WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**15294/12**
APPLICANT:	**Denis Field**
RESPONDENT:	**Department of Education and Communities**
DATE OF DETERMINATION:	**13 December 2013**
CITATION:	**[2013] NSWWCC 488**

The Commission determines:

1. Award for the respondent.

2. No order as to costs.

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

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

Robert Gray
Acting Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

INTRODUCTION

1. Mr Denis Field (the applicant) claims weekly payments of compensation and medical expenses as a result of suffering a personal injury during a periodic journey within the meaning of s 10 of the *Workers Compensation* Act 1987 (the 1987 Act) between his place of abode and place of employment on 23 October 2012.

2. Mr Field is employed by the Department of Education and Communities (the respondent) as a casual/relief primary school teacher.

3. Mr Field injured his head, shoulders, knees and back when he tripped and fell on uneven ground in Yerrick Road Lakemba while walking hurriedly to the Hampden Park Public School (the school) at Lakemba.

4. There is no dispute that Mr Field suffered a personal injury within the meaning of s 10 of the 1987 Act. However, the respondent disputes liability on the basis that there was no real and substantial connection between the employment and the accident or incident out of which the personal injury arose within the meaning of s 10(3A) of the 1987 Act.

5. Section 10(3A) was introduced into the 1987 Act by the *Workers Compensation Legislation Amendment Act* 2012. The amendment applies to injuries received on or after 19 June 2012 (Sch 6 Pt 19H cl 18 to the 1987 Act).

6. The respondent issued a notice dated 31 October 2012 pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) declining liability. The relevant parts of the s 74 notice are set out as follows:

> "We advise that we have decided to deny liability for your claim for compensation for the reasons outlined below:
>
> - Your injury on 23/10/2012 was sustained whilst you were travelling to work.
>
> - Apart from the fact you were travelling to work, your journey and the incident out of which your injury arose, was not work-related.
>
> - In the absence of a *real and substantial connection* between your employment and the incident out of which your injury arose, no compensation is payable for your injury: section 10(3A) of the Workers Compensation Act 1987.
>
> In making this decision we have reviewed and considered the following information:
>
> - The circumstances of your injury, as outlined in your report of injury, which confirms that you were on your normal commute to work on the 23/10/2012 when you have fallen over when exiting the bus on which you travelled to work.
>
> - Verbal advice from yourself on the 29/10/2012 confirmed this was your normal route to work, other than this fact, there is no real and substantial link between your employment and the incident out of which your injury has arisen as you were not undertaking any work related activity required of your position nor has your employer requested you deviate from your normal periodic journey."

ISSUES FOR DETERMINATION

7. The parties agree that the following issue remains in dispute:

    (a) whether there was a *real and substantial connection between the employment and the accident or incident out of which the personal injury arose* within the meaning of s 10(3A) of the 1987 Act?

PROCEDURE BEFORE THE COMMISSION

8. The parties attended a conciliation conference/arbitration hearing on 21 November 2013. 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.

9. Mr Hickey of counsel represented the interests of the applicant. Mr Leslie, solicitor, appeared for the respondent in the interests of the insurance scheme agent, Allianz Australia Workers Compensation (NSW) Limited.

10. The parties agree that there is no dispute in respect of the applicant's incapacity for work as a result of injury, and that he would be entitled to an award of weekly payments of compensation at the rates as set out in his wage schedule should an award be made in his favour.

11. Mr Hickey conceded that the applicant would only be entitled to an award of weekly payments of compensation up to 14 June 2013 in accordance with the last approved WorkCover medical certificate issued by the nominated treating doctor.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute (the Application) and attached documents;

    (b) Applications to Admit Late Documents filed by the applicant dated 11 June 2013, 12 June 2013 and 20 November 2013 (x2);

    (c) Applicant's Wage Schedule dated 21 November 2013;

    (d) Approved WorkCover medical certificates dated 6 December 2012 and 2 April 2013;

    (e) Reply to the Application to Resolve a Dispute (the Reply), and

    (f) Application to Admit Late Documents dated 17 July 2013.

Oral Evidence

13. No application was made by either party to adduce oral evidence. No application was made by the respondent to cross-examine the applicant.

FINDINGS AND REASONS

Did the applicant suffer a personal injury during a periodic journey between his place of abode and place of employment within the meaning of s 10 of the 1987 Act?

The legislation

14. Section 10 of the 1987 Act is set out as follows:

> "(1) A personal injury received by a worker on any journey to which this section applies is, of the purposes of this Act, an injury arising out of or in the course of employment, and compensation is payable accordingly.
>
> (1A) Subsection (1) does not apply if the personal injury is attributable to the serious and wilful misconduct of the worker.
>
> (1B) A personal injury received by a worker is to be taken to be attributable to the serious and wilful misconduct of the worker if the worker was at the time under the influence of alcohol or other drug (within the meaning of the Road Transport Act 2013), unless the alcohol or other drug did not contribute in any way to the injury or was not con summed or taken voluntarily.
>
> (1D) Subsection (1) does not apply if the personal injury resulted from the medical or other condition of the worker and the journey did not cause or contribute to the injury.
>
> (2) Subsection (1) does not apply if:
> (a) the injury was received during or after any interruption of, or deviation from, any such journey, and
> (b) the interruption or deviation was made for a reason unconnected with the worker's employment or the purpose of the journey, unless, in the circumstances of the case, the risk of injury was not materially increased because of the interruption or deviation.
>
> (3) The journeys to which this section applies are as follows:
> (a) the daily or other periodic journeys between the worker's place of abode and place of employment,
> (b) the daily or other periodic journeys between the worker's place of abode, or place of employment, and any educational institution which the worker is required by the terms of the worker's employment, or is expected by the worker's employer to attend,
> (c) a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of obtaining a medical certificate or receiving medical, surgical or hospital advice, attention or treatment or of receiving payment of compensation in connection with any injury for which the worker is entitled to receive compensation,
> (d) a journey between the worker's place of abode or place of employment and other place where the journey is made for the purpose of having , undergoing or obtaining any consultation, examination or prescription referred to in section 74 (3),
> (e) a journey between any camp or place:
> (i) where the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to reside temporarily, or
> (ii) where is reasonably necessary or convenient that the worker reside temporarily for any purpose of the worker's employment, and the worker's place of abode when not so residing,
> (f) a journey between the worker's place of abode and the place of pick-up referred to in clause 14 of Schedule 1to the 1998 Act,

(g) a journey between the worker's place of abode and place of employment, where the journey is made for the purpose of receiving payment of any wages or other money:
(i) due to the worker under the terms of his or her employment, and
(ii) which, pursuant to the terms of his or her employment or any agreement or arrangement between the worker and his or her employer, are available or are reasonably expected by the worker to be available for collection by the worker at the place of employment.

(3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

(4) For the purposes of this section, a journey from a worker's place of abode commences, at and a journey to a worker's place of abode ends at, the boundary of the land on which the place of abode is situated.

(5) For the purposes of this section, if the worker is journeying from the worker's place of employment with one employer to the worker's place of employment with another employer, the worker shall be deemed to be journeying from his or her place of abode to his or her place of employment with that other employer.

(5A) Nothing in this section prevents the payment of compensation for any personal injury which, apart, from this section, is an injury within the meaning of this Act."

(6) In this section:

"educational institution" means:
(a) a trade, technical or other training school, or
(b) a university or other college or school providing secondary or tertiary education.

"night", in the case of a worker employed on shift work, night work or overtime, has a meaning appropriate to the circumstances of the worker's employment.

"place of abode" includes:
(a) the place where the worker has spent the night preceding a journey and from which the worker is journeying, and
(b) the place to which the worker is journeying with the intention of there spending the night following a journey.

Background

15. Mr Field commenced primary school teaching in 1964. Mr Field was a permanent teacher until 1991 when he took a break from teaching. Mr Field returned to teaching in either 2001 or 2001 as a "casual/relief" teacher.

16. The respondent, through an agency known as "Casual Direct", telephoned Mr Field when he was required to work as a casual/relief teacher to fulfil the role of the regular or permanent teacher who was unavailable. Casual Direct would advise Mr Field the name and location of the school that he was to attend.

17. Casual Direct liaises between schools and teachers when schools require a casual/relief teacher because of the unavailability of a permanent or regular teacher.

18. The evidence establishes that Mr Field was contacted usually at short notice to teach at a school on a particular day. Mr Field at paragraph 5 of his statement dated 6 June 2013 (Application to Admit late Documents dated 11 June 2013 – p 6) states:

> "Over the years I would receive calls from Casual Direct, usually between 6.30am and 7.00am, requesting my attendance [at] a particular school to teach a particular class that day."

19. Mr Field usually relieved at primary schools in Alexandria, Auburn, Granville and Lakemba.

20. Although there is no evidence on this point, it appears these locations were offered to Mr Field because of proximity to his residence at Strathfield.

The accident or incident out of which the personal injury arose

21. On 23 October 2012 at 7.30 am Mr Field received a telephone call at his home from Casual Direct who advised him that he was required that day to teach at the school.

22. Mr Field said that he "hurriedly got dressed and ready". Mr Field did this because he had taught at this school in the past, and that it was a strict school with the requirement that staff be at the school at 8.30 am to receive lessons for the day or be assigned 8.30 am playground duty.

23. Mr Field took a bus to the intersection of Lakemba Street and Yerrick Road where he alighted at about 8.25 am.

24. Mr Field intended to walk to the rear entrance of the school in Yangee Road via Yerrick Road and then Yangoora Road. The distance Mr Field had to walk is unknown but it appears from the sketch attached to Mr Field's statement that it was not a long distance.

25. Mr Field hurriedly walked along Yerrick Road and when about 100 metres from the rear gate of the school tripped on an uneven surface falling to the ground and suffering injury.

26. Mr Field's evidence about the circumstances of the accident or incident out of which the personal injury arose is set out in the following paragraphs of his statement:

> "10. A bus dropped me off near Lakemba Station at around 8.25 am. After getting off the bus I noted the time; I only had a couple of minutes to get to the school so I walked hurriedly. I was half way up Yerrick Road towards Yangoona Road when I tripped on uneven surface. I fell to the ground heavily, hitting my head, shoulders, knees, and injuring my back.
> …
>
> 12. I was about 100m from the school when I fell.
>
> 13. Had Casual Direct called my [sic] between the usual times, 6.30 – 7.00am, I would have not had to rush in order to arrive to class on time as I would have had sufficient time to get ready and travel to the school.
>
> 14. Had Casual Direct called my [sic] between the usual times, I would not have injured myself."

27. Mr Field filed a supplementary statement dated 20 November 2013 (Application to Admit Late Documents filed by the applicant on 20 November 2013) giving further evidence about the circumstances of his injury. The relevant parts of Mr Field's statement are set out as follows:

> "4. I attach hereto photographs of the place where I fell and the exact footware I was wearing at the time of the fall.
>
> 5. I tripped over the broken footpath because I was hurrying. Whilst hurrying I was looking straight ahead to my destination, as people do when hurrying. I didn't notice the crack. I was worried about being late.
>
> 6. I was walking 3 times quicker than my usual pace.
>
> 7. Had I been walking [at] my usual place, I would not have tripped as I would have seen the crack and I would have avoided it or walked over it in my normal pace."

28. The section 74 notice refers to a report of injury submitted by the applicant "which confirms that you were on your normal commute to work on the 23/10/2012 when you have fallen over when exiting the bus on which you travelled to work" (the Application – p 11).

29. The report of injury referred to in the section 74 notice was not in evidence before me which I will disregard in respect of any allegation that the applicant fell "when exiting the bus on which you travelled to work" because no application was made to cross-examine the applicant, and no submission was made that the applicant injured himself in circumstances other than as set out in his statements.

Submissions

30. As the arbitration hearing was sound recorded, I propose to set out the submissions of the parties in point form only.

Applicant's submissions

31. Mr Hickey made the following submissions:

    (a) The worker brings his case of injury arising out of or in the course of his employment within the meaning of section 10 of the 1987 Act provided there is a real and substantial connection between the employment and the accident or incident out which the injury arose.

    (b) Part 4 of the Application particularises how the injury occurred.

    (c) The applicant's statement of 6 June 2013 establishes by way of inference an industrial or employment contribution to the injury during the journey.

    (d) The words "real and substantial connection between the employment and the accident or incident out of which the personal injury arose" is established by the applicant's evidence as set out in paragraphs 8, 9 and 10 of his statement [counsel referred to paragraphs 8, 9 and 10 of the applicant's statement].

    (e) The applicant tripped and fell at about 8.25 am as he was walking hurriedly to the gate of the school.

(f) It is significant that the applicant was walking hurriedly so he could arrive at the school at 8.30 am.

(g) The applicant's evidence establishes by inference the urgency of him having to be at the school by 8.30 am.

(h) The applicant's diagram shows that the applicant tripped in Yerrick Road about 100 metres from the school.

(i) The applicant's medical records [Application to Admit Late Documents filed by the applicant on 20/11/2013] show that the applicant suffered with pre-existing medical problems with his back and knees, and also had a heart condition prior to 23 October 2012.

(j) The applicant was seen by Dr Kochan on the day of the accident and gave a history of tripping on the pavement on his way to work [Application to Admit Late Documents filed by the applicant on 20/11/2013].

(k) Dr Kochan is of the opinion that the "injury may have occurred as a result of him trying to rush to his work in order to arrive on time" [counsel referred to the report of Dr Kochan dated 6/6/2013]

(l) The evidence of the applicant that he was hurriedly walking in order to be at the school by 8.30 am is corroborated by the report of Dr Kochan.

(m) In *Mitchell v Newcastle Permanent Building Society Ltd* [2013] NSWWCCPD 55 (*Mitchell*) there was no demand placed upon the worker to make haste.

(n) The worker in *Mitchell* was not on a timetable.

(o) The worker in *Mitchell* had completed her duties for the day and was in a daily journey from her place of employment to her place of abode when she tripped on tree roots in the footpath and suffered injury.

(p) In this case the worker could be considered as having a demand placed upon him to be at the school by a certain time;

(q) The applicant had an obligation upon him in terms of his industrial commitment.

(r) The applicant received a late request from the employer to go to the school.

(s) The obligation was for the applicant to fulfil the role of a casual teacher and to be at the school by 8.30 am.

(t) The same test imposed in section 9A where the employment is a substantial contributing factor is equivalent to section 10(3A) where there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

(u) Deputy President O'Grady was of the view in *Mitchell* that both the statutory terms of "substantial contributing factor to injury" in section 9A and "real and substantial connection between employment and the incident" involves a causal element [counsel referred to paragraph 73 in *Mitchell*]

(v) Deputy President O'Grady also said in *Mitchell* at paragraph 73 that the term "connection" as appears in section 10(3A) may also encompass some other association with the employment.

(w) The term "real and substantial connection" in section 10(3A) is more remote than the term "substantial contributing factor" in section 9A.

(x) The applicant's obligation was to get to work by a certain time.

(y) The applicant had an obligation to young students and the principal to be at the school by 8.30 am.

(z) The real and substantial connection between the employment and the accident or incident out of which the injury arose within the meaning of section 10(3A) is the obligation of the applicant to be at the school at 8.30 am at the request of the respondent.

(aa) The applicant was hurrying so he would be at the school at 8.30 am to meet his obligations, and that is the real and substantial connection between the employment and the accident or incident out of which the injury arose.

(bb) If the applicant was a regular teacher attending as part of his duties then the journey is part of the regular teacher's normal regime but here the applicant is a casual teacher.

(cc) The expression "may also encompass some other association with the employment" may in circumstances be where a worker in a journey is carrying something heavy in connection with his employment and suffered injury.

(dd) In this case the "real and substantial connection between the employment and the accident or incident out of which the personal injury arose" is that the applicant was in a hurry because of the respondent's request and that is why he tripped on the uneven surface.

Respondent's submissions

32. Mr Leslie made the following submissions:

(a) The amendment to section 10 of the 1987 Act by the 2012 amending legislation should not be interpreted as beneficial legislation.

(b) A worker can only succeed if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

(c) Arbitrator Sweeney in *Bina v ISS Property Services Pty Limited* [2013] NSWWCC 328 (*Bina*) is of the view that section 10(3A) will preclude most workers who are injured on a journey from obtaining compensation [Mr Leslie referred to paragraph 53 of Arbitrator Sweeney's decision].

(d) Section 10(3A) is to disentitle workers to compensation and not to be interpreted beneficially to the worker.

(e) The worker has to establish on the balance of probabilities that there is a "real and substantial connection between the employment and the accident or incident out of which the personal injury arose".

(f) The phrase "real and substantial connection between the employment and accident or incident out of which the personal injury arose" is clear and unequivocal and should be given its ordinary natural meaning.

(g) The applicant in his statement dated 6 June 2013 at paragraph seven does not lead evidence that he was told by the employer that he had to be at the school by 8.30 am.

(h) What was the conversation with the employer about his obligation about getting to work at 8.30 am?

(i) There is no evidence from the applicant that the employer demanded or requested that he be at the school by 8.30 am in order to be assigned lessons or playground duty.

(j) The applicant does not give any evidence of the employment connection. His evidence is what he imagines to be his obligation to be at the school by 8.30 am.

(k) What is real is not the same as imagined or supposed. The word "real" means "actual" and has an independent existence or relating to actual existence as opposed to non-existent or something imagined (Mr Leslie referred to the definition of "real" in the Webster dictionary).

(l) The applicant has failed to show that having to be at the school at 8.30 am was a reality.

(m) The applicant speaks about him hurrying because he thought he had to be at the school by a certain time which is not a reality.

(n) The assumption by the applicant that he had to be at school at 8.30 am was not an obligation or demand placed upon him by the employer, and on that basis there is no real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

(o) There was no requirement or demand by the employer for the applicant to be at school at 8.30 am.

(p) It was a decision by the applicant to hurry to school.

(q) The submission in *Mitchell* that there was a change in the circumstances of the worker's journey because she was required to stay back by her employer beyond her normal working hours was rejected by the Deputy President.

(r) The term "connection" as discussed by Deputy President in *Mitchell* at paragraph 73 in obiter when he said "may also encompass some other association with the employment" is an inference of broadening the concept of "link" but in the context of "real and substantial" means a "bond". The words "real and substantial" in the context of section 10(3A) means a "bond"; a physical relationship or link is required such as carrying a heavy object related to employment and not something imagined.

(s) In this case there is no "association", "relationship" or "link" between the employment and the accident or incident other than walking to work which is the same for all workers travelling to and from work.

(t) The applicant says he was hurrying but there is no evidence that the employer told him to hurry.

(u) The applicant was merely going to work which is not compensable; that is the whole purpose of the insertion of section 10(3A) by the 2012 amending legislation.

(v) In terms of the accident itself, hurrying to work is not a real event – it happens all the time with workers travelling by car or waiting for a bus.

(w) People are often running late to get to work.

(x) Far more is required than the applicant imagining he had to be at work by a certain time for him to establish that there was a real and substantial connection between the employment and the injury.

(y) There is no casual connection between the employment and the accident or incident out of which the personal injury arose.

(z) The requirement that the connection between the employment and the accident or incident must be "real and substantial" involves a test that goes to causation at least as stringent as that found in section 9A: it requires a "real link" to the employment.

(aa) In this case the only link is that the applicant was hurrying to get to work without any evidence that a demand had been placed upon him by the employer to be at work by 8.30 am.

(bb) The applicant has failed to establish on the balance of probabilities that there was a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

(cc) There should be an award for the respondent.

Applicant's submissions in reply

33. Mr Hickey made the following submissions in reply:

(a) It is not necessary that there be some tangible or physical connection with the employment.

(b) "Real and substantial connection" involves a causative element between the employment of the worker in the particular job and the accident or incident out of which the injury arose.

(c) It can be in an intangible sense as in arising out of employment. A helpful case is *Fire and Rescue New South Wales (formerly NSW Fire Brigades) v Guymer* [2011] NSWWCCPD 38 where it was found that the worker suffered an injury arising out his employment when informed of comments made about him by a radio announcer relating to his employment.

(d) Whilst the question was not fully argued in *Mitchell*, the Deputy President was of the view that in the context that the connection must be "real and substantial" may imply a lesser threshold than "substantial contributing factor" as it appears in section 9A.

(e) Whilst there is no direct evidence of conversation with the employer that the applicant had to be at work by a certain time, he was contacted and he was aware of the obligations that had to be met.

Findings

34. I respectively adopt the careful analysis of the authorities as discussed by Arbitrator Sweeney in *Bina* and agree with his view that a personal injury during a journey within the meaning of s 10 is not one arising out of or in the course of employment.

35. The purpose of s 10 is to deem a personal injury received by a worker during a journey as an injury arising out of or in the course of employment in order for the worker to receive compensation. It would be unnecessary to enact s 10 if the personal injury during a journey was one arising out of or in the course of employment within the meaning of s 4 of the 1987 Act.

36. Subsection (3A) was inserted in s 10 by Sch 6 Pt 19H cl 18 to the 1987 Act and applies to injuries received or on after 19 June 2012.

37. For convenience, I again set out s10(3A):

> "A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose."

38. Deputy President O'Grady in *Mitchell* agreed with the reasoning of the arbitrator at first instance that the term "real" in the context of s 10(3A) means "actual". The Deputy President at [71] said:

> "The word 'real' is one of common usage and its meaning, or more correctly meanings are plain. The guidance gained by the Arbitrator by reference to a dictionary caused him to construe the term, in its context, as meaning 'actual'. As was noted by the full Federal Court of Australia in *Minister for Immigration, Local Government and Ethnic Affairs v Batey* [1993] FCA 75; (1993) 112 ALR 198, the term 'real' may be used in either a qualitative sense or a quantitative sense. The Court was there considering the term 'real risk of recidivism'. In the course of discussion the Court identified that 'real' may convey the 'notion of existence as an actuality', which construes the term in its qualitative sense. It is in this sense, in my view, that the term 'real' should be construed in the context of s 10(3A). In my view, the Arbitrator's adoption of the dictionary meaning, being 'actual', was correct."

39. The word "substantial" in the context of s 9A was considered by the Court of Appeal in *Badawi v Nexon Asia Pacific Pty Ltd* (*Badawi*) [2009] NSWCA 324 at [82] and *Da Ros v Qantas Airways Limited* (*Da Ros*) [2010] NSWCA 89 at [20] to mean "real and of substance". Deputy President O'Grady adopted the reasoning of the Court Appeal as to the meaning of "substantial" as used in the context of s 10(3A).

40. In the context of the term "connection" as it appears in the subsection (3A), Deputy President O'Grady agreed with the approach of the arbitrator to construe its meaning by reference to the dictionary as meaning "association" or "relationship" or "link". The Deputy President at [72] said:

> "Connection is a word of common usage and each of those three concepts are equally open when construing the term…the most apt meaning [of the term 'connection'] would involve the concept of 'link'."

41. The term "employment" has been considered in the context of s 9A in a number of cases and refers to the work the worker is required to do including the nature, its conditions, its obligations and its incidents and extends to matters naturally incidental to the contract of employment (see *Stanton-Cook v TAFE Commission (NSW)* (1999) 17 NSWCCR 632 at 636-63; *Stewart v New South Wales Police Service* (1998) 17 NSWCCR 202 at 212; *Badawi v* at [91] and *Da Ross* at [22]).

42. Deputy President O'Grady in *Mitchell* at [49] said that the term "employment" in the context of arising out of employment "encompasses matters incidental to the features or incidents of the employment".

43. The Court of Appeal in *Pioneer Studios Ltd v Hills* (*Hills*) [2012] NSWCA 324 at [37] said:

> "The core element of a worker's course of employment will be attendance at a workplace or carrying out work functions…."

44. Deputy President O'Grady in *Mitchell* found that there is a clear distinction between the statutory terms of "substantial contributing factor to injury" (s 9A) and "real and substantial connection between employment and the accident or incident" (s 10(3A) but both involve a causal element.

45. The approach by the Deputy President is in accordance with the principles of causation in workers compensation cases to establish on a common sense approach the causal link or connection between an injury and an accident or event arising out of employment within the meaning of s 4 of the 1987 Act.

46. The question of causation in common law and workers compensation is a "commonsense test": *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*); *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 and *Sarkis v Summitt Broadway Pty Ltd t/as Sydney City Mitsubishi* [2006] NSWCA 358.

47. The commonsense test of causation in workers compensation was considered by Kirby P in *Kooragang*. His Honour at 463-464 said:

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase "results from", is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement of compensation."

48. Clarke JA in *Zinc Corporation v Scarce* (1995) 12 NSWCCR 566 at 570 said:

> "It is now well established at common law that the test of causation is a common sense one. Any controversy on the question has been laid to rest by the decision of the High Court in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. What needs to be established is that the event which is sought to be linked with injury 'was so connected with the loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it'. (See *Halvorsen Boats Pty Ltd v Robinson* (1993) 31 NSWLR 1 at 7). The question is, of course, a question of fact which 'must be determined by applying common sense to the facts of each particular case' (see *March* at 15). In my opinion, there is no reason to adopt a different approach in relation to the test of causation posed by the words 'arising out of'. The question of fact is whether there is such a connection between the worker's personal injury and his employment that, as a matter of ordinary common sense and experience, the injury should be regarded as having arisen out of that employment. In deciding that question, my preferred view is that the test laid down by Jordan CJ in *Nunan v Cockatoo Docks & Engineering Co Ltd* (1941) 41 SR (NSW) 119 at 124 – that the fact of his being employed in the particular job caused, or to some material extent contributed to, the injury – should be applied. At the very least, the test requires that the employment was a contributing factor to the injury (an expression to be found in section 6(a) and section 6(b))."

49. The term "arising out of" involves a causal element and is to be inferred from the facts as a matter of commonsense: *Badawi* .

50. Starke J in *Smith v The Australian Woollen Mills Limited* (1933) 50 CLR 504 at 517 and 518 when considering the expression "arising out of" said:

> "The expression 'arising out of' imports some kind of causal relation with the employment, but it does not necessitate direct or physical causation. Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? It must arise out of the work which the worker is employed to do – out of his service."

51. President Keating recently considered the meaning of "arising out of employment" in *Van Wessem v Entertainment Outlet Pty Ltd* [2010] NSWWCCPD 97 where his Honour said at [99]:

> "The phrase 'arising in the course of employment' refers to a temporal relationship between the injuries and the employment. A causal connection is only relevant to injuries arising 'out of' the employment."

52. Deputy President Roche considered the meaning of "arising out of" in *Qantas Airways Ltd v Watson (No 2)* [2010] NSWWCCPD 38 at [76]:

> "As observed in *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited* [2009] NSWCA 324; (2009) 7 DDCR 75, the meaning of 'arising out of … employment' is settled. The majority in *Badawi* referred to and endorsed the approach in *Nunan v Cockatoo Island Docks & Engineering Co Ltd* (1941) 41 SR (NSW) 119, where the court 'adopted a commonsense approach to the application of the phrase, noting that it involved a causative element'."

53. With reference to the distinction between the statutory terms in s 9A and 10(3A), Deputy President O'Grady in *Mitchell* said at [73]:

> "Whilst there is a clear distinction between the statutory terms 'substantial contributing factor to injury' (s 9A) and "real and substantial connection between employment and the incident etc" (s 10(3A)), both involve, as was accepted by the parties and as found by the Arbitrator, a casual element. **In the case of s 10(3A) the causal nexus is the connection between the employment and the incident** [my emphasis]. The term 'connection' as appears in s 10(3A) may also encompass some other association with the employment. That issue has not been argued and given the parties' approach to the particular facts, it is unnecessary to determine that question. Whilst the requirement is that the connection must be 'real and substantial' that concept may imply a lesser threshold than 'substantial contributing factor' as appears in s 9A. That question has not been fully agitated on this appeal, and I make no finding regarding that question. However it is clear that, as with s 9A, the requirement of there being a 'real and substantial connection' involves a test that goes to causation at least as stringent as that found in s 4(a) (arising out of employment)."

54. The argument in *Mitchell* that the injury occurred on a journey that involved travel between work and home of itself is sufficient to satisfy the requirement of s 10(3A) was rejected by the Deputy President.

55. In *Mitchell*, the worker was a business loans processing officer at a building society in Newcastle West. The worker was required to work at the employer's premises between 8.30 am to 5 pm. The worker, at the request of her employer, remained at work after normal working hours to conduct what was described as "a clean desk inspection". That additional work was completed and the worker left the premises shortly at 5.50 pm some 50 minutes after her usual work hours. It was the worker's intention to walk from her work premises to her car, which was parked nearby, to drive home. As the worker walked to her car, in the darkness, she tripped on the exposed roots of one of a number of fig trees located to the side of the roadway causing her to fall and suffer injury.

56. Deputy President O'Grady, in confirming the decision of the arbitrator, found whilst there was a link between the fact that the worker was employed and her tripping over the tree roots in the sense that but for her being employed she would not have made that journey, there was no link between the employment of the worker in her particular job as a loan processing officer and her tripping over the tree roots.

57. The legislature's intent as to the entitlement of a worker to compensation injured during a journey is found in the Minister's second reading speech concerning the proposed amendment of s 10:

> "… [t]hat journey claims will no longer be covered by the New South Wales workers compensation scheme consistent with the position in many other Australia jurisdictions. While workers for work will still be covered by the scheme, employees (sic, employers) will no longer be liable for a journey between a worker's home and his or her place of work where the risk of injury is outside the control of the employer" (Hansard Legislative Council, 20 June 2012).

58. Mr Field submits that there is a "link" between the employment and the incident (tripping and falling on uneven ground) firstly because of the requirement to attend the respondent's school at short notice as a casual or relief teacher, and secondly because he was walking hurriedly as it was a strict school and that staff were required to be at the school at 8.30 am.

59. Mr Field also submits that an inference of "urgency" should be drawn that he was required to meet an industrial commitment of the respondent's demand that he be at the school by 8.30 am to meet his obligations to the pupils and the principal.

60. Mr Hickey in making this submission referred to Part 4 of the Application as to the description of how the injury occurred.

61. I cannot accept this submission that an inference should be drawn on the basis of Mr Field's belief or perception that he was required to be at the school by 8.30 am. Part 4 of the Application alleges that "during the phone call the Applicant was notified of the urgency of the request; he was asked to arrive at work at 8.30 am". With respect to the person who drafted the Application, the evidence does not disclose that Mr Field was "notified of the urgency of the request; he was asked to arrive at work by 8.30 am".

62. I think I can infer from the evidence that Mr Field was to provide relief teaching for that day because of the absence of a permanent teacher.

63. I think I can also infer that Mr Field would learn of the duties to be allocated to him on arrival at the school.

64. However, I am unable to make a finding that it was a requirement or a demand of the respondent that Mr Field be at the school by 8.30 am when he received the telephone call from Casual Direct. There is no evidence upon which I could make such a finding.

65. It would, in my view, be unlikely that the respondent would expect a relief teacher to attend the school by 8.30 am with an hour's notice.

66. Mr Field gave no evidence that he was directed by Casual Direct to be at the school by 8.30 am. The only evidence with respect to instructions received from Casual Direct was that Mr Field was "asked to attend Hampden Road [sic] Public School Lakemba" to provide relief teaching for that day.

67. Mr Field in his statement says that he taught at this school in the past: it is a strict school, staff are required to be at the school by 8.30 am in order to be given lessons for the day; shown to the classrooms or allocated 8.30 am playground duty.

68. I think I can infer from Mr Field's statement that permanent or regular staff, including casual teachers, are expected to be at school by 8.30 am, but I do not think I can find that a relief teacher in the position of Mr Field was required to be at the school at 8.30 am when contacted by Casual Direct at short notice.

69. There is no evidence that Mr Field was requested by the respondent through its agent to be at the school at 8.30 am or as a result of previous conversations with the school's principal or some other person authorised by the respondent that he was to attend the school at 8.30 am after being contacted by Casual Direct.

70. There is no evidence from Mr Field as to when he previously taught at the school or that he had been given directions that as a casual or relief teacher he had to be at the school at 8.30 am after being contacted by Casual Direct.

71. Walking to the school after being dropped off by the bus is something Mr Field would normally have done. There is no evidence that this was not Mr Field's normal mode of travel to the school.

72. In my view, any "link" that may arguably exist between the employment and the incident is Mr Field's belief or perception that he had to be at the school at 8.30 am. This belief or perception is not supported by evidence that the respondent required or demanded his

attendance at that time. In my view, the link is far too tenuous to meet the causal requirement that the subsection, properly construed, requires.

73. I do not think the discussion by Deputy President O'Grady in *Mitchell* that the term "connection", as it appears in s 10(3A) may encompass some other association with the employment, can be construed as meaning a perception by Mr Field of an industrial commitment or obligation to pupils and the principal to be at the school at 8.30 am without evidence that the belief or perception was of real events, which are not external events, rather than imaginary (see discussion by Deputy President Roche as to the meaning of perception of real events in the workplace in *Attorney General's Department v K* [2010] NSWCCPD 76 at [52]).

74. There must be an award for the respondent.