr Dries’ wife to manoeuvre the wheelchair in and out of their vehicle and Mr Dries was reportedly dependant on his wife to push the wheelchair.

Following an assessment completed on 25 February 2019 Mr Dries attended an equipment supplier with IPAR to investigate alternate mobility options: Following this appointment Mr Dries was supplied with a forearm support walking frame and a mobility scooter to allow increased independence and safety.”

58. Ms Battese sets out what the additional mobility aids were intended to achieve for Mr Dries. In respect of the mobility scooter she advises as follows:

“The provision of the mobility scooter was to enable Mr Dries to be able to use the mobility scooter for longer distances outside of the home. Use of the mobility scooter was intended to replace use of the manual wheelchair as this would enable increased independence for Mr Dries. Use of the mobility scooter should result in reduced strain on Mr Dries’ wife in the reduced requirement for pushing the wheelchair.”

59. In terms of the forearm support walking frame Ms Battese advises its intended use and benefit namely increased safety as follows:

“Mr Dries was provided with a forearm support walking frame to enable increased safety during walking tasks outside of the home. This equipment was provided with the intention of providing a more stable option for Mr Dries when mobilising shorty distances outside of the home, rather than utilising the bilateral Canadian crutches.”

60. The equipment that has been assessed by IPAR as required by Mr Dries has been assessed as being required to support his mobility and to increase his safety.

61. Ms Battese commented on the ease of disassembling the mobility scooter:

“The mobility scooter was observed to disassemble into sections weighing less than 10kg which can be placed into a car. Mrs Dries was observed to be able to pack and unpack the mobility scooter into relevant parts without difficulty.”

62. Counsel for GGA conceded that Ms Battese was in error when she recorded the observation that the scooter disassembles into sections weighing less than 10 kg. Counsel for GGA conceded that the evidence attached to the application represents the specification's for the mobility scooter that shows the overall weight of the mobility scooter to be 55 kg with batteries and the weight of the heaviest piece is 17.4 kg with the battery weighing 15.5 kg. The scooter has to be disassembled to fit in the Mazda 3. The Dries have no garage so it has to be stored disassembled in the car. Counsel for GGA conceded that Mr Dries is unable, by virtue of injury, to disassemble and reassemble the scooter. Mr Dries is reliant upon his wife to do so. Mrs Dries has given evidence that she has difficulty with the weight of the individual parts of the scooter. Her evidence was that she sometimes has to assemble and disassembled the scooter six times a day. Counsel for GGA conceded that Mr Dries is unable to drive and that he is reliant upon Mrs Dries to drive. Counsel for GGA conceded that Mr Dries is unable to put the walker in the car. Counsel for GGA conceded that Mr Dries is unable to leave the house without his mobility aids in the form of the mobility scooter and walker. The evidence of Mr and Mrs Dries is that the walker does not fit and has never been able to fit in the car.

63. Mr Dries' evidence, was that the proposed Hyundai IMAX, a van, with the proposed ramp fit out would accommodate the scooter fully assembled.

64. Counsel for GGA submitted the fact the insurer is paying domestic assistance benefits so that Mrs dries can provide Mr Dries with care services is relevant. He submitted that Mrs Dries is being paid to do this and that as the carer she should be able to assist Mr Dries to access the community. If she can't do this because she is unable to lift the mobility equipment then Mr Dries should have proposed an alternate carer. I note that this submission is made without any evidence from GGA about the proposal for, or suitability, of an alternate carer. Despite the multiple rehabilitation reports in evidence from IPAR there is not one that deals with a proposal for an alternate carer. It seems that this submission was made without any evidence. It is not up to Mr Dries to propose an alternate carer in the context of this application. He has put on the evidence he relies upon to support his application. If GGA considers that Mr Dries should have an alternate carer then they should have put on evidence to support such a proposal. They have assessed Mrs Dries as the suitable carer for Mr Dries.

65. Counsel for GGA also submitted that if there are problems with mobility aids then alternate mobility aids should be considered. This submission was made despite the multiple reports from IPAR in evidence that have over time assessed Mr Dries' needs in this regard. He has not acquired his mobility aids of his own initiative without consultation with the rehabilitation provider IPAR paid by the insurer to assess and address these needs. Rather Mr Dries has been provided with the mobility aids paid for by the insurer that IPAR has assessed he needs to assist him with his mobility and to increase his safety when mobilising.
66. Counsel for GGA said that the case of *Grant* does not assist Mr Dries because "the thing about *Grant* was that Mrs Grant was driving the vehicle herself." On this basis counsel for GGA submitted that there is no such direct benefit to Mr Dries in this case but the benefit would accrue to Mrs Dries and so the application must fail. In fact, a proper reading of *Grant* shows that the proposed vehicle in that case was to offer Mrs Grant greater independence because she would not be reliant upon her husband transferring her to and from the wheelchair to the car. There was no evidence that she was driving herself. Rather, as evident at paragraph 34 of the decision in *Grant*, she was not driving at the time the case was decided but it had been submitted that there was "a possibility that she may be able to drive herself "subject to medical clearance in the future." Contrary to counsel for GGA's submission the case of *Grant* cannot be distinguished on the basis that Mrs Grant was the driver of the new vehicle.
67. The very clear benefit to Mr Dries as set out in his statement, the statement of Mrs Dries, and as supported by his long-time treating general practitioner Dr Harvey, is that the Hyundai IMAX being a van with proposed ramp fit out would enable the mobility equipment that Mr Dries needs to be mobile outside the home, to be transported with greater ease. The current Mazda 3 is inadequate to the task of transporting the mobility aids that Mr Dries and Mrs Dries have given evidence that they need to take with them so that Mr Dries can mobilise safely and with greater ease.
68. Mr Dries has given clear evidence about the therapeutic impact of being able to mobilise outside the home with the assistance of the mobility aids that have been assessed by the rehabilitation provider as necessary for him.
69. As Armitage CJJ stated in *Harbison* (as quoted by Deputy President Byron in *Grant*):
- "What I glean from this case [*Thomas*] is that apparatus may be 'curative' even if it does not 'cure' the condition suffered by an injured worker, in the sense of alleviating it totally, and that it may still be so if it assists in the '*continual war with disease, atrophy of the muscles by lack of use, and even psychological decay by reason of lack of something to do*'. Those last remarks seem to me to have particular application to the equipment sought in this case, and indeed to fit it perfectly. *Thomas* also seems to indicate that if something is a '*mechanical contrivance*', it may be 'apparatus'."
70. Each case is decided on its own facts. When I weigh all of the evidence in the balance in this case and having regard to the relevant authorities to which I have been referred, I am satisfied, on the balance of probabilities, that the proposed Hyundai IMAX would provide the necessary therapeutic impact to qualify as curative apparatus in the circumstances of this case where the mobility aids required by Mr Dries to assist in the "continual war with disease" (his injured spine), "atrophy of the muscles by lack of use and even psychological decay by reason of lack of something to do" cannot, on the evidence, be transported in the current vehicle without risk of injury to Mrs Dries upon whom he is dependent to travel. Mr Dries lives in a house up a steep driveway and cannot mobilise around his yard. He needs to travel by car and he needs his mobility aids to mobilise when he gets to his destination. I am satisfied, on the balance of probabilities, that the proposed new vehicle is a curative apparatus which would more ably accommodate Mr Dries' mobility aids which he needs to mobilise to assist him in the "continual war with disease" namely his injured spine.

71. I am satisfied on the balance of probabilities that the proposed new vehicle a Hyundai IMAX with ramp fit out is a reasonably necessary expense under section 60. I note that in the event this was my finding, the form of order was agreed by the parties. Accordingly, I will make the order in the form agreed as follows:

The respondent is to pay the applicant's expenses under section 60 of the *Workers Compensation Act 1987* on production of accounts and/or receipts in respect of the supply to the applicant of a Hyundai MY20 TQA IMAX ACTIVE 2.5D Auto including the cost of ramp fit-out less the trade in value of the applicant's Mazda 3 motor vehicle.