WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5744/20**
Applicant: **Boro Eftimovski**
Respondent: **Toll Transport Pty Ltd**
Date of Determination: **28 January 2021**
Citation No: **[2021] NSWWCC 31**

The Commission determines:

1. The applicant sustained injury to the left shoulder on 21 May 2020 within the meaning of sections 4(a) and 9A of the *Workers Compensation Act 1987*.

2. The respondent pays the applicant's section 60 expenses based on a general order.

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

JOHN HARRIS
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 HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Disputes Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Boro Eftimovski (the applicant) has been employed by Toll Transport Pty Ltd (the respondent) as a contract delivery driver since 2008. The applicant is seeking medical expenses pursuant to the provisions of the *Workers Compensation Act 1987* (*1987 Act*) in respect of a left shoulder injury sustained on 21 May 2020.

2. It was admitted at the arbitration hearing that the applicant is a worker employed by the respondent.

3. The applicant was required to provide a delivery van as part of the conditions of his employment with the respondent. On the day prior to the injury the applicant leased a new vehicle for the employment. The applicant's practice was to carpet the rear section of the van to ensure that stock that he delivered did not slide and was damaged in transit.

4. Following the conclusion of his normal deliveries and whilst at home, the applicant injured his left shoulder after carpeting the van. The respondent has disputed liability to pay compensation pursuant to the provisions of ss 4 and 9A of the 1987 Act.

THE PROCEEDINGS BEFORE THE COMMISSION

5. This matter was heard on 3 December 2020**.** Mr Craig Tanner of counsel appeared for the applicant, and Mr Misha Hammond of counsel appeared for the respondent.

6. The following directions/orders were made at the arbitration hearing:

    1. Leave granted to amend the Application to:

        (a) Discontinue the claim for weekly compensation; and

        (b) Amend the s 60 claim to read: "A general order pursuant to s 60 of the 1987 Act for treatment costs for the left shoulder injury".

    2. All filed documentation is admitted into evidence without objection. There was no request to adduce oral evidence.

    3. The respondent withdraws the issue of "worker".

    4. The only issues are whether the injury occurred:

        (a) In the course of employment;

        (b) Arising out of the course of employment; and

        (c) Section 9A.

7. Directions were then made for the provision of written submissions.

8. Given the amendments, the applicant is only claiming a "general order" for s 60 expenses without claiming any specific medical expense. The respondent objected to this course. Oral reasons were provided at the arbitration hearing that the claim could proceed in the amended version given the nature of the previous claims made by the applicant.

EVIDENCE

Documentary evidence

9. The applicant referred to a document headed "Symbion & Toll Fast Regional Drivers Manual" (the Manual) dated 17 February 2017.[1] He stated that it was "part of my employment" that he complied with the Manual. Relevantly clause 4 of the Manual provides:

> **"4. Loading**
>
> 4.1. When all items have been checked off and accounted for on your interim manifest and scanner has confirmed no shortages loading can commence. Drivers must ensure they have all stock accounted for before leaving the dock.
>
> 4.2. Confirm all manifests and invoices are available matching your interim manifest.
>
> 4.3. If you do not have an invoice for a particular pharmacy, contact Toll Fast Supervisor/Depot before departure. For the transportation of dangerous goods (DG), a DG manifest will be supplied and MUST be carried with the goods at all times. In the case of an incident, the DG manifest must be made available to the emergency authorities immediately.
>
> 4.4. Take care when stacking and loading freight as mishandling can cause damage to products. Hospitals and Pharmacies have high standards on the quality of goods that they receive and will return products that have the slightest damage. Where driver neglect has resulted in damaged product, the cost of the damages may be deducted from the run payment."

Transport Industry Courier and Taxi Truck Contract Determination

10. Included within the Application is the Transport Industry Courier and Taxi Truck Contract Determination (the Determination) issued under the *Industrial Relations Act 1996* and applying generally to contracts of carriage. No relevant submissions were made as how the Determination applied to the applicant's employment with the respondent.

11. Relevantly clause 7.1 of the Determination required the contract carrier in co-operation with the principle contractor to obtain and maintain a policy of insurance to cover various losses including damage to "goods in charge of the contract carrier".[2]

Statement evidence

12. The applicant stated that he was obliged to comply with various operating manuals which regulated his employment such as the Symbion & Toll Fast Regional Drivers Manual.[3]

13. On 21 May 2020, the applicant undertook his normal delivery run from 6.00 am to 2.30 pm and returned to his residence when he continued to work on his van.[4] The duties involved delivery pharmaceutical products from the Toll depot to pharmacy retailers, five days per week.[5] In addition, on unspecified days, the applicant also undertook an "Office Works run" which involves the delivery of cartons to Office Work stores.[6]

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[1] Application to Resolve a Dispute (the Application), p 7.
[2] Late Application, p 14.
[3] Application, p 1.
[4] Application, p 2.
[5] Application, p 9.
[6] Application, p 9.

14. The van driven by the applicant was relatively new and consisted of a plastic floor. The applicant stated:[7]

> "I own my own delivery van. However, I am not allowed to display any advertising on the van. Further, I must keep the van roadworthy and presentable to a standard acceptable to, and determined by, Toll. Toll imposes strict rules that the delivery vans must be presentable. For example, they mustn't have any scratches, dents etc. If the vehicle is in any way unpresentable, I must notify Toll."

15. To prevent the items, he delivered from damage due to slippage within the van, the applicant laid carpet. He stated that "other drivers/my colleagues also lay carpeting/rubber matting in their vans".[8] The carpet had a dual purpose of preventing stock from "sliding or tipping over during freightage" and also from slipping in the van.[9]

16. The applicant provided a statement to an investigator organised by the respondent.[10] The applicant stated that he leased the van on asset purchase which was collected on the afternoon of 20 May 2020. The rear of the van was a "slippery hard plastic material"[11]. He said that the plastic bins which are used to carry the deliveries would slide around unless carpet was laid.

17. The applicant stated that he always placed carpet in the back of his vans and "every other driver has carpet in their vans, and it is our responsibility to put the carpet in there".[12]

18. In a further statement dated 4 September 2020 the applicant described the pharmaceutical products that he delivers which can be "very expensive". He stated:[13]

> "It is a condition of my employment with Toll that I carry insurance for the products I am delivering. The products I deliver are pharmaceutical products and can be very expensive. I chose to take out a policy through Toll's recommended provider as this was the cheapest option. The insurance premium is taken out of my pay slip automatically."

19. Dean Necovski has been working for the respondent since 2008. He stated:[14]

> "2. I have laid carpet in every single van that I owned while working for Toll. Our main contract is Symbion and the stock we deliver for the pharmacies comes in black plastic tubs which slide around on the floor if left uncovered. These tubs are a sliding hazard if not secured properly as some tubs can weigh up to and if not more than 15kg.
>
> 3. The tubs have to be secured as we have a duty to protect the stock at all times and the carpet helps the delivery driver and the tubs to be secure and prevents them from slipping during transit.
>
> 4. Toll always stresses to us that we must have a vehicle that is safe to work with and to minimise slips and falls. The bare metal in the back of the van becomes a very unsafe surface especially when it rains so carpet is the best and safest option to have in the back of the van.

[7] Application, p 10.
[8] Application, p 2.
[9] Application, p 2.
[10] Reply, p 51.
[11] Reply, p 55.
[12] Reply, p 55, paragraph 52.
[13] Application, p 10, paragraph 14.
[14] Application, p 14.

5. Bulk that we also deliver can be damaged easily as it slides around on bare metal and the carpet provides a nice soft surface and better protection than just the bare metal.

6. I was aware that other drivers were carpeting as this was standard practice which I would also follow in all my vehicles."

20. Joy McGrath has been engaged as a sub-contractor by Toll for approximately 16 years. He stated:[15]

> "I bought a new van in 2008 and had the manufacture lay a non-slip rubber flooring mat as without anything laid on the metal of the van this becomes an OH&S Issue. This secures freight some of which is fragile and Important as the stock Is for pharmacies. It also reduces the chance of the driver slipping especially on wet days dramatically.
>
> It is also one of Tolls regulations that all vans must have carpet or rubber to coincide with there (sic) OH&S regulations of load restraint and driver safety."

21. Nathan Sinclair is the Operations Manager of the Cardiff depot employed by the respondent since 2015 and provided a statement dated 7 July 2020.[16] Mr Sinclair accepted that the applicant is required to provide a van as a condition of his contract to cover the courier run.[17]

22. Mr Sinclair's description of the applicant's duties was similar to the description provided by the applicant. He stated that the "only thing the van is required to have is a safety between the driver and the cargo area, and a reversing beeper, and any windows tinted."[18]

23. In relation to the practice of drivers carpeting their vans, Mr Sinclair stated:[19]

> "In relation to the carpet the claimant stated that he was putting in the vehicle at the time there is no stipulation or requirement by the insured to put carpet in his vehicles. I am aware that a lot of the drivers install carpet or timber or plywood or rubber matting in the bottom of their vans to protect the inside of the vans. It is their choice to do that."

SUBMISSIONS

Applicant's submissions

24. The applicant was injured when he fell from his vehicle at home on 21 May 2020. He was laying carpet in the back of the vehicle used to perform the work for the respondent.

25. The applicant is required to have a properly maintained van for the delivery of freight. They assume responsibility for the goods which are damaged in transit. Reference was made to clause 4.4 of the Symbion & Toll Fast Regional Drivers Manual and it was submitted:[20]

> "The obligation to ensure that items are delivered in an undamaged condition imposes a responsibility upon delivery drivers, like the applicant, to adopt stowage measures to ensure the secure, safe and undamaged delivery of freight."

26. The applicant explained the rationale for laying carpet in the van. The purposes included avoiding parcel damage in transit and the applicant's safety when he moved at the back of the van.

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[15] Application, p 15.
[16] Reply, p 61.
[17] Reply, p 63.
[18] Reply, p 65.
[19] Reply, p 66.
[20] Applicant's written submissions, [10].

27. The reasons for laying the carpet "are exclusively work-related".[21] There is no evidence or reason that the laying of carpet is unrelated to work.

28. The applicant referred to his uncontradicted evidence that drivers place carpet in the back of their vans and submitted:[22]

> "[T]here was a shared recognition of work-related purpose of placing a carpet in the bac of their vans, i.e. to reduce the risk of delivery items sliding around the back of delivery van and being damaged in transit."

29. The evidence of Mr Sinclair is that he is aware that drivers install carpets in their vans although he says that it is for a different purpose. He also states that there is no stipulation or requirement to do this. His understanding as to why drivers carpet the vans is unexplained and there is no source explaining his reasoning.

30. The applicant's account as to why he does it is unchallenged and otherwise accords with commonsense.

31. In terms of the meaning of "arising out of employment", the applicant referred to the observations of Starke J in in *Smith v Australian Woollen Mills Ltd* [23] (*Smith*). The applicant submitted:[24]

> "Proceeding on the understanding that the applicant was responsible for the undamaged delivery of freight, and his reasoning that carpet would reduce the risk of damage to items he was responsible for delivering, his installation of a carpet was clearly part of his employment".

32. The applicant referred to the meaning of arising out of employment as discussed by Roche DP in *Qantas Airways Ltd v Watson (No 2) (Watson (No 2)*).[25] The application of notions of "commonsense" establish a clear connection between the employment and the injury. The only reason for laying the carpet was work related and was in the mutual interests of the applicant and the respondent, that is the delivery of undamaged freight.

33. In terms of s 9A(2), the "nature of the work performed and the particular task of that work" explains why the applicant was fitting carpet in to the van. There was otherwise no probability the injury or a similar injury would have occurred.

Respondent's submissions

34. The respondent also referred to the principles enunciated in *Watson (No 2)*.

35. The respondent noted that it was a condition of the contract that the applicant was to provide his own van to undertake the courier runs. He was engaged to deliver parcels and was not employed by the respondent as "a carpet layer".[26] The fitting of the carpet in the van was "a capital outlay, not related to the actual work, but an act preparatory to being able to perform the work in a manner the Applicant chose to do".[27] The carpet was the applicant's property.

36. The vehicle was leased and the decision to lay carpet by the applicant was to avoid causing internal damage.

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[21] Applicant's written submissions, [14].
[22] Applicant's submissions, [20].
[23] [1933] HCA 60.
[24] Applicant's submissions, [29].
[25] [2010] NSWWCCPD 38.
[26] Respondent's submissions, [10].
[27] Respondent's submissions, [11].

37. The contract does not stipulate that the van be carpeted, and no direction was given by the respondent. No approval was sought by the applicant. The only contractual term on the condition of the vehicle was for a safety barrier between the driver and the cargo area, a reversing beeper and tinted windows.

38. Clause 4.4 of the Symbion & Toll Fast Regional Drivers Manual does not assist the applicant. That clause related to damage to stock whilst "stacking and loading freight". That clause does not impose an obligation of the driver to install carpet in the vehicle.

39. The respondent referred to the applicant's evidence concerning the practice of laying carpet and submitted:[28]

> "[I]t appears from the evidence, that the contract drivers choose to alter their personal vans so as to avoid damaging their own interior and preventing themselves from slipping inside."

40. The respondent disputed that employment was not the predominant reason for fitting the carpet.

41. The applicant's shift had completed at 2.30 pm. He was not in the course of his employment when the injury occurred.

42. It was the applicant's decision to lay the carpet and he had not advised the respondent of his intention to make repairs pursuant to clause 5.12 of the contract.

43. The applicant's evidence that every driver laid carpet "is not true"[29]. Mr Sinclair who had been with the respondent since 2009, stated that "a lot of drivers install carpet or timber or plywood or rubber matting in the bottom of their vans to protect the inside of their vans". Mr Sinclair addresses the practice of other drivers and provides a "more reliable account" given his "experience and interactions with far more drivers" and his "un-bias observation".[30]

44. The respondent submitted that there were purposes other than employment for placing carpet in the back of the van. The vehicle was adapted to protect it from being loaded or unloaded and products would not be damaged by sliding when the vehicle was in motion. Those products would be damaged by loading, unloading and stacking.

45. There is no commonsense connection between the employment and the injury: *Kooragang Cement Pty Ltd v Bates*.[31]

46. In relation to s 9A, the various factors set out in s 9(2) must be considered to the extent that they are relevant. Employment will be a substantial contributing factor to the injury if the contribution was "real and of substance": *Badawi v Nexon Asia Pacific Pty Ltd* (*Badawi*).[32] It is not sufficient if the injury arose out of or in the course of employment: s 9A(3)(a).

47. The activity being performed by the applicant was "not exclusively work-related".

48. The nature of the work performed, and the particular tasks of that work were deliveries or carrier work and not that of a carpet layer. There was also a high probability that the injury or similar injury would have happened anyway. The car was parked on a sloped driveway with fresh plastic steps. This would have resulted in the applicant slipping and falling from his own vehicle whether or not he had been engaged in carpet laying.

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[28] Respondent's submissions, [15].
[29] Respondent's submissions, [21].
[30] Respondent's submissions, [22].
[31] (1994) 35 NSWLR 452.
[32] [2009] NSWCA 324.

49. The injury occurred at home in circumstances where the applicant was maintaining his own vehicle. The applicant was not required to lay carpet by the respondent, and this was a personal choice.

50. The respondent submitted that "the contractual terms stipulate that each delivery is a new contract" and that "logically, an injury occurring whilst not actually delivering cannot be an injury for workers compensation purposes".[33] It was asserted that the "applicant's position would be stronger" if he was "employed under a regular contract of employment rather than individual contracts for each shift".[34]

Applicant's submissions in reply

51. The applicant filed detailed submissions in reply. The following is a summary of these submissions.

52. Th applicant emphasised that the particular job was to ensure the safe and undamaged delivery of commodities and the question posed in this case was whether the injury was sustained by the applicant whilst "doing the job he was employed to do or something incidental to it."

53. Whilst the purchase of the carpet may have been a capital outlay, the injury occurred in circumstances where the fitting of the carpet was incidental to the employment.

54. The relevant contractual stipulation was not that the vans be fitted with carpet or a similar material but that the stock be delivered in a safe and undamaged state. This obligation imposed on the drivers a "responsibility to employ measures conducive to that requirement".[35]

55. Whilst the ultimate cause of the injury was a slippery back step, that does not detract from the fact that the applicant was engaged in an activity incidental to his employment.

56. Clause 4.4 of the Manual applies to "stacking and loading" and contemplates the secure, safe and stable stacking. Goods that are stacked ad loaded in a manner that allows them to slide would fall within the meaning of the clause.

57. Furthermore, the safe and undamaged delivery of product is in the employer's interest. Steps taken to ensure safe and undamaged delivery are promoting the interests of the employer and necessarily incidental to the employment with the employer.

58. The suggestion that the carpet was laid to avoid causing internal damage to the van is "unfounded" and does not otherwise detract from the employment related purpose of the delivery of undamaged product. The other reason of reducing slipping by workers in the back of the van is another employment related reason.

59. It was a well-established practice known to the respondent that drivers would install carpet in the rear of the vans.

60. The suggestion that there was a non-employment reason for carpeting the van were without substance. The only reason was to ensure that the product was safely delivered in an undamaged state. In these circumstances the fitting of the carpet was a work-related purpose which satisfied the test in s 9A.

[33] Respondent's submissions, [37(g)].
[34] Respondent's submissions, [39].
[35] Applicant's submissions in reply, [12].

REASONS

61. The applicant must prove his case on the balance of probabilities.[36] This onus extends to those matters for consideration under s 9A of the 1987 Act.

62. The applicant did not contend that he was in the course of employment at the time of his injury. Accordingly, consistent with the respondent's submissions, that aspect of s 4 is not satisfied.

The circumstances of the injury

63. The injury occurred when the applicant was exiting the van having completed the task of carpeting the floor. The applicant fell injuring his left shoulder.

64. The accident was reported to the respondent at 6.30 pm on the day of the accident. The record noted that the applicant was "at home fitting carpet etc to the inside of his new van after his active working shifts and has fallen from the van down his driveway injuring his left shoulder."[37]

65. The claim form completed on 23 June 2020 accords with his history[38] as does the various versions set out in the written statements. Indeed, the respondent made no contrary submissions to the applicant's version as to the way the injury occurred.

The factual issue concerning why carpet was laid in the rear of the van

66. The applicant's duties principally involve the delivery of pharmaceutical products from his van. The stock is generally expensive pharmaceutical packages which can be damaged in transit. The applicant, like most if not all of the drivers at Toll, have taken steps over the years of carpeting or placing another material in the rear of the van.

67. The applicant explained why he carpeted the rear of the van. He stated that the purpose was to prevent damage to the goods and provide a safer means of entry and egress.

68. The evidence on this issue is not limited to the applicant. Mr Necovski stated that he laid carpet to prevent slippage and protect the stock as well as provide a safer means of egress from the vehicle.

69. Mr McGrath stated that he had non-slip rubbing flooring mat to secure freight and provide a safer surface for the driver.

70. It is of note that the applicant obtained the van only the previous day and immediately took steps to carpet the floor of the van.

71. An alternative explanation was provided by Mr Sinclair who said that this practice was done "to protect the inside of the vans".[39] He does not say how he came to that conclusion. He cannot explain the reasoning process of others. Further, he does not attempt to explain the specific comments made by the applicant, that is, that the van is carpeted to prevent damage to stock.

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[36] *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 per McDougall J at [44]- [55], McColl and Bell JJA (as their Honours then were) agreeing; *Chen v State of New South Wales (No 2)* [2016] NSWCA 292 per Leeming JA at [33]-[34]; McColl JA agreeing at [1].
[37] Application, p 17.
[38] Reply, p 8.
[39] Reply, p 66.

72. I agree with the applicant's submission[40] that it accords with commonsense that the carpeting of the van, as opposed to a plastic floor, would prevent movement by the parcels. Not only would that prevent damage to the van, but it also prevented damage to the stock being delivered by the courier drivers.

73. The statement by Mr Sinclair that the purpose was to prevent damage to the vans does not attempt to explain that this damage would be caused by the products shifting whilst in transit. Mr Sinclair avoids addressing the issue that the stock would be damaged when it collided with the inside side of the van.

74. Mr Sinclair does not state the basis for his knowledge that drivers laid carpet or other coverings on the floor to protect the vans. He also does not refer in his statement to the self-evident fact that if the inside of the van were damaged then it is likely that the stock that was being delivered would also be damaged. This is of course even more evident when the relevant stock was fragile pharmaceutical products.

75. The respondent's submission that Mr Sinclair should be accepted because he is "un-biased" does not address why the contrary evidence of Mr Necovski and/or Mr McGrath, who similarly have no interest in the litigation, should not be accepted. In any event, Mr Sinclair's explanation for why the carpet or similar non-slip material was laid simply ignores that, even if he was correct, the damage to the side of the van would be caused by product moving and colliding with it.

76. It is significant that the applicant was delivering pharmaceutical products that had to be delivered undamaged. That conclusion is otherwise logical and accords with commonsense as both the retailer and the ultimate consumer would be hesitant in accepting pharmaceutical products that had been damaged.

77. That conclusion is consistent with that part of clause 4.4 of the Manual which relevantly provides that "Hospitals and Pharmacies have high standards on the quality of goods that they receive and will return products that have the slightest damage".

78. It is unnecessary to determine whether clause 4.4 of the Manual provides the contractual basis for the applicant's assertion that he is liable for stock due to slippage on the floor. This is because the applicant, as he submitted,[41] was contractually bound to the respondent to exercise reasonable care in his employment by delivering undamaged pharmaceutical products. That conclusion derives from the employment relationship and requirement that the applicant, like other drivers, delivered pharmaceutical products in circumstances where the customers required "high standards on the quality of goods".

79. That conclusion is consistent with the applicant's evidence that he was required to "carry insurance for the products" he was delivering[42]. The basis of the requirement was not specified in the applicant's evidence or in his submission although that assertion was not the subject of contrary submission or evidence. The applicant stated that he paid for the insurance through a deduction from his pay. Again, that statement was not contradicted. It is another factor which supports the conclusion that the applicant was required to exercise reasonable care in the delivery of the products and that the respondent expected that the pharmaceutical products were delivered without any damage.

[40] At [26] herein.
[41] At [54] herein.
[42] The applicant's evidence on this matter is set out at [18] herein.

80. I accept the applicant's evidence, corroborated by Mr Necovski and accepted by Mr Sinclair, that there was a practice by courier drivers to lay carpet or other surfaces to the rear of the vans. I accept the evidence of the applicant, Mr Necovski and Mr McGrath that the carpeting or other material has a dual purpose, first, to prevent damage to stock in transit, and, secondly, to make entry and egress safer particularly in wet weather. If there was a purpose of preventing damage to the vans, then that was secondary and only because the stock would be damaged when it moved within the van when the stock collided with the walls.

81. It may be that the cl 7.1 of the Determination also provided a basis for the applicant's evidence set out at [18] herein. As no submission was directed to cl 7.1, I do not decide it on that basis. However, I accept that the respondent required the applicant to take out insurance to cover the loss of damage to stock whilst in carriage and that it was a condition of the applicant's employment that insurance was required to cover the loss or damage to stock in transit. I make that finding based on the applicant's evidence and the fact that the insurance was taken out through the respondent by means of deduction from the wages.

82. The safe transit of pharmaceutical products was an obvious and important matter involving the applicant, other Toll Drivers, the respondent, and the consumer. For these reasons I conclude that to prevent damage to stock in transit, the respondent was aware that the drivers had a regular practice of installing carpet or similar nonslip material to the internal floors of the vans.

Arising out of the course of employment

83. The phrase "arising out of" was discussed by the plurality of the Court of Appeal in *Badawi v Nexon Asia Pacific Pty Ltd* (*Badawi*).[43] It is unnecessary to repeat the extensive reasons of the plurality. The plurality approved the passage from *Nunan v Cockatoo Island Docks & Engineering Co Ltd*[44] when they stated:[45]

> "The meaning of '*arising out of ... employment'* is settled. In *Nunan v Cockatoo Island Docks & Engineering Co Ltd* [1941] NSWStRp 23; (1941) 41 SR (NSW) 119 in what is sometimes still referred to as the authoritative decision on the phrase the Court (Jordan CJ and Roper J, Nicholas CJ in Eq agreeing) adopted a common sense approach to the application of the phrase, noting that it involved a causative element."

84. The relevant passage in *Nunan*[46] is:

> "As the law now stands, I am of the opinion that when a worker has proved an incapacitating personal injury, then if it appears (1) that the fact of his being employed in the particular job caused, or to some material extent contributed to, the injury, and also (2) that the injury was sustained whilst he was doing the job which he was employed to do or something incidental to it, he is *prima facie* entitled to compensation; and it is for the employer to show if he can that there is something which disentitles him to compensation, or to full compensation."

85. I finally mention the statement on the necessity between the employment and the injury when determining this issue. The plurality stated:[47]

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[43] [2009] NSWCA 324 at [72]-[79].
[44] (1941) 41 SR (NSW) 324 (*Nunan*).
[45] *Badawi* at [77] per Allsop P, Beazley & McColl JJA.
[46] Nunan at 124; applied by Clarke JA in Zinc Corporation Ltd v Scarce (1995) 12 NSWCCR 566 at 570-571. See also Roche DP in Watson (No 2) at [76].
[47] *Badawi* at [79].

> "The necessity for there to be a causal element between the employment and the injury when determining whether a worker sustained injury arising out of employment, has been consistently confirmed by the High Court and this Court: see *Tarry v Warringah Shire Council* [1974] 48 WCR (NSW) 1 where Hutley JA endorsed the statements of principle in *South Maitland Railways Pty Limited v James* [1943] HCA 5; 67 CLR 496; *Weston v Great Boulder Gold Mines Limited* [1964] HCA 59; 112 CLR 30 and *Kavanagh v Commonwealth* [1960] HCA 25; 103 CLR 547. Glass JA also endorsed the statement of principle as expressed by the Court in *Nunan*."

86. The applicant otherwise referred to the application of *Nunan* by Roche DP in *Watson (No 2)*. The respondent likewise referred to *Watson (No 2).*

87. I accept that the applicant was carpeting the rear of the van for the purpose of ensuring the safe and undamaged delivery of pharmaceutical products. The employer was aware that the hospital and pharmacies had "high standards on the quality of goods" and it was essential that these products be delivered in an undamaged state.

88. I refer to and repeat my reasons at [66]-[82] herein. There was a clear practice of drivers over the years of laying a suitable flooring such as carpet or rubber to ensure that the stock did not shift in transit.

89. The injury occurred in circumstances where the applicant was completing the task of ensuring that the van was suitably equipped for the purpose required, specifically the delivery of undamaged pharmaceutical products. I agree with the applicant that it does not matter that the injury fell whilst exiting the vehicle after laying the carpet. The injury was part of the process of undertaking that activity.

90. Whilst it may be considered unusual that the applicant was undertaking this task at home, the activity must be seen in the context that it is agreed that it was a contractual condition that the applicant provided a van as part of his employment. The van was being modified at the time of injury to make it suitable for the purpose of delivering an undamaged product.

91. I consider that the respondent did not direct the applicant or otherwise give express permission for the relevant task to be undertaken. I accept the parties' common submission that the satisfaction of the causal element between employment and injury required a commonsense approach. Whilst not all circumstances involving modification of the van by Toll employees would satisfy the elements discussed in *Nunan*, the long-term practice and the necessary and essential reasons for it provide the causal link between the applicant's employment and the injury.

92. In these circumstances, I am satisfied that applicant sustained injury arising out of the employment albeit when exiting the van having completed the task of carpeting the van.

Section 9A

93. The applicant does not satisfy the onus under s 9A merely because the injury arose out of and in the course of the employment.[48]

94. The requirement imposed by s 9A that the employment concerned was a substantial contributing factor to the injury "involves a causative factor".[49]

[48] s 9A(3).
[49] *Badawi* at [80].

95. The causal connection expressed by the words “a substantial contributing factor” is one that “was real and of substance”.[50]

96. In *Kelly v Secretary Department of Family and Community Services* Basten JA stated[51]:

> “Indeed, the starting point as identified by the arbitrator, must be the terms of s 9A. The arbitrator, in an entirely conventional fashion, had regard to each of the matters set out in s 9A(2). Although they are described as ‘examples of matters to be taken into account’, some at least are likely to be material in a wide range of cases.”

97. Emmett JA stated:[52]

> “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]).”

98. I make the following findings in relation to the matters set out in s 9A (2) “to the extent that they are relevant”[53], noting that not all matters will “always be relevant”.[54]

99. I note that I am not confined to the matters specified in s 9A(2) “and may take into account other factors that are relevant to the determination of the question in issue: viz, whether the employment concerned was a substantial contributing factor to the injury.”[55]

100. “The time and place of the injury”. The time and place of the injury clearly favour the respondent as the injury occurred outside normal work hours and at the applicant’s residence.

101. “The nature of the work performed and the particular tasks of that work.” The plurality in *Badawi* emphasised that s 9A(2)(b) was directed to:[56]

> “‘[t]he nature of the work performed and the particular tasks of that work’, that is, of the employment concerned. It is s 9A(2)(a) which directs attention, in part at least, to what the employee was in fact doing at the time of the injury, because it requires an identification of the time and place of injury.”

102. Subsequently the plurality stated:[57]

> “Nor does para (b) deal with activities during the course of employment but which cannot be said to be within an interval or interlude within the course of employment (which is the relevant circumstance here) but which are not employment related.”

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[50] *Badawi* at [82].
[51] [2014] NSWCA 102, (at [24] Ward JA agreeing at [35]).
[52] at [46].
[53] *Badawi* at [89].
[54] *Badawi* at [131] per Basten JA.
[55] *Badawi* at [89].
[56] *Badawi* at [96].
[57] *Badawi* at [98].

103. The respondent submitted that the applicant was a delivery driver and not a carpet layer and that he was undertaking a task foreign to the nature of the work he normally performed. The applicant submitted that the task was incidental to delivering a safe product.

104. My reasons set out above are sufficient to reject the respondent's argument. The nature of the task was incidental to the work performed by the applicant as it was incidental to providing a van suitable for delivering an undamaged product.

105. "The duration of the employment" under s 9A(2)(c). The applicant stated that he had been employed for 12 years but did not address this matter in is submissions. The respondent asserted that the applicant's case would have been stronger if he was a "regular employee" as opposed to each run involving a new contract.

106. I am left to speculate as to the basis of the respondent's submission "that each delivery run is a new contract" and how this was relevant to the issues in dispute although the context of where it appeared in the written submissions appeared to be directed to the application of s 9A.

107. I observe that the notion of separate daily contracts was not suggested at the arbitration hearing when the respondent admitted that the applicant was a worker.

108. I am left to guess whether the respondent was relying on the meaning of "Contract Time" as defined in the Determination[58] without referring to other clauses such as the meaning of "Permanent Runs"[59]. Other documents indicated that the applicant was employed on a continuous basis such as the "Final Warning Letter" dated 2 July 2018 which referred to unacceptable workplace behaviour. It is difficult to understand how the respondent would be required to issue a final warning letter in relation to the applicant's employment if the applicant was otherwise only engaged on individual daily contract.

109. It is also difficult to understand how the applicant was engaged daily when he was delivering stock on a regular run and required permission from the respondent if another person was to fill in for the applicant's duties. The applicant was also required to seek leave in advance when he wanted to take holidays.[60]

110. However, none of this was mentioned in submissions and it is unclear how the respondent's submission applied to the issues in dispute.

111. I would have thought that the fact that the practice of laying carpet or similar flooring preventing slippage in the van over an extended period was a matter that would have favoured the applicant. As the matter was not argued by the applicant and I do not understand the relevance of the respondent's submission directed to the issues, I treat this matter as a neutral.

112. Even if I was required to accept the respondent's submission, which I have some difficulty with, I would otherwise find in favour of the applicant for the other reasons expressed under s 9A.

113. Section 9A(2)(d) refers to "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".

[58] Application, p 48.
[59] Application, p 50.
[60] Application, p 10.

114. It is unlikely that the accident or the injury or a similar injury would have happened anywhere and at a similar time given that the applicant was injured. The applicant obtained this vehicle for the sole purpose of delivering stock on behalf of the respondent. The applicant undertook this task on the day following the receipt of the vehicle. There is no doubt and I find that the injury occurred because the applicant was undertaking an activity exclusively for the purpose of securing the safe delivery of the respondent's stock and otherwise making the vehicle safer when entering and exiting. The fact that the injury occurred whilst the vehicle was parked on the driveway does not detract from the fact that the applicant was injured in circumstances of performing the very task which was incidental to his employment. I reject the respondent's submissions on this issue.

115. There is no basis to suggest that the applicant's state of health and hereditary risks were relevant to the injury within the meaning of s 9A(2)(e).

116. The respondent's submissions focused on the purported non-employment cause of the incident with reference to the protection of the applicant's van. That submission does not address the strength of the causative link to the employment and is a repeat of the error which was the subject of criticism by the Court of Appeal in *Badawi*[61].

117. In any event I agree with the applicant's submission that the reasons the applicant was carrying out the task were solely employment related. I rejected the submissions that there were non-employment reasons for the applicant carrying out the task at hand.

118. I refer to the comments of Basten JA in *Badawi* where his Honour stated[62]:

> "Where it is the very activity of the claimant, which was the conduct authorised, encouraged or permitted by the employer (and in this case, the conduct exhibited all of those characteristics), the conclusion that the employment was a substantial contributing factor to the injury is the only conclusion reasonably open."

119. Whilst there is no evidence that the conduct was "authorised" or "encouraged", there is no doubt that the respondent was aware of the activity by workers that they installed non-slip protection in the rear of the vans and in those circumstances, it was "permitted". That purpose had an obvious benefit to the employer, that is through the safe delivery of product to various pharmaceutical outlets.

120. The facts of this case clearly satisfy the concept of employment being "a substantial" contributing factor the injury, that is a causal connection which is "real and of substance".

ORDERS

121. The orders are set out in the Certificate of Determination.

[61] at [105].
[62] at [121].