

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 5908/19
Applicant: Carmel Anne Bright
First Respondent: St Joseph's Cowper Incorporated
Second Respondent: St Joseph's Cowper Limited
Date of Determination: 24 March 2020
Citation: [2020] NSWCC 87

The Commission determines:

1. The respondent is to pay the applicant weekly compensation pursuant to section 38A of the *Workers Compensation Act 1987*:
 - (a) from 12 March 2016 to 30 March 2016 at the rate of \$788.32;
 - (b) from 1 April 2016 to 30 September 2016 at the rate of \$793, and
 - (c) from 1 October 2016 to 4 December 2016 at the rate of \$796.

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

Josephine Bamber
Senior Arbitrator

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

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Carmel Anne Bright commenced work with the second respondent in 2003 as a care worker for children with special needs. On 27 August 2011, in the course of her employment she was trying to stop a child throwing something in her face, when the child pulled Ms Bright's left arm backwards causing injury to her left shoulder. After physiotherapy treatment Ms Bright says the pain in her left shoulder went away and she made a complete recovery. She did not take time off work.
2. On 12 March 2016, in the course of her employment she had to separate two teenage girls who were fighting in the kitchen of Trenayr Close House. She pulled them apart and then experienced very severe pain in her left shoulder. She reported this injury the same day. She continued to work and obtained medical treatment and says she still had pain in her left shoulder and her neck also started to be painful.
3. In the 12 months prior to 12 March 2016, she worked on average 30 hours per week with an additional 15-20 hours per week as a support worker.
4. On 9 June 2016, she was again attacked by an aggressive child in the course of her work and in defending herself she felt a significant increase in the pain in her left shoulder and neck. She reported this injury and had medical treatment. On 26 September 2016, Dr Jovanovic, orthopaedic surgeon, recommended she have surgery to repair her left shoulder. This was approved by the respondents' insurer, Catholic Churches Insurance (CCI), but after they obtained a medico-legal opinion from Dr Hitchen CCI refused to pay for the shoulder surgery.
5. Ms Bright says because of the continuing pain she was having she decided nonetheless to proceed privately with the surgery. She attended Baringa Private Hospital on 5 December 2016, however, the surgery did not in fact take place because there were severe complications from the administration of a spinal block by the anaesthetist. Because of these complications Ms Bright was transferred to the Coffs Harbour Health Campus and discharged from there on 17 December 2016.
6. In prior proceedings before the Commission, matter 6421/18, Arbitrator Egan found Ms Bright had the following injuries:
 - (a) A partial thickness tear and tendinopathy of the left supraspinatus in the incident on 27 August 2011;
 - (b) A tendinosis and a full thickness tear of the left supraspinatus and subacromial bursitis in the incident on 12 March 2016, and
 - (c) Symptomatic aggravation in the left shoulder on 9 June 2016.
7. Arbitrator Egan found that the proposed left shoulder surgery planned to occur on 5 December 2016 was reasonably necessary as a result of one or more of the work-related injuries and that the respondents remain liable to pay compensation in respect of the abovementioned injuries and from the neurological and psychological effects of the proposed surgery on 5 December 2016. He made a referral to an Approved Medical Specialist (AMS) for the permanent impairment to be assessed.
8. Ms Bright was assessed by AMS Dr Fitzsimmons who diagnosed that she suffered,

"Central nervous system injury due to subarachnoid injection of local anaesthetic. This followed the described incident with loss of consciousness and dilated pupils after the injection of local anaesthetic via an injection which pierced the dura."

9. Approved Medical Specialist Dr Fitzsimmons identified a raft of impairments including cognitive, emotional/ behavioural disorders due to brain injury, speech, station and gait, and digital dexterity in the left arm. Approved Medical Specialist Dr Hope assessed impairment of the left upper extremity (shoulder). Together these assessments combined to 38% whole person impairment (WPI)¹.
10. Arbitrator Egan also found that Ms Bright had no current work capacity at all times since 5 December 2016 and the parties filed consent orders to give effect to the decision², with weekly compensation to be paid by the respondents from that date on a continuing basis. In that matter the weekly payments were only claimed from 5 December 2016³.

ISSUES IN DISPUTE

11. In the present proceedings, Ms Bright claims weekly compensation for a closed period from 12 March 2016 to 4 December 2016 pursuant to section 38A of the *Workers Compensation Act 1987* (the 1987 Act). The respondent disputes Ms Bright's entitlement to weekly compensation because Ms Bright remained in employment and had no loss of earnings in this period. The respondent asserts she was fit to work in her pre-injury employment in this period and therefore it argues that she has no entitlement to compensation under section 38A. Ms Bright's case is that she was not fit to perform all of her pre-injury duties in this period. Both parties agree the principles to be applied are that found by the Court of Appeal in *Hee v State Transit Authority of New South Wales*⁴, but they take differing views as to the factual findings which they contend should be made in Ms Bright's matter about her ability to perform pre-injury employment.
12. The other issue in the matter is whether the decision of Acting Deputy President Geoffrey Parker SC in *Melides v Meat Carter Pty Limited*⁵ is correct. The respondent argues that decision was wrongly decided but acknowledges that I am bound to follow it. An appeal to the Court of Appeal has been filed in *Melides* but not yet heard. In *Melides* it was found that the entitlement to the special payment under section 38A of the 1987 Act arises at the time of the date of injury⁶. It was noted in *Melides* at [44] that section 38A operates from 4 December 2015. In the present proceedings Ms Bright seeks payment under section 38A from 12 March 2016 to 4 December 2016.

PROCEDURE BEFORE THE COMMISSION

13. This matter was listed for conciliation conference/arbitration hearing at Coffs Harbour on 26 February 2020. Mr Michael Inglis, counsel, instructed by Mr William Langler, solicitor, appeared for Ms Bright. Ms Bright was excused from attendance. Mr Thomas Murray, solicitor, appeared for the respondent.
14. 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.

¹ ARD pp71-81

² ARD p64

³ ARD p35, para 9 (e)

⁴ [2019] NSWCA 175, *Hee*

⁵ [2019] NSWCCPD 48, *Melides*

⁶ *Melides* at [51]

EVIDENCE

Documentary Evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (ARD) and attached documents;
 - (b) Reply and attached documents, and
 - (c) Application to Admit Late Documents dated 6 February 2020 filed by Ms Bright.

Oral Evidence

16. There was no oral evidence. Both legal representatives made oral submissions which were sound recorded. A copy of the recording is available to the parties.

FINDINGS AND REASONS

17. The evidence relevant to Ms Bright's capacity for employment in the period claimed is summarised below.

Ms Bright's statements

18. Ms Bright has provided statements dated 5 December 2018 and 30 October 2019. She relates her work experience and qualifications and describes her work with the respondents. She worked as a care worker for children with special needs and as a support worker.
19. Ms Bright describes the injury she sustained to her left shoulder on 27 August 2011. She describes attending her doctor, having x-rays and physiotherapy treatment. She says she did not take time off work and after about three months the pain in her left shoulder went away and she had a complete recovery. She also refers to experiencing pain in her right elbow in December 2012, but she says she made a full recovery from both of these incidents and she did her normal work with the second respondent.
20. On 12 March 2016 Ms Bright sustained injury to her left shoulder when she attempted to de-escalate a fight between two teenage girls. She says her shoulder became increasingly painful over the following two weeks although she continued to work. She attended upon her general practitioner, Dr Maggie Simpson, on 24 March 2016. Ms Bright states she was having difficulty using her left arm and her left shoulder had very limited movement. She says the pain disturbed her sleep.
21. Ms Bright completed a worker's compensation claim form on 29 March 2016. The insurer accepted her claim and paid for physiotherapy and attendances on her general practitioner. She says she continued to work after she had made her claim. She states at [26] of her first statement:

"I was still in pain with my left shoulder and my neck also started to become painful. My employer did not require me to do the more physical aspects of my job because of my left shoulder problems."

22. Ms Bright says she had a cortisone injection in early April into her left shoulder, but it had not worked. She saw Dr Simpson again on 20 May 2016 regarding her problems with her left shoulder. She was having a lot of difficulty sleeping and the pain in her shoulder was waking her at night. She states, despite physiotherapy treatment, she was not getting better and she was still in a lot of pain.
23. Ms Bright relates a further incident in June 2016 when working with an aggressive child she felt increased pain in her left shoulder and neck. She reported this injury. In her statement Ms Bright relates the treatment and investigations that were undertaken for her left shoulder and neck. She states there had been no improvement in pain and on 23 August 2016 Dr Simpson referred her to see Dr Jovanovic, orthopaedic surgeon. Ms Bright says she saw that doctor on 26 September 2016 and he recommended surgery to the left shoulder.
24. Ms Bright attended Baringa Private Hospital on 5 December 2016, however the surgery did not in fact take place because there were severe complications from the administration of a spinal block by the anaesthetist. Ms Bright was transferred to the Coffs Harbour Health Campus and discharged from there on 17 December 2016.
25. Ms Bright relates the symptoms and disabilities she has suffered after this anaesthetic was administered. It is not necessary for me to list these in my Reasons because the period for which the section 38A payment is claimed is from 12 March to 4 December 2016.
26. It is common ground that Ms Bright has been assessed as having 38% WPI and is a person with "highest needs", because she satisfies the requirement in section 32A (a) of the 1987 Act.
27. In her second statement Ms Bright describes in more detail her incapacity for work between 12 March 2016 and 5 December 2016. At [8] she states:

"however my capacity to work was limited due to my work injury. My left shoulder caused me a lot of pain. I could not lift things with my left arm or raise my arm above my head. I was not fit to deal with the physical aspects of my job such as handling children under our care who were prone to violent outbursts."
28. At [11] she states:

"Due to my ongoing pain and restrictions, the Respondent did not require me to do these more physical aspects of my job."
29. Ms Bright's counsel relied upon these statements from Ms Bright to support his submission that while she was able to return to work she could not perform all of her pre-injury duties. He submitted that the respondents had called no evidence to counter Ms Bright's evidence that the respondent did not require her to do the more physical aspects of the work.
30. Ms Bright says she was experiencing pain in her left shoulder and neck daily and "it was becoming more and more difficult to carry out my job and that is why I decided to have the surgery."
31. Mr Stan Bright and Ms Bianca Bright have provided statements. They are Ms Bright's husband and daughter. They deal with the change in Ms Bright before and after 5 December 2016. But as their statements do not deal, in any degree of detail, with Ms Bright's work capacity in the period claimed, they are of limited probative weight in relation to the issues in dispute.

General Practitioner

32. The records from Ms Bright's general practitioner are in the ARD. Dr Simpson records on 24 March 2016 that Ms Bright injured her left shoulder at work three weeks ago and that since then she has a painful arc, reduced range of motion and is not able to sleep on it at night⁷. The doctor gave her a referral for an ultrasound guided injection of steroid into her left shoulder. On 30 March 2016, Dr Simpson records that Ms Bright had the injection that day and noted she had been "working all along despite her injury, has had no issues."⁸ On 20 May 2016, Dr Simpson records that Ms Bright still has pain in her left shoulder that keeps her awake at night. The doctor notes that the steroid injection did not help her that well⁹.
33. On 20 June 2016, Dr Thakur recorded that Ms Bright's left shoulder bursitis was getting worse and that she had been having physiotherapy. She was given a trial of Celebrex and told if this was not effective she should take Mobic.
34. On 18 July 2016, Dr Simpson recorded that Ms Bright had ongoing left shoulder pain with involvement of the C5/6 dermatome, which was keeping her awake at night. An MRI and specialist referral was issued. Lyrica was prescribed.
35. On 23 August 2016, Dr Simpson noted that despite ongoing physiotherapy there was not much improvement with her pains although she does get some temporary relief. She also recorded that the MRI scan of Ms Bright's left shoulder showed tendinosis, labrum tear and bursitis¹⁰.
36. On 30 August 2016, Dr Simpson records that Dr Ian Smith rang her to enquire when Ms Bright could function independently again. Dr Simpson records:
- "I explained that as far as I know she is working independently and doing her pre-injury duties, however she does have ongoing pain issues restricting abduction and lifting for which I have referred her to an orthopaedic surgeon for assessment and treatment advice."¹¹
37. Dr Simpson issued various WorkCover NSW- certificates of capacity in the period for which payment under section 38A is sought, such as on 30 March 2016¹², 20 May 2016, 18 July 2016, 23 August 2016¹³ and 21 October 2016¹⁴. These certify Ms Bright fit for pre-injury duties. The part of the form about restrictions is not completed, but Dr Simpson has included details about the treatment she was recommending and in the diagnosis part of the form does refer to Ms Bright experiencing pain in the left shoulder since the injury in 2016.
38. Dr Simpson was sent a questionnaire by Phoebe Jiang from the insurer on 4 April 2016. The doctor responded possibly on 5 April 2016, although the date is unclear¹⁵. Dr Simpson advised that Ms Bright is already back to pre-injury duties.

⁷ ARD p 135.

⁸ ARD p 136

⁹ ARD p137.

¹⁰ ARD p140.

¹¹ ARD p141.

¹² ARD p142.

¹³ ARD p152.

¹⁴ ARD p156.

¹⁵ Reply pp 12-13.

Physiotherapist

39. Veronica Barker is Ms Bright's physiotherapist. In the Late Documents are four reports from her dated 5 June, 18 July, 10 August and 20 September 2016 and her clinical records. The first report records in detail Ms Bright's subjective complaints such as that she "cannot move arm to the horizontal extension or abduction or HBB without a block and pain 7/10 NAS". She also records that pain at night wakes her up and that Ms Bright cannot lie on her left side. Ms Barker records her objective findings on examination and while some of the abbreviations used are not explained it is apparent there were issues with shoulder mobility. Ms Barker considered she needed eight sessions over a three-month period to strengthen her left shoulder rotator cuff to return to normal function. She stated that Ms Bright had an intra substance tear of the supraspinatus tendon which required a graduated strength program.
40. In the report dated 18 July 2016, Ms Barker noted the left arm pain prohibits Ms Bright from using her dominant left arm. She also advised because Ms Bright had continued to work she had a further incident at work involving the left arm and it was more difficult to settle the nerve pain. It was noted that Ms Bright wanted to keep working and the physiotherapist encouraged her to do so because she says Ms Bright was not getting worse and she has a couple of days post treatment where the arm feels good.¹⁶
41. In the August report, Ms Barker says that Ms Bright did not have physiotherapy treatment for 12 days and they both noticed a significant restriction to the use of her left arm and increased pain.
42. In the last report, Ms Barker noted that initially Ms Bright was complaining of pain and dysfunction in the left shoulder with incapacity to lift her arm past 40 degrees. Ms Barker concludes by noting that Ms Bright needs to have an ongoing strength program for the supraspinatus tendon in order to reach full functional capacity. In the preceding paragraph she recorded that Ms Bright's symptoms would respond to manual physiotherapy in the short term and taping of the scapula was significant in reducing her pain, however her exercises could not be progressed as expected over the three-month period. She says that Ms Bright's strength capacity was not tested in the workplace as Ms Bright was enjoying the reduction in pain and did not want to flare her shoulder up before she saw the shoulder surgeon. Ms Barker advises that she had not been able to progress Ms Bright's strength exercises at shoulder height or above due to limitations in shoulder range and pain.
43. In Ms Barker's clinical notes, she records on 6 July 2016 that Ms Bright was good post treatment for 24 hours then the shoulder pains returned with abduction and that she notices it particularly if she has to do a quick movement, then the shoulder/upper arm can be sore for a few hours. Ms Barker also noted that if Ms Bright's condition had flared up and then the exercises tend to aggravate, not relieve her symptoms. In the note for 18 August 2016 it was recorded that Ms Bright was not lifting with her left arm unless under 5kg. It is recorded that Ms Bright had pain during the day and intermittently at night, and also that she was dropping objects¹⁷.
44. In the consultation note for 29 August 2016, it is recorded "working PPT 3 shifts- not doing anything she does not have to do, farm: similar work as in the past, not lifting heavy"¹⁸.

¹⁶ Late Documents p16.

¹⁷ Late Documents p21.

¹⁸ Late Documents p22.

45. In an Allied Health Request form completed by Ms Barker, there is reference to “Lifting capacity 5kg (10kg one off lifts), intermittent P+N along C6/7 dermatome, night pain, disturbed sleep intermittent; eased with med.” On the second page of this document are entries completed under each column. The handwriting is hard to read but it is clear that Ms Barker was documenting restrictions experienced by Ms Bright with her left arm. It was noted she was doing limited duties and had restricted lifting and reaching on the initial assessment and that she was unable to use the left arm normally. In the right column for the current assessment it was noted there was no change since starting the treatment with only short-term benefit¹⁹.
46. In the consultation note for 26 October 2016, Ms Barker noted that Ms Bright had been overseas in New Zealand relaxing and therefore her arm was not as sore but since she returned to work doing three shifts she was a little bit sore and had limited movement in certain positions. It was also noted that the pain returns if she is off medications. It was also recorded that she tries to soldier on through the pain and she was keen for an operation²⁰.

Dr Hitchen

47. Dr Hitchen is an orthopaedic surgeon qualified by the respondents’ insurer who has provided a report dated 8 November 2016. In his history he records,

“In the months that followed Mrs Bright states that she continued to work on normal duties, but through negotiation with her employer was given individuals to look after that did not require lifting or the potential for pushing or pulling. For example she was not rostered on to look after young children...

As the months went by Mrs Bright states that her shoulder symptoms persisted. She has pain travelling down the lateral border of the arm towards but not beyond the elbow. This worsens with sudden reaching activity, overhead movement and at night.”

48. Dr Hitchen accepted that Ms Bright had a mild impingement syndrome secondary to rotator cuff dysfunction. In his supplementary report dated 10 July 2018 Dr Hitchen described Ms Bright’s injury as a soft tissue injury to her shoulder. In a further report dated 2 October 2018 Dr Hitchen expresses the view that with respect to the shoulder he believes she would be physically fit to work as a direct care worker in a group home, although he thought her permanently unfit for work due to the sequelae of the anaesthetic procedure. Dr Hitchen’s opinion regarding causation was not accepted by Arbitrator Egan so I have not summarised in more detail his views about causation.

Dr Smith

49. Dr Ian Smith is the respondents’ insurer’s injury management consultant who has provided a report following his assessment on 30 August 2016²¹. He did not examine Ms Bright but sent Dr Simpson a questionnaire and it appears he spoke to Dr Simpson. In his report he notes that Dr Simpson was unsure if the 2016 injury was a new injury or aggravation of the 2011 injury. Dr Smith states that Dr Simpson indicated that the main issue was pain rather than specifically limited movement. She was unsure if Ms Bright had impingement or not. Dr Smith advised the insurer that until a report was available from the treating shoulder surgeon he regarded Ms Bright’s condition as an aggravation of the previous injury. Dr Smith says that Dr Simpson was happy in the meantime for Ms Bright to continue to undertake her normal duties. Dr Simpson’s note about this conversation is referred to above and seems to acknowledge that Ms Bright had pain issues restricting abduction and lifting.

¹⁹ Late Documents pp24-25.

²⁰ Late Documents p28.

²¹ Reply p9.

Dr Machart

50. Dr Machart is an orthopaedic surgeon who has been qualified by Ms Bright's solicitors to provide a medico-legal opinion. He states "Before the anaesthetic, she found it difficult to drive or lift anything heavy, or throw a ball.²²" Dr Machart also found that she is left with impingement symptoms in the left shoulder. He opines that "from the point of view of the shoulder injury alone, she would be able to work with some difficulties, unable to lift anything heavy or overhead²³." Dr Machart stated that the left shoulder injury was a structural injury of rotator cuff disruption. He related this to the March 2016 injury.

Dr Milder

51. Dr Milder is a neurosurgeon who has provided a medico-legal report dated 13 June 2017 for Ms Bright. His report deals mainly with the effects of the anaesthetic and the resultant brain damage. However, he does note that Ms Bright continues to suffer pain and restriction of movement at the left shoulder.

Ms Bright's submissions

52. Ms Bright's counsel submitted that the grounds given by the insurer in its section 78 notice were based on the fact that she had returned to pre-injury duties after the injury on 12 March 2016. He submitted that the medical evidence does not support such a finding. Counsel argued that the medical certificates from Dr Simpson, stating Ms Bright is fit for pre-injury duties, are not reliable or persuasive when one looks at all of the material before the Commission. Counsel relied heavily on Ms Bright's statement at [26] where she stated that her employer did not require her to do the more physical aspects of her job due to her left shoulder problems²⁴. Counsel also drew attention to Ms Bright's second statement at [8] where she explained that her capacity to work was limited as she could not lift with her left arm and raise it above her head. Counsel also referred to her statement at [11] that she was not able to deal with the physical aspects of the job such as dealing with violent outbursts by children.
53. Ms Bright's counsel submitted that these statements about her work after the injury on 12 March 2016 have not been challenged by the respondents.
54. Counsel also submitted that if one looks at the ongoing treatment between March and December 2016 the Commission would understand and find that Ms Bright had difficulty doing the heavy aspects of her job.
55. In relation to the report of Dr Smith, Ms Bright's counsel argued weight should not be given to it because Dr Smith had not examined Ms Bright and the actual clinical notes of Dr Simpson record more details about the conversation with Dr Smith, in particular that she had problems lifting and needed a referral to an orthopaedic surgeon. It was argued that Dr Simpson's consultation notes are consistent with Ms Bright's statements that she could not do all the physical aspects of her job.
56. It was submitted that the medical certificates issued by the general practitioner dealt mainly with the treatment that was being given to Ms Bright, as there was no claim at the time for weekly compensation. It was submitted that the doctor assumed she was doing pre-injury duties. Counsel submitted that more weight should be given to the actual consultation notes. Also, counsel relied upon the physiotherapist reports and clinical records. It was noted that at the first visit Ms Bright gave a history about difficulty with movement of her left arm. It was submitted that this is significant when it is borne in mind that Ms Bright is left hand dominant.

²² ARD p97.

²³ ARD p99.

²⁴ ARD p13.

57. Counsel referred in detail to the handwritten Allied Health Report referring to lifting capacity restriction and fluctuating range of motion. Counsel submitted that this report was consistent with Ms Bright's statements and the medical evidence, to lead to the conclusion that Ms Bright could not perform her normal duties.
58. Ms Bright's counsel submitted that such a factual finding should be made and that, following the decision in *Melides*, an award should be entered in favour of Ms Bright under section 38A of the 1987 Act at the rates claimed in the ARD from the date of injury.

Respondents submissions

59. The respondents' solicitor submitted that *Melides* was wrongly decided and the date for any award under section 38A should commence on the date that a worker is assessed as having highest needs. It was argued that the facts in Ms Bright's case differ to those in *Melides* because Ms Bright has permanent impairment of the left shoulder of only 10% and that it was only following the surgical incident that she attained 38% WPI. It was noted that the surgical incident took place after the period for which section 38A benefits are claimed.
60. The respondents' solicitor did concede at the outset that as an Arbitrator of the Commission, I am bound to follow the decision of the Acting Deputy President of the Commission in *Melides*.
61. The second submission of the respondents' solicitor was that Ms Bright cannot discharge her onus of proof regarding her physical restrictions. He stated that no doubt she had pain and restricted range of motion, but the respondents' submitted that it was inconsequential. It was submitted that her evidence needs to be discounted as it is a medical question. It was argued that even if the Commission accepts that Ms Bright did not do a full range of duties this was based on a lay discussion, presumably a reference to a discussion with her employer. It was submitted that this was not based on a medical assessment. The respondents submitted that *Hee* referred to a medical question, what the worker was able to do.
62. The respondents relied on the medical certificates as they certified Ms Bright as fit for pre-injury duties. It was argued that Dr Simpson could have placed restrictions on Ms Bright, but did not do so. It was argued that Dr Simpson, as the treating general practitioner, is the primary treater and on every certificate she put fit for pre-injury duties. It was submitted that there was no report from Dr Simpson to deal with the certificates and it was argued that if it was being put that the certificates are not a true reflection of Ms Bright's capacity, then there should be a *Jones v Dunke*²⁵ inference drawn.
63. The respondents also argued that the NSW WorkCover -certificates of capacity should be preferred over the clinical notes and reports from the physiotherapist. The respondent noted that Dr Machart at page 96 of the ARD had stated that Ms Bright was working in her usual capacity until 5 December 2016. It was also argued that Ms Bright's statements were not contemporaneous with the period claimed. For all of these reasons the respondents submitted there should be an award for the respondents.

Ms Bright's submissions in reply

64. It was submitted that the treating doctor does not record a clear history of Ms Bright's duties and so her certificates are drawn from her understanding that Ms Bright had return to pre-injury duties. However, counsel submitted there is no reason to doubt Ms Bright's account of what her duties actually entailed and her restrictions after the injury on 12 March 2016.

²⁵ (1959) 101 CLR 298.

Determination

65. In *Hee*, Justice White states at [60],

“I accept that if a worker returns to work for his or her employer, but is not able to perform all of his or her duties, or is not able to perform all of his or her duties as fully as he or she were able to do before the injury, then that worker is not able “to return to his or her pre-injury employment” within the definitions of “current work capacity” and “no current work capacity” in s 32A.”

66. Justice White refers to section 33 and to section 35(2) of the 1987 Act. At [89], he states that “A zero amount can be the amount of weekly compensation “payable” under s33 if the worker is not entitled to weekly compensation under s36 or 37. That is less than \$788.32.” White JA points to some anomalous results in the operation of section 38A but says re-writing of section 38A is beyond the literal scope of judicial interpretation.

67. In Ms Bright’s case, the period for which benefits are sought under section 38A is from 12 March 2016 to 4 December 2016. In that period Ms Bright had returned to work for the respondents. It is common ground that she suffered no wage loss. However, the issue as described by Justice White at [90] is whether Ms Bright was not able to return to her full duties to the same extent as she had been able to perform them before her injury. If so, then the compensation that would have been payable to Ms Bright under sections 36 and 37 of the 1987 Act would have been less than zero. The respondents’ solicitor agreed that if I determined the issues in dispute in favour of Ms Bright, then the amounts set out in the ARD were correct. These are from 12 March 2016 to 30 March 2016 \$788.32, 1 April 2016 to 30 September 2016 \$793 and from 1 October 2016 to 4 December 2016 \$796 per week.

68. I consider I am bound to follow *Melides* and therefore Ms Bright can seek section 38A benefits in the period claimed even though this period is before the AMS’s assessment of 38% WPI.

69. I also find that Ms Bright was not able to perform her pre-injury duties to the same extent as she had been able to perform them before her injury on 12 March 2016. I find the evidence overwhelming supports such a conclusion. While I accept Ms Bright cannot provide a medical opinion about her own condition, she can give factual evidence as to what duties she could perform before her injury and what she could no longer perform after the injury. She identifies physical restrictions such as lifting and using her left arm above her head. These complaints are consistent with the weight of medical evidence as having been caused by the injury to her left shoulder.

70. I find the physiotherapist’s records provide a valuable insight into the complaints made by Ms Bright and to the objective observations and examination results of Ms Barker. The physiotherapist notes cover most of the period that is the subject of the claim. They are quite detailed. For instance, the Allied Health report was the subject of much discussion at the Arbitration Hearing as the parties and I read the same to decipher the handwriting. The note clearly referred to a restriction for lifting capacity of 5kg, with one off lifts at 10kg. There was also references to reduced range of motion in Ms Bright’s left shoulder.

71. The high point of the respondents’ case is the WorkCover Medical Certificates issued by Dr Simpson. However, I find that when one carefully examines her other clinical records it seems apparent that she has not attempted on the certificates to record the restrictions Ms Bright was experiencing performing her work for the respondents. I find the following entry particularly revealing:

“I explained that as far as I know she is working independently and doing her pre-injury duties, however she does have ongoing pain issues restricting abduction and lifting for which I have referred her to an orthopaedic surgeon for assessment and treatment advice.²⁶”

72. To my mind this illustrates that Dr Simpson, when she refers to pre-injury duties, does not actually mean that Ms Bright could perform her duties to the same extent as she did before her injury. Therefore, I find that one cannot simply rely upon the WorkCover certificates of capacity because they do not tell the whole story or provide a complete medical assessment of Ms Bright’s ability to work in the period claimed.
73. The above quote is Dr Simpson’s record of the conversation with Dr Smith. I find that one cannot rely on Dr Smith’s assessment because firstly he did not examine Ms Bright and secondly he does not seem to have noted the restrictions that Dr Simpson recorded.
74. The respondents’ relied on Dr Machart’s history in his report dated 21 February 2017 that Ms Bright continued to work in her usual capacity until the time of the proposed operation. However, that overlooks the comment in the next paragraph of that report. The Doctor says before the anaesthetic she found it difficult to drive or lift anything heavy. Dr Machart found positive impingement signs in the left shoulder and problems with abduction. I find that this assessment is consistent with the issues noted by the physiotherapist throughout the period in question and consistent with the clinical notes of Dr Simpson. I am satisfied that this medical evidence does support the assertions made by Ms Bright in her statements, which have not been contradicted by any factual evidence from the employer about her altered work duties. I find Ms Bright to be a creditable witness and clearly she was a keen worker to persevere so long with her shoulder symptoms.
75. I have recorded above the history taken by Dr Hitchen, he notes that she continued to work on normal duties, but through negotiation with her employer was given individuals to look after that did not require lifting or the potential for pushing or pulling. Dr Hitchen gives the example that she was not rostered on to look after young children. Dr Hitchen does not express the view that such restrictions were unnecessary. His main issue was with causation. I have not found his reports to be of assistance to determine the issue in dispute in this matter and I prefer the evidence of Ms Barker, Dr Simpson and Dr Machart because, when carefully considered together, they provide cogent evidence of the fact that Ms Bright, while she had returned to work with the respondents, she was not able to perform her pre-injury duties to the same extent as she had before the injury.
76. Therefore, I find that Ms Bright has established an entitlement under section 38A. An assessment in the period claimed under sections 36 and 37 of the 1987 Act would have amounted to zero as she was paid her normal wage. So, following the reasoning of the majority in *Hee* Ms Bright is entitled to section 38A special benefits from 12 March 2016 to 4 December 2016 at the rates referred to above.

²⁶ ARD p141.