WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1673/20**
Applicant: **Taresa Maree Flaus**
Respondent: **Coles Supermarkets Australia Pty Ltd**
Date of Determination: **16 June 2020**
Citation: **[2020] NSWWCC 203**

The Commission determines:

1. The applicant sustained a personal injury to her left knee in the course of employment pursuant to s 4(a) of the *Workers Compensation Act 1987*.

2. Employment was a substantial contributing factor to the injury for the purposes of s 9A of *Workers Compensation Act 1987*.

The Commission orders:

1. Award for the applicant for weekly benefits pursuant to ss 36(1) and 37(1) of the *Workers Compensation Act 1987*, based on a pre-injury average weekly earnings figure of $542.75, from 28 January 2020 to date and continuing.

2. The respondent to pay the applicant's reasonably necessary medical and related treatment expenses pursuant to s 60 of the *Workers Compensation Act 1987* upon production of accounts, receipts and/or Medicare notice of charge.

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

Rachel Homan
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 RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Taresa Maree Flaus (the applicant) slipped and injured her left knee at the Coles store where she was employed by Coles Supermarkets Australia Pty Ltd (the respondent) on 27 January 2020.

2. The respondent declined liability for the knee injury by a dispute notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), dated 7 February 2020. That decision was maintained following an internal review on 10 March 2020.

3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) lodged in the Commission on 26 March 2020. The applicant seeks weekly compensation from 28 January 2020 on an ongoing basis and medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).

ISSUES FOR DETERMINATION

4. The parties agree that the following issues remain in dispute:

    (a) whether the applicant's left knee injury was sustained in the course of or arising out of employment pursuant to s 4 of the 1987 Act;

    (b) whether employment was a substantial contributing factor to the injury pursuant to s 9A of the 1987 Act;

    (c) the extent and quantification of any entitlement to weekly compensation; and

    (d) the entitlement to s 60 medical expenses.

PROCEDURE BEFORE THE COMMISSION

5. The parties appeared for conciliation conference and arbitration hearing by telephone on 25 May 2020. The applicant was represented by Mr Simon Hunt of counsel, instructed by Mr Wayne Dever. The respondent was represented by Mr Tony Baker of counsel, instructed by Mr Glenn Dolan.

6. During the conciliation conference, the parties reached agreement that the applicable Pre-Injury Average Weekly Earnings (PIAWE) figure was $542.75. It was also agreed that an order of a "general" nature would be sufficient for the claim for medical expenses, should the applicant succeed in relation to the other matters in dispute.

7. 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

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

    (a) ARD and attached documents;

    (b) Reply and attached documents, and

    (c) documents attached to an Application to Admit Late Documents filed by the respondent on 30 April 2020.

9. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

10. The applicant's evidence is set out in a written statement dated 17 March 2020.

11. The applicant said that on 27 January 2020 she had been rostered off and had returned from a holiday with her family. At approximately 5.30 pm, she received a phone call from the night supervisor asking if she could come in for a three hour shift as they were short staffed due to sickness. The applicant understood the urgency and made herself available, however, had not had a chance to do any shopping and needed supplies for the children to return to school the next day. The manager said words to the applicant to the effect that if there was time the applicant could get the groceries at the store before she finished her shift.

12. The applicant arrived at work at about 6.50 pm to commence at 7.00 pm for a three hour shift to be completed by 10.00 pm.

13. During the shift, the applicant was directed by the night manager to put away some loose stock. The manager told the applicant that she could grab what she needed for her personal shopping on her way around the store.

14. At 10.00 pm the applicant clocked off using the Bundy clock in aisle eight. The applicant walked out to the locker room to retrieve her personal belongings. On the way up to the service desk where her groceries were located, the applicant also grabbed a bunch of bananas. The applicant said her exit from the store was necessarily through the front entrance and checkouts.

15. As the applicant made her way towards the exit through the fresh produce department, the applicant walked past the watermelon display which had contained ice earlier. The applicant slipped on a pool of water, falling heavily onto the floor, injuring her lower back and left knee. The applicant experienced intense pain and called out for help. An ambulance was called to take the applicant to Maitland Hospital.

16. The applicant underwent surgery to have five screws and a plate inserted to fix the tibial bone in her left knee. The applicant was totally incapacitated for work and has remained incapacitated since that date.

17. The applicant said that but for the direction of her employer through the night shift supervisor, the applicant would not have been at her place of employment on 27 January 2020.

18. The applicant said that one of the conditions of her attending work on that occasion was that she would be able to pick up some groceries during the course of her shift as she would not otherwise have time to get food for the following day for the children's school lunches.

19. The applicant said she was required to clock off at 10.00 pm at the rear of the store then walk through the store, around the produce section, to the front entrance. One of the front doors was still open and that was the applicant's exit from work.

Respondent's evidence

20. Attached to the Reply is a time card showing that the applicant clocked on at 19:01 and clocked off at 22:03 on 27 January 2020.

21. The respondent also relies on a number of witness statements.

Corey McDonnell

22. The applicant's store manager, Mr Corey McDonnell, has provided a written statement dated 6 March 2020. Mr McDonnell also signed a brief letter on 5 February 2020 which stated:

> "This letter is to confirm that Taresa Flaus had finished work and clocked off when she slipped in the Fresh Produce area at Coles Greenhills on the 27/1/2020. Taresa shift-finished at 10pm, she had clocked off at 10:03pm and had slipped in the Produce area at 10:05pm. Taresa had grabbed a hand full of items to purchase before the registers closed."

23. In his written statement, Mr McDonnell confirmed the applicant's employment details. Mr McDonnell said:

> "All employees of the Store are required to clock on when they commence their shift. Staff usually go to the locker room prior to starting and then they go to aisle 8 at the start of their shift and input their personal identification number into a pin-pad to record the time that they clock on. At the end of a shift, staff usually go straight to the pin-pad to clock off and then to the locker room to get their belongings prior to going home."

24. Mr McDonnell confirmed that on 27 January 2020 a team member had called in sick and the store was quite busy so one of the store's staff members called the applicant to ask her to work a shift on registers. Later that evening, the store's duty manager, Ms Bianca Newby, telephoned Mr McDonnell to notify him that the applicant had fallen inside the store and an ambulance had been called. Mr McDonnell said that the next day he attempted to review the CCTV footage of the incident:

> "The following day, 28 January 2020, I reviewed CCTV of the incident and could see Taresa walking through Fresh Produce in the Store, picking up a bunch of bananas, and then continuing to walk towards the cash registers at the front of the Store and the area where the incident occurred, however, I was not able to observe Taresa's incident on the CCTV because there was no CCTV coverage in the specific area where she fell. The time-stamp on the CCTV footage immediately prior to Teresa's incident occurring shows that Taresa's incident occurred after 10.03pm, the time that Taresa clocked off that shift….
>
> The Store's bundy records for 27 January 2020 indicate that Taresa clocked on to start her shift at 19.01 pm and clocked off that evening at 10.03 pm. To my knowledge, Taresa had definitely clocked off and finished her shift prior to the incident occurring, as she would have been unable to walk to aisle 8 following the incident due to her knee injury.
>
> CCTV footage prior to Taresa's incident occurring, does not show Taresa leaving the Store at any time and re-entering the Store.

> On the day following Taresa's incident, I telephoned Taresa on a few occasions regarding her incident and injury. As part of my investigations of the incident, I asked Taresa what had happened. Taresa told me that she had finished her shift and had gone shopping for a few things and she had slipped on the floor as she walking through Fresh Produce."

Amanda Young

25. A written statement from the store's night supervisor and first aid officer, Ms Amanda Young, dated 5 March 2020, is also in evidence. Ms Young described the clocking on and off process at the store:

> "As an employee of the Store, I am required to sign in upon arrival at the Store by clocking on in aisle 8 of the Store, where each employee is required to punch in their personal pin number to indicate that have started their shift. When clocking off at the end of any shift, the same process is required of all employees.
>
> Most staff access and leave the Store at the start and finish of their shift through the front entrance of the Store. However, any employees of the Store that are still here after the Store has been closed for the night, leave the Store by the Staff Entry Door located at the side of the Store."

26. With regard to the events on the date of injury, Ms Young stated:

> "On 27 January 2020, I was scheduled to work at the Store from approximately 4pm to 10.15pm, as that day was a public holiday and the Store was set to close at 10pm. On that evening, Taresa was called in to cover for an employee that had called in sick, so Taresa was scheduled to work from 7pm to 10pm. Taresa worked in the checkouts that evening, so I was her supervisor during the shift.
>
> The shift that evening had been a very busy one, so at about 10pm or just after 10pm, I said to Taresa that she needed to go and clock off for the night. I assume that Teresa would have then walked straight to aisle 8 of the Store to clock off and then walk out to the locker room at the rear of the Store to get her bag to go home. I cannot confirm if Teresa clocked off before walking out the back of the Store to get her bag, but that is what she is supposed to do.
> …
> About a few minutes after I had told Taresa to go and clock off for the night, Bianca Newby [Bianca], the Duty Manager that shift, was closing the front roller door so I said to Bianca that Taresa was still on her way to leave the Store. At or about the time that I said this from where I was at the service desk, Bianca and I both heard a noise that sounded like the thud of a pallet dropping in the Store, but I could not pinpoint what direction the noise came from.
> …
> When I looked over towards the Fresh Produce section, I saw Taresa lying on the ground. Bianca and I both walked over to where Taresa was lying on her back on the linoleum floor between the end of Fresh Produce and the Fresh Produce Fridge. To the best of my recollection, Taresa's hessian bag was on the floor next to her and there were a bunch of bananas on the floor next to her, so I assume she was carrying the bananas when she fell as the area of the Store where the bananas are kept are at the rear of the Store about 100 metres from where Taresa was lying."

27. Further,

> "I asked Taresa what had happened and we had a conversation in words to the effect: Me: What have you done? How did you fall?
> Her: I fell on my knee. I slipped on water.
> Me: Water?
>
> I looked on the floor in the vicinity and about two metres, or less, away from where Taresa was lying I could see a small pool of water about the size of a 50 cent piece on the linoleum floor near the watermelon shelf where the ice bricks are. I assumed that a piece of ice must have melted on the floor, or it could have been water that had dripped off the trays. I did not inspect the area for any signs of where Taresa's foot might have slipped because I was worried about Taresa at the time.
>
> When Bianca and I both saw the small patch of water on the floor, Bianca pulled the nearby mat over the of the water to ensure that nobody else could slip on it."

28. With regard to the applicant's groceries, Ms Young stated:

> "During one of the times that I was checking on Taresa, Taresa told me that she had a bag of groceries in the kiosk and she asked me if I could pay for the bananas that had been on the floor next to her and put the bananas with her other groceries in the kiosk. Taresa said that she needed to get the groceries to her kids for school the next day. Taresa gave me her bank card to pay for the bananas, which I did….. I am not sure when Taresa had shopped for the bag of groceries and put them in the kiosk."

Bianca Newby

29. The store's Night Fill Lead/Duty Manager, Ms Bianca Newby also prepared a written statement on 5 March 2020.

30. Ms Newby gave an account of the clock on clock off procedure at the store which was consistent with the other evidence. Ms Newby confirmed:

> "On 27 January 2020, a public holiday, I was scheduled to work as Duty Manager from 3pm to 11pm, as the Store closes at 10pm on public holidays. That evening, Taresa was called in because we were short staffed and was asked to work the cash registers from 7pm to 10pm."

31. Ms Newby stated:

> "At approximately 10pm that evening, I went to the front of the Store to close the front roller door because all staff apart from the Night Fill team had left the Store. Mandy was standing in the kiosk, as there was one female customer taking her time leaving the Store. When the female customer left the Store, I turned the key and the roller door came down. Mandy then told me that Taresa was still in the Store and had to come back and pay for some groceries. I said to Mandy that I would keep the door shut anyway because I did not want people coming in."

32. Ms Newby described seeing the applicant on the floor shortly afterwards:

> "Mandy and I quickly walked over to see what had happened. Taresa was lying on the linoleum floor beside one of the produce safety mats. Taresa's handbag was on the floor behind her and there was a bunch of bananas on the floor in front of her about a metre away.
>
> I asked Taresa if she was okay and what had happened. Taresa said, 'It's my knee. My bad knee. I slipped in some water.'
> …
> I looked around the area for water spillage on the floor but initially could not see any. Then I looked down towards my own feet and saw there was one small pool of water, as if a single ice cube had melted on the floor, which was only about 10cm across."

33. Ms Newby further stated:

> "After Mandy had called the ambulance, Taresa telephoned her daughter at home to tell her what had happened and that she would not be coming home. I heard Taresa say to her daughter that she had bought food for them and Mandy was going to drop the food home for them.
>
> Taresa reached out and grabbed the bunch of bananas in front of her on the floor and gave the bananas to me and asked if I could pay for them with her bank card. Taresa said to me in words to the effect, 'I was-only getting bananas', and I assumed from the way she said it that she was cranky because she had gone back to get the bananas and on her way to the checkout she had fallen over. Taresa asked me to put the bananas with her other groceries at the service desk. I do not know when Taresa had bought the other groceries and left them at the service desk and I did not ask Taresa about it, as I was a bit shocked that she was worried about her groceries while waiting for an ambulance."

Applicant's submissions

34. Mr Hunt referred me to the applicant's written statement and noted that the applicant was not initially rostered to work on 27 January 2020. Importantly, the applicant indicated that she would to come in to work provided she could pick up some supplies for her children's school lunches. That was agreed at that stage.

35. The applicant's evidence was that during the course of her shift she was given permission to collect some groceries, which she left at the front of the store with the respondent's agreement. At 10.00 pm the applicant bundied off at aisle eight and went back to the locker room to collect her belongings. The applicant then grabbed a bunch of bananas at the fresh food section. The applicant was making her way to the front of the store when she slipped on some water on the ground near a display in the fresh food section. The applicant sustained a significant injury to her knee and was still receiving medical treatment.

36. Mr Hunt observed that there was not a lot of medical evidence in the case but noted that injury and capacity were not disputed on medical grounds. Mr Hunt said I would have no difficulty accepting the contents of the medical certificates.

37. Mr Hunt anticipated that the respondent's case was that the applicant had ceased work and was on a personal frolic, unrelated to work, collecting groceries when she sustained injury. Mr Hunt said the respondent's position went against the weight of authority.

38. Mr Hunt referred to the statement of Mr McDonnell. Mr McDonnell gave evidence that staff would normally clock off then go to the locker room when their shift finished. Mr Hunt noted that Mr McDonnell was not present at the store when the injury occurred and his evidence was of limited value beyond that.

39. Mr Hunt noted that Ms Young's evidence was silent with regard to whether the applicant had been given permission to purchase groceries during her shift. Ms Young's evidence did, however, confirm that staff usually accessed and left the store through the front entrance. Ms Young inspected where the applicant fell and found a small pool of water about the size of a 50 cent piece near the watermelon display. On Ms Young's evidence, the water had come from the display. Mr Hunt noted that Ms Newby's evidence was similar to that of Ms Young.

40. Mr Hunt said there was no controversy that the applicant intended to leave the store through the front exit in accordance with normal practice for staff at that store despite there being another exit.

41. Mr Hunt said it was plain that the applicant had not commenced a journey for the purposes of s 10 of the 1987 Act. The applicant had not left the boundary of her workplace. In this regard Mr Hunt referred to the authorities in *Chawla v Transgrid*[1] and *Hogno v Fairfax Regional Printers Pty Limited*[2].

42. Mr Hunt submitted that the applicant remained in the course of employment for the purposes of s 4 of the 1987 Act. The fact that the applicant was buying bananas did not take the applicant outside the course of her employment. Mr Hunt said a term of the applicant coming into work that day was that she would be allowed to purchase some groceries before she left the store. Ms Young's evidence was silent on that issue and Mr Hunt submitted that I would accept the applicant's evidence on that point.

43. Mr Hunt said it was possible for a worker to engage in activities other than direct employment activities without being taken outside the course of employment. Coming and going from the store was part of employment and the fact that the Bundy clock was located at the rear of the store clearly indicated that it was contemplated that a worker at that store would have to negotiate the store to come in and out of work. Mr Hunt submitted that the Commission would be satisfied that the injury fell within s 4 of the 1987 Act

44. Mr Hunt submitted that employment was a substantial contributing factor to the injury for the purposes of s 9A of the 1987 Act. Mr Hunt submitted that the evidence indicated that the applicant had been allowed to leave groceries at the front of the store during her shift and pay for those at the end of her shift. The hazard which caused the injury came from employment. The injury occurred in the workplace and shortly after a shift finished but whilst the applicant was performing an activity which was clearly contemplated as part of the applicant's normal work activities, that is, clocking off and leaving the workplace.

45. Mr Hunt submitted that incapacity was not in dispute for the purposes of the weekly benefits claimed. Mr Hunt further submitted that an order of a general nature would be sufficient for the purposes of the s 60 claim.

Respondent's submissions

46. Mr Baker conceded that much of the factual matrix was not in dispute. Mr Baker submitted that Ms Young's statement was silent with regard to the alleged agreement that the applicant could purchase groceries during her shift. Mr Baker noted, however, that Ms Young's statement was given prior to the applicant's written statement and so did not respond to it.

[1] Burke ACCJ, unreported, Compensation Court of NSW, 11 June 2002.
[2] [2009] NSWWCCPD 33 (27 March 2009).

47. Mr Baker said the main issue was whether the applicant was in the course of employment at the relevant time. The respondent's case was that the applicant had completed her shift and had commenced personal shopping when she fell. The witness evidence established that the applicant had her handbag with her, had completed her shift and had been collecting bananas on her way to the register to pay for her shopping when the accident occurred.

48. Mr Baker said it was common ground between the parties that the applicant had logged off prior to the accident happening. Mr Baker referred me in this regard to the timecard in evidence. Mr Baker noted that the applicant's evidence was that she arrived at the store at about 6.50 pm but the timecard confirmed she did not clock on until 7.01 pm. Mr Baker noted that Ms Young had said the shift was fairly busy and she did not know when the applicant had bought her other groceries. Mr Baker said it could be inferred that the applicant purchased her other items prior to clocking on at 7.01 pm.

49. Mr Baker submitted that there was no doubt that the applicant fell and injured her knee but said the evidence was problematic with regard to whether the applicant slipped in water. Mr Baker noted that the description by the respondent's witnesses was that there was a small puddle about the size of a 50 cent piece. There was, however, no evidence of skid marks or disturbance of the rounded puddle of water. It was not clear from the evidence how the applicant slipped. The applicant could not really say when queried.

50. Mr Baker referred to Mr McDonnell's evidence which confirmed that the applicant had clocked off at 10:03 and slipped at apparently 10:05pm. Mr McDonnell observed on CCTV footage that the applicant had walked through the fresh food department and grabbed some bananas prior to her injury. Mr Baker noted that Mr McDonnell's evidence suggested that the applicant was shopping for a few things, not just bananas.

51. Mr Baker noted that the evidence of Ms Young was that there was a staff entry door at the side of the store used after hours. Mr Baker said it may have been that the store would have been closed but for the fact that the applicant had some shopping at the kiosk which she had to pay for. It was clearly the applicant's intention to make her way to the front of the store to complete her shopping. Ms Young's evidence suggested that the applicant could otherwise have left through the side entrance.

52. Mr Baker said that the location where the applicant collected the bananas was not near where the applicant had the fall. Mr Baker said it was not necessary for the applicant to leave the store the way she did. It was clear that the applicant had gone to do some further shopping.

53. Mr Baker noted that Ms Young's evidence was that the applicant had not remembered exactly how she fell but said she had slipped over. The actual cause was still a mystery. There were no witnesses and the only people left were the night staff.

54. Mr Baker referred to the evidence of Ms Newby indicating that the roller door at the front of store had been closed but she had intended to reopen it to let the applicant out. Ms Newby's evidence was otherwise consistent with the other witness evidence.

55. Mr Baker submitted that the question for the Commission was whether the applicant was in the course of employment when injured. It was conceded that the applicant was not on a journey for the purposes of s 10. The applicant had not reached the boundary of the premises and was not on a journey. It was clear, however, that the applicant had clocked off and was conducting personal shopping in addition to that already done earlier in the evening when the injury occurred.

56. Mr Baker said the issue was whether the applicant was doing work she was required to perform whilst on the premises. Mr Baker referred to the High Court decision of Dixon J in *Humphrey Earl Ltd v Speechley*[3] (*Speechley*) and said there was nothing about going shopping that related to the applicant's carrying out of her duties. The applicant had finished work and was on a personal errand.

57. Mr Baker submitted that it was also necessary for the Commission to determine whether or not employment was a substantial contributing factor to the injury. In this regard, Mr Baker referred me to the decision of Nielsen J in *Stanton-Cook v TAFE Commission (NSW)*[4] (*Stanton-Cook*) and said that in order for the applicant to discharge her onus she must establish a causal nexus between her injury and the work required to be performed. In *Stanton-Cook* the worker had gone to her car for personal reasons. Mr Baker said the applicant was still on the premises but had clocked off and was attending to a personal matter when injured. Mr Baker submitted that neither ss 4 nor 9A were satisfied.

58. Mr Baker noted that the applicable PIAWE rate had been agreed and incapacity was not an issue other than by reference to the respondent's position that there was no compensable injury.

Applicant's submissions in reply

59. Mr Hunt submitted that the evidence clearly established that the applicant slipped in water. This was the history provided in the applicant's statement. The other witness evidence established the source of the water.

60. Mr Hunt submitted that although the applicant had intended to pay for groceries, she was doing what he would have had to do during every shift namely, making her way out of the store, when she was injured. Mr Hunt noted that the applicant had negotiated with her manager to be able to purchase groceries during her shift as a condition of her working on the day of injury. On that basis, Mr Hunt said I would be satisfied that the applicant would not have slipped if not for the risk created by her employment.

FINDINGS AND REASONS

Injury

61. Section 9 of the 1987 Act provides that a worker who has received an 'injury' shall receive compensation from the worker's employer in accordance with the Act. The term 'injury' is defined in s 4:

> "In this Act:
>
> **injury:**
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a disease injury, which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

[3] [1951] HCA 75; (1951) 84 CLR 126.
[4] [1999] NSWCC 5; (1999) 17 NSWCCR 632.

(ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and

(c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

62. The first issue arising in this case is whether the injury to the applicant's left knee occurred "in the course of employment" for the purposes of s 4(a). That test was explained in *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited*[5] (*Badawi*) at [72]:

> "Section 4 defines injury as 'personal injury arising out of or in the course of employment'. The use of the disjunctive is significant, in that two quite different tests are involved, one or other of which is sufficient to be satisfied for the purposes of s 9. It is established that the second limb of the definition 'in the course of employment' involves a temporal element and does not of itself contain a causative element. It was for that reason that Mr Zickar succeeded when his congenital aneurism ruptured when he was at work: *Zickar v MGH Plastic Industries Pty*. Difficult factual issues can arise in determining whether a worker was in the course of employment when injury was sustained, but that arises not because the principle to be applied is uncertain, but because of the fluidity of employment circumstances."

63. In this case, the uncontroverted evidence is that at the time of the applicant's fall, she had already clocked off, having completed her shift. The applicant had collected her personal belongings and had walked through the fresh produce section of the store in order to collect some bananas to purchase. The applicant had intended to make her way to the front of the store, to collect some other groceries, pay for the bananas and then exit the store. The applicant thus remained in her workplace but had ceased performing her actual work when the fall occurred.

64. The "course of employment" has been held to extend beyond normal hours of work, to "the natural incidents connected with the class of work". If a worker "is doing something which is part of or is incidental to his service", she is in the course of employment[6]: In *Henderson v Commissioner of Railways (WA)*[7] (*Henderson*), Dixon J said:

> "Where the accident arises shortly before the beginning of actual work or shortly after its cessation, or in an interval when labour is suspended, and it occurs at or near the scene of operations, the question whether it arises in the course of the employment will depend on the nature and terms of the employment, on the circumstances in which work is done and on what, as a result, the workman is reasonably required, expected or authorized to do in order to carry out his actual duties."

65. This approach was broadly endorsed in *Humphrey Earl Ltd v Speechley*[8] to which Mr Baker referred, where Dixon J added that if a worker deviates from what is reasonably incident to the execution of his duties so as to proceed on a purpose of his own not fairly resulting from the nature or incidents of the employment, that purpose cannot be considered in the course of the employment.

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[5] [2009] NSWCA 324 (8 October 2009); (2009) 7 DCR 75.
[6] See *Whittingham v Commissioner of Railways (WA)* [1931] HCA 49; (1931) 46 CLR 22.
[7] [1937] HCA 67; (1937) 58 CLR 281 (at 294).
[8] [1951] HCA 75; (1951) 84 CLR 126.

66. The respondent in this case argues that collecting bananas (and any other items) to purchase for her personal use was not incidental to the execution of the applicant's duties for the respondent. Mr Baker argued that the applicant's course of employment had ceased and she was on a personal errand unrelated to her duties when the accident occurred.

67. There has, however, been a shift in the case law on what it means to be "in the course of employment" since the decisions in *Henderson* and *Speechley*. In *Hatzimanolis v ANI Corporation Ltd*[9] Mason CJ, Deane, Dawson and McHugh JJ noted:

> "… appellate courts have upheld many awards of compensation in favour of workers in cases where injury has occurred away from the place of work, outside of or between working hours, and while the worker was engaged in an activity which is ordinarily performed for private necessity, convenience or enjoyment(11) See, for example, *Baudoeuf v. Dept. of Main Roads* (1968) 68 SR (N.S.W.) 406; *Danvers v. Commissioner for Railways (N.S.W.)* [1969] HCA 64; (1969) 122 CLR 529; *Mason v. Social Welfare Dept*. [1974] VicRp 62; (1974) VR 506; *Favelle Mort Ltd. v. Murray* [1976] HCA 13; (1976) 133 CLR 580; *Commonwealth v. Lyon* (1979) 24 ALR 300; *Qantas Airways Ltd. v. Kirkland*, unreported, New South Wales Court of Appeal, 9 October 1980; *A.T.L Limited v. Rolls*, unreported, New South Wales Court of Appeal, 10 December 1980.
> …
> Beneficial as the *Henderson-Speechley* test has proved to be in the law of workers' compensation, its formulation no longer accurately covers all cases of injury which occur between intervals of work and which are held to be within the course of employment. A finding that a worker was doing something 'in order to carry out his duties' at the time he sustained injury is in many cases simply fictitious. Consequently, the rational development of this area of law requires a reformulation of the principles which determine whether an injury occurring between periods of actual work is within the course of the employment so that their application will accord with the current conception of the course of employment as demonstrated by the recent cases…"

68. The Court found:

> "Accordingly, it should now 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. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment."

69. In *Comcare v PVYW*[10]*,* the majority (French CJ, Hayne, Crennan and Kiefel JJ) said:

> "The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly,

[9] [1992] HCA 21; 173 CLR 473.
[10] [2013] HCA 41; 303 ALR 1.

> it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the *Hatzimanolis* principle becomes relevant. When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment."

70. It is necessary, applying the more recent case law to determine whether the respondent expressly or impliedly, induced or encouraged the applicant to engage in an activity or to be present at the place when the injury occurred.

71. The evidence before me establishes that it was normal practice for workers at the applicant's store to bundy off at the back of the store at aisle eight, proceed to the locker room to collect their belongings and then depart the store through the front entrance, although there was also a side entrance used predominantly after hours.

72. I am also satisfied on the evidence that it had been both the applicant's intention and the expectation of her co-workers that the applicant would depart the store through the front entrance on the night of the injury. Although Ms Newby said she had already closed the front roller door to prevent people from entering the store, both her evidence and that of Ms Young suggests that they had expected that the applicant would exit through the front door.

73. I am satisfied on this evidence that walking through the store to depart at the end of a shift was an activity which was reasonably incidental to the execution of the applicant's duties. Had the applicant been on a direct route out of the store when she fell, there is no doubt in my mind that the applicant would have been in the course of employment. The applicant had, however, proceeded through the fresh produce section in order to collect items to purchase for her personal use, and was on her way to pay for them, at the time of the fall. The question raised by the respondent's submissions is whether that activity took the applicant outside the course of her employment.

74. The evidence consistently indicates that the applicant had not initially been rostered to work a shift on 27 January 2020, which was a public holiday. The evidence before me is that another worker had called in sick and the applicant was asked to work the shift at short notice. The applicant says that she had just returned from holiday and her children were returning to school the following day. The applicant says she had a conversation with the night manager wherein it was agreed that the applicant could get the groceries at the store before she finished her shift. The applicant further states that during the shift she was given permission to collect her personal groceries as she moved around the store putting away loose stock. It would have been necessary for the applicant to collect those groceries at the end of her shift whether or not she also collected the bananas.

75. Whilst there is no evidence from the respondent's witnesses with regard to either conversation, both Ms Young and Ms Newby have given evidence that the applicant had left some personal groceries at the kiosk at the front of the store at some stage prior to the fall. There is nothing in their evidence to suggest that this was an unusual or unauthorised circumstance.

76. I accept Mr Baker's submission that the silence in Ms Young and Ms Newby's statements can be explained by the fact that their statements were prepared prior to the applicant's statement and so were not responding to the applicant's evidence. The fact remains, however, that the applicant's evidence is uncontradicted. I am not satisfied that there is anything in the respondents' witness statements which is inconsistent with the applicant's account. Ms Young did indicate that she did not know when the applicant shopped for the bag of groceries which was left at the kiosk. The evidence does, however, indicate that it was a busy shift.

77. On the evidence before me, I accept, therefore that the respondent had authorised and induced or encouraged the applicant to collect personal groceries from the store. The applicant was expected to collect and pay for her items before leaving the workplace. At the time when the applicant fell, she was engaged in an activity that the respondent had authorised, induced or encouraged the applicant to engage in and therefore remained in the course of employment.

78. Even if I am wrong with respect to the latter finding, I find on the evidence that the applicant was walking through the store with a dual purpose when she fell. The applicant was engaged in an activity which was incidental to her duties, by walking through the store to exit. On her way out, the applicant intended to collect and pay for her grocery items. This factual matrix is not dissimilar to other cases where the worker was found to be in the course of employment when injured whilst engaging in an activity for dual purposes, such as *Glenbuddah Pty Ltd v Williams*[11] and *Gray v Sydney South West Area Heath Service (Rozelle Hospital)*[12] (*Gray*). In *Gray*, for example, the worker was on the employer's premises travelling to a ward where she was to commence her shift whilst also test riding a bicycle she wished to purchase when injured. The worker was found by O'Grady DP to be in the course of employment at the time.

79. I find that the factual matrix in this case is distinguishable from that in *Stanton-Cook* to which Mr Baker referred. The worker in that case attended the car park of her employer's premises on her day off to obtain dog coats from another worker's vehicle. While at the car park the worker tripped on a metal bar, fell and sustained injury to her right arm. There was no work purpose for her attending at the car park on that day.

80. For all of the reasons given above, I am satisfied that on 27 January 2020 the applicant sustained a personal injury to her left knee in the course of employment pursuant to s 4(a) of the 1987 Act.

Substantial contributing factor

81. In order for compensation to be payable, the applicant must also satisfy s 9A of the 1987 Act, which provides:

> **"9A No compensation payable unless employment substantial contributing factor to injury**
>
> (1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.
>
> Note. In the case of a disease injury, the worker's employment must be the main contributing factor. See section 4.
>
> (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
>
> (a) the time and place of the injury,
>
> (b) the nature of the work performed and the particular tasks of that work,

[11] (1995) 12 NSWCCR 468.
[12] [2010] NSWWCCPD 125.

(c) the duration of the employment,

(d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,

(e) the worker's state of health before the injury and the existence of any hereditary risks,

(f) the worker's lifestyle and his or her activities outside the workplace.

(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:

(a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,

(b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.

(4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies."

82. Subsection (3)(a) makes clear that the fact that injury arose in the course of the worker's employment, is insufficient to establish that employment was a substantial contributing factor to the injury.

83. In *Kelly*[13] Emmett JA stated at [43]:

> "The fact of the injury arising out of or in the course of the employment is relevant, but not determinative of itself, since both s 4 and s 9A must be satisfied. Section 9A requires that the employment concerned be a substantial contributing factor to the injury. That use of the indefinite article admits of the possibility of other, and possibly non-employment-related, substantial contributing factors. Whilst the strength of the connection between the employment and the injury is the question in issue, the determination of that question is an evaluative one, leaving a broad area for the personal judgment of the fact finder. Being an evaluative matter involving questions of impression and degree, a finding as to relative contributing factors is a finding of fact (*Badawi v Nexon Asia Pacific Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324; 75 NSWLR 503 at [48])."

84. The majority judgment (Allsop P, Beazley and McColl JJA) in *Badawi* is summarised in the headnote to that decision, which states:

> "1. The tests for an injury 'arising out of' employment under ss 4 and 9 and for employment being a 'substantial contributing factor' under s 9A must be considered separately. It is not sufficient to find that injury arose out of employment and to therefore conclude that the employment concerned was a substantial contributing factor to the injury: [85], [91].

[13] [2014] NSWCA 102.

2. The meaning of an injury 'arising out of' employment for the purpose of ss 4 and 9 is settled. An injury arises out of employment if the fact that the claimant was employed in the particular job caused, or to some material extent contributed to the injury. The phrase involves a causative element and is to be inferred from the facts as a matter of common sense: [73] - [76].

3. The phrase 'substantial contributing factor' in s 9A also involves a causative element. It is a different or added requirement to the 'arising out of' employment limb of ss 4 and 9, however the causal connection required for s 9A is not less stringent than that found in s 9. *Mercer v ANZ Banking Group* [2000] NSWCA 138; 48 NSWLR 740 not followed: [80] - [85].

4. For employment to be a 'substantial contributing factor' to the injury for the purposes of s 9A the causal connection must be 'real and of substance'. The language of the section is not to be confused with interpretations such as 'large', 'weighty' or 'predominant'. *Mercer v ANZ Banking Group* [2000] NSWCA 138; 48 NSWLR 740 not followed: [82]-[83], [107].

5. 'Employment' for the purposes of s 9A is the same 'employment' that is under consideration in ss 4 and 9: [91]

6. In determining whether worker's employment was a substantial contributing factor, the matters specified in s 9A(2) must be taken into account to the extent that they are relevant: [89].

7. Section 9A(2)(b) directs attention to the nature of the work performed and the particular tasks of that work and not to what the employee was doing at the actual time of the injury. It is an incorrect approach to consider some other activity other than the employment that had preceded the injury and then seek a linkage with the employment from the standpoint of that preceding activity: [95] – [98], [105].

8. The Presidential Member's failure to consider s 9A(2)(b) by reference to the work performed and the particular tasks of that work involved a misconstruction of the provision and was an error in point of law: [99]-[100].

9. Once it is accepted that 'substantial' in this case means 'in a manner that is real or of substance' the only answer when the test is applied to the facts of this case is that the contribution of the appellant's employment to her injury was real or of substance: [107]."

85. For the purposes of s 9A, I find that the injury occurred at the applicant's workplace and within minutes of the applicant clocking off from her shift. There is no evidence that the applicant had departed the premises before the injury occurred.

86. The applicant had been walking through the store with the dual purpose of paying for personal groceries collected from the store as previously agreed and authorised and departing the workplace in the normal fashion when the injury occurred.

87. I find there is little probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the applicant's life, if she had not been at work.

88. Whilst a dispute has been raised as to whether water from a watermelon display in the respondent's premises had caused the applicant to fall, it appears to have been the applicant's understanding and that of Ms Young and Ms Newby, who assisted the applicant immediately after the fall, that it did. The applicant expressed this to Ms Young at the time and both Ms Young and Ms Newby saw water on the floor. I am satisfied on the balance of probabilities that the fall was caused by the applicant slipping on water on the floor.

89. Whilst there is some suggestion that the applicant may have previously had a bad knee, there is nothing to suggest that the applicant's current symptoms, incapacity and need for treatment were caused by anything other than the mechanism of slipping and falling.

90. I am not satisfied that the duration of the applicant's employment or her lifestyle and activities outside the workplace are relevant.

91. In all the circumstances, I am satisfied that the causal connection between the applicant's employment and her injury was real and of substance. I am satisfied that employment was a substantial contributing factor to the injury for the purposes of s 9A of the 1987 Act.

92. I am therefore satisfied that the applicant sustained an injury that is compensable under the 1987 Act.

Entitlement to weekly benefits

93. Having found that the applicant sustained a compensable injury, there is no separate dispute as to the applicant's capacity for work as a result of the injury. The evidence indicates and I accept that she had, since the time of the injury, and continues at the time of this decision to have, no current work capacity.

94. The PIAWE rate has been agreed at $542.75.

95. The applicant is entitled to an award for weekly benefits pursuant to ss 36(1) and 37(1) of the Act in their current form, based on that PIAWE figure, from 28 January 2020 to date and continuing.

Entitlement to medical expenses

96. The applicant has agreed, and I accept, that in the circumstances of this case it is appropriate that an order of a general nature be made that the respondent pay the applicant's reasonably necessary medical and related treatment expenses pursuant to s 60 of the 1987 Act upon production of accounts, receipts and/or Medicare notice of charge.

SUMMARY

97. The applicant sustained a personal injury to her left knee in the course of employment pursuant to s 4(a) of the 1987 Act.

98. Employment was a substantial contributing factor to the injury for the purposes of s 9A of the 1987 Act.

99. There will be an award for the applicant for weekly benefits pursuant to ss 36(1) and 37(1) of the 1987 Act, based on a PIAWE figure of $542.75, from 28 January 2020 to date and continuing.

100. The respondent to pay the applicant's reasonably necessary medical and related treatment expenses pursuant to s 60 of the 1987 Act upon production of accounts, receipts and/or Medicare notice of charge.