WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3108/19**
Applicant: **Mrinal Datta**
Respondent: **Universal Consultancy Services Pty Ltd**
Date of Determination: **3 September 2019**
Citation: **[2019] NSWWCC 290**

The Commission determines:

Finding

1. The provision of 19 hours per week of domestic assistance is reasonably necessary as a result of the applicant's injuries sustained on 3 February 2001.

Order

1. The respondent is to pay the reasonable costs of the provision of domestic assistance pursuant to s 60AA of the *Workers Compensation Act 1987* for up to 19 hours per week in total as incurred and in accordance with the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*.

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

Michael Perry
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 MICHAEL PERRY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

Ann Jackson
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mrinal Datta was born in India in 1968. He came to Australia in 1998 on a work visa. On 3 February 2001 in the course of his employment with the respondent he was assaulted, sustaining serious facial and oral injuries. Further detail of his injuries appear in *Universal Consultancy Services Pty Ltd v Mrinal Datta* [2008] NSWWCCPD 87. This case dealt with an issue of whether his incapacity for work was permanent within the meaning of s 53 of the *Workers Compensation Act 1987* (the 1987 act).

2. Mr Datta returned to India in May 2002. He lives near the city of Cuttack. He says he has needed domestic assistance there since May 2002. He has lodged an Application to Resolve a Dispute (ARD) seeking compensation for the cost of 32 hours per week future domestic assistance at $50 per hour under s 60AA of the 1987 act. The parties have agreed:

    (a) It is unnecessary for me to determine the hourly rate;

    (b) Any award for future domestic assistance would commence from the date of the decision of the Commission;

    (c) The requirements under s 60AA (1) and (3) of the 1987 act have been met by Mr Datta.

ISSUE FOR DETERMINATION

3. It was then agreed that the only remaining dispute goes to the number of reasonably necessary *hours per week* of domestic assistance that should be provided for Mr Datta in the future as a result of the injuries he sustained on 3 February 2001.

PROCEDURE BEFORE THE COMMISSION

4. The parties attended a conciliation and arbitration hearing on 7 August 2019. Ms N Compton of counsel appeared for the applicant, instructed by Ms R Lawes. Mr S Flett of counsel appeared for the respondent. I am satisfied the parties understand the nature of the application and legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring them to a settlement acceptable to each. I am satisfied they have had sufficient opportunity to explore settlement and have been unable to reach an agreed resolution of the whole of the dispute.

EVIDENCE

Documentary Evidence

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

    (a) ARD and attached documents. Subsequent use of numbers immediately following the ARD and Reply refer to page numbers unless otherwise indicated.

    (b) Reply and attached documents.

Oral Evidence

6. Neither party wished to adduce oral evidence from and/or cross examine any person.

Review of the Evidence

Mr Datta (Statement 7 March 2019 - ARD 1- 4)

7. He suffers "numerous and extensive physical injuries including chronic regional pain syndrome ("CRPS"), facial disfigurement and constant facial, teeth and jaw pain". He avoids being touched on his face and is afraid of people bumping into him. He has loss of sensation in his lower lip and chin. His speech is impaired and he has difficulty talking after about 10 minutes. He experiences pain when eating, and drools from his mouth. Food and drink falls from his mouth and stains his clothes due to weakness and loss of sensation in his mouth.

8. Mr Datta also stated that he experiences stiffness and a restricted range of movement in his joints, and is required to use a Canadian crutch ("crutch" to support himself. There are various other disabilities he recounts. It is unnecessary that I recite all these. However, he says he is exhausted all the time, giving an example of when he was at Sydney Airport, on his way home to India after attending medical assessments in February 2018. He fainted and had to be assisted by check in staff. He also says he has difficulty concentrating, frequently misses meals, and has lost 15 kilograms. He must have a liquid or soft food diet. Hard foods exacerbate pain, particularly when chewing. He has poor motivation and struggles with personal hygiene and completion of domestic duties. He says he will travel and attend appointments if he has to, but he needs to mentally prepare himself to do it. He is afraid of being attacked again if he goes out.

9. He was independent in domestic duties prior to the injury. Now he is unable to undertake any domestic duties around his home. The pain is "out of control causing distress … the more I do the more my pain increases so I simply avoid doing things around the home … need help from others to do most activities…" (ARD 3).

10. He states that he "can no longer cook substantial meals … find this too difficult and … painful … can't go shopping … trouble walking and carrying groceries …" (ARD 3). He also states that even if his physical injuries allowed him to complete domestic duties, he lacks motivation and persistence to undergo the work. His wife undertakes all the domestic duties around the home, including shopping and cooking and she has done this since he returned to India.

Tembur Raj Ama – The Applicant's Wife (Statement 27 November 2019 – ARD 77)

11. When Mr Datta returned from Australia in 2002, he needed assistance from a full time care giver. She was the only person available willing and able to give it. She gave up other jobs to look after him full time, and has continued to provide this care since. In that context, they married in 2015, and now have a daughter. However, "for his mental health, he preferred to live in an apartment separately as he does now although I look after him very closely".

12. Her primary role is to assist and protect him from any adverse effect on his psychological state he is experiencing – although this is "among several other tasks that I do for him on day today [sic] basis". At times he becomes irritable and difficult to control. A maid has to be brought in on a commercial basis while she monitors the work "staying invisible". She goes on to state that he will then be unhappy with the "maid service", and she then takes over "and this cyclical pattern continues".

Dr Laxmidhar Dash (ARD 5 – 8 and 12 – 13)

13. He has been Mr Datta's treating local doctor in recent times. He prepared two certificates (29 March and 30 May 2019) noting Mr Datta suffered facial pain, whole body fibromyalgia, PTSD urinary urgency and dribbling, CRPS of the face, and erectile dysfunction. These certificates are not directed at the issue of the reasonably necessary domestic assistance hours per week. They deal with work capacity and need for medical treatment.

14. In a report of 20 May 2019, Dr Dash dealt with the need for domestic assistance (ARD 7-8). He recommended "… caregiver must be in attendance … 24 x 7 … crippling CRPS … reinforces … need for domestic assistance for 32 hours … proposed by … Cogger … a conservative estimate …". Then, in a 20 June 2019 report (ARD 5 - 6), he states:

> "… hours per week … seems to be less than reasonable … Datta is most seriously injured … probability that … impairment could be …100% in the future… life would be in great danger if he is allowed to travel unescorted as he has reported falling unconscious in the Sydney Airport on the way back to … India … in February 2018" (ARD 5 - 6).

Dr Sudhakar Singh (ARD 94 -97)

15. He was the local general practitioner (GP) treating Mr Datta before Dr Dash. Similar to the material from Dr Dash – there are four certificates, spanning the period between 27 September 2016 and 13 December 2018, mainly dealing with work capacity. But they also touch on the present issue. In his note of 3 December 2018 he states:

> "… whilst Mr Datta lacks the physical and mental capacity to perform self-care or domestic living activities, he is recommended palliative care for his present and future care needs as he has significant limitations in his ability to undertake domestic tasks or paid employment…"

Natala Cogger, occupational therapist (ARD 80-93)

16. Ms Cogger interviewed Mr Datta for 1.25 on 18 January 2019, using video conferencing software. She states that Mr Datta's wife and daughter (aged 2 years) were present during the assessment – although they "did not contribute". She noted Mr Datta's complaints about ongoing pain, described to be not only around his mouth and jaw area, but also "he reported generalised pain all over his body … rated … at 8/10 …". She also conducted an analysis of the activities of daily living (ADL) including about the home environment.

17. Ms Cogger noted that the apartment is located on a first-floor unit and there are two rooms (bedroom and living room), bathroom and kitchen. She noted that he lives on his own and his wife lives about one hour's travel away with their daughter. He had reported that he wants to live on his own as he is "angry with everybody". His wife visits daily. He acknowledges being verbally aggressive towards her and that they have had to arrange for someone else to care for him. He only leaves the house for medical appointments and his wife is in attendance with him. He is becoming increasingly forgetful and his wife has to manage his diary to ensure he attends medical appointments and she also manages his medications.

18. Ms Cogger noted that after 15 minutes of sitting, he was observed to shift his position and that he relied on a Canadian crutch (crutch) for mobility and that "on assessment pain behaviours were observed … included holding his breath when attempting movement, shortness of breath, sweating, vocalising and grimacing…". Ms Cogger assessed Mr Datta's ADL. Much of that assessment was based on reports from Mr Datta, with some also from her own observations over the video. Much of those observations involved her noting Mr Datta's reliance on the crutch.

19. When commencing to address the question of "gratuitous assistance", Ms Cogger noted Mr Datta estimated he spent 11.75 hours per week completing domestic tasks when living in a guest house in Australia in 2001 just before the assault. He was responsible for preparing his own meals, shopping, laundry, cleaning his own room and shared responsibility for cleaning shared living areas and bathrooms. She also noted that after the assault and until 1 May 2002, before returning to India, he received assistance from friends averaging one hour per week. Since returning to India, he reported the level of assistance has remained consistent at 32 hours per week, noting he initially lived with his family before moving into his present unit.

20. Ms Cogger also noted (ARD 88):

> "… it was unclear at what point the family employed his now wife and what the salary was at the time … Datta reported that on occasions … has disagreements with his wife, they have another carer that provides him with the support but he could not tell me whether there was financial remuneration for this service or not only reporting … this was his … wife's friend …".

21. He reported having assistance "for at least 6 out of the 7 nights", both in the morning and the evening. His wife was providing this assistance – she being there for two to three hours both morning and night, estimated at five hours per day (30 hours per week). His wife provides him with encouragement to shower and manages his medication and diary to ensure he attends medical appointments. His wife usually arrives with any groceries or personal shopping items and prepares all his meals, manages all laundry, floor, and bathroom cleaning.

22. Mr Datta also reported to Ms Cogger that he "has to attend medical appointments … main reason for leaving home as he does not attend social events … receives an additional 4 hours assistance … estimated … on a fortnightly basis …". She concludes that he had received 32 hours per week assistance from 2 May 2002.

23. Ms Cogger then recommends ongoing assistance "*on the basis of the extent of Mr Datta's injuries* (emphasis added)". She notes that "the level of assistance currently provided is reasonable given Mr Datta's physical and psychological limitations…current level (32 hours) of assistance is likely to be required…".

Dr Michael McGlynn, Oral FacioMaxillary (reports 23 February 2018, 11 June 2019)

24. Dr McGlynn examined Mr Datta on 21 February 2018 to assess Mr Datta's whole person impairment (WPI) for the purposes of a claim under s 66 of the 1987 Act. He assessed 27%, finding of facial disfigurement, mastication, speech/voice and trigeminal nerve impairments. He also found a 20% loss of power of speech (ARD 75). In the 11 June 2019 report (ARD 9-11) he addressed the present issue through comment on Ms Cogger's report. He found her report "consistent with the history and findings on examination when assessed by me on 21 February 2018 … also … the … diagnosis of major depressive disorder and Post-Traumatic Stress Disorder described in the … report of Dr … Allan …" (ARD 11).

Dr Martin Allan, Psychiatrist (ARD 52- 59; report and examination 23 February 2018)

25. Dr Allan saw Mr Datta for the purposes of the WPI claim. But his report is also of some assistance in relation to the present issue. He took a history that Mr Datta:

> "… is the father of a 19 month old child with whom he appears to have no contact … he explained … child was the product of an arranged marriage … went on to say … his marriage was … not like in Australia … and … he seems to have very little relationship with the mother of his child, prior to or following the birth of his child … he lives by himself, but reports he relies on a maid who visits his home twice daily .." (ARD 53).

26. Dr Allan also took a history that Mr Datta is prompted by his maid to wear clean clothes and to shower, and without such prompting he would not attend to these activities and that the maid is needed to prepare food. Dr Allan then notes: "he does not need constant care however … would seem he spends his time watching TV or on the internet …"

27. As to travel, Dr Allan notes Mr Datta "leaves his home to go to his GP on occasion". He also noted that while Mr Datta denied having left his house with any frequency, such that he would require using public transport, he was still "able to take an international journey from India to Sydney and spend almost two weeks in Sydney having various medical assessments … and has been using public transport whilst in Sydney …" (ARD 56).

28. Dr Allan does not specifically address the issue of how many hours per week of domestic assistance are reasonably necessary. But he does undertake the usual Psychiatric Impairment Rating Scale exercise which provides some insight into this. As to the travel category, Dr Allan again noted that ability to travel to Sydney from India, and exist alone in Sydney, where he had not lived for 16 years, this including an ability to use public transport on his own. He therefore thought that any impairment in relation to travel was mild. He gave higher scores in the self-care & personal hygiene and social & recreational activities categories, noting, *inter alia*, Mr Datta needed frequent prompting from his maid to wash or wear clean clothes, prepare meals and attend generally to his self-care. He also noted:

> " … Bizarrely, his pain has gone on to all "spread" to other locations… waist and hips… buttocks and in these… there isn't a part of me that doesn't ache…" (ARD 55)

Dr Patrick Morris, Psychiatrist (ARD 60 – 67; examination and report 21 February 2018)

29. Dr Morris examined Mr Datta for the purpose of the WPI claim. He noted Mr Datta "continues to suffer with pain which he described as neuropathic orofacial pain since the injury".

30. He also reported Mr Datta told him "he sees his GP every 3 months … not seeing a psychiatrist or psychologist for treatment … psychological symptoms have remained stable for many years …" (ARD 62).

31. Dr Morris took a similar history to that taken by Dr Allan in relation to the marriage; reporting:

> "had a partner from an arranged marriage by his family in India … said he was pressured into his marriage by his wife's family … marriage broke up very soon after they started living together … has an 18 month old daughter he does not see very frequently … has a maid who does all the household chores … relies on a maid who visits him on a daily basis … does all the household chores including all the cooking … maid prompts him to shower and change his clothes … frequently misses meals … never leaves his home by himself for social and recreational activity… (ARD 63 – 66)".

32. Dr Morris also noted that while Mr Datta generally remained at home, he was able to come to Australia from India by plane for medical appointments – although he felt very anxious in taking that flight.

Professor David David, Oral & Maxillo Facial surgeon (ARD 48- 51)

33. Dr David assessed Mr Datta on 23 February 2018 for the purposes of the s 66 claim. He found Mr Datta to have moderately severe uncontrolled facial neuralgic pain that did interfere with his ADL and assessed a 17% WPI. While he did give a range (15-24%), relating to the AMA 5 Table, Professor David's report confirms that Mr Datta does have a serious facial injury that involves ongoing substantial pain and interference with ADL.

Dr Satyabrata-Dash, psychiatrist ("Dr S - Dash" – ARD 108 - 113)

34. He was treating Mr Datta during 2003, soon after the latter's return to India from Australia. His report of 16 October 2003 refers to 7 consultations with Mr Datta from 2 March until 16 October 2003 – also noting another appointment was to occur on 1 December 2003.

35. Dr S - Dash noted ongoing complaints of pain and other various symptoms in and about the face and oral cavity. He also noted Mr Datta reported feelings of worthlessness, loneliness, dejection and considerable anxiety about the ongoing nature of his pain – and "remained preoccupied with thoughts of the assault and is irritable". Dr Dash noted symptoms reported to him by Mr Datta that are consistent with more recent reports. However, there is no reference in his report to Mr Datta requiring or receiving domestic assistance.

Dr Sobhan Mishra, oral and maxillofacial surgeon (ARD 45 – 47)

36. Dr Mishra was treating Mr Datta in 2002, soon after the latter returned to India. His 4 October 2002 report notes five consultations between 21 July and 1 October 2002. While he does note Mr Datta has "come back to his home country and is staying with his parents" there is no reference to him receiving, or being in need of, domestic assistance.

The Historical Medical Reports

37. This category of evidence comprises reports from various doctors who saw Mr Datta before his return to India in May 2002 - including from Drs Collins, McGoldrick, Mastroianni, Rea, Mishra, Govind, Boocock, Moore and Nasser. It is unnecessary to summarise each report. Their relevance to the issue is historical. However, they show, if this needed clarifying, that Mr Datta did sustain serious injuries, both from a physical and psychological point of view.

SUBMISSIONS

Applicant's Submissions

38. Mr Datta sustained serious injuries. So much can be acknowledged given he became entitled to s 66 payments reflecting a 44% WPI for psychiatric impairment (based on an assessment of the psychiatrist engaged by the respondent) and a 27% WPI with respect to his physical injuries.

39. Counsel for Mr Datta then carefully traced through all material in the case, particularly medical and the like reports, relevant to the issue. It is unnecessary I trail through all that now. In essence, it has been summarised above. However, these further points should be made:

    (a) Mr Datta "did not read the last sentence of paragraph 19 of his statement" (ARD 2), i.e. him stating what he had been told as to the CRPS diagnosis.

    (b) It is conceded that the CRPS is restricted to the upper head and neck – and does not extend to disabilities below that, including the arms and legs.

40. Mr Datta says that he is unable to cook food because of his stress.

41. The most important factor informing the reasonable need for domestic assistance, when considering the evidence overall, was the Mr Datta's need for supervision and prompting. In this regard, it was not put that he cannot do the cleaning around the house *per se*, but he did have pain which restricted this significantly.

42. The treating local practitioner for Mr Datta, Dr Laxmidhar Dash of Cuttack supported a claim for domestic assistance and opined that allowing of 32 hours per week was "a conservative estimate" (ARD 8). Mr Datta's previous local practitioner, Dr Singh, had died and hence the reason for his change of doctor.

43. Dr Dash believed Mr Datta needs "palliative care". (ARD 13). The Commission would be persuaded by the treating doctors given they have seen him on an ongoing basis.

44. The other factor pointing towards the seriousness of Mr Datta's condition informing the present issue, was that his level of impairment was in excess of 30%: he was in the "highest needs" category.

45. The reports of Dr McGlynn were referred to in detail. It is unnecessary to trace through them as, they have been summarised above. This also applies to the reports of Drs Mastroianni, Mishra, David, Morris and Allan and the statement of Mr Datta's spouse, Tembur Raj Ama.

46. The Commission was asked to read the whole of the report of the occupational therapist Ms Cogger, and note that Mr Datta relied on all of it.

47. Reliance was also placed upon the medical examination forms prepared by Dr Singh as being supportive of the case for Mr Datta on the present issue (A 93-97).

Respondent's Submissions

48. Care should be taken with the reference to "palliative care" by Dr Dash. There is no suggestion in this case that Mr Datta was close to dying, and this was the usual meaning of the word "palliative", at least in Australia. If it means something different in India, such was not clear or exposed in the evidence.

49. The Commission needed to look at what Mr Datta's level of functioning was. There was ample evidence of neuropathic pain, particularly noted in the early medical reports, from 2001 – 2003. However, this neuropathic pain, and the CRPS, was, again, limited to the facial area, or at least at or above the neck.

50. Care should also be taken with the reports of Dr McGlynn. His 2019 report did not involve an examination. He only adopted the findings of Ms Cogger without any or any adequate analysis. His 2018 report did involve an examination but not an analysis of the issue in the present case. It was rather directed to the s 66 claim at that stage.

51. The s 78 notice issued by the Insurer contained sound and persuasive reasoning and should be considered. Such reasoning militated strongly against the level of Mr Datta's entitlement to domestic assistance being anywhere near 32 hours per week. It included that Mr Datta's only work related injury was to his head and face and that the claimed disability for those parts of his body below the neck were not compensable. The insurer also stated that the evidence from Mr Datta's wife was unpersuasive and not corroborated.

52. Ms Cogger, has not engaged in her own analysis as to what Mr Datta's *reasonable* needs are. She has simply accepted, without adequate critical analysis, the subjective views of Mr Datta and/or Mr Datta's spouse about what assistance has been, or needs to be, provided. Her assessment was done by Skype interview over only about 1.5 hours.

53. Mr Datta lives in a 2 room flat by himself. It was unlikely that the amount of hours posited were reasonable. There must be overstatement by Mr Datta about this amount, and such has been adopted by Ms Cogger. Although It is conceded he requires some level of assistance.

Referral to an Accredited Medical Specialist (AMS)

54. Towards the end of submissions, I asked whether it was appropriate for me to make an assessment of what particular number of hours per week are reasonable, in circumstances where the only such estimate was from Ms Cogger – and whether this question should be sent to an AMS. Ms Compton submitted against such proposal, saying that if the Commission was not of the mind to allow the full 32 hours per week, it was well within power to find some other amount of hours per week ranging between 0 – 32, and ought to adopt that approach rather than send the case to an AMS. Mr Flett did not embrace my proposal.

FINDINGS AND REASONS

55. There is no doubt Mr Datta has sustained serious injuries and consequential disabilities. However, there are some inconsistencies in his case; and these are relevant to the issue. His case was essentially put on the basis of the functional assessment of Ms Cogger. That is not to say that other evidence is irrelevant to the issue. To the contrary, much of it is. But the real issue relates to the *number* of hours that should be *reasonably* provided each week. Ms Cogger has identified the number of hours *claimed* – and allegedly being provided - 32. She has done so essentially on the basis of what Mr Datta has reported to her.

56. While Mr Datta's wife was present during the interview, she did not contribute. Given she was there, this is odd, if only because the personal and domestic ADL assessment histories taken (ARD 85 – 86) contain various reports of Mr Datta's wife performing such duties. I am surprised that at least some confirmation, or clarification was not obtained in this situation. The person performing the duties would usually be expected to know best what duties were or were not done and how long they take. Mr Datta told Dr Allan that he spends his time watching TV or on the Internet (ARD 55).

57. Ms Cogger's analysis is premised upon his wife assisting him for at least about 30 hours per week personal and domestic assistance and two hours per week on average for travelling. This is consistent with Mr Datta's statement (ARD 3 - 4). Ms Cogger noted that it was unclear to her about when Mr Datta's family employed his wife, and what her salary was. Mr Datta also told her that "his wife's friend" also provided him with support "on occasions…he had disagreements with his wife… could not tell me whether there was financial remuneration for this service or not…" (ARD 88).

58. To some significant extent, this is inconsistent with other evidence. For example, only about 11 months before being interviewed by Ms Cogger, Mr Datta told Dr Morris that his marriage broke up very soon after they started living together, and he had a maid who visited him on a daily basis, doing *all* the household chores. Two days after seeing Dr Morris, Mr Datta told Dr Allan something similar. Dr Allan understood that Mr Datta had no contact with his child and very little relationship with his wife and understood he essentially lived by himself, relying on a maid who visited his home "twice" daily. It's may be the extent of such inconsistency could be explained by Mr Datta's wife stating that "at times he becomes irritable … very difficult to control … looks the other way as I come in. During such period, a maid has to be brought in on a commercial basis … while I still monitor the work staying invisible…". But I do not think this likely. Mr Datta's evidence is that his wife has to travel one hour each day, twice a day, to his home for two to three hours both morning and night. That history is difficult to reconcile with a maid being brought in on a commercial basis when Mr Datta is irritable – at least so that maid could perform that particular shift. I also do not know what Mr Datta's wife means by "staying invisible". Presumably, it does not mean she vacates the unit entirely – because she states this in the context of being able to "still monitor the work". If there is an explanation to make this plausible, it has not been provided.

59. In *OneSteel Reinforcing Pty Ltd v Sutton* [2012] 282 at [2], Allsop P (as His Honour then was) stated that although this Commission was not bound by the rules of evidence, It "is required to draw its conclusions from material that is satisfactory, in the probative sense, in order that it act lawfully and in order that conclusions reached by it are not seen to be capricious, arbitrary or without foundation or material".

60. There is a related inconsistency relevant to the critical issue: the evidence going to the level of *past* domestic assistance asserted. Mr Datta has stated (ARD 3) that his wife "currently undertakes all the domestic duties around the home including shopping and cooking. *She has done since I returned home* following my injury (emphasis added). Such is also at least implicit from his wife's statement.

61. I doubt the accuracy of the history given to Ms Cogger by Mr Datta in relation to the *amount* of domestic assistance his wife has been giving him. I also doubt the accuracy of the statement of his wife. These doubts are limited to the *hours* of assistance she has been providing him. However, I believe it is likely that between her and "the maid", he has been provided with a significant amount of assistance.

62. Another difficulty with Mr Datta's wife's statement is that it does not identify the number of hours per week she performs the domestic assistance. That has not been remedied by Ms Cogger gaining a contribution from her during the interview. The history comes from Mr Datta. I take into account his wife states that when he returned from Australia in 2002, she gave up other jobs to look after him *full time*, and "continued to provide care ever since". But that may be inconsistent with the lack of reference to any such care, or need for it, in the report of Dr S-Dash, who saw Mr Datta on at least seven occasions between March and October of 2003. There is also no further reference to any such care or assistance until Dr Singh's report of 27 September 2016 – and even then there is no detail of the level of domestic assistance need – only a reference to "need of palliative care".

63. I also am concerned about the inconsistency between Mr Datta's claimed inability to travel, even for short distances or times outside his home, against his ability to travel internationally by himself in February 2018, and exist alone in Sydney where he has not lived for 16 years, including using public transport. Again, this concern goes only to the *extent* of inconsistency. Dr Allan, who pointed such inconsistency out, recognised that there was still a significant deficit in relation to travel – but not to the extent claimed by Mr Datta.

64. There is a further concern in relation to travel. Ms Cogger allows two hours per week "assistance with transport". Mr Datta gave her a history that he has to attend medical appointments and such has been the main reason for him leaving his home "…as he does not attend social events… receives an additional 4 hours assistance on these occasions and estimated this is provided on a fortnightly basis (2 hours per week)…". In his own statement, Mr Datta only refers (para 45) to "the treating doctors… consistently mentioned the need for… care in their quarterly medical examination form since the year 2002…". Dr Allan's history in this regard is that the only treatment Mr Datta receives is from his GP (ARD 54) and that he virtually never leaves home – except to see his GP "on occasion" (ARD 55). However, Dr Morris noted that he also attended an Indian traditional healer and he only sees his GP every three months. There is no other corroboration, including from his wife, that he receives or needs four hours assistance with travel per fortnight. I am not satisfied the allowance of two hours per week travel by Ms Cogger is probative evidence.

65. The respondent says Mr Datta has "overstated" his need for assistance and the extent of his disabilities. It was submitted it was unlikely that 30 hours assistance per week would be required to assist Mr Datta in a small unit. I accept the submission that there has been such overstating. I also agree with the submission that Ms Cogger has accepted Mr Datta's history – and that her opinion is essentially based on that history. That history does not include a contribution Mr Datta's wife. I appreciate Ms Cogger noted that "the level of assistance currently provided is reasonable …". But, any reasons she has provided are limited to or based on the statements put to her by Mr Datta. Given these observations, and the principle identified above in *OneSteel Reinforcing*, I do not think the evidence in relation to the *reasonably* necessary *amount* of hours is totally satisfactory.

66. I do not believe that this overstating, and other inconsistencies, in Mr Datta's evidence represents deliberate deception. He sustained what must have been a very frightening and traumatic assault in 2001, and is still living with the substantial physical and psychiatric consequences. I believe this burden has affected his perceptions of what amount of domestic assistance are *reasonably* necessary. My treatment of his evidence is not an adverse credit finding. It rather reflects my concern to ensure that the principle identified in *OneSteel Reinforcing* is observed – i.e. that I draw my conclusions on material that is satisfactory.

67. I am unable to accept the evidence of Ms Cogger totally because I need to take care with Mr Datta's evidence, which, for the above reasons, I do not totally accept. The same applies to the evidence in Dr McGlynn's last report (11 June 2019). When he examined Mr Datta on 21 February 2018, he did not address the domestic assistance question. Sixteen months later he was asked to look at Ms Cogger' report and noted her conclusions were consistent with his history and findings on examination. The viability of his report depends, to *some extent in this respect*, on the extent of my acceptance of Ms Cogger's opinion.

68. The other problem with Dr McGlynn's last report is that there is no, or no sufficient, reasoning to allow me to identify whether his opinion is otherwise erroneous. This does matter because I am also in doubt about whether he is correct in saying that what Ms Cogger reported to be the "current level of assistance" (ARD 10) *is* in fact "consistent with his history and findings" on 21 February 2018. One concern I have with this is her partial reliance on complaints of:

> "… generalised pain all over his body… cannot get comfortable in any one position… relied on a Canadian crutch for mobility when walking within the home… relied on his arms and … crutch with all transfers… unable to squat or crouch and relied on the crutch to transfer to lower himself to floor level" (ARD 87).

69. This does not appear consistent with the history and findings in Dr McGlynn's 21 February 2018 report. I do not there see any reference to any such problems, apart from asymmetry of hair growth on the back and lower limbs and dry scaling patches of skin on the lower limbs. Dr McGlynn did diagnose a CRPS Type 2. But no symptoms such as generalised pain all over the body, including the need for a crutch, were recorded. Neither is there any such reference in the report of Dr Morris. I take into account Dr Singh's noting Mr Datta "requiring a Canadian crutch… to support self…" in December 2017, and Dr Allan's note that Mr Datta's pain had "Bizarrely… spread… to other locations… isn't a part of me that doesn't ache…". However, there is no reference to Mr Datta having, or needing, a crutch when he was in Sydney in February 2018.

70. There is no satisfactory explanation otherwise as to the basis of such need. This is important because when one considers the report of Ms Cogger, including her ADL exercise, it can be easily seen that Mr Datta's reliance on the crutch was an important factor in her assessment. Again, I do not think this aspect of Mr Datta's evidence is probative.

71. In the result, the amount of hours that may be said to be reasonably necessary has been left for me to decide. This has concerned me and caused my enquiry of the parties as to whether the issue should be sent to an AMS. They have essentially resisted that course. In all the circumstances, I think it most appropriate that I do not, unilaterally, refer this question to an AMS - particularly when it has been submitted for Mr Datta that I should not, and that I am at liberty to make a finding as to the reasonably necessary level of domestic assistance of anywhere between 0 - 32 hours.

72. The words "reasonably necessary" do not mean Mr Datta needs to establish the assistance was reasonable *and* necessary. That test is too demanding. The word "reasonably" qualifies or moderates the word "necessary". The assistance must be "a reasonable necessity" having regard to all relevant matters. These circumstances require the application of "prudence, sound judgement and good sense" in coming to a conclusion. I have taken into account the principles discussed in *Diab v NRMA Ltd* [2014] NSWWCCPD 72 including the previous authorities discussed by Roche DP in that case. I appreciate it dealt with medical expenses rather than domestic assistance. But the words "reasonably necessary" apply in both cases.

73. I am not persuaded by the reports or certificates of Drs Laxmidhar Dash or Singh in relation to the critical issue. Dr Singh does not deal in any detail with the amount of hours of domestic assistance that may be reasonably necessary for Mr Datta. I also do not accept the evidence of Dr Dash. The suggestion that a caregiver "must be in attendance… 24×7…" is clearly well outside the bounds of reasonableness. Not even Mr Datta himself puts his need anywhere near that amount of time. He also provides no adequate analysis of what level of assistance is reasonably needed.

74. I also believe the assessments of Drs Dash and Singh depend upon an acceptance of the Mr Datta's evidence. I have not totally accepted that evidence. Dr Dash's comment that Mr Datta's life would be in great danger if he was allowed to travel unescorted depends upon the report by Mr Datta to the doctor that he fell "unconscious in the Sydney airport on the way back to… India… in February 2018". I believe Mr Datta did have problems on this journey, in particular some anxiety. Dr Morris noted that. I also think it likely that something of this nature occurred at the airport on his way home and he may have needed some assistance from someone. But I do doubt the extent to which it has been described, e.g. "falling unconscious" (ARD 5-6), or having "fainted and had to be assisted by check in staff" (ARD 2). If this event was so serious, I would have expected a history of it to have been given to Ms Cogger. It does not appear in her report.

75. It is still necessary for me to draw my conclusions from material that is satisfactory, in the probative sense. I do not reject the totality of Ms Cogger's opinion. To the contrary, it is important part of the basis for my conclusions. I have taken into account her careful analysis of Mr Datta's ADL's, the other written material she considered, including medical evidence and the level of domestic assistance that was reported to her as being given since 2002 up to the time of her interview and report.

SUMMARY

76. Accordingly, and utilising Ms Cogger's approach, I find that the level of domestic assistance that is reasonably necessary for Mr Datta is 19 hours per week. Ms Cogger allows domestic assistance for 6 days of the week, 5 hours a day: 30 hours plus 2 hours travel allowance. However, his report to her was that his wife provided assistance for 2 - 3 hours both morning and night. If the lower end of that range is adopted, the result would be 24 hours a week plus the 2 hours for travel. Having regard to my concerns of overstatement, and taking all the evidence I have discussed above, I think a reasonable level of necessity is 3 hours a day for 6 days a week. I also believe one hour per week reasonably covers what assistance he may need with travel or transport.

77. In so finding, I also take into account the inconsistencies in the evidence about the extent to which Mr Datta's wife has in fact been affording him domestic assistance. However, the issue has not been formulated by reference to, or necessarily based on, the level of assistance she has been giving and can give into the future. It is rather about what level of assistance is reasonably necessary whether it be from his wife or another appropriate person. While the evidence about the assistance from "the maid" is not particularly satisfactory, it is clear enough, looking at all the evidence, that this person has at least been assisting Mr Datta for significant times. I also take into account those matters summarised by Ms Cogger (see in particular ARD 89) in coming to the finding of 19 hours per week.