WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

MATTER NO:	**003945/13**
APPLICANT:	**Catherine Mary Hopkins**
RESPONDENT:	**Department of Education & Communities**
DATE OF DETERMINATION:	**29 July 2014**
CITATION:	**[2014] NSWWCC 258**

The Commission determines:

1. Finding that the applicant sustained an injury arising out of or in the course of her employment with the respondent on 14 June 2007.

2. Finding that the applicant's employment was a substantial contributing factor to her injury.

3. That the respondent pay the applicant's expenses under section 60 of the *Workers Compensation Act* 1987 (general order).

4. That the matter be remitted to the Registrar for referral to an Approved Medical Specialist on the following basis:

    (a) Date of Injury: 14 June 2007

    (b) Matters for assessment: Permanent impairment (right lower extremity).

    (c) Method of Assessment : Whole person impairment

    (d) Evidence

        (i) Application to Resolve a Dispute and attached documents.
        (ii) Reply.

5. That the respondent pay the applicant's costs as agreed or assessed.

6. Having regard to the significant and unusual issues of fact, law and medical causation, I certify the matter is complex and order that the costs payable, in respect of both parties, are to be subject to an uplift of 20 per cent.

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

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

Darren Moore
Senior Dispute Services Officer

By Delegation of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Catherine Mary Hopkins (the applicant) commenced employment as a teacher with the Department of Education and Training in 1997. The applicant teaches food tech, textiles, child studies and hospitality for years 7 to 12 at Cessnock High School.

2. On 14 June 2007, the applicant left work and returned to her home at about 5.30 pm. It had been raining. The applicant took some books inside for marking using a cane basket, and returned to her car to retrieve more books, holding the cane basket in front of her as she descended some steps at her home. The steps were uncovered.

3. As she descended the steps, the applicant slipped and fell down the steps. She was taken to Maitland Hospital and was found to have suffered a right ankle pylon fracture. On 20 June 2007 the applicant underwent surgery, performed by Dr O'Sullivan. The applicant underwent further surgery on 22 September 2008.

4. By an Application to Resolve a Dispute (the Application), lodged in the Commission on 14 March 2013, the applicant claims lump sum compensation for injury to the right lower extremity on 14 June 2007, and medical expenses compensation, following the respondent's denial of liability by a section 74 Notice issued on 25 January 2013.

ISSUES FOR DETERMINATION

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

    (a) Whether the injury sustained by the applicant arose out of employment with the respondent;
    (b) Whether the applicant's injury occurred in the course of employment with the respondent, and
    (c) Whether the applicant's employment was a substantial contributing factor to her injury.

PROCEDURE BEFORE THE COMMISSION

6. The parties attended a conciliation conference and arbitration hearing on 20 February 2014. The applicant was represented by Mr Hickey of counsel, instructed by Philip Watson. The respondent was represented by Mr Lowe of counsel, instructed by Sparke Helmore Lawyers. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

Documentary Evidence

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

    (a) The Application, and
    (b) The Reply.

SUBMISSIONS

8. As the applicant's submissions are recorded and a transcript is available of the proceedings, I do not intend to repeat them in full.

EVIDENCE

The applicant's statement

9. The applicant provides a statement dated 27 February 2013. The statement provides a background of the applicant's work history, including her employment as a teacher at Cessnock High School. She states that on the day of the injury, she got home at about 5.30 pm. She goes on to state:

> "There is no time provided at school for preparing lessons, marking and doing school reports and so the practice is for the teachers to take this work home. I had those books with me as well as the basket of equipment which I have to take to and from school each day. That included a Food Tech folder, a Child Studies Folder and a Technology Folder."

10. The applicant describes the mechanism of injury as follows:

> "I had taken some books inside for marking after parking the car in the carport in the backyard. There were steps at the house leading from the carport up to the house. These were uncovered. It had been raining. I carried some books inside and was coming back down the steps to get some more when I tripped and fell. I tried to stay upright by I lost my balance and fell to the bottom of the steps."

11. The applicant then goes on to describe her recovery from injury, including two surgeries, and her trouble returning to work, the effect the injury has had in terms of ongoing pain, effect on other body parts, and restrictions in activities of daily living.

12. Another statement of sorts appears at page 61 of the Application, "To supplement injury notification submitted by Ian Scanlon Principal Cessnock High School", an "Explanation of injury for Catherine Hopkins". This document is undated but is signed by the applicant worker. The applicant states that:

> "I left school at 3.45 pm on Thursday 14th June 2007 and travelled home Bishops Bridge Rd (due to roads cut by flood water on the normal route).
>
> On returning to Maitland (Rutherford), I dropped a teacher of (sic.) who travelled with me. I then continued on my direct route home which took me approximately 1 hour due to get home (Lorn) due to heavy traffic as a result of road closures in the area.
>
> On arriving home I took a load of books up the stairs and on returning down stairs to get the balance of books in a basket I tripped and fell."

Statement of Tim Plater

13. A fellow teacher at Cessnock High School, Tim Plater, provides a signed, undated statement. He states that he has been a teacher at Cessnock High School for 12 years. In relation to work from home, he states:

"It needs to be stated clearly that taking work home is standard practice for teachers in NSW schools and for most teachers in similar schools in the western world. Teachers regularly perform the following tasks at home; marking student work books and assignments, preparing lessons and teaching programs and preparing reports."

14. He also opines on the provision of laptops requiring additional work. In relation to Cessnock High School particularly, he states:

"From 3.30 pm when the students leave the school cleaning staff begin locking up the school. There is only a period of an hour and a half after teaching is finished to complete any work in the staffroom before the school is closed. Teachers can only work back at school through special arrangements with the Principal."

15. In relation specifically to the applicant he states:

"I have known Catherine Hopkins since she was employed at Cessnock High. Like all other teachers at the school she takes work home on a daily basis. This includes carrying texts, multiple students work books, computers and other student projects. It should be recognised that taking work home is the normal practice of school teachers."

Oral evidence

16. During the course of the arbitration hearing on 20 February 2014, the applicant provided oral evidence. The evidence adduced centred around what exactly the applicant was doing when she tripped down the stairs leading to her injury:

"MR HICKEY: Recall that. How did you take the books upstairs in the original transportation of the books?

MS H: I took them up in a basket and I returned with another basket to pick up the rest of the books because we were marking, we were doing reports at the time.

MR HICKEY: All right. When you say another basket is that a different basket or the same basket?

MS H: Sorry, the same basket."

17. It was then established through gesturing that the basket carried by the applicant was approximately 18 inches wide, 12 to 15 inches deep, with a handle over the top, and that it was made out of cane. The following evidence was then adduced:

"MR HICKEY: All right. And on the return trip to retrieve further material from the car where were you holding the basket?

MS H: In the front.

MR HICKEY: How many stairs did you have to negotiate back down to the carport area?

MS H: Approximately?

MR HICKEY: Yeah.

MS H: 20.

MR HICKEY: All right. Where was it that you lost your footing?

MS H: Halfway down."

18. It was then further clarified that the applicant was holding the basket in front of her as she descended the steps, and that the entire set of 20 or so steps were exposed to the weather. Finally, the applicant explained the mechanism of injury as thus:

> "MS H: I've put my right foot down, going down to the next step but I must have, I've slid and gone over the edge. So I must, so what I've done is on the edge of the step I've slipped and then just fallen onto the next step."

FINDINGS AND REASONS

19. For the applicant to succeed, she must establish that, pursuant to the definition in section 4 of the *Workers Compensation Act* 1987 (the 1987 Act), her injury according arising out of or in the course of employment, and that pursuant to section 9A of the 1987 Act her employment was a substantial contributing factor to injury.

Injury arising out of or in the course of employment

20. The meaning of the terms "arising out of or in the course of" employment are settled, and have been subject to extensive examination before relevant Courts of authority. *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited* [2009] NSWCA 324 (*Badawi*) at [72] – [79] provides useful guidance on the disjunctive nature of the section and the relevant test to be undertaken.

21. The concept of "in the course of" employment is temporal in nature:

> "It is established that the second limb of the definition "*in the course of employment*" involves a temporal element and does not of itself contain a causative element. It was for that reason that Mr Zickar succeeded when his congenital aneurism ruptured when he was at work: *Zickar v MGH Plastic Industries Pty*. Difficult factual issues can arise in determining whether a worker was in the course of employment when injury was sustained, but that arises not because the principle to be applied is uncertain, but because of the fluidity of employment circumstances." (*Badawi* at [72]).

22. On the other hand, the concept of "arising out of" employment is causative. In *Badawi*, the Court referred to the case of *Smith v Australia Woollen Mills Limited* [1933] HCA 60; 50 CLR 504: (at 77])

> "In *Smith v Australian Woollen Mills Limited* [1933] HCA 60; 50 CLR 504, Starke J, at 517-518, stated the following propositions:
>
> > '1. The expression 'arising out of' imports some kind of causal relation with the employment, but it does not necessitate direct or physical causation. Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? It must arise out of the work which the worker is employed to do—out of his service (*Stewart v. Metropolitan Water, Sewerage and Drainage Board*, and the cases there cited).
> >
> > 2. An injury does not cease to arise out of the employment because its remote cause is the ideopathic condition of the injured man. The ideopathic condition must be dissociated from the other facts (*Wicks v. Dowell & Co*).

> 3. An injury which arises directly out of circumstances encountered because to encounter them falls within the scope of employment is an injury arising out of the employment. If the worker is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the injury with his employment (*Upton v. Great Central Railway Co; Brooker v. Thomas Borthwick & Sons (Aus.) Ltd.*)." (Citations omitted)'"

23. The applicant submits that, in transporting materials for the purposes of marking them, the applicant is in the course of doing her work (at T11.20), which would satisfy the concept of "in the course of" employment in section 4 of the 1987 Act.

24. In the alternative, the applicant submits that the injury arises out of her employment because of the requirement to transport the material to her house because she has to complete it in her own hours at home (at T11.23). The respondent submits that *Badawi* and *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21 (*Hatzimanolis*) are distinguishable in that they deal with employment extending over a period (T 16.1), whereas in this case, the applicant had discrete regular hours of employment, and there is no evidence that the employer encouraged or induced the employees to perform outside work.

25. In *Hatzimanolis,* Mason CJ, Deane, Dawson and McHugh JJ said (at [16]):

> "Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment "and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen"(20) *Danvers* (1969) 122 CLR, at p 537."

26. As stated in *Watson v Qantas Airways Limited* [2009] NSWCA 322, before embarking on questions as to what a worker does during a period of work, it first must be established that a period of work is one overall period of work or two or more (per Allsop P, Beazley JA and McColl JA and Handley AJA at [58]):

> "The test that was required to be applied was that stated in *Hatzimanolis*. This requires, **in the first instance**, a determination or characterisation of the period or periods of work of the employee as one overall period or episode of work, or two or more; one does not first, before that task, examine aspects of, and employers' attitudes to, how the period of work is spent: see *Hatzimanolis* at 483. Once the period of work of the employee is characterised, the circumstances of what occurred are to be analysed within that framework."

27. *Hatzimanolis* was discussed at length in the recent case of *Comcare v PVYW* [2013] HCA 41 (*PVYW*). In the joint judgement of French CJ, Hayne, Crennan and Kiefel JJ, their Honours placed a warning on the application of the principles in *Hatzimanolis'* as if they were words of a statute':

> "The words of the principle articulated in *Hatzimanolis* are not to be applied literally to facts without further consideration of what is conveyed by the reasoning about the

principle and without bearing in mind the terms of the SR&C Act and the limit it seeks to place upon an employer's liability for compensation" (at [15]).

28. To this, further was added: "Attention is not to be focussed just upon the occasion giving rise to the injury" (at [33]). The majority went on to say, on the link between injury, circumstances, and employment (at [36]):

> "Moreover, it is an unstated but obvious purpose of *Hatzimanolis* to create a connection between the injury, the circumstances in which it occurred and the employment itself. It achieves that connection by the fact of the employer's inducement or encouragement. Thus, where the circumstances of the injury involve the employee engaging in an activity, the question will be whether the employer induced or encouraged the employee to do so".

29. The majority then went on to helpfully outline how to apply the *Hatzimanolis* principle (at [38]):

> "The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred. The essential enquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the *Hatzimanolis* principle becomes relevant. When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment."

30. The applicant submits that she was required to do work at home; that it is well recognised that teachers carry out a lot of work in the home environment, but in this case the worker has stated that she was required to do it because of the constraints in place (T10.1). The respondent submits that there is no evidence that the employer encouraged or induced the employees to perform outside work (T16.09).

31. The applicant's statement provides evidence in support of her submission that work was done at home. She states: "There is no time provided at school for preparing lessons, marking and doing school reports and so the practice is for the teachers to take this work home". Mr Plater's statement provides support for this, as he states that the school day finishes at 3.30 pm and there is only an hour and a half before the school is locked. The respondent has not provided any evidence to contradict the applicant's, or Mr Plater's statements.

32. The *Hatzimanolis* principle, as explained by the majority in *PVYW*, requires a series of enquiries to be made of the factual circumstances in a case. Did the applicant suffer injury, but not whilst engaged in work? What was the applicant doing when injured, and how was that injury brought about? It seems to me that the circumstances of the wetness due to the rain, the applicant hurrying, the carrying of the basket in front of her for the purpose of the collecting further work materials from her vehicle, all contributed to the circumstances of her fall.

33. Did the employer induce or encourage the employee to engage in that activity?

34. This inducement can be express or implied (*Hatzimanolis* at [16]). Without access to the applicant's contract of employment, terms of engagement, or other documentary evidence as to how work is performed, it is difficult to make a finding that the applicant was expressly induced to perform work at her home during an employment interval.

35. However, the nature of her employment as a teacher, with requirements not only of face-to-face teaching hours, but also lesson preparation, marking, and evaluation of students, to name but a few of the ancillary tasks performed by teachers, indicates an implied inducement to perform tasks outside of the contractual hours of employment. This is further reinforced by the factual scenario of the particular school where the applicant worked; at Cessnock High School, there was a period of 1.5 hours in the staffroom only after the finish of the school day to perform all those ancillary tasks and otherwise the class rooms are closed. The evidence is that without permission of the principal, a teacher is not allowed to stay on school property after that time to complete that work. With no other alternative, the applicant took home her work, in this case in the form of marking, to be completed after her scheduled work hours.

36. I cannot accept the respondent's submissions that the applicant's duties as a teacher are relevantly confined to the work she does at the school. I am of the view that *Badawi* and *Hatzimanolis* are not distinguishable on their factual circumstances, as the respondent submits.

37. The respondent, by implication, induced the applicant to perform work at her home. On the facts before me, uncontradicted by the respondent, the applicant was presented with limited opportunity to perform the work at Cessnock High School. As a teacher she was a professional. She had no alternative but to complete the work at her home. It had to be completed in a timely manner. It is a necessary consequence of this implied inducement that the applicant was required to transfer that work from her vehicle to her home. It was during that transfer that the applicant slipped, fell, and sustained an injury.

38. In accordance with section 4 of the 1987 Act, I find that the applicant sustained an injury arising out of or in the course of her employment with the respondent.

Substantial contributing factor

39. Determining whether employment is a substantial contributing factor to an injury, pursuant to section 9A of the 1987 Act, is a finding of fact, and a question of impression and degree: *Dayton v Coles Supermarkets Pty Ltd* [2001] NSWCA 153 at [29]. The concept of employment in section 9A is not just the fact of being employed, and involves more, per Mason P in *Mercer v ANZ Banking Group* [2000] NSWCA 138 (*Mercer*) (at [13]):

> "It is common ground between the parties and well established by earlier authority that, when s9A(1) speaks of 'the employment concerned' being a substantial contributing factor to the injury, the legislation is not referring to the fact of being employed, but to what the worker in fact does in the employment (see *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 632-3, 641). In other words, one starts with the actual and not the hypothetical, with what (if anything) the worker was in fact doing in his or her employment that caused or contributed to the 'injury' as defined in s4."

40. It is common ground (to the extent that it is undisputed) that when the applicant was injured, she was walking down a set of uncovered steps, which were exposed to the weather, for the

purpose of extracting books from her car to take inside. The applicant was carrying a basket at the time, the size and shape of which was clarified during the course of the hearing (at [16]-[18] above).

41. Pursuant to Mercer above, starting with the actual and not the hypothetical, the applicant was obtaining items from her car when she was injured. The items were related to her employment, in that they were brought home for the purposes of marking. What caused or contributed to the injury as defined in section 4 of the 1987 Act was the fact that the applicant brought the books home to mark them.

42. Relevant to this is the nature of her work as a teacher (involving not only face-to-face teaching hours, but also lesson preparation, marking, and evaluation of students, to name but a few of the ancillary tasks performed by teachers). Further to this is the factual scenario of the particular school where the applicant worked at Cessnock High School, there was a period of 1.5 hours after the finish of the school day to perform all those ancillary tasks. The evidence is that without permission of the principal, a teacher is not allowed to stay on school property after that time to complete that work. With no other alternative, the applicant took home her work, in this case in the form of marking, to complete after her scheduled work hours.

43. In considering whether employment is a substantial contributing factor to an injury, first and foremost it is necessary to give effect to the meaning of 'substantial'. In *Badawi*, it was held that "the '*proper link*' in the legislative context was a causal connection expressed by the words '*a substantial contributing factor*', meaning one that was real and of substance." (at [82]). I am satisfied the employment was a contributing factor which was real and of substance to the injury.

44. I find that the applicant's employment was a substantial contributing factor to her injury.

SUMMARY

I make the following orders:

45. Finding that the applicant sustained an injury arising out of or in the course of her employment with the respondent on 14 June 2007.

46. Finding that the applicant's employment was a substantial contributing factor to her injury.

47. That the respondent pay the applicant's expenses under section 60 of the 1987 Act. (general order).

48. That the matter be remitted to the Registrar for referral to an Approved Medical Specialist on the following basis:

    (a) Date of Injury: 14 June 2007

    (b) Matters for assessment: Permanent impairment (right lower extremity).

    (c) Method of Assessment : Whole person impairment

    (d) Evidence

        (i) Application and attached documents.
        (ii) Reply.

49. That the respondent pay the applicant's costs as agreed or assessed.

50. Having regard to the significant and unusual issues of fact, law and medical causation, I certify the matter is complex and order that the costs payable, in respect of both parties, are to be subject to an uplift of 20 per cent.