WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6510/19**
Applicant: **Juan Capablanca**
Respondent: **Contamination Control Laboratories (CCL) Pty Limited**
Date of Determination: **12 March 2020**
Citation: **[2020] NSWWCC 75**

The Commission determines:

1. Award for the applicant on the claim for medical expenses under section 60 of the *Workers Compensation Act 1987* (the 1987 Act). The respondent is to pay the costs of the claimed bilateral hearing aids, and associated expenses.

2. Award for the applicant on the claim for lump sum compensation under section 66 of the 1987 Act. The respondent is to pay the applicant lump sum compensation for 12% permanent impairment totalling $17,050 resulting from a binaural hearing loss injury with a date of injury of 11 September 2009 (deemed).

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

NICHOLAS READ
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 NICHOLAS READ, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A MacLeod

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

STATEMENT OF REASONS

BACKGROUND

1. Juan Capablanca, the applicant, was employed by Contamination Control Laboratories (CCL) Pty Limited, the respondent, for approximately from 1993 until September 2009. During this time he operated a CNC machine which treated various types of metals and steel. There is no dispute this work was noisy and capable of causing sensorineural hearing loss.

2. In 2019, Mr Capablanca made a claim for lump sum compensation and hearing aids for a further loss of hearing attributable to his employment with the respondent. The issue is dispute in this matter is whether Mr Capablanca is excused from complying with the time limits for notifying his injury and brining his claim.

ISSUE FOR DETERMINATION

3. The issues for determination are:

    (a) Whether Mr Capablanca's claim is defeated by operation of sections 254 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) (failure to provide notice of injury within the time prescribed); and

    (b) Whether Mr Capablanca's claim is defeated by operation of sections 261 (failure to make claim within the time prescribed) of the 1998 Act;

    (c) Whether Mr Capablanca's claim for lump sum compensation should be referred for assessment by an Approved Medical Specialist (AMS) or determined by me.

Matters previously notified as disputed

4. The issues were notified a notice issued section 78 of the 1998 Act dated 3 June 2019.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a conciliation conference and then arbitration on 4 March 2020.

6. Mr Craig Tanner of counsel appeared for the applicant. Mr Paul Stockley appeared for the respondent.

7. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I used my best endeavours to attempt to bring the parties to a settlement acceptable to them. I was satisfied that the parties had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute, and attachments (ARD);

    (b) Reply, and attachments (Reply); and

(c) Application to Admit Late Documents lodged by the respondent dated 18 February 2020, and attachments (ARD).

Oral evidence

9. There was no application to adduce oral evidence or to cross-examine Mr Capablanca.

EVIDENCE

10. Mr Capablanca was employed by Bernard Hastie Pty Ltd at a sheet metal worker until 1993, during which he was exposed to high levels of noise from the manufacturing process.

11. In or around 1993, Mr Capablanca made a claim for compensation arising from hearing loss suffered in the employment of Bernard Hastie. He was assessed to suffer from 8.27% binaural hearing loss and was duly compensated. A copy of unsigned terms of settlement between Mr Capablanca and Bernard Hastie were attached to the ARD (ARD page 27).

12. After ceasing employment with Bernard Hastie in 1993, Mr Capablanca commenced employment with respondent where he operated the CNC machine.

13. In a statement dated 9 August 2019 Mr Capablanca said at paragraph 13:

> "Although I was aware of my hearing loss for many years, I was not aware that I might be eligible for further compensation with respect to the further loss I had suffered since 1993."

14. Mr Capablanca said he consulted National Hearing Centre (NHC) in January 2019 and was advised that he suffered from further hearing loss, which may have been due to his employment. Mr Capablanca was referred to solicitors. Mr Capablanca said it was not until he spoke to the solicitors that he became aware he could claim further compensation for the industrial deafness he had suffered since his 1993 claim.

15. In a supplementary statement dated 6 December 2019 Mr Capablanca said:

> "With regard to paragraph 13 of my statement dated 9 August 2019, the awareness of hearing loss to which I was referring to in that paragraph was to the loss I had prior to commencing employment with CCL. It is correct that I was unaware that I was eligible for further compensation with respect to any further hearing loss I had suffered since 1993. I was not aware that I had in fact suffered a further hearing loss until assessment thereof in January 2019" (ARD page 4).

16. Mr Capablanca said it was January 2019, when he consulted NHC, when he discovered he might be suffering a further loss due to exposure to noise in employment. He said the first time he became aware he had a further hearing loss related to his employment with the respondent was on 27 March 2019 when Dr Joseph Scoppa, ear nose and throat physician and medicolegal consultant, informed him that his current degree of hearing loss was related to that exposure (ARD page 4).

17. In a report dated 27 March 2019 Dr Scoppa recorded that Mr Capablanca had been compensated for industrial deafness in or about the 1980s, but thought that his hearing loss had deteriorated since then due to further occupational noise exposure (ARD page 22).

18. Dr Scoppa assessed Mr Capablanca as suffering from 12% whole person impairment due to industrial deafness after deducting the previously paid compensation (ARD page 24).

19. Dr Scoppa opined that treatment with bilateral digital hearing aids was reasonably necessary (ARD page 25).

20. The records from NHC were admitted into evidence. Along with the details of the January 2019 consultation, the records showed that Mr Capablanca had attended the centre complaining of missing some words in background noise on 10 August 2007. At that time advice was given to Mr Capablanca regarding the fitting of hearing aids. The 2007 NHC records state that Mr Capablanca had noticed his hearing loss deteriorating gradually over the past five years and had been exposed to noise during his employment for approximately 13 years (ALD page 17). In 2007 Mr Capablanca was in the employ of the respondent. He remained in employment for an additional two years (ALD page 15).

REASONS

Notice of injury

21. In order for a worker to recover compensation the respondent employer must have received notice of the injury.

22. Section 254 of the 1998 Act relevantly provides:

> "(1) Neither compensation nor work injury damages are recoverable by an injured worker unless notice of the injury is given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.
>
> (2) The failure to give notice of injury as required by this section (or any defect or inaccuracy in a notice of injury) is not a bar to the recovery of compensation or work injury damages if in proceedings to recover the compensation or damages, it is found that there are special circumstances as provided by this section.
>
> (3) Each of the following constitutes special circumstances:
>
> (a) the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings by the failure to give notice of injury or by the defect or inaccuracy in the notice,
>
> (b) the failure to give notice of injury, or the defect or inaccuracy in the notice, was occasioned by ignorance, mistake, absence from the State or other reasonable cause,
>
> (c) the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened,
>
> (d) …"

23. Mr Capablanca bears the onus of establishing that special circumstances exist, including the absence of prejudice (section 61(2)); section 254(3)(a)).

24. The standard of proof is the balance of probabilities (see *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 at [44]).

25. Section 17 of the 1989 Act relevantly provides:

> "(1) If an injury is a loss, or further loss, of hearing which is of such a nature as to be caused by a gradual process, the following provisions have effect:

(a) for the purposes of this Act, the injury shall be deemed to have happened:

(i) where the worker was, at the time when he or she gave notice of the injury, employed in an employment to the nature of which the injury was due—at the time when the notice was given, or

(ii) where the worker was not so employed at the time when he or she gave notice of the injury—on the last day on which the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice,

(b) the provisions of section 61 of the 1998 Act shall apply to or in respect of the injury as if the words 'as soon as practicable after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury' were omitted therefrom,

(c) compensation is payable by:

(i) where the worker was employed by an employer in an employment to the nature of which the injury was due at the time he or she gave notice of the injury—that employer, or

(ii) where the worker was not so employed—the last employer by whom the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice,

...

(2) Without limiting the generality of subsection (1), the condition known as 'boilermaker's deafness' and any deafness of a similar origin shall, for the purposes of that subsection, be deemed to be losses of hearing which are of such a nature as to be caused by a gradual process...."

26. Mr Capablanca's claim is based on a "further loss of hearing". The terms of section 17(1) make it clear that an injury may be a "loss" of hearing or a "further loss" of hearing. Section 17 reflects that industrial deafness is a gradual process and contemplates that more than one claim may be made, so long as there is evidence that supports a deterioration in a worker's condition is caused by the relevant employment.

27. Mr Capablanca made a previous claim, which dealt with loss of his hearing up to the date of resolution of the claim in 1993. The current claim is one for further loss based on the 2019 assessments of the NHC and Dr Scoppa. This distinction is relevant to the determining whether Ms Capablanca has proved, on the balance of probabilities, he is excepted from the notice of injury and notice of claim provisions in the 1998 Act.

28. Mr Capablanca has given notice of the injury following cessation of his employment on 17 April 2019. Applying section 17(1)(a)(ii), the injury is deemed to have happened on the last day on which he was employed with the respondent, that being 11 September 2009.

29. It is common ground between the parties that the first notice of the injury was given on 17 April 2019. It is also common ground that when the claim was made on 21 April 2017 this satisfied the requirements of sections 260 and 261 on the 1998 Act (ARD pages 7 and 8).

30. There is no doubt that, in order to recover compensation, Mr Capablanca must prove on the balance of probabilities that "special circumstances" exist.

31. Mr Capablanca primarily relied on section 254(3)(b) in that his failure to give notice was excused by ignorance. “Ignorance” may include a case where a worker does not know of the need to give notice within a specified timeframe (*G C Singleton & Co Pty Ltd v Lean* [1970] ALR 129).

32. Mr Capablanca says, and I accept, that he did not know he had an entitlement to make a claim for the further loss of hearing resulting from exposure to noise in the workplace after 1993. Mr Capablanca’s evidence is reasonable given in the complexity of the legislation to a lay person and the absence of any evidence concerning him consulting with lawyers since 1993 in respect of his further loss of hearing. The 2007 NHC record does not state that a referral was made a solicitor, contrary to the 2019 records.

33. In my view Mr Capablanca’s evidence is adequate to meet the test in section 254(3)(b). There is no contradictory evidence or evidence from which it may be reasonably inferred that Mr Capablanca knew that he had an entitlement to make a claim for further loss of hearing or that such claim must be made within a specified timeframe. Mr Capablanca’s evidence was not tested be cross-examination. I am therefore satisfied that a special circumstance is made out under section 254(3)(b).

34. Mr Capablanca also submitted that the respondent was not prejudiced by his failure to give notice of injury prior to cessation of his employment. In this case the delay has been almost 10 years.

35. Although the delay has been lengthy, delay in itself does not give rise to prejudice. Actual injustice must be demonstrated, not merely potential injustice (*Camden Council v Hancock* [2005] NSWWCCPD 6 Byron DP at [59]).

36. As pointed out by Mr Stockley, the respondent company has been deregistered, which had the probable effect of an inability to make any inquiries as to matters that might be relevant to denial of the claim on grounds other than on the basis of the statutory limitation period. The company went into liquidation in 2009.

37. Mr Capablanca submitted that the respondent made a forensic decision to dispute the claim on the notice of injury and notice of claim provisions. That may be so, however I find that the cessation of the business almost 11 years ago is likely to have given rise to an actual injustice to the respondent in investigating and responding to the claim. I am not persuaded on the balance of probabilities that the respondent has not been prejudiced by the failure to give notice of injury within the timeframe required. this finding is not determinative of whether Mr Capablanca has met his onus of proving a “special circumstance” under section 254(3).

38. I am satisfied that the “special circumstance” test is made out under section 254(3)(b) on the basis that Mr Capablanca was not aware of his rights to being a claim for further loss of hearing or the statutory timeframe to bring such claim. Therefore, there is no bar to Mr Capablanca recovering compensation from a failure to give notice of injury.

Notice of claim

39. Section 261 of the 1998 Act relevantly provides:

> “(1) Compensation cannot be recovered unless a claim for the compensation has been made within 6 months after the injury or accident happened or, in the case of death, within 6 months after the date of death.
>
> (2) If a claim for compensation was made by an injured worker within the period required by this section, this section does not apply to a claim for compensation in respect of the death of the worker resulting from the injury to which the worker’s claim related.

(3) For the purposes of this section, a person is considered to have made a claim for compensation when the person makes any claim for compensation in respect of the injury or death concerned, even if the person's claim did not relate to the particular compensation in question.

(4) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either:

(a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or

(b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker.

(5) The failure to make a claim within the period required by this section is not a bar to the recovery of compensation if the insurer concerned determines to accept the claim outside that period. An insurer cannot determine to accept a claim made more than 3 years after the injury or accident happened or after the date of death (as appropriate) except with the approval of the Authority.

(6) If an injured worker first becomes aware that he or she has received an injury after the injury was received, the injury is for the purposes of this section taken to have been received when the worker first became so aware…"

40. "Awareness of injury" is awareness of injury as defined in sections 4 and 17 of the *Workers Compensation Act 1987* (the 1987 Act), and not merely awareness of a physical problem (*Heartcraft Australia Pty Ltd v Lapa* [2007] NSWCCPD 27 at [37]).

41. For a worker to be aware of boilermaker's deafness, he or she must be aware that he has sensorineural hearing loss (hearing loss of such a nature as to be contracted by a gradual process) and that his hearing loss has been contributed to by his employment (*Inghams Enterprises Pty Ltd v Jones* [2012] NSWCCPD 17 (*Jones*)).

42. In *Jones* Roche DP said the following in respect of when a worker becomes aware that he or she has received an injury for the purposes of section 261(6) of the 1998 Act at [89]:

> "The test is an objective one, but is based on the individual worker's knowledge, not the knowledge of some hypothetical reasonable person. The worker must be actually aware, not constructively aware. In determining when a worker became aware he has received an injury it is necessary to have regard to the worker's state of knowledge at the relevant time. A worker cannot be said to be aware he has received a work injury if he is unaware of the nature of the condition said to constitute the injury or is unaware that it has been caused by work. Because of the insidious nature of boilermaker's deafness, and lack of general knowledge in the community of its cause, awareness that a worker has received a s 17 injury will usually require specialised knowledge that will normally come from an appropriate expert in the field."

43. In *Unilever Australia Ltd v Petrevska* [2013] NSWCA 373; 13 DDCR 260 (*Petrevska*) Tobias AJA observed at [43]:

> "Knowledge of symptoms is insufficient as the sub-section requires awareness of the injury and its cause as matters of fact. Although deafness is itself an injury it can be one of gradual onset and was in the present cases. More importantly, gradual loss of hearing is sensorineural. It was therefore necessary in the present case for the respondent to have knowledge as a fact that her deafness was work induced. The difficulty with sensorineural deafness is that it may be due to a number of causes including those which are not so induced. It was insufficient for the respondent to believe that her condition was noise induced due to the possibility of that not being the cause of her type of deafness. Accordingly, in order for the respondent to be aware (or have knowledge) of the fact that her deafness was noise induced, it was necessary for her to obtain specialist advice and until that advice was obtained and confirmed that the condition arose out of her employment, she could not be aware of her injury within the meaning of s 261(6)."

44. In *Petrevska* Macfarlan JA (Meagher JA and Tobias AJA agreeing) observed at [34]:

> "34. The approach taken by the arbitrator was in my view consistent with the decisions to which I have referred. She made particular reference to *Inghams Enterprises v Jones* which I consider aptly encapsulates the proper approach: that is, because the determination of the cause or causes of sensorineural hearing loss ordinarily requires the application of medical expertise, the opinion of a medically unqualified worker about that issue will rarely be of value, or amount to knowledge of that worker that his or her hearing loss has been caused by the worker's noisy employment."

45. Mr Capablanca also referred me to *Unilever Australia Limited v Saab* [2013] NSWWCCPD 2 which was said to be a factually analogous matter.

46. The claim for compensation was made on 21 April 2017.

47. The critical issue in this matter is when, based on the evidence, Mr Capablanca became aware that he had received an injury under section 261(6). Importantly, the injury of which Mr Capablanca must be aware is not a loss of hearing generally but one of the further loss of hearing assessed by the NHC and Dr Scoppa in 2019.

48. Mr Capablanca submitted that he first became aware on or around 27 March 2019 when informed by Dr Scoppa that his current degree of hearing loss was related to the exposure to loud noise during employment with the respondent. If this is found to be the date of awareness of injury, the claim has been brought within time.

49. In the alternative, Mr Capablanca submits his failure to make a claim was occasioned by ignorance and is therefore excused from the time limit under section 261(4).

50. The respondent submits I would not be satisfied Mr Capablanca did not know he had noise induced hearing loss as a result of employment with it prior to the receipt of advice from Dr Scoppa. The respondent points to the consultation with NHC in 2007, the absence of any explanation from Mr Capablanca about this the 2007 consultation and submits that an inference should be drawn from Mr Capablanca's prior claim in 1993 that he knew his further hearing loss was connected to the employment with the respondent. The respondent submits that Mr Capablanca's evidence as to when he first became aware the that he had suffered a further loss of hearing connected to his employment should not be accepted.

51. I do not accept that an inference can be drawn about Mr Capablanca's state of knowledge from the fact that he was compensated for noise induced hearing loss in 1993. Whilst it is reasonable to assume that Mr Capablanca had knowledge that working in noisy workplaces had the capacity to caused sensorineural hearing loss, the loss he was compensated for in 1993 is different from the loss claimed in these proceedings. The relevant knowledge that must be assessed is the knowledge of the "further loss" of hearing due to noise exposure in the respondent's workplace assessed by the NHC and Dr Scoppa.

52. The 2019 audiometry reports (ARD page 19) demonstrate that Mr Capablanca has suffered additional hearing loss in both ears since the tests in 2007. As a matter of common sense, Mr Capablanca could not have been aware of the further loss of hearing loss between 2007 and 2019 until the 2019 assessment was undertaken.

53. Mr Capablanca's claim that was finalised in 1993 was a separate claim to the claim made in these proceedings. Mr Capablanca may have had an entitlement to make a claim in 2007, following the assessment, but he did not. Even if he had, that would not have precluded him from making a claim for the further loss taken to have arisen from the continuing noisy employment, which did not crystalise until he ceased his employment with the respondent in on 11 September 2009. Mr Capablanca cannot have been aware of the injury for the purposes of section 261 of the 1998 Act that he had received before it had crystalised (see discussion in *Fairfield City Council v Deguara* [2019] NSWWCCPD 1 (18 January 2019) at [217] – [218] and [228]).

54. Whilst Mr Capablanca may have been aware of a gradual deterioration of his hearing since 1993, as evidenced by the attendance on NHC in 2007, I am satisfied that he did not have actual knowledge that his hearing loss has been contributed to by his employment with the respondent until 2019. Mr Capablanca's knowledge cannot be constructed from various pieces of evidence. Even if Mr Capablanca suspected his hearing loss was caused by his exposure to noise during his employment with the respondent, this is not sufficient to establish he had awareness of receipt of an injury (see *Petrevska* [34] and [43]).

55. The 2007 NHC records state that Mr Capablanca had been exposed to noise during his employment with the respondent and had experienced gradual loss of hearing. By 2007 it is clear there had been a marked deterioration in Mr Capablanca's hearing, however as noted above there was further noise induced hearing loss evident on the audiometry tests in 2019. However, it is difficult to draw an inference from the records surrounding Mr Capablanca's knowledge even when combined with the fact of the 1993 claim. I accept that Mr Capablanca has not provided any explanation of the 2007 attendance on NHC but this is of little significance in the circumstances where is evidence of further noise induced loss by 2019. The consultation with the NHC was 14 years prior to this claim. I am not satisfied that an inference should be drawn from the 2007 that Mr Capablanca knew he had suffered further hearing loss as a result of exposure to noise in the respondent's workplace. It appears from his statement evidence that Mr Capablanca connected the further hearing loss to his employment with Bernard Hastie and not the respondent.

56. I also note that Dr Scoppa made deductions for presbycusis in both Mr Capablanca's left and right ears. As sensorineural hearing loss may have multiple caused, it is also possible that Mr Capablanca connected the further loss to his age, however there is not specific evidence on this point.

57. For the above reasons, I am satisfied on the balance of probabilities that Mr Capablanca became aware that he had suffered a compensable injury on the advice from Dr Scoppa's on or around 27 March 2019. The injury was a further loss of hearing that crystallised on 11 September 2009, that being the deemed date of injury under section 17(1)(a)(ii) the 1987 Act. It follows from my finding that the claim has been brought within the time period prescribed by section 261 of the 1998 Act.

58. Had I not made the above finding about Mr Capablanca's state of knowledge of receipt of his further loss of hearing I would have been satisfied on the balance of probabilities that his failure to make the claim was occasioned by ignorance pursuant to section 261(4). I accept Mr Capablanca's evidence that he did not know he was entitled to make a claim for further loss until he saw his solicitors in 2019. The claim is for an additional 12% whole person impairment. This is a serious and permanent disablement.

Medical expenses

59. The applicant claims medical treatment expenses in the form of bilateral hearing aids. A quotation has been provided by NHC.

60. Section 60(1) of the 1987 Act provides that if, as a result of an injury received by a worker, it is reasonably necessary that medical treatment be provided the worker's employer is liable to pay the cost of that treatment.

61. During the arbitration hearing the respondent conceded that if I found in Mr Capablanca favour on the issues of notice of injury and notice of claim, an award the claimed hearing aids should follow. There is no evidence that contradicts the opinion of Dr Scoppa and the NHC that Mr Capablanca would benefit from the provision of the recommended hearing aids.

62. Accordingly, I find that the hearing aids are reasonably necessary treatment. There will be an award for Mr Capablanca on the claim for hearing aids pursuant to section 60 of the 1987 Act.

Should the matter be referred to an AMS?

63. I am satisfied that Mr Capablanca has an entitlement to lump sum compensation as a result of the injury suffered in the course of employment with the respondent.

64. Mr Capablanca submitted I should make orders in accordance with the assessment of Dr Scoppa, there being no alternative or contradictory assessment. It was submitted this was an appropriate matter to make a determination and remitting the matter to be referred to an AMS would result in unnecessary costs to the scheme. The respondent submitted the matter should be referred to an AMS due to the delay in bringing the claim.

65. Since the repeal of section 65(3) of the 1987 Act the Commission has the power to make awards in respect of permanent impairment compensation suffered by a worker without the requirement to have the degree of permanent impairment assessed by an AMS. I accept Mr Capablanca's submission that a referral to an AMS in this instance will result in unnecessary costs to the scheme, particular in the circumstances where a threshold is not in dispute. It was open to the respondent to obtain an independent assessment of the extent of Mr Capablanca's degree of impairment whilst maintaining the dispute in relation to notice of injury and notice of claim, however it elected not to do so.

66. I am satisfied that the evidence of Dr Scoppa is adequate to make a determination as to the degree of impairment. The respondent did not make any submission concerning Dr Scoppa assessment methodology, for example that he has made an obvious error or applied the incorrect criteria.

67. Accordingly, I am satisfied that an award should be entered in favour of Mr Capablanca on his claim for lump sum compensation in accordance with assessment made by Dr Scoppa. The terms of the order are set out above.