WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3864/20**
Applicant: **Vaughan Hitchings**
Respondent: **Secretary, Department of Finance, Services and Innovation**
Date of Determination: **25 September 2020**
Citation: **[2020] NSWWCC 339**

The Commission determines:

1. The applicant did not sustain an injury in the course of his employment with the respondent on 8 October 2019.

2. The applicant did not sustain an injury arising out of his employment with the respondent on 8 October 2019.

3. There was no real and substantial connection between the applicant's employment and the incident out of which the applicant's injury arose in the journey undertaken by the applicant from his place of abode to his place of employment on 8 October 2019.

The Commission orders:

1. An award for the respondent.

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

John Isaksen
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 JOHN ISAKSEN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Vaughan Hitchings, commenced employment with the respondent, Secretary, Department of Finance, Services and Innovation, on 4 February 2019 as an Aboriginal Procurement Manager.

2. The offer of employment made by the respondent in a letter dated 24 January 2019 states that the applicant's "Commencing Location" was Queanbeyan. The applicant's place of abode was in Port Macquarie.

3. The applicant claims that on the morning of 8 October 2019 he had commenced to drive from his place of abode in Port Macquarie to Queanbeyan to meet clients when just past Kew he felt severe lower back pain and pain down his left leg which caused him to stop driving, return to Port Macquarie, and seek medical treatment later that morning.

4. The applicant has not worked at all since this event due to ongoing lower back pain.

5. The applicant made a claim for workers compensation benefits. The applicant claims that he sustained an injury to his lower back arising out of or in the course of his employment or, in the alternative, he was on a journey to his place of employment and there was a real and substantial connection between his employment and the accident or incident out of which his personal injury arose.

6. In a dispute notice dated 6 November 2019, Allianz Australia Limited, disputed liability on the grounds that there was no real and substantial connection between the applicant's employment and the accident or incident out of which his personal injury arose.

7. In a dispute notice dated 29 April 2020, Allianz Australia Limited, disputed liability on the additional grounds that if the injury occurred in the course of the applicant's employment, then that employment was not a substantial contributing factor to the injury.

ISSUES FOR DETERMINATION

8. The following issues remain in dispute:

    (a) Whether the personal injury the applicant sustained to his lower back on 8 October 2019 arose out of or in the course of his employment with the respondent (sections 4 and 9A of the *Workers Compensation Act 1987* (the 1987 Act));

    (b) Whether on the journey from the applicant's place of abode to his place of employment there was a real and substantial connection between his employment and the accident or incident out of which the personal injury arose (section 10 (3A) of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

9. The parties attended a conference and hearing on 17 September 2020. 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.

10. Mr Harrington appeared for the applicant, instructed by Mr Jason Smith. Mr Baker appeared for the respondent, instructed by Ms Ferry, with Ms Delis from the respondent and Ms Luhrs from Allianz Australia Limited also in attendance.

11. The hearing was conducted by telephone in accordance with the protocols set out by the Commission due to the coronavirus pandemic.

12. The applicant's pre-injury average weekly earnings (PIAWE) were agreed at $2,078.

13. The respondent did not oppose the applicant adding to his evidence that when he was driving from Port Macquarie to Queanbeyan on 8 October 2019, he had his work laptop and a change of clothes in his car.

EVIDENCE

Documentary Evidence

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

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

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents filed by the applicant on 9 September 2020;

    (d) Application to Admit Late Documents filed by the respondent on 14 September 2020.

15. There was no application to cross-examine the applicant or to adduce oral evidence.

FINDINGS AND REASONS

The applicant's evidence

16. The applicant has provided two statements dated 3 June 2020 and 8 September 2020.

17. In his statement dated 3 June 2020, the applicant states he commenced employment as a procurement manager with the respondent on 4 February 2019. He states that he was required to "meet with external and internal clients" to increase indigenous companies supplying to the New South Wales government. That involved travelling over 1,600 kilometres each week to cover an area between Queanbeyan and Coffs Harbour.

18. The applicant states that his employment was initially based in Queanbeyan and he would drive from Port Macquarie to Queanbeyan and return each working week. He states that in July 2019 it was agreed with the respondent that he could work full time from the respondent's Port Macquarie office, but that this was subsequently changed to him working Monday and Tuesday in Queanbeyan, Wednesday in Sydney, and Thursday and Friday in Port Macquarie. The applicant states that he would normally drive from Queanbeyan to Port Macquarie early Monday morning.

19. The applicant states:

> "On 8 October 2019, I had left home and was driving to the office in Queanbeyan. The purpose was to attend the office in Queanbeyan to meet with clients. I had just driven past Kew, south of Port Macquarie, when I felt severe back pain to the extent that I couldn't keep driving. I pulled over and eventually returned back to Port Macquarie. I noticed I had severe lower back pain and pain down my left leg. I was very stiff in the lower back."

20. The applicant states that he attended Dr Goodridge at Port Macquarie Medical and Dental Centre at 9.40am on 8 October 2019. He states that he then saw Dr Jones at the same practice on 10 October and 14 October 2019 and was provided with medical certificates on both occasions which certified the applicant as being unfit for work.

21. The applicant also saw Dr Spedding at Port Macquarie Medical and Dental Centre but after that doctor passed away, the applicant attended Dr McDonald at Flynns Beach Medical Centre. He states that he saw Dr McDonald on 19 December 2019 and was provided with a certificate which certified him unfit for work from 8 October 2019 to 8 January 2020 and a certificate that he was fit for light duties from 9 January 2020.

22. The applicant states that Dr McDonald has continued to provide him with Workcover certificates. He states that he has been unable to return to work. He states that has experienced high levels of pain and restriction of movement in his lower back and left leg. He states that he cannot sit for any longer than 20 minutes. He states that he only does light indoor tasks at his home.

23. The applicant states that he takes Tramadol twice a day and that while he is on this medication he cannot drive and has difficulty concentrating for long periods of time.

24. The applicant states that he had a minor back strain approximately 18 months to two years ago but from no particular incident. He states that the pain settled very quickly and he had no further trouble with his back until the episode on 8 October 2019.

25. In his statement dated 9 September 2020, the applicant states the arrangement of where he worked each week "may vary on a week to week basis." He states: "my job involved meeting clients both at the office in Queanbeyan but also out of the office at Queanbeyan, Sydney, Port Macquarie or wherever needed."

26. The applicant also states that there was an appointment entered in his Outlook calendar for a meeting with a client in Queanbeyan on 8 October 2019.

The evidence of Mary Sexton

27. Mary Sexton has provided a statement dated 14 July 2020. Ms Sexton states that she is employed with the respondent as a Senior Procurement Manager. She states that she had been on extended leave from September 2018 to 29 July 2019.

28. Ms Sexton states that in August 2019 she negotiated with the applicant that he work on Monday and Tuesday in Queanbeyan, Wednesday in Sydney, and Thursday and Friday in Port Macquarie. She states that the applicant was to advise immediately of any changes to this pattern and that travel time and expenses pertained only to trips to Sydney.

29. Ms Sexton states that it later became apparent to her that the applicant was not adhering to this agreement and that he was also not performing at the level he should have been. She also states that she discovered the applicant had not declared a potential conflict of interest in being the principal of a construction business in Port Macquarie and that he had submitted an application for a departmental database which had no application to his role. She states that she was on the threshold of commencing performance management to address these issues.

30. Ms Sexton states that she arranged a Skype meeting on Friday 4 October 2019 to raise her concerns with the applicant and that the meeting was brought forward on that day so that the applicant could travel to Sydney for the rugby league grand final over the long weekend. However, the meeting was cut short due to difficulties with the internet connection.

31. Ms Sexton states that she received an email from the applicant at 6.55am on 8 October 2019 which states:

> "As per our discussion, on Friday I was heading down to Queanbeyan to meet my clients today and my back locked up. I could not complete the Journey. I will go to the Doctors today to find out what is up."

32. The applicant responds in his statement dated 9 September 2020 that there had not been any performance issues raised by the respondent and he had been given an exemplary performance review in September 2019.

The medical evidence

33. Clinical notes from Port Macquarie Medical and Dental Centre are in evidence. The entry made by Dr Goodridge on 8 October 2019 includes: "Non traumatic radiculopathic back pain – while driving – pushed pedals – acute LBP." It is also recorded that the applicant is tender over the L3 to S1 midline.

34. The clinical notes record that the applicant saw Dr Jones on 10 October and 14 October 2019 and there are medical certificates for both dates certifying the applicant being unable to work "due to a medical condition."

35. The applicant attended Dr Spedding at Port Macquarie Medical and Dental Centre on 21 October 2019. The cause of the applicant's lower back condition that is recorded on that date is: "Back pain on tramadol Tuesday the 9th in Kew when driving to Canberra." The entry also includes: "Servicing a bigger area Canberra Sydney Port for three months."

36. Dr Spedding issues a Certificate of Capacity on 21 October 2019 which certifies the applicant as having no current work capacity from 21 October 2019 to 4 November 2019. The Certificate states that the injury is related to work by: "Excessive sitting driving and work pressure."

37. The applicant also attends for a CT scan of the lumbar spine on 21 October 2019 which reports: "mild degenerative changes seen at L1-L2 level with the loss of disc height, endplate changes and facet joint arthropathy."

38. The applicant attended Dr McDonald at Flynns Beach Medical Centre on 19 December 2019. The notes for that attendance include: "Presents requesting work certificate for workcover – chronic back pain." The notes also include: "workplace injury sustained Oct 19", although there are no other details recorded as to the cause of the injury.

39. A Certificate of Capacity issued by Dr McDonald on that day certifies the applicant having no current work capacity from 8 October 2019 to 8 January 2020, but also that the applicant has capacity for some work from 9 January 2020 for 35 hours per week with limits on lifting, sitting and driving. The Certificate states that the injury is related to work by: "long periods of driving from Port Macquarie to office in Queanbeyan. Developed pain en route on 8/10/19."

40. Dr McDonald also writes a referral on 19 December 2019 for physiotherapy which includes the statement that: "His occupation involves drives for long period of time."

41. A further Certificate of Capacity issued by Dr McDonald and dated 30 January 2020 certifies the applicant having no current work capacity from 8 January 2020 to 13 February 2020, but also that the applicant has capacity for some work for 35 hours per week with limits on lifting, sitting and driving.

42. The notes for the applicant's attendance upon Dr McDonald on 30 January 2020 include:

> "tried to go back to work 9/1/20
> back locked up again
> dring a bit as procurement officer with driving to sydney, queanbeyan
> got as far as sydney."

43. The applicant attended Dr Hyde-Page, orthopaedic surgeon, at the request of his solicitors on 1 April 2020, and has provided a report of the same date. The examination of the applicant was conducted by video.

44. Dr Hyde-Page records that the applicant left home at 2.00am on 8 October 2019 to drive to Canberra from Port Macquarie in the course of his work. He records that after driving for 20 minutes, the applicant developed severe low back pain and shooting pain down his left leg.

45. Dr Hyde-Page records that the applicant had been working as a procurement manager for the NSW Government since February 2019 and that his "work was nearly all office based with some driving and face-to-face contact with clients involved."

46. Dr Hyde-Page records that the applicant had some low back pain about two years ago but that it settled very quickly without treatment.

47. Dr Hyde-Page opines:

> "I closed questioned him about any pre-existent history of back injury or complaint. He is quite adamant that he has never had any significant back problem in the past. He only had some minor low back pain two years ago that settled without any treatment.
>
> Overall, I have concluded that the acute onset of his low back pain and left sided sciatica is a consequence of his early morning driving on 8 October 2019, when in the course of his work he had left Port Macquarie to drive to Canberra. His acute low back pain and sciatica is therefore directly related to his employment."

48. Dr Hyde-Page opines that the applicant is not fit for his pre-injury employment. He notes that the applicant has a workstation where he can sit or stand but even this workstation set-up is likely to aggravate his back and leg symptoms. He also notes that the applicant remains on a high dose of Tramadol and is unable to drive to and from work. Dr Hyde-Page also concludes as the applicant is unfit for his present job, which is mainly office based, the applicant would also be unfit for any job in the open labour market as those jobs would almost certainly have the same amount or more of physical tasks that would aggravate the applicant's back.

49. Mr Baker for the respondent confirmed that the applicant attended Dr Panjratan at the request of Allianz Australia Limited. Mr Baker did not dispute that the applicant attended Dr Shahzad at the request of the respondent on 11 March 2020. No reports are in evidence from those doctors.

Determination

50. The applicant has put his claim on alternative bases. Firstly, the applicant claims that the onset of lower back pain which he experienced while driving to work at Queanbeyan arose out of or in the course of his employment with the respondent. This requires the application of section 4 of the 1987 Act. If that section is satisfied, it is still necessary to consider whether the applicant's employment was a substantial contributing factor to the injury, as required by section 9A of the 1987 Act.

51. Secondly, the applicant claims that he was on a journey to his place of work and that he has met the requirement imposed by section 10 (3A) of the 1987 Act that there was a real and substantial connection between his employment and the accident or incident out of which the injury to his lower back arose.

52. The respondent disputes that the applicant sustained an injury which arose out of or in the course of his employment. The respondent concedes that the applicant was on a journey to his place of work but that there is no real and substantial connection between his employment and any accident or incident out of which an injury to the applicant arose. The respondent further contends that the applicant's onset of lower back pain cannot be regarded as an accident or incident as provided for in section 10 (3A) of the 1987 Act.

53. I will deal with each of these claims separately. However, there was also a dispute between the parties as to whether the applicant's onset of lower back pain on the morning of 8 October 2019 can be regarded as a personal injury within the meaning of the 1987 Act.

54. Mr Baker for the respondent submits that the applicant's onset of lower back pain was spontaneous, as it had also been two years before this episode, and that there is no medical evidence which addresses this spontaneous onset of pain. He submits that there was no more than a temporal connection between the applicant driving his car and the onset of lower back pain.

55. Mr Baker refers to the CT scan dated 21 October 2019 which does not report any recent trauma but only long standing changes to that part of the applicant's spine.

56. In *Trustees of the Society of St Vincent de Paul (NSW) v Maxwell James Kear as administrator of the estate of Anthony John Kear* [2014] NSWWCCPD 47 (*Kear*), DP Roche said at [38]:

> "The authorities establish that a 'personal injury' is 'a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state' (Gleeson CJ and Kirby J in [*Petkoska Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45; 200 CLR 286] at [39]). In other words, as stated at [81] in [*North Coast Area Health Service v Felstead* [2011] NSWWCCPD 51 (*Felstead*)] it is 'a sudden identifiable pathological change'."

57. The applicant attended Dr Goodridge some hours after the onset of his lower back pain on 8 October 2019, and Dr Goodridge records that the applicant was tender over the L3 to S1 midline. Tramadol is also prescribed.

58. Two weeks later the applicant's ongoing symptoms warrant the referral for a CT scan and the prescription of analgesic medication.

59. I accept from the applicant's evidence of a sudden onset of lower back pain, and the records made by the doctors at Port Macquarie Medical and Dental Centre on and from 8 October 2019, that there was a sudden pathological change in the applicant's lower back, even though it might not have been positively identified in any subsequent radiology. I accept from this evidence that the applicant did sustain a personal injury to his lower back on the morning of 8 October 2019.

60. I now turn to whether that personal injury sustained by the applicant arose out of or in the course of his employment, or whether there was a real and substantial connection between his employment and the incident out of which the personal injury arose when the applicant was on a journey from his place of abode.

Whether the applicant sustained an injury in the course of his employment with the respondent

61. Mr Harrington for the applicant submits that the circumstances of this dispute are very different to the usual situation of a worker travelling a short distance from his or her place of abode to the place of work. In this dispute the applicant was required to travel a considerable distance each week from his place of abode in Port Macquarie to Queanbeyan, and then later that week to Sydney, and then the following day back to Port Macquarie.

62. Mr Harrington submits that it is open to find that all of those journeys occurred in the course of the applicant's employment as that was an inherent requirement of his job.

63. Mr Harrington submits that the respondent had a duty of care to provide a safe means of access for the applicant to travel to work because of the distances the applicant has to travel, which creates significant additional risk injury to the applicant.

64. In *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21; 173 CLR 473 (*Hatzimanolis*), Mason CJ, Deane, Dawson and McHugh JJ said at [14]:

> "….The course of employment is ordinarily perceived as commencing when the employee starts work in accordance with his or her ordinary or overtime hours of work and as ending when the employee completes his or her ordinary or overtime hours of work."

65. However, it was then said at [15]:

> "…there are cases where an employee is required to embark upon some undertaking for the purpose of his or her work in circumstances where, notwithstanding that it extends over a number of daily periods of actual work, the whole period of the undertaking constitutes an overall period or episode of work."

66. Mason CJ, Deane, Dawson and McHugh JJ concluded their review of the law in *Hatzimanolis* by stating at [16]:

> "…In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment 'and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'."

67. The decision of *Hatzimanolis* was re-visited by the High Court in *Comcare v PVYW* [2013] HCA 41; 88 ALJR 1 (*PVYW*), where French CJ, Hayne, Crennan and Kiefel JJ said at [34]:

> "It is important to identify how *Hatzimanolis* sought to define the circumstances for, and the extent of, an employer's liability for compensation. *Hatzimanolis* sought to provide a legal justification for an injury, which occurred between periods of actual work, being regarded as occurring in the course of the employee's employment. It did so by characterising the interval by reference to the employer's inducement or encouragement. The employer's liability in such circumstances depends upon what the employer induced or encouraged the employee to do. *Hatzimanolis* did not seek to extend the employer's liability beyond that."

68. Their Honours then said at [38]:

> "The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the *Hatzimanolis* principle becomes relevant. When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment."

69. There is no dispute between the applicant and respondent that as at 8 October 2019 the applicant was to work on Monday and Tuesday in Queanbeyan, Wednesday in Sydney, and Thursday and Friday in Port Macquarie. The applicant's course of employment would be "ordinarily perceived", as the High Court observed in *Hatzimanolis,* as commencing when he started work at Queanbeyan and ending when he had completed his work that same day in Queanbeyan.

70. In the early hours of the morning of Tuesday 8 October 2019 (the day before being a public holiday) the applicant was driving to commence work that day at Queanbeyan when he felt the onset of pain in his lower back. The activity of a driving a motor vehicle to the applicant's place of work, which Dr Hyde-Page identifies as the cause of the applicant's low back pain, is no different from the same activity undertaken by thousands of workers in this State at the start of a working week. It is a journey from a place of abode to a place of work. Once the applicant gets to his workplace, then the duties which he then performs occurs in the course of his employment with the respondent.

71. It was acknowledged in *Hatzimanolis* that the whole period of an undertaking for the purposes of work can constitute an overall period or episode of work, and that the general nature, terms and circumstances of employment must be considered in determining whether injury has occurred in the course of employment. That provides some support for the submission made by Mr Harrington that the unique role which the applicant had of travelling a considerable distance each week between three different places of work, means that the entire period from leaving and then returning to Port Macquarie each week can be regarded as being in the course of the applicant's employment.

72. The applicant's evidence is that he met clients both at the office at Queanbeyan but also out of the office, as well as elsewhere in quite a large area in the eastern part of New South Wales. He had a job which involved a considerable amount of travel not just between three offices but outside of those offices. However, at the time the applicant experienced the onset of low back pain he was on a journey to start his work for that week.

73. Although there may have been other trips or excursions undertaken by the applicant within a working week where an injury could be found to be in the course of his employment because of the nature of the work the applicant was required to do, the onset of low back pain while driving on the morning of 8 October 2019 was not part of an overall period or episode of work but occurred during a journey to work and before the activities of his employment had commenced.

74. I also do not consider that the respondent encouraged or induced the applicant in the activity of driving from Port Macquarie to Queanbeyan, thereby bringing the applicant's injury within the course of his employment.

75. The applicant entered into a contract of employment with the respondent in February 2019 which required him to work full time from the respondent's office in Queanbeyan. For some weeks in July 2019 he was able to work full time from the respondent's office on Port Macquarie, but the applicant states that his new manager then required him to work at Queanbeyan, Sydney and Port Macquarie each week.

76. Mary Sexton states that the applicant was amenable to the pattern of attendance Monday and Tuesday in Queanbeyan, Wednesday in Sydney, and Thursday and Friday in Port Macquarie. The applicant does not assert that he had to be persuaded or motivated to undertake this pattern of attendance. No doubt the applicant would have preferred to work full time in Port Macquarie. However, the contract of employment offered to the applicant required him to work full time in Queanbeyan, and it is reasonable to infer in the absence of any other evidence that this was because there was a lot of the work required of the applicant that was based in and around that town.

77. The activity being undertaken by the applicant when he had the onset of the applicant's lower back pain was the driving from his place of abode to his place of employment. I can find nothing in the evidence that supports a finding that the respondent encouraged or induced the applicant to undertake this activity. It was simply a necessary requirement of his employment that the applicant work each Monday and Tuesday in Queanbeyan. So long as the applicant lived in Port Macquarie, he needed to undertake a journey each week to Queanbeyan, so that he could undertake his employment duties in accordance with the terms of his contract of employment with the respondent. The injury sustained by the applicant occurred while he was on a journey from his place of abode and not in the course of his employment.

78. I am therefore not satisfied that the applicant's onset of low back pain on the morning of 8 October 2019 as he drove to work at Queanbeyan was sustained in the course of his employment with the respondent. Having made such a finding, it is not necessary for me to consider whether the applicant's employment was a substantial contributing factor to his injury.

Whether the applicant sustained an injury arising out of his employment with the respondent

79. The decision of *Bina v ISS Property Services Pty Limited* [2013] NSWWCCPD 72 (*Bina*) will be referred to when addressing the claim made by the applicant pursuant to section 10 of the 1987 Act.

80. However, the worker in that matter also claimed compensation on the grounds that she sustained an injury arising out of her employment. The worker had sustained injuries in a motor vehicle while on her way home after the first of two shifts that she worked as a cleaner at a public school.

81. In the arbitral decision (WCC13437-12), Arbitrator Sweeney undertook a review of the law as it had developed in regard to "arising out of employment." He said at [25]: "It is beyond dispute that the phrase 'arising out of the employment' requires a causal connection with the employment."

82. Arbitrator Sweeney said at [38]:

> "…I do not believe that it is open to an arbitrator to hold that an injury on a journey, between a worker's place of abode and place of employment, arises out of the employment unless there is some greater connection with the employment than having to get to and from the place of employment."

83. Arbitrator Sweeney then said at [39]:

> "…If a journey arose out of the employment why was it necessary for the legislature to enact a provision whereby such an injury was to be treated or deemed an injury arising out of the employment?"

84. On appeal, the reasoning of Arbitrator Sweeney was approved by Keating P, where he said at [62]:

> "The Arbitrator's Reasons establish that he identified and applied the correct causal connection test to his consideration of whether the injuries sustained by Ms Bina during the journey between her place of work and her home arose out of her employment. He concluded (at [44]) that the mere fact that a worker must travel to or from work, of itself, does not establish a causal connection between her injury and the activities of, or incidental to, her employment. In the present case, there is no causal relationship between Ms Bina's employment and her injury. For the reasons given, I am satisfied that the Arbitrator identified and applied the correct test."

85. In my view the mere fact that the applicant had to drive from his home to Port Macquarie to start work at Queanbeyan does not establish a causal connection between the onset of his lower back pain while doing that driving and his employment as a procurement officer. Although the applicant was required to drive long distances each week to work at several of the respondent's offices, there was no greater connection to the applicant's employment in the journey which he undertook on 8 October 2019, because it was merely a journey that he was taking from his place of abode to his place of work.

86. Mr Harrington made a submission that the journey on 8 October 2019 should be seen in the context of a worker who had to drive hundreds of kilometres each week in the course of his employment. However, there is little in the medical evidence relied upon by the applicant which supports a claim that the injury to the applicant's lower back was due to prolonged periods of driving.

87. The Certificate of Capacity issued by Dr Spedding on 21 October 2019 states that the injury is related to work by: "Excessive sitting driving and work pressure." Dr Spedding also records in his notes: "Servicing a bigger area Canberra Sydney Port for three months." The Certificate of Capacity issued by Dr McDonald on 19 December 2019 states that the injury is related to work by: "long periods of driving from Port Macquarie to office in Queanbeyan. Developed pain en route on 8/10/19." However, there are no reports from these doctors to provide further clarity or explanation as to their conclusions on the question of causation of injury.

88. Dr McDonald also refers to the applicant driving for long periods of time in his occupation in her referral of the applicant for physiotherapy, but that is no more than an observation which is provided to the physiotherapist by way of the applicant's background.

89. Dr Hyde-Page is the only medical expert to provide a detailed opinion on causation, which is that "the acute onset of his low back pain and left sided sciatica is a consequence of his early morning driving on 8 October 2019." Mr Harrington submits that Dr Hyde-Page seems to be saying that the applicant's driving on that morning on 8 October 2019 aggravated degenerative changes in his lower back. That is not an opinion proffered by Dr Hyde-Page. Dr Hyde-Page does not extend the cause of injury beyond the driving being undertaken by the applicant that morning.

90. Furthermore, Dr Hyde-Page does not record any details of the extensive driving which the applicant had been undertaking each week while he worked for the respondent. Dr Hyde-Page records that the applicant's "work was nearly all office based with some driving and face-to-face contact with clients involved." It is consistent with this understanding of the applicant's employment activities that Dr Hyde-Page only identifies the 20 minutes of driving on 8 October 2019 to be the cause of the applicant's injury.

91. I do not accept that the injury the applicant sustained on that journey on 8 October 2019 arose out of his employment.

Whether on the journey from the applicant's place of abode to his place of employment there was a real and substantial connection between the applicant's employment and the accident or incident

92. The relevant parts of section 10 of the 1987 Act for the purpose of this dispute are:

> "(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 Act 2013*), unless the alcohol or other drug did not contribute in any way to the injury or was not consumed 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 any 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 it 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 1 to 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.

……..

(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."

93. In *Bina,* Keating P said at [112]:

> "(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."

94. At [117] Keating P said:

> "It is therefore clear that s 10(3A) has work to do. Its purpose is found in the words used in the subsection, read in the context of the 1987 Act as a whole. In my view, the purpose of the provision is to ensure that injuries received in the circumstances provided for are injuries that are deemed to arise out of or in the course of employment and compensation is payable accordingly. The subsection will usually be satisfied, depending on the facts, when there is a real and substantial connection between some feature of what the worker is reasonably required, expected or authorised to do, by reason of his or her employment, and the accident or incident out of which the personal injury arose."

95. At [120] Keating P said:

> "Whether, and in what circumstances, s 10(3A) will be satisfied will be a question of fact, applying the words of the provision, in a commonsense and practical manner in each case (Doyle CJ in *Brophy*)."

96. In *Bina,* the worker was not successful in arguing that in the journey back to her home after the first of two shifts that were broken by time, there was a real and substantial connection between her employment and the motor vehicle accident which caused her injury.

97. In *Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden* [2014] NSWWCCPD 13 (*Wickenden*), Roche DP said at [91]:

> "Whether s 10(3A) is satisfied will only arise if a worker's journey otherwise satisfies the requirements of s 10. If those requirements are satisfied, there will be a "connection" between the employment and the journey. However, that does not satisfy s 10(3A), which requires a real and substantial connection between the employment and the accident concerned. On its own, the mere fact of travelling to and from work will not provide that connection (*Bina* at [63])."

98. The worker was successful in *Wickenden* because it was accepted that there was a real and substantial connection between the worker having to work back late and travel home in darkness, and the injury that she sustained when she crashed her motor vehicle trying to avoid cattle on the road.

99. In *Field v Department of Education and Communities* [2014] NSWWCCPD 16 (*Field*), Roche DP said at [47-48]:

> "….Each case depends on its own facts.
>
> Section 10(3A) only requires a real and substantial connection between the employment and the accident or incident out of which the injury arose. As observed in *Bina* (at [120]), citing *The State of South Australia v Brophy* (1997) 68 SASR 97, whether, and in what circumstances, s 10(3A) will be satisfied will be a question of fact, applying the words of the provision in a commonsense and practical manner in each case."

100. In *Field* it was accepted that the worker was "walking hurriedly" to a school where he had been given short notice to attend as a relief teacher and as he did this he tripped on an uneven surface on the pathway and sustained injury. Roche DP said at [50]:

> "However, Mr Field was hurrying because of the late notice he received from the respondent's agent, Casual Direct, to attend at the school on the day of the accident and because he had to be at the school by 8.30 am to be given lessons for the day, shown to the classrooms or be given playground duty. These reasons were perfectly plausible and logical and, more importantly, were unchallenged. In these circumstances, the only conclusion open is that Mr Field was hurrying because of reasons that were directly connected with his employment as a relief teacher with the respondent."

101. In *State Super Financial Services Australia Limited v McCoy* [2018] NSWWCCPD 26 (*McCoy*), a real and substantial connection between employment and the incident out of which an injury arose was found where the worker tripped and fell as she hurried to a work function after being tired from a long day at work.

102. Mr Harrington submits that the long periods of driving undertaken by the applicant in his employment with the respondent was causative of his lower back injury and thus establishes the real and substantial connection between employment and injury.

103. I do not accept that submission. As I have already stated, Dr Hype-Page identifies the cause of injury as being the driving that the applicant was doing on the morning of 8 October 2019 and no more.

104. As I have also already observed, Dr Hyde-Page does not record any details of the extensive driving which the applicant had been undertaking each week that would support the submission made by Mr Harrington.

105. I cannot identify any real and substantial connection between the applicant's activities of his employment and the onset of low back pain while driving on the morning of 8 October 2019. The journey which the applicant undertook was not reasonably required, expected or authorised by reason of his employment, other than what would ordinarily be expected of an employee to travel from his place of abode to attend his place of employment. The applicant's driving on that morning was simply a journey to his place of work which was required as part of his contract of employment.

106. It seems to me that the applicant's situation on the morning of 8 October 2019 fits with what Keating P said in *Bina* that "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" and "if merely travelling to and from work was sufficient to establish the relevant connection, s 10(3A) would be otiose."

107. The facts in this dispute are distinguishable from those in *Wickenden, Field,* and *McCoy,* because in each of those cases an injury resulted from an event that could be causally related to an activity or requirement of that worker's employment. In this dispute the onset of low back pain does not result from an activity of employment, or even something which is incidental to that employment. The injury sustained by the applicant only occurs while on a journey from his place of abode to his place of work.

108. The applicant was merely on a journey to his place of work when he sustained an injury to his lower back. There was no real and substantial connection between the applicant's employment and the incident out of which the injury arose, and so the provisions of section 10 (3A) of the 1987 Act have not been met by the applicant.