WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2041/19**
Applicant: **KENNETH LINDSAY**
Respondent: **ISS PROPERTY SERVICES PTY LIMITED**
Date of Determination: **6 August 2019**
Citation: **[2019] NSWWCC 269**

The Commission determines:

1. Award in favour of the respondent.

2. The parties are to file within 7 days the documents noted at paragraph 5. (c) and (d) of the attached reasons.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. This Application to Resolve a Dispute (the Application) is in respect of a claim for bilateral hearing loss on (deemed) date of injury 22 October 2012. The insurer denied the claim in a notice dated 26 February 2019. The Application is for section 60 of the *Workers Compensation Act 1987* (the 1987 Act) medical expenses for binaural hearing aids.

ISSUES FOR DETERMINATION

2. The following issues remain in dispute:

    (a) Was the employment with the respondent of the nature to which the disease of industrial deafness is due? (s17 1987 Act);

    (b) Is Mr Lindsay entitled to compensation for medical expenses for binaural hearing aids for the claimed injury? (s 60 of the 1987 Act).

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and arbitration hearing on 8 July 2019. 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.

EVIDENCE

Oral evidence

4. There was no oral evidence adduced.

Documentary evidence

5. The following documents were in evidence before the Commission and I have taken them into account in making this determination:

    (a) Application to Resolve a Dispute with annexed documents;

    (b) Reply with annexed documents;

    (c) Application to Admit Late Documents filed for the respondent comprising statement of Mr Alan Renwick dated 7 July 2019 and product specification sheet; and sheet “17. Vacuuming – Floor Model- OHS Risk Assessment” (tendered at arbitration - to be filed);

    (d) Application to Admit Late Documents prepared for the applicant dated 3 July 2019 comprising supplementary statement of the applicant dated 1 July 2019; and SafeWork Australia Managing Noise and preventing Hearing Loss at Work – Code of Practice, september 2015 applicant (tendered at arbitration - to be filed).

SUBMISSIONS

6. The representatives made oral submissions at the arbitration hearing. As they were recorded they will not be repeated here, but I have taken them into account, and they are referred to in the discussion below.

Was Mr Lindsay's employment with the respondent of the nature to which the disease of hearing loss is due? (s 17 of the 1987 Act)?

7. During his working life Mr Lindsay has worked in various types of noisy employment as a labourer, barman, security guard, bus driver, and cleaner. He worked at Sunny Brand Chickens (later Inghams) from approximately 2003 to 2011, which he describes as a noisy factory setting.

8. Mr Lindsay also outlines in his statements the nature of his work as a cleaner for the respondent from 19 September 2011 up to October 2012. He was required to use a commercial "backpack" vacuum cleaner and a floor polisher, as well as a mop and bucket and other cleaning equipment. He states that the vacuum cleaner was significantly louder than a domestic vacuum cleaner, being so loud that he would have to turn it off in order to hear anyone trying to speak with him. The vacuum would "drown out" any other sound. He estimated that he "… used the backpack vacuum for at least 2 hours per shift but more frequently at times."

9. In his supplementary statement of 1 July 2019 Mr Lindsay says he provided the information in his original statement on the basis of his minimum exposure to noise rather than the usual or maximum exposure. He compared the noise of the vacuum to that of a domestic lawnmower. He gives greater detail as to the use of the vacuum in specific areas of the premises and also added that he used the floor polisher for approximately 15-20 minutes once or twice per week, and compared that machine's noise to something between a front end loader and a lawnmower. He estimated that he was exposed to noise from the machines for a minimum of 2 hours and 55 minutes and a maximum of 3 hours and 55 minutes per shift.

10. Mr Renwick, an area manager of the respondent when Mr Lindsay was working for it, has provided a statement dated 5 July 2019. He disagrees with Mr Lindsay's comment that the vacuum would have to be turned off because it drowned out any other sound. Mr Renwick says the vacuum was no louder than a domestic vacuum. He said use of the vacuum for over 3 hours per day would have been very unusual, and the usual time spent was 2 hours.

11. Mr Renwick attached the product specification of what he states was the model of vacuum used by Mr Lindsay. He refers to the specification sheet stating the noise emitted was 67 +3Db(A) at 1.5 metres and it was not a noisy machine. Mr Renwick also says the polishing machine was less noisy than the vacuum.

12. Dr Malouf's report takes the history of the period of employment and records that Mr Lindsay used the backpack vacuum cleaner for 3 hours per day and usually worked without earmuffs. Dr Malouf concludes that the employment with the respondent had "the necessary incidents, characteristics and tendencies to be capable of causing noise induced hearing loss". This is paraphrasing the test from *Shire Council v Lobley* (1995) 12 NSWCCR 52 (*Lobley*) and *Tame v Commonwealth Collieries Pty Ltd* (1947) 47 SR (NSW) 269. The test of the nature of the employment for hearing loss claims does not require strict causation but only that it was "of a type which could give rise to the injury in fact suffered"[1].

[1] *Lobley*

13. To satisfy this test the worker does not require evidence from an independent expert such as an acoustic engineer to establish the noise levels to which the worker was exposed. The worker's evidence together with appropriate medical evidence may be sufficent.[2]

14. It is not enough for a worker to state that the employment was "noisy", but it may be sufficient for an expert medical practitioner who obtains a history consistent with the worker's evidence with enough detail to form the opinion that the employment concerned had the capacity to cause hearing loss.

15. The weight given to the expert medical opinion is dependent on the degree of correlation between the history upon which the expert opinion is based and the evidence overall.[3]

16. This draws attention to the statement of Mr Renwick, whose opinion differs from Mr Lindsay's view, and the other evidence relied on by the respondent. Mr Renwick was an area manager at the time of the relevant employment of Mr Lindsay. He states that he was aware of the duties of the cleaners under the contract. Mr Renwick says that there was no need to turn off the vacuum backpack to hold a conversation with someone a metre away. He does not offer any further detail, for example that he saw Mr Lindsay holding conversations with the machine running.

17. Mr Renwick says the "usual" time spent vacuuming was 2 hours. He says 3 hours would be unusual, but it not apparent where these figures come from. There is no log of the actual time spent by Mr Lindsay in each cleaning activity. I prefer to accept the memory of the person actually performing the work over an area manager who I infer was not present at the one work place at all times. Mr Renwick does not explain how he knows the detail of the time spent vacuuming. In any case there is not a huge difference in the time spent on the vacuuming taken recorded by Dr Malouf from Mr Lindsay of 3 hours and Mr Renwick's estimation. I prefer Mr Lindsay's recollection as given to Dr Malouf over Mr Renwick's estimation from a distance.

18. Similarly Mr Renwick says that the vacuum was not noisy, but he does not say he used the machines himself. He provides a factory specification brochure giving a noise figure, but there is no independent verification of this. As submitted for Mr Lindsay, the noise figures are in any case stated to be based on a distance of 1.5 metres which is not relevant to the issue here with the backpack machine. It also refers to the specifications of a new machine, and does not take account of the particular machines Mr Lindsay used, or their particular noise levels, including for example their age and degree of wear.

19. Mr Renwick says the polisher was not noisy but again he does not say he was using the machine himself, and as an area manager this seems unlikely. Mr Lindsay is reporting from the position of using the machines on a daily basis. I note also that Dr Malouf does not take a history about the polisher, so it has not formed part of his conclusions. It was in any case only used once or twice per week for 15-20 minutes.

20. The applicant also relies on a document of Safe Work Australia, "Managing Noise and Preventiing Hearing Loss at Work". I do not find this document of use on the issue to be determined here based on expert medical opinion about the extent and duration of noise exposure.

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[2] *Lobley*; *Dawson & Ors t/as The Real Cane Syndicate v Dawson* [2008] NSWWCCPD 35 (*Dawson v Dawson*).

[3] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (*Makita*); *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11; *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58 (*Paric*)

21. The respondent submits that Mr Lindsay's evidence cannot be accepted as reliable because there are inconsistencies between his two statements. However, it seems to me that Mr Lindsay has simply provided more detail in his supplementary statement. He has expanded on the statement of using the vacuum for "at least" 2 hours per day, to a more specific breakdown of the day's work in the various areas of the premises to arrive at a more precise figure. Dr Malouf took the history of three hours on the vacuum per day, and this is quite conservative given the breakdown of the day's vacuuming activity Mr Lindsay details in the supplementary statement. I find nothing unreliable in Mr Lindsay's evidence, or any conflict between his two statements. There is no reason not to accept his explanation that he was focussing on minimum noise exposure times in his first statement.

22. The submission of the respondent with which I agree concerns the history taken by Dr Malouf. There is nothing in his history that refers to the the level of noise. Mr Lindsay describes the difficulty with conversation and compares the noise to other machinery but there is nothing to suggest that Dr Malouf took this into account. The statements were both made after the examination by Dr Malouf, so were not before him as part of the documentation he acknowledges.

23. In *Dawson v Dawson* Roche DP said,

> "Whilst it is not necessary for a worker to call an acoustics engineer in every case of boilermaker's deafness, it is not sufficient for a worker to merely say 'my employment was noisy and I have boilermaker's deafness'. It is always essential that he or she present detailed evidence (if no acoustics expert is to be relied on) of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the "tendency, incidents or characteristics" of that employment are such as to give rise to a real risk of boilermaker's deafness."

24. The requirements noted above for both the nature and the extent of the noise exposure were met in the case of Mr Dawson.

25. By contrast, Roche DP in *Combined Civil Pty Ltd v Rikaloski* [2007] NSWWCCPD 181 (*Rikaloski*) found against the worker because there was "…no evidence of the noise level to which Mr Rikaloski was exposed, the period of exposure, and whether those two factors were sufficient to result in his employment being employment to the nature of which boilermaker's deafness is due."

26. In this matter there is no acoustic expert evidence but we do have the duration of exposure sufficiently correlated between the evidence of Mr Lindsay and the history of Dr Malouf, and this is also consistent with the evidence overall, with Dr Malouf settling on what is necessarily an average of 3 hours per day with the vacuum backpack.

27. What is missing in Dr Malouf's history is evidence as to noise levels, either consistent with Mr Lindsay's statements or otherwise, that shows he considered any such history in arriving at his conclusion about the nature of the work in relation to potential hearing loss.

28. Mr Lindsay has detailed evidence in his supplementary statement, but unfortunately this does not appear to have been before Dr Malouf to consider in forming his opinion as to the nature of the noise exposure.

29. For these reasons the onus has not been discharged on the relevant principles from *Dawson v Dawson*, *Lobley* and *Makita* and Mr Lindsay's claim must fail.

SUMMARY

30. There is to be an award for the respondent.