# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** **330/20**
**Applicant:** **Bradford Martin Handley**
**Respondent:** **Canterbury City Council**
**Date of Determination:** **15 April 2020**
**Citation:** **[2020] NSWWCC 117**

The Commission determines:

1. Leave is granted to amend the Application to Resolve a Dispute to claim permanent impairment compensation in the sum of $6,305 in respect of a 9.7% binaural hearing loss, with a deemed date of injury of 3 July 1998.

2. The applicant suffered injury by way of binaural hearing loss in the course of his employment with the respondent, with a deemed date of injury of 3 July 1998.

3. The applicant became aware of his injury in or about June 2018.

4. The applicant's claim was made more than three years after he became aware of his injury.

5. The applicant has not demonstrated he suffers a serious and permanent disablement as a result of his injury (section 261(40(b).

6. Award for the respondent.

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.

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Lucy Golic
Acting Senior Dispute Services Officer
**As delegate of the Registrar**

# STATEMENT OF REASONS

## BACKGROUND

1. Bradford Martin Handley (the applicant) worked as a pool attendant with Canterbury City Council (the respondent) between 1987 and 1994. There is no issue he was exposed to significant noise in the course of that employment, and there is no suggestion any of his subsequent work has exposed him to excess noise.

2. On 13 February 2019, the applicant's solicitors wrote to the respondent's insurer making a claim for permanent impairment compensation in respect of a 9.7% binaural hearing loss together with the costs of hearing aids, based on the assessment of Dr Scoppa dated 5 June 2015. On 14 January 2020, the respondent declined liability for the claim on the basis the applicant had failed to give notice of his injury or made a claim within the times prescribed by sections 254 and 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

## ISSUES FOR DETERMINATION

3. The parties agree that the only issue in dispute is whether the applicant is within the time to make his claim and bring these proceedings.

## PROCEDURE BEFORE THE COMMISSION

4. The parties attended a hearing on 16 March 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

5. At the hearing of the matter, Mr J Hallion of counsel appeared for the applicant and Mr J Gaitanis of counsel appeared for the respondent.

6. At the outset of the hearing, Mr Hallion moved an amendment which was foreshadowed at the telephone conference to plead a claim for permanent impairment compensation. The Application to Resolve a Dispute (the Application) had only pleaded the cost of hearing aids. The respondent opposed that application, however, Mr Gaitanis properly admitted there was no actual prejudice to the respondent by that claim being made, as it was foreshadowed in the applicant's solicitor's letter of claim dated 13 February 2019 and met by the respondent's section 78 notice.

7. Given these circumstances, I propose to allow the amendment, noting the respondent's view that it has not suffered any prejudice as a result of it.

8. Accordingly, I grant leave to amend the Application to claim permanent impairment compensation in respect of a 9.7% binaural hearing loss, with a deemed date of injury of 3 July 1998, being the date the applicant last worked for the respondent.

9. That date of injury is derived from the applicant's taxation department records including his notice of assessment found at page 20 of the Application. That document indicates his last date of employment with the respondent was 3 July 1998.

## EVIDENCE

### Documentary evidence

10. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) the Application and attached documents;

    (b) Reply and attached documents, and

    (c) Applicant's Application to Admit Late Documents (AALD) dated 5 March 2020 together with attached documents.

### Oral evidence

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

## FINDINGS AND REASONS

### Time limits

12. Although section 254 of the 1998 Act was raised in the respondent's dispute notice, the argument at the hearing was confined to whether the applicant's claim could be made despite the operation of section 261 of the 1998 Act.

13. Section 261 provides that compensation cannot be recovered unless a claim has been made within six months of the injury. Subsection 4 provides that the failure to make a claim within the six-month period required is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause, and either:

    (a) the claim is made within three years after the injury or accident happened or, in the case of death, within three years after the date of death, or

    (b) the claim is not made within that three years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker.

14. Section 261(6) provides that a worker's injury is taken to have been received when the worker first became aware they had suffered an injury. In this matter, that was at the earliest in or about June 2015, when the applicant was assessed by Dr Scoppa, who then provided a report to the applicant's solicitors.

15. If the applicant is found to have had knowledge from that time, the three-year limitation period arguably expired in or about June 2018. On another view, the applicant at the latest had knowledge of the injury on 29 October 2015, which was the date his solicitors forwarded an email confirming the last date he was employed with the respondent, namely 3 July 1998.

16. However, in his supplementary statement the applicant says, and I accept:

    "10. It remained unclear to me from the time the report of Dr Scoppa was obtained until the claim was made against Canterbury Council on 20 November 2018 as to which employer the claim should be made. As far as I can recall, I was never during this period, given specific advice by Mr Kilby that my claim should be made against Canterbury Bankstown Council in relation to my employment at the Rose/ands Aquatic Centre. I remained under the impression that the issue as to which employer the claim should be made against remained unresolved and that further investigation was required."

17. The question for determination is when the applicant can be said to have had awareness of his injury (section 261(6)).

18. "Awareness of injury" is awareness of "injury" as it is defined by the legislation, not merely awareness of a physical problem: *Heatcraft Australia Pty Ltd v Lapa* [2007] NSWWCCPD 27 (*Lapa*) at [37]; also, *Roads and Traffic Authority of NSW v McNally* [2006] NSWWCCPD 359 (*McNally*) at [35]-[40]. In this context, injury includes a disease (section 4 *Workers Compensation Act 1987* (the 1987 Act)).

19. In *Inghams Enterprises Pty Ltd v Jones* [2012] NSWWCCPD 17 (*Jones*), Roche DP discussed the test for awareness of injury in cases of boilermaker's deafness (see [85]-[92]). The Deputy President stated that, in a claim for boilermaker's deafness, awareness of injury arises when the worker is aware of two things: first, that he has sensorineural hearing loss (hearing loss of such nature as to be contracted by a gradual process); and second, that his hearing loss has been contributed to by his employment (at [90]).

20. The Deputy President noted that:

> "[b]ecause of the insidious nature of boilermaker's deafness, and lack of general knowledge in the community of its cause, awareness that a worker has received a s 17 injury will usually require specialised knowledge that will normally come from an appropriate expert in the field." (at [89])

21. Accordingly, the worker's awareness of hearing loss, and having worked in a noisy place, are not sufficient: "[i]t is neither appropriate nor reasonable to expect workers to 'put two and two together'" (at [86]), as was put to the worker in cross examination in that case. Nor does the worker have to be aware that they have "a watertight case that is bound to succeed" (at [87]). The test is an objective one, based on the individual worker's knowledge at the relevant time, and each case will turn on its own facts. *Jones* was considered and applied in *Unilever Australia Ltd v Saab* [2013] NSWWCCPD 2 at [34]-[35], and *Unilever Australia Ltd v Petrevska* [2013] NSWWCCPD 3 at [41] (*Petrevska*).

22. Taking into account the evidence in this matter, I believe the applicant had knowledge of his injury, as that term has been interpreted in cases such as *Petrevska* from the time he was made aware of the contents of Dr Scoppa's report. The evidence of Mr Kilby, paralegal clerk employed by the applicant's solicitors, discloses that the solicitors would be seeking clarification from Dr Scoppa of the impact, if any, of subsequent employment, however, that does not in my view detract from the applicant having had knowledge of his injury from approximately mid-2015 when Dr Scoppa's report was produced.

23. I have examined the evidence in this matter, and in my view the applicant had "knowledge" as that term is used in the context of section 261 when he became aware he had suffered loss of hearing and that his employment was to blame. As the Court of Appeal noted in *Petrevska*, the cause of a worker's gradual hearing loss will ordinarily be a fact of which the worker is not "aware" until he or she receives medical advice. The worker may have an opinion or belief that the hearing loss is related to the worker's employment, but that is not sufficient. The "high level of assurance required for 'awareness' of its correctness will ordinarily require expert advice" (at [25]). That medical advice in this matter was received in or about June 2015.

24. Section 261(6) of the 1998 Act deems the date of injury to be the date of awareness. Accordingly, the applicant's claim has been brought outside three years of his gaining awareness of the injury at issue.

25. Given this is the case, the applicant must satisfy the requirements of section 261(4)(b), namely that the injury in question has resulted in serious and permanent disablement.

26. The leading authorities on this issue are *Broken Hill Proprietary Company Ltd v Kuhna* (1992) 8 NSWCCR 401 (Kuhna) and *Gregson v L & Mr Dimasi Pty Ltd* [2000] NSWCC 47; (2000) 20 NSWCCR 520 (Gregson). The effect of those authorities is that the disablement which afflicts an injured worker must, in the context of section 261(4), affect a worker's ability to carry out employment (see Cripps JA in Kuhna at 127). In Gregson, Burke CCJ said:

> "In this matter the question becomes whether Mr Gregson suffers a serious and permanent disablement. Does he have a disability, is it serious, is it permanent, does it impinge adversely upon his capacity to work? If all questions were answered in the affirmative then he would satisfy that requirement. The basic question then presenting is the degree of the applicant's incapacity and losses before a considered answer to those previous questions is available." (at [78])

27. There is no question that hearing loss can cause serious and permanent disablement (see *BHP Billiton Ltd v Eastham* [2013] NSWWCCPD 34 (Eastham)). In that matter, a worker suffered total hearing loss of 25% and provided evidence that he "'could not carry out work where he had to engage in telephone conversations, or converse with people (particularly in groups). He could not work in circumstances where the ability to hear is necessary for reasons of safety.'

28. The nature of the evidence in Eastham stands in stark contrast to that in this case. In his statements, the applicant deals with the nature of his subsequent employment, and rules it out as being noisy. However, the only evidence he proffers as to serious and permanent disablement is found at paragraph three of his statement at page 12 of the Application. He says:

> "I have been employed by Sylvania Bowling Club Co-Op Limited as a bar/cellarman from 23 October 2010 to date. This has been relatively quiet employment. There is a lot of noise from patrons that echoes within the Club but in general I am able to have a normal conversation with a person standing about a metre away. The only other noise exposure during the course of this employment is from a DJ for about 3 hours once per month."

29. Put simply, there is no other evidence from the applicant which goes to the question of serious and permanent disablement. That being so, and noting the applicant bears the onus of proof, I am not satisfied the applicant suffered such serious and permanent disablement in the course of his employment with the respondent.

30. I note Mr Hallion made submissions concerning the precise knowledge of the applicant and his solicitors, and the steps they took to rule out other employers as being causative of the applicant's loss. In the context of the relevant inquiry for the Commission, I do not believe those matters are relevant. Rather, the question is when the applicant obtained knowledge of his injury (section 261(6)) and, having done so, whether he made his claim within three years. In my view, he did not. That being the case, the relevant inquiry then becomes whether he suffered serious and permanent disablement (section 261(4)(b)).

31. As noted, I am not satisfied on the evidence before me that the applicant suffered such a serious and permanent disablement. Accordingly, there will be an award for the respondent.