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**ISSUE NUMBER 61**

**Bulletin of the Workers Compensation Independent Review Office (WIRO)**

# CASE REVIEWS

**Recent Cases**

*These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions.*

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## Court of Appeal Decisions

### *Section 4 (b) (ii) WCA - Predisposition to Bipolar disorder is not a disease that can be aggravated, accelerated, exacerbated or deteriorated during employment – Appeal dismissed*

**Booth v Fourmeninapub Pty Ltd [2020] NSWCA 57 – Bell P, Leeming JA & White JA – 2/04/2020**

The decision of President Phillips was reported in Bulletin no. 35 - *Fourmeninapub Pty Ltd v Booth* [2019] NSWWCCPD 25. The Court summarised the facts and issues as follows:

The appellant suffered a primary psychological injury, which manifested as Post Traumatic Stress Disorder, as a result of a traumatic incident that she witnessed at work in November 2002. She ceased work at the end of that month. About 2 years later, Bipolar Disorder manifested in the appellant. It was not disputed that she had a genetic predisposition to Bipolar Disorder. In April 2018, the appellant claimed lump sum compensation for psychological injuries that included Bipolar Disorder and she relied upon an opinion from a consultant psychiatrist, who stated that she "*was psychiatrically well prior to the [traumatic incident]*" and that her "*Bipolar Affective Disorder was not a pre-existing illness*". The insurer disputed the claim.

In July 2018, the appellant made another claim and relied upon a further report from the same consultant psychiatrist, in which he opined that some aspect of the consequences or treatment flowing from the work incident had aggravated, accelerated and/or exacerbated an underlying Bipolar Disorder. The question and answer used the words used in the definition of "*injury*" in s 4 (b) (ii) *WCA.*

The insurer disputed the claim, partly on the basis that it was not possible to aggravate, accelerate and/or exacerbate a predisposition to a disorder, and as the Bipolar Disorder itself did not exist until some two years after the work incident, the most that could be said was that the appellant had a predisposition to the disorder during her employment.

The appellant commenced proceedings in the Commission and an Arbitrator determined the dispute in her favour and found that the consultant psychiatrist's report formed a proper basis to conclude that the Bipolar Disorder was a "*disease*" and that employment contributed to the disease's "*aggravation, acceleration, exacerbation or deterioration*" within the meaning of s 4 (b) (ii) *WCA.*

The respondent appealed and ***President Phillips*** held that it was not open to the Arbitrator to find that the appellant suffered a disease within the meaning of s 4 (b) (ii) *WCA.*

The worker appealed to the Court of Appeal as of right, but confined to "*in point of law*", under s 353 *WIMA*. On appeal, she applied to adduce further evidence on the understanding of genetic predispositions to disease, in the form of a report of a clinical geneticist. The issues in the appeal were:

(1) Whether there were "*special grounds*" for receiving further evidence on appeal as required by s 75A (8) of the *Supreme Court Act 1970 (NSW).*

(2) Whether the President erred in point of law in failing to give effect to the expert opinion in the second report of the consultant psychiatrist that the appellant suffered an "*underlying disease condition*" for the purposes of s 4 (b) (ii) *WCA*.

(3) Whether the President erred in point of law in finding that the appellant's genetic predisposition to Bipolar Disorder was not a "*disease*" such as to engage the definition of "*injury*" in s 4 (b) (ii) *WCA.*

**The Court dismissed the Appeal.**

**In relation to issue (1), Leeming JA (Bell P & White JA agreeing)** held:

1. The principles governing the discretion to receive further evidence on appeal are not formulated as crisply dispositive rules. However, there are two generally applicable preconditions to the exercise of the power, namely, that the evidence could not have been obtained without reasonable diligence at trial and must be such that there is a high degree of probability that there would be a different outcome: at [25].

   *Akins v National Australia Bank* (1994) 34 NSWLR 155; *Searle v Commonwealth of Australia* (2019) 100 NSWLR 55; [2019] NSWCA 127 referred to and applied.

2. The appellant had not established that the evidence in respect of the understanding of genetic predispositions to disease could not have been obtained with reasonable diligence for use in the proceedings in the Workers Compensation Commission, in circumstances where the insurer had maintained prior to commencement of those proceedings that a mere predisposition could not be aggravated, accelerated, exacerbated or deteriorated in the requisite sense: at [26]-[27].

3. The appellant had not established that the further expert evidence would assist in identifying that the decision of the President made in the absence of that evidence was wrong in point of law: at [28]-[30].

   *Pacific National Pty Ltd v Baldacchino* [2018] NSWCA 281 referred to.

**In relation to issue (2), Leeming JA (Bell P & White JA agreeing) held:**

4. The President correctly construed the report of the consultant psychiatrist, and no error in point of law was made out: at [47]-[48]. Nothing in the report suggested any process of reasoning in support of the conclusion that a genetic predisposition was a disease; rather, the report was directed to the possibility that the work incident or its consequences led to the development of Bipolar Disorder in circumstances where the appellant was genetically predisposed to that condition: at [46].

5. In construing the report, the President had not discounted unchallenged expert evidence but rather identified what that evidence was: at [44].

   *Rodriguez v Telstra Corp Ltd* [2002] FCA 30; 66 ALD 579 referred to.

**In relation to issue (3), Leeming JA (Bell P & White JA agreeing) held:**

6. The two limbs in the definition of "*injury*" in s 4 (b) of the *Workers Compensation Act 1987 (NSW)* are distinct. Where the first limb applies, the worker will not previously have had the relevant disease; where the second limb applies, the worker will previously have had the disease, but there will have been an aggravation, acceleration, exacerbation or deterioration of the disease to which the employment contributed: at [52]-[53].

   *Asioty v Canberra Abattoir Pty Ltd* (1989) 167 CLR 533; [1989] HCA 40 applied.

7. Predisposition to a disease is a term used in contradistinction to having a disease. A predisposition means merely that there is potential for future morbidity and the fact that a person is more likely eventually to suffer from a disease does not mean that the person has the disease: at [51], [54]. A genetic predisposition is not an abnormal physical or mental condition such as to constitute a "*disease*": at [57].

   *Commissioner for Railways v Bain* (1965) 112 CLR 246; [1965] HCA 5 applied.

## WCC – Presidential Decisions

### *Section 82A WCA – indexation of PIAWE before 1/04/2013 where injury pre-dated enactment of s 82A WCA*

**Theoret v Aces Incorporated [2020] NSWWCCPD 18 – Deputy President Wood – 25/03/2020**

On 23/12/2002, the appellant suffered facial, dental and neck injuries at work. Liability was accepted and the appellant received weekly payments from June 2004. On 1/04/2018, the insurer made a WCD that the appellant's PIAWE was $407.42 and it maintained that WCD following an internal review. The appellant applied for a Merits Review and on 14/08/2018, MRS confirmed that PIAWE was $407.42, which was indexed under s 82A *WCA* from 1/04/2013, to arrive at a figure of $458 as at 1/04/2018.

On 3/04/2019, the insurer issued a s 78 notice, stating that it assessed the appellant as having no current work capacity, but that it had decided that PIAWE, as indexed under s 82A, was $466 and that she was entitled to weekly payments under s 37 *WCA* at the rate of $372.80 per week.

On 24/07/2019, the appellant's solicitors challenged the PIAWE calculation and asserted that indexation should apply from the date that the appellant first received compensation (assumed to be in 2002) and that PIAWE should have been $690.19. The insurer disputed that indexation commenced from the date that compensation was first paid.

During a teleconference on 9/10/2019, ***Arbitrator Harris*** drew the parties' attention to his decision in *Thompson v ATN Channel 7 (No. 2)* [2017] NSWWCC 269 (*Thompson*). He directed them to file written submissions, after which he would determine the dispute on the papers.

On 6/11/2019, the Arbitrator issued a COD, which declined to index PIAWE prior to 1/04/2013. However, the appellant appealed against that determination.

***Deputy President Wood*** identified the issue for determination as whether PIAWE should be indexed from the date the appellant began receiving weekly payments or from 1 April 2013 (the first review date on which the PIAWE was to be indexed after s 82A *WCA* commenced). She determined the appeal on the papers.

The appellant argued that the Arbitrator erred in not accepting her arguments that s 82A *WCA* is retrospective in the sense identified by the High Court in *Goudappel* and she cited the following passage from the judgment of Gageler J at [48]:

> Secondly, a provision of a regulation might be said to have retrospective operation if, and to the extent that, the regulation operates to alter rights or liabilities which have already come into existence by operation of prior law on past events. The potential for a regulation to have retrospective operation in that substantive sense is affected in part by s 30 of the *Interpretation Act* and in part by the '*general rule of the common law*' stated by Dixon CJ in *Maxwell v Murphy*.

Wood DP noted that Dixon CJ expressed the rule of common law as follows:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.

Section 30 of the *Interpretation Act 1987* provides that an amendment to an Act does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act unless the contrary intention appears. The Arbitrator reasoned that s 82A did not affect the appellant's weekly entitlement until the date of its commencement – 1/10/2012 and Wood DP upheld his approach and reasoning process in construing s 82A *WCA.* She stated:

> 91. Section 82A (1) provides a formula for the calculation of the indexation of the worker's weekly payment, where "*A*" is the worker's PIAWE or if the amount was varied "***in accordance with this section, that amount as last so varied***" (emphasis added). Subsection (4) provides that the Authority (formerly the Minister) is to declare the number that equates to the factor B/C which is done "*for the purposes of the variation required for that review date under this section*." That is, the subsection requires the Authority to publish the declaration for the purpose of implementing the indexation of benefits. Reading the text of the provision as a whole, it is clear that the declaration made by order is a requisite element in the indexation of weekly benefits…
>
> 96. The appellant contends that the Arbitrator erred in his determination of the effect of subs (5), because subs (5) does not deem the numbers that make up the formula. The Arbitrator dealt with subs (5) in the following terms:
>
> > I accept the [appellant's] submission that s 82A (5) provides that the Authority can publish a figure after the review date and that means '*that the legislation allows for the publication of historical review dates*.' However, what the submission ignores is that the Authority, and previously the Minister, did not publish '*historical review figures*' for the period prior to 1 April 2013. Whilst such a right clearly exists under s 82A (5), it has not been exercised. The review figures specifically provide that the indexation commences on 1 April 2013…

Accordingly, Wood DP confirmed the COD.

### *Section 151D WCA – Pre-filing Statement struck out*

**State of NSW (Illawarra Shoalhaven Local Health District) v Bosevski [2020] NSWWCCPD 17 – President Judge Phillips – 25 March 2020**

In 1986, the worker commenced employment with the applicant as a carpenter/joiner. On 29/08/1006, he suffered a crush injury to his left big toe, which required partial amputation, and he also alleged consequential injuries to his back (due to altered gait), right shoulder injury, depression and brain damage.

On 20/08/2017, the worker filed an ARD that claimed lump sum compensation, s 60 expenses and domestic assistance. On 24/09/2007, the Commission issued a COD – Consent Orders, under which the applicant agreed to pay him, $36.25 per fortnight for domestic assistance, but the other claims were discontinued.

On 25/10/2017, the worker's solicitors served notice of a WIDs claim on the applicant. The letter referred to a letter dated 17/10/2017, in which the parties agreed that the worker had suffered combined 37% WPI. On 3/11/2017, the employer requested further and better particulars of the WIDs claim from the worker and he responded on 12/02/2018. On 13/04/2018, the insurer disputed liability for the claim.

On 23/05/2018, the worker served a pre-filing statement on the employer and on 6/06/2018, it filed a defence. On 22/06/2018, the worker filed an Application for Mediation with the Commission. The applicant filed a response on 11/07/2018. The claim proceeded to Mediation on 24/08/2018, but it did not resolve and a Certificate of Mediation Outcome was issued on 31/08/2018.

On 8/07/2019, the employer's solicitors sent a letter to the worker's solicitors, advising that if they did not confirm within 7 days whether the WIDs claim was withdrawn, they would apply to the Commission to have the pre-filing statement struck out. However, the worker's solicitors did not respond.

On 17/07/2019, the employer's solicitors applied to strike out the pre-filing statement. The Registrar directed the worker to file and serve a Notice of Opposition by 29/08/2019, but he did not comply. On 2/09/2019, the Commission attempted to contact his solicitors by telephone, but there was no answer, and it also sent an email to the worker's solicitor on the record. On 3/09/2019, it contacted the worker's solicitor's secretary to clarify whether the law firm was still acting for the worker. However, she replied that she was not sure whether the firm was still acting as the file had been archived. The Commission advised that it needed to know whether the worker opposed the application and the worker's solicitor's secretary said that she would bring this to his attention when he returned to the office that afternoon.

On 6/09/2019, the worker's solicitors filed a letter with the Commission, which advised that the worker did not wish to make any submissions in relation to the application. On 13/09/2019, a Senior Lawyer at the Commission emailed the worker's solicitor to ascertain whether the worker sought to file a Notice of Opposition and, if he did not intend to do so, requested the parties to file either Consent Orders or an Agreement or Election to Discontinue Proceedings. In the alternative, she requested submissions to enable the application to be determined by the President. However, the worker's solicitor did not respond.

On 27/09/2019, the Commission telephoned the worker's solicitors and was advised that the solicitor was on leave. It then sent an email to the parties advising that the worker was to provide his response to matters set out in its emails by 4/10/2019, and if no response was received, the Commission would take this to mean that he consents to the application and the President would independently consider whether the requirements for striking out the pre-filing statement were met. However, the worker's solicitors did not respond.

***President Judge Phillips*** determined the application on the papers. He noted that an employer may apply to strike out a pre-filing statement once 6 months have elapsed since it filed its pre-filing defence (s 151DA (3) *WCA*). He stated that there are no impediments to the application being determined, as since the failed mediation, the worker had taken no active steps to resolve the WIDs claim. More than 6 months have elapsed since the pre-filing defence was served and the medical evidence indicates that the degree of permanent impairment is fully ascertainable. He held that it is apparent from the worker's solicitors' communications with the Commission, that the worker has no intention of pursuing his WIDs claim and he does not oppose the current application.

Accordingly, his Honour exercised his discretion and struck out the pre-filing statement.

## WCC – Medical Appeal Decisions

### *AMS assessed condition not included in the Referral – MAC revoked*

**Secretary, Department of Family & Community Services v Oh [2020] NSWWCCMA 63 – Arbitrator Wynyard, Dr B Noll & Dr P Harvey-Sutton – 25/03/2020**

On 14/11/2019, a delegate of the Registrar issued a referral to an AMS as follows: (1) to assess permanent impairment of the neck and right arm at or above the elbow under the Table of Disabilities with respect to injuries on 2/07/1998 and 6/02/2001; and (2) for a combined assessment of WPI (cervical spine and right upper extremity (shoulder & wrist) for the effects of the injuries suffered on those dates.

The Referral indicated prior settlements for injuries sustained in 2001: (1) A s 66A Agreement registered 21/05/2004 – 15% permanent loss of efficient use of the right arm below the elbow; and (2) A s 66A Agreement dated 22/05.2012 – further 5% permanent loss of efficient use of the right arm below the elbow.

On 17/12/2019, Dr Pillemer issued a MAC, which assessed 10% permanent impairment of the neck under the Table of Disabilities and combined 25% WPI (5% cervical spine and 20% right upper extremity – including carpal tunnel syndrome).

Dr Pillemer diagnosed "*what would seem to be*" a soft tissue injury to the cervical spine and "*possibly*" the right shoulder region (presumably in 1998) which was aggravated by the motor vehicle accident in March 2001, in which the worker sustained the fracture of the right scaphoid, which had healed in a good position. He then said:

> As noted Ms Oh has been left with ongoing symptoms in her neck and right upper limb, and in my opinion the main cause of her ongoing problems is a carpal tunnel syndrome on the right side. It is not unusual for carpal tunnel problems to cause referred pain proximally.
>
> In my opinion then at this stage Ms Oh needs to see a hand specialist and noting the duration of her symptoms, is likely to require nerve conduction studies and in my opinion will require a carpal tunnel release.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* It asserted that the AMS erred by assessing impairment with respect to carpal tunnel syndrome, as the worker had never alleged that injury and there was no medical evidence that confirmed that diagnosis and/or established a causal connection between the work injuries and that condition.

The MAP upheld the appeal as there was no suggestion in the medical evidence that either of the referred work injuries had caused or aggravated the carpal tunnel syndrome. It stated that it is clear that the reference to the wrist in the Referral related to the opinion of the worker's specialist that she had an impairment caused by stiffness following the fracture of the scaphoid bone.

The MAP accepted the worker's argument that an AMS is able to make independent assessments as to medical causation. The Appeal Panel in ***Bindah*** found that the worker's blindness, which occurred a year or so after he had struck his eye in a workplace accident, was not as a result of that accident. However, the Panel's reasoning was carefully explained in precise detail as to why it reached that conclusion. There has been no such explanation given in the current case.

In this matter, the AMS increased the assessment under the Table of Disabilities from 20% to 25% loss of use of the right arm (to simplify the nomenclature). No submissions were addressed to this assessment and the MAP confirmed it. However, it held that the WPI assessment must be revoked as it was devoid of any explanation regarding any causal nexus between the carpal tunnel syndrome and either of the referred injuries.

The MAP held that the worker is entitled to 10% UEI reduced range of shoulder movement and 3% UEI for the reduced range of wrist movement. Thus the assessment is 13% UEI which pursuant to table 16-3 of AMA 510 gives an entitlement to 8% WPI. This, when combined with the 5% WPI assessment of the cervical spine, gives an entitlement of 13% WPI. No re-examination is necessary, as the AMS has included an assessment for the reduced range of movement of the wrist, the injury identified by Dr Conrad.

Accordingly, the MAP revoked the MAC (for WPI) and issued a fresh MAC.

### *Psychological injury – AMS erred by applying 1/10 deductible under s 323 WIMA in the absence of evidence of a pre-existing injury or condition*

**Licovski v Smartstone Australia Pty Limited; Smartstone Australia Pty Limited v Licovski [2020] NSWWCCMA 62**

On 23/07/2014, the worker suffered fractures to his ribs, sternum and right wrist at work. he also suffered a primary psychological injury.

On 19/12/2019, Dr Shaikh issued a MAC, which assessed 14% WPI (15% - 1/10 under s 323 *WIMA*) with respect to the psychological injury. This did not satisfy the applicable threshold under s 65A *WCA.*

The AMS recorded ongoing symptoms including low motivation, easy agitation, procrastination, sleep disturbances and ideations of self-harm. He noted that the worker has not worked since August 2018. He assessed Class 5 for the PIRS category of employability, although he opined that the worker should be capable of alternative employment for approximately 10 to 20 hours per week. He noted that the worker denied a past history of mental illness, but he felt that there was evidence of significant life stressors, including the murder of an uncle in the months before the injury occurred, and family losses after it occurred. On that basis, he applied a 1/10 deductible under s 323 *WIMA.*

Both parties appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.*

***Employer's appeal***

***The MAP*** was not satisfied that the MAC contained a demonstrable error or that the assessment for employability was based upon incorrect criteria. It held that the examples of activities in each class under PIRS are examples only and it is ultimately for the AMS to determine the most appropriate class based upon clinical judgment of the worker on the day of the assessment: see *Ferguson v State of New South Wales* [2017] NSWSC 887 (*Ferguson*) and *Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*).

In *Ferguson*, Campbell J cited with approval the decision in *NSW Police Force v Wark* [2012] NSWWCCMA 36 (*Wark*), which stated at [33]:

> …the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face…

After reviewing the available evidence, the MAP held that the AMS properly applied his clinical judgment to the appropriate class for employability and it dismissed the appeal.

***Worker's appeal***

The worker argued that the AMS did not identify a diagnosable or established clinical entity when making a deduction under s 323 *WIMA.* He relied upon the decision of Garling J in *Periera v Siemens Ltd* [2015] NSWSC 1133 (*Pereira*), which sets out the evaluative steps to be undertaken in the consideration of section 323 *WIMA.*

The worker argued that contrary to cl 11.10 of the Guidelines, the AMS failed to carry out a proper analysis of the asserted pre-existing impairment and there was no evidence of any pre-existing condition or abnormality and emotional distress as a result of bereavement does not qualify as a diagnosable or established clinical entity.

***The MAP*** revoked the MAC and issued a fresh MAC that assessed 15% WPI.

## WCC – Arbitrator Decisions

### *Section 38A WCA – Worker entitled to payment of the special benefit for a closed period that pre-dates the relevant threshold assessment – Arbitrator bound to follow the decision of Parker ADP in Melides v Meat Carter Pty Limited*

**Bright v St Joseph's Cowper Incorporated & Anor [2020] NSWWCC 87 – Senior Arbitrator Bamber– 24/03/2020**

In proceedings commenced in 2018, ***Arbitrator Egan*** held the worker suffered the following injuries: (1) 27/08/2011, a partial thickness tear and tendinopathy of the left supraspinatus tendon; (2) 12/03/2016, tendinosis and full thickness tear of the left supraspinatus tendon and subacromial bursitis; and (3) 9/06/2016, symptomatic aggravation of the left shoulder. He held the surgery that was planned on 5/12/2016 was reasonably necessary as a result of one or more of the work injuries and that the respondent was liable to pay compensation in respect of the injuries and the consequential neurological and psychological effects (the worker suffered severe complications as a result of a spinal block). He referred the dispute under s 66 *WCA* to an AMS.

Dr Fitzsimmons, AMS, diagnosed injury to the central nervous system due to the spinal block and identified a number of impairments, including cognitive, emotional/behavioural disorders due to brain injury, speech, station and gait and digital dexterity in the left arm. Dr Hope assessed impairment of the left upper extremity (shoulder). They assessed 38% WPI (combined).

Arbitrator Egan found that the worker had no current work capacity since 5/12/2016 and he noted that the respondent agreed to pay weekly payments from that date.

However, the worker claimed weekly payments from 12/03/2016 to 4/12/2016 under s 38A *WCA.* The respondent disputed the claim on the basis that the worker remained in employment and she did not suffer a wage loss during the period claimed and that she was fit for pre-injury duties. The worker disputed that she was fit for pre-injury duties.

***Senior Arbitrator Bamber*** noted that the parties agreed that the principles set out by the Court of Appeal in *Hee v State Transit Authority of New South Wales* [2019] NSWCA 175 (*Hee*) apply, but there was a dispute about the factual findings that should be made with respect to work capacity. A further issue was the correctness of ADP Parker's decision in *Melides v Meat Carter Pty Limited* [2019] NSWWCCPD 48 (*Melides*). The respondent argued that it was wrongly decided, but conceded that it bound the Senior Arbitrator.

The Senior Arbitrator stated that in *Melides* it was found that the entitlement to the special payment under s 38A *WCA* arises at the date of injury and that the section operates from 4/12/2015. She noted that in *Hee*, White JA stated (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.

His Honour referred to ss 33 and 35 (2) *WCA* and (at [89]) he held that a zero amount can be the amount of weekly compensation "*payable*" under s33 if the worker is not entitled to weekly compensation under ss 36 or 37. That is less than $788.32. He pointed to some anomalous results in the operation of s 38A but stated that rewriting the section is beyond the literal scope of judicial interpretation.

The Senior Arbitrator held that as she is bound to follow *Melides*, the worker could seek weekly benefits under s 38A *WCA* even though the period claimed pre-dates the AMS' assessment of 38% WPI. She stated:

> 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…

Accordingly, the Senior Arbitrator awarded the worker weekly payments under s 38A *WCA* during the closed period claimed.

***It is appropriate for the Commission to determine the deductible under s 323 WIMA because the qualified specialists were consistent in their WPI assessments – Etherton v ISS Properties Pty Ltd applied***

**Wales v The Frank Whiddon Masonic Homes of NSW Ltd [2020] NSWWCC 89 – Arbitrator Harris – 24/03/2020**

On 19/09/2014, the worker injured her cervical spine at work. She claimed compensation that included a claim under s 66 *WCA,* but she withdrew her claims for weekly payments and allegations of consequential conditions to her upper extremities at arbitration.

On 24/03/2020, ***Arbitrator Harris*** issued a COD, which indicated that the only issue for determination was the assessment of permanent impairment of the cervical spine. The worker asked him to determine this issue based upon the decision of the President in *Etherton v ISS Property Services Ltd.* However, the respondent argued that *Etherton* was wrongly decided or did not apply because the Commission does not have power to assess a deductible under s 323 *WIMA.* He stated that in *Etherton*, the President stated:

> As can be seen, the relevant alteration is that prior to 1 January 2019 the Commission was prohibited, by virtue of the terms of s 65 (3) of *the 1987 Act*, from awarding permanent impairment compensation absent an assessment by an Approved Medical Specialist. That prohibition was removed and the Commission was then empowered to determine such matters itself.

The Arbitrator held that he is bound by *Etherton* and he rejected the respondent's argument that it was wrongly decided. He also rejected the respondent's argument that *Etherton* did not apply as that matter did not involve an issue regarding the extent of any s 323 deduction. He stated:

15. In *Etherton* the Arbitrator found that the assessment of permanent impairment was 10% after a significant s 323 deduction. The President noted that finding in his reasons. There is otherwise no justification for making a distinction between the power of the Commission to make a determination of the extent of permanent impairment but otherwise be limited in making a determination as to the extent of any s 323 deduction.

16. Since the repeal of s 65 (3) of *the 1987 Act* as and from 1 January 2019, the Commission has power to determine the extent of permanent impairment. I reject the respondent's submission that the Commission has no power or jurisdiction to determine this issue.

The Arbitrator noted that both qualified specialists assessed 17% WPI and he held that the degree of permanent impairment is 17% WPI before any s 323 deduction. However, the worker's specialist assessed a 10% deductible and the respondent's specialist assessed a 30% deductible. He held that a 10% deductible is appropriate and stated:

73. My reasons should not be taken as expressing a view that the Commission should regularly determine permanent impairment. The facts of this matter were unique. My reasons indicate that the medical opinions on assessment were consistent save as to one matter. The determination of WPI could be properly made by the Commission as the change in Dr Machart's opinion on the s 323 issue could be rejected on an analysis of the facts based on a reading of contemporaneous notes. Upon rejecting the reasons for the change in Dr Machart's opinion, the ultimate decision was that there was only one clear outcome of the assessment for the applicant's WPI.

Accordingly, the Arbitrator issued a COD, which determined that the worker had suffered 15% WPI as a result of the injury and awarded her compensation under s 66 *WCA.*