WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**011400/12**
APPLICANT:	**Elle Rose Wickenden**
RESPONDENT:	**Dewan Singh and Kim Singh trading as Krambach Service Station**
DATE OF DETERMINATION:	**5 December 2013**
CITATION:	**[2013] NSWWCC 471**

The Commission determines:

1. The applicant sustained injury on 5 July 2012 on a journey to which section 10 of the 1987 Act applies, namely a daily or other periodic journey between the worker's place of employment and place of abode, such journey being one to which the section applies by reason of a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

2. Order the respondent pay the applicant weekly compensation at the rate of $400 per week from 5 July 2012 to 31 December 2012 pursuant to section 36 of the *Workers Compensation Act* 1987 (as in force prior to the weekly payments amendments made by the *Workers Compensation Legislation Amendment Act* 2012).

3. Order the respondent pay the applicant weekly compensation at the rate of $320 per week from 1 January 2013 to date and continuing pursuant to section 37(1) of the *Workers Compensation Act* 1987 1987 (as in force since the weekly payments amendments made by the Workers Compensation Legislation Amendment Act 2012) (being 80 per cent of the AWE of $400 per week).

4. I further order the respondent to pay the applicant's section 60 expenses (general order).

5. The respondent is to pay the applicant's costs as agreed or assessed.

6. I grant an uplift of 25 per cent (both parties) having regard to the complex factual and legal issues which were argued when at all relevant times there was no decided case.

7. Grant liberty to apply.

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

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

Abu Sufian

Senior Dispute Services Officer
By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Elle Rose Wickenden, the applicant, worked as a casual employee for the Krambach Service Station on and off from July 2009.

2. She did not work between October 2011 and February 2012.

3. Dewan Singh and Kim Singh t/as Krambach Service Station (the respondent), took over the service station in October 2011 and did not require her services until February 2012.

4. The applicant has worked a minimum of 15 hours per week, three days per week of five hours each day with additional days as required. Her normal working hours were between 9.30 am and 2.30 pm.

5. The applicant normally rode her motorbike to and from work and rode her motorbike home in daylight usually in view of the 2.30 pm finishing time.

6. From about the middle of June 2012 the applicant was asked by the respondent to work longer hours while she was trained to undertake additional duties of opening and closing the service station, so that she could run the service station by herself when the respondent went away to a wedding for the weekend of 7 to 8 July 2012, leaving her in charge and without any assistance. During that training period of about three weeks she was working from 7.30 am to 5.30 pm for three days per week without any breaks.

7. The applicant normally rides her motorbike to and from work. The respondent helped her to get a loan to buy the motorbike. The trip from her home in Nabiac to her place of employment in Krambach is about 15 kilometres each way. It is a fairly poor quality country road, sealed but rough in many places and quite narrow.

8. On Thursday 5 July 2012 the applicant closed up the service station at the normal closing time of 5.30 pm, knocked off and starting driving home. It was dark. She normally rode home in daylight and had to ride home in darkness while doing this extra training. Her headlight was on (see police report).

9. About halfway home the applicant saw cattle on the road ahead in the light from an oncoming car's headlights. It was difficult to see the cattle clearly. The applicant slowed down and she observed an oncoming car swerving as it approached towards the cows on the road. That vehicle collided with the applicant's motorbike throwing her off the bike. She suffered serious injuries.

ISSUES FOR DETERMINATION

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

    (a) whether there is a real and substantial connection between the applicant's employment and the accident or incident out of which the personal injury arose?

PROCEEDINGS BEFORE THE COMMISSION

11. Written submissions were subsequently provided by the applicant and respondent's counsel and the applicant provided a further submission in reply.

12. 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. The parties have agreed to the determination of the matter without a conference or formal hearing.

EVIDENCE

Documentary Evidence

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

    (a) Application to Resolve a Dispute and attached documents, and
    (b) Reply and attached documents.

FINDINGS AND REASONS

14. I have set out at length the circumstances under Background (above). I find them as facts.

15. As pointed out by the respondent in their submissions, the applicant was travelling from her place of employment to her place of abode on 5 July 2012 and as such was undertaking a journey subsequent to the operation of the *Workers Compensation Legislation Amendment Act* 2012 which commenced relevantly on 27 June 2012.

16. It is clear that Parliament intended to repeal the journey provisions except for the saving provision in subsection 10(3A).

17. The question is whether that savings provision in subsection (3A) applies in this factual situation.

18. The parties have canvassed the matter appropriately in the written submissions and have dealt with the matters which are the subject of the decision in *Mitchell v Newcastle Permanent Building Society Limited* [2013] NSWWCCPD 55 *(Mitchell)* per O'Grady DP handed down on 22 October 2013 confirming the decision of Arbitrator Douglas.

19. No attempt was made, very properly, to allege that the applicant was in the course of her employment at the relevant time. It is accepted it is either compensable as a journey within the meaning of section 10 of the *Workers Compensation Act* 1987 (the 1987 Act) or it is not compensable at all under the 1987 Act.

20. Section 10 of the 1987 Act provides as at the date of the applicant's injury:

    "10 Journey claims

    (1) A personal injury received by a worker on any journey to which this section applies is, for the purposes of this Act, an injury arising out of or in the course of employment, and compensation is payable accordingly.
    (1A) Subsection (1) does not apply if the personal injury is attributable to the serious and wilful misconduct of the worker.
    (1B) A personal injury received by a worker is to be taken to be attributable to the serious and wilful misconduct of the worker if the worker was at the time under

the influence of alcohol or other drug (within the meaning of the Road Transport Act 2013), unless the alcohol or other drug did not contribute in any way to the injury or was not consumed or taken voluntarily.

(1C) (Repealed)

(1D) Subsection (1) does not apply if the personal injury resulted from the medical or other condition of the worker and the journey did not cause or contribute to the injury.

(2) Subsection (1) does not apply if:

(a) the injury was received during or after any interruption of, or deviation from, any such journey, and

(b) the interruption or deviation was made for a reason unconnected with the worker's employment or the purpose of the journey, unless, in the circumstances of the case, the risk of injury was not materially increased because of the interruption or deviation.

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

(a) the daily or other periodic journeys between the worker's place of abode and place of employment,

(b) the daily or other periodic journeys between the worker's place of abode, or place of employment, and any educational institution which the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to attend,

(c) a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of obtaining a medical certificate or receiving medical, surgical or hospital advice, attention or treatment or of receiving payment of compensation in connection with any injury for which the worker is entitled to receive compensation,

(d) a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of having, undergoing or obtaining any consultation, examination or prescription referred to in section 74 (3),

(e) a journey between any camp or place:

(i) where the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to reside temporarily, or

(ii) where it is reasonably necessary or convenient that the worker reside temporarily for any purpose of the worker's employment, and the worker's place of abode when not so residing,

(f) a journey between the worker's place of abode and the place of pick-up referred to in clause 14 of Schedule 1 to the 1998 Act,

(g) a journey between the worker's place of abode and place of employment, where the journey is made for the purpose of receiving payment of any wages or other money:

(i) due to the worker under the terms of his or her employment, and

(ii) which, pursuant to the terms of his or her employment or any agreement or arrangement between the worker and his or her employer, are available or are reasonably expected by the worker to be available for collection by the worker at the place of employment.

(3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

(4) For the purposes of this section, a journey from a worker's place of abode commences at, and a journey to a worker's place of abode ends at, the boundary of the land on which the place of abode is situated.

(5) For the purposes of this section, if the worker is journeying from the worker's place of employment with one employer to the worker's place of employment with another employer, the worker shall be deemed to be journeying from his or her place of abode to his or her place of employment with that other employer.

(5A) Nothing in this section prevents the payment of compensation for any personal injury which, apart from this section, is an injury within the meaning of this Act.

(6) In this section:

educational institution means:

(a) a trade, technical or other training school, or

(b) a university or other college or school providing secondary or tertiary education.

night, in the case of a worker employed on shift work, night work or overtime, has a meaning appropriate to the circumstances of the worker's employment.

place of abode includes:

(a) the place where the worker has spent the night preceding a journey and from which the worker is journeying, and

(b) the place to which the worker is journeying with the intention of there spending the night following a journey.

21. At first instance in *Mitchell* the learned Arbitrator Mr Douglas made these comments in his reasons:

> "[25] …both the fact that she had to travel home from her place of employment and the fact that her journey was done at a time when it was dark are circumstances related merely to the fact of her being employed and not to her being employed in her particular job. Her journey being done in the dark on that day related not to the work she had to do, but the time at which she concluded her work. Given that, to my mind, her employment only provided the occasion or the setting for her injury to occur. There was nothing within or about or intrinsic to her employment in her particular job at the Building Society that, on a common sense analysis, contributed to her injury."

22. The Arbitrator further found at [26] of the reasons that the evidence did not establish that Ms Mitchell "was exposed to any increased peril in her journey by working until 5.50 pm on 20 June 2012 rather than 5.00 pm."

23. Ms Mitchell failed in her case before Arbitrator Douglas and this was confirmed on appeal by O'Grady DP.

24. It was common ground in the applicant's and the respondent's submissions in this matter that a "real and substantial connection" between the employment and the accident or incident requires a connection with the employment that is real and of substance, applying the same test as was considered in *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited* [2009] NSWCA 324 (*Badawi*).

25. It was also common ground that "employment" in section 10(3A) refers to some characteristic of the work performed under the conditions in which it is performed rather than the fact of employment (see *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; 110 CLR 626 (*Semlitch*).

26. The words of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky v ABA* [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 are instructive:

> "69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> 70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> 71. Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent" (footnotes omitted).

27. The applicant's counsel, Mr McManamey, submits:

> "It is clear that the journey provisions must have some work to do. The purpose of the section is to provide coverage where a worker is not otherwise in the course of employment and where the injury does not arise from the employment. It follows the test of whether there is a connection that is real and of substance must be a less stringent test than the test for arising out of employment. That test is satisfied by there being some feature of what the worker is reasonably required, expected or authorise(d) to do that has contributed in a way that is real and of substance to the incident causing the injury.
>
> In this case the applicant usually finished work at 3.00pm. This meant her journey home was usually taken in daylight. The applicant was specifically required to work later at the time of her accident. These extra duties that she was required to do placed her on the road in the dark. There can be little doubt that the time of day contributed to the accident in a manner that was real and of substance. The lack of light on a country road reduced the visibility of both the applicant and the oncoming driver and reduced the opportunity to simply stop without an accident occurring. The circumstances of confronting the cattle on a country road in the dark was a circumstance to which the applicant was exposed because of her employment and would not otherwise have been exposed."

28. The applicant's employment, as part of the special work that she was asked to do to enable the respondents to take leave on 7 to 8 July 2012, required the necessary additional training of the applicant including the closing of the premises in darkness in the nine days leading up to the accident in question before commencing her journey home.

29. That particular time of closing brings it into the area to which Arbitrator Douglas made comment in *Mitchell* as follows:

> "[40] Further, and for the sake of argument only, it were open to hold that the connection between a worker's employment and an incident causing injury on a worker's journey home from work is real and substantial if the worker's journey became more perilous due to a change in the time the worker finished work, then such is not this case. The evidence in this case does not establish that there was something about Ms Mitchell working back on the particular day to complete a particular task that exposed her to a journey that was more perilous than it would otherwise have been had she ceased work at her normal time."

30. The arguments put forward by the respondent in this matter align themselves very much with the thrust of the reasons given by Arbitrator Douglas and O'Grady DP in *Marshall*.

31. Mr M H Best for the respondent submitted, amongst other matters:

> "17 It is crucial to make appropriate findings as to the cause of the accident so as to discern whether or not there was a real and substantial connection between the worker's employment and the accident, remembering that causation is a fact-laden conclusion which must be based on common sense: *March v Stamare (E & M H) Pty Limited* [1991} ACA 12; 171 CLR 506; *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited* [2009] NSWCA 324; 75 NSWLR 503 at [81].
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> …
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> 24 It is clear that although the applicant rode home in the darkness, there is no evidence that darkness was in any way event (sic., even) remotely connected with the presence of the cows upon the road or the actions of the driver of the motor vehicle that struck the plaintiff's motor bike. In particular, the reason (or reasons) for his reaction, or failure to react, to the presence of the cattle on the roadway are completely unknown.
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> …
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> 26 The correctness of the assertion that it was the presence of the cows and the behaviour of the other driver that were the cause of the accident is further confirmed by posing the rhetorical question: on the basis of the evidence, had it been broad daylight, would the applicant have reacted any differently?
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> …
>
> 28 Finally, there is simply no evidence, beyond the mere fact that the applicant was traveling home from work, that the Applicant's work was a real and substantial connection to the accident."

32. Mr McManamey for the applicant in reply submitted:

> "The issue raised by the Respondent is a factual issue.

> The Applicant's employment placed her upon a poor quality country road, sealed but rough in many places and quite narrow (Statement par. 6.) It was dark when she saw cattle on the road. They were difficult to see (Statement par. 8).
>
> It is clear that the condition of darkness made it more difficult to see the cattle and reduced the time during which both drivers had to react. Visibility was limited to the range of the headlights. The applicant on the more manoeuvrable motor bike was able to avoid the cattle. The other driver swerved and seems to have avoided the cattle but in doing so crossed to the incorrect side of the road and hit the applicant. The circumstances of the injury are similar to those considered by the Court of Appeal in *Da Ros v QANTAS Airways Limited [2010] NSWCA 89.* That case concerned a car accident in the course of the employment. The Court found that the accident was something to which the Worker was exposed and would not otherwise be exposed applying the words of Kitto J in *Federal Broom Company Pty Ltd v Semlitch* (1964) 110 CLR 696.
>
> The accident was in the course of her employment by virtue of section 10(1). On that journey, which was solely for work purposes, she was exposed to the accident. An accident to which she would not otherwise have been exposed and one which the time of the journey, as dictated by her work, has contributed to the accident in a manner that is real and of substance.
>
> In the circumstances the correct conclusion is that the Applicant is entitled to workers compensation benefits."

33. I am of the view that the circumstances of the accident more probably than not accord with the analysis of the facts made by the applicant's counsel set out above.

34. The applicant was placed by reason of her employment in a position of greater peril at night time than would have applied by reason of her normal finishing time of 3:00 pm.

35. The notion that an employment exposed someone to increased peril in a journey originally came from the terms used by Windeyer J in the case of *Scobie v K D Welding Co Pty Ltd* (1959) 103 CLR 314 (*Scobie*) at 330:

> "The question in the case is the effect in these circumstances of s. 7 (1) (b) of the *Workers' Compensation Act 1926-1954*, commonly and conveniently known as the journey provision. By it a worker who, without his own serious or wilful misconduct, receives personal injury on his daily journey between his place of abode and place of employment is entitled to compensation under the Act. The risk that some event on the journey may result in the incapacity or death of a worker thus falls on his employer.
> …
> A deviation or delay, prima facie, increases the perils of a journey, because it adds a new place or further time in which danger might arise and loss occur. In particular cases, however, a deviation may actually reduce the risk of loss."

36. Earlier journey provisions can be used for broad context, but do not displace the starting point of the ordinary or grammatical or natural meaning of the words used by the legislature. It is not improper to have an initial engagement with the enactment history and context of a particular provision when that is particularly prominent in a particular case (and needs to be brought out in a properly structured decision) as long as it is not part of (or becomes) an enquiry into the subjective intent: *Axiak v Ingram* [2012] NSWCA 311 at [57] and [58].

37. The accident or incident in this case arose by reason of the fact that the applicant's normal employment would not have required her to have been on the road in darkness save for the special requirements of the employer in requiring the worker to stay back by well over two hours in a situation where the applicant was placed in a situation of increased peril.

38. I do not think that being placed in a position of peril by reason of one's employment is necessarily the true ambit of section 10(3A). In my view however such circumstances would normally fall within it.

39. It is unhelpful to attempt to define the precise meaning of section 10(3A). Each journey case should be considered on its own facts by reference to the subsection to decide whether there is a *real and substantial connection* between the worker's employment and the accident.

40. In my view Ms Wickenden's case fits within that special category to which Mr Douglas referred. If Ms Wickenden's case did not so fit, I find it very hard to contemplate a circumstance where section 10(3A) could apply. I must assume that that was not the intent of the Legislature and that "such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent" per Griffith CJ in *The Commonwealth v Baume* (1905) 2 CLR 405 at 414.

41. I note that the respondent does not dispute the applicant's wages schedule.

42. The applicant is in the second entitlement period within the within the meaning of section 32A of the Workers Compensation Act 1987;

43. The AWE or pre-injury average weekly earnings of the worker within the meaning of sections 35 and 44C(1) of the *Workers Compensation Act* 1987 for the purposes of the calculation of weekly payments in the first 52 weeks for which weekly payments are payable are $400.

44. I find that the worker has not received any deductible amount as defined by "D" in section 35 of the *Workers Compensation Act* 1987.

45. I further find that the AWE or pre-injury average weekly earnings of the worker is lower than the MAX both within the meaning of sections 35 of the *Workers Compensation Act* 1987.

46. I accordingly find that:

    (a) The applicant sustained injury on 5 July 2012 on a journey to which section 10 of the 1987 Act applies, namely a daily or other periodic journey between the worker's place of employment and place of abode, such journey being one to which the section applies by reason of a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

    (b) Order the respondent pay the applicant weekly compensation at the rate of $400.00 per week from 5 July 2012 to 31 December 2012 pursuant to section 36 of the 1987 Act (as in force prior to the weekly payments amendments made by the *Workers Compensation Legislation Amendment Act* 2012).

(c) Order the respondent pay the applicant weekly compensation at the rate of $320 per week from 1 January 2013 to date and continuing pursuant to section 37(1) of the *Workers Compensation Act* 1987 1987 (as in force since the weekly payments amendments made by the Workers Compensation Legislation Amendment Act 2012) (being 80 per cent of the AWE of $400 per week).

(d) I further order the respondent to pay the applicant's section 60 expenses (general order).

(e) The respondent is to pay the applicant's costs as agreed or assessed.

(f) I grant an uplift of 25 per cent (both parties) having regard to the complex factual and legal issues which were argued when at all relevant times there was no decided case.

(g) Grant liberty to apply.