WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1929/19**
Applicant: **Netini Taylor**
Respondent: **Woolworths Limited**
Date of Determination: **19 July 2019**
Citation: **[2019] NSWWCC 247**

The Commission determines:

1. The applicant's employment was not a substantial contributing factor to the injury on 16 November 2018 pursuant to section 9A of the *Workers Compensation Act 1987*.

The Commission orders:

1. Award for the respondent.

A brief 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.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Netini Taylor (the applicant) was employed by Woolworths Group Limited (the respondent) as a batch operator and forklift driver. On 16 November 2018, the applicant fractured the little finger on her left hand at her workplace. The applicant claims that she fractured her finger whilst hitting a metal crowbar against a rack with the intention of causing a loud noise and frightening a co-worker who had done the same thing to her about three weeks earlier.

2. On 20 November 2018, the applicant made a claim for workers compensation and, on 17 January 2019, the applicant was notified that liability had been disputed for her claim. A notice was issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), advising the applicant that the decision to dispute liability was made in reliance on ss 14(2) and 60 of the *Workers Compensation Act 1987* (the 1987 Act).

3. On 25 March 2019, the applicant made a claim for lump sum compensation pursuant to s 66 of the 1987 Act in reliance on a report by Dr P Endrey-Walder, dated 19 March 2019.

4. An Application to Resolve a Dispute (ARD) was filed in the Commission on 18 April 2019 seeking compensation in the form of weekly benefits from 16 November 2018 to date and continuing, s 60 medical expenses and lump sum compensation pursuant to s 66 of the 1987 Act.

5. The respondent filed a Reply to the ARD on 9 May 2019, attached to which was a new notice pursuant to s 78 of the 1998 Act also dated 9 May 2019. That notice indicated that following an internal review a decision had been made to dispute liability on the ground that employment with the respondent was not a substantial contributing factor to the applicant's left little finger injury, pursuant to s 9A of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

6. An application for leave to rely on s 9A pursuant to s 289A(4) of the 1998 Act was made by the respondent's solicitor at teleconference on 16 May 2019. After hearing oral submissions from both parties, which were recorded, I determined the application in the respondent's favour on 21 May 2019. The respondent conceded that the dispute by reference to s 14(2) of the 1987 Act was no longer relied on.

7. The parties appeared for conciliation and arbitration on 2 July 2019. The applicant was represented by Mr Stephen Hickey. The respondent was represented by Mr Joshua Beren. Neither instructing solicitor was present.

8. During conciliation, leave was granted to the applicant to amend the ARD to close the period of weekly benefits claimed at 20 June 2019. The parties agreed that the pre-injury average weekly earnings (PIAWE) figure pleaded in the ARD of $1,200 was correct. There was evidence of payment of some weekly benefits at the rate of $206 per week and the parties agreed that the respondent should have credit for any weekly benefits paid to date in the event of a determination favourable to the applicant. The parties also agreed that a general order for s 60 expenses would suffice.

9. 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.

ISSUES FOR DETERMINATION

10. The parties agree that the following issue remains in dispute:

    (a) Whether the applicant's employment was a substantial contributing factor to the injury to her left little finger on 16 November 2018.

11. In the event of a finding in favour of the applicant on the above question, determinations would be required as to:

    (a) the quantum of the applicant's entitlement to weekly benefits;
    (b) entitlement to s 60 expenses, and
    (c) entitlement to lump sum compensation.

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents.,and
    (b) Reply and attached documents.

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

Applicant's evidence

14. The applicant's evidence is set out in a written statement dated 5 February 2019. The applicant said she was employed by the respondent has a batch operator and forklift driver.

15. On 16 November 2018, the applicant was working in the "batch room". A co-worker, Mr Tom, was there operating the machines. The applicant picked up a metal bar used to release pallets and whacked it against a rack in order to cause a massive noise and therefore frighten Mr Tom. The applicant said she did this because she was angry with Mr Tom after he had done the same thing to her about three weeks earlier. Mr Tom had been trying to be funny and was playing a bit of a practical joke. The applicant had remained annoyed with him and the employer had done nothing to discipline Mr Tom. The applicant decided to do the same thing to Mr Tom and, in doing so, caught her wedding ring and broke her little finger.

16. The applicant stated that her finger does not move or extend. The finger had been operated upon with a pin and plate. The applicant was unable to use her left hand as much and the injury affected the use of her arm.

17. The applicant's employment with the respondent was terminated as a result of the incident. The applicant was unemployed and said she could not work. The applicant said she did not have any other skills and had only ever worked in packing or other work involving her hands. The applicant's injury required her to avoid using her left hand and she had limitations in relation to pushing and pulling. The applicant said it was very difficult to do her job avoiding the use of her left hand as the job required the use of both hands.

18. The applicant said she was in need of ongoing treatment, physiotherapy and specialist consultations.

19. A worker's injury claim form completed by the applicant on 20 November 2018, described the injury as having occurred when the applicant was helping Mr Tom. The applicant said she got a metal bar and hit it on the side of some racking whereupon it struck her on her ring and cut and broke her finger.

Medical evidence

20. WorkCover New South Wales certificates of capacity in evidence confirm a fracture of the left little finger on 16 November 2018. The certificates indicate that the applicant had no current work capacity for any employment until 23 November 2018 and then capacity for some type of employment from 26 November 2018 with lifting/carrying and pushing/pulling restrictions requiring avoidance of the left arm.

21. An Allied Health Recovery Request form dated 7 January 2019 completed by an occupational therapist, Mr Cameron Small, recorded current signs and symptoms as follows:

> "++tenderness and hypersensitivity over scar and proximal phalanx
> Increased sweating and colour changes over the little finger
> decreased range of motion into flexion and extension
> ?early signs of complex regional pain syndrome
>
> AROM left little finger:
> mp 0°175°
> pip 25°170°
> dip ~5°140°"

22. The applicant was assessed as having capacity to perform light office-based duties. Mr Small's findings were reflected in a letter by him to the applicant's orthopaedic surgeon of the same date.

23. The applicant's orthopaedic surgeon, Dr David Bradshaw, issued a WorkCover certificate of capacity on 12 February 2019 certifying the applicant as fit for pre-injury duties from 13 February 2019.

24. A series of reports from Dr Bradshaw are in evidence. Dr Bradshaw's initial report, dated 20 November 2018, confirmed the applicant had sustained a left little finger proximal phalanx open fracture on 16 November 2018. Dr Bradshaw indicated that surgical management would be required and post operatively the applicant would require extensive hand therapy and have restricted workplace activities for a minimum of six weeks. Dr Bradshaw indicated that he had completed a WorkCover certificate of capacity indicating that the applicant would be unable to return to work until her next review on 4 December 2018, at which stage, she would hopefully be able to gradually commence workplace duties.

25. A report from Dr Bradshaw dated 21 November 2018 confirmed that a surgical procedure was performed on the finger at Fairfield Hospital. Dr Bradshaw indicated that the applicant's previous WorkCover certificate of capacity remained current.

26. On 4 December 2018, Dr Bradshaw indicated that the applicant was progressing as expected following surgery. Wounds had healed nicely and sensation was intact. The applicant described the finger being swollen and stiff but Dr Bradshaw anticipated that this would improve with motion, time and therapy. The applicant was advised to continue wearing a splint for a further three weeks and to avoid any rotational forces on the finger. Dr Bradshaw expected to review the applicant's progress in mid-January 2019 with a view to upgrading her activities. Until then, the applicant was advised to undertake only light activities with her left hand.

27. On 29 January 2019, the applicant reported to Dr Bradshaw that she had not obtained approval for hand therapy. Dr Bradshaw described this as “a shame” as the applicant had been progressing well with therapy and therapy was integral to her progression back to maximum function.

28. On 12 February 2019, Dr Bradshaw reported that the applicant had obtained an x-ray which demonstrated good progress of union. The applicant felt ready to return to full duties and Dr Bradshaw agreed that the applicant was fit for pre-injury duties. Dr Bradshaw strongly recommended the applicant to continue hand therapy to work on range of motion and said he was happy to see the applicant on an “as required” basis.

Dr P Endrey-Walder

29. General and trauma surgeon, Dr P Endrey-Walder, provided a medicolegal report to the applicant’s legal practitioner on 19 March 2019. Dr Endrey-Walder took a history of the applicant’s employment as involving quite physically strenuous work. The applicant would handle 10 kg batteries which she had to change in various machinery, including forklifts. The applicant would handle 30 of these per day. On some days, the applicant had only forklift driving duties. At other times, her duties were picking and packing.

30. Dr Endrey-Walder took a history of the circumstances and mechanism of injury that was consistent with the applicant’s written statement. The accident occurred at the end of the applicant’s shift at around 1.30 pm. The applicant got a Band-Aid from the first-aid box and sought help from her general practitioner that afternoon. The next day, the applicant returned to work but had only forklift driving duties, which she managed. That afternoon, the applicant sought help from another general practitioner who recommended that an x-ray be performed. The x-ray was performed the following Monday and highlighted fracture through the mid shaft of the proximal phalanx of the left little finger.

31. Dr Endrey-Walder recorded that the applicant reported being unable to fully straighten the finger. The applicant complained of nerve pain travelling up the left side of the neck which came and went. The applicant was unable to make a full fist and the finger was very tender if it was bumped. The applicant was unable to lift anything with her left hand or hold anything tight. The applicant said she was unable to mop, needed help with shopping, could not lift the washing basket and could not change the bed.

32. On physical examination, Dr Endrey-Walder noted a 2 cm long well healed diagonal scar and restriction in range of movement at the proximal interphalangeal joint. Dr Endrey-Walder found abject weakness in the left hand grip where the little finger did not contribute at all and in fact seemed to be in the way because of the radial deviation of the digit with the effort. The finger remained very tender to knock.

33. With regard to incapacity, Dr Endrey-Walder found:

> “Ms. Taylor is not fit for her pre-injury duties notwithstanding the latest certification from Dr. Bradshaw (12.2.2019), but I believe that she is fit to perform work activity at work or in her domestic situation right-handed.
>
> Thus, forklift driving is within her capacity, but she would have great difficulty picking/packing, certainly has no capacity to perform battery replacement.”

34. Dr Endrey-Walder considered the injury had caused serious and permanent disablement. He assessed the applicant as having 12% whole person impairment.

Respondent's evidence

35. A letter dated 7 December 2018 from Woolworths Group detailed allegations of misconduct made against the applicant which were said to have been substantiated. The letter alleged:

> "1. On 16 November 2018, you:
> a) entered the Battery Change area with no reason or instruction to be in this high-risk zone;
> b) hid behind a stand of racking holding a raised crowbar, awaiting another team member operating a forklift to approach, in order for you to scare them;
> c) ran across exclusion zone where the operating MTC battery change machine was in operation;
> d) hit a crowbar against a stand of racking in an attempt to scare another team member, resulting in you hitting your own hand and breaking your finger; and
> 2. During an initial conversation on 20 November 2018 you provided a fraudulent account when you advised that you had injured your hand by placing the crowbar down hard on the racking in its correct place."

36. The respondent also relies on a written statement of Christopher Mackintosh, a Shifts Operations Manager for the respondent, dated 7 May 2019, which states:

> "I have also been informed the act Ms Taylor performed (which caused her injury) was in retaliation to a 'practical joke' another employee, Mr Sammy Tom, had performed on her in approximately Mid October 2018 and because Mr Tom had not been disciplined.
>
> I have comprehensively searched our complaints register and note there is no record of Ms Taylor ever having made a complaint about Mr Tom."

37. A Vocational Assessment Report from Rocket Rehab, dated 27 January 2019, indicated that the applicant had capacity to engage in full-time work at 38 hours per week in occupations including warehouse dispatch clerk, warehouse manager and retail assistant at an average weekly wage rate of at least $1,127.33 per week.

38. Amongst the materials attached to the Reply is correspondence indicating that an appointment was made for the applicant to be examined by Independent Medical Examiner Dr Brian Stephenson on 21 May 2019. No report from Dr Stephenson has been filed in these proceedings. I was informed at conciliation that the report had been served on the applicant but the respondent did not seek to rely upon it.

Applicant's submissions

39. Mr Hickey submitted that the circumstances of the injury to the applicant's left finger were as set out in her written statement and the history recorded by Dr Endrey-Walder. The evidence indicated that the bar which caused injury to the applicant's little finger was a piece of equipment used in the course of her work. The accident occurred towards the end of the applicant's shift at work.

40. Mr Hickey conceded that the mere fact that an injury occurred in the course of work was insufficient to satisfy the test in s 9A and that in accordance with *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd*[1] (*Badawi*) there must be some real and substantial causal connection with the work. Mr Hickey noted that there was no longer an issue with regard to misconduct or the doing of an unauthorised act following the concession by the respondent at teleconference that s 14(2) was no longer in dispute.

[1] (2009) 75 NSWLR 503; (2009) 7 DDCR 75; [2009] NSWCA 324; BC200909216.

41. Turning to the considerations set out in s 9A(2) of the 1987 Act, Mr Hickey submitted that having regard to the time and place of injury there was a substantial causal connection to work.

42. Regarding the nature of the work and the particular tasks of the work, Mr Hickey noted that the applicant's work was heavy and that the applicant used the particular crowbar to break apart pallets. The crowbar was part of the applicant's toolkit. The injury occurred using a tool which was usually used by the applicant in her employment.

43. Mr Hickey submitted that the injury was also substantially connected to work in that the applicant was paying back a practical joke done to her by a co-worker shortly beforehand. In this sense, the injury arose in response to what a fellow worker had done. The applicant remained annoyed at her co-worker and nothing had been done by the management with regard to the co-worker's practical joke. Mr Hickey said the case of *Stojkovic v Telford Management Pty Ltd*[2] could be distinguished on the facts.

44. Mr Hickey said the injury would not have occurred at about the same time or at the same stage of the applicant's life, had it not been for the employment. Away from work, the applicant would not have been exposed to the fellow worker and would not have been using the crowbar.

45. Mr Hickey submitted that the other considerations set out in s 9A(2) were irrelevant in the circumstances of this case.

46. With regard to the applicant's capacity for work, Mr Hickey noted that Dr Bradshaw had certified the applicant as fit for pre-injury duties but had at the same time, and perhaps incongruously, indicated that the applicant continued to need hand therapy and work on her range of motion. Mr Hickey submitted that Dr Bradshaw's report and the certificates of capacity had to be read in conjunction with Dr Endrey-Walder's opinion that the applicant did not have capacity for pre-injury duties.

47. Mr Hickey submitted that despite the certifications from the general practitioner and the treating surgeon, the applicant remained unfit for any work at least until 13 February 2019. Mr Hickey noted that Mr Small had noted the onset of symptoms of chronic regional pain syndrome in his report. In view of her ongoing symptoms and restrictions, Mr Hickey submitted that the applicant had, in reality, little capacity to perform work in the labour market. The applicant had always performed labour-intensive and heavy work. Having no experience in sedentary work, the applicant would find it very difficult, if not impossible, to find suitable employment to accommodate her restrictions.

48. Mr Hickey submitted that if the applicant was found to have some capacity, an hourly rate of $20 per hour should be applied. Mr Hickey submitted that it was difficult to imagine the applicant being able to perform forklift driving work safely given her grip restrictions and consequent difficulties controlling a vehicle.

49. Mr Hickey submitted that I should draw a *Jones v Dunkel*[3] inference from the failure by the respondent to submit the report of Dr Stephenson. Mr Hickey submitted that I should infer that what was said by Dr Endrey-Walder was not rebutted by Dr Stephenson and that his report would not assist the respondent's case.

50. Mr Hickey further submitted that the only evidence of permanent impairment before the Commission was the report of Dr Endrey-Walder and asked that an award of s 66 compensation for 12% whole person impairment be made by me as arbitrator without a referral to an AMS in the absence of a dispute.

---

[2] (1998) 16 NSWCCR 165.

[3] (1959) 101 CLR 298; [1959] ALR 367; (1959) 32 ALJR 395; (1959) 76 WN (NSW) 278; BC5900240.

Respondent's submissions

51. Mr Beren submitted that Mr Hickey's submissions had not addressed the terms of s 9A(3) and said that work was not to be regarded as a substantial contributing factor to the injury merely because the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment.

52. Mr Beren submitted that my focus should be on the words in s 9A(1) and whether "the employment concerned" was a substantial contributing factor to the injury. "The employment concerned" in this case was that the applicant was a batch operator and forklift driver. Consistently with Dr Endrey-Walder's history, that involved changing heavy batteries, picking and packing and driving forklifts. The applicant's evidence was that she was performing a practical joke when she was injured. The letter from Woolworths Group, dated 7 December 2018, confirmed that the applicant had no reason or instruction to be in the high-risk zone where the practical joke was performed. It was no part of the applicant's duties to be in that area. It was no part of the applicant's duties to hit racking with the crowbar to scare her co-worker. The practical joke or skylarking formed no part of the applicant's employment.

53. Mr Beren submitted that the fact that the applicant was using a crowbar which was part of her toolkit was insufficient to establish employment was a substantial contributing factor.

54. Mr Beren referred me to *Badawi* at [67] and said that s 9A referred to what the worker in fact did in employment not the mere fact of employment.

55. Mr Beren also referred me to *Pioneer Studios Pty Ltd v Hills*[4] at [29] and *Tudor Capital Australia Pty Limited v Christensen*[5] *(Tudor Capital v Christensen)* at [330]-[332] and submitted that Mr Hickey's submissions had focused erroneously on the test in s 4, rather than the additional requirement in s 9A.

56. Mr Beren distinguished the facts of this case from those in *Muscat v Woolworths Ltd*[6] saying there was nothing incidental to employment about the practical joke.

57. Mr Beren noted that there was no evidence, having regard to the statement of Mr Mackintosh, of the applicant having made a complaint to management that a practical joke been performed on her previously.

58. With regard to the quantum of any entitlement to weekly benefits, Mr Beren submitted that Mr Hickey was asking me to overlook certifications of capacity to undertake pre-injury duties made by both the applicant's treating orthopaedic surgeon and general practitioner in favour of the opinion of Dr Endrey-Walder who had seen the applicant only once. Mr Beren submitted that the medical certificate by the treating surgeon should hold more weight than any other opinion.

59. Mr Beren conceded that there was no evidence to suggest capacity for work up until 26 November 2018. From 26 November 2018, the certificates indicated capacity for employment with no restrictions as to hours or days, only physical duties. That capacity for work continued until the assessment by Dr Bradshaw that the applicant was fit for pre-injury duties, which included forklift driving. Dr Endrey-Walder had similarly considered that forklift driving was within the applicant's capacity.

60. Mr Beren submitted that the comments by Mr Small with regard to chronic regional pain syndrome were not supported by any of the specialist medical evidence and should be discounted.

---

[4] [2015] NSWCA 222 (4 August 2015).
[5] [2017] NSWCA 260 (17 October 2017).
[6] [2000] NSWCC 16 (6 July 2000).

61. Mr Beren submitted that the applicant was capable of performing her pre-injury duties of forklift driving. Other occupations were identified as medically suitable given the applicant's restrictions in the report by Rocket Rehab. That report indicated that the applicant would be able to earn in excess of her PIAWE or at least in excess of 95% of her PIAWE. Mr Beren noted that pursuant to s 32A, it did not matter whether the applicant was able to obtain such employment or not. Mr Beren submitted that the applicant was capable of earning at least a full-time minimum wage of approximately $800 gross per week.

62. Mr Beren submitted that I would not be satisfied that Dr Endrey-Walder's report provided a reliable basis for awarding s 66 compensation. Mr Beren submitted that based on range of movement, Dr Endrey-Walder's impairment assessment was only 3%. The doctor discounted that assessment on the basis that it was more "equitable" to assess on the basis of grip strength loss. Mr Beren queried whether this assessment complied with the Guidelines. In the circumstances, Mr Beren submitted that it would be more appropriate to refer the matter to an AMS for independent assessment.

Applicant's submissions in reply

63. Mr Hickey submitted that Mr Beren was not qualified to conduct an assessment of permanent impairment and his submissions with regard to Dr Endrey-Walder's report were merely lay commentary. Mr Hickey reiterated that the matter should not be referred to the AMS in the absence of any rebutting report by Dr Stephenson.

64. Mr Hickey submitted that the dispute in this case could be considered analogous to the dispute in *JR & DI Dunn Transport Pty Ltd v Wilkinson*[7]. Mr Hickey also referred me to the decision of *Fire and Rescue New South Wales (formerly NSW Fire Brigades) v Guymer*[8] at [90].

FINDINGS AND REASONS

Whether the applicant's employment was a substantial contributing factor to the injury to her left little finger on 16 November 2018

65. 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
>
> (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

[7] [2015] NSWWCCPD 38 (30 June 2015).
[8] [2011] NSWWCCPD 38 (29 July 2011).

(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."

66. In order for compensation to be payable, the applicant must also satisfy s 9A, 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,

(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."

67. 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.

68. The majority judgment (Allsop P, Beazley and McColl JJA) in *Badawi*, to which both parties referred in submissions, is summarised in the headnote, 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].
>
> 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]."

69. There is, in this case, no dispute that the applicant's injury occurred temporally "in the course of employment" and thus falls within s 4(a) of the 1987 Act. The dispute that I am tasked with determining is whether the additional causative requirement set out in s 9A of the 1987 Act, that employment be a substantial contributing factor to the injury, is satisfied.

70. In describing the causative test in s 9A, Mr Beren quoted a passage from *Badawi*, cited in *Tudor Capital v Christensen:*

> ""[T]he concept and purpose of the introduction of s 9A was to remove the possibility of compensation for injury with only a 'remote or tenuous connection with work'".When s 9A(1) speaks of "the employment concerned" being a substantial contributing factor to the injury, the legislation is not referring to the fact of being employed, but to what the worker in fact does in the employment.
>
> Like the test for whether an injury is one "arising out of" employment, s 9A involves a causative element. However, as Basten JA said in *Badawi*, "[t]he test imposed by s 9A is intended to be more stringent: s 9A(3)" than the test for "arising out of" the employment in s 4.
>
> Insofar as a finding that the temporal element in the second limb of the definition of "injury" (course of employment) is satisfied does not require a causative test, a person claiming compensation must establish for the purposes of s 9A that there was a causal connection which is "real and of substance" between the "injury" and the "employment concerned" in order to establish an entitlement to compensation under the WCA."

71. Mr Beren's submissions suggested that I should focus my attention on the expression "the employment concerned" in s 9A(1). Mr Beren submitted that as playing a practical joke upon a co-worker, banging a crowbar against a metal rack and being in the "batch room" formed no part of the applicant's duties or employment contract, the causal test in s 9A was not satisfied.

72. This submission appears to apply too narrow a construction to the expression "employment". A wide range of circumstances may be encompassed by the term "employment". In *Dayton v Coles Supermarkets Pty Ltd*[9], Burke CCJ provided a summary of judicial interpretation of the term "employment" in the context of s 9A:

> "Employment in that context is a wide concept. As Lord Shaw of Dumferline said in *Thom v Sinclair* [1972] UKHL 5; [1917] AC 127 it included all elements, 'its nature, its conditions, its obligations and its incidents'. It extends to matters 'naturally incidental' to the contract of employment: *Charles R Davidson & Co v McRobb* [1918] AC 304 per Lord Dunedin at 321; to 'some incident or state of affairs to which the worker was exposed in the performance of his duties and to which he would not otherwise have been exposed': *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 per Kitto J at 632 - 633; it includes 'some characteristic of the work or the conditions in which it was performed': *Semlitch* per Windeyer J at 641 - 642: it includes that which the worker was ' reasonably required, expected or authorised to do': *Humphrey Earl Ltd v Speechley* [1951] HCA 75; (1951) 84 CLR 126, per Dixon J at 133".

[9] [2000] NSWCC 14; (2000) 19 NSWCCR 526 at [72].

73. Turning to the particular circumstances of this case, and having regard to the examples set out at s 9A(2), I note that Dr Endrey-Walder's report indicates that the injury occurred at the end of a shift of work. It is not entirely clear whether the applicant's shift had finished or was about to finish. Given the absence of any dispute as to whether the applicant was temporally in the course of employment and in view of the applicant's evidence which suggests she was still working, I am prepared to accept that the injury occurred toward the end of a shift of work and that this circumstance weighs in favour of the applicant.

74. I accept that the applicant was employed by the respondent for a substantial period of time. I accept that the applicant's employment did expose her to the co-worker, Mr Tom. There is no evidence to suggest that the applicant had any personal relationship or acquaintance with Mr Tom outside of employment. I accept Mr Hickey's submission that there is little to no probability that the injury or a similar injury would have happened anyway had the applicant not been at work or had not worked in that employment. These circumstances also weigh in favour of a finding that s 9A is met.

75. The place of injury was the applicant's place of employment, although the evidence indicates that at the time of the injury the applicant's duties may not have required or authorised her to be in the particular part of the workplace at which the injury occurred. The letter from Woolworths Group dated 7 December 2018 describes the applicant as having entered a "high risk" part of the workplace without reason or instruction to be in that zone. The applicant's own evidence indicated that she had been working in the room in question. I am prepared to accept that the location of the injury was a part of the workplace in which the applicant was required to work from time to time as part of her duties. I am not, however, satisfied that at the time of the injury the applicant's duties required her to be in that location. This circumstance does not tend to weigh in the applicant's favour.

76. I accept that the nature of the applicant's work and her particular tasks, required her to use the crowbar which contributed to her injury from time to time. The applicant's employment was the reason why she had access to both the crowbar and the racking. I do not accept, however, that the applicant's work duties required or induced her to use either piece of equipment at the time of the injury or in the manner which caused her injury. This is not a case where the applicant has in the course of attempting to perform her duties misused a piece of equipment causing injury. The evidence in this case indicates that the applicant had deliberately and intentionally used the equipment for a purpose unrelated to her work duties.

77. Mr Hickey has submitted that the circumstance of the applicant retaliating against a practical joke played against her by a co-worker at work previously was an element which rendered employment a substantial contributing factor to the injury. I am prepared to accept for the purposes of this decision that Mr Tom had directed a similar practical joke toward the applicant, notwithstanding the evidence indicating that no formal complaint had been made about it by the applicant.

78. I have considered the case of *JR & DI Dunn Transport Pty Ltd v Wilkinson* to which Mr Hickey referred in submissions. Although this was not a case in which s 9A was in issue, the reasoning in relation to causation is of some assistance. In that case, the worker was injured in a fight with a fellow employee. The arbitrator was satisfied that the injury arose out of or in the course of employment because the fight was provoked by a dispute concerning work related matters. The arbitrator found the facts of the case to be akin to *Evans v Australian Gas Light Company*[10] (*Evans*) where the worker was injured while remonstrating with a fellow employee after having been repeatedly tripped by his co-worker during working hours. In *Evans*, Wall J held that the worker was entitled to remonstrate with his fellow employee:

[10] [1958] WCR 30.

> "There was in fact, skylarking, but this fracas had resulted in injury which arose out of a remonstration about that skylarking. As I have said, a workman is entitled to make such a remonstration, and I think it arises in the course of employment when it occurs."

79. On appeal, Keating PJ also likened the facts of the case to *Tarry v Warringah Shire Council*[11] where the worker was injured, and subsequently died of a cardiac arrest, after a fight with another worker about the performance of their work duties:

> "Hutley JA held that it was "quite clear" on the evidence that the injury from which the deceased died arose out of his employment. He concluded that it arose out of an altercation between two employees about a matter which concerned their respective duties and authorities, that is, it arose out of a work situation. His Honour held (at 6) that the facts established that the injury from which the worker died was "directly and unbrokenly connected with his employment, that is, things he was doing properly within the scope of his employment." Glass JA agreed, finding that there was an unbroken sequence of events occurring within the space of ten minutes commencing with the disagreement about the allocation of work and terminating in the cardiac arrest of the deceased."

80. The facts of this case are distinguishable from the cases above in that the injury did not occur temporally in response to Mr Tom's skylarking. Mr Tom's practical joke had occurred some three weeks earlier. At the time of the injury, the applicant was not merely remonstrating with Mr Tom, she was in fact playing a practical joke herself. It was the applicant who was skylarking when the injury occurred. I do not accept that the applicant was doing anything properly in the scope of her employment at the time of the injury.

81. Mr Hickey also referred me to *Fire and Rescue New South Wales (formerly NSW Fire Brigades) v Guymer*[12], where the worker alleged that a psychological injury was caused by broadcasting of information and comment concerning matters relating to his work for the appellant. Again, the issue in dispute in that case involved consideration of the definition of injury in s 4 and not s 9A. It was argued that the third party broadcaster, was not controlled by the employer and made the broadcasts in exercise of his "independent will". On appeal, neither of those matters, were found to preclude a conclusion reached, by the arbitrator, that the injury arose out of employment. I have not found the facts of that case or the reasoning on causation to be of particular assistance in the present circumstances.

82. Although Mr Hickey attempted to distinguish it, I do find the facts of this case rather akin to *Stojkovic v Telford Management Pty Ltd*, whilst noting that that was also not a case involving consideration of the particular causal test in s 9A. In *Stojkovic* there was an exchange of insults between the applicant and another employee that had nothing to do with employment. A third employee attempted to intervene leading to a physical brawl during which the applicant received an injury. The trial Judge found that the applicant had instigated the altercation and had been the aggressor throughout. Judge Neilson on appeal found the applicant abandoned his employment and remained outside the employment up to and including the time when he sustained the injury. He was not doing anything to further his employer's interest nor anything that was an incident of his employment; indeed, he was acting contrary to his duty to his employer.

83. I have also considered the case of *Muscat v Woolworths Ltd*, which Mr Beren sought to distinguish. In that case, Neilson CCJ was satisfied that making a cup of tea in the employer's staff room immediately prior to commencing work, during the course of which the worker was injured, was incidental to employment in the sense of ancillary to the worker's work and a substantial contributing factor to the injury:

---

[11] [1974] WCR 1.
[12] [2011] NSWWCCPD 38 (29 July 2011).

> "The applicant was not employed to drink tea. The applicant was employed normally to work as a checkout operator. On the day that she sustained the injury she was employed to carry out a stocktake. The stocktake had not yet commenced. However, the applicant was making use of part of the employer's premises for an activity which she was permitted or authorised to do. A worker taking refreshment prior to work is not uncommon in our community. It appears to me to be incidental to the employment in the sense that it is an activity ancillary to carrying out work duty."

84. I accept that the facts of this case can be distinguished from those in *Muscat v Woolworths Ltd*.

85. I find that the applicant playing a potentially dangerous practical joke on her co-worker by making a sudden, loud noise intended to cause fright, in a "high risk zone", was not matter which was ancillary to the carrying out of the applicant's work duties. The act which caused injury in this case was not something the applicant was reasonably required, expected or authorised to do. The act was not 'naturally incidental' to the applicant's employment. For the reasons above, consideration of the nature of the work performed by the applicant and the particular tasks of that work weighs strongly against employment being a substantial contributing factor to the injury.

86. Consistently with the parties' submissions, I draw no assistance from the considerations set out in s 9A(2)(e) or (f).

87. I am cognisant that s 9A does not require employment to be the only contributing factor to the injury, or even a 'large', 'weighty' or 'predominant' cause of injury. Whilst I accept that employment was a contributing factor to the injury in this case, after carefully weighing all the circumstances, I am not satisfied that employment was a real and substantial contributing factor to the applicant's injury.

88. I am not satisfied that s 9A is met. No compensation is payable in respect of the injury. There will be an award for the respondent.

SUMMARY

89. The applicant's employment was not a substantial contributing factor to the injury on 16 November 2018 pursuant to s 9A of the 1987 Act.

90. There will be an award for the respondent.