WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5455/17**
Applicant: **Suzanne Elizabeth McCoy**
Respondent: **State Super Financial Services Australia Limited**
Date of Determination: **21 March 2018**
Citation: **[2018] NSWWCC 77**

The Commission determines:

1. Findings:

    (a) The applicant suffered injury to her right ankle on 5 December 2013 whilst on a journey for the purpose of s 10 of the *Workers Compensation Act 1987*.

    (b) The applicant is entitled to weekly payments of compensation as a result of injury to the right ankle on 5 December 2013.

2. Orders:

    (a) By 30 March 2018, the parties are to file proposed orders in relation to the respondent's liability to pay weekly payments of compensation.

    (b) By 30 March 2018 the parties are to file proposed orders in relation to the respondent's liability to pay medical expenses.

3. The matter is remitted to the Registrar for referral to an Approved Medical Specialist for assessment or whole person impairment according to the following:

    (a) As a result of injuries to the right ankle on 5 December 2013 (including, if present, Complex Regional Pain Syndrome).

    (b) Documents to be provided to AMS (with attachments unless excluded):

        (i) Application to Resolve a Dispute;
        (ii) The Reply.

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

Gerard Egan
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 GERARD EGAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Suzanne McCoy (the applicant) suffered an injury to her right ankle on 5 December 2013 while on her way to a Christmas party arranged by her employer State Super Financial Services Australia Limited (the respondent). The right ankle injury led to significant complications including the presentation of symptoms suggestive of Complex Regional Pain Syndrome (CRPS). More detailed facts are set out by way of findings in the Reasons below.

2. The applicant claims weekly compensation from 9 December 2013 "to date and continuing". However the state of the evidence in regard to the actual earnings during the relevant periods of the claim is unclear and Mr Grant, Counsel for the applicant, has suggested that agreement should be reached between the parties if the applicant succeeds in establishing her entitlements. I agree with this course.

3. The applicant also claimed medical expenses in the amount of $88,513.86, and lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of CRPS from the injury. The respondent does not dispute the development of CRPS.

4. The dispute revolves around a number of issues set out in a Dispute Notice dated 20 January 2016 pursuant to s 75 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). These matters will be more fully identified and considered below.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a conciliation arbitration in Port Macquarie on 19 January 2018. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

6. Mr Grant instructed by Mr Smith, solicitor, appeared for the applicant. Mr Niven appeared for the respondent. Given the legal complexities both counsel sought leave to file written submissions. This was allowed.

EVIDENCE

Documentary evidence

7. The following documents (and attachments) were in evidence before the Commission and taken into account in making this determination:

    (a) Application to Resolve a Dispute;

    (b) Application to Admit Late Documents by the applicant dated 12 January 2018 (tendered at the hearing), and

    (c) The Reply.

8. There is also an Applicant's Wages Schedule dated 28 January 2018.

9. There was no oral evidence.

SUBMISSIONS

10. The applicant's written submissions, by Mr Grant are dated 9 February 2018. The respondent's, by Mr van der Hout, solicitor, are dated 22 February 2018. These will be considered when the issues are addressed.

CONSIDERATION

11. Although the respondent raised a number of issues in the Dispute Notice, some are not pressed in submissions.

12. In submissions, the respondent identifies the issues for determination to remain:

    (a) Did the injury arise "in the course" of the applicant's employment (s 4 of the 1987 Act)?

    (b) Did the injury arise "out of that employment" (s 4 of the 1987 Act)?

    (c) Was the applicant's employment a "substantial contributing factor" to her injury? (s 9A of the 1987 Act)? And

    (d) Was the applicant on a "journey" as defined in s 10 of the 1987 Act?

    (e) If so, was there a real and substantial connection between her employment and the injury (s 10(3A) of the 1987 Act)?

13. The facts are straight forward and may be set out by the following findings, which are either uncontroversial, or where there is dispute or not agreed, reflect my findings based on the evidence:

    (a) The applicant lived at Laurieton and worked at the respondent's office in Port Macquarie, some 40km away by road. She had worked there since August 2009.

    (b) A Christmas party was arranged to commence at 6pm on 5 December 2013 at Sails Resort, in Port Macquarie.

    (c) Mr Hogg, the respondent's Regional Manager at the time, described the event as a "staff Christmas party".

    (d) The party was "sponsored" and "funded" by the respondent, and alcohol was to be served;

    (e) The applicant says she was "encouraged to attend" but does not say how. The respondent's evidence does not engage with his assertion.

    (f) A newsletter titled "The Exchange" dated October 2017 reminded employees that the function was considered a "work function" organised for the employees enjoyment; and email from the respondent's CEO Mr Graeme Arnott dated 30 November 2017 reminded the employees that the "definition of "workplace" extends to these types of functions".

    (g) Both communications remind employees of their responsibility to adhere to the Code of Conduct and Ethics Policy.

(h) This evidence, and the descriptions they contain suggest, objectively, that there was a level of expectation, probably short of a requirement, that staff were to attend. It is reasonable to infer the respondent's desire was for staff to intermingle in a more relaxed situation than work, and improve the esprit de corps. I so find.

(i) The applicant and her husband intended to drink alcoholic drinks at the party.

(j) The applicant says: "the road between my home and Port Macquarie is a secondary road that is narrow in places and dark at night".

(k) On the day of the party, Thursday 5 December 2013, the applicant had worked her usual hours from 8:45 am to 5:15 pm, when she was collected from the office by her husband.

(l) The applicant says she was tired after the days work, and what had been a busy year.

(m) Her husband had reserved a room at the Mid Pacific Hotel, Port Macquarie "to be ready for the function on time and avoided a long trip home afterwards in circumstances where we had both worked a full day before attending the function and both expected to consume some alcohol". She says it "would have been impractical to have not stayed at the hotel and to have returned home before the function to prepare for it because of the time and distance involved and the issue of safety on the road after the function concluded".

(n) The applicant had arranged and paid for the hotel.

(o) While Mr Hogg knew about the hotel arrangements, he had no involvement in the arrangements other than the bare knowledge of the applicant's intentions in that regard. He says the respondent did not offer any accommodation, nor as far as he was aware, did it encourage or endorse the applicant's arrangements. No other employee made similar arrangements.

(p) The applicant and her husband arrived at the Mid Pacific at about 5:30pm, and showered and dressed for the party. They left the hotel at about 5:45pm. It is not alleged that anything the applicant was wearing or carrying contributed to her fall.

(q) The fall occurred en route to the party. The applicant says she and her husband had left the hotel, crossed the street toward where they were to be picked up by co-worker Kath Richards, when she fell on a raised paver.

(r) As to the cause, the applicant says "I was not only tired at the time as I had completed a full day at work, it having been at the end of a busy year, but I was also hurrying to be on time for the start of the function which was due to commence at 6 p.m. I felt that this significantly contributed to my tripping and falling."

(s) After the fall the applicant says that she returned to the hotel and rang Ms Richards. The applicant says she understood Ms Richards herself was still finishing getting ready at the time.

(t) It is clear from the foregoing that the injury did not happen at the party.

Time in making the claim: s 261 of the 1998 Act

14. Although, in the Dispute Notice, the respondent raised the defence that the claim was not made within the time limits under s 261 of the 1998 Act, no submissions relating to it are made. In any event, I accept the applicant's evidence that she was ignorant of her rights to claim until 2015, meaning she is not prevented from pursuing the claim, as the claim was made within three years of injury: s 261(4).

Definition of "injury": s 4(a) - Arising out of or in the course of employment

15. The applicant argues that the injury arose out of employment, and in the course of her employment. Either would satisfy s 4(a) of the 1987 Act.

Arising out of employment

Applicant's submissions: Arising out of employment

16. Mr Grant conceded this requirement contains a causative element, established if the fact that the worker was employed in a particular job caused, or to some material extent contributed to the injury. The determination is to be inferred from the facts as a matter of common sense: (*Nunan v Cockatoo Island Docks & Engineering Co Ltd* (1941) 41 SR (NSW) 119 (*Nunan*)).

17. He says the relevant facts are not in dispute including that the applicant was tired and hurrying. It is somewhat boldly submitted that this means that:

> "it can therefore be comfortably assumed that the Respondent accepted that for the Applicant and her husband to safely attend the event, given the time and distance restraints, (she) would need to stay in Port Macquarie even though the Respondent did not pay for or provide the accommodation".

I do not accept that this assumption is appropriate.

18. Mr Grant invokes the "but for" test. He says "(i)t is reasonable also to infer that if it were not for those restraints the Applicant would not have stayed in Port Macquarie. The reason she was there when injured was directly connected to her employment". That is, but for if the applicant deciding to stay at the hotel that night because of the work party, the accident would not have happened. "Therefore", he submits, the injury can be characterised as "arising out of her employment" applying a common sense approach to the facts.

Respondent's submissions: Arising out of employment

19. Mr van der Hout identifies *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324; 75 NSWLR 503 (*Badawi*) (at [73]) as identifying the test to ascertain whether injury arises out of employment.

20. He concedes said that the term "employment" in the context of arising out of employment "encompasses matters incidental to the features or incidents of the employment": *Mitchell v Newcastle Permanent Building Society Limited* [2013] NSWWCCPD 55 at [49].

21. He emphasised the notions of a compulsion or requirement by the employer for the worker to be in the place the injury occurred relying upon *Ryan v Regional Imaging Pty Ltd* [2017] NSVWCCPD 48 (*Ryan*) (worker posting office letters at the end of the day); and Arbitrator Harris in *Smith v Woolworths Limited* [2017] NSWWCC 290 (*Smith v Woolworths*).

22. In contrast, he says, the applicant was leaving the hotel when she was injured and was not "required, compelled or induced" to attend the specific location, the hotel, between ceasing her ordinary duties and the commencement of the party.

Discussions and Findings: arising out of employment

23. An injury may arise out of the employment, even though at the time it is sustained the worker is no longer in the course of his or her employment: *Tarry v Warringah Shire Council* [1974] 48 WCR 1 (*Tarry*), Glass JA (Samuels JA agreeing). However, the employment must cause or contribute to the injury (*Nunan,* Jordan CJ, at 125); or put another way, there needs to be a causal connection between the employment and the injury (*Kavanagh v The Commonwealth* (1960) 103 CLR 547 (*Kavanagh*).

24. The Court of Appeal in *Badawi* (Allsop P, Beazley and McColl JJA agreeing, at [72]-[79]) considered these principles, extracting the following propositions:

    (a) Whether an injury arose out of employment connotes "a certain degree of causal connection between the accident and the employment";

    (b) It is sufficient to establish that an injury arose out of the employment if it appears that the fact of his being employed in the particular job caused, or to some material extent contributed to, the injury;

    (c) It is unnecessary to show that the employment exposed the worker to some special danger, and

    (d) Although some kind of causal connection with the employment is required, it does not necessitate direct or physical causation and it should be asked "was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury?"

25. In *Pioneer Studios Pty Ltd v Hills* [2012] NSWCA 324, Basten JA (Allsop P and Hoeben JA agreeing) (*Hills No 1*), said at [46]:

> "…. there can be no implicit finding that the worker's attendance was in the course of her employment for the necessary assessment of the causal connection because the issues critical to such a finding were not addressed. It was not necessary that the temporal element be satisfied; however, the nature of the link with her employment, objectively determined, was critical."

26. I accept the notion of some type of requirement arising out of the employment (not necessarily compulsion or direction, or even that a certain task or thing be done in a certain way), for the applicant to be doing what she did. *Ryan* and *Smith v Woolworths*, cited by the respondent adopt this approach.

27. I also note that "direct or physical causation" is not required, but the fact that the injury occurred while the applicant, of her own motion, decided to venture to a hotel, thence to be collected and transported to the party leaves me unconvinced that the circumstances of injury were "part of the injured person's employment to hazard, to suffer, or to do that which caused (her) injury": *Badawi*. The application of common sense does not lead me to conclude that the employment had a causative element, which is conceded by Mr Grant to be necessary.

28. I conclude that injury did not arise out of the applicant's employment.

In the course of employment

Applicant's submissions: In the course of employment

29. Mr Grant submits in the alternative that the applicant was "in the course of her employment" when injured.

30. He notes that a temporal connection between employment and the activity that was being performed when an injury occurs is suggested (see *Smith v Australian Woollen Mills Limited* (1933) HCA 64), and submits that if the applicant had reached the party as planned she would have "again" been "in the course of" her employment. He points to the CEO"s email and the newsletter in support and cites *Bull v Schweppes (Aust) Pty Ltd* (1960) WCR 67 (*Bull*).

31. However, Mr Grant says that because she was moving from a one place where she was in the course of her employment to another place where she would again be in the course of her employment "only minutes apart and for connected reasons" the interim period could also be categorised as being in the course of her employment. He says this scenario would be no different to the respondent requiring the applicant to move between offices situated some minutes apart.

32. He says that the diversion to the hotel to prepare for the party, and then cross the street for transport were all "for reasons associated with the party", and all events arose in the course of her employment.

Respondent's submissions: In the course of employment

33. Mr van der Hout notes "(t)he core element of a worker's course of employment will be attendance at a workplace or carrying out work functions..." (*Hills (No 1)* at [37]), but concedes the course of employment extends beyond the worker's normal hours and place of work to "natural incidents connected with that class of work". If a worker ""is doing something which is part of or is incidental to his service" he or she is in the course of employment.

34. He also concedes, properly in my view that if the applicant arrived at the party "employment duties would be performed". However, it is submitted that while walking to the party the applicant was not performing "anything which was part of or was incidental to her service as a Client Services Officer".

35. He cites the tests propounded in *Henderson v Commissioner of Railways (WA)* and *Humphrey Earl Ltd v Speechely* (1941) 41 SR (NSW) 199, per Dixon J (*Henderson*); *Kavanagh,* per Fullagar J, at p 559; *Bill Williams Pty Ltd v Williams* [1972] HCA 23, at [4-5]; and Keating in *Ryan*.

36. As such, the respondent submits the applicant was not "in the course of her employment" when she was injured.

Discussions and Findings: the course of employment

37. *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21; (1992) 173 CLR 473 (*Hatzimanolis*) is the High Court's seminal consideration of the factors applicable to the determination of whether an injury occurred in the course of employment. More recently, *Hatzimanolis* was discussed in detail by the High Court majority (French CJ, Hayne, Crennan and Kiefel JJ) in *Comcare v PVYW* [2013] HCA 41; 303 ALR 1 (*PVYW*), at [23] to [33]. The discussion is particularly pertinent and is set out at length (footnotes omitted):

"23. Two cases upon which the joint reasons drew in *Hatzimanolis – Henderson* and *The Commonwealth v Oliver* – had in common that the injury was suffered by the employee during a lunch break, between periods of actual work. The circumstance that distinguished them was that in *Henderson*, rather like *Danvers*, the employee, a railway ganger, was living remotely in a camp for a period of time, whereas in *Oliver* the employee was injured at his permanent workplace.

24. In *Henderson*, an employee was killed in his lunch break by a train whilst crossing the railway line on his way to the camp provided by the employer. Dixon J said that an accident may arise in the course of employment notwithstanding that it occurs during an interval in actual performance and went on to state the principle referred to above, which had regard to the nature and terms of the employment and the circumstances in which the work is done in determining what an employee is 'reasonably required, expected or authorized to do' (in order to carry out his duties).

25. In *Oliver*, employees were playing cricket in their lunch break at their place of work, when one employee was injured. He had tripped over a metal disc as he walked forward to pick up a ball. In a passage which is set out in *Hatzimanolis*, Dixon CJ said that an inference could properly be drawn that the course of employment extended over the lunch break because of the circumstances of employment, including that employees were not expected to leave the premises and that playing games was a recognised practice. Menzies J [48] explained that *Whittingham*, which had involved a similar situation to that in *Oliver* but reached a different conclusion, one denying compensation [49], was not comparable to the 'widely-accepted and sensible present-day practice' of employers encouraging workers to spend intervals between working hours in recreational activities.

26. The joint reasons in *Hatzimanolis* concluded that, useful as the *Henderson* test had been, its formulation no longer adequately covered all relevant cases of injury. In reformulating the principle, *Hatzimanolis* identified as a striking feature of these cases that, where an injury occurred in an interval between periods of actual work, 'the employer has authorized, encouraged or permitted the employee to spend his time during that interval at a particular place or in a particular way.' Clearly enough, the reference to a case involving a 'particular place' was to *Danvers*. It was the only case which turned on the employee's presence at a place. *Oliver*, like the earlier cases, was a case where the employee was engaged in a particular activity.

An interval between periods of actual work

27. In what follows in the joint reasons the notion of an 'interval' between periods of actual work in which an injury is sustained was explored. It was approached in the following way.

28. In the ordinary situation, where work is performed at a permanent place of work, an injury occurring after the working day would not normally be regarded as occurring in the course of employment. An injury occurring between two discrete periods of actual work is less likely to be seen as in the course of employment. On the other hand, an injury occurring in a lunch break might be understood as occurring in an interval in an overall period of work.

29. The reasoning continues. Where an employee is required to live in a remote location for a period until a particular work-related undertaking is completed, the notion of an overall period or episode of work could apply to that whole period. Thus, on the facts in *Danvers*, it might be concluded that the time spent at the remote location and in the accommodation provided by the employer constituted one whole period of work, rather than a series of discrete periods. In such a circumstance, an injury which occurs in an interval between periods of actual work might more readily be understood as being within the course of employment than one occurring after working hours in the ordinary situation.

30. The joint reasons then observed, in the passage extracted above, that *Oliver* and other cases show that an interval will ordinarily be accepted as being part of the course of employment if the employer has induced or encouraged an employee to spend the interval "at a particular place or in a particular way." Indeed, absent gross misconduct, injury occurring in such an interval will invariably result in a finding that it occurred in the course of employment.

31. The principle in *Hatzimanolis* is then stated. 'Accordingly,', it is said, it should 'be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way.' To this it may be added 'and the employee does so'. That is implicit in what follows.

32. An employer's inducement or encouragement may create an interval according to *Hatzimanolis*, but it is not itself a sufficient condition for liability. Further factual conditions necessary for the application of that principle are stated in the passage, following the word 'Furthermore'. There, it is said that an injury sustained in such an interval will be in the course of employment if it occurred at that place or while the employee was engaged in that activity. It will be so considered unless the employee has been guilty of gross misconduct.

33. To these conditions it is added, in similar words to those used in *Danvers*, that it will always be necessary to have regard to the 'general nature, terms and circumstances of the employment' in determining the overall question, whether the injury occurred in the course of employment. Attention is not to be focused just upon the occasion giving rise to the injury."

38. Later, in *Hills No 1*, Basten JA said at [37]:

"37. The core element of a worker's course of employment will be attendance at a workplace or carrying out work functions, during usual business hours. The nature of the core will vary depending on the nature of the work. Over the years, the boundaries have tended to erode. Thus it is now well accepted that social events (such as the office Christmas party) and recreational activities (such as trips on days off work for employees required to remain at remote locations) can well form part of the course of employment. Such events and activities tend to be marked by the employer's commitment of time and resources to organising the events and encouraging staff to attend. The fact that clear boundaries have been eroded does not mean that there are no boundaries; rather, the further from the core one moves the closer scrutiny of the circumstances involved."

39. The identification of the scope of employment by reference to the worker's understanding of what was required of her would be an error. In *Hills No 1*, Basten said at [45]:

> "In finding that her attendance was in the course of her employment, if that were the finding to be inferred, the Deputy President focussed squarely on the worker's subjective 'impression' and that she 'felt' she should attend for 'work purposes' - at [125]; her being 'actuated to attend' - at [126] and [136], and by reference to her response to encouragement, at [142]. None of these findings is sufficient to engage the conclusion that her attendance was in the course of her employment. Her motives and beliefs may provide some evidential support for a conclusion that she was in fact attending in the course of her employment, but they do not form the relevant test. The course of employment is determined by the employer……."

40. *Pioneer Studios Pty Ltd v Hills* [2015] NSWCA 222, (*Hills (No 2)*) was an appeal from a decision of O'Grady DP after re-determination following remittal, in *Hills v Pioneer Studios Pty Limited* [2014] NSWWCCPD 42. In the Commission, O'Grady DP had held at [88]:

> "88. The relevant circumstances of Ms Hills' injury were that:
>
> (a) It occurred during an interval between periods of employment;
>
> (b) the respondent, through Mr Ludbrook and Ms Martel, had encouraged or induced Ms Hills to be present during that interval at a particular place, namely the business premises in Broadway Sydney;
>
> (c) a purpose of Ms Hills' presence was employment related, being a farewell party for a fellow employee;
>
> (d) the 'factual association or connection' with Ms Hills' employment, which matter is considered in *PVYW* (at [50] of the majority judgment), concerned the respondent's inducement or encouragement to be at that place, and
>
> (e) the injury was received at the place (the business premises) and by reference to that place (Ms Hills fell on the stairs).
>
> 89. The matters enumerated immediately above establish that the subject injury 'was suffered at and by reference to a place where [the respondent] had induced or encouraged [Ms Hills] to be': *PVYW* at [61]. I note that the respondent did not place reliance upon any argument as to misconduct in terms of s 14 of the 1987 Act. I find on this review that the subject injury was received in the course of Ms Hills' employment."

41. In *Hills (No 2)*, Basten JA, (McColl JA agreeing, Simpson JA dissenting) said at [15]:

> "…. not every activity which an employer may encourage, or even induce, an employee to undertake will result in the employee acting in the course of his or her employment by acceding to such encouragement or inducement"

42. Also in *Hills (No 2)*, Basten JA, noted the "camp cases" such as *Hatzimanolis*, and said at [35]:

> "There is an important limitation on the scope of that principle and an important distinction between the camp cases and cases where the worker is engaged for regular hours and goes home after work."

43. This is not to import a causal element into the question of whether the applicant was in the course of her employment. One, but not the only focus is whether there is any inducement or encouragement to spend the period between actual work and the party "at a particular place or in a particular way".

44. Kirby A-CJ (as he then was) noted in *WorkCover Authority (NSW) v Billpat Holdings Pty Ltd & Others* (1995) 11 NSWCCR 565 (*Billpat*) at 593:

> "….. (*Hatzimanolis*)…. goes beyond previous authority. But mere authorisation is not enough to cast the protective net of the *Workers Compensation Act*. To give the very substantial protections which that Act affords, there needs, according to the majority opinion in *Hatzimanolis*, to be a more direct connection with the employer's enterprise. This involves encouragement and even inducement by the employer."

45. His Honour continued at [62]:

> "62. If mere authorisation were to attract the protection of the Act, it would involve re-writing a great deal of law which has been established for a very long time. In the face of the apparent disinclination of the majority of the High Court in *Hatzimanolis* to express itself in such terms, I consider that this Court should hold back. It should be remembered that defining the limits of workers' compensation protection, by way of court interpretations, has significance for risk definition, premium setting and possibly re-insurance. If one simply looks at the present case in terms of the reasonable imposition on an employer of the duty to protect a worker 'in the course of employment' with the employer, it is not immediately apparent that departure by the worker for a purely private activity during a free weekend should (by way of the journey provisions applied) be regarded as part of the 'course of employment' of the employer. There is no direct economic benefit, as such, to the employer. The only benefit is that which Toohey J mentioned in his minority view in *Hatzimanolis*, namely making employment in a remote part of Australia more attractive by rendering it more flexible. But what the worker did in his own spare weekend time was his own business. Applying *Hatzimanolis*, I do not consider that the injury occurred in the course of the worker's employment by Billpat".

46. In *Worrell v Longworth & Anor* [2000] NSWCC 42; (2000) 20 NSWCCR 400 (*Worrell*) Burke CCJ, considered *Hatzimanolis* and its application. His Honour observed at [12]:

> "*Hatzimanolis* has been considered, and possibly interpreted, in quite a number of matters decided subsequently. Two matters raise a pertinent consideration: *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92 and *WorkCover Authority (NSW) v Billpat Holdings Pty Ltd* (1995) 11 NSWCCR 565. Both place some stress upon an employer not merely passively authorising a particular activity but actively encouraging or inducing it before the requisite nexus to employment can be established. *Glenbuddah Pty Ltd v Williams* (1995) 12 NSWCCR 468 and *Van Haeften v Caltex Oil (Australia) Pty Ltd* (1995) 12 NSWCCR 250 have the same general thrust on this particular aspect. *Hatzimanolis* appears to have modified one limb of the test in *Humphrey Earl Ltd v Speechley* [1951] HCA 75; (1951) 84 CLR 126 per Dixon J at 133, of '*reasonably required, expected or authorised to do*'. If '*required*', the activity was explicitly part of the employment; if '*expected*', it is tacitly part of the employment. It is the '*authorised*' parameter that has been modified. Insofar as that merely imports permission that, of itself, will not suffice to render the activity part of the employment. It must not merely be permitted but encouraged or induced."

47. Deputy President Roche cited *Worrell* with approval in *JP Morgan Holdings Australia Ltd t/as JP Morgan Operations Australia Ltd v Haider and Ors* [2006] NSWWCCPD 234 Roche DP, at [73], which decision was confirmed on appeal to the Court of Appeal.

48. One may readily accept that a worker's activity undertaken for both work and non-work purposes may be within the course of employment. The relevant purpose is the work related reason (if present) and the others may be disregarded, not inquiring as to the dominant purpose: *Hook v Rolfe* (1986) 7 NSWLR 40, Glass JA (Hope and Samuels JJA agreeing); *Van Wessem v Entertainment Outlet Pty Ltd* [2010] NSWWCCPD 97, Keating J at [117]. However, the requisite features of, inducement or encouragement, express or implied, from the employer must still be found.

49. In the background of these authorities, I make the further observations and findings, applying the facts to the law:

    (a) The party was not held at the respondent's premises (cf *Hills (No 1)*);

    (b) The newsletter and CEO" s email recognising the party venue was to be a workplace, and the fact that it was a "staff party" leads me to infer that it was "marked by the employer's commitment of time and resources to organising the events and encouraging staff to attend": *Hills (No 1)*. There are benefits to an employer from the applicant meeting and mixing with her fellow employees, plainly a part of corporate team-building and sustaining esprit de corps: (*Wolmar v Travelodge Australia Ltd* (1975) 26 FLR 249). In that regard, I conclude that while in attendance at the party the applicant would have been in the course of her employment. However, that is not when or where the injury occurred.

    (c) Although I accept that the respondent "authorised, encouraged or permitted" the applicant to attend the party, there is no evidence that the respondent "authorized, encouraged or permitted the (applicant) to spend (her) time during that interval at a particular place or in a particular way".

    (d) One place was at the hotel. Other than by merely holding the party, the respondent did not encourage or "permit" the applicant to stay at the hotel. It could not reasonably stop her even if it wanted to.

    (e) It can also be readily accepted that the respondent encouraged or induced the applicant to travel to the party – she had to get there. However, I do not accept that the respondent can be said to have encouraged the applicant to undertake the activities involved - to journey to the hotel, or to arrange to be collected by Ms Richards from (or near) the hotel to the party. These are the places and the activities leading to the applicant being on a footpath under renovation on Clarence Street, and which are relevant to the injury. There is no evidence that the respondent had any involvement in the "particular activity" the applicant was undertaking. The only involvement was the "sponsoring" of the party: *Hatzimanolis; PVYW*.

    (f) The fall occurred (to use the words in *PVYW*) "in an interval between periods of actual work". Even though the period may have been short, I consider, by going to the hotel, the applicant had finished her day's work as on any other day, and had ceased to be in the course of her employment. Similarly, when she left the hotel to travel to the party, she did not "re-enter" the course of her employment solely because she was en-route to a workplace, which she had been encouraged to attend. In that regard, she was in no different a position than a co-worker who went to her own home in Port Macquarie to get ready for the party.

(g) If I were to take a broader view, and conclude that the applicant was in the course of her employment merely because she was travelling to the party as encouraged by her employer, it would, in my view render, s 10(1), which deems injuries received on a journey to be injuries received arising out of or in the course of employment in certain circumstances, unnecessary. If the applicant's submissions that she was in the course of employment while on a trip back to a workplace (absent any special circumstances such as in "camp" cases) are accepted, all injuries on such trips to work would be received in the course of employment. Further, the same considerations would apply to all staff attending.

(h) "In the ordinary situation, where work is performed at a permanent place of work, an injury occurring after the working day would not normally be regarded as occurring in the course of employment. An injury occurring between two discrete periods of actual work is less likely to be seen as in the course of employment": *PVWY* at [28].

(i) Any other periodic journey to work has the same purpose as proposed by the applicant (to get the worker to her place of employment), but is generally not considered to put the worker in the course of employment. If injured, the injury is deemed to be in the course of employment. That is, all other activities during that journey are not done in the course of employment. Section 10 merely deems some injuries to be injuries during the course of employment.

(j) I do not consider either the location of the applicant's usual residence being inconvenient for her to attend the party on time, or for her and her husband to drink alcohol while at the party, sufficient to involve the respondent so as to conclude that it encouraged or even permitted the applicant to stay at the hotel. It is relatively clear that the respondent had no input into these arrangements and was powerless to influence them. To give permission, the respondent must have some control or authority over what is being permitted.

(k) As the applicant, presumably, travelled to and from work every other day, I do not consider her relationship with the employer changed on the evening of the party, based on the fact that it would have been dark or inconvenient for her. It is not stretching the boundaries of common knowledge to note that sunset in the Port Macquarie area during winter is around 5pm. Her usual finish time was 5:15pm, when during that season, the 40 km trip home was in front of her. The reasons proffered by the applicant for the arrangement on the evening of the party are, not unreasonably, personal choices made the applicant and her husband. There is no evidence as to whether, or how often they did the same thing for a night out in Port Macquarie. These choices do not place the applicant in the course of employment.

(l) There is no issue of remoteness of the respondent's activities in this case. It is the case that the applicant lived 40km away from Port Macquarie. That is not an excessive distance, given that she travelled it every day. There is no evidence that the respondent recruited the applicant from afar and required her to attend a remote workplace, or in any other way encouraged the applicant to do as she did.

50. I am not satisfied that the applicant has discharged her onus to establish that at the time of the fall she was in the course of her employment with the respondent.

51. In so concluding, it follows from what was said in *Hatzimanolis*, as analysed in *PVYW*, that I do not accept the applicant's alternative submission that she was injured during an interval or interlude in an overall period of work.

Substantial contributing factor: s 9A of the 1987 Act

52. As I have found that the applicant was not in the course of employment, and the injury did not arise out of employment, 9A does not arise. However, if I am wrong in either conclusion, I now consider the facts and the application of s 9A.

Section 9A: Applicant's submissions

53. The parties agree that the phrase "substantial contributing factor" in s 9A involves a causative element which is "real and of substance": *Badawi*.

54. Mr Grant submits that the respondent cannot restrict the causal link by weighing employment factors such as whether the activity being undertaken when the injury occurred constituted an essential element of the employment.

55. That the injury is one that the worker would not otherwise have been exposed to can be enough: *Da Ros v Qantas Airways Limited* (2010) NSWCA 89 (*Da Ros*). It is submitted that the facts in *Da Ros* were close those in this case.

Respondent's submissions: s 9A

56. Mr van der Hout submits that the word "employment" in s 9A does not mean the fact of being employed, but the actual work that the worker is required to carry out in the course of the employment: *Mercer v ANZ Banking Corporation* [2000] NSWCA 138; (2000) 20 NSWCCR 7 (*Mercer*), (per Mason P at [13]).

57. He seeks to distinguish *Da Ros* by the facts that Mr Da Ros was paid throughout the period of his absence from his home base in Sydney when he stayed in Los Angeles, and that he was required to stay from between 6:00 am one day, and 11:00 pm the following day.

Discussions and Findings: s 9A

58. As the parties note, the meaning of "substantial contributing factor" and the application of s 9A generally were also considered at length in *Badawi*.

59. In *Badawi* at [48], the Court held that the following propositions distilled from *Mercer*, have been accepted as correct, in respect of the operation of s 9A:

> "(1) The strength of the causal linkage between the employment concerned and the injury is the question in issue: *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; 2 DDCR 271 at [106] 299 per McColl JA (Mason P and Beazley JA agreeing).
>
> (2) The fact of the injury arising out or in the course of employment is relevant but not determinative of itself: *Chubb Security Australia Pty Ltd v Trevarrow* [2004] NSWCA 344 at [36] per Santow JA (Beazley and Ipp JJA agreeing).
>
> (3) Both s 4 and s 9A require independent satisfaction: *McMahon v Lagana (t/as The Vessel 'Nimble II')* [2004] NSWCA 164; 4 DDCR 348 at [25] 355 and [33] 356 per Hodgson JA (Santow JA and Stein AJA agreeing) and *Larson v Commissioner of Police* [2004] NSWCA 126; 3 DDCR 365 at [38] 378 per Tobias JA (Mason P and Santow JA agreeing).

(4) Section 9A requires that the employment concerned be '*a substantial contributing factor to the injury*'. The use of the indefinite article admits of the possibility of other and possibly non-employment related substantial contributing factors: *Department of Education and Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206 at [49]216 per Spigelman CJ (Hodgson and Bryson JJA agreeing); and *Dayton* at [22] per Giles JA.

(5) Although the strength of the linkage between the employment and injury is the question in issue, the determination is an evaluative one, leaving a broad area for the personal judgment of the trial judge: *Hevi Lift* at [105]-[106] 299 per McColl JA (Mason P and Beazley JA agreeing).

(6) Being an evaluative matter involving questions of impression and degree, a finding as to relative contributing factors is a finding of fact: *Haider v J P Morgan Holdings Aust Ltd* [2007] NSWCA 158; 4 DDCR 634 at [56] 646 per Basten JA (Giles and McColl JJA agreeing); *WorkCover Authority of NSW v Walsh* [2004] NSWCA 186 at [99]; *McMahon v Lagana* at [32] per Hodgson JA (Santow JA and Stein AJA agreeing), *Dayton* at [22] per Giles JA and *Murray v Shillingsworth* [2006] NSWCA 367 at [65] per Einstein J.

(7) The phrase 'employment concerned' in s 9A(1) bears the same meaning as 'employment' in the phrase 'arising out of or in the course of employment': *Mercer* at [13] 745 and *Federal Broom* at 632-633. We agree."

60. The applicant says she was hurrying. The applicant and her husband had 45 minutes between "clocking off" from work at 5:15pm and the commencement of the party at 6pm. However, what occurred in the interim was entirely the applicant's, and not the respondent's, volition. The applicant described the start at 6pm "for drinks and then dinner". There is no evidence that punctuality was important to the employer. Even if it were important, she left the hotel at 5:45pm, crossed the street, and the fall happened then, shortly after 5:45pm. This left 15 minutes to arrive at the party by the start at 6pm. There is no evidence of the length of the walk to her proposed collection point, or of the trip from that point to the Sails Resort. Further, after the applicant fell, she sat on the footpath for several minutes, and then returned to the hotel where she sat on her bed. She took her sandals off and then rang Ms Richards (who was to pick her up). The applicant understood, at that point, Ms Richards herself was then still getting ready. I conclude that the applicant may have been hurrying, but taking the evaluative approach of impression and degree, the reasons for the hurrying were her own, and was not such as to elevate the employment to a substantial contributing factor to the injury.

61. Section 9A(2) provides examples of matters to be taken into account when determining whether a worker's employment was a substantial contributing factor to an injury. These factors do not support the applicant. The injury occurred outside the workplace and between two discrete period of work: s 9A(2)(a). The applicant was not performing any work or undertaking tasks as part of her duties: s 9A(2)(b), *Mercer*.

62. It may be argued that the injury would not have happened at about the same time or at the same stage of the worker's life if not for the party, but that is to apply the "but for" test alone. This is not the determinative approach to causation: *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796.

63. I also accept the respondent's submission that *Da Ros* may be distinguished for the reasons advanced by the respondent.

64. I conclude that the applicant's employment was not a substantial contributing factor to the injury. Although a different issue entirely, I am comforted in that conclusion by the fact that a journey alone does not provide a real and substantial connection to employment.

Journeys:

65. Section 10(1) of the 1987 Act provides that a personal injury received by a worker on any journey (as defined) is, for the purposes of the 1987 Act, an injury arising out of or in the course of employment and compensation is payable. So far as is relevant to the applicant's case, the section provides (irrelevant provisions omitted):

> **"Journey claims**
> (cf former s 7 (1) (b)–(d), (f), (g))
>
> (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.
>
> ….
>
> (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) to (g) not applicable……
>
> (3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.
> (4) …
>
> (5) ……
>
> (5A) Nothing in this section prevents the payment of compensation for any personal injury which, apart from this section, is an injury within the meaning of this Act.
>
> (6) In this section:
>
> ***.....***
> ***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."

66. Section 9A of the 1987 Act (substantial contributing factor) does not apply to an injury within the meaning of s 10 (s 9A(4)).

67. The respondent denies the applicant was on a journey covered by s 10 of the 1987 Act, and if she was, denies that there was a real and substantial connection between the employment and the accident or incident.

68. It is common ground that the applicant was on her way from the hotel to the Sails Resort at the time of her injury.

Journey: Applicant's submissions

69. Mr Grant points out that s 10 does not contain a definitive definition of what constitutes a "place of abode", but notes s 10(6) defines "place of abode" to include the place where the worker spent the night preceding the journey and from which the worker is journeying. He does not grapple with the fact that the applicant had not actually "spent the night", or consider the effect of the definition of "night". It is simply submitted that the hotel would fit the definition of "place of abode" if a purposive approach is taken to the definition.

70. He urges a purposive rather than a literal construction relying on *Hook v Rolfe*. As a union picnic was a "place of employment" in *Bull*, Mr Grant submits, so too would the party venue be here.

71. As to whether there is a real and substantial connection between the employment and the fall, he submits that it is not necessary for the applicant to prove that it was caused by her employment: *Bina v ISS Property Services Pty Ltd* (2013) NSWWCCPD 72 (*Bina*).

72. He submits an accident resulting from a teacher hurrying to school (*Field v Department of Education and Communities* (2014) NSWCCPD 16) (*Field*); and as a result of tiredness associated with working long hours (*Namoi Cotton Co-Operative Limited v Stephen Easterman (as Administrator of the Estate of Zara Lee Easterman)* (2015) NSWWCCPD 29) (*Easterman*) have been accepted as having a real and substantial connection to employment.

73. Mr Grant notes the applicant's evidence of the busy year and a full day's work prior to the fall, and hurrying, given the short period between finishing work and the party start during which the applicant had to travel to the hotel, shower and change. He says "it is reasonable to suppose that her tiredness and her hurrying resulted from her employment and therefore it is arguable that there is a "real and substantial connection" between her employment and the fall that she suffered".

Journey: Respondent's submissions

74. The respondent concedes that the Sails Resort was to be considered a "place of employment", if the applicant had arrived there, consistent with *Bull*.

75. It would be unnecessary to enact s 10 if the personal injury during a journey was one arising out of or in the course of employment within the meaning of s 4 of the 1987 Act.

76. In the dispute notice, the respondent also denied that the applicant suffered "personal injury" arising out of the accident or incident, but that is not raised in submissions. The applicant clearly suffered personal injury, and I so find.

77. Mr van der Hout submits 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 - there must be some real relationship (connection or link) between the activities of the employment and the accident out of which the personal injury arose. If merely travelling to and from work was sufficient to establish the relevant connection, s 10(3A) would be redundant.

78. He submits that *Field* and *Easterman* are entirely distinct from the material facts in this matter. In *Field*, the worker was able to prove that he had been given less than an hour's notice between being called up for work and being required to be at the respondent's school, causing him to rush and not notice the crack in the pavement. Deputy President Roche at [39] is cited:

> "... the logic of the worker's evidence was and is compelling. He explained the basis for his assertion that staff were required to be at the school by 8.30 am, namely, his past experience. He also explained why staff had to be present by that time. His reasons were logical and plausible."

79. In the present case there are no relevant contemporary materials or objectively established facts to suggest the applicant's employer "demanded that she be present immediately before 6:00pm for the Christmas party". Certain submissions concerning the distance from the hotel to Sails Resort are made, but I am not directed to any evidence to support these submissions. In any case, it is noted that injury occurred at 5:45pm, 15 minutes before the nominated start, insufficient to conclude applicant was late. It is submitted that there is no reasonable basis to draw the inference/assertion the worker was required to be `hurrying".

80. In *Easterman* the worker had performed 12-hour shifts, from 7:00pm to 7:00am, and at the date of injury she had commenced her sixth straight shift. It is noted that Keating at [72] and [73] observed evidence was relied upon by the Arbitrator in inferring that the accident occurred because of fatigue due to working long night shifts. In the applicant's case, however, it is submitted that here is no contemporaneous evidence the applicant was fatigued (other than in her updated statement, some four years post-accident), and that was merely because she points out that the fall occurred *"at the end of the year and after a full day in the office at the end of a busy week and that she was tired"*. The facts are that the applicant had performed her normal ordinary hours from 8:45am to 5:15pm.

81. It is submitted that, in the circumstances, there was no "real *and substantial connection*" between the applicant's employment and the accident.

Discussions and Findings: Was the applicant on a journey covered by Section 10?

82. The types of journeys covered are exhaustively set out in s 10(3).

83. In my view, the journey concerned can only be the journey from the hotel to the party.

84. The onus is on the applicant to establish the relevant journey is a journey covered by the section as set out in s 10(3): *Young v Commissioner for Railways* (1960) 34 WCR 71; *Walker v Amalgamated Wireless Australasia Pty Ltd* [1985] NSWCC 2; (1985) 1 NSWCCR 88 (*Walker*).

85. Characterising the journey is a question of fact, and the intention of the worker when she embarks on the journey is an important factor: *Dobson v Morris* (1975) 4 NSWLR 681; *Walker*; *Athval Management Pty Ltd v Doherty* [2000] NSWCA 277; (2000) 20 NSWCCR 687.

86. The respondent itself admits that the party venue was to be a "workplace". I conclude that the applicant was en route to her "place of employment".

87. For the applicant's journey to fit within s 10(3)(a), the questions arising are: whether the hotel was her "place of abode" (s 10(3)(a)); and whether the journey from the hotel to the party (which I have found was also her place of employment) was a "daily or periodic" journey.

88. Whether the worker was travelling to his place of employment or to a place of abode was a question of fact and degree: *Toner v Leconsfield Colliery* [1961] 35 WCR 101.

89. For a place to be a "place of abode" it is not necessary that the worker permanently reside there: *Hook v Rolfe.* It does not matter that the points of departure and arrival may vary from time to time, if the place where a worker is to spend, or has spent, the night must have the character of his place of abode even though (s)he may travel to that particular place on one occasion only. The journey may have more than one purpose, but still be characterised as a journey within the section (*Hook v Rolfe*).

90. On the facts of this case, the particular journey involved was from the hotel to the party, which I have found to be the relevant place of employment. She had not, in ordinary parlance, "spent the night preceding a journey and from which the worker is journeying", as required by the definition. However, the definition of "night" expands the concept for a worker employed on shift work, night work or overtime, and gives the somewhat broad directive to allocate a "meaning appropriate to the circumstances of the worker's employment". Overtime, however, usually connotes payment and there is no evidence that that was arranged.

91. While the applicant was not on shift work, she may well be considered to have been on her way to "night work". Certainly the party was held at night, and the venue was the place of employment. In any case, I do not consider anything turns on that given the facts of the case.

92. The applicant had been to the hotel, direct from work. The hotel was "the place to which the worker is journeying with the intention of there spending the night following a journey", under paragraph (b) of the definition in s 10(6). The applicant arrived at the hotel, bathed and changed, and then left the hotel to go to the party, I do not consider that changes the fact that the hotel was a "place of abode" satisfying the definition. I have considered the use of the words "is journeying" in the definition, which, on one view, may suggest that the injury must occur on that particular journey. However, the journeys during which injuries are compensable are dealt with in s 10(3). Section 10(6) deals with extending the notion of "place of abode". In my view, the place of abode was fixed with that purpose because she did attend that place and intended to spend the night there. Therefore the hotel became the place of abode for the applicant for that night. Thereafter, because it was her place of abode for that evening, the fact that she ventured out to go to the party, the relevant place of employment, the journey is covered by s 10(3)(a). That is, once the hotel became her place of abode, it is no longer necessary for the applicant to rely upon paragraph (a) of the extended definition of "place of abode" for the purpose of the second journey to the party.

93. If I am wrong in taking that approach (for example because the injury must happen during the journey ***to*** the hotel, the same result may be reached in another way. If one accepts that the applicant was going to "night work", as I do, then "night" is to be given "a meaning appropriate to the circumstances of the worker's employment". The employment, in this case, is the "employment" at the party. The applicant attended the hotel, to shower and change clothes, and no doubt, to freshen up generally. It is true that the applicant did not, at that stage, sleep there. Given the time between finishing work and the start of the party, that was not possible. However, just as occurs between a "split shift", the intention was the same – to make oneself presentable, and refreshed in order to return to work. In all the circumstances of the employment concerned in this case (the attendance at the annual party), I consider "night" should be considered to include the period, albeit short, at the hotel before embarking on the journey to the party, under paragraph (a) of the definition of place of abode.

94. In either case, the applicant was on a journey from her place of abode to her place of employment.

Periodicity

95. The respondent has not submitted that the journey was "periodic". However, I consider that issue below.

96. *Hall v Estate of J. R. Hughes* [1948] WCR 97 (*Hall*) dealt with s7(1)(b) of the *Workers* Compensation *Act 1926*, which was relevantly in the same terms as s 10(3)(a). Lamond J said, at p98:

> "The other question is whether this particular journey constituted a 'daily or periodic journey.' It was submitted for respondent that there must be periodicity past or future attached to the journey from the place of employment provided by the employer from whom compensation is claimed."

97. Later, his Honour said:

> " ... in the case of a man who obtained employment for one day only and was injured on his way to work, so that he never even performed the homeward journey, it seems to me that it could not be said that he had not been injured on his daily journey notwithstanding the absence of repetition of the journey. In my view, the phrase is one directed not to the existence of a contract of employment between the worker injured and his employer, under which the worker is to perform a series of journeys, but rather to the character or intention of the journey. So, if the journey is one undertaken by the worker for the purposes of going to or from his employment, it becomes a journey within the meaning of the phrase 'daily or periodic,' notwithstanding that he personally may not perform the journey more than once. In other words, it is a journey of the character which workers generally, either daily or if not daily, periodically, undertake for the purpose of going to or from their employment."

98. In *Cotswold Australia Pty Limited v Pickwell* [2001] NSWCC 64, (*Pickwell*) Neilson J said:

> "For instance, in the case of a man who obtained employment for one day only and was injured on his way to work, so that he never even performed the homeward journey, it seems to me that it could not be said that he had not been injured on his daily journey notwithstanding the absence of repetition of the journey. In my view, the phrase is one directed not to the existence of a contract of employment between the worker injured and his employer, under which the worker is to perform a series of journeys but rather to the character or intention of the journey. So, if the journey is one undertaken by the worker for the purposes of going to or from his employment, it becomes a journey within the meaning of the phrase 'daily or periodic,' notwithstanding that he personally may not perform the journey more than once. In other words, it is a journey of the character which workers generally, either daily or if not daily, periodically, undertake for the purpose of going to or from their employment".

99. In light of *Hall* and *Pickwell*, I am satisfied that the journey the applicant was on when injured was a periodic journey.

Discussion and findings: Real and substantial connection: s 10(3A)

100. The mere fact that the applicant was on her way to the party (a workplace) is not sufficient, of itself, to establish a real and substantial connection to her employment: *Bina,* Keating J.

101. In *Bina*, His Honour also noted (at [102]), that the word "connection" in s 10(3A), may, but does not necessarily, convey the notion of a causal relationship.

102. In *Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden* [2014] NSWWCCPD 13 (*Wickenden*) Roche DP, held, at [38], following *Bina*:

> "….. 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 at [44] and [50], though those observations were made in a different context."

103. Ms Wickenden was injured on a country road after dark, when her motorcycle was struck by a car which swerved late to avoid cattle on the road, did establish a real and substantial connection between employment and the injury. The worker had been required to work longer hours during a period of training so that she rode home on a narrow country road in darkness when she would otherwise have arrived home in the light. Though the darkness may not have been the sole cause of the accident, the connection with employment was real and of substance.

104. Similarly, a real and substantial connection was also established in *Field*. Mr Field, a casual teacher, was injured when he fell because he was rushing, after a late request to work. Mr Field had been given less than an hour to prepare and travel to work. The applicant here had 45 minutes between ending work and the party.

105. Roche DP confirmed in *Field*, consistent with *Bina* and *Wickenden*, that "connection" involves a wider concept than causation. It was the worker's perception that the particular school was strict about staff arrival times, thus the worker was hurrying to arrive on time. In the absence of evidence which challenged that perception, a real and substantial connection between the employment and the incident was established.

106. The respondent submits that there are "no relevant contemporary materials or objectively established facts to suggest the Applicant's employer demanded the attendance at 6:00pm" for the party. Similarly, it is submitted that there is no evidence that the applicant was "required" to be hurrying. I do not accept that a demand or requirement from the respondent is necessary for a real and substantial connection to be established.

107. Here, the applicant says she was tired after a full day's work, and a busy year. She testifies that she was hurrying to get to the party, or her pick-up point. The evidence is not persuasively challenged. Although there may be cases where a worker's behaviour is so unreasonable so as to negate any real connection to employment, the above authorities do not impose a test of reasonableness on the motives of the applicant. Otherwise, the connection merely has to be to the employment.

108. Although the applicant's own analysis of the contribution of those factors to the accident may not be conclusive, it is not, I consider, to be disregarded. She was at the place of the fall due to work (although that itself is not enough). The only factors that she implicates are the raised paver, and the fact that she was tired and hurrying. There are no other factors, such as shoes, water, or other propensity for her to fall in evidence. In *Wickenden*, the darkness was the work connected factor. In *Field*, the hurrying was sufficient.

109. The fact that the applicant was hurrying and/or tired is not in dispute. Whether one or both these employment factors had any connection to "the accident or incident out of which the personal injury arose" is a question of fact. The applicant says she feels these circumstances "significantly contributed to her tripping and falling". As in *Field*, it was the applicant's perception that prompt arrival was required, or desirable. This is so even though, objectively, there may not have been a need for the applicant to have that perception, or other circumstances may suggest the hurrying was unnecessary. As in *Field*, in the absence of evidence which challenged the applicant's perception, I consider that a real and substantial connection between the employment and the fall is established.

110. I accept that the applicant had a level of fatigue due to work that day and over the year. Common sense suggests that fatigue reduces awareness and reaction times, even though I do not accept that it did so to the level required for the injury to arise out of employment.

111. In *Wickenden*, Roche DP"s said of the darkness:

> "these facts would not be enough to establish that, as a matter of common sense, the employment caused the injury, to satisfy the arising out of test, they are enough to satisfy the different, less demanding, s 10(3A) test".

112. I conclude that, in combination, the tiredness and/or hurrying, to adopt the expression used by Roche DP in *Wickenden* "… may not have been the sole cause of the accident, the connection between the employment and the accident was real and of substance."

113. I conclude that there is a real and substantial connection between the applicant's employment and the fall causing injury.

Recess

114. The respondent denies the applicant was injured on an ordinary recess (s 11 of the 1987 Act), but this is not addressed in either parties" submissions.

115. I content myself by finding simply that I am not satisfied that the applicant was on a recess, or if she was, it was not an "ordinary recess or authorised absence" as contemplated by s 11.

Incapacity: s 33, s36, s37

116. The only issues raised in regard to the applicant's injury related incapacity concerns the relationship of the injury to employment, or general liability issues. The fact of the applicant's incapacity from a medical point of view is not addressed in the Dispute Notice or in submissions.

117. The applicant indicates attempts to reach agreement on the amounts and periods to be paid would be made. I propose to await the outcome of those attempts before making Orders. I note, however, that the period of weekly payments claimed exceeds 130 weeks, leaving the Commission, potentially without jurisdiction if s 38 of the 1987 Act is to be relied upon.

Medical expenses

118. The applicant points out that there is no issue that the treatment that she was afforded was otherwise than reasonably necessary medical treatment. However, (due to the operation of s 38), s 59A may restrict the period in which she is entitled to medical expenses, and that will depend upon the Order for weekly payments made.

119. As I await the parties" agreement regarding the period of weekly payments applicable I also reserve making any Orders for medical expenses at this stage.

SUMMARY

120. I therefore make the following findings and set out the proposed orders:

(a) The applicant suffered injury to her right ankle on 5 December 2013 whilst on a journey under s 10 of the 1987 Act.

(b) As a result of that injury, the applicant has been incapacitated from time to time and to various degrees.

(c) As a result of that injury, the applicant has required the provision of medical treatment from time to time.

121. On the basis of these findings I propose the following orders:

(a) The applicant is entitled to weekly payments of compensation as a result of injury to the right ankle on 5 December 2013.

(b) By 30 March 2018, the parties are to file proposed orders in relation to the respondent's liability to pay weekly payments of compensation.

(c) By 30 March 2018 the parties are to file proposed orders in relation to the respondent's liability to pay medical expenses.

(d) The matter is to be remitted to the Registrar for referral to an Approved Medical Specialist for assessment of whole person impairment as a result of the right ankle injury on 5 December 2013 (including, if present, Complex Regional Pain Syndrome).