

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-4221/19
Appellant:	Kevin Burke
Respondent:	Eastland Engineering Pty Ltd
Date of Decision:	21 February 2020
Citation:	[2020] NSWCCMA 28

Appeal Panel:	
Arbitrator:	Mr William Dalley
Approved Medical Specialist:	Dr Henley Harrison
Approved Medical Specialist:	Dr Joseph Scoppa

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 28 October 2019, Kevin Burke (Mr Burke/the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Sylvester Fernandes, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 30 September 2019.
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 WorkCover Medical 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 WorkCover Medical 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. Mr Burke was exposed to loud industrial noise between 1964 and 2017. All but three years of that employment were noisy. He was assessed in 2007 as having 13% whole person impairment due to noise induced hearing loss. He had continued in employment which was of a nature likely to give rise to hearing loss thereafter to 2017 with Eastland Engineering Pty Ltd (the Respondent).

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. Neither party requested re-examination of Mr Burke. 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. Neither party requested re-examination and the Panel has determined that the grounds of appeal have not been made out and that the MAC should be confirmed for the reasons set out 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 AMS noted that Mr Burke was aged 72 at the time of examination. The AMS tabulated Mr Burke's exposure to noise from the commencement of his apprenticeship as a fitter and turner in 1964 through to the deemed date of injury, 1 March 2017. He noted:

"He has worn ear protection for approximately 38 years when in very noisy situations.

There is no history of noisy hobbies or amusements sufficient to cause material noise exposure.

There is no history of extra work organic solvents exposure.

There is no history of ear disease or ear surgery or significant past head injury or family history of deafness or exposure to a photo toxic medication.

There is no history of military service."

The AMS noted tinnitus over a period of 40 years and the use of hearing aids.

11. The AMS diagnosed noise induced hearing loss in the upper middle and treble frequencies and "an excess loss of uncertain origin (non-occupational) in the bass and lower middle frequencies and age-related hearing loss".
12. The AMS assessed noise induced hearing loss noting:

"The frequencies below 2 kHz are not included in the calculation because:

1. The almost 'flat' configuration of the audiogram and the magnitude of the losses obtained in the lower frequencies is not compatible with that of a noise induced hearing loss.
2. Also in [sic] noise induced hearing losses, the threshold at a higher frequency is not equal or better than that of a lower frequency. This is not consistent with the mode in which a noise induced lesion spreads to the lower frequencies.

Hence after consideration of the nature and duration (emission levels) of occupational noise exposure and the nature and extent of all the hearing losses, including those at 0.5, 1 and 1.5 kHz, the hearing losses at 2, 3 and 4 kHz are caused by his occupational noise exposure."

13. The AMS noted that Mr Burke had previously been assessed as suffering 13% whole person impairment resulting from noise induced deafness. The AMS explained:

“Past claim more

It may be noted that the past claim (in 2007) is more than the current calculations in spite of the cumulative tendency of noise exposure. The following may help to explain the discrepancy:

1. The extent and magnitude of the initial damage may limit for the further extension of noise induced hearing loss.
2. Factually the rate of hearing loss due to chronic noise exposure is greatest in the initial years of exposure and decreases as the hearing threshold increases (see *American College of Occupational and Environmental Medicine* 2002).
3. In this respect it is also important to remember that, clinically, hearing loss from presbycusis is an accelerating process unlike hearing loss in noise induced hearing which is a decelerating process.
4. Also in this regard the effects of presbycusis causes a loss of hearing at all frequencies, the rate of growth becoming more rapid as age increases (especially after 60 years).
5. The prescriptive presbycusis models were designed from group data but application in an individual case is required here.
6. Assessment is based on non-contemporary audiograms.
7. The assessment of permanent impairment is based on findings on the day of assessment. It is not determined by having regard to other doctors' assessments made other times. (See s 1.6a Guidelines (1 April 2016).
8. See also *Roche v Australian Prestressing Services Pty Ltd* [2013] NSWCCPD7; *Rail Corp NSW v Registrar of the WCC of NSW* [2013] NSWSC 231; *Prisk v Department of Ageing Disability and Home Care (No. 2)* and *Abu-Haider v Consolidated Wire Pty Ltd.*”

SUBMISSIONS

14. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
15. The appellant submitted that the AMS adopted incorrect criteria: “The AMS notes that he conducted this assessment by reference to the multiple gradual process occupational hearing loss process at page 48 of the guidelines.” The appellant submitted that in doing so the AMS had referred to the wrong criteria, there being no evidence of “multiple gradual processes”. The appellant submitted that the AMS had therefore erred in excluding losses below 2000 Hz.
16. The appellant also submitted that the exclusion of hearing loss in respect of frequencies below 2000 Hz was not justified upon consideration of the audiogram, the opinion of the independent medical experts whose reports were in evidence and the additional exposure to noise since the earlier assessment in 2007.
17. In reply, the respondent submits that the AMS had assessed the appellant in accordance with the Guidelines as noted on page 46 and the AMS had referred to the correct example at page 48. The AMS was entitled to assess noise induced hearing loss on the basis of his own testing of the appellant. That assessment was a matter of clinical judgement which did not illustrate demonstrable error. The AMS had explained his reasons for excluding losses below 2000 Hz.

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.
20. The Panel accepts that, if it is established that the AMS had relied upon the example of the assessment of hearing loss set out in the Guidelines at page 48 of Chapter 9, he would have fallen into error. However, the example, labelled as "Example 9.3: Multiple gradual process occupational hearing loss" at page 48 does not provide criteria for the assessment of hearing loss but merely provides an example of assessment of hearing loss due to multiple processes, in that case noise exposure and exposure to workplace solvents.
21. The AMS specifically recorded "there is no history of extra work organic solvents exposure" and did not record any exposure to solvents in the workplace. It appears that the reference to page 48 is simply a typographical error. The AMS recorded that the audiogram had been "carried out in accordance with the WorkCover Guides Chap 9.8 p.48". The operative reference to the Guidelines is the reference to paragraph 9.8 which provides:

"hearing threshold level for pure tones is defined as a number of dB above standard audiometric zero for a given frequency at which the listener's threshold of hearing loss lies when tested in the suitable sound attenuated environment. It is the reading on the hearing level dial of an audiometer that is calibrated according to Australian standard AS 2586 1983".
22. That paragraph appears at page 46 of the Guidelines and it appears that the reference to page 48 is a typographical error. The reference to Chapter 9.8 is appropriate in the context with reference to the assessment to be performed whereas the example on page 48 describes a different causal scenario.
23. The Panel is of the view that the AMS fell into error in describing the exclusion of hearing loss below 2000 Hz as required pursuant to s 323 of the 1998 Act. That section refers to impairment relating to previous injury or pre-existing condition or abnormality. In accordance with *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 per Schmidt J, the relevant time at which the pre-existing condition or abnormality is to be assessed or considered is prior to the onset of the injury which in the present case is exposure to noise.
24. The deduction made by the AMS for hearing loss attributed to causes other than exposure to industrial noise is made pursuant to s 319 (c) of the 1998 Act and paragraph 9.4 of the Guidelines:

"The level of hearing impairment caused by non-work-related conditions is assessed by the medical specialist in considered when determining the level of work-related hearing impairment. While this requires medical judgement on the part of the examining medical specialist, any non-work-related deductions should be recorded in the report."
25. The mislabelling by the AMS of the deduction for non-work-related causes does not affect the accuracy of the conclusion. Although the Panel is of the view that the AMS erred in describing the exclusion of hearing loss below 2000 Hz as a deduction pursuant to s 323, that error had no effect upon the conclusion.

26. Although the AMS refers to a deduction pursuant to s 323 in the text of the report, the MAC itself at page 8 correctly reflects the AMS's reasoning by recording the overall binaural hearing loss and then deducting losses relating to the frequencies below 2000 Hz and presbycusis to arrive at an assessment of binaural hearing loss attributable to workplace noise. After adding a further 1% in respect of tinnitus and making a deduction in respect of the earlier assessment, the AMS correctly records that s 323 is not applicable ("N/A"). That conclusion with respect to s 323 was correct, there being no evidence of any hearing loss at the time when Mr Burke's exposure to noise commenced with his apprenticeship.

27. The AMS appropriately considered:

- "1. Type and duration of noise exposure (*emission* levels)
2. Type of hearing impairment
3. Mode of onset and progression
4. Shape of audiogram
5. Presence of a dip or 'bulge' around 4 kHz
6. Clinical picture
7. No competing diagnoses and complications."

and explained his reasons for excluding the frequencies below 2000 Hz as set out above. The AMS considered the reports of Dr Hulcombe (who included losses at all frequencies below 2000 Hz) and Dr Macarthur (who included loss at 1500 Hz). The AMS explained his reasons for disagreeing with those assessments. Those reasons relied on the clinical judgement of the AMS in accordance with Paragraph 9.4 of the Guidelines.

28. The Panel is satisfied that the AMS has accurately performed the assessment in accordance with the criteria set out in Chapter 9 of the Guidelines and the adoption of incorrect criteria has not been made out.

29. The appellant submitted that consideration of the audiogram, the respective opinions of the independent medical experts whose reports were in evidence and the history of prior assessment, did not support the reasons given by the AMS for concluding that the lower frequencies should not be included. The appellant submitted that this constituted "demonstrable error".

30. The appellant submitted that the conclusion of the AMS was not supported by the evidence which the AMS referred to. Specifically the appellant noted that the AMS had relied upon his observations that:

"1. The almost 'flat' configuration of the audiogram and the magnitude of the losses obtained in the lower frequencies is not compatible with that of a noise induced hearing loss.

2. Also in [sic] noise induced hearing losses, the threshold at a higher frequency is not equal or better than that of a lower frequency. This is not consistent with the mode in which a noise induced lesion spreads to the lower frequencies."

31. With respect to the first of these reasons the appellant submits that "In regard to point 1, it is clear from the viewing of the audiogram that there is no 'flat configuration' in the frequencies between 250 at 1500 Hz. They show a clear progression in a downward fashion."

32. The appellant's submission in this regard reflects an understanding of the use of the word "flat" as indicating "horizontally level". That is clearly not the meaning which the AMS intended to be given to the shape of the line described by the audiogram. The configuration clearly shows a "clear progression in a downward fashion" as noted by the appellant.
33. The significance of the configuration is that the line is more or less straight which is not typical of noise induced hearing loss. Noise induced hearing loss usually produces an audiogram that bends downward at the higher frequencies.
34. The Macquarie dictionary records 61 different meanings and usages of the word "flat". The first three are recorded as follows:
 1. level, even, or without inequalities of surface, as land, etc.
 2. horizontally level: a flat roof.
 3. comparatively lacking in projection or depression of surface: a broad flat face."
35. The Panel is satisfied that the AMS intended to convey that the configuration of the audiogram was not curved, bent or irregular, as was in fact the case. The audiogram presents a more or less even slope to the 3000 Hz point.
36. The Panel accepts that the use of the word "flat" to describe the shape of the audiogram does not demonstrate error on the part of the AMS in relying on that configuration. The AMS was correct to observe that the shape of the audiogram was not indicative of noise induced hearing loss frequencies below 2000 Hz.
37. The appellant submitted with regard to the second reason provided by the AMS:

"In regard to point 2, when viewing the audiogram, the threshold at the higher frequency are clearly worse than at the lower frequency. As justification for the deduction, the AMS opines that 'in noise induced hearing losses, the threshold at a higher frequency is not equal or better than that of a lower frequency'. It is clear from the audiogram that the threshold at the higher frequency is not equal or better than that of a lower frequency which is indeed consistent with the mode in which a noise induced lesion spreads to the lower frequencies, by the AMS's own admission."
38. The Panel accepts that it is difficult to follow the reasoning of the AMS with regard to this second point. The Panel accepts that the evidence of the audiometry suggests a severe and unusual loss at frequencies below 2000 Hz. The respective audiograms in evidence suggest that the substantial losses below 2000 Hz are probably unrelated to noise exposure and due to other causes. If the AMS intended to convey that comparison of the extent of loss of the higher frequencies with the extent of loss at the lower frequencies suggested that losses at the lower frequencies were due to causes other than industrial noise then he was entitled to draw that conclusion.
39. The Panel understands the AMS to be saying that the extent of loss at the lower frequencies is so extensive as to be unlikely to be caused by exposure to noise. The Panel agrees that the conclusion; "this is not consistent with the mode in which a noise induced lesion spreads to the lower frequencies" is correct.
40. The AMS has assessed Mr Burke in accordance with the Principles of Assessment set out in Paragraph 1.6 of the Guidelines in that he has assessed Mr Burke as he presented on the day of assessment taking into account Mr Burke's relevant medical history and the available relevant medical information.

41. The AMS has considered the nature and duration of occupational noise exposure as well as the nature and extent of the hearing losses at the relevant frequencies. Based on those considerations the AMS has exercised his clinical judgement to arrive at the conclusion expressed in the MAC.
42. Although experts may disagree in the interpretation of the material available to the AMS, the conclusion reached by the AMS was open to him as a matter of clinical judgement. Demonstrable error has not been established.
43. For these reasons, the Appeal Panel has determined that the MAC issued on 30 September 2019 should be 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*.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

