

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**MATTER NO:** 4326/19  
**APPLICANT:** Kevin Geoffrey Eather  
**FIRST RESPONDENT:** Skillset Limited  
**SECOND RESPONDENT:** Kathleen Anne Eather  
**THIRD RESPONDENT:** Andrew Eather  
**FOURTH RESPONDENT:** Lauren Eather  
**DATE OF DETERMINATION:** 7 January 2020  
**CITATION:** [2020] NSWCC 11

The Commission determines:

1. The deceased worker, Bradley Thomas Eather, died on 10 November 2015 as a result of injuries sustained in a motor vehicle accident on the way home from work.
2. There was a real and substantial connection between the deceased's employment and the motor vehicle accident.

The Commission orders:

3. The applicant is to file and serve a statement regarding his dependency on the deceased by 21 January 2020.
4. The parties are to file written submissions in respect of dependency, apportionment, payment of the death benefit and interest by 31 January 2020.
5. Any submissions in reply are to be filed and served by 7 February 2020.
6. At the conclusion of the time allowed for submissions, the dispute will be determined "on the papers".

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

**Glenn Capel**  
**Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*S Naiker*

Sarojini Naiker  
Senior Dispute Services Officer  
As delegate of the Registrar



## STATEMENT OF REASONS

### BACKGROUND

1. The deceased worker, Bradley Thomas Eather (the deceased), died on 10 November 2015 as a result of injuries sustained in a motor vehicle accident when he was driving home from Bathurst to Clifton Grove after completing his usual duties for Skillset Ltd (the first respondent).
2. On 11 November 2015, the first respondent completed a Report of Injury Form that was submitted to Allianz Australia Workers Compensation (NSW) Ltd (the insurer).
3. On 23 November 2015, the insurer wrote to the estate of the deceased and advised that it had insufficient information to accept liability. It invited the estate to provide further information for review.
4. On 10 December 2015, the insurer advised that liability would not be accepted because the deceased was on a journey from his place of employment to his place of residence at the time of his death and there was no real and substantial connection between the incident and his employment. It cited s 10(3)(A) of the *Workers Compensation Act 1987* (the 1987 Act).
5. On 14 March 2017, the applicant's solicitor served a notice of claim in respect of the death benefit on behalf of the estate of the deceased, who died intestate.
6. On 24 May 2017, the insurer issued a notice pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that it was liable to pay compensation in respect of the deceased's death on the grounds that there was no real and substantive connection between the deceased's employment and the accident that led to his death.
7. The insurer indicated that it did not consider that there was evidence available to support that the deceased was fatigued as a consequence of his employment or that fatigue caused the accident. It cited s 10 (3A) of the 1987 Act.
8. Kevin Geoffrey Eather (the applicant), as the legal personal representative of the deceased, filed an Application to Resolve a Dispute (the Application) that was registered in the Commission on 23 August 2019 seeking the lump sum death benefit of \$750,000 in accordance with s 25(1)(a) of the 1987 Act.
9. At the arbitration hearing, the applicant's counsel, Mr Morgan, advised that the applicant intended to make a claim on the death benefit as a dependent. The Application was also amended to make a claim for interest on the lump sum benefit from 14 March 2017 and to seek orders authorising payment pursuant to ss 85 and 85A of the 1987 Act.
10. The deceased mother, Kathleen Anne Eather, is the second respondent, his brother, Andrew Eather, is the third respondent and his sister, Lauren Eather, is the fourth respondent.

### PROCEDURE BEFORE THE COMMISSION

11. 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.

## **ISSUES FOR DETERMINATION**

12. In the absence of any evidence of dependency of the applicant, I determined that the liability dispute would be dealt with and if necessary, I would issue a direction regarding the further conduct of the matter.
13. The first respondent's counsel, Mr Callaway, conceded that there was no dispute that the motor vehicle accident on 10 November 2015 was caused by fatigue.
14. The parties agree that the following issues remain in dispute:
  - (a) was there a real and substantial connection between the deceased's employment and the accident? – s 10(3A) of the 1987 Act;
  - (b) whether there were any persons wholly or partially dependent on the deceased – s 25 of the 1987 Act;
  - (c) apportionment of the lump sum of \$750,000 payable – s 29 of the 1987 Act;
  - (d) orders in relation to payment of the compensation – ss 85 and 85A(1)(a) of the 1987 Act, and
  - (e) whether the first respondent is liable for the payment of interest – s 109 of the 1998 Act.

## **EVIDENCE**

### **Documentary evidence**

15. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) Application and attached documents;
  - (b) First Respondent's Reply and attached documents;
  - (c) Second Respondent's Reply and attached documents;
  - (d) Third Respondent's Reply and attached documents;
  - (e) Fourth Respondent's Reply and attached documents;
  - (f) Application to Admit Late Documents received on 5 December 2019, and
  - (g) Application to Admit Late Documents received on 10 December 2019.
16. Written submissions were also handed up by the second respondent's counsel, Mr Latham.

### **Oral evidence**

17. No party sought leave to adduce oral evidence or cross examine any witnesses.

## **REVIEW OF EVIDENCE**

18. I will focus my review on the evidence relevant to the liability dispute.

### **Applicant's statements**

19. The applicant provided a statement on 1 March 2017. He advised that the deceased commenced employment with the first respondent as a printer/graphic art apprentice in September 2015. He had been previously unemployed for most of the year.

20. The applicant stated that his son looked very tired at the end of a day's work. He would get up early and leave home about 5.30 am, travel to Orange to meet a friend, Sean Norton, and then drive to Bathurst. He advised that by the time that his son arrived home at night, he was very tired. He was driving to work in his car with Mr Norton when he was involved in the fatal accident.
21. The applicant stated that his other son, Andrew, had noticed that the deceased had been getting up very early and was very fatigued at the end of a day's work. They thought that the deceased was very fatigued on the day that he died.
22. In his statement dated 15 November 2017, the applicant advised that he moved out of the family home on 12 June 2014. He caught up with his children on most Sunday nights at his house in Orange. He stated that he saw the deceased once a week after he moved out of the marital home.
23. The deceased told him that he would wake at 5.00 am and travel to work at Bathurst with a friend from Orange. The deceased also attended a gym after work. On the occasions that he saw the deceased after he started work at the first respondent, he appeared to be tired.
24. The applicant stated that at a wedding a few weeks before his death, the deceased said to the applicant's father that "I am so tired, I need to go home and sleep". The applicant thought that this was strange.

#### **Statement of Jayne Dell**

25. Jayne Dell, the applicant's partner of approximately four years, provided a statement on 21 February 2019. She advised that she had met the deceased on about three occasions before seeing him at the wedding near Boggabri. She confirmed that the deceased had told his father that he was really tired because he had been getting up early and he had to get up early to travel to the wedding. The applicant's father asked the deceased if he wanted him to drive him home and the deceased agreed.

#### **Statement of Kathleen Eather**

26. Kathleen Eather, the deceased's mother, provided a statement 9 April 2019. She stated that the deceased commenced part-time work at a bakery from 9.00 am to 3.00 pm or 4.00 pm in July/August 2015.
27. Ms Eather stated that the deceased commenced employment as an apprentice with the first respondent on 14 September 2015. He worked from 6.30 am to 3.00 pm or 3.30 pm. Initially, the deceased drove from Clifton Grove to Bathurst each day, but after a few weeks, he car-pooled with Sean Norton to save fuel costs. Their house was a 10 minute drive from Orange.
28. Ms Eather stated that the deceased's alarm would sound at 4.00 am. She would hear him get up, have a shower and eat breakfast. Sometimes he would pack more food for lunch. He would usually leave for work at 4.45 am or 5.00 am and she estimated that they would have arrived at work at 6.15 am each day. He returned to Orange each day in time to pick up his sister at the bus stop near their home at 4.00 pm. Sometimes he would take his sister to dancing class and he would pick her up at 7.30 pm.
29. Ms Eather stated that the deceased attended the gym every afternoon during the week. She noticed that he had bags under his eyes. and he was very tired after work each day. He would often say that he was tired. At dinner time, he would yawn and rub his eyes. After dinner, he would prepare his lunch for the next day and then have a shower or brush his teeth. He was usually in bed by about 9.00 pm each night.

30. Ms Eather stated that the deceased would usually sleep in on weekends and spend the day at home playing with his puppy. He usually spent time with his friends in the afternoons. Sometimes he would go out with his friends and if he drank alcohol, he would stay in town overnight.
31. Ms Eather stated that the deceased travelled to a wedding in Boggabri on a Saturday (1 November 2015). She would not let him drive after work on the Friday because he was too tired. He turned 21 years old on 4 November 2015 and he had a small celebration with his friends at a bowling club and a friend's house in Orange. On 10 November 2015, she heard the deceased talking to his brother before he left for work.

### **Statement of Andrew Eather**

32. Andrew Eather provided a statement on 17 April 2019. He confirmed that the deceased would leave early for work and he was home in time to pick up his sister from the bus stop. He stated that the deceased generally looked tired and had bags under his eyes after he started work with the first respondent.
33. Mr Eather stated that on 10 November 2015, he finished work at the bakery at about 3.30 am and he was eating his dinner at 4.00 am when his brother woke up to go to work. He recalled that his brother looked like he had just woken up and he rubbed one of his eyes.

### **Statement of Lauren Eather**

34. Lauren Eather provided a statement on 29 April 2019. She stated that the deceased would regularly pick her up at about 4.00 pm from a bus stop. She noticed that he was tired, he would yawn, and he was anxious to get home. On the day before the accident, he picked her up from her dance class in Orange at between 8.00 pm and 9.00 pm and drove her home. He was yawning and when they arrived home, he went straight to bed.

### **First Respondent's statements and documents**

35. Anthea Koehn, the Operations and Injury Manager, provided a statement on 8 May 2017. She advised that she only had met the deceased during his induction in September 2015. She stated the deceased did not look tired or mention that he was tired during the induction.
36. Paul Weal, a print finisher, provided a statement on 9 May 2017. He advised that he worked with the deceased for two months. He stated the deceased did not complain about being tired or appear to be to be tired.
37. Mr Weal stated that the duties could be physically tiring. Guillotine duties and work on the folding machine were tiring. Work hours varied, but most workers started at 6.30 am. He was unaware of the duties that the deceased performed in the week prior to his accident.
38. Ryan Sparke, a print finisher, provided a statement on 9 May 2017. He advised that he did not work with the deceased on a regular basis as he worked in a different area. He stated the deceased did not complain to him about being tired and he did not notice that he was tired. He worked with the deceased on the date of the accident and he did not appear to be tired.
39. Mr Sparke stated that from 6 November 2015 to 10 November 2015, he was doing hand binding with the deceased and Mr Norton. This involved stab sewing the newspaper to bind the spines, gluing, trimming three edges on a guillotine, cutting covers, placing a title in the spine and gluing the paper into the cover. He stated that hand binding was not strenuous. The deceased told him that he was going to have a party for his 21<sup>st</sup> birthday, but he did not know when or if this happened.

40. Dominic Keniry, a print finisher, provided a statement on 9 May 2017. He advised that he worked with the deceased for about three months. He did not recall the deceased complaining about being tired and he saw nothing out of the ordinary to indicate that the deceased was tired. He stated that the deceased had a 21<sup>st</sup> birthday party on the weekend before 10 November 2015 or the weekend before that.
41. Craig Randazzo, the CEO of the first respondent, provided an unsigned statement on 8 May 2017. He could not recall ever meeting the deceased, but he confirmed that he did not work for excessive hours and he had never performed any overtime. All breaks were taken. He stated that the first respondent would address any complaints or appearances of tiredness. He was aware that the deceased had a 21<sup>st</sup> party the week before he died, and that he had a new puppy.
42. Mr Randazzo stated that the deceased helped his sister, Lauren, and he would often drive her to dance class after work.
43. Jane McWilliam, a senior manager, provided a statement on 8 May 2017. She indicated that she had never met the deceased, but she was aware that he and Sean Norton car-pooled. She stated that the deceased worked normal hours without overtime, and she believed that he had a 21<sup>st</sup> birthday party on the Saturday night before his accident. The deceased had a new blue healer cattle dog and she thought that the deceased may have been up and down at night looking after it.
44. Amanda Ferguson, the regional manager, provided a statement on 8 May 2017. She advised that she had minimal contact with the deceased, but confirmed the nature of his duties and his normal hours of 7.00 am to 3.30 pm, with an occasional starting time of 6.30 am. She was aware that he had done some casual work in a bakery before starting work with the first respondent. She had not had any discussions with the deceased about tiredness or fatigue.
45. Ms Ferguson advised that the deceased and Mr Norton car-pooled, and that the deceased was driving his own car on the day of the accident. She did not know whether he had a birthday party on the weekend before the accident and she did not recall being told that the deceased owned the puppy. She did not believe that the work performed by the deceased was strenuous or physically tiring.
46. Dion Moxon, the deceased's supervisor, provided a statement on 9 May 2017. He advised that the deceased's duties included hand binding and use of the guillotine and folding machines. He was unaware of the nature of the duties that the deceased performed on his last day of work. He stated that most workers commenced duties at 6.30 am, but this was not a requirement.
47. Mr Moxon stated that the deceased was a good worker. He never complained about being tired, and he did not observe that the deceased was tired. He considered that the work of an apprentice was not tiring, especially in the first couple of years when they were learning the trade. He thought that the deceased may have mentioned a birthday party, but he did not know when this was.
48. The deceased's time sheets show that he worked from 7.00 am to 3.30 pm prior to 22 October 2015, and then from 6.30 am to 3.00 pm. Details were confirmed by Krystal Jeffery in her statement dated 1 March 2019.
49. In an undated letter, Mr Randazzo advised that in the six weeks of his employment, no issues were ever raised about fatigue. He stated that fitness for work and fatigue management were an important priority and when applicable, fatigue management plans were put in place. He advised that a fatigue management plan was not warranted in the deceased's case, because he was working a standard 38 hour week with regular breaks and no overtime.

## **Statements of Sean Norton**

50. Sean Norton, an apprentice printer, provided a statement to the Police on 11 November 2015. He stated that the deceased would usually drive to his house each morning and then they would drive to work in his car. Occasionally the deceased would drive. Mr Norton advised that he rose each day at 4.00 am. The deceased told him that he usually rose at 5.00 am and he reached Orange at 5.30 am. They then drove to Bathurst for a 6.30 am start. They always observed the speed limit.
51. As his car registration had expired, it was agreed that the deceased would drive his ute to work. On 10 November 2015, the deceased arrived at 5.30 am. He stated that the deceased was always tired in the mornings and it was not usually until after smoko that he would wake up. The deceased had a normal lunch and he had been going to the gym for four or five weeks.
52. Mr Norton stated that they left work at 3.00 pm and the deceased started sneezing due to hay fever. He did not see the deceased taking any medication for the condition. He advised that he fell asleep near the roadworks at the Rocks and the next thing that he recalled was when he heard a loud bang. He looked at the deceased and noticed that he had suffered head injuries. He kicked the door open and escaped from the vehicle.
53. In a statement dated 5 March 2018, Mr Norton confirmed that he worked with the deceased and they drove to and from work together in their vehicles. They would alternate driving and normally one of them would sleep in the front passenger seat on the drive home after work. He advised that the shift commenced at 6.30 am and after working all day and having to drive home, they would be tired. They would talk to each other intermittently during the trips, or the passenger would look out of the window or doze.
54. Mr Norton stated that they finished work at 3.30 pm on the day of the accident and they did not talk much on the drive home. He estimated that they were about 10 km east of Lucknow when he saw a large semi-trailer approaching from Orange. Their vehicle veered slowly across the lane and when he looked across, he observed that the deceased had his head down on his chest and his eyes were closed. Mr Norton braced himself for the collision and put his head down under the dashboard before the vehicles collided. The ute spun violently but did not roll over. He looked at the deceased and could tell that he was dead. He was eventually able to free himself from the vehicle.
55. Mr Norton indicated that on most occasions when he was a passenger on the way home, he would take a nap because he always felt tired at the end of a day's work. The deceased told him that he had started going to the gym in the evening after a day's work.
56. Finally, in a statement dated 11 April 2019, Mr Norton advised that he could not recall whether the deceased worked on Friday 6 November 2015, but he confirmed that he drove the deceased to work in his car on 9 November 2015. He recalled that on several occasions between 14 September 2015 and 10 November 2015, the deceased had mentioned that he was tired at the end of the day's work.

## **Police documents and Brief of Evidence**

57. According to the Police Traffic Accident Report, the motor vehicle accident occurred at approximately 3.35 pm on a curved section of the Mitchell Highway, 1 km east of Guyong. The deceased's vehicle failed to negotiate a left hand bend, crossed onto the wrong side of the road and collided with a vehicle proceeding in the opposite direction.
58. Constable Lindsay-Egan provided a statement on 5 January 2016. She confirmed that she attended the accident site at 3.40 pm on 10 November 2015. She observed that the ute was badly damaged and that the deceased had suffered catastrophic injuries.

59. The Constable advised that she interviewed Catherine O'Brien, the driver of a vehicle that was proceeding behind the deceased's ute. The witness told her that the vehicle began to wander, and it appeared that the driver was distracted or was falling asleep. Ms O'Brien then saw the ute go straight into the path of the truck that was travelling in the opposite direction.
60. Another witness, John Dingell, who was driving behind two trucks, advised that he saw the ute cross lanes and go in front of the truck.
61. The Constable confirmed that she interviewed the driver of the tanker, Kevin Whalen. He indicated that as he started coming down the hill, the deceased's ute crossed lanes and came straight at his vehicle.
62. The Constable advised that she spoke to Sean Norton, who told her that he was asleep and then heard a crash. He told her that he had been asleep for a while. He later told her that the deceased had just had his 21<sup>st</sup> birthday and he had partied over the weekend. The deceased had also been at the pub the week before, but he had not been drinking.
63. The Constable spoke to Michael Manson, who was driving a truck immediately behind the tanker that was involved in the collision. He advised that both heavy vehicles were travelling under the speed limit. He saw the ute go onto the wrong side before it collided with the tanker. The tanker driver had attempted to avoid the ute, but he was unable to do so.
64. The Constable later spoke to the deceased's parents. The second respondent advised that the deceased had left home at about 5.15 am and usually arrived home from work at 3.50 pm. The applicant told her that he was concerned that the deceased had been "burning the candle at both ends", with contributions from early starts, a long drive, busy days and the recent gym interest.
65. The Constable reported that the deceased would usually drive to Mr Norton's house each morning and then Mr Norton would drive them to work. As Mr Norton's car registration had expired, they drove to work in the ute on the day of the accident. Mr Norton told her that the deceased had hay fever and had sneezed a few times, but he had not seen him take any medication.
66. The Constable stated that the Police considered that the major contributing factor to the accident was fatigue. The deceased had recently started a new job with early starts, the work was physically demanding, the days were longer than he was accustomed to and he had been attending a gym for four to six weeks. The vehicles were driving at a slower pace due to another collision and the deceased was driving into the sun.

### **Reports of Dr Desai**

67. Dr Desai, a respiratory and sleep medicine physician, reported on 26 September 2018. He was asked to assume that the deceased rose each morning at 5.00 am, set out from Orange to Bathurst at 5.30 am and worked from 6.30 am to 3.00 pm, when he returned home. The distance was 110 km return.
68. The doctor noted the nature of the deceased's duties that could be physically tiring. He was advised that the deceased attended a gym and lifted weights for about an hour each day after work. He was informed that the deceased went to bed around 10.30 pm to 11.00 pm and that he had left a wedding at 8.30 pm because he was tired.
69. Dr Desai confirmed that the deceased fell asleep at the wheel and this was the cause of the accident. This was in the context of chronic partial sleep restriction, because he generally had up to 6.5 hours of sleep each night before work. He stated that according to medical literature, adults required seven to eight hours of sleep to avoid sleep restriction or deprivation.



70. Dr Desai stated that the other fatigue factor that contributed to him falling asleep was circadian sleepiness. The deceased fell asleep at a time of circadian sleepiness. He stated that there was a peak in accidents in the early morning and in the mid-afternoon, because at these times, bodies experienced a natural tendency for sleepiness that was regulated by circadian or diurnal rhythm, although circadian influences were less prominent in younger individuals.
71. The doctor advised that the sleep restriction and fatigue would have been minimised if the deceased went to bed at least an hour earlier. He concluded that there were work factors, namely starting work early and finishing in the afternoon, that contributed to him falling asleep, but these employment factors were not substantial contributing factors.
72. In a supplementary report dated 10 December 2018, Dr Desai, armed with an explanation of the meaning of a “real and substantial connection”, advised that the deceased’s work was a real and substantial contributing factor to him falling asleep immediately before the motor vehicle accident. The early starts and lack of fatigue management by his employer had likely led to chronic sleep restriction, causing him to fall asleep at the wheel of his car.
73. Finally, in his report dated 26 April 2019, Dr Desai noted that according to his mother, the deceased would go to bed at 9.00 pm and wake up at 4.00 am. This meant that the deceased had approximately seven hours of sleep each night, so the severity of the sleep deprivation would have been reduced. He also noted that his mother had indicated that the deceased looked tired after work, which was consistent with sleep deprivation causing driver fatigue. The doctor stated that he saw no reason to change his opinion.

#### **Report of Professor Dawson**

74. Professor Dawson, an expert in sleep and fatigue research, provided a report on 15 October 2019. He conceded that it was very difficult to determine definitively whether an accident was caused by fatigue or something else. This required a consideration of the evidence of fatigue and whether the circumstances of the accident were consistent with a fatigue-related accident.
75. Dr Dawson indicated that it was likely that the deceased’s hours of work and the travel to and from work resulted in a significantly reduced sleep opportunity at times of the greatest likelihood of sleep and consequently a greater likelihood of fatigue. He stated that it had been established in literature that early start times were likely to lead to increased levels of fatigue, which is in part due to circadian factors that typically result in an increased urge for sleep overnight and lower sleepiness during the day. This meant that the deceased would have found it difficult to go to sleep early enough to get a full night of sleep before work days.
76. Professor Dawson concluded that it was likely that the deceased would have had shortened sleep periods on the nights prior to work days. He stated that actual sleep obtained was usually significantly lower than the available sleep opportunity, and it was likely that the deceased was routinely obtaining between 5.5 to 6.5 hours of sleep per night during the working week, instead of the recommended 7 to 9 hours of sleep each night. This reduced amount of sleep was likely to be associated with increased levels of fatigue during the day.
77. Professor Dawson stated that the time of day when the accident occurred also may have been associated with an increased likelihood of fatigue, because circadian rhythms typically had a dip in alertness in the mid-afternoon when sleepiness and fatigue were heightened. Therefore, he thought that it was likely that the deceased was experiencing heightened sleepiness at the time of the accident, on a background of sleep deprivation.

78. Professor Dawson cautioned that there was no direct evidence of the amount of sleep the deceased had in the days immediately preceding the accident or whether he was acting in a manner directly attributable to fatigue. However, he noted the statements of family members and Mr Norton that were suggestive of the deceased being tired after work and at the wedding. This evidence was consistent with likelihood that the deceased was significantly fatigued due to his work situation and at the time of the accident.
79. Professor Dawson noted details of the mechanism of the accident and commented that the failure to respond to changes in road direction was often a direct indicator of reduced situational awareness, or even falling asleep, associated with elevated levels of fatigue. The evidence suggested that the deceased failed to take any evasive action and excessive speed was not a factor. He was proceeding in a slow fashion and was wandering, consistent with a fatigue-related accident.
80. Professor Dawson stated that early work start times are associated with even earlier wake times and this results in shortened sleep periods. It is difficult to go to sleep early enough to get a full night of sleep due to the demands of social activity and the high levels of alertness from 6.00 pm to 9.00 pm. This was compounded by the deceased's family responsibilities.
81. Professor Dawson concluded that as the deceased's start times were likely to have resulted in shortened sleep periods, which resulted in fatigue, he believed that there was a real and substantial connection between the deceased's employment and his fatigue. He indicated that the deceased may have used his weekends to catch up on his sleep, meaning that his employment was likely to have been associated with increased levels of fatigue.
82. Professor Dawson stated that that the length of the commute to and from work and the change in the shift times may have also contributed to his fatigue, because it was more difficult to move a human's circadian rhythms backwards rather than forward. This meant that the deceased may have had difficulty getting to sleep 30 minutes earlier each night, resulting in sleep deprivation. It was also possible that the physical nature of the deceased's work tasks may have contributed, although he conceded that he did not have precise details of the duties, the timing of breaks and actual shifts, so he was obliged to make assumptions.
83. Professor Dawson conceded that some of the deceased's fatigue may have resulted from an increased amount of physical exercise at the gym, although he stressed that generally the primary cause of fatigue was reduced sleep rather than high levels of physical activity. Therefore, he thought that any contribution to the deceased's fatigue by his gym work would have been minimal.
84. In conclusion, Professor Dawson stated that he was satisfied that the deceased was fatigued at the time of the accident, the accident was fatigue-related, and the deceased's employment had a real and substantial connection with his fatigue at the time of the accident.

### **Report of Glen Smith**

85. Glen Smith, an ergonomist and occupational therapist, reported on 3 December 2019. He noted that factors that contributed to and increased the risk of fatigue included work schedules such as early start and finishing times or late finishes, short breaks between shifts, overtime or double shifts and not enough non-sleep rest breaks during a shift.
86. Mr Smith stated that the mental and physical demands of a job were also relevant. However, he observed from the statements that on the day of the accident and the two days beforehand, the deceased's duties were not physically demanding and contained a variety of tasks.

87. Mr Smith indicated that the length and quality of sleep was also a factor in the onset of fatigue. He stated that adults generally required seven to eight hours of sleep per day and fatigue could occur if they had less sleep and were unable to overcome the "sleep debt". It could take days to recover from sleep debt. He noted that the deceased worked an eight hour shift and he had breaks at 9.30 am and 12.00 pm. He commuted by car for 50 minutes each way. Therefore, he had the opportunity to sleep for 14 hours per day.
88. Mr Smith acknowledged that the deceased's commute time of 8.3 hours per week was greater than the Australian average time of 4.5 hours, but the level of commuting would be considered as low risk. Nevertheless, he agreed with Professor Dawson that the effects of fatigue may have been heightened at the time of the accident due to circadian rhythms.
89. Mr Smith was largely in agreement with the views of Professor Dawson, but he noted that some of the literature relied upon by the Professor related to shift workers, early starts and irregular work schedules, which would not apply to the deceased. Further, he noted that the first respondent could not control what the deceased did outside of work.
90. Mr Smith noted that the deceased had the weekend off and there was only one work related sleep opportunity on the Monday night. He stated that if the deceased was fatigued, it seemed likely that a significant component of that fatigue had accumulated over that weekend and therefore, it was unlikely to be work related fatigue.
91. Mr Smith stated that there was no sudden introduction of early shifts for the deceased and the variation was only 30 minutes earlier, and the deceased had the opportunity to sleep for 14 hours per night for a period of 2.5 weeks. The fact that social activities might impact on the deceased's sleep could not be controlled by the respondent.
92. Mr Smith indicated that Professor Dawson's assumption that the deceased used his weekends to catch up on sleep was unsustainable, because the research cited by him suggested that young adults slept for 8.5 hours per night on weekends and 7.5 hours per night on weekdays. He believed that two working days of for eight hours per day with no excessive physical demands would not result in work related fatigue.
93. Mr Smith agreed that it was likely that the deceased was fatigued, and the accident was caused by fatigue, but he disputed that there was a real and substantial connection with the deceased's employment. He considered that an assessment based upon the legislative requirements should be completed before a decision can be made regarding this issue.

## **APPLICANT'S SUBMISSIONS**

### **Was there a real and substantial connection between the deceased's employment and the accident? – s 10(3A) of the 1987 Act**

94. Mr Morgan submits that there is no dispute that the accident was caused by fatigue and the issue concerns whether there was a real and substantial connection between the deceased's employment and the accident. The relevant test was discussed in *Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden*<sup>1</sup> and *Bina v ISS Property Services Pty Ltd*<sup>2</sup>. There is no need to show a casual relationship, only a connection.
95. Mr Morgan submits that the deceased was only 21 years old. He had not been exposed to the restraints and requirements of a full time job. He did not work long hours, but it was likely that he was fatigued, his cognition was affected, and this led to the accident. This represented the relevant connection.

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<sup>1</sup> [2014] NSWCCPD 13 (*Wickenden*).

<sup>2</sup> [2013] NSWCCPD 72 (*Bina*).

96. Mr Morgan submits that the deceased performed physical work although the evidence varies as to whether this was taxing. Some aspects would have tested him physically. His hours were not excessive, but he was a young worker at the start of his working life. He rose at 4.00 am in the morning, and his starting time changed from 7.00 am to 6.30 am. This fitted in with the evidence of Professor Dawson.
97. Mr Morgan submits that great comfort can be gained from the reasoned explanation of Professor Dawson. The deceased had to travel 40 to 45 minutes to work and the nature of his apprenticeship required him to work at a particular place. Professor Dawson was satisfied that there was the relevant relationship.
98. Mr Morgan submits that the views of Professor Dawson are supported by Dr Desai. Dr Desai indicated that the accident could have been avoided if the deceased had more sleep. Dr Desai stated that even though the deceased had seven hours of sleep, he was struggling with tiredness and this bolsters the opinion of Professor Dawson.
99. Mr Morgan submits that Mr Smith is an ergonomist and his report has little, if any relevant comment about the issues in dispute. He submits that it is difficult to understand how an ergonomist and occupational therapist would be able to comment on whether work was likely to give rise to fatigue, when he placed relevance on the fact that the physical requirements were not very onerous, and the deceased had a 14 hour sleep opportunity. He is not qualified to talk about the gains associated with longer sleep. This is on a background of the deceased being a young apprentice and the statements of Mr Norton, who may or may not have been awake at the time of the accident.
100. Mr Morgan submits that Mr Norton was a young apprentice and he also had difficulty staying awake, so this also shows a causal relationship existed as to why both nodded off. The early start at work caused them to fall asleep. The first respondent cannot avoid the fact that both apprentices were tired. The question is whether fatigue/tiredness led to the accident and this was related to the employment. The only evidence to address this is Professor Dawson.
101. In reply, Mr Morgan submits that the present matter can be distinguished from *Bina*, because the deceased was not merely on a journey when he was struck by another vehicle. The evidence supports a real and substantial connection.
102. Mr Morgan submits that in *Mitchell v Newcastle Permanent Building Society Ltd*<sup>3</sup>, the worker was not on her usual journey when she tripped over in the dark. The present state of the law would suggest that there was the requisite connection between Ms Mitchell's injury, employment and the journey. Therefore, *Mitchell* is deceptive because subsequent decisions have "loosened up" the interpretation and application of s 10(3A) of the 1987 Act.
103. Mr Morgan submits that the first respondent is based in Orange and work was provided to apprentices, who worked elsewhere. The deceased had never worked regular hours in a regular job, and he was still coming to terms with it. He had never risen at 4.00 am to go to work and then travel for 40 to 45 minutes. The evidence suggests that he was struggling.

## **SECOND RESPONDENT'S SUBMISSIONS**

104. Mr Latham submits that the authorities confirm that there is no need to show that the accident was caused by the deceased's employment, rather that the employment caused fatigue and there was an "a" connection, not "the" connection. There is no dispute that fatigue caused the accident and no witness has suggested that the deceased was not fatigued. Professor Dawson supports a relevant connection.

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<sup>3</sup> [2013] NSWCCPD 55 (*Mitchell*).

105. Mr Latham submits that Mr Smith is not an expert in the classical sense, because he is not a sleep expert and he has been distracted by the question as to whether the first respondent had satisfied its legislative obligations. Whether the employer should have dealt with fatigue in a particular way is irrelevant. Mr Smith did not address the question as to whether there was a real and substantial connection and his conclusions are irrelevant.
106. In reply, Mr Latham submits that the Commission needs to determine whether there was a real and substantial connection. The submission that other factors such as late nights and gym work contributed to the deceased's fatigue is a wrong statement of the statutory test. The connection between work and the injury only has to be one of the reasons, not the only reason. Circadian factors were relevant. Social factors affect all workers.
107. Mr Latham submits that *Mitchell* was determined on the basis of the tenuous work connection and unsubstantial nature of the link. The conclusion that the journey was done merely undertaken as a consequence of being employed was obiter and was irrelevant to the ultimate decision.

### **THIRD RESPONDENT'S SUBMISSIONS**

108. The third respondent's counsel, Mr Gaitanis, submits that Professor Dawson considered that the small change in the starting time was possibly a further contributing factor to the deceased's fatigue and perhaps the young man had not fully adapted to the change.
109. Mr Gaitanis submits that Professor Dawson has published a number of articles regarding the effects of fatigue on accidents, driving performance during sleep restriction and circadian misalignment, as well as the effects of fatigue on long haul airline pilots. He satisfied each limb in respect of his specialised knowledge, experience and training. He deals with real phenomenon on a background of abundant experience.
110. In contrast, Mr Smith is an ergonomist and occupational therapist which means that he does not have the expertise to provide a compellable report. He was aware of the issue concerning the early starts and the change in starting time. He continued to refer to the fact that the deceased could have slept for 14 hours to catch up, but this avoids the issue. His expectation that the deceased should have gone straight to bed after work is implausible, and he did not address whether there was a real and substantial connection.
111. In reply, Mr Gaitanis submits that Mr Norton confirmed that the deceased had mentioned that he was tired on a number of occasions and this evidence has not been contradicted. The fact that the deceased had not complained to his employer is of no consequence, given that he had only been employed for seven weeks.

### **FOURTH RESPONDENT'S SUBMISSIONS**

112. The fourth respondent's counsel, Ms Goodman, made no submissions regarding the expert evidence, which had already been addressed. She submits that the principles were considered by President Keating in *State Super Financial Services Australia Limited v McCoy*.<sup>4</sup>

### **FIRST RESPONDENT'S SUBMISSIONS**

113. Mr Callaway submits that the authorities show that the issue of a real and substantial connection is a question of fact. The facts in the present case differ from the authorities.

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<sup>4</sup> [2018] NSWCCPD 26, (*McCoy*).

114. Mr Callaway submits that the accident occurred on a Tuesday, and the deceased only worked on the Monday, so any work connection would likely have dissipated over the weekend. The evidence of tiredness was anecdotal, and when the deceased was at work, there were no signs or complaints of tiredness. If he had been genuinely tired, he would have been seen.
115. Mr Callaway submits that Messrs Weal, Sparke and Keniry confirmed that the deceased never complained about being tired and he did not appear to be tired. He did hand binding on the day of the accident and this work was not strenuous. Mr Randazzo stated that if the deceased had complained about tiredness, this would have been addressed. The deceased worked regular hours without overtime until his accident.
116. Mr Callaway submits that the applicant was concerned that the deceased was “burning the candle at both ends” and the evidence shows that he had other responsibilities around the household. He attended the gym, and this contributed to his tiredness. The evidence shows that he went to bed at 9.00 pm each night and slept for seven hours. This is contrary to the history recorded by Dr Desai, so his opinion can be rejected. Further, Dr Dawson stated that 80% to 90% of the time in bed was spent sleeping, meaning that the deceased slept for seven hours during the week and he slept in on weekends.
117. Mr Callaway submits that the deceased spent time with his puppy, socialised with friends and picked up his sister from the bus stop, so there were a lot of factors contributing to his fatigue. One could not immediately conclude that the deceased’s work hours caused or contributed to his fatigue. There is no issue that the deceased fell asleep because he was tired, and his age, activities and sleep habits may have contributed, but these are not factors that have a real and substantial connection with his employment. The deceased did not perform strenuous work on the day of his accident, and he had only driven for less than 40 minutes in broad daylight.
118. Mr Callaway submits that Dr Dawson’s conclusion on causation cannot be accepted. The deceased did not perform strenuous or shift work, and there was no change in his hours. The deceased’s starting time were similar to the usual starting time for tradesmen and he drove every second day. The need to travel was not out of the ordinary. Circadian factors affect everyone who start work at 6.30 am, and there was no connection with the deceased’s work merely by their existence.
119. Mr Callaway submits that the deceased was sleeping seven to nine hours as recommended by Professor Dawson at least on Friday and Saturday nights, at it was open to him to go to bed earlier on Sunday nights. He attended a gym, so his fatigue may have been caused by exercise.
120. Mr Callaway submits that Professor Dawson made a number of assumptions that the deceased was likely fatigued at the time of the accident, but the evidence of the employer’s witnesses suggests that this was not the case. This may have been a one off event and have no connection with the deceased’s employment.
121. Mr Callaway submits that Professor Dawson indicated that there were several key factors to be considered when determining if fatigue had a real and substantial connection with the deceased’s employment. The deceased’s hours were constant, and he still woke at 4.00 am when he started work at 6.30 am and 7.00 am. His travel requirements were constant, and his extra-circular activities varied. He was not involved in physically demanding work in the days leading up to his accident. There were other activities that established a real and substantial connection. The authorities confirm that the length of the commute to work is not a relevant factor.

122. Mr Callaway submits that Mr Smith has the requisite expertise in industrial matters, and he pointed out the difficulties with the articles relied upon by Professor Dawson which concerned shift workers. Based on the reasoning in *Mitchell* and *Bina*, there was no real and substantial connection between the deceased's death and his employment. Mr Norton had no issue with the deceased driving on the day of the accident.

## REASONS

### Section 10(3A) of the 1987 Act

123. There is no dispute that the deceased was suffering from fatigue that resulted in him falling asleep whilst he was driving home from Bathurst after work. This is consistent with the views of the Police. The issue that I need to determine is whether there was a real and substantial connection between the deceased's fatigue with his employment.

124. Section 10 of the 1987 Act deals with journeys. It provides:

- “10(1) A personal injury received by a worker on any journey to which this section applies is, for 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 (Safety and Traffic Management) Act 1999), unless the alcohol or other drug did not contribute in any way to the injury or was not consumed or taken voluntarily...
- (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....
- (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....”

125. In *Mitchell*, Deputy President O'Grady indicated that “substantial contributing factor” in s 9A of the 1987 Act and “real and substantial connection” in s 10(3A) of the 1987 Act required a causal element. He stated:

“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 causal element. In the case of s 10(3A) the causal nexus is the connection between the employment and the incident. 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).”<sup>5</sup>

126. The authorities since *Mitchell* have watered down this analysis and have established that the real and substantial connection referred to in s 10(3A) of the 1987 Act does not necessarily require a causal connection between the employment and the injury.

127. In *Bina*, President Keating stated:

“The Arbitrator’s essential conclusions, with which I agree, may be summarised as follows:

- (a) that a substantial connection is one “of substance” (*Badawi* at [82]-[83], [107]);
- (b) that “employment” in s 10(3A) is the same as in s 9A, that is, it is the activities of, or incidental to the employment, as opposed to the (mere) fact of being employed (*Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at [11]);
- (c) the mere fact that a worker must travel to and from work is insufficient to establish a real and substantial connection between the employment and the accident - there must be some real relationship (connection) between the activities of the employment and the accident out of which the personal injury arose, and
- (d) if merely travelling to and from work was sufficient to establish the relevant connection, s 10(3A) would be otiose.”<sup>6</sup>

128. In *Wickenden*, Deputy President Roche stated:

“There is no doubt that the actions of Ms Thomas played an important role in the accident. However, the submission that the accident was caused by the action of Ms Thomas, and that, therefore, Ms Wickenden cannot succeed, attributes to s 10(3A) a causative element that is not present. As noted above, the word ‘connection’ in s 10(3A) may, but does not necessarily, convey the notion of a causal connection (*Bina v ISS Property Services Pty Ltd* [2013] NSWCCPD 72 at [102] and [114] (*Bina*)).

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<sup>5</sup> *Mitchell*, [73].

<sup>6</sup> *Bina*, [112].



As the authorities discussed in *Bina* confirm, the expression ‘real and substantial connection’ does not require any causal relationship between the two circumstances or situations concerned (*Phillips v Commissioner for Superannuation* [2005] FCAFC 2 at [44]; *Commissioner of Superannuation v Benham* [1989] FCA 93; 22 FCR 413 at [421]). It requires an association or relationship. This approach to the meaning of ‘connection’ is consistent with the observations of the majority in *Comcare v PVYW* [2013] HCA 41; 88 ALJR 1 (*PVYW*), though those observations were made in a different context.”<sup>7</sup>

129. Further, the Deputy President stated:

“In s 10(3A), which talks about a real and substantial connection between the employment and the accident or incident, the connection may be provided by establishing that the employment caused the accident, but that is not a necessary requirement. Even if, contrary to my view, s 10(3A) requires a causal connection between the employment and the accident, the employment does not have to be the only, or even the main, cause. It is trite law that an accident can have many causes (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]).

The use of the indefinite article ‘a’, in s 10(3A), makes it clear that employment does not have to be ‘the’ connection between the accident or incident. It only has to be ‘a’ connection, albeit one that is real and of substance (*Bina* at [112], citing *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324; 75 NSWLR 503 (*Badawi*) at [82]–[83] and [107]). That requirement is satisfied on the facts of the present case because Ms Wickenden’s employment required her to work later than normal. That meant she finished work in darkness and had to journey home on a narrow country road in darkness.”<sup>8</sup>

130. This was also confirmed by the Deputy President in *Field v Department of Education and Communities*<sup>9</sup> as follows:

“The Arbitrator based his decision on the premise that Mr Field had to prove that his employment caused the accident or incident (the trip and fall). That follows from his reference to, and reliance on, *Mitchell and Kooragang*. That was an error. For the reasons explained in *Bina v ISS Property Services Pty Ltd* [2013] NSWCCPD 72 (*Bina*) at [102] and [114] and *Wickenden* at [37], s 10(3A) may, but does not necessarily, require a causal connection between the employment and the accident. It follows that I accept Mr Hickey’s submission that the word ‘connection’ in s 10(3A) involves a wider concept than causation.”<sup>10</sup>

131. Finally, in *McCoy*, President Keating stated:

“The test to be applied under s 10(3A) is a different and less demanding test to that applied to establish that an injury arose out of or in the course of employment pursuant to s 4 of the 1987 Act. The test under s 4 requires a causative element which is to be inferred from the facts as a matter of common sense. The test under s 10(3A) of a ‘real and substantial connection’ may, but does not necessarily, convey the notion of a causal connection. It requires an association or relationship between the employment and the accident or incident, which may be provided by establishing that the employment caused the accident or incident. However, employment does not have to be the only, or even the main cause.”<sup>11</sup> (citations omitted)

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<sup>7</sup> *Wickenden*, [37] to [38].

<sup>8</sup> *Wickenden*, [41] to [42].

<sup>9</sup> [2014] NSWCCPD 16 (*Field*).

<sup>10</sup> *Field*, [34].

<sup>11</sup> *McCoy*, [69].

132. In this matter, there is no dispute that the motor vehicle accident on 10 November 2015 was caused by fatigue. Therefore, I need to consider what was the cause of the fatigue and whether there was a real and substantial connection between the deceased's death and his employment.
133. The factual situation is not disputed. The evidence of the applicant and the second respondent establishes that the deceased had only worked for the first respondent since 14 September 2015. He had been previously unemployed for most of 2015, but he had obtained some part time work in a bakery in July or August 2015.
134. The evidence of the second respondent shows that during the week, the deceased went to bed at 9.00 pm and he rose each weekday at 4.00 am. He left home at around 5.00 am and he travelled to Orange where he met up with Mr Norton. They then drove to work in Bathurst. He initially started work at 7.00 am, but this later changed to 6.30 am. His shift concluded at 3.00 pm and he then drove home with Mr Norton. He would pick up his sister at the bus stop at 4.00 pm and sometimes he would take his sister to and from dancing class.
135. According to family members, the deceased looked tired, he had bags under his eyes, and he complained about being tired or was observed to be tired after a day's work.
136. The second respondent indicated that her son attended the gym every afternoon during the week. He would usually sleep in on weekends and spend the day at home playing with his puppy and he socialised with his friends in the afternoons and at night. She stated that he had a small celebration for his birthday on 4 November 2015. She also confirmed that her son was tired when he attended the wedding.
137. According to the applicant, the deceased rose at 5.00 am to travel to work. Given that he did not reside with the deceased, I consider that the evidence of the second respondent, namely that the deceased rose each weekday at 4.00 am, is more reliable.
138. The applicant told the Police that he was concerned that his son had been "burning the candle at both ends", with early starts, a long drive to work, busy days and the gym.
139. The applicant stated that on the occasions that he saw the deceased after he started work, he appeared to be tired and he suggested that the deceased was very fatigued on the day that he died. He advised that the deceased complained about being tired when he was attending a wedding a few weeks before his death. This evidence was corroborated by the applicant's partner, Ms Dell.
140. The applicant stated that he that he saw the deceased once a week after he moved out of the marital home and he caught up with his children on Sunday nights. It is unclear whether he saw his son on the Sunday, but he did not see his son on the day of the accident, so less weight can be given to his evidence regarding the state of the deceased on 10 November 2015.
141. The third respondent stated that the deceased looked tired and had bags under his eyes after he started work with the first respondent, whilst the fourth respondent indicated that the deceased was tired and on the day before the accident, when they arrived home that night, he went straight to bed.
142. The first respondent relies upon a number of statements from the deceased's work colleagues. Ms Koehn, Ms Ferguson and Messrs Weal, Sparke, Keniry and Moxon stated the deceased did not look tired or complain that he was tired when he was at work.

143. However, whether the deceased looked tired or made no complaints does not mean that he was not tired or fatigued. This was confirmed in *Namoi Cotton Co-Operative Ltd v Stephen Easterman (as administrator of the estate of Zara Lee Easterman)*<sup>12</sup>, where President Keating indicated that subjective assessments of the deceased's physical state based on her appearance at work was not determinative of whether she was in fact fatigued.
144. Mr Weal stated that the deceased's duties could be physically tiring but this depended on the nature of the job, whilst Mr Sparke confirmed that the deceased was only doing hand binding in the days before his accident and this was not strenuous. The nature of the duties performed by the deceased prior to 6 November 2015, when he commenced the hand binding, is unknown.
145. Mr Randazzo, Ms McWilliam and Ms Ferguson never met the deceased, so they can shed little light on the dispute apart from confirming the deceased's work hours and the fact that no complaints were made to management about fatigue.
146. The statements of Mr Norton contain a number of inconsistencies. He stated that the deceased told him that he rose at 5.00 am each weekday, which differs from the evidence of the second respondent.
147. Further, Mr Norton told the Police that he was asleep when the accident occurred, whereas in his statement dated 5 March 2018, he said that he was awake and looked across to the deceased shortly before the accident. Nevertheless, Mr Norton stated that he felt tired at the end of a day's work and the deceased had made similar comments to him.
148. It is true that Dr Desai's initial report was based on an incorrect history that the deceased went to bed around 10.30 pm to 11.00 pm, however, the history was corrected upon receipt of the statement from the second respondent and the doctor was aware that the deceased had seven hours of sleep during the week.
149. Dr Desai noted that the deceased's duties could be physically demanding and that he lifted weights at a gym for about an hour each day after work. He was satisfied that the deceased had chronic partial sleep restriction and that circadian influences, starting work early and finishing in the afternoon contributed to the deceased falling asleep. He stated that the deceased's work was a real and substantial contributing factor to him falling asleep immediately before the motor vehicle accident.
150. In my view, the report of Professor Dawson carries significant weight, given his qualifications and expertise. He quite rightly conceded that it was very difficult to determine definitively whether the accident was caused by fatigue, but this is not a matter in dispute as the first respondent concedes that the accident was caused by fatigue.
151. Professor Dawson stated that it was likely that the deceased's early start times, the change in the shift times, and the travel to and from work would have resulted in a significantly reduced sleep opportunity and he would have only slept for 5.5 to 6.5 hours instead of 7 to 9 hours each night. This would have likely led to increased levels of fatigue, which was in part due to circadian factors. Circadian factors were also in play in the mid-afternoon when sleepiness and fatigue were heightened. He stated that the physical nature of the deceased's duties may have contributed, but he did not have specific details.
152. Professor Dawson conceded that the demands of social activity, the high levels of alertness from 6.00 pm to 9.00 pm and the increased physical activity in the gym would also have had some impact, but the primary cause of fatigue was reduced sleep.

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<sup>12</sup> [2015] NSWCCPD 29 (*Easterman*).

153. Professor Dawson thought that it was highly likely that the deceased was fatigued at the time of the accident and this was the cause of the accident. He concluded that there was a real and substantial connection between the deceased's employment and his fatigue.
154. The first respondent relies upon a report from an ergonomist and occupational therapist, Mr Smith. I must confess that I have concerns about his ability to comment on the medical issues associated with fatigue and its causes.
155. Mr Smith acknowledged that factors which contributed to the risk of fatigue included early start and finishing times or late finishes, short and/or insufficient breaks, working overtime or double shifts and the mental and physical demands of the job. He noted that the evidence did not suggest that the deceased's duties were physically demanding.
156. Mr Smith noted that the deceased had the opportunity to sleep for 14 hours per week day and he had the opportunity to catch up on weekends. Of course, whilst the deceased may have had the opportunity to sleep for 14 hours per week night, the evidence shows that he only slept for about seven hours each night. Mr Smith also indicated that it could take days to recover from sleep deprivation, so on this basis, it is possible that the deceased was still suffering from the effects of the previous week's work at the time of the accident. There is no evidence to substantiate such a conclusion.
157. Mr Smith stated that if the deceased was fatigued, which is not disputed by the first respondent, it was likely that a significant component of that fatigue had accumulated over the weekend. That may well have been the case, but the evidence is silent as to the deceased's activities over the weekend immediately before his accident. His birthday celebrations were held a week earlier.
158. Mr Smith believed that for two eight hour days prior to the accident with no excessive physical demands would unlikely cause work related fatigue. Whilst he agreed that it was likely that the deceased was fatigued, and the accident was caused by fatigue, he disputed that there was a real and substantial connection with the deceased's employment. He did not really explain why he was of that view and seemed to defer to an assessment based upon the legislation. In other words, he did not properly address the relevant question.
159. The authorities referred to above confirm that all the applicant needs to show is that there was "a" real and substantial connection between the deceased's employment, not that it was "the" only connection. There only needs to be an "association or relationship"<sup>13</sup>. The deceased did not work long hours, but he was only young and was in his first full time position. His employment required him to start early and finish early, and this contributed to his fatigue. This was something that he was not accustomed to.
160. The evidence establishes that some of the deceased duties were physically demanding, but he was not doing strenuous work in the days leading up to his accident. Significantly, Professor Dawson did not consider the nature of the work to be material. Professor Dawson's focus was on the early starts and lack of sleep. Dr Desai agreed that lack of sleep was a relevant cause of fatigue.
161. There seems little doubt that the deceased's family obligations, social activities on weekends and the gym exercises would have contributed to his fatigue. However, the evidence of Professor Dawson and Dr Desai supports the contention that early starts, travelling to work, early finishes and lack of sleep would have made a contribution. Of course, according to *Bina*, merely having to travel to and from work is insufficient to establish a real and substantial connection between the employment and the accident, but clearly there are other factors in play.

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<sup>13</sup> *Wickenden*, [38].

162. Mr Callaway submits that Professor Dawson made a number of assumptions that the deceased was fatigued at the time of the accident, but this submission is without merit, because the first respondent does not dispute that the deceased was fatigued, and the accident was caused by fatigue.
163. Although Mr Callaway submits that the deceased could go to bed earlier and he had the weekend to recover, there is no evidence to suggest that he availed himself of this opportunity. There is evidence that he slept in on weekends, but there are no specific details. In any event, Mr Smith commented that it could take days to recover from sleep deprivation. Further, whether the deceased's work hours mirrored other workers is irrelevant, as each case needs to be viewed on its own facts.
164. The applicant has the support of lay evidence and the reports of Professor Dawson and Dr Desai. The clinicians have reviewed the evidence and have concluded that there was a real and substantial connection between the deceased's employment and the accident.
165. The only evidence to challenge that there was a real and substantial connection are the statements of work colleagues, who merely stated that the deceased did not appear to be tired and did not complain about being tired, and the report of Dr Smith, who has not properly addressed the relevant question. Therefore, the evidence of Professor Dawson and Dr Desai carries more weight.
166. There were certainly other factors in play that contributed to the deceased's fatigue, such as social activities and gym exercises, but this does not mean that there was no real and substantial connection between the employment and the accident.
167. In the circumstances, I am satisfied that there was a real and substantial connection between the employment and the fatal motor vehicle accident on 10 November 2015 for the purposes of s 10(3A) of the 1987 Act.

### **Dependency and interest**

168. I propose to direct that further evidence and written submissions be filed in respect of the issues of dependency, apportionment, payment of the death benefit and interest, and I will determine the remaining issues "on the papers".

### **FINDINGS**

169. The deceased worker, Bradley Thomas Eather, died on 10 November 2015 as a result of injuries sustained in a motor vehicle accident on the way home from work.
170. There was a real and substantial connection between the deceased's employment and the motor vehicle accident.

### **ORDERS**

171. The applicant is to file and serve a statement regarding his dependency on the deceased by 21 January 2020.
172. The parties are to file written submissions in respect of dependency, apportionment, payment of the death benefit and interest by 31 January 2020.
173. Any submissions in reply are to be filed and served by 7 February 2020.
174. At the conclusion of the time allowed for submissions, the dispute will be determined "on the papers".