

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 124/19
Applicant: Sonia Khullar
Respondent: ANZ Banking Group Limited
Date of Determination: 1 July 2019
Citation: [2019] NSWCC 230

The Commission determines:

1. The injuries sustained in the motor vehicle accident of 7 June 2018 materially contributed to the need for weekly compensation and s 60 expenses caused by the injuries of 21 May 2018.
2. In any event the provisions of s 10(3)(c) and s 10(3A) the *Workers Compensation Act 1987* apply to the circumstances of the motor vehicle accident of 7 June 2018.
3. I make the following orders:
 - (a) The respondent will pay the applicant's s 60 expenses upon production of accounts receipts and/or HIC notice of charge.
 - (b) The respondent will pay the applicant \$366.84 per week from 30 October 2018 to 29 January 2019.
 - (c) The respondent will pay the applicant \$190.50 per week from 30 January 2019 to date and continuing.

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

John Wynyard
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 WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant brings a claim for weekly compensation and s 60 expenses in relation to injuries she sustained on 21 May 2018 and 7 June 2018. On 21 May 2018, she alleges that in her employment as a personal banker with the respondent situated at the Sydney Airport Branch, she sustained an injury to her right eye whilst using a note counting machine when a rubber band broke and flicked into her right eye. This caused her to hyperextend her neck and she was thrown backwards. She claimed that she also suffered neck and shoulder pain as a result of that injury.
2. On 7 June 2018 whilst returning from an appointment with her ophthalmologist for treatment of her right eye condition, she was involved in a motor vehicle accident which she alleged aggravated her neck and shoulder injuries.
3. Section 74 notices were issued on 9 August 2018, 11 October 2018 and 27 December 2018 (x two). Although the Reply contained a summary of the matters raised in the s 74 notices in Part 3, nothing therein was in the nature of a previously unnotified issued.
4. Ms Khullar issued an Application to Resolve a Dispute (ARD) on 10 January 2019 and the Reply was lodged as a late document on 6 February 2019.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) whether the injuries the applicant sustained in the motor vehicle accident were an exacerbation of the injuries she sustained on 21 May 2018;
 - (b) whether the journey during which the applicant suffered her motor vehicle accident was one to which s 10(3)(c) applied, given the requirement in s 10(3A) for the applicant to establish that there was a real and substantial connection between employment and the accident;
 - (c) whether the applicant has any current work capacity.

PROCEDURE BEFORE THE COMMISSION

6. This matter was heard on 24 May 2019 at Sydney. Mr Bruce McManamey of counsel appeared for the applicant and Mr Fraser Doak of counsel for the respondent. 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.

EVIDENCE

Documentary Evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Application to Admit Late Documents (ALD) dated 15 May 2019;
 - (c) ALD from the applicant dated 17 May 2019;
 - (d) Reply.

Oral Evidence

8. No application was made in respect to oral evidence.

FINDINGS AND REASONS

EVIDENCE

9. It is common ground that Ms Khullar experienced the two incidents mentioned above under "background". The injury to the eye caused by the rubber band on 21 May 2018 has now largely resolved. It is also common ground however that Ms Khullar was returning from receiving treatment for the eye on 7 June 2018 when she experienced the motor vehicle accident.

The injury of 21 May 2018

10. Ms Khullar described the circumstances of her injuries in her statement of 9 January 2019.¹ she said:

"On 21 May 2018, whilst using the note counting machine, a rubber band broke and flicked onto my right eye. As a natural reaction to the flicking of the rubber band into my eye, I also hyper-extended my neck and I was thrown backwards. However, I did not fall to the ground.

'7. As a result of the incident, [I] experienced an immediate onset of pain in my eye which later became red. I also noticed an onset of neck pain, shoulder pain and severe headaches. My initial concern was the damage I had caused to my eye. I reported the incident to my employer and attended upon a GP at the nearby medical centre who examined my eye and advised that I should consult a specialist if the redness in my eye did not resolve."

11. Ms Khullar recounted that she experienced a gradual increase of symptoms in her neck and right shoulder, and in her headaches. She attended Campbelltown hospital, where she was admitted overnight, and she underwent a CT scan of her brain regarding her headaches. She said that approximately one week after her injury her neck and shoulder girdle pain was quite severe. She saw her GP on "the following Monday" as a result. She said that she began a course of physiotherapy and medication for her headaches and "right shoulder girdle pain."
12. The discharge summary from Campbelltown hospital indicated that on 25 May 2018 Ms Khullar presented to the emergency Department complaining of:

"1st ever gradually worsening right-sided headache with nausea but no fever/meningism or h/o trauma."²

13. Ms Khullar's GP was Dr Ramana Venkatesan at the Camden surgery. According to the clinical notes, Ms Khullar had been Dr Venkatesan's patient since 2010. Dr Venkatesan received a number of questions from Ms Khullar's legal advisers regarding the subject injuries, and reported back on 5 November 2018. Dr Venkatesan took a consistent history of the episode with the rubber band. She said:³

"..Due to the focal right eye pain and other symptoms such as watering and conjunctival injection, the patient's focus was entirely on her ocular symptoms. She was seen about an hour later by a doctor close to her place of work whose assessment was

¹ ARD 438

² ARD 175

³ ARD 16

that the condition should improve over the next 2 to 3 days .. However, while she attended work the next day, she had developed a " very bad headache" , causing her to return home prematurely where she found that simple analgesia such as paracetamol and ibuprofen were ineffective. As the patient had not experienced such a headache previously and as it appeared to be unrelenting, she attended the Campbelltown Hospital emergency department. There amongst other management and treatment a cerebral CT scan was performed which I understand to be within normal limits. As the patient did not link her work injury to her symptoms, she did not volunteer that particular work history. She was discharged the next day- please refer to the attached discharge summary for further details."

14. Amongst the medical records were the clinical notes of the medical practice, and the WorkCover certificates issued at the time. On Monday 28 May 2018, an entry consistent with the history of the eye injury was made. Dr Venkatesan noted that the forceful recoil involved a hyper extension of the neck:

"-seemed okay at the time but then developed the most severe of right sided cervical headaches with ? Neck stiffness....Still [has] some right sided neck stiffness..."

15. The notes indicated a complaint that Ms Khullar was "still having right sided neck pain..." on 1 June 2018, and that on 4 June 2018 her neck symptoms were improving although she was still seeing the physiotherapist.
16. The physiotherapist to whom Ms Khullar was referred was Ms Melanie Keegan from Southwest Wellness Centre. Ms Keegan supplied a report dated 26 June 2018 in which she stated:

"Sonia initially presented with pairi throughout her neck and bilateral shoulders and was highly irritable. After two sessions Sonia reported feeling reduced pain and increased movement. Following this second appointment Ms. Khuller was involved in an MVA which resulted in another whiplash movement and caused her pain to increase. Sonia experienced increased nerve pain into her right shoulder, aggravated by certain neck positions and limiting her use of her right arm."

17. The WorkCover certificates issued between 21 May 2018 and 7 June 2018 described Ms Khullar's injuries as being "right sided traumatic anterior uveitis with secondary muscular-ligamentous strain of cervical spine/shoulders" (31 May 2018⁴), "right-sided muscular ligamentous strain of cervical spine/shoulders" (7 June 2018⁵). Subsequent certificates issued after the motor vehicle accident referred simply to "neck pain/stiffness."⁶
18. The damage to Ms Khullar's eye was diagnosed as traumatic uveitis, for which she was prescribed eyedrops. She was also referred to Dr Alman Ogane, Ophthalmologist, whose rooms were situated at Camden. Ms Khullar resided at Mount Annan, and her workplace was at the airport at Mascot.

The motor vehicle accident of 7 June 2018

19. On 23 July 2018, Dr Ogane reported that Ms Khullar had made a full ocular recovery from the rubber band injury. Dr Ogane noted that the consultation occurred on 7 June 2018, and noted further that Ms Khullar had been involved in a motor vehicle accident following that appointment.⁷

⁴ ARD 88

⁵ ARD 79

⁶ see e.g. ARD 66, 77

⁷ ARD 26

20. With regard to the motor vehicle accident, Ms Khullar said in her statement of 9 January 2019:

“ ... I was stationary waiting to enter the roundabout as there was traffic in the roundabout on my right hand side. I was suddenly hit from behind by another vehicle. My vehicle was crashed forward but it did not strike any other vehicles. As a result of the accident, I noticed an increasing neck and shoulder girdle pain. The following day, I had physiotherapy.”

21. Dr James Bodel was retained as Ms Khullar’s medico legal referee. He took a more thorough history of the motor vehicle accident in his report of 24 November 2018.⁸ He said:

“Unfortunately, on 07 June 2018, just three weeks after the injury at work, she was involved in a motor vehicle accident while on her way back from an appointment with the eye specialist. She was at the time the driver of a Nissan Pathfinder. She was at the time wearing her seatbelt. The accident occurred at 7:15am. She indicates that the eye specialist appointment was for 6:30am.

The road was dry and the accident occurred as she was entering a roundabout. She was stationary waiting to enter the roundabout because there was traffic in the roundabout on her right hand side. Suddenly she was hit from behind by another vehicle.

She states that her vehicle was pushed forward but it did not strike any other vehicles. Her vehicle was driveable and the main damage was to the bumper bar. This was replaced at a cost of about \$1,800 and there was no other major damage to her vehicle.

The vehicle that hit her however was a very small vehicle and it was very badly damaged and had to be towed away.”

22. Dr Richard Powell, Orthopaedic Surgeon, took a similar history of the motor vehicle accident.
23. Ms Khullar lodged a further statement dated 16 May 2019, in which she expanded further on the circumstances of the motor vehicle accident.⁹ She said that she was at the intersection of Welling Drive and Veness Circuit, Narellan Vale at about 7:20 AM. She confirmed that she was stationary and that as she stopped to give way to a motor vehicle entering the roundabout from her right she was “suddenly hit from behind” and the force of the collision caused her to hit her head on the steering wheel. She said:

“The woman driving the [car] apologised for having collided into me and told me that she was in a rush to get to work after dropping her kids to childcare. She gave me her details.”

24. Ms Khullar said that her appointment with her ophthalmologist had been scheduled for 7 AM.
25. Ms Khullar said that she then came under the care of Dr Chandra Dave, Orthopaedic Surgeon. On 11 July 2018, an MRI scan was taken of Ms Khullar's right shoulder and neck, and a further MRI scan of her neck occurred on 6 August 2018. In September 2018, she underwent an injection of local anaesthetic hydro-cortisone which aggravated her uveitis and was not effective.

⁸ ARD 1

⁹ ALD 17 May 2019

26. On 13 September 2018, Dr Dave reported that Ms Khullar was complaining of pain anterolaterally in the shoulder with difficulty in lifting her arm above shoulder height. Her MRI scan confirmed "an impingement type process."¹⁰
27. Dr Bodel noted that by August 2018 Ms Khullar's eye had settled and she was able to return to work on that account, but the neck and shoulder girdle pain particularly in the right-hand side was continuing to prevent her from returning. On examination Dr Bodel found impingement in the right shoulder and a reduced range of motion in the cervical spine.
28. On 23 August 2018 Dr Vishal Patel, neurologist, reported to Dr Venkatesan.¹¹ The main concern described to Dr Patel by Ms Khullar was a recurrent tremor of her right hand. Dr Patel recorded that Ms Khullar "started [losing] control on her right hand after six weeks" and that she had an intermittent tremor at rest but got worse when she performed a job. Her handwriting was affected and she dropped things, although she did not spill tea or coffee.
29. In a further report to Dr Venkatesan dated 19 September 2008 Dr Patel noted that Ms Khullar felt a bit better. Sensation on the right upper limb was back to normal although she still had intermittent tremor which got worse when she performed jobs.¹²

Causation opinions

30. Dr Bodel's opinion as to causation was that the incident of 21 May 2018 caused Ms Khullar to suffer a sudden hyper extension injury to her neck and the right shoulder which were still symptomatic at the time of the motor vehicle accident on 7 June 2018. He found that the motor vehicle accident therefore caused a further soft tissue injury in the neck and the right shoulder, and that her injuries arose as a consequence of both incidents.¹³
31. For the respondent, Dr Richard Powell, Orthopaedic Surgeon, was retained as medico-legal referee. In his first report of 21 September 2018 Dr Powell took a consistent history. He said:¹⁴

"The workplace injury of 21 May 2018 is sufficient to have caused a minor soft tissue injury involving the cervical spine. This in turn was aggravated by the motor vehicle accident occurring on 7 June 2018. That aggravation is ongoing. The MRI scan demonstrated minor underlying degenerative disc pathology which is likely to be pre-existing in nature, though previously asymptomatic."

32. Dr Powell wrote a supplementary report to the insurer on 9 October 2018. He was asked the following question:¹⁵

"At item 6 of your report, you have mentioned that of the two incidents in May and June respectively the motor accident in June appears to have been the more significant to the survival spine. Under the legislation, ANZ is not liable for the motor vehicle accident on 7 June 2018. This claim has been formally declined by ANZ. Could you please clarify whether you consider that the current survival spine condition is related to the initial injury of 21 May 2018? Or the later incident in June 2018? Please provide a clear opinion as to which incident is responsible for the current presentation?"

¹⁰ ARD 23

¹¹ ARD 428

¹² ARD 435

¹³ ARD 8

¹⁴ reply 22

¹⁵ Reply 25

33. With regard to the injury of 21 May 2018, Dr Powell said:

"The forces involved with her "recoil movement" are relatively minor and would be unlikely to in themselves have resulted in any significant structural pathology involving the musculoskeletal system.

34. He said further:

"...based on the available information I would consider that Ms Khullar's current cervical spine condition is primarily the result of the motor vehicle accident occurring in June 2018. Any contribution from the workplace incident on 21 May 2018 would have been minor and should have settled by now.

The forces involved in that initial incident are unlikely to have been sufficient to have caused any significant structural pathology and any minor soft tissue injury should have settled over a period of several weeks at most.

Therefore, Ms Khullar's current presentation is more likely to be the result of injuries sustained in the motor vehicle accident."

Capacity for employment

35. Dr Bodel found that Ms Khullar was not fit for her pre-injury level of work as a result of the neck and shoulder girdle symptoms "at this stage." He described her current complaints as of 24 November 2018 as follows:¹⁶

- This lady has pain at the base of the neck and over the top of the right shoulder; and
- She has periscapular pain in the upper part of the back; and
- Head down posture or use of the right arm overhead can aggravate the pain; and
- She has some numbness and tingling in the region of the right hand and this extends into the thumb and also into the ring and little finger but not the index or middle finger."

36. As to capacity, Dr Powell said that Ms Khullar was not fit to return to pre-injury duties "as a result of injuries sustained in the course of her employment." Dr Powell recommended suitable duties, which would avoid overhead work, limit periods of prolonged fixed gaze, doing alternate tasks and having regular breaks over reduced hours. Dr Powell gave as an example, working 4 to 5 hours per day 4 to 5 days per week.¹⁷

37. Dr Powell recorded Ms Khullar's complaints as of 21 September 2018 as follows:

"Ms Khullar complains of ongoing neck pain. She reports a constant aching pain on the right side of the neck. Pain radiates to the right shoulder and down the volar aspect of the upper limb to the hand. She is aware of neck stiffness and some restriction in range of motion. She suffers headaches. She is aware of intermittent numbness involving the ulnar two digits and the thumb, as well as the hand tremor."

38. Dr Venkatesan's opinion regarding capacity was given in her report of 5 November 2018. She said:

"4. Your opinion as to any restriction on our client's capacity for work?

The patient has had ongoing right upper limb pain, right-sided neck and right shoulder pain with stiffness at times. This condition has been diagnosed as a musculo-ligamentous sprain of those regions. It has proven only marginally improved so far to various interventions such as physiotherapy and acupuncture. There are significant

¹⁶ ARD 4

¹⁷ Reply 23

current restrictions to the movement of her right shoulder and her neck as well. Due to the restrictions on her right upper limb and neck movements, she is unable to complete her activities of daily living competently and sometimes requires assistance. Her chronic pain in the above regions has further hampered her recovery leading to depressed mood at times. Her family and social life have been somewhat disrupted as well due to this.

39. Dr Powell said that Ms Khullar's current injury would represent an aggravation of her pre-existing asymptomatic degenerative pathology in the lumbar spine. He observed that of the two incidents, the motor vehicle accident was the more significant, regarding the cervical spine. He considered that Ms Khullar suffered a whiplash type injury and that her symptoms would take several months to improve.

SUBMISSIONS

Mr Doak

40. Mr Doak submitted that there was no dispute that Ms Khullar had injured herself on 21 May 2018 as she alleged. He submitted however that the evidence showed that the incident on 21 May 2018 did not cause any lasting pathology or symptomology giving rise to any incapacity from her neck injury or her right shoulder. Mr Doak submitted that there was no contemporaneous support for any injury to the right shoulder, apart from the reference to the shoulders within the WorkCover certificates. The WorkCover certificates could be discounted, Mr Doak argued, as some referred to the cause of the orthopaedic injuries to be the motor vehicle accident, whilst others nominated the injury of 21 May 2018. Mr Doak submitted that the clinical notes made no mention of any injury to the right shoulder. Further, Mr Doak submitted that I would have some reservations as to the accuracy of Ms Khullar's recollection, as when she was admitted to Campbelltown hospital she made no mention of any neck or shoulder symptoms. Moreover, the hospital records showed that no history of trauma had been given.
41. This in turn cast some doubt on the opinion of Dr Bodel, Mr Doak said, as Dr Bodel had accepted that Ms Khullar was suffering pain in the neck and the shoulders following the incident of 21 May 2018. Mr Doak submitted that I would not accept Dr Bodel's opinion that Ms Khullar's injuries had been caused by both the incident on 21 May 2018, and the motor accident of 7 June 2018. Mr Doak submitted that Dr Bodel was "struggling to restrain himself in an advocate's role" in finding that Ms Khullar's neck pain had been developing and becoming worse prior to the motor accident.
42. I was taken to the clinical notes which demonstrated that at the time of the motor accident Ms Khullar's neck symptoms from the injury of 21 May 2018 had improved. The clinical notes demonstrated, Mr Doak said, a great improvement. He noted again that the clinical notes at no stage prior to the motor accident showed any reference to the right shoulder. He submitted that the first reference to the shoulder problems in the clinical notes was on 23 June 2018¹⁸.
43. Mr Doak submitted that there was a clear distinction between the injuries caused by each event. He submitted that although there was some later support for an allegation of injury to the right shoulder following the event of 21 May 2018, the contemporaneous material did not support that claim. He submitted that the clinical notes demonstrated that just before the motor accident of 7 June 2018 that Ms Khullar's neck symptoms were improving and that it was common ground, he submitted, that the injury to the eye had resolved.

¹⁸ ARD 100

44. Mr Doak submitted that Dr Powell's opinion was more in keeping with the contemporaneous medical records. Mr Doak submitted that I would prefer Dr Powell's supplementary opinion of 9 October 2018 that the pathology arising from the rubber band incident on 21 May 2018 was minor and had settled to all intents and purposes by 7 June 2018. Mr Doak submitted that I would be satisfied that it was the motor vehicle accident that caused Ms Khullar's current need for treatment and incapacity, but that the respondent was not liable because of the effect of s 10(3A).
45. Mr Doak submitted on the authority of *Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden*¹⁹ and *Bina v ISS Properties Pty Ltd*²⁰ that the applicant had failed to establish that there was a real and substantial connection between her employment and the motor vehicle accident she experienced on 7 June 2018
46. Mr Doak submitted that the facts could not establish compliance with s 10(3A). I could not infer that such a connection was present, Mr Doak submitted. It could have been caused by the driver of the following car taking her eyes off the road, and he submitted that the account in the further statement made by Ms Khullar on 15 May 2019 did not assist her case.
47. Mr Doak submitted that the evidence was simply that the applicant was involved in a "rear ender", a common form of motor accident, and unremarkable. He submitted that I could not infer that because the injury occurred at 7:20am in Narellan, it had occurred during rush hour, or rather that there was a rush hour at that time at that place. Nor did the statement by the other driver to the effect that she was "in a rush to get to work" allow me to infer the same. There were a number of explanations for the driver's statement, Mr Doak urged. It may, for instance, have been that the police were not called because the driver was in a rush to get to work. It did not follow that this evidence established a real and substantial connection between Ms Khullar's accident and her employment.
48. Mr Doak submitted that *Bina* was a case involving similar circumstances where a worker, whilst working shifts, drove to her home in the morning when she suffered an accident. He said that President Judge Keating found that the required connection mandated by s 10(3A) was not there. Mr Doak said that the circumstances of the motor accident experienced by Ms Khullar were similar. He said that the test was whether there was a real and substantial connection between the employment and the accident and that I was unable to draw an inference that there was increased traffic at the roundabout at that time.
49. In *Singh* Mr Doak submitted that the applicant, as a result of working late, was driving in the dark on a motorcycle, and was injured in a collision. The necessity for the applicant to ride in the dark was caused by her work circumstances, which was found to be a real and substantial connection and an example of the proper application of s 10(3A).
50. Regarding Ms Khullar's work capacity, Mr Doak submitted that there was "no clear pathway" to a finding that she had no current capacity to work.

Mr McManamey

51. Mr McManamey referred to evidence which rebutted Mr Doak's submissions. This evidence is considered below, under "Discussion."
52. Mr McManamey submitted that neck and shoulder injuries resulted from the injury of 21 May 2018, so that even if the motor vehicle accident were not found to have a substantial or real connection with the employment, liability would still be found as the injuries of 7 June 2018 constituted a material contribution to the injuries caused on 21 May 2018. I should

¹⁹ [2014] NSWCCPD 13

²⁰ [2013] NSWCCPD 72

accordingly find that the injuries of 21 May 2018 contributed to the injuries that had been aggravated by the subsequent motor vehicle accident. Thus, I could find that the event of 21 May 2018 was the cause of the present incapacity.

53. With regard s 10(3A), Mr McManamey submitted that the question of whether a connection was real or of substance was one of fact. Mr McManamey submitted that, contrary to the submissions of Mr Doak, there were factual issues which pointed to a causal connection that was real and of substance. Mr McManamey submitted that the phrase “real and substantial connection” was not unusual in the legislation and indeed had been interpreted to mean “real” or “actual”. These factual matters are also discussed below.
54. In response, Mr Doak submitted that the motor vehicle accident was solely causative and it was not necessarily on the respondent to demonstrate that it was the second accident that caused the problem. Rather, the applicant had the onus of demonstrating the connection between the first and second injurious events.
55. Insofar as Mr McManamey relied upon the report of the physiotherapist to negate his submission that there had been no complaint about the right shoulder until after the second accident, Mr Doak pointed out that the complaints recorded by the physiotherapist were of bilateral shoulder problems. Further, a perusal of the clinical notes as recently as 2019 showed that Ms Khullar was complaining of complaints both in the neck and bilateral shoulders.
56. Mr Doak submitted that the evidence was ambiguous at best.

Discussion

57. The first issue to be determined is as to whether Ms Khullar injured both her neck and right shoulder when she hyperextended her neck as she reacted to the rubber band flicking into her eye. I am satisfied that she did. Mr Doak said all that could be said in arguing to the contrary, but he quite properly conceded that the contemporaneous evidence supported Ms Khullar’s claim that she injured her neck and shoulders as well as her eye on 21 May 2018.
58. The support for the neck injury came within the clinical notes, when Dr Venkatesan recorded Ms Khullar’s complaint of neck pain on 28 May 2018. Mr Doak emphasised that when Ms Khullar had attended Canterbury Hospital on 25 May 2018 she had neither complained about her neck/shoulders nor that she had been involved in any trauma. There was no suggestion in Ms Khullar’s statement that she made such complaints, and the explanation for her failure to report the trauma or the symptoms in her neck was given in Dr Venkatesan’s report of 2 November 2018. Dr Venkatesan said that the nature of the headache Ms Khullar was experiencing was unprecedented and unrelenting. She went to the emergency Department where a CT scan was taken of the brain, but she had not at that point linked the rubber band incident to her symptoms and accordingly did not volunteer that episode. Dr Venkatesan had been Ms Khullar’s family doctor for some years and I accept her explanation, which obviously was given to her by Ms Khullar, whom I regard as a reliable witness.
59. There was also contemporaneous support for the presence of an injury to the shoulders (and neck) in the WorkCover certificate dated 31 May 2018, which specifically identified symptomatology in the “cervical spine” and “shoulders.”
60. Further corroboration was contained in the report of Ms Keegan of 26 June 2018, who confirmed that she had been treating Ms Khullar for “pain throughout her neck and bilateral shoulders” for two sessions before the motor vehicle accident of 7 June 2018 occurred. Ms Keegan also reported that the motor vehicle accident caused Ms Khullar’s pain to increase, particularly nerve pain into the right shoulder, which was aggravated by certain neck positions and which restricted the use of the right arm.

61. Mr Doak relied on the fact that some WorkCover certificates nominated the motor vehicle accident as the cause of Ms Khullar's shoulder symptoms whilst others nominated the incident on 21 May 2018 as being the cause. It is trite law that caution must be exercised when making inferences from the contents of clinical notes and certificates.²¹ Mr McManamey submitted that the two different dates might well have been entered on the instructions of those administering Ms Khullar's Injury Management Plan, on the basis that a claim pursuant to the CTP legislation was being anticipated.²² Mr Doak made other submissions regarding the contemporaneous evidence, but was unable to overcome the concessions he had to make as to the existence of the corroborative evidence to which I have just referred.
62. A further difficulty that Mr Doak was unable to overcome was the opinion of the respondent's own medico-legal referee, Dr Powell. In his first report of 21 September 2018 Dr Powell found, without equivocation, that the workplace injury of 21 May 2018 was sufficient to cause a minor soft tissue injury involving the cervical spine. He found further that this injury was aggravated by the motor vehicle accident of 7 June 2018, and that the aggravation was ongoing. He found that MRI scanning demonstrated degenerative disc pathology which had previously been asymptomatic.
63. I have reproduced the somewhat leading question from the respondent's legal advisers that was recorded in Dr Powell's supplementary report of 9 October 2018. Although Dr Powell concluded that Ms Khullar's current presentation was more likely to have been caused by the motor vehicle accident, his opinion was so hedged and conditional that I do not accept it. Dr Powell said that the recoil movement in the injury of 21 May 2018 was unlikely to have resulted in any *significant* structural pathology (my emphasis). It has not been suggested that any significant structural pathology was caused by this first incident. It was described as a soft tissue injury. Dr Powell allowed that the minor soft tissue injury should have settled over a period of several weeks at most, but of course the motor vehicle accident, occurring as it did two weeks and three days later, prevented that from occurring.
64. Mr Doak submitted that I would not accept the report of Dr Bodel, as Dr Bodel did not take the history of the admission to Canterbury Hospital and was therefore, as I understood the submission, unaware that Ms Khullar had not complained about neck or shoulder pain, or indeed any trauma on that occasion. He also argued that I could not accept Dr Bodel's opinion because Dr Bodel had recorded that Ms Khullar's symptoms in the shoulder were worsening at the time of the motor vehicle accident when the evidence showed that the symptoms were in fact improving.
65. These submissions must be rejected. It is correct that Dr Bodel did not take a history of the admission to Canterbury Hospital, but I draw no adverse inference as, for reasons I have given, there was no significance to be attached to Ms Khullar's failure to mention the work injury or to complain of neck or shoulder pain at the hospital.
66. Dr Bodel's comment as to the symptomatology in the neck and right shoulder girdle at the time of the motor vehicle accident was that Ms Khullar was 'developing' significant pain, when the clinical note said that her neck symptoms were 'improving'. I was not assisted by that submission, concerned as it was with semantic minutiae. Whether the neck pain were improving or developing, the essential point is that it was present at the time of the motor vehicle accident on 7 June 2018.

²¹ See eg *Qannadian v Bartter Enterprises Pty Limited* [2016] NSW WCC PD 50

²² See report 21 June 2018, ARD 312 –“On June 20 it was suggested that the motor vehicle accident be the subject of separate certificates as it was an injury.”

67. I accept Dr Bodel's opinion. He found that the motor vehicle accident therefore caused a further soft tissue injury in the neck and the right shoulder, and that Ms Khullar's injuries arose as a consequence of both incidents.
68. I am accordingly satisfied that Ms Khullar was suffering symptoms in her cervical spine and shoulders at the time of the motor vehicle accident on 7 June 2018. I am also satisfied that the injuries sustained in that collision materially contributed to the aggravation of Ms Khullar's degenerative condition in her cervical spine and right shoulder, which had already been rendered symptomatic by the injury of 21 May 2018. There is no claim in respect of the left shoulder, which I assume settled in accordance with the medical practitioners' prognosis for a soft tissue injury. However, the evidence of Ms Keegan is that Ms Khullar was complaining of an increase in her right shoulder following the motor vehicle accident. I do not place much weight on Ms Keegan's provisional diagnosis of 'nerve pain', bearing in mind her qualifications as a physiotherapist, but it is relevant that she recorded a specific complaint of an increase in the right shoulder pain following the collision.
69. In *Megson v Staging Connections Group Ltd*²³ DP Snell considered the law regarding causation. He referred to a review by Roche DP, in *Murphy v Allity Management Services Pty Ltd*,¹ of the authorities and the principles governing issues of causation. DP Snell said at [88]:
- “88. In *Murphy* Roche DP dealt with a claim for the cost of surgery, where there was a compensable shoulder injury, followed by an injury to the same shoulder in non-compensable circumstances, followed by a requirement for surgery to the shoulder. Causation of the requirement for surgery was in issue. Roche DP said:
- “57. ... even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes... The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
- 58.....[S]he has to establish that the injury materially contributed to the need for the surgery..
- 89.The above passage from *Murphy* is consistent with authority, and I accept it sets out an appropriate approach to issues of causation in such circumstances. ..”
- (Authorities omitted).
70. The approach is also appropriate to the current circumstances. The need for treatment has been materially contributed to by the motor vehicle accident. The inability of Ms Khullar to perform her pre-injury duties has also been materially contributed to by the motor vehicle accident. Accordingly, the injuries sustained in the motor vehicle accident are causally connected to the injuries sustained on 21 May 2018.
71. It thus becomes unnecessary to determine whether the journey claim during which the motor vehicle accident occurred complied with s 10 of the *Workers Compensation Act 1987* (the 1987 Act). As the matter was argued before me, however, this issue should be determined.

²³ [2019] NSWCCPD 2

72. Section 10 provides relevantly:

“10 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.

(1A)

(1B)

(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)

(a)

(b)

(3) The journeys to which this section applies are as follows:

(a) ...

(b)

(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)

(e)

(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)”

73. I was referred to *Dewan Singh* and *Bina* as examples of the application of s 10(3A).

74. In *Bina*, President Judge Keating said that the mere fact that a worker must travel to or from work does not of itself establish a causal connection between an injury sustained during such a journey and the worker's employment.²⁴

75. At [117] His Honour said:

“It is therefore clear that s 10(3A) has work to do..... 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.”

²⁴ At [62].

76. In *State Super Financial Services Australia Limited v McCoy*²⁵ President Judge Keating said at [69]:

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

77. It follows the determination as to whether there is a real and substantial connection between the injury and the employment depends on the facts in any particular case. Mr McManamey submitted that the following facts were relevant:

- Ms Khullar was injured at work
- having become injured, required treatment
- that treatment was reasonably necessary from an ophthalmologist situated in Camden
- Ms Khullar lived in Mount Annan
- Ms Khullar works at the airport
- thus, in order to seek treatment from her ophthalmologist it was necessary for her to go into the opposite direction to that which she would normally take to go to work as Camden is a little to the west of Mount Annan and the airport is to the north east
- the accident occurred at 7:20am which I could infer in any point in Sydney would be peak hour
- that in any event, if not for all of the above facts, Ms Khullar would never have been on that road at the time of her accident.

78. I accept that summary of relevant facts as establishing the necessary degree of association or relationship between the employment and the injury caused by the motor vehicle accident.

79. I would also add that, although Ms Khullar failed to mention it in her statement, it is a reasonable assumption that her appointment with Dr Ogane was at 7 AM because she was still at work and needed an early appointment to facilitate her attendance at work on time.

80. Whilst Ms Khullar’s journey was made for the purpose of receiving medical treatment in connection with her compensable eye injury and accordingly was on a journey that was permissible pursuant to s 10(3)(c), the real and substantial connection between the employment and the injury caused by the motor vehicle accident was because treatment for her injured eye required Ms Khullar to travel from her home to the rooms of Dr Ogane on a journey that she would not otherwise have made, at an hour when she would not otherwise have been at the intersection where the collision occurred.

²⁵ [2018] NSWCCPD 26

81. Accordingly, I am satisfied that the provisions of s (10)(3A) would apply in any event to the injuries suffered in the motor vehicle accident on 7 June 2018. However, as I have indicated, because the injuries sustained in that accident materially contributed to the injuries sustained in the workplace accident of 21 May 2018 Ms Khullar has satisfied her onus of establishing that she is entitled to compensation in respect of the effects of the injuries caused in both events.
82. Ms Khullar claims payment of weekly compensation from 30 October 2018 to date and continuing, together with section 60 expenses. In respect of the latter claim I will make a general order.
83. The evidence establishes that Ms Khullar is fit for suitable duties. On 24 November 2018 Dr Bodel thought that Ms Khullar was not fit to return to her pre-injury duties, although there was no residual incapacity as a result of the eye injury. His description of the restrictions Ms Khullar was experiencing, and the sort of duties that would be suitable for her, were extremely general.
84. Dr Powell in his report of 21 September 2018 agreed that Ms Khullar was not fit to return to her pre-injury duties and recommended suitable duties with instructions to avoid overhead work, alternate her tasks where possible and have an opportunity for regular breaks. He thought that Ms Khullar had capacity to work on reduced hours, nominating 4 to 5 hours a day, 4 to 5 days a week. Dr Powell also gave advice regarding her eye injury, which is no longer symptomatic.
85. Dr Venkatesan also referred to the restrictions on the right upper limb and neck movements, saying there was a psychological overlay which is hampering recovery.
86. Another area in which Ms Khullar's statements were unsatisfactory was that they failed to describe her duties as a personal banker for the respondent at Sydney airport. Moreover, Ms Khullar failed to describe what activities were limited by her neck and right shoulder injuries. All she said was that she was, on the date of the statement of 9 January 2019, "unfit for work." Just why she was unfit for work, Ms Khullar failed to explain.
87. Ms Khullar has been employed in a position of responsibility with the bank since 2007. At the time of her injury on 21 May 2018 she was working part-time, 31 hours per week. She is 37 years of age. I infer that the term "personal banker" carries with it some social skills in dealing with members of the public, and that her duties were primarily of recording and reporting financial matters, and indeed dealing with money, which was the cause of her injury in the first place. I assume that it was rarely necessary for her to use her right arm overhead, although I accept that her duties would involve some head down posture. The numbness and tremor in her right hand was described as intermittent.
88. No reason was given as to why she was working such restricted hours, but there is no suggestion that she was limited by any injury to doing part-time work, which I assume was a matter of choice.
89. Doing the best I can with the evidence, and having regard to the provisions of s 32A of the 1987 Act, I think Ms Khullar is capable of working at a desk engaging in customer service doing work similar to her pre-injury work such as a personal banker but for more limited hours. I accept the higher estimate in Dr Powell's opinion, being the most detailed, that she is capable of working five hours per day five hours per week, earning \$30 per hour, a weekly total of \$750 per week.
90. The pre-injury average weekly earnings of Ms Khullar were agreed to total \$1175.63. Pursuant to section 36 her weekly entitlement is \$1116.84 (95% of the pre-injury average weekly earnings) less residual earning capacity doing suitable duties, \$750, giving a weekly entitlement of \$366.84. The claim dated 30 October 2018 so that the 13-week entitlement. Ceases on 29 January 2019.

91. Pursuant to section 37 the weekly entitlement is 80% of the pre-injury average weekly earnings, \$940, less Ms Khullar's residual earning capacity on suitable duties, \$750, giving a weekly entitlement of \$190.50 from 30 January 2019 to date and continuing.

SUMMARY

92. I find that the injuries sustained in the motor vehicle accident of 7 June 2018 materially contributed to the need for weekly compensation and s 60 expenses caused by the injuries of 21 May 2018.
93. I find further that in any event the provisions of s 10(3)(c) and s 10(3A) the 1987 Act apply to the circumstances of the motor vehicle accident of 7 June 2018.
94. For the above reasons, I make the following orders:
- (a) The respondent will pay the applicant's s 60 expenses upon production of accounts, receipts and/or HIC notice of charge.
 - (b) The respondent will pay the applicant \$366.84 per week from 30 October 2018 to 29 January 2019.
 - (c) The respondent will pay the applicant \$190.50 per week from 30 January 2019 to date and continuing.