WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**3833/20**
Applicant:	**Mark Stewart Schofield**
Respondent:	**Holcim (Australia) Holdings Pty Ltd**
Date of Determination:	**4 September 2020**
Citation:	**[2020] NSWWCC 302**

The Commission determines:

1. The applicant sustained an injury in the form of sensorineural hearing loss arising out of or in the course of his employment with respondent on 8 August 2018 (deemed).

2. The applicant's employment was the main contributing factor to his injury.

3. The respondent was the last employer who employed the applicant in an employment to the nature of which the injury, sensorineural hearing loss, was due for the purposes of section 17(1)(a)(i) of the *Workers Compensation Act 1987*.

4. The provision of bilateral digital hearing aids is reasonably necessary as a consequence of the applicant's injury.

The Commission orders:

5. The respondent is to pay medical expenses in respect of the supply and fitting of bilateral digital hearing aids on production of accounts and/or receipts pursuant to section 60 of the *Workers Compensation Act 1987*.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mark Stewart Schofield (the applicant) is 57 years old and was employed by Holcim (Australia) Holdings Pty Limited (the respondent) as a driver, batcher and plant supervisor from 1989 until he ceased work on 8 August 2018.

2. On 19 July 2019, the applicant's solicitor served a notice of claim together with a notice of injury form on the respondent for the payment medical expenses for hearing aids.

3. On 21 August 2019, the respondent as a self-insurer (the insurer) sent an email to the applicant's solicitor seeking particulars of applicant's employment with Easy Mix Pty Ltd t/as Easy Mix Concrete (Easy Mix). A response was forwarded to the insurer on 29 October 2019.

4. On 19 November 2019, the insurer sought further particulars, including a noise level study and site map from his current employer. The insurer advised that it was not able to determine the last noisy employer in the absence of this information. Therefore, no dispute notice was issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

5. By an Application to Resolve a Dispute in matter no. 495/20 (Application No.1) registered in the Workers Compensation Commission (the Commission) on 31 January 2020, the applicant claimed medical expenses for hearing aids pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) as a result of injury arising out of or in the course of his employment with the respondent on 8 August 2018 (deemed). A Reply (Reply No.1) was filed on 21 February 2020.

6. At the telephone conference on 28 February 2020, the respondent was granted leave to issue a direction for the production of documents on Easy Mix. The prior proceedings were discontinued at a conciliation and arbitration hearing on 21 April 2020.

7. By an Application to Resolve a Dispute (Application No.2) registered in the Workers Compensation Commission (the Commission) on 10 July 2020, the applicant claims medical expenses for hearing aids pursuant to s 60 of the 1987 Act as a result of injury arising out of or in the course of his employment with the respondent on 8 August 2018 (deemed).

8. On 3 August 2020, the respondent's solicitor filed a Reply (Rely No. 2). She submitted that the respondent had been unable to determine the claim due to applicant's failure to respond to particulars. She sought leave to dispute that the applicant had not suffered an injury and that the respondent was the last noisy employer who employed the applicant in employment to the nature of which industrial deafness was due, for the purposes of ss 4 and 17 of the 1987 Act.

PROCEDURE BEFORE THE COMMISSION

9. The matter was listed for a telephone conference before me on 10 August 2020. The matters in dispute were discussed and I issued the following Direction:

> "1. The respondent does not dispute that it was a noisy employer and that the applicant requires hearing aids as a result of exposure to industrial noise.
>
> 2. The respondent is directed to file and serve a copy of the email from the respondent to Australasian Safety Services dated 27 July 2020, with any attachments, by 12 August 2020.

3. The respondent seeks leave pursuant to s 289A of the *Workplace Injury Management and Workers Compensation Act 1998* to dispute that it was the last noisy employer. This is opposed by the applicant.

4. The parties object to the admission of certain evidence in the Application to Resolve a Dispute and the Reply.

5. The parties are to file and serve written submissions addressing the following preliminary matters:

    a. Whether leave should be granted to the respondent to dispute that it was the last noisy employer.

    b. Whether the following documents should be admitted into evidence:

        (i) Applicant's statement dated 30 April 2020;
        (ii) Report of Dr Macarthur dated 16 June 2020;
        (iii) Statement of Con Hantzi dated 29 July 2020;
        (iv) Photograph of street view on page 38 of the Reply, and
        (v) Report of Australasian Safety Services dated 30 July 2020.

6. In the alterative, the parties are to file and serve written submissions addressing the proposed liability dispute identified in paragraph 3 above.

7. The respondent is to file and serve written submissions by 20 August 2020.

8. The applicant is to file and serve written submissions by 28 August 2020.

9. Any submissions in reply are to be filed and served by 4 September 2020.

10. At the conclusion of the time allowed for submissions, this issue will be determined on the papers."

10. Written submissions were filed by the respondent on 14 August 2020 and 3 September 2020, and by the applicant on 19 August 2020.

11. The applicant's solicitor sought leave to rely upon a letter of instructions to Dr Macarthur dated 22 May 2019, which was attached to his submissions. The Commission sought the respondent's views, and it consented to its admission into evidence.

12. 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.

13. 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.

14. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.

PRELIMINARY ISSUES FOR DETERMINATION

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

    (a) whether leave should be granted to the respondent to dispute that it was the last noisy employer – s 289A of the 1998 Act.

(b) whether the following documents should be admitted into evidence:

(i) Applicant's statement dated 30 April 2020;
(ii) Report of Dr Macarthur dated 16 June 2020;
(iii) Statement of Con Hantzi dated 29 July 2020;
(iv) Photograph of street view on page 38 of the Reply, and
(v) Report of Australasian Safety Services dated 30 July 2020.

RESPONDENT'S SUBMISSIONS IN RESPECT OF THE PRELIMINARY ISSUES

Leave to dispute "last noisy employer" – s 289A(4) of the 1998 Act

16. The respondent's counsel, Mr Beran, submits that Application No.1 contained the same allegations in respect of injury as the current proceedings. Reply No.1 placed the issue of last noisy employment in question. The respondent's sought particulars of the applicant's subsequent employment with Easy Mix, but they were not provided before the proceedings were discontinued.

17. Mr Beran submits that the applicant knew as early as November 2019, when the respondent sought particulars, that the respondent was aware of his employment with Easy Mix, which in its view could have been the last noisy employer.

18. Mr Beran submits that particulars of the applicant's employment with Easy Mix were not provided until the current proceedings were commenced wherein the applicant relied upon a second statement and a supplementary report of Dr Macarthur. The applicant did not seek a review under s 287A of the 1998 Act. It was the respondent's mistaken understanding that the applicant sought to bring proceedings against Easy Mix by virtue of his discontinuance of Application No.1.

19. Mr Beran submits that in circumstances, leave should be given to the respondent pursuant to s 289A(4) of the 1998 Act to place "last noisy employment" in issue, having regard to the Commission's objectives in s 354(3) of the 1998 Act . This issue had been previously notified in the Reply No.1, and it is in the interests of justice to allow such a dispute to be heard because the dispute has been placed before the Commission at the earliest available opportunity, the delay in giving notice was due to the applicant's failure to provide particulars, there was a reasonable question of fact and law to be determined, and there was no prejudice to the worker.

20. In reply, Mr Beran submits that the applicant was aware as early as November 2019 that there was an issue regarding last noisy employment, and this was also identified in Reply No.1. There could be no allegation of surprise in the current proceedings, so there would be no prejudice.

Admissibility of fresh evidence

21. Mr Beran submits that the applicant's most recent statement is the first evidence to address his subsequent employment and the liability of the respondent. The applicant had not previously provided any or adequate evidence regarding his employment with Easy Mix.

22. Mr Beran submits that the statement was in existence for two and half months prior to it being served in Application No. 2. The respondent is prejudiced by the admission of this evidence in circumstances where it cannot have it verified or tested in any way. The admission of such evidence is contrary to the Commission's duty to act according to equity and good conscience.

23. Mr Beran submits that the report of Dr Macarthur was in existence for one month prior to it being served in Application No. 2. The applicant did not request a review under s 287A of the 1998 Act, thereby preventing the respondent from considering the report or commissioning a report in reply. The initial report of Dr Macarthur took no history of the applicant's employment with Easy Mix and is of little forensic value. Admission of the doctor's supplementary report is prejudicial to the respondent and does not comply with the requirement of equity in the circumstances.

24. Mr Beran confirms that the photograph at page 38 of Reply 2 is not pressed. He submits that the statement of Mr Hantzi and the report of Australasian Safety Services directly respond to the fresh evidence contained in Application No. 2. It would not be in the interests of justice, or consistent with the Commission's duty to exclude them from evidence, particularly if the applicant's fresh evidence is admitted into the proceedings.

APPLICANT'S SUBMISSIONS IN RESPECT OF THE PRELIMINARY ISSUES

Leave to dispute "last noisy employer" – s 289A(4) of the 1998 Act

25. The applicant's solicitor, Mr Bechelli, submits that the respondent's submissions do not address any of the relevant criteria identified by Deputy President Roche in *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services*[1], so the only inference that can be drawn is that the respondent is unable to address the criteria in a manner favourable to its application. Accordingly, leave should not be granted.

26. In the alternative, Mr Bechelli submits that there are a number of relevant matters relating to any leave application. He submits that the letter of claim was sent by facsimile to the respondent on 19 July 2019, and it was obliged to determine the claim within 21 days in accordance with s 279 of the 1998 Act. The failure to determine the claim is an offence according to s 283 of the 1998 Act, and the respondent has not provided any reasonable or any excuse for its failure. The inference can be drawn that it does not have a reasonable excuse.

27. Mr Bechelli submits that the respondent requested further particulars on 21 August 2019 and it is clear that it was aware of the applicant's employment with Easy Mix. It questioned whether Dr Macarthur had been properly advised of the nature and tendencies of his role at Easy Mix to enable a proper assessment.

28. Mr Bechelli submits that the applicant provided a reply to the request for particulars on 29 October 2019, noting that the respondent's request was out of time, and the applicant requested a determination of the claim without further delay.

29. Mr Bechelli submits that on 19 November 2019, the respondent raised issues concerning the adequacy of the replies, and it is clear from the correspondence that it did not accept that it was the last noisy employer, and it did not determine the claim as required under the legislation. He submits that none of the issues that were raised in the two letters constituted relevant particulars in accordance with ss 281 and 282 of the 1998 Act, and the respondent failed to determine the claim by issuing a dispute notice.

30. Mr Bechelli submits that in the prior proceedings, the respondent disputed that the applicant was not exposed to noise at Easy Mix. However, it had not served a dispute notice and had not adduced any evidence to support its contention.

31. Mr Bechelli submits that when the proceedings were discontinued, the respondent had no reason to believe that the claim would not be pursued, that further evidence would not be obtained, that the further evidence would be served on it prior to fresh proceedings being commenced, and it had no reason not to have determined the claim by issuing a dispute

[1] [2007] NSWWCCPD 227, (*Mateus*).

notice. Accordingly, there is no basis to grant leave to the respondent to dispute that it was the last noisy employer.

32. Mr Bechelli submits that the review process referred to in s 287A of the 1998 Act is not mandatory, and it is concerned with the review of a claim by the insurer that is disputed. The respondent did not issue a dispute notice in accordance with the legislative requirements. Further, it was apparent that the respondent considered that Easy Mix was the last noisy employer, so there was little point in seeking a review. He submits that the respondent could not have been under the impression that the applicant intended to bring proceedings against Easy Mix.

Admissibility of fresh evidence

33. Mr Bechelli submits that if the respondent is granted leave to dispute that it was the last noisy employer, the applicant does not object to the admission of the respondent's late evidence, and the real issue will be the weight to be given to these documents.

34. Mr Bechelli submits that there is no obligation on the applicant in the legislation or in the SIRA Guidelines (the Guidelines) to have served evidence prior to the commencement of the proceedings. The applicant's reliance on Dr Macarthur's initial report when he made the claim satisfied the requirements under the Guidelines.

35. Mr Bechelli submits that in Reply No.2, the respondent states that the material offends ss 287, 289 and 289A of the 1998 Act, but does not disclose how it does so. Accordingly, the applicant assumes that this ground of objection is not pressed.

36. In the alternative, Mr Bechelli submits that one must consider the history of the matter. The respondent's contentions during the prior proceedings meant that the onus of proof fell onto the applicant to not only prove that the respondent was a noisy employer, which the respondent has now conceded, but also that his employment with Easy Mix was not noisy. This was not on the basis of the applicant's evidence regarding his employment, but on the basis of the respondent's understanding of the conditions of that employment. This is an erroneous approach.

37. Mr Bechelli submits that the applicant bears the legal onus of proof of proving his case on the balance of probabilities. If the respondent disputes the facts relied upon by Dr Macarthur in forming his opinion, then the respondent bears the evidentiary burden by raising the issue in a dispute notice, and by adducing evidence. The respondent has failed to do this.

38. Mr Bechelli submits that the applicant's fresh evidence constitutes evidence in reply to the contentions raised by the respondent rather than evidence in chief. In the circumstances, if the respondent is given leave to dispute that it was the last noisy employer and its documents are admitted, then in the interests of procedural fairness, the applicant's documents should be admitted in response.

39. Mr Bechelli submits that the letter of instructions to Dr Macarthur dated 22 May 2019 referred to the applicant's employment with Easy Mix with details of the period of employment and a description of his position as a sales representative. There is no evidence about what history, if any, Dr Macarthur obtained from the applicant regarding his current employment, and this is a matter for speculation. It is possible that Dr Macarthur may have concluded that the employment as a sales representative was not noisy.

40. Mr Bechelli submits that the respondent chose not to qualify its own specialist in order to obtain a comprehensive history. It challenges the opinion of Dr Macarthur and its forensic value because of an incomplete history, without any evidence to the contrary.

41. Mr Bechelli submits that the respondent cannot complain that the applicant has not provided adequate particulars of his employment with Easy Mix, and then object to the admission of

those particulars when they are provided. The respondent's contention that the applicant's employment with Easy Mix is noisy employment could only have been based on either fact or speculation. The respondent has not indicated whether it was one or the other.

42. Mr Bechelli submits that relevant information would have come to light had the respondent addressed the criteria in *Mateus*, and this should be considered when determining whether it is in the interests of justice to exercise the discretion under s 289A(4) of the 1998 Act. The respondent has had ample time to present evidence of the facts upon which it relies to formulate its position and cannot object to the applicant's documents by now claiming that is prejudiced by the fresh evidence. Leave should not be granted to dispute that it was the last noisy employer and its documents should not be admitted.

43. Mr Bechelli submits that the respondent failed to determine the claim in accordance with its statutory obligations, and it has provided no excuse for its failure. It has failed to address the criteria identified in *Mateus* in support of its application to dispute that it was the last noisy employer. Finally, the respondent has failed to refer to any statutory provision or authority that requires the applicant's fresh evidence to have been provided to the respondent prior to the commencement of these proceedings.

REASONS IN RESPECT OF THE PRELIMINARY ISSUES

44. Section 282 of the 1998 Act sets out what constitutes relevant particulars about a claim. It provides:

> **"282 Relevant particulars about a claim**
>
> (1) The ***relevant particulars about a claim*** are full details of the following, sufficient to enable the insurer, as far as practicable, to make a proper assessment of the claimant's full entitlement on the claim:
>
> (a) the injury received by the claimant,
> (b) all impairments arising from the injury,
> (c) any previous injury, or any pre-existing condition or abnormality, to which any proportion of an impairment is or may be due (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act),
> (d) in the case of a claim for work injury damages, details of the economic losses that are being claimed as damages and details of the alleged negligence or other tort of the employer,
> (e) information relevant to a determination as to whether or not the degree of permanent impairment resulting from the injury will change,
> (f) in addition, in the case of a claim for lump sum compensation, details of all previous employment to the nature of which the injury is or may be due,
> (g) such other matters as the Workers Compensation Guidelines may require.
>
> (2) If the employer requires the claimant to submit himself or herself for examination by a medical practitioner provided and paid for by the employer, the claimant is not considered to have provided all relevant particulars about the claim until the worker has complied with that requirement.
>
> (3) The insurer is not entitled to delay the determination of a claim under this Division on the ground that any particulars about the claim are insufficient unless the insurer requested further relevant particulars within 2 weeks after the claimant provided particulars."

45. Sections 289 and 289A of the 1998 Act set out restrictions regarding the referral of a dispute to the Commission. They provide:

> " **289 Restrictions as to when dispute can be referred to Commission**
>
> (1) A dispute about a claim for weekly payments (other than a dispute based on a work capacity decision) cannot be referred for determination by the Commission unless the person on whom the claim is made—
>
> (a) disputes liability for the claim (wholly or in part), or
> (b) fails to determine the claim as and when required by this Act.
>
> **Note.**
> The determination of a claim requires the commencement of weekly payments of compensation. The failure to commence weekly payments pursuant to a work capacity decision (without having disputed liability) constitutes a failure to determine the claim.
>
> (2) A dispute about a claim for medical expenses compensation cannot be referred for determination by the Commission unless the person on whom the claim is made—
>
> (a) disputes liability for the claim (wholly or in part), or
> (b) fails to determine the claim as and when required by this Act.
>
> (2A) Subsection (2) does not prevent the referral to the Commission of a dispute about whether any proposed treatment or service is reasonably necessary as a result of an injury.
>
> **Note.**
> Section 60 of the 1987 Act provides for such a dispute to be referred to the Commission.
>
> (3) ……
>
> **289A Further restrictions as to when a dispute can be referred to Commission**
>
> (1) A dispute cannot be referred for determination by the Commission unless it concerns only matters previously notified as disputed.
>
> (2) A matter is taken to have been previously notified as disputed if—
>
> (a) it was notified in a notice of dispute under this Act or the 1987 Act after a claim was made or a claim was reviewed, or
>
> (b) it concerns matters, raised in writing between the parties before the dispute is referred to the Registrar for determination by the Commission, concerning an offer of settlement of a claim for lump sum compensation.
>
> (3) The Commission may not hear or otherwise deal with any dispute if this section provides that the dispute cannot be referred for determination by the Commission. However, the Commission may hear or otherwise deal with a matter subsequently arising out of such a dispute.

(4) Despite subsection (3), a dispute relating to previously un-notified matters may be heard or otherwise dealt with by the Commission if the Commission is of the opinion that it is in the interests of justice to do so".

46. In this matter, the applicant was entitled to commence proceedings, even though the insurer had not determined the claim, by reason of s 289 (2A) of the 1998 Act.

47. There is merit in Mr Bechelli's submissions regarding the respondent's failure to properly determine the claim in accordance with s 279 of the 1998 Act. It should have acted within 21 days of 19 July 2019. If it was not satisfied with the particulars of the claim, it should have requested particulars within two weeks of 19 July 2019 in accordance with s 279(3) of the 1998 Act. I agree with Mr Bechelli that the issues raised by the respondent were not relevant for further particulars in accordance with s 282 of the 1998 Act.

48. Despite the failures that I have identified above, the respondent sought further particulars on 21 August 2019, which was again out of time. The applicant responded on 29 October 2019, so even if the respondent was entitled to seek those particulars, it should have finally determined the claim by 12 November 2019, but it failed to do so.

49. The inadequacy or otherwise of the response to the request for particulars was an issue for the applicant and not the respondent. The respondent should have been gathering its own evidence and it should have issued a dispute notice as required pursuant to s 78 of the 1998 Act, even though it would have been out of time.

50. Further, there was ample opportunity for the respondent to issue a dispute notice pursuant to s 78 of the 1998 Act during the course of the prior proceedings from the time that Application No.1 was filed on 31 January 2020 until the proceedings were discontinued on 21 April 2020. There was further opportunity to do so before the telephone conference in this matter on 3 August 2020.

51. Therefore, there are compelling reasons why the respondent should not be granted leave to dispute liability because it had not previously notified the applicant in a dispute notice that it was disputing that it was not the last noisy employer and that it was not liable in respect of medical expenses. Section 289A(2)(b) of the 1998 Act offers the respondent no relief, as it concerns claims for lump sum compensation.

52. It is unlikely that the insurer would have succeeded in its application for leave in the prior proceedings. However, it had identified the issues that it wished to rely upon, so it could not be said that the applicant was not on notice in either set of proceedings.

53. Therefore, it is appropriate to consider whether leave should be granted pursuant to s 289A(4) of the 1998 Act because "it is in the interests of justice to do so".

54. In *Mateus*, Deputy President Roche stated:

> "In exercising her discretion under section 289A (4) the Arbitrator considered the following factors at paragraph 18 of her Reasons:
>
> (a) the degree of difficulty or complexity to which the un-notified issues give rise;
> (b) when the insurer notified that it wished to contest any un-notified issue/s;
> (c) the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability;

(d) any prejudice that may be occasioned to the worker, and
(e) any other relevant matters arising from the particular circumstances of the case."[2]

55. The Deputy President continued:

> "In determining whether it was "in the interests of justice" to allow the Respondent Employer to dispute injury, the Arbitrator correctly identified at paragraph 18 of her Reasons the matters relevant to the exercise of the discretion (see [38] above). To those matters I would add the following observations:
>
> (a) a decision by an insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved;
> (b) any insurer seeking to dispute an un-notified matter is seeking to have a discretion exercised in its favour and, accordingly, must act promptly to bring the matter to the attention of the Commission and all other parties;
> (c) any unreasonable or unexplained delay in giving notice of an un-notified matter will be relevant to the exercise of the discretion;
> (d) in exercising its discretion, the Commission may have regard to the merit and substance of the issue that is sought to be raised;
> (e) in assessing prejudice to the worker, it will be significant to consider when and in what circumstances the worker was first made aware of the un-notified issue that is sought to be raised;
> (f) though it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to equity, good conscience and the substantial merits of the case, those matters will not be determinative, and
> (g) the general conduct of the parties in the proceedings will also be relevant to the exercise of the discretion."[3]

56. When Application No.1 was served on the respondent, it took no steps to issue a dispute notice pursuant to s 78 of the 1998 Act, so it could not be said that it acted promptly to respond to the claim. It left it to its solicitor to identify the injury dispute as well as a dispute regarding last noisy employer in Reply No.1. Further, the insurer did not issue a dispute notice after the prior proceedings were discontinued on 21 April 2020, when there was ample time to do so.

57. Despite the relative inactivity and delay by the respondent, the applicant was aware of the dispute when Reply No.1 was served shortly after it was filed on 21 February 2020.

58. The respondent does not dispute that it was a noisy employer. The prejudice to each party must be weighed up when deciding whether the respondent should be granted leave to raise the issue regarding "last noisy employer".

59. Since the prior proceedings were discontinued, both parties have obtained further evidence to address the proposed liability dispute. The applicant provided a supplementary statement and obtained a further report from Dr Macarthur. The respondent obtained a statement from one of its employees and a report from Australasian Safety Services.

60. The respondent will obviously suffer prejudice if I decline to grant leave. The applicant might also suffer prejudice if I allow the respondent's request, so the prejudice is similar, but the applicant has been on notice since February 2020 and he has obtained evidence to address the issue.

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[2] *Mateus*, [38].
[3] *Mateus*, [48].

61. Section 354 (3) of the 1998 Act provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms".

62. On the basis of the evidence currently before me, I consider that there is merit in the respondent's application and in the interests of justice and having regard to the greater prejudice that the respondent will suffer, I propose to grant leave pursuant to s 289A (4) to allow the respondent to dispute that it was the last noisy employer.

63. The next matter to consider is the admission of the fresh evidence. Whilst it is true that the applicant's solicitor did not serve the supplementary statement before Application No. 2 was served, the respondent was still able to address his evidence.

64. There was no obligation on the applicant to seek a review of the insurer's decision pursuant to s 287A of the 1998 Act, because the insurer had not made any determination, and leave had not been granted to raise the liability dispute in the prior proceedings. Further, there was no obligation on the applicant to serve the fresh evidence before these proceedings were filed.

65. The respondent did not qualify its own medical specialist when the claim was originally served on 19 July 2019, or at any time thereafter, when there was ample opportunity to do so. Therefore, any prejudice that it might suffer as a result of the medical evidence obtained by the applicant is of its own doing.

66. If the applicant's fresh evidence is admitted, this would be to the detriment of the respondent, unless the statement of Mr Hantzi and the report of Australasian Safety Services are also admitted into evidence. The same prejudice would arise if the respondent's fresh evidence was admitted without the applicant's fresh evidence.

67. Without the fresh evidence, neither party would be in a position to press or defend the claim. Therefore, in the interests of justice and having regard to the merits of the respective cases, the fresh evidence that has been obtained by both parties will be admitted into the proceedings.

ISSUES FOR DETERMINATION

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

    (a) whether the respondent was the last noisy employer who employed the applicant in employment to the nature of which the injury was due – s 17(1)(a)(ii) of the 1987 Act, and

    (b) the respondent's liability in respect of medical expenses – s 60 of the 1987 Act.

REVIEW OF EVIDENCE

Applicant's statement

69. The applicant provided a brief statement on 17 January 2020. He described the nature of his duties at the respondent and his exposure to noise from 1989 to August 2018. Initially he was exposed to the noise of jackhammers, and later he was exposed to the noise of blades scraping yards, concrete plant, front-end loaders, conveyor belts, truck motors, trucks in the batching room and concrete mixers. He averaged 60 to 70 hours per week.

70. In his statement dated 30 April 2020, the applicant described in greater detail his duties at the respondent as a batch allocator and supervisor, and the noise to which he was exposed. As noisy employment at the respondent is not in issue, I do not propose to summarise his evidence regarding his noise exposure, which has not been challenged by the respondent. Suffice to say that he was exposed to noise in the yard, in the batching room and in a shed located under a conveyor belt, when he was undertaking administrative duties.

71. The applicant stated that in 2018, he was approached to work at Easy Mix as a sales representative. He was aware what the work involved as he was familiar with the duties of the sales representatives at the respondent. He indicated that he rarely saw sales representatives near the batch production. Their duties were office-based involving phone calls, quotes and developing goodwill.

72. The applicant stated that he does the usual duties of a sales representative at Easy Mix as well as a logistics role, which does not require him to spend time in the yard. He is involved in sourcing work and visiting office sites before construction has commenced.

73. The applicant stated that the Easy Mix site at Berkley Vale was about 3000 square metres, with 12 agitators and a batching concrete plant. He works in the back of an office at the front of the yard, about 25 metres from the batch room. The office is quiet and insulated and he is able to communicate at a normal volume.

74. The applicant indicated that at the beginning of each day, he goes into the sound proofed batch room and takes a photo of the day sheet which details deliveries and other matters. He performs administrative work in his office for no more than an hour, and he then goes out on the road for four or five hours. He visits jobs to see the customers and check if there are any issues with the product, the drivers or the deliveries. He stated that he had picked up a truck at a mechanic shop four or five times.

75. The applicant stated that most of the work undertaken by his current employer involves residential houses. He does not usually see his clients until after the concrete been poured. This is the noisy part of the site work.

Reports of Dr Macarthur

76. Dr Macarthur reported on 14 June 2019 and 16 June 2020. He noted that the applicant had noticed slowly increasing deafness over the past 15 years, particularly in the presence of background noise. He recorded a history of noise exposure at the respondent consistent with the applicant's initial statement. He had also been exposed to the occasional noise of a motor mower and a whipper snipper and a chainsaw. The doctor reported that the applicant had worked as a sales representative at Easy Mix since 4 September 2018 and he had not been exposed to excessive noise.

77. Dr Macarthur diagnosed bilateral high tone sensori-neural deafness due to exposure to loud noise at the respondent. He was satisfied that the applicant's employment at the respondent was employment to the nature to which the disease boilermaker's deafness was due. He considered that this employment had the tendencies, incidents and characteristics to give rise to a material risk of noise induced hearing loss.

78. Dr Macarthur assessed 8% whole person impairment and confirmed that the applicant would be reasonably assisted by the provision of digital hearing aids.

79. For the purposes of his supplementary report dated 16 June 2020, Dr Macarthur was provided with a copy of the applicant's statement dated 30 April 2020. The doctor advised that the applicant's duties at Easy Mix did not expose him to noise sufficient to cause industrial deafness. Therefore, he was satisfied that the respondent was the last noisy employer.

80. A quote for the cost of digital hearing aids was provided by Bay Audio on 8 March 2019 in the sum of $5,694.40.

Statement of Con Hantzi

81. Con Hantzi, an account manager at the respondent, provided a statement on 29 July 2020. He confirmed that he worked with the applicant for a period of seven years and he saw him on a daily basis.

82. Mr Hantzi disputed the applicant's evidence that his current employment was not noisy. He stated that he was familiar with the manufacturing process at Easy Mix because it is the same as that in operation at the respondent. He stated that Easy Mix was a competitor and the process to make and produce concrete was the same. The system of work was the same and includes truck loading, truck slumping, truck discharging and running the plant, which was around the same size as the respondent's plant.

83. Mr Hantzi stated that he had seen the applicant standing beside a noisy concrete batcher at Easy Mix in early 2020 before the Covid-19 restrictions commenced. He stated that from his experience in the concrete industry, it was necessary to walk through a noisy yard to reach an office and there would be exposure to noise if the office door was left open..

84. Mr Hantzi stated that he did not know whether Easy Mix had double glazed offices like the respondent, which helped to keep out the noise. He had witnessed the applicant at his current employer, and he believed the applicant was exposed noise on a daily basis from the plant operation and the unloading of trucks. He disputed that the applicant's evidence regarding his current employment was accurate.

Letter from the respondent to the applicant's solicitor dated 19 November 2019

85. The respondent sought particulars from the applicant's solicitor on 19 November 2019. The author, Kira Hanrahan, claims manager, stated:

> "In addition to the above, our investigations confirm that Easy Mix Concrete is a singular site, with which the full concrete operation/production takes place, including all office and administration of the company. It hosts approximately 10 Agitator Trucks, along with the usual Tipper trucks for delivery of materials, a front end loader or forklift to transport material to the conveyor belt as well as the batching office and slump stands. Concrete Plants are required to maintain a foundation of production, comparable amongst brands/employers.
>
> As a self-insurer, we sought the expert opinion and confirmation of internal staff who are similarly employed as Sales Representatives and conduct and perform roles to achieve similar outcomes, being sales of concrete products. The confirmation is that the requirement to attend a worksite in person, on foot to establish a contact, e.g. a foreman/ project manager involves moving around the worksite on foot, amongst all operations, including heavy machinery, earthmoving machinery, trucks of many types etc and having verbal conversations at the worksite, usually in close proximity to these operations. This occurs when attempting to forge a relationship, and in turn contracting a sale, and further when the product is poured on site, the sale representative attends in person, on foot to ensure the product is matching that of the ordered specifications.

Moreover, the single site of Easy Mix Concrete is the concrete production plant, and the office you cite, that Mr Schofields attends every day is physically located within the concrete plant. We have referenced several noise surveys from internal and external providers, acknowledging the difference in size and average daily production, and the overarching results confirm that the concrete production plant itself, regardless of size, is considered a workplace which has the 'tendency, incidents or characteristics' as to give rise to a real risk of boilermaker's deafness."

Letter of Appointment with Easy Mix Concrete and Payslips

86. According to the applicant's letter of appointment with Easy Mix, his duties as a sales manager were as follows:

> "**12. Position Description**
>
> The duties and responsibilities of this position shall include but are not limited to the following;
>
> (a) Build and maintain relationships with both new and existing customers.
> (b) Prepare project and customer pricing.
> (c) Communication with customers regarding upcoming orders/projects.
> (d) On-Site Coordination on large jobs.
> (e) Project planning.
> (f) Assistance with the debt recovery process.
> (g) Coordination of concrete testing.
> (h) Specialised stock control (example - Oxides and Additives).
> (i) Occasional relief allocation and batching.
> (j) Prepare all necessary documentation , record production and statistical information.
> (k) Assisting with cleaning of yard and site amenities if required.
> (l) Ability to supervise and provide direction and guidance to other Employees including the ability to assist in the provision of on-the-job training and induction.
> (m) Any other duty for which the Employee has been trained and deemed necessary by the employer to complete a task at this level.
> (n) An Office space and computer will be provided to assist you with your duties."

87. The payslips from Easy Mix show that the applicant works on average for 38 hours per week.

Report of Australasian Safety Services

88. On 27 July 2020, Mr Ledwidge, the worker's compensation manager of the insurer, sent an email to Michael Dean of Australasian Safety Services. He requested that a boundary noise survey be conducted of the Easy Mix site at Berkeley Vale. Mr Ledwidge provided a Google Maps image in the email and a photograph of the site from the street. This photo is not relied upon by the respondent in these proceedings.

89. A report was provided by Australasian Safety Services on 30 July 2020. The report bears two names, but it is only signed by one person, presumably Mr Dean. He advised that the company had conducted over 500 noise surveys of concrete industry sites around Australia for multiple companies. He indicated that he had reviewed the photos, layout and equipment at the Easy Mix site, and this was similar in all aspects to the operations of other concrete batching plants in Australia.

90. Mr Dean stated that it the opinion of Australasian Safety Services that the noise levels generated by the applicant's current employer would be above the noise exposure standards of 85 dBa as an 8 hour average, so the batching plant would be considered a noise risk job.

RESPONDENT'S SUBMISSIONS

91. Mr Beran concedes that the applicant was exposed to noise during the course of his employment with the respondent. He submits that the applicant did not indicate in his statement that sales representatives did not at any stage come into contact with batch production. His evidence that he is not required to spend any time in the yard in his current position has been refuted by Mr Hantzi.

92. Mr Beran submits that the applicant confirmed that the site of Easy Mix contained agitators and a batching concrete plant. His office is 25 metres from the batch room, and whilst it is insulated, he would be exposed to noise from the yard when he was entering his office. The applicant also conceded that he was required to drive trucks around the site.

93. Mr Beran submits that in its letter dated 19 November 2019, the respondent referred to its enquiries about the Easy Mix site and it indicated that the applicant would be required to attend work sites and he would be in close proximity to all of the operations. The applicant's evidence does not negate the fact that he was required to attend the site whilst building processes were taking place that involved concrete.

94. Mr Beran submits that the letter of appointment with Easy Mix describes the applicant's duties, and all of the work tasks would expose the applicant to loud noise, the nature of which hearing loss would be due.

95. Mr Beran submits that Mr Hantzi refutes the applicant's evidence and he is familiar with the size and operations of Easy Mix, because they are similar to those undertaken by the respondent. He had personally seen the applicant standing beside a noisy concrete batcher in 2020, and from his experience of working in an office, one had to walk through the noisy yard to get to the office. He had witnessed the applicant's employment with Easy Mix and he believed that the applicant was exposed to noise on a daily basis.

96. Mr Beran submits that Mr Dean of Australasian Safety Services reviewed the photographs and equipment of the Easy Mix site and he was of the view that noise level generated would be above the noise exposure to standards of 85 dBA as an eight-hour average.

97. Mr Beran submits that in his initial report, Dr Macarthur did not record a history of the applicant's employment with Easy Mix. When provided with the applicant's second statement, Dr Macarthur indicated that based on the applicant's evidence, he was not exposed to noisy employment with Easy Mix. However, the doctor did not have regard to the evidence of Mr Hantzi, the position description, or the report of Mr Dean. In the circumstances, the opinion of the doctor was of limited use because he was not provided with all of the evidence.

98. Mr Beran submits that the report of Mr Dean and the statement of Mr Hantzi provide evidence that Easy Mix was a noisy employer. The applicant was actually seen when he was exposed to the noise when he was standing beside a concrete batcher, similar to the noise to which he was exposed at the respondent.

99. Mr Beran submits that whilst it is not in possession of a noise level study from Easy Mix, scientific evidence was not necessarily a requirement in accordance with the principles discussed in *Dawson and Others t/as The Real Cane Syndicate v Dawson* [4]. All that was required was that the employment in question was sufficient to create a real risk of loss of hearing[5]. There was evidence that the applicant's employment with Easy Mix could expose him to noise of at least 85 dBa and there is evidence of the applicant actually being exposed to large levels of noise in this employment. In the circumstances, Easy Mix was the last noisy employer by whom compensation is payable pursuant to s17(1)(a) of the 1987 Act.

[4] (2008) 7 DDCR 42 [44], (*Dawson*).
[5] *Callaby v State Transit Authority (NSW)* (2000) 21 NSWCCR 216, (*Callaby*).

100. In reply, Mr Beran submits that the applicant has not addressed the issue in question, that is there was no history taken and hence no "fair climate" for Dr Macarthur's opinion in accordance with the principles discussed in *Hancock v East Coast Timbers Products Pty Ltd*[6]. Given the applicant's concession regarding the absence of evidence of what details the doctor obtained at the consultation with regard to Easy Mix and any conclusions reached, Dr Macarthur's report was of little to no forensic value. Accordingly, the respondent was under no obligation to obtain evidence in reply. He submits that Mr Hantzi personally observed the applicant in circumstances where he was exposed to loud noise.

APPLICANT'S SUBMISSIONS

101. Mr Bechelli submits that none of the evidence relied upon by the respondent establishes that the applicant's duties as a salesman with Easy Mix had the tendencies, incidents or characteristics to cause industrial deafness. This issue could only be relevant if there was evidence to show that the applicant was exposed to noise, and there was no such evidence.

102. Mr Bechelli submits that the applicant provided a comprehensive statement regarding his employment duties. The letter of appointment by Easy Mix is in general terms and there is no reason to conclude that it accurately reflects all aspects of the applicant's duties undertaken during the course of his employment. What may have been contemplated as a possibility may not necessarily have eventuated. Further, what was involved in the duties is unclear and it could only be the subject of speculation.

103. Mr Bechelli submits that the opinion of Mr Hantzi was irrelevant in the absence of a disclosure of the facts upon which his opinion was based and details of his training, education, or experience. His views, based on an alleged familiarity with the operations, should be rejected.

104. Mr Bechelli submits that even if Mr Hantzi had sufficient familiarity, the relevance of his evidence carried no weight in the absence of evidence that addressed the test for noisy employment discussed in *Dawson* and in the absence details the applicant's exposure to such noisy employment. Expert opinion that such noise coupled with such exposure would have the tendencies, incidents or characteristics to cause industrial deafness was also necessary.

105. Mr Bechelli submits that the failure by the applicant to mention that he attended the site when building processes were being undertaken, that he was provided with a job description, and that he would have been exposed to loud noise, in the absence of evidence that addressed noisy employment, was irrelevant.

106. Mr Bechelli submits that little weight should be given to the evidence of Mr Hantzi, as his comments lack detail and are irrelevant. Further, he submits that no facts which have been adduced which make anything referred to in the Australasian Safety Services report relevant to the applicant's claim.

107. Mr Bechelli submits that Mr Hantzi provided his statement after Dr Macarthur had completed his second report, and it contained nothing of relevance or consistent with the applicant's evidence. What Dr Macarthur could make of his evidence that the applicant stood next to a noisy batcher on some date for some indeterminate time is unknown.

[6] [2011] NSWCA 11, (*Hancock*).

REASONS

Was the respondent the last noisy employer who employed the applicant in an employment to the nature of which the injury was due? – s 17 of the 1987 Act

108. There is no dispute that the applicant was exposed to noise during the course of his employment with the respondent prior to 8 August 2018. Further, his hearing loss is such that the provision of digital hearing aids is reasonably necessary. What is in dispute is whether the respondent is the last noisy employer who employed the applicant in employment to the nature of which his hearing loss was due in terms of s 17 of the 1987 Act.

109. Section 17 of the 1987 Act provides:

> "17 (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…".

110. The applicant bears the onus of proof to establish on the balance of probabilities that his employment with the respondent carried the risk of him suffering from industrial deafness[7]. The level of noise and the length of exposure are relevant, and these matters need to be the subject of expert evidence[8].

[7] *Galdemar v Asta Enterprises Pty Ltd* [1998] NSWCC 47; 17 NSWCCR 155 [26] (*Galdemar*).
[8] *Galdemar,* [18].

111. According to the applicant's evidence, his employment at the respondent involved exposure to noise from jackhammers, blades scraping yards, concrete plant, loaders, conveyor belts, truck motors, trucks in the batching room and concrete mixers. His evidence has not been challenged by the respondent. Of course, the respondent concedes that it was a noisy employer.

112. The summary of the authorities undertaken by Deputy President Roche in *Dawson* gives some guidance regarding the evidence of noisy employment. The Deputy President confirmed that it was preferable to call an acoustics expert to give evidence of the level of noise to which a worker was exposed during the period of employment, but the absence of a noise level study was not fatal to a claim. He stated:

> "Whilst it is not necessary for a worker to call an acoustics engineer in every case of boilermaker's deafness, it is not sufficient for a worker to merely say 'my employment was noisy and I have boilermaker's deafness'. It is always essential that he or she present detailed evidence (if no acoustics expert is to be relied on) of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the 'tendency, incidents or characteristics' of that employment are such as to give rise to a real risk of boilermaker's deafness."[9]

113. The applicant indicated that from his observations at the respondent, the sales representatives rarely came near the batch production. Their duties were office-based involving phone calls, quotes and developing good will. There is no direct evidence from sales representatives of the respondent to challenge the applicant's evidence.

114. According to Ms Hanrahan of the respondent, enquiries were made of its sales representatives and they advised that they were required to attend and move around worksites whilst all operations were being undertaken. This included activities performed by heavy machinery, earthmoving machinery, trucks, and when the product is poured on site.

115. Unfortunately, I do not have the benefit of a job description of the duties of sales representatives employed by the respondent. There is no direct evidence from any sales representatives of the respondent, only a third-hand summary of the enquiries that were apparently made by an employee or employees of the respondent. The identities of the person or persons who made the enquiries, and the identities of the employees who were interviewed, have not been disclosed. The source material that was relied upon for the purpose of the letter is not in evidence, so in the circumstances, little weight can be given to the letter of Ms Hanrahan. Further, what a salesperson does at the respondent could quite easily be different from the duties of a salesperson employed by Easy Mix.

116. The applicant does not claim that he has been exposed to noise during his current employment. If the respondent wished to dispute his evidence by way of a comparison between employers, it would have been prudent for the insurer to obtain such direct evidence, with specific comment from individual sales representatives regarding their daily noise exposure at the respondent. Noise level studies undertaken at the respondent's premises might have also been of assistance. Of course, the absence of noise level studies is not fatal to a claim.

117. According to the applicant's evidence, he does not currently spend time in the yard. He indicated that each morning, he goes to the batch room some 25 metres away and then works for about an hour in his office, before going on the road. These rooms are insulated and/or sound proofed. He does not suggest that he spent prolonged periods in the yard where he might be exposed to excessive noise.

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[9] *Dawson*, [44].

118. The applicant indicated that he sources work, visits sites before construction commences and after concrete has been poured. He checks with customers regarding the product, drivers and deliveries. Most of the work involves residential projects. He maintains that his current employment is not noisy.

119. The job description from Easy Mix identifies a number of work tasks, and this is largely consistent with the applicant's evidence. It gives no guidance as to the applicant's involvement in the manufacturing process or on site duties where there might be some potential for exposure to excessive noise. The only reference to the yard concerns cleaning, but the applicant has not described performing such activities in his statements.

120. The respondent relies upon the statement of Mr Hantzi and the report from Australasian Safety Services. Mr Hantzi describes himself as an account manager, who has worked for the respondent for nine years. He provides no information as to the nature of his duties, the duties undertaken by sales representatives or any noise exposure at the respondent. He does not suggest that he has worked as part of the production process as a driver, batcher, plant supervisor, or as sales representative like the applicant, so his evidence must be viewed with some caution.

121. Mr Hantzi indicated that he was familiar with the manufacturing process at Easy Mix because it was the same as that undertaken at the respondent. It included truck loading, truck slumping, truck discharging and running the plant. Significantly, his views are not corroborated by any direct evidence from employees involved in the manufacturing process at the respondent or at Easy Mix. This is merely Mr Hantzi's perception. He does not suggest that he has spent any prolonged periods at the Easy Mix site or that he had observed the system of work in detail.

122. Mr Hantzi stated that he had seen the applicant "standing beside a concrete batcher that is noisy" at Easy Mix. It is unclear from his statement whether the concrete batcher was actually operating, or that he was expressing his opinion that the machine was a noisy machine when it was working. It would have been clearer if he had indicated that the applicant was "standing beside a concrete batcher as it was operating and it was making loud noise". Therefore, there are alternative ways of interpreting his statement.

123. Mr Hantzi could not recall when he observed the applicant, but he insisted that it was earlier this year. He did not say how long the applicant was standing next to the machine. On the other hand, his evidence has not been challenged by the applicant.

124. Mr Hantzi stated that from his experience in the concrete industry, it was necessary to walk through a noisy yard to reach an office and there would be exposure to noise if the office door was left open. He considered that the applicant would be exposed to noise on a daily basis from the plant operation and the unloading of trucks. However, his evidence is inconsistent with that of the applicant, who indicated that he only walked to the sound proofed batch room 25 metres away from his office, and that he worked in his insulated office for one hour when he was on site.

125. Clearly the applicant's direct evidence about the system of work at Easy Mix carries more weight than that of Mr Hantzi. Mr Hantzi's views are not substantiated by any direct evidence from employees of Easy Mix, and it is purely speculation on his part. The conclusion drawn by Mr Hantzi is inconsistent with the applicant's evidence and was not based on any factual or expert evidence, such as noise studies undertaken at Easy Mix.

126. It is true that the applicant indicated that he had picked up a truck from repair at a mechanic shop four or five times, but there is no evidence that he was exposed to any noise at the mechanic's premises, when he was driving the truck, or when he delivered the vehicle at Easy Mix's premises or elsewhere.

127. Mr Dean of Australasian Safety Services was requested to undertake boundary noise studies by the insurer. His report does not refer to any such studies, whether they were undertaken or if not, why they were not undertaken. This raises concerns as to whether such studies are in existence.

128. According to Mr Dean, his company had conducted over 500 noise surveys of concrete industry sites and the material that he had viewed, namely the Google map image and the street photograph, was similar to the operation other concrete batching plants in Australia. This suggests that he had not undertaken any noise studies at Easy Mix or at the respondent, otherwise I expect that he would have included the results. The operations might well have been similar, but that does not mean that the applicant was exposed to noise at Easy Mix.

129. Mr Dean's report does not include any noise level studies from similar concrete manufacturers. One would have expected some raw material from other sites, if more than 500 studies had been undertaken.

130. Mr Dean was not provided with copies of the applicant's statements. Therefore, he had minimal information before him. One would have thought that he should have been provided with the applicant's statement and the reports of Dr Macarthur as part of his file, so that he could express a more balanced and well informed opinion.

131. Mr Dean stated that it was the opinion of Australasian Safety Services that the noise levels generated by the applicant's current employer would be above the noise exposure standards of 85 dBa as an eight hour average. Such a view is not based on actual noise level studies, placing in issue the weight to be given to his conclusion. Further, there is no direct evidence that the applicant was exposed to noise in excess of 85 dBa over an eight hour average period.

132. Therefore, whilst the respondent relies on the evidence of a noise expert, the opinion is not based on actual noise level studies undertaken on site at the respondent, at Easy Mix or at the places that the applicant visits as part of his duties as a sales representative. Further, it does not it take into account the applicant's evidence and that of Dr Macarthur regarding the lack of exposure to noise at Easy Mix.

133. Whether an employment has the "tendencies, incidents, or characteristics" is matter of expert evidence. It was confirmed in *Blayney Shire Council v Lobley*[10] that it must be shown that the relevant employment had a tendency, incident or characteristics to cause industrial deafness. Cole JA (Kirby ACJ and Rolfe AJA, agreeing) stated:

> "It follows from these authorities (*Smith v Mann* [1932] HCA 30; (1932) 47 CLR 426; *Tame v Commonwealth Collieries Pty Ltd* (1947) 47 SR (NSW) 269 and *Commonwealth v Bourne* [1960] HCA 26; (1960) 104 CLR 32) that in determining whether, at the time when notice of injury was given, Mr Lobley was 'employed in an employment to the nature of which the injury was due', attention must be directed not to whether the employment then engaged in actually caused the injury but whether the 'tendencies, incidents or characteristics' of that employment were of a type which could give rise to the injury in fact suffered."[11]

134. According to Dr Macarthur, the applicant's employment at the respondent had the "tendencies, incidents, or characteristics" to cause industrial deafness, and it was the last noisy employer.

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[10] (1995) 12 NSWCCR 52 (*Lobley*).
[11] *Lobley*, [64].

135. Mr Beran submits that Dr Macarthur's opinion cannot be accepted on the basis of the principles in *Hancock*, because he did not obtain a history from the applicant regarding his current employment. There is merit in such a submission when one considered the doctor's first report. He only noted that the applicant was working as a salesperson for Easy Mix since 4 September 2018 and "has had no excessive noise exposure".

136. However, for the purposes on his supplementary report, the doctor was provided with a copy of the applicant's statement dated 30 April 2020, and he confirmed that he noted the details of the applicant's employment with Easy Mix as described in paragraphs 18 to 29.

137. Dr Macarthur commented that "In my opinion, Mr Schofield's new position as a Sales Representative for Easymix does not require him to be exposed to sufficient noise to cause an industrial hearing loss. I therefore still consider Holcim (Australia) Pty Ltd to be Mr Schofield's last noisy employer". Therefore, it could not be said that Dr Macarthur's opinion was based on an inadequate or incorrect history.

138. The fact that Dr Macarthur was not provided with the evidence of Mr Hantzi and Mr Dean is of little consequence because of the issues I have identified above regarding the weight to be given to their opinions.

139. The respondent chose not to qualify its own medical expert for reasons unknown. The respondent relied on factual evidence which was highly speculative, and it ignored the applicant's evidence and the opinion of an experienced medico-legal specialist, who was provided with details of the applicant's current duties, which did not involve exposure to excessive noise.

140. There is no direct evidence from the applicant's current employer to challenge the applicant's evidence regarding his exposure to noise in his sales position. The respondent relies upon the opinion of an account manager, who has no connection whatsoever with Easy Mix, and an acoustics expert, who has not performed any noise level studies. It seems that in the absence of any direct evidence from Easy Mix or actual noise level studies undertaken at Easy Mix, the respondent wants me to draw an inference that the applicant's current employment is noisy.

141. In *G v H*[12], when considering the inferences to be drawn in a Family Law matter where a party declined to undergo a paternity test in contravention of a court order, the High Court stated:

> "An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law".[13]

142. The High Court continued:

> "……as earlier indicated, the inferences must be consistent with the other evidence. In all the circumstances of the present case, the "just" inference to be drawn was that it was more probable than not that the outcome of the court-ordered test would be unfavourable to G. And given the accuracy of the test, that must lead to the finding that, on the probabilities, he was the father of the child."[14]

[12] [1994] HCA 48, (*G v H*).
[13] *G v H*, (per Brennan and McHugh JJ), [4].
[14] *G v H*, (per Deane, Dawson and Gaudron JJ), [22].

143. In *Raulston v Toll Pty Ltd*[15], Deputy President Roche discussed the principles relating to the drawing of inferences. He stated:

> "…the following principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506 (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 140; 140 ALR 227) are relevant (I have substituted "Arbitrator" for "trial judge" where appropriate):
>
> (a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.
>
> (a) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the "fact of the [Arbitrator's] decision must be displaced". It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.
>
> (b) It may be shown that an Arbitrator was wrong "by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong."

144. The reasoning in *Raulston* was cited with approval by Deputy President Wood in *Australia and New Zealand Banking Group Limited v Khullar*[16], when she held that an inference drawn by an arbitrator at an accident occurred during "peak hour" was available to the arbitrator, because this was "consistent with human experience that in a Sydney suburb on a week day in June, traffic will be heavier around 7.20 am than at most other times of the day".[17]

145. It is clear from these authorities that an inference is an exercise of reasoning based on human experience to establish the existence of a fact that is based on the existence of some other facts. However, any inference must be consistent with the other evidence.

146. In this matter, the only direct evidence regarding the noise levels to which the applicant is exposed at Easy Mix is contained in the applicant's statement and the second report of Dr Macarthur. The views of Mr Hantzi and Mr Dean are speculative in nature. Even if the work site at Easy Mix was noisy, the applicant spent minimal time on the premises and there is no evidence to suggest that his employment as a sales representative had the "tendencies, incidents and characteristics" to give rise to a material risk of noise induced hearing loss.

147. As I have no reason to question the veracity of the applicant's evidence, I consider he would be in the best position to say if he was exposed to noise in his current employment. If I were to infer that he was exposed to noise during the course of his employment at Easy Mix, such an inference would be contrary to his evidence. His evidence is supported by the expert opinion of Dr Macarthur.

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[15] [2011] NSWWCCPD 25 (*Raulston*).
[16] [2020] NSWWCCPD 3, *Khullar*,
[17] *Khullar*, [63].

148. The situation may have been different if the respondent had adduced evidence that challenged the applicant's direct evidence. For example, if there were noise level studies undertaken that showed that the applicant was exposed to excessive noise for protracted periods during a normal working day at Easy Mix, then the applicant's case might well have been compromised.

149. Further, if the respondent had adduced lay evidence regarding the extent of noise exposure from sales representatives at the respondent, or more importantly, from employees of Easy Mix, then it may have been possible to draw an appropriate inference. To suggest that the applicant would have had to walk through the Easy Mix site, contrary to his evidence and without evidence from his current employer to contradict what he has said, is illogical and without merit.

150. In the circumstances, I am satisfied that the respondent was the last noisy employer who employed the applicant in an employment to the nature of which his injury was due.

Medical Expenses – s 60 of the 1987 Act

151. The medical evidence of Dr Macarthur supports the need for digital hearing aids. The provision of hearing aids is an appropriate, accepted and effective form of treatment for industrial deafness, and it comes at a minimal cost. Hearing aids have the potential of improving the applicant's quality of life and there is really no alternative non-invasive treatment.

152. Although there is no dispute about the need for hearing aids, I am satisfied that the provision of bilateral digital hearing aids is reasonably necessary as a result of the injury sustained by the applicant on 8 August 2018 (deemed).

FINDINGS

153. The applicant sustained an injury in the form of sensorineural hearing loss arising out of or in the course of his employment with respondent on 8 August 2018 (deemed).

154. The applicant's employment was the main contributing factor to his injury.

155. The respondent was the last employer who employed the applicant in an employment to the nature of which the injury, sensorineural hearing loss, was due for the purposes of s 17(1)(a)(i) of the 1987 Act.

156. The provision of bilateral digital hearing aids is reasonably necessary as a consequence of the applicant's injury.

ORDERS

157. The respondent is to pay medical expenses in respect of the supply and fitting of bilateral digital hearing aids on production of accounts and/or receipts pursuant to s 60 of the 1987 Act.