NSW SELF INSURERS ASSOCIATION INC

DATE: 24th May, 2012

Inquiry into the NSW Workers Compensation Scheme

Requested Response to Questions from Evidence provided on Monday 21st May, 2012

Thank you for the opportunity to give evidence before the Joint Select Committee on the Workers' Compensation Scheme and also for the opportunity to address the question on notice from Mr Mark Speakman MP as set out on page 34 of the Transcript and supplementary questions from Mr Mark Speakman.

We can respond firstly by indicating that the citation for the decision referred to is *Vinidex Pty Ltd v Campbell [2012] NSWWCCPD 6* (10 February 2012). For completeness a copy of the decision of Deputy President O'Grady is attached. In addition to this decision, the types of decisions to which we referred at the top of page 14 of our submissions are as follows:-

1. *Badawi v Nexon Asia Pacific Pty Limited* t/a Commander Australia Pty Limited [2009] NSWCA328 (8 October 2009) ("Badawi") and 2. *Da Ros v Qantas Airways Limited* [2010] NSWCA 89 (28 April 2010) ("Da Ros").

   In *Badawi* the Claimant sustained a knee injury while engaged in recreational skiing with her partner. The only connection with her employment was that the Claimant was at the ski resort for the purpose of a business trip and employment was found to be "a substantial contributing factor" to injury.

   In *Da Ros* the Claimant was in Los Angeles on what is generally described as a "lay over". In his capacity as a member of a Qantas Flight Staff Recreational Club he had access to recreational facilities including a bicycle. The Claimant took a bus to Santa Monica and spent the day cycling "… to maintain fitness and also for relaxation".

   When returning to his hotel in Los Angeles the Claimant was struck by another cyclist and sustained injury. Employment was found, by the Court of Appeal, to be "a substantial contributing factor" to injury.

   Copies of these decisions are also attached for ease of reference.

   In regard to the Supplementary Questions, we can respond as follows:-

   (a) We note that the submission of the Association regarding removal of coverage for journey claims did not make any specific reference to decisions where the Courts extended the application of journey claims however there can be no doubt that there are a number of decisions that come within this category and which serve to demonstrate the unfair operation of the journey provisions.

We would firstly direct your attention to the decision of President Keating in *MT Smith, JK Williams t/as Harris Wheeler Lawyers v Mason* [2009] NSWWCCPD 106 (26 August 2009) a copy of which is attached. In that case the worker (a solicitor) usually rode his bicycle to and from work each day other than in extreme weather conditions or when required to attend work outside Newcastle and he was also a member of a cycle club and participated, with other members of the club, in a training ride from John Hunter Hospital to Swansea and return every Tuesday and Thursday.

During one of these training rides the worker was fatally injured as a result of a collision between the bicycle he was riding and a semi trailer. It was alleged that the worker's usual practice after completing the training ride was to continue on to his place of employment in Newcastle.

Liability for the payment of compensation benefits was disputed however the Workers' Compensation Commission (both at first instance and on appeal to President Keating) found that the worker was on a periodic journey between his place of abode and his place of employment and further that while there was a deviation to that journey the deviation was said not to involve material increase in the risk of injury to the worker with the result that compensation was payable.

We would also direct your attention to the decision of Acting Deputy President Deborah Moore in *Woolnough v Target Australia Pty Ltd* [2008]NSWWCCPD109 (2 October 2008) a copy of which is enclosed. In that case the Claimant had completed her shift at work at 2.30 pm on 29 August 2007 and drove from work to her home making two stops. The first was at a home of her friend to collect a quantity of eggs and the second was at the home of another friend to deliver some of those eggs.

While returning to her car which was parked in the driveway of the second of the friends that the Claimant visited, she tripped and fell sustaining injuries.

The Commission determined that the Claimant was on a periodic journey from her work to her home and that, while there was an interruption or deviation in this journey it did not materially increase the risk of injury so that compensation was again payable.

There are other cases to which the enquiry could be directed (see, for example, *ISS Facility Services Australia Pty Ltd v Antonio*s [2008] NSWWCCPD52 (20 May 2008) copy attached) however the concerns of the Association are sufficiently demonstrated by these examples. We would however add that in view of decisions like these many cases never come before the Court for determination. A member of our Association (who has requested that his name be withheld) has provided us with an example of an employee who was fatally injured in a motor vehicle accident on a journey home from work in circumstances where the accident was the fault of the employee.

Despite the fact that the employee had no financial dependants at all the employer was required to pay to the deceased employee's estate a lump sum death benefit of $425,000.00. Whilst the loss of any life is inevitably tragic the employer involved could not help but think that it was receiving an extremely substantial fine merely for the "crime" of providing someone with a job.

(b) Examples of Court decisions demonstrating its approach to the application of Section 9A have been provided above.

(c) The most obvious example of the inadequacies is the defence provided under Section 14 of the *Workers Compensation Act 1987* relating to serious and wilful mis-conduct is found in the decision referred to in the evidence given at the hearing and above of *Vinidex Pty Ltd v Campbell* which we have cited by reference to deficiencies in the application of Section 9A of the Act.

In that case the Commission quite properly determined (and indeed it was conceded) that the action of the Claimant Mr Campbell in participating in the impromptu "wake boarding" while being towed behind a forklift constituted serious and wilful misconduct as described in the defence provided under Section 14.

The problem which then arose however is that the defence under Section 14 was not available if the injuries sustained were found to result relevantly in "serious and permanent disablement of a worker". The Commission found (both at first instance and before the Presidential Member that the injury did result in serious and permanent disablement despite the presidential member acknowledging that "the evidence on this subject is scant" (see paragraph 83)).

This decision provides one of the clearest examples of the frustrations that confront employers in New South Wales in regard to claims for compensation benefits in circumstances of this kind. It is arguable that the claim should have failed on three aspects. Firstly, the activities of the Claimant were such as should have been regarded as taking the Claimant outside the course of his employment so that he could not properly be said to have sustained an injury within the definition set out in Section 4 of the Act. Secondly, as there were no employment characteristics associated with the circumstances of the Claimant's injury, employment should not have been regarded as being a substantial contributing factor to injury as required under Section 9A. Finally, as the Claimant's injuries clearly resulted from serious and wilful misconduct, compensation should arguably not have been payable by reason of Section 14 of the Act.

As is apparent the employer was unable to succeed on any one of the three possible defences available and the Association believes this clearly demonstrates the operation of the legislation in these areas to be defective.

It is worth noting finally that the Association understands that advice was given to the scheme agent in regard to the case of *Vinidex v Campbell* recommending an appeal from the decision of the Deputy President to the Court of Appeal. The WorkCover Authority has however continued to discourage the scheme agents (and attempted to discourage self insurers) from lodging appeals in respect of Commission decisions and as a consequence of this the scheme agent provided instructions not to proceed with any further appeal. We have of course provided submissions separately on the inappropriateness of the intervention of the WorkCover Authority in case management issues such as this.

The Association remains ready and willing to provide further evidence or assistance in respect of these matters if required, and in this regard is mindful of the constraints facing the Inquiry, which resulted in a relatively limited time being available for the Association to give evidence or any opportunity to provide an opening statement.

We remain grateful to the Committee for this opportunity and for its attention to this difficult issue.

Workers Compensation Commission of New South Wales - Presidential

MT Smith, JK Williams trading as Harris Wheeler Lawyers v Mason [2009] NSWWCCPD 106 (26 August 2009)

Last Updated: 25 October 2011

WORKERS COMPENSATION COMMISSION

DETERMINATION OF APPEAL AGAINST A DECISION OF THE COMMISSION CONSTITUTED BY AN ARBITRATOR

STATUS: Reported Decision: ***MT Smith, JK Williams (t/as Harris Wheeler Lawyers) v Mason*** **(2009) 7 DDCR 514**

CITATION:	**MT Smith, JK Williams t/as Harris Wheeler Lawyers v Mason [2009] NSWWCCPD 106**
APPELLANT:	MT Smith, JK Williams t/as Harris Wheeler Lawyers
RESPONDENT:	Michelle Mason
INSURER:	QBE Workers Compensation (NSW) Ltd
FILE NUMBER:	A1-658/09
ARBITRATOR:	Mr R Foggo
DATE OF ARBITRATOR'S DECISION:	30 April 2009
DATE OF APPEAL DECISION:	26 August 2009

SUBJECT MATTER OF DECISION:	Section 10 of the *Workers Compensation Act 1987*; periodic journey; ⇦ **deviation** ⇨ for a purpose connected with employment; material increase in risk of injury.
PRESIDENTIAL MEMBER:	Keating P
HEARING:	On the papers
REPRESENTATION:	**Appellant:** Sparke Helmore **Respondent:** Braye Cragg Solicitors
ORDERS MADE ON APPEAL:	The decision of the Arbitrator dated 30 April 2009 is confirmed. The Appellant is to pay the Respondent's costs of the Appeal.

BACKGROUND TO THE APPEAL

1. On 25 May 2009, M T Smith, J K Williams trading as Harris Wheeler Lawyers ('the Appellant') sought leave to bring an 'Appeal Against Decision of Arbitrator' in the Workers Compensation Commission ('the Commission') against a decision, dated 30 April 2009.

2. The Respondent to the Appeal is Michelle Mason ('Mrs Mason/the Respondent').

3. Mrs Mason is the widow of Dominic Bernard James Mason ('Mr Mason/the worker').

4. Mr Mason was employed by the Appellant as a solicitor and worked from premises located in Scott Street, Newcastle. It was his usual practice to ride his bicycle to and from work each day from his home at Rankin Park a suburb about 9.9 kilometres from Scott Street. The only exceptions to that practice occurred during extreme weather conditions or if he was required to attend court outside of the Newcastle CBD.

5. Mr Mason was a member of the Kooragang Open Cycle Club. Every Tuesday and Thursday various members of the club, including Mr Mason, participated in what has been described as a 'training ride' from John Hunter Hospital at New Lambton Heights Newcastle to Swansea and return. The round trip was approximately 44 kilometres.

6. On Tuesday 11 December 2007, during one of the training rides Mr Mason was fatally injured as a result of a collision between the bicycle he was riding and a semi trailer on the Pacific Highway at Blacksmiths. Mr Mason had been riding in a group of approximately 19 cyclists in the breakdown lane, when the driver of the semi trailer, who was under the influence of illegal drugs, veered off the highway and came into contact with Mr Mason.

7. It was Mr Mason's usual practice after completing the ride to Swansea to continue on to his place of employment in Newcastle. The route he took varied, sometimes he would peel off

from the group and ride directly to work or he would complete the ride by returning to the John Hunter Hospital and then cycle to work. On some occasions he returned to his home to collect certain belongings and on other occasions he would stop for coffee, en route, before proceeding to work.

8. On the day of his death, Mr Mason had said to his colleague Mr Glendenning, that he intended to join Mr Glendenning and a group of other riders for coffee at the 'Three Beans' coffee shop at Beaumont Street, Hamilton. According to Mr Glendenning it was Mr Mason's invariable practice on the occasions that he attended the 'Three Beans' coffee shop after a training ride to proceed from there directly to his office in Newcastle to commence work.

9. Mr and Mrs Mason and were married on 15 March 1997. There are two children of the marriage, a daughter, born 18 December 2002 and a son, born 15 December 2005.

10. Mrs Mason claimed benefits under section 25 and/or section 26 of the *Workers Compensation Act* 1987 ('the 1987 Act'). The application was denied by QBE Workers Compensation (NSW) Ltd, acting on behalf of the Appellant, on 31 July 2008, on the basis that Mr Mason's death did not arise during the course of, or out of his employment, and employment was not a substantial contributing factor to his death. Alternatively, Mr Mason died during an interruption of, or **deviation** from, a journey to work.

11. An Application to Resolve a Dispute ('Application') was filed on behalf of Mrs Mason in the Commission on 29 January 2009. She claimed lump sum benefits in the sum of $425,000 pursuant to section 25(1)(a) and/or section 26. A further claim was made for weekly benefits in the sum of $228.00 per week from 11 December 2007 to date and continuing pursuant to section 25(1)(b). The dependents listed included Mrs Mason and her two children.

12. A Reply to the Application was filed on behalf of the Appellant, by leave, on 23 February 2009.

13. The matter came before an Arbitrator for a conciliation/arbitration hearing on 7 April 2009 in Newcastle. The decision was reserved and determination and Statement of Reasons ('Reasons') was delivered on 30 April 2009, the Arbitrator finding in Mrs Mason's favour.

14. On 25 May 2009 the Appellant sought leave to bring an 'Appeal Against Decision of Arbitrator' against that decision.

15. An amended Certificate of Determination was issued on 7 August 2009, following further submissions by the parties in respect of apportionment of the lump sum and interest. This is not the subject of any dispute between the parties.

THE DECISION UNDER REVIEW

16. The 'Certificate of Determination', dated 30 April 2009 records the Arbitrator's orders as follows:

"The Commission determines:

1. The Deceased's death was not as a result of any injury sustained arising out of or in the course of his employment with the Respondent.

2. The Deceased's employment with the Respondent was not a substantial contributing factor to the injuries, which caused the Deceased's death

3. At the time of his death the deceased was undertaking a periodic journey between his place of abode and place of employment.

4. The Deceased was injured during a ⇦ **deviation** ⇨ of such journey

5. The ⇦ **deviation** ⇨ was connected with the Deceased's employment with the Respondent.

6. The ⇦ **deviation** ⇨ did not materially increase the risk of injury to the Deceased

7. This matter is remitted to the Registrar for the appointment of a telephone conference to determine the questions of interest and apportionment pursuant to Section 29."

ISSUES IN DISPUTE

17. The issues in dispute in the appeal are:

    (a) whether Mr Mason was undertaking a periodic journey between his place of abode and place of employment at the time of his death;

    (b) if Mr Mason was on a periodic journey, were the injuries sustained whilst on a ⇦ **deviation** ⇨ connected to his employment, and

    (c) if Mr Mason was on a ⇦ **deviation** ⇨ at the time of the accident, did it materially increase the risk of injury.

ON THE PAPERS REVIEW

18. Section 354(6) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the 1998 Act') provides:

"(6) If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing."

19. Having regard to Practice Directions Numbers 1 and 6, the documents that are before me, and the submission by the parties that the appeal can proceed to be determined on the basis of these documents, I am satisfied that I have sufficient information to proceed 'on the papers', without holding any conference or formal hearing, and that this is the appropriate course in the circumstances.

LEAVE

20. Before proceeding to deal with an appeal the Commission must determine whether the appeal meets the requirements of section 352 of the 1998 Act.

21. The appeal was lodged within 28 days of the Arbitrator's decision in compliance with section 352(4) of the 1998 Act.

22. The amount of compensation at issue on the appeal is such that the thresholds as specified in section 352(2)(a) and (b) have been met.

23. The requirements as to time and monetary thresholds specified in the 1998 Act have been satisfied. Having regard to the arguments raised I grant leave to appeal.

EVIDENCE AND SUBMISSIONS

24. The documentary evidence before the Arbitrator consisted of:

(a) the Application to Resolve a Dispute and attached documents;

(b) the Reply;

(c) statement of Mr Glendenning of 28 February 2009;

(d) statement of Mr Smith and attachments dated 7 April 2009, and

(e) material produced by the Appellant pursuant to a Notice for Production. These documents concerned the Appellant's support for cycling and other sports and expenditure on promotional items.

25. There was no oral evidence before the Arbitrator.

DISCUSSION AND FINDINGS

Mrs Mason's Evidence

26. Mrs Mason provided a signed statement dated 3 September 2008. She stated that the accident occurred on the Pacific Highway near the intersection of Maneela Street Blacksmiths, which is just north of Swansea, about 22 kilometres from Scott Street Newcastle.

27. Mrs Mason states that it was her husband's practice to ride his bicycle to work every day. On Tuesdays and Thursdays he rode with a group of other bicycle riders. They met in the vicinity of the John Hunter Hospital. They would follow the Charlestown bypass to the Swansea roundabout and then return via the Pacific Highway.

28. Mr Mason took a week's supply of shirts to work every Monday. He would leave his suits and shoes at work. He would then ride to work, shower and change at the Harris Wheeler premises. Mrs Mason confirmed that she had read the statement of Mr Brian Glendenning of 11 January 2008 and confirmed its contents to be true insofar as they related to her husband's usual habits.

29. Mrs Mason stated that she believed on the morning of the accident her husband was intending to meet a group of other cyclist known to him. They were to meet at the water tower opposite of the John Hunter Hospital and ride down the Charlestown bypass to the Swansea roundabout where they would turn around and come back to Newcastle via the Pacific Highway. Mrs Mason conceded that she was not certain of her husband's specific intentions from that point on.

30. Mrs Mason gave evidence about the extent of her dependency on the deceased, which is not an issue in this appeal.

31. Mr Brian Glendenning is a partner of Harris Wheeler Lawyers. He has been so employed for 14 years. He provided a statement of evidence dated 11 January 2008.

32. Mr Glendenning was familiar with Mr Mason and had known him since 6 January 2003, when Mr Mason commencement employment with Harris Wheeler. Mr Mason reported either to him or another partner Mr Tony Cardillo.

33. Mr Mason normally worked from 8:30am to 6pm, Monday to Friday. The hours varied according to workload. He would frequently work from home and also attended the office on weekends from time to time. Mr Mason was a qualified solicitor.

34. Mr Glendenning confirmed it was Mr Mason's normal practice to ride his bicycle to and from work each day. Exceptions to that practice would be extreme weather conditions or if he was required to attend court outside the Newcastle CBD.

35. Mr Mason was a member of the Kooragang Open Cycle Club Inc. Mr Glendenning is the secretary of the club, which has approximately 190 members. Mr Mason had been a member of that club since joining in 2007. He invariably wore a crash helmet. Training rides are not organised or sanctioned by the club.

36. According to Mr Glendenning Mr Mason was a regular rider/participant in the rides that departed from the water tower opposite John Hunter Hospital, then proceeded through the Charlestown bypass to Swansea roundabout and return to the hospital. The ride departed every Tuesday and Thursday at 6am. Subject to weather conditions, Mr Mason normally participated in the ride every Tuesday and every second Thursday.

37. Mr Glendenning stated that Mr Mason's practice on the mornings he participated in the training rides changed from week to week. Sometimes he would deviate en route to the final destination, 'peeling off' at Carney Avenue and riding directly to work. On other occasions he would ride to John Hunter Hospital, conclude the ride and then ride to work. On occasions Mr Mason rode from John Hunter Hospital to his home address, collected something, and then rode his bicycle to work. Harris Wheeler Lawyers provided showering facilities and change rooms for the use of all staff. Mr Mason kept a change of clothes at work for such purposes.

38. On 11 December 2007 when Mr Glendenning joined other riders at the top of Blackbutt Reserve, Mr Mason was already present. Mr Glendenning and Mr Mason rode next to each other until reaching Jewells Hill on the Pacific Highway at Belmont. The group changed at that point and the riders rotated. Riders at the front rotated in a circular fashion, which, according to Mr Glendenning, is standard procedure of all training rides. The group continued on to Swansea cycled around the roundabout and then commenced to ride north towards John Hunter Hospital.

39. Mr Glendenning stated that the group crossed Swansea Bridge at about 6:30am. The traffic conditions were fairly light. The weather conditions were fine and dry.

40. Mr Glendenning stated that as the group approached the site of the accident they were cycling two abreast with the riders rotating their positions. All riders were positioned to the left completely within the confines of the sealed shoulder and the solid white line. He subsequently checked his heart rate monitor and believed that the group were travelling at the speed of 44 km/h. How that speed was derived from reference to the heart rate monitor is not in evidence. Mr Glendenning was positioned towards the rear of the group, about two or three positions from the rear on the outside of the group. Mr Mason was positioned towards the front of the group either in the second or third position, also on the outside.

41. Mr Glendenning first became aware of a truck when it passed him. He sensed the bullbar or bumper 'close' to him. He was concerned about the closeness of the truck but did not consider himself in immediate danger. He states that he was aware that all riders were within the

marked white line and the truck was just on the other side, that is, the right hand side of the white mark line. He looked forward and saw that the riders ahead of him were all in a straight line and he formed the impression that the truck would overtake them. He noticed the truck commenced to slowly 'drift' across towards the group. When the cabin of the truck reached Mr Mason's position he saw Mr Mason's right shoulder 'tense' as though he was attempting to move his body away from the truck. Mr Glendenning saw the trailer section of the truck had crossed over the white line. He did not see the impact with Mr Mason or any other rider. He saw Mr Mason commence to tumble to the ground.

42. Mr Mason was rendered first aid at the scene. He was conveyed to John Hunter Hospital but did not regain consciousness. Mr Glendenning expressed the opinion that Mr Mason was following his normal route to work on the day of the accident. He was wearing cycling pants and a yellow cycling jersey provided by Harris Wheeler advertising 'Harris Wheeler Lawyers'.

43. Mr Glendenning further stated that during the course of the ride he asked Mr Mason if he was 'coming for coffee' after the ride. Mr Mason said that he intended to join the group for coffee. This was a regular activity. The group normally attended the 'Three Beans' coffee shop at Beaumont Street, Hamilton to discuss work-related and other matters. On each and every occasion that Mr Mason attended at the 'Three Beans' coffee shop after a training ride he always rode from that location to his office in Newcastle to commence duties.

44. Mr Glendenning made a further statement dated 11 January 2008. It dealt with the Appellant's promotion of cycling. He stated:

"1. Harris Wheeler Lawyers strongly promoted cycling in the following ways:

(a) We sponsored the Kooragang Cycling Club.

(b) We entered teams in various cycling and triathlon events.

(c) Provided cyclists to those events with Harris Wheeler shirts.

(d) We had a dedicated area at Harris Wheeler Newcastle office where cyclist could leave their bicycles and gear.

(e) In our capacity as the Solicitors for Newcastle City Council, we have been involved in promoting cycling within the Newcastle area. In particular our "Cycling Lawyers" have been involved in various stories in the print media and radio promoting cycling.

2. In general terms we consider our involvement in cycling to be an important business networking opportunity." (emphasis added)

45. Matthew Smith, a partner of Harris Wheeler Lawyers, provided a statement dated 7 April 2009. Mr Smith was familiar with Mr Glendenning's statement and was familiar with the route taken by Mr Mason on the day of the accident. He had cycled on many occasions as a member of the training group. Mr Smith stated that the route taken consisted mainly of arterial roads, which were multi-lane and which mostly, had a breakdown lane. The route was chosen for safety reasons.

46. Mr Smith stated that he was aware of the most direct route between Mr Mason's home at Rankin Park and Newcastle city involving a route along McCaffery Drive, Lookout Road, Russell Road, Lambton Road, Belford Street and King Street. This route is depicted in map 'A' attached to Mr Smith's statement, which was extracted from the "whereis.com" website. It shows a distance of 9.9 km and an estimated time of travel, by car, of 15 minutes. Attachment

'B' to Mr Smith's statement is another map also taken from the "whereis.com" website, it shows the route taken by Mr Mason on 11 December 2007 from John Hunter Hospital to Swansea to be approximately 22.2 km and an estimated time of travel, by car, of 27 minutes.

47. Mr Smith described both routes. That is, the training route and the direct route between Mr Mason's home and work as involving major arterial roads with a significant proportion of both routes having a "breakdown" lane.

48. In response to a 'Notice for Production' the Appellant produced a series of newsletters issued at six monthly intervals between Spring 2004 and Autumn 2006. Seven newsletters were produced. With one exception, all of them recorded the participation of members of the Appellant's law firm in triathlon, swimming or cycling events.

49. Also, in response to a 'Notice for Production', the Appellant produced a series of invoices and receipts dated between October 2003 and February 2009 relating to the purchase of various sporting goods or equipment. These included invoices for the purchase of cycling jerseys and cycling pants, a bicycle stand, a Marquee, entry fees for various sporting events and the printing of the Appellant's promotional material on cycling jerseys and pants. The expenditure was in the order of $13,500.00.

50. The police report of the accident contains a description of the accident consistent with Mr Glendennings' description, but notes at page 4 that the driver of the truck that collided with Mr Mason was affected by "three cones of cannabis".

Appellant's Evidence

51. There was no evidence filed for the Appellant either before the Arbitrator or on appeal.

THE ARBITRATOR'S REASONS

52. After reviewing the evidence and reserving his decision, the Arbitrator provided a Statement of Reasons ('Reasons') that are summarised below:

(a) the Arbitrator was not persuaded that Mr Mason sustained injury arising out of or in the course of his employment. He took into account the Appellant's promotion of cycling including the facilities made available at the workplace to leave bicycles and store gear. He noted Mr Glendenning's evidence that the firm's involvement in cycling provided an important business networking opportunity. He also noted the mere promotion and enthusiasm for cycling, which the Appellant manifested, was not sufficient for any form of cycling to come "within the course of employment" (see *WorkCover Authority (NSW) v Billpat Holdings Pty Limited* (1995) 11 NSWCCR 565).

(b) "scope of employment" is limited to what an employer has "expressly or impliedly induced or encouraged" see *Hatzimanolis v ANI Corporation Limited* [1992] HCA 21; (1992) 173 CLR 473 ('*Hatzimanolis*'). The Arbitrator found that there was no evidence that the Appellant actively induced or encouraged Mr Mason to be a cyclist, other than by making space available in its office for him and other employees to store bicycles and gear. Although Mr Mason was wearing a Harris Wheeler cycling vest at the time of his death he was entitled to wear it as a member of the Kooragang Cycling Club. There was no evidence that it was provided because he was an employee of the Appellant. Accordingly, the Arbitrator found that the injury did not arise out of or in the course of Mr Mason's employment with the Appellant;

(c) the Arbitrator concluded that if his finding in relation to injury was incorrect Mr Mason would not have satisfied the requirements of section 9A of the 1987 Act. He considered the observations of Mason P in *Mercer v ANZ Banking Group Ltd* [2000] NSWCA 138 at [22] the words "employment concerned" in section 9A reinforced the view that it is the work activity in which the worker was engaged at the time of injury that is relevant. The Arbitrator considered the examples referred to in section 9A(2). He found that although the Appellant sponsored a cycling club and made facilities available to employees who cycled to work none of these or any other actions on behalf of the Appellant in promoting cycling was substantial enough to be characterised as a substantial contributing factor to Mr Mason's death;

(d) the Arbitrator was satisfied that Mr Mason was on a periodic journey at the time of his accident. He found that there was no dispute that Mr Mason rode his bicycle to and from work every day and that on Tuesdays and Thursdays (sic every second Thursday) he joined other riders on the ride from John Hunter Hospital to Swansea via Charlestown (*Vetter v Lake Macquarie City Council* [2001] HCA 12 ('*Vetter*'));

(e) the onus was on the employer to establish there had been an interruption of a kind which would put an end to the entitlement to compensation for the rest of the journey (*Napoli v Arthur H Stephens (NSW) Pty Ltd* [1970] 1 NSW LR 125);

(f) having regard to Mr Glendenning's evidence concerning the promotion of cycling and the fact that Mr Mason was wearing a riding shirt with the Appellant's livery printed on it was sufficient to find that any interruption or ⇦ **deviation** ⇨ was made for a reason connected with Mr Mason's employment with the Appellant, and

(g) if the training run was unconnected to Mr Mason's employment, he was on a ⇦ **deviation** ⇨ where the risk of injury was not materially increased by reason of the ⇦ **deviation** ⇨.

SUBMISSIONS, DISCUSSION AND FINDINGS

Was Mr Mason on a periodic journey?

Appellant's submissions

53. The Appellant submits that:

(a) Mr Mason was on a training ride with the Kooragang Cycling Club at the time of his death and not on a periodic journey;

(b) the real character of this journey, which added some 20 extra kilometres to the worker's trip, took place well before office hours, took him on a path in the opposite direction to the usual trip, and usually ended with a break at a cafe in Hamilton, was that of a training ride of a person involved with a cycling club and not a periodic journey between his home and work;

(c) the purpose of the trip was to train for the worker's participation in cycling events with the Kooragang Cycling Club and not for any event organised by the employer;

(d) the circumstances of this case fall neatly into the circumstances envisaged by Kirby J in *Vetter* and that Mr Mason's death did not occur on a journey. The Appellant further submits that the ⇦ **deviation** ⇨ was so protracted and substantial and was for the purpose of a training ride, that it did not have the character of a periodic journey at all;

(e) the evidence of the witnesses in the matter and attached to the Application confirm that the worker was on a training ride with the Kooragang Cycling Club at the time of his death;

(f) the worker was employed as a solicitor and not as a cyclist, and the fact that the worker was on a training ride with other representatives of his firm, does not denote a connection with employment;

(g) the training ride had no temporal connection to work and took place at a time prior to normal office hours. It is submitted that the purpose of the training ride was to facilitate the worker's membership of and performance in the Kooragang Cycling Club, and it was not connected to the actual employment as a solicitor, and

(h) there is no evidence to suggest that there was any requirement for the worker to be on the ride, and submits that the employer had other staff who had not ridden a bicycle for many years, indicating a lack of compulsion in the worker's decision to be on the training ride. The Appellant submits that this is consistent with there being only three riders from Harris Wheeler on the training ride, in a large group of cyclists, and emanating from a large firm in Newcastle. The Appellant further submits that if the training ride was connected to employment this would have been evidenced by a much greater participation by representatives of the firm.

54. The Appellant relies on *Vetter*, where Kirby J noted the following at [86]:

"Of course, a point will be reached where an interruption is greatly protracted, a **deviation** is very substantial or the purposes are wholly private or unknown. In such circumstances the 'journey' will never have had, or will during its course lose, the character of a 'journey' for the purposes of s 10 of the Compensation Act."

55. The evidence established that the time of his death was well before usual office hours of a solicitor.

Respondent's submissions

56. The Respondent submits that:

(a) the Appellant's emphasis on the worker being on a 'training ride' at the time of his death involves an enquiry that is apt to mislead. It is not necessary to attempt a characterisation of the sole or main or dominant purpose of the activity in which the worker was involved; rather, one looks at the relevant purpose and disregards the others, as Glass JA observed in *Hook v Rolfe* (1986) 7 NSWLR 40;

(b) in any event, because Mr Mason was, as the Arbitrator found, on a periodic journey at the time he was killed the factual matters referred to by the Appellant (which go to enquiry arising out of or in the course of employment) are essentially irrelevant to the enquiry;

(c) the only conceivable relevance of such an attempt at characterisation might be if the activity was so far disconnected from the employment that it fell within Kirby J's concept of a wholly private purpose, as referred to in *Vetter*. The journey on which Mr Mason was engaged cannot be characterised as "wholly private" because the activity upon which the worker was engaged was a regular periodic journey to work that he undertook each Tuesday, and

(d) the factors referred to by the Appellant, bear on injury "arising out of or in the course of employment" and are not relevant in cases involving injury to or the death of a worker whilst on a periodic journey.

57. The Respondent's fundamental submission in answer to the Appellant's contentions is that Mr Mason was in the course of a periodic journey at the time he was killed and therefore there was no ⇦ **deviation** ⇨ from the periodic journey he took each Tuesday and the question of any material increase in risk did not arise.

Discussion

58. Relevantly section 10 of the 1987 Act provides:

(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) .....

(1B) .....

(1D) .....

(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) ....."

59. The evidence clearly establishes that the journey being undertaken by Mr Mason at the time of his death was one that he undertook on Tuesday of every week and every second Thursday.

60. The facts in this case are, as the Arbitrator observed, strikingly similar to those in *Vetter*. In *Vetter* the worker's residence was 38.9 km from her workplace, a journey by car, her usual mode of travel, was about 45 minutes or so. The worker had adopted a practice of calling upon her grandmother on a fortnightly basis after leaving work and before travelling home. The practice was a regular one from which she departed very rarely, if at all. In order to call upon her grandmother the worker was obliged to travel an additional 19km further than she would if she had travelled directly home. When the worker left her grandmother's house it was dark and raining. During the journey between her grandmother's home and her own home the worker collided with an unattended truck parked on the verge of the highway and was badly injured. The Court held that the primary judge made no error of law in deciding that the worker was undertaking a journey, properly to be described as a periodic journey between a place of employment and her place of abode within the meaning of section 10(3)(a). It was

further held that the worker was injured after an interruption to or during a **deviation** from the journey. The Court did not disturb the findings of fact in her favour that in the circumstances of the case the risk of injury had not materially increased.

61. Kirby J in *Vetter* noted that the High Court had emphasised in a number of decisions that claims for compensation for injuries sustained on a journey as defined in the applicable Act may only succeed if the journey in question is properly classifiable as one between a specified origin and a specified destination. His Honour noted at [81] that that point was most clearly in *Young v Commissioner for Railways* [1961] ALR 258 ('*Young*').

62. In *Young* the worker left work early with the permission of his employer to attend to private business. There was no evidence as to what the worker did between 2:35 pm and 5:00 pm. At a later time he met another worker in a hotel and left with him at about 5:40 pm. Just before 6pm on the road leading to his home, the car he was driving was involved in an accident and he was killed. Dixon CJ said at [105]:

"It is clear that the road upon which the accident occurred led to the deceased's home, and no one need doubt that he was then on his way home when the accident occurred. But that is not enough to satisfy the provision of the statute, which says that the journey must have been between the worker's place of abode and place of employment. Of course, as I have already shown, the proviso allows for interruptions, **deviations** and other breaks in the journey, but the journey must commence as a journey between the place of abode and place of employment.

It is, of course, plainly true that ultimately on that day he intended to reach home. That intention was no doubt present with him when he left to go to the works in the morning: it was probably an intention which he entertained day after day. But it does not follow that he was on the journey between the factory, the place of employment, and his abode. He obviously had some other destination which doubtless was intermediate, but was a destination at which he was going to transact business. The time is long. It is not a short time ... [It is] not right or in accordance with any probability of fact to treat that interval of time as a mere interruption of a journey which he commenced to go home. He commenced the journey to transact whatever business it was."

63. In *Vetter*, Kirby J at [82] distinguished *Young* from the facts in *Vetter* on several bases. First, the route of the journey was known. It conformed to the worker's "periodic" pattern. There was no gap in the evidence nor was there any suggestion that the worker had commenced the journey with some unidentified person or business in mind. The origin of the journey was undoubtedly the "place of employment". The ultimate destination of the journey was the worker's "place of abode". His Honour held that whilst it is true that there was both an interruption of, and **deviation** from, the direct journey to the worker's home there was no interruption or **deviation** from the journey home which she took each Friday fortnight to interpose a call on her grandmother.

64. His Honour held at [84] that the approach taken in *Vetter* by Handley JA in the Court of Appeal to categorise the journey as a private affair by considering (1) it involved travel in a direction opposite to the place of abode; (2) it increased the distance and time travelled significantly; and (3) it was for a private purpose having nothing to do with the employment, was mistaken [109]. He noted that the Act is intended to apply to employment journeys of workers in a great variety of employment and domestic situations. It provides a valuable benefit to such workers. "This benefit should not be narrowly construed nor confined to journeys in which the employer has some direct or notional interest". (emphasis added)

65. Kirby J went on to note at [85]:

"From the first provision of this benefit in the 1926 Act, the realities of interruptions of, and

deviations from, direct journeys to and from work were accepted as inevitable and not necessarily disqualifying. The fact that s 10 of the Compensation Act contemplates such interruptions and **deviations** contradicts a narrow classification of a "journey" as one to a private, non-statutory, destination, simply because it involves a departure from the direct journey between a permitted work origin and the place of abode. So long as the journey in question can fairly be characterised as a "journey", or part of a "journey", within s 10, questions of interruption and **deviation** must be left to the judge to determine in accordance with s 10 (2). It is inconsistent with the terms of that sub-section for interruptions and **deviations**, as such, to deprive the travel involved of the character of a "journey" within the Compensation Act."

66. In this case, the journey being undertaken by the worker conformed to a periodic pattern. It clearly began when the worker left his home. The route taken was consistent with the route Mr Mason took every Tuesday. The evidence clearly established that his ultimate destination was his place of work. Mr Glendenning ascertained from Mr Mason prior to the accident that it was his intention to join Mr Glendenning and others for coffee at the coffee shop where they regularly stopped at Beaumont Street, Hamilton. Mr Glendenning's evidence, which I accept, was that it was Mr Mason's invariable practice to proceed directly from the coffee shop to work.

67. In *Vetter* Gleeson CJ, Gummow and Callinan JJ held at [29]

"There is no obligation upon a worker to take the shortest and most direct route from the worker's place of work to the worker's abode so long as the journey can be said to be a journey between the worker's place of abode and place of employment. And there is no reason why a worker might not, within the statutory meaning of the journey, choose a route, albeit an indirect and longer one, which may enable the worker to achieve a purpose in addition to the purpose of reaching the worker's residence in order to spend the interval between ceasing and recommencing work, again provided that the journey still has a character of a journey between his or her place of work and place of abode, and there is no material increase in risk during or after any **deviation** or interruption".

68. Consistent with these authorities I find that the worker was on a journey between his place of abode and place of employment within the meaning of section 10 of the 1987 Act at the time of his death. There is no compulsion for a worker to take the shortest and most direct route to work. There is no prohibition on a worker achieving an additional purpose, in this case, the training ride, in addition to his purpose of cycling to work.

69. There is no precise evidence of the additional length of the journey taken on the training ride, bearing in mind the route Mr Mason intended to take. I've inferred that it is in the order of 35 to 45 km bearing in mind the evidence that Mr Mason intended to travel directly to work after the coffee stop at Hamilton thus negating part of the usual 9.9km for the trip between his home and office. In my view, the fact that the worker included a training ride with his cycling club, which added approximately 35 to 45 km to the more direct route, and which in part took him on a path opposite to the direct route, being undertaken before normal office hours, did not deprive the journey of the character of a periodic journey within the meaning of section 10 (3).

70. Kirby J noted in *Vetter* at [86] that there will be cases where a greatly protracted journey, or a **deviation** which is very substantial, or for a wholly private or unknown purpose will either never have had or will during its course lose, that character of a "journey" for the purpose of the Compensation Act. I reject the Appellant's submission that this is such a case. Mr Mason commenced his journey at his place of abode and his intended destination was his place of employment. It was periodic in nature as this was the journey he undertook every Tuesday. The fact that his journey also included a training ride with a cycling club did not detract from the essential nature and character of the journey as a periodic journey between Mr Mason's home and his place of employment.

71. The Arbitrator's finding that the worker was on a periodic journey within the meaning of section 10 of the 1987 Act, at the time of his accident was certainly open to him on the evidence and I agree with it. In those circumstances it is unnecessary to consider whether, at the relevant time, Mr Mason was on a ⇦ **deviation** ⇨ from his usual journey, whether any ⇦ **deviation** ⇨ was for a reason connected with his employment or whether any interruption or ⇦ **deviation** ⇨ materially increased the risk of injury. However if I am wrong in finding Mr Mason was on a periodic journey at the relevant time, then it is necessary to determine those issues.

Was any ⇦ deviation ⇨ in the periodic journey for a purpose connected with his employment?

Appellant's Submissions

72. The Appellant submits that the employer's support of cycling in general is not unusual for a modern day firm giving support to work/life balance and a healthy lifestyle, but this support does not make the training ride connected to the worker's employment.

73. Before the Arbitrator, the Appellant submitted that even though it may have taken pride in its employees' achievements in cycling and other sports, it did not follow that the employees' training ride was connected their employment.

Respondent's Submissions

74. The Respondent has not addressed this issue.

Discussion

75. In finding that the interruption or ⇦ **deviation** ⇨ in the worker's journey was made for a reason connected to his employment, the Arbitrator was influenced by Mr Glendenning's evidence concerning various means by which the Respondent promoted cycling by its partners and staff. He was also influenced by the fact that Mr Mason was wearing a "Harris Wheeler" shirt at the time of his death. Notwithstanding one of the partners was described in a Harris Wheeler newsletter as having a rusty unused bicycle, the majority of the newsletters have a strong focus on cycling and display an obvious enthusiasm for cycling by its employees.

76. In *Napoli v Arthur H Stephens (NSW) Pty Ltd* [1970] 1 NSWLR 125 ('*Napoli*') referring to the journey provisions of the *Workers Compensation Act* 1926, Sugarman JA said at [127]:

"The question postulated by s 7 (b) (i) whether or not the substantial interruption was made for a reason connected with the worker's employment is a question of degree. It is not the same question as that posed by the words 'arising out of or in the course of the employment', but is a wider question."

77. The facts in this case establish the employer's enthusiasm and support of cycling generally, and particularly amongst its partners and staff. I consider the reference in the profile on Mr Ball (a partner of the Appellant), in the Harris Wheeler newsletter issue 2, Summer 2004 (at page 4) referring to his disinterest in cycling as nothing more than, as the Arbitrator described it, an amusing counterpoint to the Appellant's involvement in cycling. The remaining newsletters made numerous references to the firm's participation in various cycling activities.

78. The Appellant sponsored the Kooragang Cycling Club of which Mr Mason was a member. The Appellant expended considerable funds providing cycling facilities and gear, both through the club, and directly for the benefit of its partners and staff. It provided funding for members of the firm to enter various cycling events. Mr Mason was wearing a cycling jersey with his employer's livery at the time of his accident (although it was issued to him as a member of the cycling club, not as an employee of the Appellant). Mr Glendenning, the partner to whom Mr Mason reported, was also participating in the training ride and from time to time, Mr Smith, another partner, also participated.

79. According to Mr Glendenning the firm considered its involvement in cycling to be an important business networking activity. Other riders participating in the training rides included local business and professional people.

80. For the foregoing reasons, I agree with the Arbitrator's conclusion, that the interruption or ⇦ **deviation** ⇨ to the periodic journey on which the worker was engaged at the time of his accident was for a reason connected with his employment, namely, the promotion of Harris Wheeler through networking in the cycling club.

81. If I am wrong, and the interruption or ⇦ **deviation** ⇨ was made for a reason unconnected with the worker's employment then it is necessary to consider whether the risk of injury was materially increased because of the interruption or ⇦ **deviation** ⇨.

Was a risk of injury materially increased because of the interruption or ⇦ deviation ⇨?

Appellant's submissions:

82. In relation to ⇦ **deviation** ⇨ the Appellant submits that the Arbitrator erred in finding at [68] that:

"Accordingly I am not persuaded that if the training run was unconnected with the Deceased's employment it was a ⇦ **deviation** ⇨ where the risk of injury was materially increased as a result of the ⇦ **deviation** ⇨. I am not persuaded that the Deceased's presence amongst a group of cyclists in a breakdown lane materially increased the risk of injury as opposed to the Deceased cycling alone in the breakdown lane"

83. *Babcock Australia Ltd v Proudfoot* [1993] NSWCC 30; (1993) 9 NSWCCR 525 ('*Babcock*') is authority for the proposition that once a ⇦ **deviation** ⇨ has been established the onus then rests on the worker to prove that the ⇦ **deviation** ⇨ has not materially increased the risk of injury. The Appellant submits that the Arbitrator reversed the onus of proof in this matter in indicating that he was not satisfied on the evidence that material increase in risk resulted from the ⇦ **deviation** ⇨. He needed to be satisfied on the evidence, that a material increase in risk did not eventuate from the ⇦ **deviation** ⇨, and a failure to provide sufficient evidence on this point was a failure to establish the onus that rested on the Respondent.

84. There is ample evidence, so it is argued, that the training ride materially increased the risk of injury including:

(1) the training ride increased the length of the journey by approximately 35-40 km and roughly an hour;

(2) the training ride took place with a large group of riders in a pack, such that any one rider was heavily reliant on the conduct and riding skills of the other riders of the group. The fact that the worker was riding in a large group necessarily restricted his ability to avoid obstacles and threats on

the road, and placed him closer to the traffic than riding alone;

(3) the training ride took in parts of the Pacific Highway, which was a much busier road than any of the roads the worker would be required to ride on between his home and office on his usual route;

(4) the Pacific Highway is a main arterial road and therefore clearly subject to more traffic and a greater number of trucks than the worker's usual journey between his home and office, and

(5) one of the main reasons why the pack chose to ride on the Pacific Highway was that it afforded them the ability to travel in a large group and at high speed, thus increasing the effectiveness of the ride for training purposes of the Kooragang Club. The fact that a pack of cyclists usually is able to travel faster than a single cyclist is further evidence of increased risk.

85. The Appellant submits that all of these factors, considered alone or in combination, were evidence indicating that the Respondent was unable to establish that participating in the training ride did not materially increase the risk of injury. If there was a failure to adduce enough evidence in respect of this issue then with the onus falling on the Respondent, the claim must fail.

Respondent's submissions

86. The Respondent agrees that if the worker was on a periodic journey and if there is found to be a ⇦ **deviation** ⇨ from the periodic journey then there is an evidentiary onus on the worker to establish that there was no material increase in risk. The Respondent submits the Arbitrator did not reverse the onus. The Appellant's real complaint is against the Arbitrator's factual determination that the evidence adduced had not established a material increase in risk.

87. The difficulty of "proving a negative" is recognised both logically and legally as being accommodated by requiring a party bearing such an onus to adduce some evidence that the tribunal accepts as establishing a prima facie case for the issue for which it contends.

88. The only evidence adduced on the point went to the only factor that may have been materially different, namely the nature of the roadways on the route actually taken, as compared with the more direct route between Mr Mason's home and work that the deceased worker took on days other than on Tuesdays and every second Thursday. The evidence bearing on this point was limited to that of Mr Glendenning and Mr Smith and its effect was that the physical circumstances in which the activity was being conducted, that is, the roadway in each case, did not materially differ. Each roadway was a busy arterial multi-lane road, and each had a breakdown lane. Consequently there was sufficient evidence to establish a prima facie level there was no material increase in the risk arising from the physical circumstances, and the Appellant elected to adduce no evidence in rebuttal.

89. The only other matter dealt with in the evidence that was focused upon by the Arbitrator, and was the subject of submissions by the Appellant, was the effect of the worker riding as one of a group or team of cyclists at the time of his death. The Appellant did not adduce any evidence about how that factor went to the risk of injury or about whether the risk of injury was materially increased.

90. The Respondent submits that the extension of the journey in time and distance is not a material consideration and is "necessarily put out of account" (*Scobie v K D Welding Company Pty Ltd* (1969) 103 CLR 314 ('*Scobie*') per Dixon CJ: applied by the Full Court in *Tucker v W D & H O Wills (Australia) Ltd* [1969] 43 WCR 11('*Tucker*')(per Herron CJ) and by the Court of Appeal in *Alcatel v Griffiths* (1997) 15 NSWCCR 398 at 404-405 per Mason P).

91. The factual submissions made by the Appellant in [84](2)-(5) are not self-evident and were not the subject of evidence. The actual evidence before the Arbitrator, including the evidence adduced by the Respondent on the point, was sufficient to discharge the Respondent's evidentiary burden. On that evidence, and in the absence of any contradictory or further evidence from the Appellant affirmatively pointing to a material increase in risk of injury the Arbitrator correctly determined that there was no material increase in risk.

Discussion

92. Once the employer has established that the worker was injured during an interruption or **deviation** to a journey, the worker bears the onus of negating a material increase in risk, (see *Babcock*).

93. The material consideration is not whether the increase in the risk of injury resulting from the interruption or **deviation** actually caused the injury, but whether in fact there has been a material increase in the risk of injury generally by reason of the interruption or **deviation** (see *Scobie* at page 322).

94. Whether the interruption or **deviation** has materially increased the risk of injury requires a comparison of the risk likely to arise had there been no interruption or **deviation** and the risk involved in or during the **deviation** or interruption.

95. Whether the risk is likely to have been increased is a question of fact and degree. In *Babcock,* a blood alcohol level of 0.08g was held to have increased the risk because it was four times more likely that the worker would be involved in a motor vehicle accident with that level of intoxication.

96. In *Tucker,* stopping at a hotel and consuming three schooners of beer was held not to have increased the risk of injury. Nor did the fact that the worker walked home in darkness as the route taken was well lit and although there may have been some slight increase in risk the court was not satisfied that it was a material increase in risk of injury. I refer to these cases only to illustrate the point that the assessment of whether an interruption or **deviation** from a periodic journey will materially increase the risk of injury is a question of fact and will vary from case to case.

97. Whilst the worker bears the onus of proving that there has been no material increase in risk, which the Respondent accepts, once the worker has led sufficient evidence, from which if accepted, the negative proposition may be inferred, the evidentiary onus shifts to the employer to adduce evidence that tends to show that the negative proposition is incorrect. In *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd; Carelli v FS Architects Pty Ltd* [2008] NSWCA 39 (28 March 2008) ('*Rockcote*'), Justice Campbell said at [78]:

"If a plaintiff has the onus of proving a negative proposition, the fact that the defendant has greater means to produce evidence which contradicts that negative proposition, does not mean that the plaintiff ceases to have the onus of proof of that negative proposition. However, once the plaintiff establishes sufficient evidence from which, if that evidence is accepted, the negative proposition may be inferred, an evidential onus shifts to the defendant to adduce evidence that tends to show that the negative proposition is incorrect. If a defendant adduces such evidence, the plaintiff must then, as part of its overall burden of proof, deal with that evidence either by submission or argument. See generally *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561; *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367 at [1]- [2], 371-2; *Baiada v Waste Recycling & Processing Service of NSW* [1999] NSWCA 139; (1999) 130 LGERA 52 at [55], 64-65".

98. Justice Campbell added that [84]:

"Before an evidential onus shifts from a plaintiff, the plaintiff must have adduced enough evidence for the court to infer, if the evidence that the plaintiff adduced was accepted by the court and was the only evidence on that topic in the case, that the proposition concerning which the plaintiff had the onus of proof was more likely than not true. In that situation, one says that an onus of adducing evidence shifts to the defendant because the defendant is then in a situation in which, if the defendant does not adduce evidence concerning that proposition, the plaintiff might succeed in establishing that proposition".

99. The factors the Appellant submits materially increased the risk of injury are identified in paragraph [84]. First, it is alleged that the training ride extended the journey by 20 km and roughly one hour in time. As has been discussed there is no obligation on the worker to take the shortest and most direct route from his home to his place of work (see *Vetter*).

100. As Windyer J said in *Scobie*, at 331[par10] the increased risk due to the additional time taken on the journey as a result of a ⇦ **deviation** ⇨ or interruption is not necessarily material. At page 322 Dixon CJ added:

"Of course the mere prolongation of the period of time during which the worker was occupied between the two termini of his journey must in a logical sense cause an increased risk of injury; for it lengthens the time during which the injury may occur. But that element is necessarily put out of account"

101. In *Mechanical Advantage Group Pty Ltd v George* [2003] NSWCA 121, at [24] ('*George*') the worker and his brother had been required by their employer to work at Young in New South Wales. When the job they had been working on was finished they set out to drive to their home in Brisbane. The worker and his brother drove along the Hume and Pacific highways. They deviated from their direct route to meet their sister at Coogee and stayed overnight with her in Kensington. The following day they left Sydney and drove north along the Pacific Highway and then 11 km off the Highway to Bellingen where they stayed overnight at a hotel. During the evening the worker fell off a balcony at the hotel and was seriously injured. A traffic engineer qualified by the employer gave evidence about the risks involved in driving on the M5 at Beverly Hills to Coogee and from Coogee to the Pacific Highway. Referring to *Scobie*, Handley JA said at [24]:

"the increased risk due to the additional time taken on the journey as a result of a ⇦ **deviation** ⇨ or interruption is not necessarily material. On the evidence of the traffic engineer the Judge was entitled to find as a fact that the increased risks associated with the additional time and road mileage were not material."

102. Second, the Appellant submits that the training ride took place in a large group of riders in a pack, such that any one rider was heavily reliant on the conduct and riding skills of the other riders of the group. The fact that the worker was riding in a large group necessarily restricted his ability to avoid obstacles and threats on the road, and placed him closer to the traffic than riding alone. The Appellant adduced no evidence of these matters. Mr Smith's evidence demonstrated that the route being taken by Mr Mason had been selected by the cycling club for "safety reasons". The route consisted mainly of arterial roads which were multi-lane and which mostly had a breakdown lane. All of the riders, including Mr Mason, were riding wholly within the solid white line of the breakdown lane.

103. Whether riding in a group or riding alone is more dangerous is a matter of speculation. There was no evidence on that issue. There was no attempt made to cross-examine either Mr Glendenning or Mr Smith, both of whom had provided statements of evidence and both of

whom were experienced cyclists. On the one hand it may be considered that riding in a large group enhances the safety of the riders in that the group is more visible. On the other hand, whilst it may provide an opportunity for a single rider to ride closer to the shoulder or curb, there is no evidence from which a conclusion may be drawn one way or the other.

104. Third, it is submitted that the training ride took the riding group onto parts of the Pacific Highway, a much busier road than any of the roads the worker would have been required to ride on between his home and office on the direct route. The only evidence on this point is from Mr Smith who provided detailed maps of both routes. Being familiar with both routes, he said that both of them involve major arterial roads with each providing a breakdown lane for significant portions of the routes. Whilst it was open to the Appellant to call evidence, for example from a traffic engineer (as occurred in *George*), the Appellant elected not to do so. On the available evidence I am not satisfied that the training route was any busier than the direct route or that it was more dangerous.

105. Fourth, the Pacific Highway is a main arterial road and therefore clearly subjected to more traffic and a greater number of trucks than the worker's usual journey between his home and office. This submission is no different in substance to the previous submission. There was no evidence adduced to support it. This submission is inconsistent with the evidence of Mr Smith, and I reject it.

106. Fifth, it is submitted one of the main reasons why the pack chose to ride on the Pacific Highway was that it afforded them the ability to travel in a large group and at high speed, thus increasing the effectiveness of the ride for training purposes at the Kooragang Club and the fact that a pack of cyclists is usually able to travel faster than a single cyclist is further evidence of increased risk. Again there was no evidence adduced to support the submission. Mr Smith had cycled the route on many occasions, he made no mention in his statement of any particular risk associated with the speed at which the group travelled, neither did Mr Glendenning. There is no evidence that the route was chosen to increase the speed at which the group could travel or that the increase in speed, if it did occur, made the cycling any more hazardous.

107. For the reasons given I do not accept the submission that the additional length of the journey or the time taken on the journey materially increased the risk of injury. Through the evidence of Mr Glendenning and Mr Smith, the Respondent has adduced sufficient evidence, which I have accepted, for the Commission to infer that there was no material increase in the risk of injury by reason of any interruption or ⇦ **deviation** ⇨. That being the case, the onus then shifts to the employer to adduce evidence to demonstrate that the negative proposition is incorrect (see *Rockcote*). That has not occurred. The Appellant called no evidence before the Arbitrator or on appeal in relation to the issue. In these circumstances I find that the risk of injury was not materially increased because of the interruption of, or ⇦ **deviation** ⇨ from, Mr Mason's periodic journey.

CONCLUSION

108. Having conducted a review on the merits (per Spigelman CJ *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249; (2007) 5 DDCR 287 at [28]), I have concluded that at the time of his death Mr Mason was undertaking a periodic journey between his place of abode and place of employment. If however, Mr Mason was injured during an interruption or ⇦ **deviation** ⇨ from such journey, the interruption or ⇦ **deviation** ⇨ was for a reason connected with Mr Mason employment with the Appellant. Further, if contrary to my finding that the ⇦ **deviation** ⇨ was for a reason unconnected with Mr Mason's employment, I have concluded the ⇦ **deviation** ⇨ did not materially increase the risk of injury to Mr

Mason.

DECISION

109. The Arbitrator's determination of 30 April 2009 is confirmed.

COSTS

110. The Appellant is to pay the Respondent's costs of the appeal.

His Hon. Judge Keating

President

26 August 2009

I, MARIE JOHNS, CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF HIS HON. JUDGE KEATING, PRESIDENT OF THE WORKERS COMPENSATION COMMISSION.

ASSOCIATE

Workers Compensation Commission of New South Wales - Presidential

Woolnough v Target Australia Pty Ltd [2008] NSWWCCPD 109 (2 October 2008)

Last Updated: 9 October 2008

WORKERS COMPENSATION COMMISSION

DETERMINATION OF APPEAL AGAINST A DECISION OF THE COMMISSION CONSTITUTED BY AN ARBITRATOR

CITATION:	**Woolnough v Target Australia Pty Ltd [2008] NSWWCCPD 109**
APPELLANT:	Christine Anne Woolnough
RESPONDENT:	Target Australia Pty Ltd
INSURER:	Coles Group Limited
FILE NUMBER:	WCC472-08
DATE OF ARBITRATOR'S DECISION:	7 April 2008
DATE OF APPEAL DECISION:	2 October 2008
SUBJECT MATTER OF DECISION:	Journey claim; whether the interruption / ⇦ **deviation** ⇨ materially increased the risk of injury; section 10(2) of the *Workers Compensation Act* 1987.

PRESIDENTIAL MEMBER: Acting Deputy President Deborah Moore

HEARING: On the papers

REPRESENTATION:

Appellant: Everingham Solomons Solicitors

Respondent: Lander & Rogers Lawyers

ORDERS MADE ON APPEAL:

1. The decision of the Arbitrator dated 7 April 2008 is revoked.
2. The matter is remitted to the Arbitrator at first instance for redetermination in accordance with these reasons.
3. The Respondent is to pay the Applicants costs of the proceedings before the Arbitrator.
4. The Respondent is to pay the Appellant's costs of the Appeal

BACKGROUND TO THE APPEAL

1. On 2 May 2008 Christine Anne Woolnough ('the Appellant/Ms Woolnough') sought leave to bring an 'Appeal Against Decision of Arbitrator' in the Workers Compensation Commission ('the Commission') against a decision dated 7 April 2008.
2. The Respondent to the Appeal is Target Australia Pty Ltd ('the Respondent /Target').
3. Ms Woolnough was employed by Target in Port Macquarie as a customer services assistant / door greeter.
4. On 29 August 2007 she completed her shift at 2.30 pm as required. She drove from Target to her home making two stops: firstly, at the home of a friend Cheryl Vick ('Cheryl') to collect a quantity of eggs, and secondly, at the home of her friend Glanda Banks ('Glanda') to deliver some of the eggs.
5. Whilst returning to her car, which was parked in Glanda's driveway, she tripped and fell injuring her right hand and wrist.
6. Ms Woolnough lodged a claim with Target's insurer which was denied.
7. On 24 January 2008 she filed an 'Application to Resolve a Dispute' ('Application') in the Commission seeking weekly benefits compensation from 29 August 2007 to 15 February 2008.
8. The parties attended a conciliation / arbitration hearing on 10 March 2008 where Ms Woolnough gave brief oral evidence.
9. On 7 April 2008 a 'Certificate of Determination' with an accompanying 'Statement of Reasons' was issued wherein the Arbitrator made an award in favour of the Respondent, Target, on the grounds that "...the material risk of injury was increased because of the interruption or ⇦ **deviation** ⇨ to her journey..." such that section 10(2) of the *Workers Compensation Act* 1987 (the 1987 Act) operated to defeat the claim.
10. It is from this decision that Ms Woolnough seeks leave to appeal.

ON THE PAPERS REVIEW

11. Section 354(6) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the 1998 Act') provides:
    - (a) "(6) If the Commission is satisfied that sufficient information has been supplied to it

in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing."

12. Having regard to Practice Directions Numbers 1 and 6, the documents that are before me, and the submission by both parties that the appeal can proceed to be determined on the basis of these documents, I am satisfied that I have sufficient information to proceed 'on the papers' without holding any conference or formal hearing, and that this is the appropriate course in the circumstances.

LEAVE

13. Before proceeding to deal with an appeal the Commission must determine whether the application meets the requirements of section 352 of the 1998 Act.
14. The appeal was lodged within 28 days of the Arbitrator's decision in compliance with section 352(4) of the 1998 Act.
15. Leave to appeal is granted.

THE REVIEW PROCESS

16. The nature of the review process has been succinctly summarised by Deputy President Roche in a number of decisions, and recently in *Universal Consultancy Services Pty Ltd v Datta* [2008] NSWWCCPD 87 where he said as follows [16-18]:

"16. The Court of Appeal considered the nature of a 'review' under section 352 of the 1998 Act in *Aluminium Louvres & Ceilings Pty Limited v Zheng* [2006] NSWCA 34; (2006) 4 DDCR 358 ('*Zheng*'), where Bryson JA said at [38]:

'A review is a different process to an appeal and the matters which may be considered and the manner in which they may be considered are somewhat wider. See *Boston Clothing Co Pty Ltd v. Margaronis* (1992) 27 NSWLR 580 at 584 (Kirby P). An attack, on review or otherwise, on an Arbitrator's discretionary decision in controlling procedure may be based on the test stated in *House v. R* [1936] HCA 40; (1936) 55 CLR 499 at 504 - 505; but that is not the only basis on which the Presidential member may act. The powers of a Presidential member on review are somewhat wider and extend to power to reopen consideration of a matter of which an Arbitrator has disposed; the manner in which the powers of the Presidential member are to be exercised is itself the subject of discretion of the Presidential member.'

17. McColl JA approved this passage in *South Western Sydney Area Health Service v Edmonds* (2007) 4 DDCR 421; [2007] NSWCA 16 at [134] ('*Edmonds*'). To describe the relative weight and relevance of the expert evidence as "a discretionary decision which could only be disturbed on *House v The King* principles" was described by McColl JA as "an over-generalisation" (at [133]). Thus, on review, a Presidential member is not bound by an Arbitrator's discretionary decision, but can reach his or her own conclusion.
18. The nature of a review was further considered by the Court of Appeal in *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249; (2007) 5 DDCR 287 ('*Chemler*') where Spigelman CJ said at [28] and [30]:

'28. The concept of a review on the merits is wider than the concept of an appeal in a judicial context. There is a well established line of authority on the use of the terminology of 'review' instead of 'appeal' with respect to the workers compensation system in this State which establishes the breadth of a review on the merits.

30. A Presidential member exercising a power to review a decision must decide whether the original decision is wrong or, as it is often put in the context of administrative appeals on merits, must decide what is the true and correct view. If s/he does so decide then s/he should substitute his or her own views, unless it is an appropriate case to remit. The power to remit is not constrained in the manner for which the Appellant contends.'"
17. Bearing these principles in mind, I turn now to the issues in dispute.

THE ISSUES IN DISPUTE

18. Target does not dispute that Ms Woolnough injured her right wrist and hand on 29 August 2007. Moreover, Target has conceded that she was on a journey from her place of employment to her place of abode at the time of the injury so that prima facie, she was entitled to compensation by virtue of the provisions of section 10 (1) of the 1987 Act.
19. The dispute is confined to the issue as to whether there was an interruption of, or ⇦ **deviation** ⇨ from Ms Woolnough's journey which materially increased the risk of injury such that section 10(2) would operate to defeat her claim.
20. I note also Target's concession that if successful, Ms Woolnough was entitled to benefits at the rate of $311.37 per week pursuant to section 36 of the 1987 Act.

THE GROUNDS OF APPEAL

21. Ms Woolnough submits that the Arbitrator erred in two respects as follows:

"(a) in determining on the facts that the Applicant's injury was received during or after an interruption of or ⇦ **deviation** ⇨ from the Applicant's journey from her place of employment when the evidence supported that the Applicant's injury was sustained on a journey regularly embarked upon by the Applicant from her place of work to her home albeit not the most regular and shortest route taken to her home: ***(the 'Interruption or ⇦ Deviation ⇨' Issue)***

(b) in determining that interruption of or ⇦ **deviation** ⇨ from a periodic journey materially increased the risk of injury such that section 10 (2) of the 1987 Act applied to defeat the Applicant's claim for compensation." ***(the 'Material increase of Risk' Issue)***

THE RELEVANT LEGISLATION

22. Section 10 of the 1987 Act makes special provisions for payment of compensation when a worker is injured on a periodic journey. Relevant provisions are as follows:

"Section 10

(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.

(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."

THE EVIDENCE

23. Ms Woolnough relied upon a statement she gave to Target's investigators dated 15 November 2007. She stated that:
    a. She collected four trays of eggs from Cheryl, a practice she has undertaken generally fortnightly for the past eighteen months or so.
    b. She delivered a tray of eggs to Glanda's home, again something she has done regularly over the past eighteen months or so.
    c. She stumbled on a slight rise in the concrete of Glanda's driveway which was difficult to see but of which she was aware because of prior conversations with Glanda.
    d. She has known Glanda for about two years and visited her home frequently.
    e. She has never previously experienced any difficulty negotiating Glanda's driveway.
    f. The weather was fine.
    g. Her vision was not impeded, and she was wearing her prescription glasses.
    h. She was not distracted, not carrying anything, nor using a mobile phone or other device.
    i. Her usual practice was to drive directly home after delivering eggs to Glanda.
    j. It was not always the case that Glanda purchased eggs every fortnight, and sometimes Glanda would collect her eggs from Ms Woolnough.
24. Ms Glanda Banks (Glanda) also provided a statement to Target. She confirmed the 'egg delivery' arrangement, although stated that in more recent times she requested them monthly, not fortnightly. She was aware of the incident because Ms Woolnough had telephoned her later in the day to advise of the fall. She stated that she asked Ms Woolnough "Where did it happen?" to which Ms Woolnough replied "Up that little bit of the driveway." Glanda stated: "I knew exactly what Christine was talking about." She then went on to describe the slope or rise in her driveway a few metres from her front door, stating that " I have on numerous occasions stumbled on that rise." She stated that other visitors had also stumbled and fallen on the rise in the past. She could not recall warning Ms Woolnough of the rise in the driveway.
25. Photographs of the 'rise' were tendered by Target at the hearing. They were attached to the report of MJM Investigators dated 21 November 2007.

THE SUBMISSIONS, EVIDENCE AND FINDINGS

The 'Interruption or ⇦ Deviation ⇨' Issue

26. Ms Woolnough submits that the Arbitrator erred in determining that her injury was received

during or after an interruption to or ⇦ **deviation** ⇨ from her journey since"... it was one embarked upon regularly...although not her most regular journey route home." She further submits that "...after having placed the eggs on the chair and having formed an intention of continuing on her way home, she had recommenced or was continuing on her journey and was in the motion of so doing when she was injured.". Thus she claims that this was "...one of the normal journey routes home from her place of employment which [she] had embarked upon many times beforehand..."

27. In other words, there was no interruption to or ⇦ **deviation** ⇨ from her journey so as to bring section 10(2) into play.
28. This same submission was made to the Arbitrator and rejected.
29. The Arbitrator noted the evidence as to the 'regularity' of such a journey referring to portions of the statements of both Ms Woolnough and Glanda Banks (at [21] to [23]). She then noted the submission made by Ms Woolnough that the decision of the High Court in *Vetter v Lake Macquarie City Council* [2001] HCA 12 ('*Vetter*') was authority for the proposition that she had not interrupted nor deviated from her journey because of its 'regularity'.
30. In *Vetter*, the worker regularly (about once per fortnight) visited her grandmother on her way home from work. She was injured in the journey from her grandmother's home to her own. The Court of Appeal found that she had in effect undertaken two discreet journeys.
31. This approach was rejected by the High Court, the majority stating:

"[29] There is no obligation upon a worker to take the shortest and most direct route from the worker's place of work to the worker's place of abode so long as the journey can be said to be a journey between the worker's place of abode and place of employment. And there is no reason why a worker might not, within the statutory meaning of a journey, choose a route, albeit an indirect and longer one, which may enable the worker to achieve a purpose in addition to the purpose of reaching the worker's residence in order to spend the interval between ceasing and recommencing work, again provided that the journey still has a character of a journey between his or her place of work and place of abode, and there is no material increase in the risk during or after any ⇦ **deviation** ⇨ or interruption. That is what the Act requires."

32. The Arbitrator quoted from the reasons of Kirby J at [26] as follows:

"So long as the journey in question can fairly be characterised as a 'journey' or 'part of a journey', within s10, questions of interruption or ⇦ **deviation** ⇨ must be left to the judge to determine in accordance with s10(2). It is inconsistent with the terms of that subsection for interruptions and ⇦ **deviations** ⇨, as such, to deprive the travel involved of the character of a 'journey' within the Compensation Act."

33. This issue was recently considered by President Keating in *ISS Facility Services Australia Pty Ltd v Antonios* [2008] NSWWCCPD 52 ('*Antonios*') where he said [39]:

"The Appellant Employer further submits that the "journey" undertaken by the Respondent Worker was not over[sic] an indirect route but that the route taken bore no relationship to the route between the place of abode and place of employment. If I were to accept this submission, which I do not, it would render section 10(2) with little or no work to do. The intention of this section is to compensate journey injuries which would not otherwise qualify for compensation. It is accepted that a worker may choose a longer route to allow him or her to achieve a purpose additional to the journey provided the journey still retains the character of a journey between the place of abode and the place of employment, see *Vetter* and *George v Mechanical Advantage Group Pty Ltd* [2002] NSWCC 16; (2002) 23 NSWCCR 303 ('*George*')."

34. In other words, *Vetter* does not exclude journeys that are not the shortest or most direct. It in essence further defines the nature of a "periodic journey." Section 10(2) comes into play where a journey has the character of one defined in section 10(1). If a ⇦ **deviation** ⇨ or interruption occurs, it is a matter for the trial judge to determine if the risk of injury was materially increased.
35. A similar submission to that of Ms Woolnough was put to Deputy President Roche in *Hapago Pty Ltd trading as Noni B v Anderson* [2006] NSWWCCPD 217, being that there was no interruption or ⇦ **deviation** ⇨ at all, relying again on *Vetter* as the authority. Deputy President Roche said:

"[34] In that case, [*Vetter*] the High Court did not consider the question of 'material increase in risk of injury' because that issue had been determined as a question of fact by the trial judge and no appeal was available against that factual finding. Therefore, the only question for the High Court was whether the worker was on a journey given that she had interrupted that journey to visit her grandmother and was injured while driving from her grandmother's house to her own home. The Court held that a worker may still be on a journey within the meaning of section 10 of the 1987 Act even if he or she chooses a longer and more indirect route."

36. The Arbitrator concluded as follows at [29]:

"The Applicant's stop off at Glanda's house to deliver a tray of twenty eggs was for a reason '*unconnected with the worker's employment or the purpose of the journey*' (section 10(2)(b)). Her stop interrupted her journey from work and took her off her usual route home – she travelled from work to Vicki's[sic] house and then as conceded in cross-examination travelled back towards her place of employment to Glanda's house. During that interruption and ⇦ **deviation** ⇨ she was injured...."

37. The Arbitrator's findings on this issue were open to her on all of the evidence, and I am not persuaded that she has erred in her determination on this issue. Even if I am wrong, it seems to me that Ms Woolnough had not, on the evidence, established a 'regular' routine such as would entitle her to claim that there was no interruption to or ⇦ **deviation** ⇨ from her route. I say this because of Ms Woolnough's statement that she did not always deliver eggs to Glanda, and Glanda's statement that the arrangement had become less regular (monthly).

The 'Material Increase in Risk' Issue

38. As the Arbitrator rightly pointed out, having determined that the injury occurred during or after an interruption to or ⇦ **deviation** ⇨ from her journey, the onus was then on Ms Woolnough to establish that the risk of injury was not materially increased because of the interruption or ⇦ **deviation** ⇨.
39. The Arbitrator made reference to the decision of the Court of Appeal in *Babcock Australia Ltd v Proudfoot* [1993] NSWCC 30 ('*Babcock*'). The judgment of Cripps JA is particularly instructive. He said as follows at [529]-[530]:

"Section 10 does not mandate that to be within its purview a worker must take the shortest most direct route home. Furthermore, a journey once started does not cease to be one because of ⇦ **deviations** ⇨ or interruptions. What the section provides is that an injury arising during or after a ⇦ **deviation** ⇨ or interruption unconnected with work will not be one arising out of or in the course of the worker's employment unless the worker discharges the onus of establishing the proviso."

40. As the Arbitrator noted at [32]:

"As the issue of whether the interruption or ⇦ **deviation** ⇨ has materially increased the risk of injury is[a] question of fact and degree to be determined in the particular circumstances of each case, it is accordingly necessary to carefully review the evidence before me in order to determine whether the Applicant has proved that the risk of injury '*was not materially increased because of the interruption or* ⇦ ***deviation*** ⇨*'* in the circumstances of this case."

41. The Arbitrator then set about reviewing the statements of Ms Woolnough and Glanda Banks, particularly emphasising the evidence of Glanda as to "...the risk of harm posed by the rise in the driveway..." She then summarised the parties' submissions before concluding as follows at [44]-[53]:

"44. In my view, the evidence in the Applicant's case [the two statements]...do not, on the balance of probabilities, serve to negative [sic] a material increase in risk.

45. Rather than negativing [sic] a material increase in risk, the evidence...serves...to highlight ...that the risk of injury was materially increased during or because of the interruption or ⇦ **deviation** ⇨ to Glanda's place.
46. On the Applicant's own evidence she was warned by Glanda on more than one occasion about the risk of injury because of the rise in the driveway.
47. Being forewarned of the risk or danger that the rise in the driveway represented does not in my view negate the risk it presented.
48. Glanda gives evidence about numerous occasions that she herself has stumbled...
49. It is also relevant in my view that there is evidence from Glanda about other people being injured because of the rise...
50. The Applicant has given evidence that she had been told by Glanda on more than one occasion that *'someone had tripped on the driveway'* at that particular point.
51. As Counsel for the Respondent submitted the Applicant's knowledge of the risk '*existing upon attending the residence of Ms Banks...must be considered to be an acknowledgment of the material increase in the risk ... '*
52. The Applicant was required to discharge the onus of establishing that the risk of injury was not materially increased by the interruption or ⇦ **deviation** ⇨. On the evidence before me, this has not been done.
53. I am satisfied that the material risk of injury was increased due to the interruption or ⇦ **deviation** ⇨..."
42. However, as Ms Woolnough rightly submits:

"It is necessary that the correct legal issue be addressed, namely, not the materiality of the increase of the risk of the particular injury that occurred, but the increase of risk generally, having regard to any ⇦ **deviation** ⇨ found: *Scobie v K.D.Welding Co. Pty Ltd* [1959] 103 CLR 314." ('*Scobie* ')

43. This issue was considered by the Court of Appeal in *NRMA Smash Repairs v Hoy* (1995) 11 NSWCCR 326. In that case, a Commissioner made an award for a worker who had interrupted his journey home by attending a 'send off' for a fellow worker at a hotel. He consumed a quantity of alcohol and waited for a break in the wet weather. Some two hours after stopping at the hotel, he left and was injured when, failing to take a bend in the road, he was thrown from his motorbike. The Commissioner found that the consumption of alcohol had caused "some increase in the risk [of injury] but not a material increase" but also said "in accordance with *Scobie,* I am satisfied that the factor of alcohol was not the cause of the actual injury."
44. In dismissing the appeal, the Court held:

"The question to be asked in applying section 10(2) of the Act is not whether the actual injury could be traced to the particular increase in danger involved but whether, by reason of the interruption, the journey became a more hazardous one, and more hazardous to a material extent, than it would otherwise have been."

45. In other words, the cause of the injury is irrelevant: what must be considered is not the actual injury which occurred and the materiality of the increase of the risk of that particular injury, but the increase of the risk of injury generally as a result of the interruption or ⇦ **deviation** ⇨. As Fullagar J said in *Scobie* (at [326]):

"The proviso is concerned not with cause of injury but with increased risk of injury. Further, it is concerned only with *acts of the worker* which increase the risk of injury. The ⇦ **deviation** ⇨ is an act of the worker."

46. In the present case, it is clear from the passages I have quoted above from the Arbitrator's Statement of Reasons that her focus was on the rise in Glanda's driveway, known to Ms Woolnough, as the cause of her injury, and not the increase in the risk of injury as such.
47. Having regard to these decisions, did the interruption or ⇦ **deviation** ⇨ materially increase the risk of injury generally?
48. The authorities suggest that:

"The issue when determining whether the interruption or ⇦ **deviation** ⇨ has materially increased the risk of injury is a comparison of the risk likely to arise had there been no interruption or ⇦ **deviation** ⇨ and the risk that did in fact arise. The conclusion then to be drawn from the comparison is a matter of fact and degree: *Young v Cmr for Railways* [1960] WCR (NSW) 71: *Old Spaghetti Factory v Oughtred* [1975] WCR (NSW) 231." [See *Mills Workers Compensation New South Wales* (Sydney: Butterworths, 2002) p 1744]

49. In the present case, the evidence was clear that Ms Woolnough was aware of the rise and its risks, but had never previously, over many occasions, had any difficulty with Glanda's driveway. The weather was fine; she was not distracted in any way. She states that on 29 August 2007 she "...stumbled, lost my balance and fell towards the ground."
50. I cannot see how the interruption or ⇦ **deviation** ⇨ undertaken by Ms Woolnough could be said to have materially increased the risk of injury generally. I accept Ms Woolnough's submissions that:

"...the risk presented...by the uneven surface upon the driveway was no different to uneven surfaces that present to all pedestrians when using footpaths, stairs, ramps and the like. [She] fell or stumbled due to inadvertence and submits that the general increase in the risk of injury having regard to the ⇦ **deviation** ⇨ was not a 'material' increase as proscribed by the section. There was no increase in the risk of injury generally..."

51. In the absence of any expert evidence to the contrary, and this is by no means a criticism since it is not a case that benefited from such analysis, I am of the view that Ms Woolnough's statement was sufficient to discharge the onus upon her, having regard to the principles established in the cases to which I have referred.
52. President Keating dealt with the issue of 'onus 'in considerable detail in *Antonios* stating at [47]-[48]:

"47. In *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd* [2008] NSWCA 39 Justice Campbell

said:

'If a plaintiff has the onus of proving a negative proposition, the fact that the defendant has greater means to produce evidence which contradicts that negative proposition, does not mean that the plaintiff ceases to have the onus of proof of that negative proposition. However, once the plaintiff establishes sufficient evidence from which, if that evidence is accepted, the negative proposition may be inferred, an evidential onus shifts to the defendant to adduce evidence that tends to show that the negative proposition is incorrect. If the defendant adduces such evidence, the plaintiff must then, as part of its overall burden of proof, deal with that evidence either by submission or argument.

...Before an evidential onus shifts from a plaintiff, the plaintiff must have adduced enough evidence for the court to infer, if the evidence that the plaintiff adduced was accepted by the court and was the only evidence on that topic in the case, that the proposition concerning which the plaintiff had the onus of proof was more likely than not true. In that situation, one says that an onus of adducing evidence shifts to the defendant because the defendant is then in a situation in which, if the defendant does not adduce evidence concerning that proposition, the party might succeed in establishing that proposition.'

48. In this case no expert evidence was called by either party. I make no criticism of the parties as this is not a case which readily lends itself to any form of expert evidence. It seems to me that the evidence of the Worker's stated intent when he set out on the journey, the clothing he was wearing, the evidence of the route to be taken between the West Ryde Shopping Centre and the Naremburn Public School and the evidence that the Worker had sufficient time to complete that journey prior to commencing his shift establish that there was sufficient evidence from which the negative proposition may be inferred. That being so, the evidential onus then shifted to the Employer to adduce evidence that the negative proposition is incorrect. No such evidence was introduced by the Employer leaving the Arbitrator with the Worker's evidence as the only evidence on that topic."
53. He went on at [52]-[53] as follows:

"The Appellant Employer submits that whether the risk of injury is materially increased is a question of fact and a Worker must prove the negative *Tucker v WD & HO Wills* (1969) 43 WCR 11 ('*Tucker*') at [19]. On this point the Respondent Worker agrees. In *Tucker* Gibson J in the Workers Compensation Commission of NSW found in favour of a worker seeking compensation after having sustained an injury during the course of an interruption to his journey during which he spent one hour in a local hotel. He there consumed his normal consumption of alcohol and proceeded home in darkness. Had he not interrupted his journey he would have reached his home during a period of light. His Honour Judge Gibson found in favour of the Worker finding that the intake of alcohol and the darkness did not materially increase the risk of injury. An appeal to the NSW Court of Appeal was dismissed. In dismissing the appeal, Herron CJ said:

'For the reasons that I have averted to earlier, in my opinion these were questions of fact for his Honour and as he was entitled to come to such a decision as a question of fact this court cannot and will not disturb his finding.'

He went on to say:

'This finding of the Judge, that there was some slight increase in the risk, is not inconsistent with the Applicant having discharged the onus placed upon him upon such an issue. His Honour distinguished

between the prima facie slight increase present in such circumstances and a material increase which deprives a worker of his right to compensation. In my opinion the two findings are reconcilable when one comes to consider the context in which they are used in the Workers Compensation Act.'

Jacobs JA went on to add:

'I also agree that the question arising under the proviso was one of fact for the Commission, and in this regard it must be borne in mind that the Applicant was bound to prove a negative, namely that the risk of injury was not materially increased by reason only of the substantial interruption or substantial ⇦ **deviation** ⇨. This negative could not in the nature of things be exhaustively proved, because the number of elements of which account might be taken was practically inexhaustible. The Applicant could not negative all elements, but could only point to those of them that seemed to be most important. There was evidence before the Commission on important aspects of this question, and the Commission on those aspects could satisfy itself that the risk had not been materially increased. That being so, the issue remained one of fact and the learned Commissioner was entitled to reach the conclusion to which he did come.'"

54. In the present case, Ms Woolnough's statement clearly addressed what seemed to be the most important factors, and the Arbitrator could readily conclude on that information that the risk of injury had not been materially increased.
55. I acknowledge Target's submission that the critical issue to consider in this matter is whether the risk of injury was materially increased due to the visits to the homes of Cheryl and Glanda, and the submission that Ms Woolnough's knowledge of the risk "...must be considered to be an acknowledgement of the material increase in the risk inherent upon interruption or ⇦ **deviation** ⇨ of the Appellant's journey being the visit to Ms Bank's residence." But that is not the test, and confuses the cause of the injury with the general risk of injury. In any event, it may well be argued that , being forewarned of the rise in the driveway, Ms Woolnough was thus forearmed , and her fall on this particular occasion was clearly a result of mere inadvertence.

CONCLUSION

56. I am satisfied in all the circumstances and for the reasons stated that the interruption to and ⇦ **deviation** ⇨ from her place of employment to her place of abode did not materially increase the risk of injury to Ms Woolnough, and accordingly, she is entitled to an award.
57. Although the parties agreed on the amount of the award if Ms Woolnough was successful, its duration remains obscure. I note that in her Application, Ms Woolnough sought weekly benefits from 29 August 2007 to 15 February 2008. However, in the Transcript [page 7] the Arbitrator said:

"And I note for the record that you agree that if the applicant is successful it will sound in and [sic] quantum of $311.37 for the period 29 August '07 to 27 February '08, and then from 28 February at the rate of $280.23 per week..."

58. In the circumstances, I think the appropriate course is to remit the matter to the Arbitrator at first instance to formalise the award and to consider any claim for section 60 expenses which may flow from the award.

DECISION

59. 1. The decision of the Arbitrator dated 7 April 2008 is revoked.
    2. The matter is remitted to the Arbitrator at first instance for redetermination in accordance with these reasons.
    3. The Respondent is to pay the Applicant's costs of the proceedings before the Arbitrator.

COSTS

60. The Respondent is to pay the Appellant's costs of the appeal.

Deborah Moore

Acting Deputy President 2 October 2008

I, MARIE JOHNS, CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF DEBORAH MOORE, ACTING DEPUTY PRESIDENT OF THE WORKERS COMPENSATION COMMISSION.

ASSOCIATE

Workers Compensation Commission of New South Wales - Presidential

ISS Facility Services Australia Pty Ltd v Antonios [2008] NSWWCCPD 52 (20 May 2008)

Last Updated: 28 May 2008

WORKERS COMPENSATION COMMISSION

WORKERS COMPENSATION COMMISSION

DETERMINATION OF APPEAL AGAINST A DECISION OF THE COMMISSION CONSTITUTED BY AN ARBITRATOR

CITATION: ISS Facility Services Australia Pty Ltd v Antonios [2008] NSWWCCPD 52

APPELLANT: ISS Facility Services Australia Pty Ltd

RESPONDENT: Tony Antonios

INSURER: Allianz Australia Workers Compensation Ltd

FILE NUMBER: WCC7950-07

DATE OF ARBITRATOR'S DECISION: 4 February 2008

DATE OF APPEAL DECISION: 20 May 2008

SUBJECT MATTER OF DECISION: Journey claim; periodic journey; onus of proof; material increase in risk of injury.

PRESIDENTIAL MEMBER: President Greg Keating, DCJ

HEARING: On the papers

REPRESENTATION: Appellant: Stephen Lee Legal

Respondent: Slattery Thompson

ORDERS MADE ON APPEAL: The decision of the Arbitrator dated 4 February 2008 is confirmed.

The Appellant Employer is to pay the Respondent Worker's costs of the appeal.

BACKGROUND TO THE APPEAL

1. On 29 February 2008 ISS Facility Services Australia Pty Ltd ('the Appellant/Employer/ISS') sought leave to bring an 'Appeal Against Decision of Arbitrator' in the Workers Compensation Commission ('the Commission') against a decision, dated 4 February 2008.
2. The Respondent to the Appeal is Tony Antonios ('the Respondent/Worker').
3. Mr Antonios was employed by ISS as a cleaner working morning shifts at North Sydney Boys High School and afternoon shifts at Naremburn Public School. He alleges he suffered injury to his left ankle and ribs in a car accident on 1 August 2007 when he was on a periodic journey between his home and place of employment.
4. The Worker's usual routine was to work a morning shift at Sydney Boys High School and an afternoon shift at Naremburn Public School. He normally walked to the afternoon job from his home, which is also in Naremburn, unless it was raining in which case he drove to work. A journey that takes him approximately 20 minutes. On the day of the car accident, Mr Antonios worked his morning shift at North Sydney Boys High School, returned home and at approximately 10.30 am drove to the West Ryde Shopping Centre, to undertake shopping activities. He left the shopping centre to drive directly to Naremburn Public School at approximately 2.30 pm to commence his shift at 3 pm. On the drive from the shopping centre to the school Mr Antonios was involved in a car accident.
5. ISS through its workers compensation insurer, Allianz Australia Workers Compensation Limited denied liability on the basis that the Worker was not on a periodic journey within the meaning of section 10(1) of the *Workers Compensation Act* 1987 ('the 1987 Act') or alternatively if the injury was sustained on a periodic journey, then it was sustained during or after an interruption or ⇦ **deviation** ⇨ unconnected with the Worker's employment (section 10(2)).
6. On 18 October 2007 the Worker filed an Application to Resolve a Dispute in the Commission claiming weekly compensation at the rate of $450.00 per week on the basis of total incapacity from 1 August 2007 to date and continuing. The matter was listed for a conciliation and arbitration hearing on 15 January 2008. The parties were unable to resolve the claim and the matter proceeded to hearing. Both parties were represented. On 4 February 2008 the Arbitrator issued a Certificate of Determination and written Statement of Reasons. It is from this decision that the Employer now seeks leaver to appeal.

THE DECISION UNDER REVIEW

7. The 'Certificate of Determination', dated 4 February 2008 records the Arbitrator's orders as follows:

"The Commission determines:

1. On 1 August 2007 the Applicant received a personal injury on a journey to which section 10(3)(a) of the 1987 Act, being a daily or other periodic journey between his place of abode and place of employment. The personal injury is therefore a compensable injury for the purposes of section 10(1) of the 1987 Act.
2. Subsection 10(2) of the 1987 Act does not apply to negate the operation of section 10(1) because, in the circumstances of the case, the risk of injury was not materially increased because of the interruption of or ⇦ **deviation** ⇨ from the journey.
3. The Respondent is to pay the Applicant weekly benefits compensation at the rate of $450.00 per week pursuant to section 36 of the 1987 Act from 1 August 2007 to date and continuing.
4. The Respondent is to pay the Applicant's costs as agreed or assessed."

ISSUES IN DISPUTE

8. The Appellant submits that the Arbitrator erred:
    1. in law and fact in finding that the Worker was on a daily or periodic journey between his abode and place of employment when there was no evidence upon which to base such a finding or in the alternative, such a finding was against the weight of evidence ('*periodic journey*');
    2. in stating that:
        a. the issue to be determined was "was the risk of injury materially increased because of an interruption of, or ⇦ **deviation** ⇨ from that journey" and
        b. in finding that "whilst 'in a general sense' there could have been an increase in the risk of injury" the Commission had to be satisfied that there was a material increase in the risk in the circumstances,

when the law required the Worker establish that on the balance of probability there was no material increase in the risk of injury because of an interruption or ⇦ **deviation** ⇨ from the journey ('*material increase in the risk of injury- onus*')

3. in finding against the weight of evidence that there was no material increase in the risk of injury ('*material increase in the risk of injury- weight of evidence*').

ON THE PAPERS REVIEW

9. Section 354(6) of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the 1998 Act') provides:

"(6) If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing."

10. Having regard to Practice Directions Numbers 1 and 6, the documents that are before me, and the submission by the parties that the appeal can proceed to be determined on the basis of these

documents, I am satisfied that I have sufficient information to proceed 'on the papers', without holding any conference or formal hearing, and that this is the appropriate course in the circumstances.

LEAVE

11. Before proceeding to deal with an appeal the Commission must determine whether the application meets the requirements of section 352 of the 1998 Act.
12. The appeal was filed on 29 February 2008 within 28 days of the Arbitrator's decision in compliance with section 352(4) of the 1998 Act.
13. The monetary thresholds in section 352(2) are met.
14. Leave to appeal is granted.

FRESH EVIDENCE

15. Neither party seeks to rely on fresh evidence.

REVIEW

16. The nature of a review and the role and function of a Presidential member on appeal has been considered in many cases in the Commission. In *The King Island Company Ltd v Deery* [2005] NSWWCCPD 1 it was held at [19]:

"19. A Presidential Member on appeal has a specific and limited role in the review of a decision of an Arbitrator. The review is not a rehearing. The Presidential member is not dealing with the matter *de novo* and is not arriving at a fresh decision based on all of the evidence available at a later time (*Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194; *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616). The powers of the Presidential Member to revoke the decision pursuant to section 352(7) of the 1998 Act and to substitute a new decision in its place, are exercisable only where it is demonstrated that the decision of the Arbitrator is affected by some legal, factual or discretionary error (*Allesch v Maunz* (2000) 203 CLR 172). Alternatively, the Presidential Member may remit the matter back to the Arbitrator concerned, or to another Arbitrator, for determination in accordance with any decision or directions made."

17. The nature of a review was considered by the Court of Appeal in *Aluminium Louvres & Ceilings Pty Limited v Zheng* [2006] NSWCA 34 where Bryson JA said at [38]:

"A review is a different process to an appeal and the matters which may be considered and the manner in which they may be considered are somewhat wider. See *Boston Clothing Co Pty Ltd v Margaronis* (1992) 27 NSWLR 580 at 584 (Kirby P). An attack, on review or otherwise, on an Arbitrator's discretionary decision in controlling procedure may be based on the test stated in *House v. R* [1936] HCA 40; (1936) 55 CLR 499 at 504 - 505; but that is not the only basis on which the Presidential member may act. The powers of a Presidential member on review are somewhat wider and extend to power to reopen consideration of a matter of which an Arbitrator has disposed; the manner in which the powers of the Presidential member are to be exercised is itself the subject of discretion of the Presidential member."

18. This passage was recently quoted with approval by McColl JA in *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 at [134] ('*Edmonds*'). To describe the relative

weight and relevance of the expert evidence as "a discretionary decision which could only be disturbed on *House v The King* principles" was described by McColl JA as "an over-generalisation" (at [133]).

19. The nature of a review was further considered by the Court of Appeal in *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249 where Spigelman CJ said at [28] and [30]:

"28. The concept of a review on the merits is wider than the concept of an appeal in a judicial context. There is a well established line of authority on the use of the terminology of 'review' instead of 'appeal' with respect to the workers compensation system in this State which establishes the breadth of a review on the merits.

30. A Presidential member exercising a power to review a decision must decide whether the original decision is wrong or, as it is often put in the context of administrative appeals on merits, must decide what is the true and correct view. If s/he does so decide then s/he should substitute his or her own views, unless it is an appropriate case to remit. The power to remit is not constrained in the manner for which the Appellant contends."

20. Before an Arbitrator's decision will be revoked on review it must be demonstrated that it contains or has resulted from an error of fact, law or discretion. The error must be such that, but for it, a different decision should have been made (see *Snow Confectionary Pty Ltd v Askin* [2004] NSWWCCPD 56; Section 294 of the 1998 Act; *YG & GG v Minister for Community Services* [2002] NSWCA 247, and *Absolon v NSW TAFE* [1999] NSWCA 311).
21. I intend to apply the above principles in the matter before me.

EVIDENCE

22. Mr Antonios relied on a signed statement dated 3 October 2007. In it he stated that he has worked for ISS for approximately six or seven years. He works at North Sydney Boys High School from 5 am to 9 am and Naremburn Public School from 3pm to 5pm.
23. He stated that on 1 August 2007 he returned home after completing his morning shift and at 10.30 to 11am he left home and drove his car to West Ryde shops. He arrived at the shops at 11.45am and bought some sports shoes and left the shops at 2.30pm with the intention of driving straight to work at Naremburn Public School.
24. The Worker stated that he was travelling north along Hermitage Road when the car accident occurred as a result of a vehicle in front of him, without slowing or indicating, attempted to perform a U turn. The Worker stated that he swerved to the right to avoid the car but collided with the right passenger front light. He then lost control of his vehicle, mounted the curb and impacted with a fence. Mr Antonios was taken to hospital in an ambulance and suffered a fractured ankle, which was treated with internal fixation.
25. The Worker also stated that he had received an infringement notice that he was at fault in the accident as a result of overtaking on the right. The police based this conclusion on a statement from a witness. At the time of signing the statement the Worker was off work and receiving physiotherapy treatment.
26. Mr Antonios prepared a further signed statement dated 26 November 2006. He stated that he left home about 11 am dressed in his work clothes. He drove to the shops where he arrived at 12 o'clock. The trip was 14 km and took him 45 minutes to drive. He stated he left the shops 30 minutes before he was due to commence work and he intended to drive straight to work. If he had intended to drive home first the trip would have taken him 45 minutes. He was involved in the accident 10 minutes after leaving the shops.
27. Mr Antonios also relied on a signed statement from his wife, Nadia Antonios dated 11 December 2007. She stated that on 1 August 2007, Mr Antonios and his friend Mr Germanos

were at home between 10.30 and 11am on 1 August 2007. Mr Antonios was dressed in his work clothes and said to his friend that he was dressed for work and going to West Ryde to do some shopping before going to work. He left home at about 11am.

28. Mr Germanos provided a signed statement also dated 11 December 2007 confirming the evidence as contained in Mrs Antonios' statement.
29. The Worker also relied on a number of WorkCover certificates certifying him unfit for work from 1 August 2007 and a report from his treating general practitioner, Dr Artinian dated 19 November 2007 certifying the Worker unfit for his pre-injury duties due to his ankle injury.
30. The Employer relied on a factual investigation report prepared by Quantumcorp dated 22 November 2007. The report is referred to as an interim report and delays were experienced in the completion of the report as it became apparent to the investigator that the Worker may not have been responsible for the accident and avenues of recovery were investigated. Further the report confirms that the time of 30 minutes he estimated to travel from the shops to the workplace was accurate and appropriate.
31. The Worker gave the investigators a signed statement, which was, on the whole, consistent with the statements referred to above, with the exception of him stating that he purchased a pair of shoes at the shop, on which nothing turns.
32. Attached to the report was a copy of the Police report dated 9 October 2007 which concluded that the Worker attempted to over take a vehicle, which was attempting to perform a right hand turn. The police report recorded the street as straight, the gradient level, the surface sealed and dry and that the accident occurred during daylight hours at approximately 3pm on 1 August 2007.

SUBMISSIONS AND DISCUSSION

Periodic Journey

33. The Appellant submits that:
    1. The test the Arbitrator was required to apply is that set out by the High Court in *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [29] which states:

"There is no obligation upon a worker to take the shortest and most direct route from the worker's place of work to the worker's abode so long as the journey can be said to be a journey between the worker's place of abode and place of employment. And there is no reason why a worker might not, within the statutory meaning of a journey, choose a route, albeit an indirect and longer one, which may enable the worker to achieve a purpose in addition to the purpose of reaching the worker's residence in order to spend the interval between ceasing and recommencing work, again provided that the journey still has a character of a journey between his or her place of work and place of abode, and there is no material increase in risk during or after any **deviation** or interruption. That is what the Act requires. Any question whether that requirement has been satisfied is not to be answered by posing and answering a different question altogether and of the kind posed by the Court of Appeal, was the appellant engaged in one or more journeys."

2. There was no evidence that the journey undertaken by the Worker had the character of a journey between his abode and his place of employment. He normally walked 20 minutes to work from his home in a south-south-easterly direction whereas the West Ryde shops are located 14.2 km west of the Worker's home.
3. The fact that Mr Antonios left his home and drove to the West Ryde shops rather than walk to work was an indication that the 'journey' did not have the character of a daily or periodic journey.
4. Travelling from the West Ryde shops to the Naremburn area was unrelated to his employment.
5. The journey undertaken was not an "indirect" route because the route bore no relationship to

the route between the Worker's abode and his workplace.

6. The fact that the Worker wore his uniform did not provide evidence as to the character of the journey.
7. The direction of the journey and the distanced travelled was contrary to the Arbitrator's finding.
8. The period of 3 hours that the Worker spent shopping was contrary to the Arbitrator's finding.
9. The Worker's intention when he left home was to go to the West Ryde shops and his intention when he left the shops was not relevant and did not change the character of the journey.

34. Mr Antonios submits that:
    1. *Vetter* contains the principles to be applied and the Arbitrator applied those principles and *Vetter* does not exclude journeys that are not "the shortest and most direct routes".
    2. There was evidence to support each if the elements of 'journey' identified by the Court in *Vetter*.
    3. Contrary to the Appellant's submission that the journey was not a 'periodic journey' within the meaning of the Act, the evidence in support of a periodic journey was that:
        a. he was proceeding to his daily afternoon shift at 3pm, and
        b. the West Ryde ⇦ **deviation** ⇨ occurred about once per month.
    4. There was no evidence to support the Appellant's submission that he was intending to travel to the "Naremburn area" rather than to his place of employment.
    5. The Arbitrator's finding that the wearing of his work clothes to the shops provided evidence as to the character of the journey was supported by his sworn evidence that he intended to travel to work via Ryde without travelling home after visiting the shops and before commencing the afternoon shift and was a correct finding on the evidence.
    6. The evidence in relation to the distance and direction travelled only prove ⇦ **deviation** ⇨, which is not in issue.
    7. The fact that the he limited the time spent at the shops and left the shops 30 minutes before his shift started to travel directly to work and his intentions both when first leaving home and throughout the journey remain relevant and his intention at the time of leaving the shops was a relevant consideration.
35. I say at the outset that I am indebted to the learned Arbitrator for her thorough and lucid analysis of the authorities on this issue and her application of the relevant legal principles to the facts in this case. The Arbitrator found that the Worker was injured in a car accident on 1 August 2007 on a daily or other periodic journey between his home (place of abode) and his place of employment as required by section 10(3) of the 1987 Act. The finding was open to the Arbitrator and I agree with it for the reasons stated below.
36. The Appellant Employer argues that the decision of the High Court in *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 ('*Vetter*') at paragraph [29] sets out the test, which the Arbitrator was required to apply in order to determine whether the particular journey was such as to qualify for benefits under section 10 of the 1987 Act. I agree that *Vetter* provides relevant guidance as to the approach to be adopted. The Arbitrator was mindful of the significance of *Vetter*, and the similarity of the factual background in *Vetter* and in the instant case. The Arbitrator (at paragraph [23] of the Reasons) carefully applied *Vetter* noting in particular that:

"The question as to whether the statutory requirements were satisfied is not to be answered by posing and answering an entirely different question, being whether or not the Worker had engaged in one or more journeys. At paragraph [76] of the decision Kirby J is similarly critical of this approach. While noting that past decisions have posed and answered that question, Kirby J is clearly of the opinion that whether the Worker had engaged in one or more journeys is not the relevant question. That question is unnecessary and may sometimes tend to mislead."

37. The Appellant Employer submits that there was "no evidence" that the "journey" undertaken by the Respondent Worker had the character of a journey between his abode and his place of work. I disagree with that submission. The Arbitrator found that she was satisfied on the evidence that the Worker's intention from the time he set out on his trip at about 10.30 or 11am was clear and definite. He intended to drive to West Ryde shops, look around and perhaps do some shopping,

and then drive directly to Naremburn Public School in order to do his 3pm shift. She noted that the Worker had undertaken his morning shift at the Sydney Boys High School as was his practice on a regular work day. She noted the Worker's own evidence supported by two independent witnesses, his wife, Nadia Antonios and Hassib Germanos, that he was dressed in his work clothes/uniform when he left his home to drive to the West Ryde shops. It was open on the evidence for the Arbitrator to find that the Worker's evidence of his intention when he set out on the journey, the clothing he was wearing, and his evidence as to the route to be taken between West Ryde Shopping Centre and Naremburn Public School, and the Worker's evidence of the time it would take to complete that journey all constitute evidence to support the finding that the journey undertaken had the character of a journey between his place of abode and place of work. I agree with the finding.

38. The Appellant Employer submits that the fact that the Respondent Worker left his place of abode to travel by car to West Ryde Shopping Centre rather than to walk to his place of employment is an indication that the journey did not have the character of a daily of periodic journey. I disagree. Whilst these may be factors relevant to the question of whether, or not the risk of injury was materially increased because of an interruption or ⇦ **deviation** ⇨ from a journey, the driving as opposed to the walking, does not in my view destroy the character of a daily or periodic journey.
39. The Appellant Employer further submits that the "journey" undertaken by the Respondent Worker was not over an indirect route but that the route taken bore no relationship to the route between the place of abode and place of employment. If I were to accept this submission, which I do not, it would render section 10(2) with little or no work to do. The intention of this section is to compensate journey injuries which would not otherwise qualify for compensation. It is accepted that a worker may choose a longer route to allow him or her to achieve a purpose additional to the journey provided the journey still retains the character of a journey between the place of abode and the place of employment, see *Vetter* and *George v Mechanical Advantage Group Pty Ltd* [2002] NSWCC 16; (2002) 23 NSWCCR 303 ('*George*').
40. As stated by the Arbitrator in her Reasons at paragraph [25]:

"In the Court of Appeal decision in *The Old Spaghetti Factory v Oughtred* [1975] WCR 231 Street CJ said:

'...in the vernacular, it would seem to be perfectly permissible on the evidence to regard the applicant as having called in at restaurant and the having dropped off his female co-employee in the course of a roundabout journey to his home. That is essentially what the section comes down to... this was a single and continuing journey upon which the applicant had embarked at the time he left the restaurant. When he left the restaurant he commenced a journey the terminal point of which was his home at Dundas, notwithstanding that he also intended to interrupt substantially, and to deviate substantially, from that journey ...'

In the Court of Appeal decision in *Vetter* Priestley JA concluded that the case before him fell within the class of cases of which *The Old Spaghetti Factory* was an example. At paragraph 87 of his judgment in the High Court Kirby J agrees that Priestley JA correctly regarded the decision in *The Old Spaghetti Factory* as relevantly indistinguishable on its facts from *Vetter*, indicating his disagreement with the position taken by Handley JA."

There is no requirement for the route taken, that is the interruption of or ⇦ **deviation** ⇨ from a periodic journey to bare a "relationship" to "the route between the place of abode and place of employment", as submitted by the Appellant Employer. I reject that submission.

41. Again the Appellant Employer submits that the work clothing/uniform in which the Worker

was dressed "did not provide evidence as to the character of the journey undertaken by the Respondent Worker". I also reject this submission. The Arbitrator relied, and was entitled to rely, as a factor in determining the character of the journey, on the clothing the Worker was wearing at the time of his accident, which was consistent with his stated intention of travelling directly to work from the shops at West Ryde. The Appellant Employer's submission that he was dressed in his work clothes "so as to avoid the need to change clothes later on" is mere conjecture.

Material increase in the risk – onus

42. The Appellant submits that:
    1. The Worker failed to discharge the onus of proving that the risk of injury was not materially increased because of the interruption or ⇦ **deviation** ⇨.
    2. The Arbitrator erred in considering whether or not the Employer had established a material increase in the risk of injury because of an interruption of and ⇦ **deviation** ⇨ from the journey.
    3. The decision of the High Court in *Maksymczuk v Gillespie Brothers* [1957] HCA 89; (1957) 98 CLR 523 established that the Worker bore the onus of proving that there was no material increase in the risk.
    4. If there is a material increased risk of injury it is not necessary that the increased risk caused the injury. See *Scobie v K.D.Wilding* (1959) 103 CLR 314, where his Honour Fullagher J stated at [326]:

"the proviso is concerned not with the cause of injury but with increased risk of injury"

5. The evidence before the Arbitrator would tend to suggest there was an increased risk of injury. The Worker failed to discharge the onus of proving that there was no material increase in risk in circumstances where he was involved in a car accident on Hermitage Road, West Ryde when he usually walked a relatively short distance from his home to Naremburn Public School.

43. Mr Antonios submits that:
    1. The Arbitrator did not reverse the onus. She correctly stated at paragraph [31] of her Reasons that:

"In these circumstances it is necessary for the Applicant to prove the risk of injury 'was not materially increased because of the interruption or ⇦ **deviation** ⇨.'"

2. The Arbitrator correctly applied the principles in *Maksymczuk v Gillespie Brothers* [1957] HCA 89; (1957) 98 CLR 523.
3. The fact that at paragraph [35] the Arbitrator stated "I am not satisfied that in the circumstances of this case the risk of injury was materially increased because of the interruption or ⇦ **deviation** ⇨" does not mean that she departed from the principles she expressly stated in paragraph [31] (as quoted above).
4. The arbitrator did not reverse the onus. She simply considered all the evidence and decided that the Worker had satisfied the evidentiary onus of showing there had not been a material increase in risk.
5. The Employer's submission that the Worker failed to call expert evidence to prove the absence of material increase in risk, cannot be founded on a rule of law, nor do the facts of the case require expert evidence, nor would there be a relevant expert upon which to rely.
6. The Arbitrator's findings of fact are shown to be most probably correct. Her detailed statement of reason discloses no error of law or discretion. Further the workers compensation legislation is to be construed as beneficial legislation (*Meggitt Overseas Ltd and others v Grdovic* [1998] 43 NSWLR 527 at 536 F-G)

44. In *Maksymczuk v Gillespie Brothers Proprietary Limited* [1957] HCA 89; (1957) 98 CLR 523 ('*Maksymczuk*') at 527, Dixon CJ in dealing with section 7(1)(b) of the *Workers Compensation Act* 1926 (which is relevantly in the same terms as section 10 of the 1987 Act) said:

"The learned Judge of the Workers Compensation Commission decided that the employer, if the proviso was invoked, must prove that the risk of injury was materially increased by reason of the substantial interruption or ⇦ **deviation** ⇨, or other break. As his Honour found in the proofs no sufficient evidence that the risk was thus increased, he held in favour of the applicant for compensation.

The learned judges of the Supreme Court, on appeal by case stated, were unable to concur in that conclusion and took the view that the burden of proof to satisfy the conditions stated in the proviso lay on the applicant for compensation.

We think that the view of their Honours of the Supreme Court is clearly right....

It is, in effect, an ordinary case of the burden of proof lying upon him who affirms."

45. At paragraph [31] of the Statement of Reasons the Arbitrator, after finding that there was a substantial interruption of, and a substantial ⇦ **deviation** ⇨ from the Worker's journey to work, a finding which is not challenged in this appeal she went on to say, "I am further satisfied the interruption and ⇦ **deviation** ⇨ were for purposes unconnected with either his employment or for the purpose of the journey (section 10(2)(b) of the 1987 Act). In these circumstances it is necessary for the Applicant to prove the risk of injury was 'not materially increased because of the interruption or ⇦ **deviation** ⇨'".
46. The Arbitrator has clearly identified in accordance with *Maksymczuk* the onus of proving that the risk of injury had not been materially increased because of the interruption or ⇦ **deviation** ⇨, clearly lay with the Applicant.

47. In *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd* [2008] NSWCA 39 Justice Campbell said:

"If a plaintiff has the onus of proving a negative proposition, the fact that the defendant has greater means to produce evidence which contradicts that negative proposition, does not mean that the plaintiff ceases to have the onus of proof of that negative proposition. However, once the plaintiff establishes sufficient evidence from which, if that evidence is accepted, the negative proposition may be inferred, an evidential onus shifts to the defendant to adduce evidence that tends to show that the negative proposition is incorrect. If the defendant adduces such evidence, the plaintiff must then, as part of its overall burden of proof, deal with that evidence either by submission or argument.

...Before an evidential onus shifts from a plaintiff, the plaintiff must have adduced enough evidence for the court to infer, if the evidence that the plaintiff adduced was accepted by the court and was the only evidence on that topic in the case, that the proposition concerning which the plaintiff had the onus of proof was more likely than not true. In that situation, one says that an onus of adducing evidence shifts to the defendant because the defendant is then in a situation in which, if the defendant does not adduce evidence concerning that proposition, the party might succeed in establishing that proposition."

48. In this case no expert evidence was called by either party. I make no criticism of the parties as this is not a case which readily lends itself to any form of expert evidence. It seems to me that the evidence of the Worker's stated intent when he set out on the journey, the clothing he was wearing, the evidence of the route to be taken between the West Ryde Shopping Centre and the Naremburn Public School and the evidence that the Worker had sufficient time to complete that journey prior to commencing his shift establish that there was sufficient evidence from which the negative proposition may be inferred. That being so, the evidential onus then shifted to the Employer to adduce evidence that the negative proposition is incorrect. No such evidence was introduced by the Employer leaving the Arbitrator with the Worker's evidence as the only evidence on that topic.
49. I am satisfied that the Arbitrator's findings on onus of proof were open to her and were entirely consistent with the approach adopted by the High Court in *Maksymczuk*. Thus, the submission that the Arbitrator fell into error on this question of law must also fail.

Material increase in the risk – evidence

50. The Appellant submits that:
    1. "Whether the risk of injury was not materially increased is a question of fact and the worker must prove the negative - *Tucker v WD and HO Wills* (1969) 43 WCR 11 at 19."
    2. In accordance with *Scobie*, the Worker both extended the journey with a substantial interruption or ⇦ **deviation** ⇨ and drove a total of 28 km rather than walk from his home to the school in the same suburb.
    3. The Arbitrator in finding that "in a general sense" driving on back roads for an additional 1.5 hours could increase the risk of an accident occurring, that she in fact found that there was an increase in the risk of injury consequent upon the interruption /⇦ **deviation** ⇨.
    4. The Arbitrator correctly stated that there was no evidence regarding material increase in risk.
    5. The Arbitrator erred in making a comparison of the risk of driving directly to Naremburn Public School with the risk of driving via the West Ryde shops. The comparison should have been between walking to the school and driving via the West Ryde shops.
51. Mr Antonios submits that:
    1. The factual evidence that proves the absence of a material increase in risk include:
        i. he had undertaken the journey many times and was familiar with the route;
        ii. he was taking a common backstreet route used by many motorists and thus reducing the risk by avoiding heavy traffic;
        iii. it was bright daylight and a fine day;
        iv. he was travelling outside peak hour, and
        v. there was no evidence of speeding.
    2. The Employer's submissions in relation to *Scobie* are misconceived and the Arbitrator correctly applied the principles in *Scobie*.
    3. *Scobie* distinguished three categories of risk:
        i. The lowest risk in which there is no ⇦ **deviation** ⇨ or interruption to a periodic journey;
        ii. A higher level of risk accompanied by a ⇦ **deviation** ⇨ or interruption necessitated by the increased distance or increased time taken to travel, and
        iii. An even higher level of risk that may or may not accompany a ⇦ **deviation** ⇨ or interruption by reason of an additional feature of the journey.
    4. The Arbitrator accepted the presence of (i) and (ii) above but did not find the presence of the additional feature in (iii).
    5. The Employer's submissions that driving the distance and location that he did as opposed to walking, confused and merged the risk levels in (ii) and (iii).
    6. The Employer cannot, on the *Scobie* principles, rely on the increased distance and time travelled as relevant to material increase in risk.
52. The Appellant Employer submits that whether the risk of injury is materially increased is a

question of fact and a Worker must prove the negative *Tucker v WD & HO Wills* (1969) 43 WCR 11 ('*Tucker*') at [19]. On this point the Respondent Worker agrees. In *Tucker* Gibson J in the Workers Compensation Commission of NSW found in favour of a worker seeking compensation after having sustained an injury during the course of an interruption to his journey during which he spent one hour in a local hotel. He there consumed his normal consumption of alcohol and proceeded home in darkness. Had he not interrupted his journey he would have reached his home during a period of light. His Honour Judge Gibson found in favour of the Worker finding that the intake of alcohol and the darkness did not materially increase the risk of injury. An appeal to the NSW Court of Appeal was dismissed. In dismissing the appeal, Herron CJ said:

"For the reasons that I have averted to earlier, in my opinion these were questions of fact for his Honour and as he was entitled to come to such a decision as a question of fact this court cannot and will not disturb his finding."

He went on to say:

"This finding of the Judge, that there was some slight increase in the risk, is not inconsistent with the Applicant having discharged the onus placed upon him upon such an issue. His Honour distinguished between the prima facie slight increase present in such circumstances and a material increase which deprives a worker of his right to compensation. In my opinion the two findings are reconcilable when one comes to consider the context in which they are used in the Workers Compensation Act."

53. Jacobs JA went on to add:

"I also agree that the question arising under the proviso was one of fact for the Commission, and in this regard it must be borne in mind that the Applicant was bound to prove a negative, namely that the risk of injury was not materially increased by reason only of the substantial interruption or substantial ⇦ **deviation** ⇨. This negative could not in the nature of things be exhaustively proved, because the number of elements of which account might be taken was practically inexhaustible. The Applicant could not negative all elements, but could only point to those of them that seemed to be most important. There was evidence before the Commission on important aspects of this question, and the Commission on those aspects could satisfy itself that the risk had not been materially increased. That being so, the issue remained one of fact and the learned Commissioner was entitled to reach the conclusion to which he did come.

54. The Appellant Employer submits that there is "a clear and obvious distinction" between the risks involved in being a pedestrian, walking from the Respondent Worker's home to Naremburn Public School and driving a total of some 28 kilometres from Naremburn to West Ryde shops and return. The Appellant Employer argues that there is support for that notion drawn from the High Court decision in *Scobie v KD Welding Co Pty Ltd* (1959) HCA 65; (1959) 103 CLR 314 ('*Scobie*'). The Arbitrator referred in her decision to *Scobie* and noted that the Court observed that the increased length of a journey and the increased time of travel, even where both are substantial, do not without more bring a case within the proviso dealing with the material increase in risk of injury (per Dickson CJ). Quoting from the judgment of Windyer J at 330-331 she noted:

"A ⇦ **deviation** ⇨ or delay, *prima facie*, increases the perils of a journey, because it adds a new place or a further time in which danger may arise and loss occur. In particular cases, however, a ⇦ **deviation** ⇨ may actually reduce the risk of loss...as I have said...any substantial interruption or ⇦ **deviation** ⇨ must, in one sense, be likely to increase the risk of injury during the journey...but

such an increase would not necessarily be a material increase."

55. In order to determine the policy of the enactment the High Court considered the various amendments to the journey provision of the 1926 Act, having done so Windyer J noted:

"The policy of the enactment becomes, I think, evident. A worker is disentitled to compensation if, but only if, a material increase in the hazards of the journey, in the circumstances existing when the interruption, ⇦ **deviation** ⇨ or break is made, be then predicated as it's necessary consequence. The Worker in making such an interruption, ⇦ **deviation** ⇨ or break forthwith deprives himself of the benefit of the Act and the Employer is discharged from liability. But the Worker does not suffer if the interruption, ⇦ **deviation** ⇨ or break would not, without some fortuitous and unforeseen further occurrence, have materially increased the risk."

56. The Arbitrator accepted that the ⇦ **deviation** ⇨ and interruption were substantial. She accepted that in a "general sense" driving on roads whether main roads or back roads, for an additional 1.5 hours (approximately) would increase the risk of an accident occurring. I agree with those findings.
57. The Arbitrator, correctly, directed herself that she must be satisfied that there was a **material** increase in the risk of injury in the particular circumstances of the case. The Appellant Employer argues that driving some 28 kilometres from Naremburn to West Ryde shops and return, of itself and without more, when compared with a pedestrian walking from the Worker's home to the Naremburn Public School, is a material increase in risk. Whether this is true is a question of fact. In determining that question of fact the Arbitrator took into account a number of factors:
    i. the Applicant usually walked to work but he sometimes drove to the school from his home;
    ii. the traffic to and from West Ryde on the day of the accident was light;
    iii. the Respondent Worker was not travelling in peak hour;
    iv. the journey was conducted entirely in daylight;
    v. the Worker was travelling on a back route from West Ryde to his place of employment to avoid the heavier traffic of the main roads including Ryde Road;
    vi. the weather conditions were fine;
    vii. the Respondent Worker allowed himself sufficient time to complete the journey from West Ryde taking the route that he elected, in order to arrive at Naremburn School within time to start his shift, and
    viii. there was no evidence of excessive speed.
58. The Arbitrator accepted the Respondent Worker's evidence that the accident occurred in circumstances where the vehicle travelling ahead of him on Hermitage Road made a sudden and unexpected U turn across his path rendering a collision unavoidable.
59. It is trite to say that Workers Compensation legislation is beneficial legislation and should be construed beneficially (see *Meggitt Overseas Ltd and Others v Grdovic* [1998] 43 NSWLR 527 at 536 F-G). Dixon CJ in *Scobie* noted (at 321) it is important to note that the proviso is expressed in terms which give a positive right to a worker to receive compensation. Section 10 of the 1987 Act is also couched in terms that give a positive right to compensation.
60. The Arbitrator, mindful of the principles set out in *Vetter* and *Scobie* and considering the circumstances as a whole, was satisfied as a question of fact, that the risk of injury to the Respondent Worker was not materially increased by reason of the interruption or ⇦ **deviation** ⇨ from his journey. On the facts before the Arbitrator, this finding was open, and I agree with it.
61. The Arbitrator accepted that driving around the metropolitan streets of Sydney, when compared to walking a much shorter distance between the Respondent Worker's place of abode and place of employment created a risk of injury. The Appellant Employer would argue that without more the driving, compared to the walking was a material increase in the risk of an injury. I do not

believe that to be the case. The Appellant Employer has been unable to argue that there were additional factors such as travelling in darkness, travelling in inclement weather, travelling over rough terrain or travelling when affected by alcohol, for example, which may be factors that could, in certain circumstances, but not invariably, elevate a risk of injury to a material risk of injury.

62. It is instructive to observe, though it is not necessary for the determination of the issues raised on appeal, that the actual cause of the injury suffered by the Respondent Worker was a "fortuitous and unforeseen further occurrence" (see *Scobie* page 332), namely, the attempt by another driver to execute, without warning, a U turn across his path in circumstances where a collision was inevitable.
63. The approach taken by the Arbitrator to determine whether there was a material increase in the risk of injury because of the Respondent Worker's interruption or ⇦ **deviation** ⇨ from his journey is consistent with the authorities. I agree with the findings she made. They disclose no error.

DECISION

64. For the reasons given in this decision the Arbitrator's determination of 4 February 2008 is confirmed.

COSTS

65. The Appellant Employer is to pay the Respondent Worker's costs of the appeal.

His Hon. Judge Greg Keating

President

20 May 2008

I, EMMA LETHBRIDGE-GILL CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF HIS HON. JUDGE GREG KEATING, PRESIDENT OF THE WORKERS COMPENSATION COMMISSION.

ASSOCIATE