WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **3238/19**
Applicant: **Peter Wehbe**
Respondent: **Rayrod Pty Ltd**
Date of Determination: **18 November 2019**
Citation: **[2019] NSWWCC 369**

The Commission determines:

1. The applicant was a worker employed by the respondent as that term is defined in s 4 of the *Workplace Injury Management and Workers Compensation Act 1998*.

2. The applicant suffered an injury in the course of his employment with the respondent by way of binaural hearing loss, with a deemed date of injury of 31 January 2007.

3. The applicant's delay in claiming compensation is explained and excused under s 251(4)(b) of the *Workplace Injury Management and Workers Compensation Act 1998* due to it being occasioned by ignorance and/or mistake as the applicant did not become aware until 2018 of an entitlement to claim compensation.

4. The hearing aids claimed by the applicant are reasonably necessary pursuant to s 60 of the *Workers Compensation Act 1987.*

5. The respondent is to pay the cost of the hearing aids claimed by the applicant.

6. The applicant's claim for permanent impairment compensation is to be remitted to the Registrar for referral to Approved Medical Specialist (AMS) for determination of the degree permanent impairment arising from the following:

    (a) Date of injury: 31 January 2007 (deemed)
    (b) Body systems referred: binaural hearing loss
    (c) Method of assessment: whole person impairment.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker
Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Peter Wehbe (the applicant), currently aged 79, brings proceedings seeking payment by Rayrod Pty Ltd (the respondent) for digital hearing aids and for lump sum compensation.

2. The respondent was the applicant's own company. He was a director and allegedly an employee for many years. He says he last worked for the respondent in 2007, and his claim has a deemed date of injury of 31 January 2007.

3. The applicant is a carpenter by trade and has worked on building sites since he was approximately 15 years old. In 1999, he incorporated the respondent and became, on his own evidence, both an officer as Managing Director and Secretary and an employee of the company.

4. According the applicant, the respondent was involved in constructing residential premises, and he was the only full-time employee of the company.

5. In a detailed second statement which was admitted into evidence and marked Exhibit A, the applicant set out his former duties as follows:

> "10. As an employee of the company I was involved in preparing quotes, meeting with clients, lodging development applications, undertaking demolition works, co-ordinating sub-contractors and undertaking building works. In this latter regard I did not most if not all of the carpentry works and sometimes, I also did the tiling.
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> 11. I would attend building sites every day and usually for the whole day.
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> 12. During the course of my employment history including my employment with Rayrod Pty Ltd I was exposed to noise from machinery typically found on construction sites such as jackhammers, compressors and power tools. I worked 8 to 12 hours per day. I wore ear protection in the latter part of my employment.
>
> 13. The noise level was such I had to raise my voice and often shout in order to communicate with the person standing about 1 metre away."

6. The applicant has had hearing problems in the past and has been previously fitted with hearing aids, however, he states the first time he became aware he may have an entitlement to claim in relation to industrial deafness was when his solicitors arranged for him to be examined by Dr Scoppa in May 2018.

7. On 22 June 2018, the applicant's solicitors wrote to the respondent's insurer making a claim for s 60 expenses and permanent impairment compensation. In that letter, the solicitors stated the deemed date of injury was 31 January 2010.

8. On 26 June 2018, the respondent's insurer advised the applicant's solicitors they were unable to locate a policy which was in effect at 31 January 2010. They noted there was a past policy in place for the respondent, but the policy did not cover that deemed date of injury.

9. The applicant's solicitors then wrote to the State Insurance Regulatory Authority (SIRA) requesting details of any policies held by the respondent. SIRA replied that the only policy held by the respondent was for the period 26 May 2006 to 26 May 2007.

10. The applicant then swore a statement on 26 November 2018 in which he said:

> "5. I recall the last job that Rayrod Pty Ltd did was to construct eight townhouses located at 34 Carinya Street, Blacktown.
>
> 6. This was the last job undertaken by Rayrod Pty Ltd and as far as I can recall it was completed in 2007. I do not know the exact date that is was completed.
>
> 7. At the time my sister, Renee, was undertaking some administrative work for the company including arranging workers compensation insurance.
>
> 8. My sister informs me that to the best of her knowledge once the project was completed, she would have allowed for workers compensation policy to have lapsed."

11. On 6 December 2018, the applicant's solicitors again made a claim on the respondent's insurer in identical terms to the previous one, save the deemed date of injury was alleged to be 31 January 2007.

12. On 20 December 2018, the respondent's insurer wrote to the applicant's solicitors asking for proof of employment of the applicant by the respondent and noting the hearing aids quoted were not a type approved by iCare.

13. The applicant initially commenced proceedings on 8 January 2019. On 22 January 2019, the respondent's insurer issued a s 78 notice denying liability on the basis:

    a. the applicant had failed to give notice of the injury within time without explanation;
    b. the applicant was not a worker as defined in section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);
    c. the applicant did not suffer an injury in the course of or arising out of his employment, pursuant to section 4 of the *Workers Compensation Act 1987* (the 1987 Act); and
    d. the respondent was not the applicant's last noisy employer pursuant to section 17 of the 1998 Act."

14. The applicant's initial proceedings were discontinued, and on 1 July 2019 the applicant commenced these proceedings.

ISSUES FOR DETERMINATION

15. The parties agree that the following issues remain in dispute:

    (a) has the applicant provided a reasonable excuse for the late notice of making a claim;

    (b) was the applicant a worker or deemed worker of the respondent;

    (c) did the applicant suffer an injury in the course of or arising out of his employment; and

    (d) if so, what was the cause of that injury, including whether the respondent was the last noisy employer of the applicant.

PROCEDURE BEFORE THE COMMISSION

16. The parties attended a hearing on 3 September 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.

17. At the hearing, the applicant was represented by Mr J Hallion of counsel and the respondent by Mr F Doak of counsel.

18. I note the applicant also provided written submissions to the Commission on 3 September 2019, after the hearing. On 1 October 2019, the respondent's solicitors confirmed via email that the respondent did not wish to make submissions in reply.

EVIDENCE

Documentary Evidence

19. The following documents were in evidence before the Commission:

    (a) Application to Resolve a Dispute (the Application) and attached documents;

    (b) The Reply and attached documents;

    (c) The applicant's Application to Admit Late Documents (AALD) dated 30 July 2019 and attached documents;

    (d) The respondent's AALD dated 16 August 2019 and attached documents; and

    (e) The applicant's second AALD dated 5 August 2019 and attached documents.

Oral Evidence

20. There was no oral evidence called at the hearing.

SUBMISSIONS

The Respondent's Submissions

21. Mr Doak referred the Commission to section 17(1)(a)(ii) of the 1987 Act, and noted the applicant has been wearing hearing aids since approximately 2003. He submitted the applicant having changed the deemed date of injury from 2010 to 31 January 2007, the only relevant period of exposure and risk for the respondent's insurer is between 26 May 2006 and 26 May 2007.

22. Mr Doak noted the applicant's evidence in his second statement to the effect he wore ear protection in the latter part of his working life, and submitted that would have included the period of risk for his client's insurer. Mr Doak submitted the problem for the applicant in proving the respondent was the last noisy employer is the applicant's reliance on noise over many years from approximately 1970, the vast majority of which was a period for which the applicant can obtain no comfort in his claim against the respondent, because until May 2006, there was no insurance.

23. In relation to the question of worker, Mr Doak submitted the indicia of an employment relationship have not been addressed by the applicant, who simply asserts he was an employee director of the respondent. He took the Commission to the applicant's 2007 tax return and noted the income referred to is derived from "allowance, earnings, tips, director's fees, et cetera" and no mention of wages or salary or PAYG earnings is made. Mr Doak also noted the applicant failed to produce documents in answer to the respondent's Notice to Produce, particularly being the respondent's tax returns and profit and loss statements, and asked the Commission to draw an inference that those documents would not have assisted the applicant.

24. In summary, Mr Doak submitted that for the applicant to succeed, the Commission would need to accept he was an employee by drawing a legal conclusion, and do so contrary to all other evidence apart from his own statement. He submitted the evidence in support of the applicant being a worker falls well short of the requisite standard.

The applicant's submissions

25. Mr Hallion submitted the respondent is in a difficult position as it had not sought separate representation, and therefore the applicant's evidence is also that of the respondent, given he was the Managing Director and Secretary of the company.

26. Mr Hallion submitted the applicant did not have to be corroborated, he only needs to keep records for seven years by law, and the contemplation of bringing the claim in issue did not arise until 2017 or 2018, well over a decade after the respondent ceased trading.

27. Mr Hallion noted the applicant's statements all indicate he was the only employee of the respondent, and the only conclusion which the Commission can draw is that he was an employee director. He said there is no evidence to the contrary which questions the applicant's status as an employee, and the presence of an employee relationship is consistent with the respondent having taken out a worker's compensation policy for the period up to and including May of 2007.

28. Given the respondent is not separately represented, Mr Hallion submitted it cannot make assertions contrary to the evidence given by the applicant, and accordingly the issue of worker is not a live one.

29. Concerning causation, Mr Hallion relied on the opinion or Dr Scoppa, whom he said was an experienced ear, nose and throat surgeon. He said there was no doubt the applicant's employment was noisy up until the point when he ceased work, which the evidence suggests was in or about January 2007.

30. The noisiness of the applicant's employment, Mr Hallion submitted, is not in issue and he noted there is not a particular time when one can say they have suffered industrial hearing loss, but rather the date of injury in such a circumstance is a deemed legal construct. Mr Hallion further submitted there was no evidence put forward by the respondent to dispute the view of Dr Scoppa, and said the applicant had comfortably satisfied the requirements of causation in that he provided Dr Scoppa with a clear history, has audiometry results consistent with that history and the level of exposure by the applicant over the course of his working life is not contested.

31. Mr Hallion submitted the applicant does not have to prove to a scientific extent as alleged by the respondent that his exposure to noise whilst working with the respondent had caused his hearing loss. Rather, Mr Hallion submitted the applicant's statement evidence and the history given to Dr Scoppa was sufficient to satisfy the causal test.

32. Mr Hallion submitted there is no question the hearing aids sought are a medical necessity and, if the Commission found the applicant a worker and the injury proven, payment by the respondent for the cost of the hearing aids would follow.

33. Concerning the question of notice under sections 254 and 261 of the 1998 Act, Mr Hallion noted that although the applicant had hearing aids for many years, he had always paid for them himself and had not been given any advice as to an entitlement to claim in relation to industrial deafness until approximately 2017 or 2018.

34. It was not until the applicant attended Dr Scoppa that he obtained the requisite knowledge to make a claim. Accordingly, Mr Hallion said there was nothing to contradict the suggestion that the first notice of any entitlement to claim arose after the assessment of audiologist Blooms, and that notice was then given as soon as the applicant found out he had such an entitlement.

35. In summary, Mr Hallion submitted the employment relationship was sufficiently established, as was the causal connection between the applicant's employment with the respondent and his development of binaural hearing loss. The reasonable necessity of the hearing aids was established by the report of Dr Scoppa, and in relation to the notice requirements, the Commission should accept the applicant was ignorant of his entitlement to seek compensation until he obtained an opinion from Dr Scoppa, which was the catalyst along with the audiology report for the making of a claim.

The respondent's submissions in Reply

36. Mr Doak submitted it was not necessary for the respondent to be separately represented. He noted the applicant was not his client, and the respondent as the applicant's company was a party to the proceedings and accordingly was separately represented. He submitted the fact the applicant says he was employed by the respondent does not preclude the respondent from contesting that allegation. Mr Doak lastly submitted the statement of the applicant's sister to the effect the respondent employed a number of casuals from time to time provides the basis for the taking out of workers compensation insurance, rather than the applicant being an employee.

DISCUSSION

Late notice of claim

37. Section 65(7) of the 1998 Act provides a claim must be made within six months of the date of injury. Section 65(15), however, provides:

> "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 subsections (7) and (13) taken to have been received when the worker first became so aware. If death results from an injury and a person who is entitled to claim compensation under this Act in respect of the death first becomes aware after the death that the death resulted or is likely to have resulted from the injury, the date of death is, for the purposes of the application of subsections (7) and (13) to a claim by that person, taken to be the date that the person became so aware.

38. In this matter, the only evidence as to when the applicant became aware of having received an injury is found in his second statement at paragraph 14, where the applicant says:

> "The first time I became aware that I was suffering from hearing loss related to my employment was when my solicitors obtained a report from Dr Joseph Scoppa dated 23 May 2018."

39. There is no evidence to contradict this assertion by the applicant, and I accept it. Having done so, I find section 65(15) of the 1998 Act operates to effectively mean the alleged injury to the applicant was received on 23 May 2018. As noted under the heading "Background" above, the applicant's solicitors gave notice of a claim in June 2018, and accordingly, the applicant has, in my opinion, given notice within time. I note section 261(6) of the 1998 Act is in identical terms to section 65(15) and operates to the same effect.

40. Accordingly, in my view the applicant's claim is within time.

Worker

41. The evidence in relation to the issue of worker is limited to the applicant and his sister's statements and his personal taxation records. There are no company records available for the respondent, despite a Notice for Production being issued on the applicant. Although Mr Doak sought to have the Commission draw an adverse inference against the applicant, I accept Mr Hallion's submission that there was no obligation on the applicant to retain the respondent's records for more than seven years, and that he had no reason to think he would need to retain them. I therefore decline to draw any inference regarding lack of records.

42. The applicant bears the onus of proving he was a worker employed by the respondent. In his first statement, attached to the Application, the applicant says:

> "3. I am a director and an employee of Rayrod Pty Ltd.
>
> 4. Rayrod Pty Ltd undertook residential construction work.
>
> 5. I recall the last job that Rayrod Ply Ltd did was to construct 8 townhouses located at 34 Carinya Street, Blacktown.
>
> 6. This was the last job undertaken by Rayrod Pty Ltd and as far as I can recall it was completed in 2007. I do not know the exact date that it was completed.
>
> 7. At the time my sister, Renee, was undertaking some administrative work for the company including arranging workers compensation insurance.
>
> 8. My sister informs me that to the best of her knowledge once the project was completed, she would have allowed the workers compensation policy to have lapsed."

43. In his second statement, the applicant sets out the nature and extent of his duties. He says:

> "5. Rayrod Pty Ltd (the company) was incorporated on 20 January 1999 and I became an office holder and an employee of the company.
>
> 6. The other officeholders of the company are my sons Rodney George Wehbe and Raymond Peter Wehbe. They have not been employed by the company…
>
> 8. I was the only full-time employee of the company.
>
> 9. The company would employ sub-contractors and/ or casual employees as and when required.

10. As an employee of the company I was involved in preparing quotes, meeting with clients, lodging development applications, undertaking demolition works, co-ordinating sub-contractors and undertaking building works. In this latter regard I did most if not all of the carpentry works and sometimes, I also did the tiling.

11. I would attend building sited every day and usually for the whole of the day."

44. The applicant's sister, Renee Wehbe, also provided a statement. She worked for the applicant undertaking administrative duties. She arranged the workers compensation policy at issue. She said:

"5. In 2007 the company was involved in the construction of town houses situated at 34-36 Carinya Street Blacktown. It was the last construction undertaken by the company. I would not have allowed the company's workers' compensation insurance policy to have lapsed prior to all work being completed in relation to the building and construction work.

6. Whilst there were any employees or subcontractors on site, it was my policy to ensure that insurance was in place. I would therefore not have allowed the policy to lapse until all relevant work had been completed. When I refer to works being completed, I do not mean things such as carpet laying and landscaping because these contractors would have had their own insurance."

Ms Wehbe then stated she does not think it unreasonable to conclude the works undertaken by the respondent had been completed by 26 May 2007.

45. That is the extent of the evidence in relation to the issue of worker. The applicant's pro forma tax returns for the relevant years leading up to and including 2007 provide little guidance, as they each record income by way of "allowances, earnings, tips, directors' fees etc." It is not clear whether those "earnings" include wages paid to the applicant.

46. The state of the evidence presents the Commission with difficulties. Normally in cases where worker is in issue, there is evidence which goes to the relevant indicia of the relationship between applicant and respondent, as set out in the line of authorities commencing with *Stevens v Brodribb Sawmilling Co Pty* Ltd (1986) 160 CLR 16 (*Stevens*). That evidence is lacking in this matter, save the applicant's own statement in which he says he was an employee director who carried out certain duties, including physical work.

47. As brief as that evidence is, it is not contradicted by any other material. In my view, the tax returns provide little assistance in determining the nature of his relationship with the respondent. The respondent's tax returns produced by the applicant do not go back as far as the financial year ending 30 June 2007, nor is the applicant required to retain those records after such a period of time. Certainly, the characterisation of sources of income in the applicant's pro forma returns is not helpful, as it does not refer to any wage or salary being drawn. Ideally there would be some explanation as to why this is so, however, the tax returns are not definitive in determining the nature of the relationship between the applicant and the respondent.

48. Given the applicant's evidence is at least in part corroborated by his sister, and is not contradicted by any other material, I accept it. I note the applicant was managing director and secretary of the respondent, and whilst I do not accept Mr Hallion's submission the respondent is disentitled to challenge that evidence unless separately represented, there is nothing before the Commission to contradict the applicant's evidence that he was an employee of the respondent. Moreover, the applicant was not cross examined, nor was any application made to cross examine him.

49. As already mentioned, whilst I have concerns regarding the evidence put forward on the question of worker, I am satisfied – just - on the balance of probabilities that the applicant was a worker.

50. Accordingly, I find the applicant was a worker employed by the respondent as at the deemed date of injury.

Injury and noisy employment

51. I have no difficulty in accepting the applicant was exposed to significant noise in the course of his employment with the respondent. As is the case with the evidence regarding worker, there is nothing to contradict the applicant's evidence to the effect this was the case. Likewise, the evidence of the applicant and his sister regarding the timeframe of the respondent ceasing to carry out building works is corroborated by the timeframe in which the townhouses which comprised the last project were sold.

52. The evidence discloses the applicant wore noise protection towards the latter part of his employment, however, it is unclear whether that protection was either adequate or whether the applicant wore it constantly. In my view, the preponderance of the evidence, such as it is, demonstrates the applicant was exposed to noise in the course of his employment with the respondent, which I also find, based on the uncontested evidence of the applicant, was the last noisy employment in which he was engaged.

53. Given the evidence of the applicant and his sister as to the timing of the work last carried out by the applicant and respondent, I accept the respondent was the last noisy employer, and accept the applicant suffered injury by way of hearing loss as a result of that employment. Accordingly, I find the claim for hearing loss with a deemed date of injury of 31 January 2007 proven.

54. Given these findings, the matter will be remitted to the registrar for referral to an AMS for determination of the whole person impairment arising from the injury, and the respondent will be ordered to pay the costs of the hearing aids claimed by the applicant.