

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4997/20
Applicant: Jeffrey Wilson
Respondent: OneSteel Manufacturing Pty Ltd
Date of Determination: 18 January 2021
Citation No: [2021] NSWCC 18

The Commission determines:

1. The applicant suffered a workplace injury in the course of his employment with the respondent by way of binaural hearing loss, with a deemed date of injury of 3 July 2019.
2. As a result of injury referred to (1) above, the applicant requires the use of hearing aids.
3. The hearing aids claimed recommended by Dr Dhasmana are reasonably necessary as a result of the injury referred to in (1) above.
4. The respondent is to pay the costs of and incidental to the hearing aids as recommended by Dr Dhasmana.

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

Cameron Burge
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Jeffrey John Wilson (the applicant) worked as an electrician for OneSteel Manufacturing Pty Ltd (the respondent) from on or about 12 January 2012.
2. There is no issue that during the course of his employment, the applicant was subjected to continuous loud noise, albeit he was provided with ear protection. As a result of the nature and conditions of his employment, it is agreed the applicant suffered a binaural hearing loss injury, deemed to have occurred on 3 July 2019. The respondent accepts the fact of the applicant's injury, however, by section 78 notice dated 24 July 2019, it rejected the applicant's claim for the provision of hearing aids on the basis that they were not reasonably necessary as a result of the compensable injury.
3. The applicant requested a review of the respondent's decision, and on 27 September 2019, the declinature of liability for the hearing aids was maintained. In declining liability, the respondent relied on the report of Dr Fernandes, independent medical examiner (IME) in which the doctor indicated the applicant's speech reception frequencies were not significantly affected.

ISSUES FOR DETERMINATION

4. The parties agreed that the only issue to be determined by the Commission is whether the hearing aids recommended by Dr Paramatma Dhasmana, IME for the applicant, are reasonably necessary as a result of the accepted workplace injury.

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a hearing before me on 27 November 2020. On that occasion, Ms L Goodman of Counsel appeared for the applicant instructed by Ms C Seeman, solicitor. Mr A Parker of Counsel appeared for the respondent, instructed by Ms K Faapito, solicitor.
6. The parties were unable to resolve their differences, and accordingly the matter proceeded to hearing before me. I am satisfied the parties to the dispute are aware of the effects of the representations made in the proceedings. Both counsel made oral submissions at the hearing.
7. The respondent had lodged an Application to Admit Late Documents (AALD) attaching a further report of Dr Fernandes dated 13 October 2020. That document was objected to and was not allowed into evidence. The basis for exclusion of that document was that it was not served until 18 November 2020, and the respondent did not advise the applicant of the possibility of the document being served at the preceding telephone conference. In those circumstances, the applicant was unable to respond to the matters contained within the report of Dr Fernandes, and no satisfactory explanation was provided for the late service of the document.

EVIDENCE

Documentary evidence

8. The following documents were before the Commission and taken into account in making this decision:
 - (a) Application to Resolve a Dispute (the Application) and attached documents; and
 - (b) Reply and attached documents.

Oral evidence

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

FINDINGS AND REASONS

Reasonable necessity of the hearing aids

10. The applicant bears the onus of proving that the medical treatment claimed is reasonably necessary. The relevant test for establishing reasonable necessity is set out in the decision of Deputy President Roche in *Diab v NRMA Ltd* [2014] NSWCCPD 72 (*Diab*). In that matter, the Deputy President cited with approval the test articulated by his Honour Judge Burke in *Bartolo v Western Sydney Area Health Service* [1997] 14 NSWCCR 233. Thus, treatment will be considered reasonably necessary if the Commission finds that it is preferable that the worker should have treatment than it be forborne.
11. In this matter, there is a discrepancy in the medical evidence between Dr Barrie, treating specialist and Dr Dhasmana on the one part and Dr Fernandes on the other. Dr Barrie and Dr Dhasmana each attribute hearing loss equal to 9% whole person impairment to the applicant's noisy employment with the respondent. Dr Fernandes attributes 5% whole person impairment to that loss. Drs Barrie and Dhasmana indicate hearing aids are reasonably necessary as a result of the workplace injury. Dr Fernandes says they are not.
12. On balance, I prefer the views of Dr Barrie and Dr Dhasmana for the following reasons.
13. In his report dated 28 March 2019, treating ear, nose and throat physician Dr Barrie noted the applicant's complaints of deafness and tinnitus. He described the pattern of the applicant's hearing loss as "bilateral sensorineural deafness with a typical industrial hearing loss pattern." He recommended a hearing aid trial and assessed a total hearing loss of 16.8%, or 9% whole person impairment.
14. On 9 September 2019, IME Dr Dhasmana examined the applicant. She noted the applicant had given a history of no noise exposure outside of employment and in relation to the nature of the hearing loss noted:

"The audiometric configuration is probably consistent with the diagnosis of noise-induced hearing loss (Boilermaker's deafness or deafness of the like origin)".
15. Dr Dhasmana then calculated the hearing loss at 16.6%, or 9% whole person impairment. She attached a copy of her audiogram and concluded work was a substantial contributing factor to the applicant's injury and that there were no non-work-related conditions which contributed to his loss. She concluded the provision of hearing aids was "reasonable and necessary and related to the work injury."
16. For the respondent, Dr Fernandes IME provided a report dated 11 July 2019. At that time, he had access to the report of Dr Barrie. Dr Fernandes accepted that the last noisy employer of the applicant was the respondent. He noted the history of three years intermittent, high-pitched tinnitus together with gradual, progressive and bilateral hearing loss for approximately three years. He took the following history from the applicant in relation to his functional status:

"Mr Jeffrey Wilson states that he has difficulty understanding conversation in the presence of background noise, has the television turned up causing discomfort to fellow viewers and has no difficulty understanding on the telephone."
17. Dr Fernandes diagnosed noise-induced hearing loss in the upper, middle and triple frequencies together with an excess loss of non-occupational, uncertain origin in the lower middle frequencies.

18. Ms Goodman submitted, and I accept given the untrammelled evidence contained in the applicant's statement, that the history taken by Dr Fernandes to the effect the applicant did not have difficulty on the telephone is incorrect. She noted the finding by Dr Barrie does not indicate a basis for finding the presence of non-occupational hearing loss.
19. In making a finding that hearing aids are not reasonable and necessary [sic] as a result of the compensable injury, Dr Fernandes provided as a reason that in the audiogram he obtained "it appears that the speech reception frequencies are not significantly affected. Also the speech reception thresholds are 90% at 65 dB on the left and 90% at 70 dB on the right."
20. With respect to Dr Fernandes, he has rejected the reasonable necessity of hearing aids on an incorrect basis. Firstly, he has applied a test of "reasonable and necessary" as opposed to reasonably necessary. As Deputy President Roche noted in *Diab*, the word "reasonably" operates to "moderate any sense of the absolute which might otherwise be conveyed by the word 'necessary' if it stood alone." The test applied by Dr Fernandes on the face of his report of "reasonable and necessary" is a stricter test than the reasonably necessary test set out in section 60 of the *Workers Compensation Act 1987* (The 1987 Act).
21. Nevertheless, it is unfortunate though not uncommon for medical practitioners to set out the test pursuant to section 60 "reasonable and necessary" in the lexicon of their reports whilst substantively applying the reasonably necessary criteria. Indeed, Dr Dhasmana has made a similar error. The relevant difference in the two reports is, however, that if a doctor opines that treatment is "reasonable and necessary", it follows they are of the opinion that treatment is "reasonably necessary" as the latter is a less stringent test than the former.
22. I do not, in the circumstances of Dr Fernandes' report, considered his use of the phrase "reasonable and necessary" in itself fatal to his opinion being accepted. The real problem with Dr Fernandes' report is that he has based his finding that hearing aids are unnecessary on incorrect criteria relating to the applicant's speech receptors. As was made clear by Deputy President Wood in *BlueScope Steel (AIS) Pty Ltd v Sekulovski* [2018] NSWCCPD 48 (*Sekulovski*), the relevant test is as set out in *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 (*Murphy*) namely that an injured worker "only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd V Bates*) that the treatment is reasonably necessary 'as a result of' the injury. That is, [they] have to establish that the injury materially contributed to the need for [the treatment]."
23. As Deputy President Wood noted in *Sekulovski*, there are a number of decisions where injured workers with comparatively low levels of binaural hearing loss were nevertheless found to require hearing aids on a reasonably necessary basis. It is not strictly relevant to the matter to be determined by the Commission in this instance to make a finding as to whether Dr Barrie and Dr Dhasmana's level of whole person impairment is to be preferred to that of Dr Fernandes. Rather, the question is as set out in *Murphy*, namely whether the hearing aids are reasonably necessary as a result of the workplace injury.
24. With respect to Dr Fernandes, he has not considered that test. Rather, he has relied upon findings in relation to speech reception frequencies as a reason to find against the reasonable necessity of the hearing aids. As Ms Goodman noted in her submissions, the decision in *Sekulovski* makes clear (at [106]) that the work injury need not be the only cause of the need for the hearing aids. She noted that in *Sekulovski*, the injured worker's percentage of binaural hearing loss attributable to the work injury was only 1.9%, but was found to be sufficient to require hearing aids. Ms Goodman noted, and I accept, that the hearing loss does not need to be completely related to work, but in this instance the hearing loss is high enough that the Commission would require a cogent reason not to grant the hearing aids given the evidence put before it in the form of the reports of Dr Barrie, treating specialist and also Dr Dhasmana.

25. For the respondent, Mr Parker noted that the tests carried out by Dr Fernandes included a discarding of findings in certain frequency ranges, which had been included by Dr Dhasmana. He submitted that the discarding of those frequencies by Dr Fernandes in the 1000 and 1500 MHz range is what accounts for the difference in findings between the doctors concerning whole person impairment. He submitted that on a close and careful reading, the doctor who provides the greater reasons as to their findings is in fact Dr Fernandes, owing to his explanation as to the exclusion of irrelevant frequencies to the determination of binaural, noise-induced hearing loss.
26. With respect, the degree of whole person impairment is not the relevant or material consideration for the Commission in this instance. Rather, I accept the applicant's submissions that the relevant test is whether he requires on a common-sense basis the treatment as a result of the agreed work-related injury.
27. In the applicant's statement, he sets out the difficulties which he has as a result of the injury. Contrary to the findings and the history taken by Dr Fernandes, at paragraph 23 of his statement the applicant says:

"I have extreme difficulty following phone conversations. When I converse with people on a face-to-face basis, I often miss words and have to extrapolate the meaning of a sentence based on the few words that I do hear. I cannot hear a thing if two people are talking at once or if someone is talking to me from a different room."

That history, which is uncontested, flies in the face of the history as set out briefly in the report of Dr Fernandes and upon which he relies in excluding hearing aids as being reasonably necessary.

28. On balance, I find that the hearing aids are reasonably necessary and prefer the views of Dr Dhasmana, supported as they are by treating specialist Dr Barrie. The findings of those doctors are, in my view, consistent with the applicant's evidence regarding his ongoing issues. There is no evidence which explains the alleged non-noise induced hearing loss found by Dr Fernandes, and his findings in that regard are contrary to those of the other experts. On balance, I therefore find the preponderance of medical evidence supports a finding that the applicant requires the proposed hearing aids as a result of the agreed workplace injury.
29. Although the submissions made by the respondent may well be correct insofar as they relate to questions of whole person impairment, they do not address, in my view, the correct test as to whether the treatment is reasonably necessary. That question is, by contrast, appropriately dealt with by Dr Barrie and Dr Dhasmana whose findings are consistent with each other as to the cause of the applicant's hearing loss and the reason he requires hearing aids.

SUMMARY

30. For the above reasons, the Commission will make the findings and orders as set out on page 1 of the Certificate of Determination.