WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

Matter Number:	**M1-5802/19**
Appellant:	**Nelden Pty Ltd t/as Monaro Gates**
Respondent:	**James Watt**
Date of Decision:	**24 April 2020**
Citation:	**[2020] NSWWCCMA 78**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Brian Williams**
Approved Medical Specialist:	**Dr Joseph Scoppa**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 4 February 2020, Nelden Pty Ltd t/as Monaro Gates, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Kenneth Howison, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 9 January 2020.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the assessment was made on the basis of incorrect criteria
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

> "Work history including previous work history if relevant: Mr Watt gave a history of being employed since 1980 to the present by Nelden Pty Ltd as a steel fabricator involved in the manufacture of gates. As such, he describes being exposed to the noise of abrasive saws, grinders, needle guns, hammering and the cutting of steel. From his description of the noise I would consider that he is working in noise sufficient as to be responsible for the causation of noise induced hearing loss. I note Mr Watt has worn muffs as a form of ear protection.
>
> Mr Watt previously worked as a fencing contractor from 1976-1980 and was exposed to noise from chainsaws and post hole diggers.
>
> From 1974-1976, he worked as a truck driver and was exposed to some noise, as he was from 1970-1973.
>
> In summary, Mr Watt's last noisy employer is Nelden Pty Ltd."

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

8. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination for the reasons given below.

EVIDENCE

Documentary evidence

9. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

12. The appellant requested an oral hearing, but the Panel does not require an oral hearing, as the matter can be determined "on the papers", for the reasons given below.

Appellant

13. In summary, the appellant submits, firstly, that the AMS has erred in failing to exclude the period of work from 1976 to 1980 from the assessment because he was a sole trader and therefore not covered by the 1987 Act.

14. Secondly, the AMS has erred in failing to apply an appropriate deduction under s 323 of the 1998 Act for that proportion of the impairment due to the period as a "sole trader" from 1976 to 1980.

15. The Panel should make a deduction for the period of self-employment from 1976 to 1980.

Respondent

16. The respondent submits, regarding the appellant's first ground of appeal, that the AMS was correct not to exclude a period of work because of the deeming operation of s17 of the *Workers Compensation Act 1987* (1987 Act) and the authorities confirming the disease of gradual process of industrial deafness is considered to be caused "at one blow" on a particular date.

17. As to the second ground of appeal in relation to s 323 of the 1998 Act, the AMS was correct not to apply a deduction to the assessment under s 323 because there is no evidence to support such a deduction on the relevant authorities.

FINDINGS AND REASONS

18. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment, but the review is limited to the grounds of appeal on which the appeal is made.

19. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

Ground of appeal 1: "worker" for the purposes the 1987 Act

20. The submissions of the appellant regarding the AMS being obliged to exclude a period of work as an independent contractor or sole trader from 1976 to 1980 pursuant to s 319 of the 1998 Act involve an issue as to whether Mr Watt was a "worker" under the 1987 Act for his whole working life.

21. The respondent submits that s 17 operates to obviate this issue, relying on a series of authorities on the operation of s 17 establishing that all noise induced hearing loss over time is included by deeming the injury to have occurred on a set date. It is submitted that it is immaterial whether the worker was a sole trader for part of the period.

22. The Panel notes that the appellant's first ground of appeal addresses an issue that is outside the scope of the powers of the AMS. In industrial deafness matters the AMS does decide "injury" in the sense of finding whether all or part of any hearing loss is "boilermakers' deafness"[1] (see s 326(1)(c)). However, there is a division between the role and powers of the Arbitrator and the AMS.[2] For example, the determination as to whether a person is a "worker" under the 1987 Act is clearly a matter for an Arbitrator. If the appellant wished to have a period excluded from the Referral to the AMS then the time to do this was prior to that Referral being made by the Registrar.

23. The Referral to the AMS was for the date of injury "5 November 2018 – Deemed" without any period specified as excluded. The period to be considered by the AMS therefore included all Mr Watt's working life.

[1] See *McGowan v Secretary, Department of Education and Communities* [2014] NSWWCCPD 51.
[2] *Haroun v Railcorp New South Wales* [2008] NSWCA 192; *Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79.

24. The appellant's primary submissions would require the AMS to determine whether Mr Watt was a worker as defined by the 1987 Act for the period covered by the Referral. However, even if relevant, this involves a legal issue to be ventilated and determined before the Commission constituted by an Arbitrator, not an AMS. This process did not occur.

25. However, these considerations are not relevant for the task of the AMS as referred to him. As discussed below, the process for an AMS to satisfy s 319 of the 1998 Act is by means of s 323 and/or using Part 8.g. of the MAC Template regarding subsequent injuries.[3] The AMS dealt with the Referral made to him.
26. For these reasons the ground of appeal is not made out. There is no error by the AMS discerned by the Panel regarding this ground; incorrect criteria have not been used.

Ground of appeal 2: section 323 of the 1998 Act deduction

27. For the second ground of appeal, regarding s 323 of the 1998 Act, the appellant submits that the AMS has erred in failing to make a deduction under s 323 for a period during which it alleges Mr Watt was not covered by the Act between 1976 and 1980.

28. The AMS records a history that generally accords with that taken by Dr Fagan and he had before him Dr Fagan's detail as to the extent and duration of the noise exposure in each period.

29. The Panel notes that both Dr Fagan and Dr Tamhane record periods of employment before 1980. Dr Fagan records three periods of employment between 1970 and 1980. He says in his history of the work from 1974 to 1980 that the exposure to noise "was described as constant and continuous for up to one hour". Dr Fagan says that exposure for more than two hours would be hazardous for a person's hearing. Dr Fagan records a history of work as a truck driver/concreter from 1 December 1970 to 30 December 1973. He records the degree and duration of the noise as being greater than 90dB and as being present for one to two hours per day. He says that exposure to that noise for more than two hours would be hazardous.

30. Dr Tamhane's history is not detailed and does not delve into the extent and duration of noise in each period of exposure as does Dr Fagan. Dr Tamhane's history also seems a little confused as to when Mr Watt began with the respondent. Dr Tamhane records Mr Watt working for three years as a "Self-employed" Steel Fabricator after four years as a "Sole Trader" fencing contractor. There is also an error in Mr Watt's statement with two periods of work before 1980 ostensibly having the same date range. It seems to the Panel that the employment history taken by Dr Fagan is the most reliable, with the specific dates recorded and detail on the extent and duration of noise exposure clearly set out.

31. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing injury; condition; or abnormality and that this element contributes to the impairment and "assumption will not suffice".

32. As noted above, the correct approach to be taken by an AMS with s 323 of the 1998 Act was reiterated by Campbell J *Greater Western Area Health Service v Austin* [2014] NSWSC 604,

> "An Approved Medical Specialist's task is to assess the whole person impairment with which the injured worker presents. Whether it be caused by the injury or whether its cause is from an unrelated source, nonetheless the impairment should be recorded. If it is the opinion of the AMS that the losses, or part of them, had been caused for other reasons then an AMS has the power to make an appropriate deduction under s.323 of the 1998 Act, or to vary his assessment as provided at [8(g)] of the MAC."

[3] For example, see *Greater Western Area Health Service v Austin* [2014] NSWSC 604, discussed below.

33. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526, Campbell J explained the requirements for a deduction [emphasis in original],

> "What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the *degree* of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the *degree* of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality."

34. A pre-existing condition can be asymptomatic before the injury providing the evidence establishes when is occurred and that it forms part of the impairment.[4]

35. The appellant submits that hearing loss due to the period of work when Mr Watt was apparently a "sole trader" from 1976 to 1980 must be deducted from the assessment under s 323.

36. Accepting for the time being for the purposes of the appellant's second ground of appeal that Mr Watt was not covered by the 1987 Act for the period from 1976 to 1980 then what is required is evidence of a pre-existing element pre-dating the period of relevant employment. If this is established an AMS then is to consider whether that element contributes to the impairment.

37. For the exercise, the Panel notes that there is no evidence of injury before 1980. There does not need to be an audiogram, but there does need to be evidence to support a finding that there was a pre-existing injury or condition. There is no evidence in the reports of Dr Fagan and Dr Tamhane, or anywhere else, of any industrial deafness before the employment with the respondent.

38. In *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 Campbell J said,

> "As Schmidt J pointed out in *Cole* and *Elcheikh*, it is necessary to find a pre-existing abnormality or condition, here the latter, actually contributing to the impairment before s. 323 *WIM* is engaged. This conclusion has to be supported by evidence to that effect. Assumption will not suffice."

39. Campbell J also noted that it is '… necessary for the evidence acceptable to the appeal panel to actually support the connection between a previous injury (here, pre-existing abnormality or condition) and the overall degree of impairment in the instant case.'

40. The respondent relies on *Pereira v Siemens Ltd* [2015] NSWSC 1133 which also reflects the principles from the authorities noted above. It was found that basing a deduction on a simple proportionate time-based calculation of hazardous noise exposure outside the jurisdiction (in respect of 17 years previous noise exposure in Pakistan) is not a proper approach.

41. The authorities require that no deduction can be made under s 323 of the 1998 Act without evidence establishing a pre-existing injury, condition, or abnormality and when it occurred. In this matter there is a complete absence of evidence to establish an injury or condition before the employment with the respondent in 1980.

[4] *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25.

42. Dr Tamhane, relied on by the appellant, assumes Mr Watt was not covered by the Act in the period 1976 to 1980. Dr Tamhane makes a deduction of “10%” because “Mr Watt was exposed to loud noise while operating as a Sole Trader for 4 years.” There is no evidence referred by Dr Tamhane of any industrial deafness before 1980.

43. Dr Tamhane does not say whether he made the deduction because he considered s 323(2) of the 1998 Act and found it costly or difficult to assess the contribution by that period of employment. Even more problematic is the lack of any evidence upon which to base the conclusions that firstly, there was a pre-existing injury/condition of industrial hearing loss at some point before1980; and, secondly, that that injury contributes to the impairment assessed now. The conclusion of Dr Tamhane does not accord with the principles from the authorities noted above

44. In these circumstances any conclusion that there was injury in the period would be assumption. It follows that there would be no basis for the next step for a finding that a proportion of the impairment assessed by the AMS is due to the period before 1980.

45. The Panel notes that the indications of the degree and duration of noise exposure before 1980, including that recorded by Dr Fagan, suggest it was very unlikely to cause hearing loss. The AMS takes a history that “Mr Watt previously worked as a fencing contractor from 1976-1980 and was exposed to noise from chainsaws and post hole diggers.” The AMS answers “No” to the question at Part 8.e. as to any pre-existing element and also at Part 11 notes only the non-occupational hearing loss before stating “There is no deductible proportion” at Part 11.c.

46. This is entirely consistent with the lack of evidence to establish any injury or condition in the period 1976 to 1980. It is also consistent with what the Panel considers to be the most detailed history recorded by Dr Fagan. The AMS notes that his assessment differs from that of Dr Tamhane but is close to that of Dr Fagan. Given Dr Tamhane did not rely on any evidence of injury to arrive at his 1/10 deduction, the AMS was not obliged to engage further with that assessment.

47. Therefore, even if the Referral had been different and the period before 1980 was excluded for the reasons submitted by the appellant, there would be no deduction applicable to the assessment.

48. The Panel finds no demonstrable error under this ground of appeal, and there is no reliance by the AMS on incorrect criteria.

Findings

49. The grounds of appeal are not made out. The Panel discerns no demonstrable error on the face of the Certificate. The assessment was not based on incorrect criteria.

50. For these reasons, the Appeal Panel has determined that the MAC issued on 9 January 2020 is confirmed.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar