WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**013437/12**
APPLICANT:	**Ana Filicia Bina**
RESPONDENT:	**ISS Property Services Pty Limited**
DATE OF DETERMINATION:	**17 September 2013**
CITATION:	**[2013] NSWWCC 328**

The Commission determines:

1. Award for the respondent.

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

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

Abu Sufian
Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ana Filicia Bina (the applicant) is employed by ISS Property Services Proprietary Limited (the respondent) as a cleaner at the Guildford West Public School. At the time of her injury she worked a broken or split shift. Her normal hours of work were 5.30am to 8.00am and 3.00pm to 6.30pm on weekdays.

2. The applicant routinely drove a motor vehicle to and from her place of employment. At about 8.20am on 27 July 2012, she was driving a motor vehicle from the Guildford West Public School to her home in Fairfield Heights, when her vehicle was involved in a collision with another vehicle at the intersection of Polding Street and the Horsley Drive, Fairfield. The applicant suffered injuries to her neck, back and arms in the accident. As a consequence of those injuries she has been unable to return to her employment as a cleaner.

PROCEEDINGS BEFORE THE COMMISSION

3. By these proceedings, the applicant alleges that the circumstances of her injuries give rise to an entitlement to compensation under the *Workers Compensation Act* 1987 (the 1987 Act). She claims weekly payments of compensation from 27 July 2012 to date and continuing. She also claims an indemnity in respect of her medical expenses pursuant to section 60 of the 1987 Act.

4. By a Section 74 Notice dated 2 October 2012, the respondent disputed that it was liable to pay compensation to the applicant on several discrete bases. In particular, it stated that the applicant was not entitled to compensation as the accident in which she was injured on 27 July 2012 did not have a "real and substantial connection" with her employment in accordance with section 10(3A) of the 1987 Act.

5. When this matter came on for conciliation and arbitration on 3 July of 2013, Mr Stockley of counsel appeared for the applicant and Mr Newton of counsel appeared for the respondent. Counsel agreed that the only issue for determination by the Commission was whether the circumstances of the applicant's injury fell within section 10(3A) of the 1987 Act. As that subsection had not previously been considered in the Commission case law, counsel for the respondent sought leave to address its application to the facts of this case by written submissions. As Mr Stockley did not quibble with this proposal, I made orders requiring the parties to lodge written submissions.

6. As those submissions are in writing, I do not propose to reiterate each submission made by the parties in these short reasons. I briefly canvass the general thrust of their arguments below.

7. The applicant's submissions dated 11 July 2013 were lodged well within the period limited by my orders. By those submissions Mr Stockley argued:

    (a) The applicant's injury was compensable as it was a personal injury *arising out* of her employment;

    (b) Section 10(3A) does not have the effect of **excluding** the entitlement of a worker to compensation for injury sustained on a relevant journey per se;

    (c) The South Australian legislation is different in terms to the New South Wales legislation;

(d) The test of whether an incident/accident has a real and substantial connection with the employment must be a less stringent test of causation, than that imposed by section 9A of the 1987 Act, and

(e) Assuming that section 10(3A) enacts a more stringent test of causation on a worker's entitlement in respect of such an injury, the particular circumstances of the accident in this case satisfies that test.

8. The respondent's submissions were not received until 21 August 2013, almost a month late. By those submissions the respondent argued:

(a) The onus of proving that there is a real and substantial connection between the employment and the incident out of which the personal injury arises is on the worker;

(b) The focus of subsection 10(3A) is on the "the incident or accident, rather than personal injury itself";

(c) As the contract of employment does not include within its scope a journey between place of abode and place of employment the applicant's injury could not be said to *arise out* of the employment;

(d) Cases arising under the South Australian workers compensation legislation, which contained a similar provision, provided some guidance to the interpretation of the sub-section, and

(e) There was no "real and substantial connection" between the accident/incident and the employment in this case.

9. On 19 July 2013, after service of the applicant's submissions, Arbitrator Douglas delivered reasons in *Mitchell v Newcastle Permanent Building Society Ltd* (*Mitchell*) matter number 12823/12 in which he discussed at some length the meaning and effect of section 10(3A). In what follows, I have adopted much of his reasoning.

THE APPLICANT'S EVIDENCE

10. By her written evidence, which was neither challenged nor contradicted by other evidence, the applicant says that she initially commenced employment as a cleaner with a company known as Broadlex, which had secured the relevant school cleaning contract, in 2002 or 2003. In early 2010, when another company, Spotless Cleaning, secured the cleaning contract she became employed by that company. As I understand the evidence, at about this time she was sent to work at the Guildford West public school. Then in 2011, she was employed by the respondent when it secured the school cleaning contract.

11. The applicant says that when she commenced employment with Broadlex "the employment application asked if I had a drivers licence and I said yes". She then records that as she commenced work early and worked a split shift it was necessary for her to drive to and from work. She states:

> "Additionally, there was no train station near the Guildford West Public School and there was no direct bus service between the Guildford West Public School and my home. As a result I would drive to work every day to commence work at 5.30am and then drive home from work, leaving work at about 8.00am. And then I would drive to

work from my home to commence work at 3.00pm and then drive home from work at about 6.30pm."

12. The applicant says that on 27 July 2012 she commenced to drive to her home at the conclusion of her morning shift following her usual route. That route took her to the site of the accident at the intersection of Polding Street and Horsley Drive. Following the accident, the applicant says that she was taken to the Liverpool Hospital where she was treated and discharged to the care of her family doctor, Dr Ronald Fitch.

13. Dr Fitch has continued to certify the applicant as unfit for her usual duties. From 25 September 2012, the applicant was then certified as fit to perform suitable duties six hours a day for five days each week provided she does not perform vacuuming. The respondent has been unable to provide the applicant with suitable duties and she has not returned to work since the injury.

MEDICAL EVIDENCE

14. As the respondent did not dispute incapacity for work at the arbitration, I do not propose to canvas the medical evidence in detail. I note, however, that Dr Endrey-Walder who saw the applicant at the request of her solicitors and prepared a report dated 21 November 2012, expressed the opinion that she had significant residual symptoms in her neck and left shoulder as a consequence of the accident. He thought that the applicant should undergo further testing to identify the extent of pathology in both areas. He opined that the applicant was only fit for "truly light duties, restricted work over, say, three hours for four or five days a week." He stated:

> "I believe it is most unlikely that this lady will ever be able to return to full duty work as a school cleaner."

15. By a supplementary report of the same date, he assessed that the applicant had 14 per cent whole person impairment, half of which related to the condition of her cervical spine and half of which related to the condition of her left shoulder.

THE LEGISLATION

16. At the time of the applicant's injury section 10 of the 1987 Act read as follows:

> "(1) A personal injury received by a worker on any journey to which this section applies is, for the purposes of this Act, an injury arising out of or in the course of employment, and compensation is payable accordingly.
> (1A) Subsection (1) does not apply if the personal injury is attributable to the serious and wilful misconduct of the worker.
> (1B) A personal injury received by a worker is to be taken to be attributable to the serious and wilful misconduct of the worker if the worker was at the time under the influence of alcohol or other drug (within the meaning of the Road Transport Act 2013), unless the alcohol or other drug did not contribute in any way to the injury or was not consumed or taken voluntarily.
> (1D) Subsection (1) does not apply if the personal injury resulted from the medical or other condition of the worker and the journey did not cause or contribute to the injury.
> (2) Subsection (1) does not apply if:
> (a) the injury was received during or after any interruption of, or deviation from, any such journey, and

(b) the interruption or deviation was made for a reason unconnected with the worker's employment or the purpose of the journey,
unless, in the circumstances of the case, the risk of injury was not materially increased because of the interruption or deviation.
(3) The journeys to which this section applies are as follows:
(a) the daily or other periodic journeys between the worker's place of abode and place of employment,
(b) the daily or other periodic journeys between the worker's place of abode, or place of employment, and any educational institution which the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to attend,
(c) a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of obtaining a medical certificate or receiving medical, surgical or hospital advice, attention or treatment or of receiving payment of compensation in connection with any injury for which the worker is entitled to receive compensation,
(d) a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of having, undergoing or obtaining any consultation, examination or prescription referred to in section 74 (3),
(e) a journey between any camp or place:
(i) where the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to reside temporarily, or
(ii) where it is reasonably necessary or convenient that the worker reside temporarily for any purpose of the worker's employment,
and the worker's place of abode when not so residing,
(f) a journey between the worker's place of abode and the place of pick-up referred to in clause 14 of Schedule 1 to the 1998 Act,
(g) a journey between the worker's place of abode and place of employment, where the journey is made for the purpose of receiving payment of any wages or other money:
(i) due to the worker under the terms of his or her employment, and
(ii) which, pursuant to the terms of his or her employment or any agreement or arrangement between the worker and his or her employer, are available or are reasonably expected by the worker to be available for collection by the worker at the place of employment.
(3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.
(4) For the purposes of this section, a journey from a worker's place of abode commences at, and a journey to a worker's place of abode ends at, the boundary of the land on which the place of abode is situated.
(5) For the purposes of this section, if the worker is journeying from the worker's place of employment with one employer to the worker's place of employment with another employer, the worker shall be deemed to be journeying from his or her place of abode to his or her place of employment with that other employer.
(5A) Nothing in this section prevents the payment of compensation for any personal injury which, apart from this section, is an injury within the meaning of this Act."

17. Section 10(3A) was introduced into the 1987 Act by the *Workers Compensation Legislation Amendment Act* 2012. It applies to injuries received on or after 19 June 2012.

DISCUSSION AND FINDINGS

18. At the time of her injury the applicant was undoubtedly on a daily or periodic journey between her place of employment and place of abode, as those terms are used in section 10 of the 1987 Act. Equally, it is not disputed that she suffered "personal injury", in the sense of a sudden identifiable pathological change as a result of the accident. Provided the other prerequisites in the section are met, such an injury is to be treated, for the purposes of the Act, as an injury arising out of or in the course of the employment. Since 19 June 2012, one of the pre-requisites that must be proven is that the accident or incident out of which the personal injury arose has a real and substantial connection with the worker's employment.

19. The effect of section 10 is to deem personal injury on a relevant journey to have arisen out of or in the course of employment. That reflects the approach of the case law which considered the journey provisions of the *Workers Compensation Act* 1926 (the 1926 Act). In discussing those provisions, which were in a somewhat different form to section 10 of the 1987 Act, Lord Simonds, who delivered the judgment of the Privy Council in *Slazenger's (Australia) Pty Ltd v Burnett* (1950) 51 SR (NSW) 1 (*Slazenger*), said this:

> "on the other hand to treat an injury received by a workman in the course of the journey of the limited character covered by section 7(1)(b) as if it were an injury received by him in the course of his employment or (to put it somewhat differently) to treat the worker as being in the course of his employment, while he is in the course of certain journeys, and to give the same measure of protection if he receives the same kind of injury, is a provision both rational and consistent with the general scheme of the Act. It is, in their Lordship's opinion, legitimate so to construe the subsection."

20. His Lordship continued that it was necessary in order to give effect to the legislative intention to read words into the section so that a worker who had received injury on a journey "shall be deemed to have received such an injury in the course of his employment".

21. It is unnecessary to read words into the present section 10, as its language explicitly conveys the meaning propounded by Lord Simonds, an injury on a journey that falls within the section is to be treated as if it arises out of and in the course of the employment.

22. But the applicant argued that it was unnecessary to invoke section 10 in this case as her injuries fell within the definition of "injury" in the 1987 Act, as they arose out of her employment.

Arising out of the employment

23. In support of his submission that the applicant's injury arose out of her employment, Mr Stockley argued that there were "particular features of her employment contract which were the reason that she was in a motor vehicle at all at 8.20am on 27 July of 2012". These features included her early starting time, the necessity to make four separate journeys each day to and from the Guildford West Public School, and the absence of any, or possibly any convenient, public transport between her home and the school.

24. As the journeys "sole purpose was to convey the applicant from her place of work to her home", Mr Stockley submits that it "clearly arises out of the employment". The absence of case law supporting a conclusion that journey injuries generally arise out of the employment is explained by the fact that for the last 70 years it was easier for a worker to "base an application upon the journey provision itself".

Discussion

25. It is beyond dispute that the phrase "arising out of the employment" requires a causal connection with the employment. In considering the phrase in *Zinc Corporation v Scarce* [1995] 12 NSWCCR 556, Clarke JA equated its meaning to the test of causation at common law as explained by the High Court in *March v E and MH Stramare Pty Limited* [1991] 171 CLR 506. He continued:

> "In my opinion there is no reason to adopt a different approach in relation to the test of causation posed by the words "arising out of". The question of fact is whether there is such a connection between the workers personal injury and his employment that, as a matter of ordinary common sense and experience, the injury should be regarded as having arisen out of the employment. In deciding that question my preferred view is that the test lay down by Jordon CJ in *Nunan v Cockatoo Docks and Engineering Co Limited* 41 SR (NSW) 119 at 124 – that the fact of is the being employed in the particular job caused or, or to some material extent contributed to the injury – should be applied".

26. Although it is now almost a century old, the speech of Lord Sumner in *Lancashire and Yorkshire Railway Company v Highley* [1917] 10 BWCC 241 (*Highley*) has also been consistently embraced by judges and arbitrators seeking to ascertain whether an injury arises out of the employment. At 263 his Lordship put forward a test that he found generally of some real assistance in this endeavour :

> "It is this: was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment".

27. Prior to the amendment of the 1926 Act in 1942, compensation was only payable to a worker who had suffered injury arising out of *and* in the course of his employment. This was consistent with the law in the United Kingdom up until the repeal of the English Workman's Compensation legislation and in the various states of the United States of America which enacted workers compensation laws on the basis of the English legislation.

28. The case law in both England and Australia held that a journey injury did not arise in the course of a worker's employment. That was sufficient to defeat a claim where both a temporal and causal connection with the employment must be proven. Some decisions went further. Lord Shaw reasoned that a worker "might reach the place of his employment in any way he liked": *Walters v Staveley Coal and Iron Co Limited* [1910] 4 BWCC 303. Hence an injury sustained in taking a short cut provided by his employer to the place of employment neither arose out of nor in the course of the employment.

29. In *Ridgwell v Gilbarco Australia Proprietary Limited* matter 001243/12 (28 September 2012) (*Ridgewell*), I analysed some of the exceptions to the well-established principle that the course of a worker's employment ended when he left the premises under the control of his employer. Referring to *Mills Workers Compensation (NSW)*, Second Edition, 1979, I said:

> "At paragraph 45, Mr Mills lists some of the circumstances which may enable a finding that a journey between home and work is in the course of the employment. By and large, these circumstances were exceptions to the pre-World War II English and

> New South Wales common law that a journey between work and home, or vice versa, did not arise out of or in the course of the employment. Characteristically, the exceptions to the general rule were categorised for reasons of convenience. The categories included where a worker has been called out to work "as an emergency"; or where he has been directed to proceed to work without delay; or where he was required to perform some duty or errand for his employer."

30. As discussed in that case, these categories were not exhaustive, and have been expanded by both the recent New South Wales and English case law. Thus, a worker who is encouraged by his employer to transport fellow employees or to carry equipment to and from their employment; or who travels in transport provided by his employer; or is required by his employer to travel from his home to a temporary place of employment, will be in the course of his employment. Further, it is likely that the injuries sustained in such circumstances will arise out of the employment. In each instance, however, the courts have relied upon some particular aspect of the employment, rather than the mere fact of the journey, to find that the journey was incidental to the employment.

31. By the *Workers Compensation Act and Workmen's Compensation (Broken Hill) Act (Amendment) Act* 1942 (the 1942 Act), the definition of injury in the 1926 Act was amended so that the compensation was payable for injury arising out of *or* in the course of the employment. By the same Act, journey provisions were included in the 1926 Act, in the form later considered by the Privy Council in *Slazenger*.

32. I am unaware of any post-1942 decision of an appellate court, which addresses the issue of whether injury on a statutory journey may also be said to arise out of the employment, although the reasoning of the Court of Appeal in *Great Northern Wool Dumping and Stevedoring Co Pty Ltd v Flanagan* [1949] WCR 42 (*Flanagan*) strongly suggests that absent some additional or special factor, a journey between work and home does not arise out of the employment. In *Flanagan*, the Court of Appeal, overturning Lamond J, held that a worker who sustained injury while riding a bicycle to obtain a meal, in a one hour break between a double shift, did not suffer injury either in the course of or arising out of his employment. Jordan CJ said;

> "I think it is impossible to hold, consistently with the authorities, that evidence that a worker left his place of employment to obtain a meal and sustained an injury after leaving and before returning, of itself justifies the conclusion of that the injury arose out of or in the course of his employment. But added circumstances may justify such a conclusion. It depends on what they are."

33. A little more than a decade later, in *Jones v Rex Aluminium Co. Pty Ltd* [1957] SR (NSW) 631 (*Jones*), Wall J in the Commission was prepared to contemplate that injury on a journey from home to his place of employment made by a worker to collect wages arose out of the employment. Having found that the worker did not make the journey at "the express behest of the respondent's agent", the judge continued:

> "Apart from the considerations about to be mentioned, I would feel that the injury on the relevant journey was one which arose out of the employment, as indeed would be all injuries on journeys to a place of employment in ordinary circumstances."

34. The considerations which constrained Wall J from finding that an injury on a journey, between a worker's place of employment and place of abode, arose out of the employment flowed from the language of the 1942 Act. He expressed the opinion that if all journeys

between home and work arose out of the employment, it would have been unnecessary to reintroduce the journey provisions. He said this:

> "But in 1942 upon the view of the literal import of the words 'arising out of' already alluded to it would not have been necessary to insert provisions specifically related to periodic journeys. Yet the legislature did insert such provisions. It must, in my opinion, therefore be concluded that the legislator did not intend that an injury on a journey to or from work was to be classed an injury 'arising out of the employment'".

35. The decision in *Jones* has been the subject of criticism. Mr Mills suggests that the judge's reasoning was "false, for the extremely liberalising effect of the 1942 amendments gives a very strong impression that the legislature was intending to provide new benefits of the worker in circumstances where no benefits previously existed." See Mills op. cit 63. With respect, the fact that the intention was to provide new benefits where no benefits previously existed appears to support rather than derogate from the judge's reasoning. In my opinion the judge's analysis of the interrelationship between the amended definition of injury, whereby *and* was substituted for *or*, and the journey provisions is logical and compelling. Why would the legislature re-introduce the journey provisions in the same enactment as the amended definition of injury, if it was the legislative intention that the phrase "arising out of the employment" was sufficiently expansive to cover journeys between work and home?

36. More recently, Judge Neilson, in the Compensation Court of New South Wales in *Smith v Brown* (1998) 16 NSWCCR 492 adopted Mr Mill's criticisms of the decision in *Jones*, postulating that Wall J had given no reason why the worker's injury had not arisen in the course of his employment. But Wall J had specifically found that there was no order or request from the employer to attend upon his place of employment, so as to make the journey "a specifically designated incident of the employment." That is clearly a factual finding that the injury did not arise in the course of the employment.

37. In *Smith*, on the other hand, Judge Neilson found as a fact that in travelling between work and home, the applicant had been encouraged by his employer to travel with a workmate. Accordingly, the journey was a specifically designated incident of the employment. Further, the judge did not hold that the applicant's injury arose out of his employment, although the case law establishes that in the vast majority of cases an injury in the course of the employment will also arise out of it.

38. It is true that some of the case law which I have discussed above came into existence when the line of demarcation between work and private life was more clearly defined than it is at present. Nevertheless, I do not believe that it is open to an arbitrator to hold that an injury on a journey, between a worker's place of abode and place of employment, arises out of the employment unless there is some greater connection with the employment than having to get to and from the place of employment. That connection might be found in the "additional circumstances" contemplated by Jordan CJ in *Flanagan* which cause the journey to be characterised as incidental to the employment. Once the journey is part of the employment a causal connection may readily be inferred by the tribunal of fact. Alternatively, there may be some peculiar causal nexus between the worker's duties and his injury as illustrated by the facts of *Carr v Donnelley* (1937) WCR (NSW) 294.

39. My conclusion is consistent with the reasoning of Wall J in *Jones*. But it is also consistent with the language of the journey provisions in both the 1926 Act, as expounded in the *Slazenge*r case, and the 1987 Act. If a journey injury arose out of the employment why was it necessary for the legislature to enact a provision whereby such an injury was to be treated or deemed an injury arising out of the employment?

40. The conclusion that injury on a journey does not arise out of the employment is also consistent with the case law prior to 1942. To the extent that is addressed in the case law after the reintroduction of the journey provisions it is also consistent with that case law. In *Flanagan* Owen J said this:

> "On the facts found by the Commission the respondent was, at the time of his injury, not subject to his employer's control, and was away from the employers premises for a purpose of his own and on a journey which his contract of employment did not require him to make, although no doubt he had a right to make it. The mere fact that, having left the wharf to get a meal, he had to journey along the road where he met with his injury in order to return to his place of employment does not afford a sufficient basis for the conclusion that his injury arose in the course of his employment"

41. While he did not specifically say so, I have little doubt that Owen J was of the opinion that the worker's injury did not arise out of employment. If a worker riding his bike to a nearby cafe to obtain sustenance between two arduous eight-hour shifts, is not on a journey that arises out of the employment, it seems unlikely that a journey between work and home can be said to arise out of the employment.

42. The tests enunciated by Jordan CJ in *Nunan v Cockatoo Docks & Engineering Co Ltd* (1941) 41 SR (NSW) 119 (*Nunan*) and by Lord Sumner in *Highley,* both emphasise that the phrase "arises out of the employment" requires a causal connection between injury and the employment activities a worker is obliged to perform under his contract of service. This approach was reaffirmed by the recent decision of the Court of Appeal in *Pioneer Studios Pty Ltd v Hills* [2012] NSWCA 324. Patently, during the course of the last century, the activities which can be said to form part of the employment or are incidental to it, have been greatly enlarged by judicial decisions.

43. In *Dayton v Coles Supermarkets Pty Ltd* (2000) 19 NSWCCR 526 Burke J, reasoned that "employment" in the context of the workers compensation acts is a wide concept. It extends beyond the duties of the employment to what the worker was reasonably required expected or authorised to do by the employer. As a consequence of the decision in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473, it also extends to activities between overall periods of employment which the worker has been induced or encouraged to undertake by his employer.

44. Whether one applies the test of Jordan CJ or of Lord Sumner, or the words of the Act it is not evident that there is any causal connection between the applicant's employment and injury she sustained on a journey to her place of abode. It is true, as Mr Stockley argued that the applicant was travelling at the time of the injury for the purpose of going home after a morning's work. But this fact alone does not establish any causal connection between her injury and the activities of, or incidental to, her employment. Further, unlike the cases collected in *Ridgwell*, she was not in the course of employment, and her obligations under her contract of employment did not expose her to injury at the intersection of Polding Street and Horsely Drive. It therefore cannot be said that the employment brought her to the locus of the injury and, in that sense, caused her injury.

45. I do not accept that the absence of a convenient bus or rail service to convey the applicant to and from work demonstrates a causal connection between injury and her employment. The requirements that she work a split shift and commence work at 5.30 in the morning are obviously important aspects of the contract of employment but neither fact was causative of her injury. The mere fact that a worker has to make two journeys to and from work in the course of the day says nothing about the causal relationship between each journey and the

employment. On the basis of my analysis of the law, the applicant's journey home had no causal relationship to her employment.

Subsection 10(3A)

46. By operation of subsection 10(3A) an injury on a journey between a workers place of abode and place of employment will only be deemed to arise out of or in the course of the employment, if there is a real and substantial connection between the employment and the accident or incident giving rise to personal injury. Arbitrator Douglas provided a succinct and incisive analysis of the subsection in *Mitchell*. I agree with his analysis.

47. In particular, I agree that the meaning of the phrase "real and substantial connection with the employment" can be found by reference to judicial explication of the same words in other sections of the legislation. The meaning of "employment" and "substantial" in the 1987 Act has been the subject of a great deal of consideration by appellate courts over many years. I therefore accept that a substantial connection is one that is "of substance", and that "employment" is the activities of and incidental to the employment, as opposed to the fact of being employed, as explained in *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324.

48. It follows from this analysis that the mere fact that a worker must travel to or from work is insufficient to establish a real and substantial connection between her employment and the accident/incident. There must be some relationship between the activities of the employment and the accident/incident.

49. The same outcome might be achieved by a different approach. If the mere fact that a worker was travelling to or from his place of employment at the time of an accident was sufficient to establish a real and substantial connection between the employment and the accident, subsection 10(3A) would be otiose. Section 10 compensated workers who were injured on such a journey prior to the enactment of subsection 10(3A). As it is one of the principal rules of statutory interpretation that effect must be given to all of the words of an Act, such a conclusion is clearly unacceptable: see *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198; "no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent."

50. Both parties referred to section 30 of the *South Australian Workers Rehabilitation and Compensation Act* 1986, which may be the source of section 10(3A), and the case law that has interpreted the section since its enactment. Mr Stockley argued that by reason of subsection (6) the "manner in which courts have interpreted the South Australian legislation is of no utility" in interpreting section 10(3A). Subsection 6 is as follows:

> "The fact that a worker has an accident in the course of a journey to or from work does not in itself establish a sufficient connection between the accident and the employment purposes of subsection (5) (b)."

51. It is undoubtedly permissible to consider both cognate legislation and the case law arising from it, when the words of an amending act are ambiguous. But if the approach to the legislation I have adopted from the decision in *Mitchell* is correct, I doubt that there is any ambiguity in the words of section 10(3A). For that reason also, it is unnecessary to resort to extrinsic material: see *Harrison v Melhem* [2008] NSWCA 67.

52. While the meaning of the subsection is reasonably clear, difficulties will almost certainly arise in determining whether there is a real and substantial connection between the employment and that the accident or incident giving rise to the injury in any given case. But

these will be factual difficulties, of a kind which invariably arise when a tribunal of fact attempts to ascertain whether there is a relationship between one event and another. They are not difficulties of statutory interpretation.

53. Mr Stockley also argued that test imposed by subsection 10(3A) is less stringent than the test of causation contained in section 9A, otherwise the legislature could have simply extended the operation of section 9A to injuries on a journey. Section 9A is a test of causation of injury, whereas the word 'connection' in section 10(3A), may, but does not necessarily, convey the notion of a causal relationship. As I discussed above, workers travelling between home and work are rarely in the course of their employment. If an injury on a journey does not actually arise out of or in the course of the employment, I cannot see any conceivable basis for a finding that the employment was a substantial contributing factor to the injury. If that is correct, the removal of the exemption that the employment be a substantial contributing factor to an injury from section 10 would completely nullify its operation. It is clear that section 10(3A) does not go that far.

54. Nevertheless, section 10(3A), as I understand it, will preclude most workers who are injured on a journey from obtaining compensation. It is probably not profitable to attempt to describe the particular circumstances which will enable a finding that an incident/accident has a substantial connection with a worker's employment. The case law on the new subsection will provide guidance as to what particular circumstances might have such a connection with the employment as to be compensable under section 10. The South Australian case law relating to similar words may also offer some insights.

55. On the basis of the reasoning above, I cannot accept that there is any connection between the applicant's employment and her injury in a motor vehicle accident in a private vehicle on the way home from work. The particular matters relied upon by Mr Stockley to establish a connection with the applicant's employment were the same as those upon which he relied to prove that the applicant's injury arose out of her employment. As previously canvassed, these include the unavailability of public transport and the fact that the applicant had to make the journey to and from work twice per day. Neither factor, however, has a connection with the activities of her employment in her particular job. Accordingly there must be an award for the respondent.