WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2347/20**
Applicant: **George Gardiner**
Respondent: **Ausgrid Management Pty Limited**
Date of Determination: **11 August 2020**
Citation: **[2020] NSWWCC 270**

The Commission determines:

1. The supply and fitting of the right ear monaural hearing aid proposed by Ms Gemma Millar, Clinical Audiologist and Dr Joseph Scoppa, Ear, Nose and Throat Physician is reasonably necessary treatment as a result of the industrial deafness deemed to have been sustained by the applicant in the course of his employment with the respondent on 11 December 2019 within the meaning of section 60 of the *Workers Compensation Act 1987*.

The Commission orders:

2. The respondent is to pay for the costs of and ancillary to the supply and fitting of the right ear monaural hearing aid proposed by Ms Gemma Millar, Clinical Audiologist and Dr Joseph Scoppa, Ear, Nose and Throat Physician.

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

Anthony Scarcella
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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr George Gardiner, is a 63-year-old man who was employed by Ausgrid Management Pty Limited (the respondent) initially, as an electrical supplies operative, then as a standby officer and finally, as a rescue officer until he took a voluntary redundancy on 16 December 2019.

2. On 11 December 2019, Mr Gardiner gave notice of his intention to make a claim under section 60 of the *Workers Compensation Act 1987* (the 1987 Act) for the cost of the supply and fitting of a right ear monaural hearing aid as a result of hearing loss sustained in the course of his employment with the respondent.[1]

3. On 14 February 2020, the respondent issued a Dispute Notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) disputing liability for the cost of the supply and fitting of hearing aids under section 60 of the 1987 Act, on the basis that they were not reasonably necessary or related to Mr Gardiner's employment with the respondent.[2]

4. On 26 February 2020, Mr Gardiner, through his lawyers, requested a review of the decision contained in the respondent's Dispute Notice dated 14 February 2020 under section 287A of the 1998 Act.[3]

5. On 12 March 2020, the respondent issued a Dispute Notice pursuant to section 78 of the 1998 Act maintaining its decision to deny liability.[4]

6. Mr Gardiner lodged an Application to Resolve a Dispute (ARD) dated 29 April 2020 in the Workers Compensation Commission (the Commission) claiming the cost of the supply and fitting of a hearing aid under section 60 of the 1987 Act.

ISSUE FOR DETERMINATION

7. The parties agreed that the following issue remained for determination:

    (a) Whether the supply and fitting of a right ear monaural hearing aid proposed by Ms Gemma Millar, Clinical Audiologist and Dr Joseph Scoppa, Ear, Nose and Throat Physician is reasonably necessary treatment as a result of the industrial deafness deemed to have been sustained by Mr Gardiner in the course of his employment with the respondent on 11 December 2019 within the meaning of section 60 of the 1987 Act.

Matters previously notified as disputed

8. The issue in dispute was notified in the Dispute Notices referred to above.

Matters not previously notified

9. No other issues were raised.

---

[1] Application to Resolve a Dispute at pages 5-8
[2] Application to Resolve a Dispute at pages 9-12
[3] Application to Resolve a Dispute at page 13
[4] Application to Resolve a Dispute at pages 14-19

PROCEDURE BEFORE THE COMMISSION

10. The parties participated in a Commission teleconference on 27 May 2020. Mr Richard Dababneh, Solicitor appeared for Mr Gardiner and Mr Daniel Wilkins, Solicitor appeared for the respondent. I offered the parties the opportunity to make oral submissions at the teleconference. However, Mr Wilkins indicated that he was not in a position to do so. The parties agreed to provide written submissions and that thereafter, I would determine the matter 'on the papers'.

11. On 27 May 2020, I issued the following directions:

> "1. The applicant is to lodge and serve by 10 June 2020 written submissions on the only issue in dispute, namely, whether the supply of a hearing aid for the right ear proposed by Ms Gemma Miller, Audiologist and Dr Joseph Scoppa is reasonably necessary treatment as a result of the injury deemed to have been sustained by the applicant on 11 December 2019 within the meaning of section 60 of the 1987 Act.
>
> 2. The respondent is to lodge and serve by 24 June 2020 written submissions in reply.
>
> 3. At the conclusion of the time allowed for submissions the dispute will be determined 'on the papers'."

12. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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.

EVIDENCE

Documentary Evidence

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

    (a) ARD dated 29 April 2020 and attached documents;

    (b) Reply dated 20 May 2020 and attached documents;

    (c) The applicant's written submissions dated 9 June 2020;

    (d) The respondent's written submissions dated 24 June 2020.

Oral Evidence

14. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

SUBMISSIONS

15. The parties lodged the written submissions referred to above with the Commission. I will refer to the parties' written submissions under each relevant issue for determination set out below.

FINDINGS AND REASONS

Is the supply and fitting of a right ear monaural hearing aid proposed by Ms Gemma Millar, and Dr Joseph Scoppa reasonably necessary treatment as a result of the industrial deafness deemed to have been sustained by Mr Gardiner in the course of his employment with the respondent on 11 December 2019 within the meaning of section 60 of the 1987 Act?

16. It was made clear in the parties' respective written submissions that:

    (a) There was no issue that Mr Gardiner suffered industrial deafness as a result of his prior employment with P & O Ports Limited and that the Compensation Court of NSW awarded him 85% loss of hearing in the left ear and 15% binaural hearing loss on 19 September 2002.[5]

    (b) There was no issue that Mr Gardiner's employment with the respondent during the period 27 February 2006 to about 13 December 2019 was "noisy" employment.

    (c) There was no issue that the proposed right ear monaural hearing aid is a medical necessity.

17. Section 60(1) of the 1987 Act relevantly provides:

    "If as a result of an injury received by a worker, it is reasonably necessary that:

    (a) any medical or related treatment (other than domestic assistance) be given, or

    (b) any hospital treatment be given, or

    (c) any ambulance service be provided, or

    (d) any workplace rehabilitation service be provided,

    the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)."

18. Section 60(5) of the 1987 Act relevantly provides:

    "The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute may be referred by the Registrar for assessment under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act."

19. There are two elements to section 60(1) of the 1987 Act that must be considered. The first element is "as a result of an injury received by a worker". The second element is that of "reasonably necessary". In this case, it is not necessary for me to consider the second element because the respondent has conceded that the proposed right ear monaural hearing aid is a medical necessity for Mr Gardiner.

[5] ARD at pages 20-21

20. Dealing with the first element, namely, "as a result of injury received by a worker", I am required to conduct a common sense evaluation of the causal chain in accordance with the principles espoused in *Kooragang Cement Pty Ltd v Bates*[6] (*Kooragang*) to determine whether the right ear monaural hearing aid is reasonably necessary "as a result of" the alleged progression of the hearing loss in Mr Gardiner's right ear during the course of his employment with the respondent between 27 February 2006 to about 13 December 2019.

21. As I understand it, when referring to applying "common sense", Kirby, P in *Kooragang* was not suggesting that it be applied "at large" or that issues were to be determined by "common sense" alone but by a careful analysis of the evidence. This includes a careful analysis of the expert evidence.

22. *Murphy v Allity Management Services Pty Ltd*[7] (*Murphy*) referred to *Kooragang* and is authority for the proposition that an injured worker must establish that the injury materially contributed to the need for the treatment or the surgery. In *Murphy*, Roche DP stated that the need for treatment or surgery can arise from multiple causes because a condition can have multiple causes. Roche DP made it clear that the work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under section 60 of the 1987 Act.

23. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

24. Mr Gardiner's principal submissions may be summarised as follows:

    (a) On the evidence, Mr Gardiner's right ear industrial deafness has progressed significantly since the commencement of his employment with the respondent.

    (b) Dr Scoppa opined that it was clear that the hearing loss in Mr Gardiner's right ear had progressed from 16.7% to 28.4% based on Dr David Crocker's audiograms prior to and at the end of his employment with the respondent. Dr Sylvester Fernandes, Ear, Nose, Throat and Facial Plastic Surgeon found a significantly lower loss of 17.6%, yet still slightly higher than the loss of 16.7% found by Dr Crocker in December 2005.

    (c) The Commission would prefer the consistent evidence of Dr Crocker and Dr Scoppa as to the level of the right sided loss, rather than the lower percentage loss found by Dr Fernandes. On the weight of the evidence and on Dr Scoppa's evidence, Dr Crocker's two audiograms were the best of the audiograms to use by way of comparison and they demonstrated an increase in Mr Gardiner's right ear hearing loss from 9% whole person impairment (WPI) to 14% WPI.

    (d) Dr Scoppa opined that Dr Fernandes erred in deducting 14% WPI as being due to industrial deafness based on the pre-employment audiogram because the 14% WPI was based on the total binaural hearing loss of 28.3%, caused by a combination of industrial deafness and acute traumatic hearing loss.

    (e) Dr Scoppa further opined that Mr Gardiner's description of his occupational noise exposure with the respondent was a substantial contributing factor to his having developed the injury of industrial deafness.

    (f) Dr Sylvester Fernandes did not provide a proper basis for the opinions he expressed on page 6 of his report dated 15 February 2020.

---

[6] *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796
[7] *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49

(g) The legal issue to be determined is whether the industrial deafness hearing losses resulting from his employment with the respondent materially contributed to the need for the right ear monaural hearing aid treatment: *Murphy*.

(h) The Commission should find that Mr Gardiner sustained, after allowance for age, a further 11.7% loss of hearing in his right ear to a total industrial deafness loss of 28.4% right ear (14% WPI) as a result of his employment with the respondent, and that such further loss has materially contributed to the need for the right ear hearing aid which is reasonably necessary as a result of the injury.

25. The respondent's principal submissions may be summarised as follows:

(a) On the evidence, there has been no further deterioration in Mr Gardiner's right ear industrial deafness since the commencement of his employment with the respondent.

(b) On the evidence, Mr Gardiner's employment with the respondent did not materially contribute to the need for a right monaural hearing aid. The question of material contribution must be addressed globally, as industrial deafness forms part of the overall hearing loss.

(c) Dr Crocker conducted a pre-employment audiometric assessment on 5 December 2005, which revealed a binaural hearing loss of 28.3%. Mr Gardiner sought to rely on the assessment of Dr Scoppa, who assessed a 28.2% binaural hearing loss. On Dr Fernandes' method of assessment, he found a significantly lower loss of 17.6% binaural hearing loss. Accordingly, there was no evidence of further loss.

(d) Dr Fernandes opined that the requirement for the hearing aid specifically related to the hearing loss prior to Mr Gardiner's employment with the respondent from 27 February 2006.

(e) The Commission ought not accept Dr Scoppa's reports. Dr Scoppa's findings and opinion were at odds with those of Dr Fernandes, Dr Ng, and Dr Crocker's pre-employment audiogram. Dr Scoppa has essentially contradicted his own methodology.

(f) Dr Scoppa has erroneously interpreted Dr Crocker's pre-employment audiogram dated 5 December 2005.

(g) Industrial deafness is bilaterally symmetrical. Dr Fernandes' calculation of occupational hearing loss took into consideration the extent to which Mr Gardiner's left ear hearing loss exceeded his right ear hearing loss.

(h) There is a clear inconsistency as to the correct approach to apply in the circumstances. Where the injury relates to further loss of hearing, the dispute as to the nature and extent of the injury is determined not by the Commission but by an Approved Medical Specialist.

(i) Mr Gardiner has not established, on the balance of probabilities, that his industrial deafness made a material contribution to the need for a monaural hearing aid: *Bikesic v James Hardie Industries Ltd*[8] (*Bikesic*). Based on the findings of Dr Scoppa, Dr Crocker and Dr Fernandes, there is no further hearing loss attributable to the worker's employment with the respondent.

[8] *Bikesic v James Hardie Industries Ltd* [2020] NSWWCC 31

26. In evidence, there is a statement by Mr Gardiner dated 24 March 2020.[9]

27. In his evidentiary statement, Mr Gardiner summarised his employment history to date. Relevant to these proceedings are his last two places of noisy employment, namely, P & O Ports Limited and the respondent.

28. Mr Gardiner stated that he was employed by P & O Ports Limited as a waterside worker at the Port Botany pier between 1995 and 2000. He stated that during his employment with P & O Ports Limited he was exposed to loud noise from the loading and unloading of freight, the impact noise of heavy metal containers being stacked on top of one another, from the straddles and the forklifts. The noise was so loud that he could not hold a normal conversation with someone standing about a metre away from him and had to raise his voice or shout in order to communicate.

29. Mr Gardiner stated that, in 1999, he sustained a head injury in the course of his employment with P & O Ports Limited when he slipped and struck his head on the kerb of the footpath. As a result of the head injury, he was left with profound hearing loss in the left ear. He pursued his workers compensation entitlements in respect of the injury, including an industrial deafness claim against P & O Ports Limited. In evidence, there are the Short Minutes of Order executed in the Compensation Court of New South Wales in two separate proceedings on 19 September 2002 and subsequently issued by the Court.[10] Amongst other things, Mr Gardiner was compensated in respect of a 15% binaural hearing loss and an 85% permanent loss of hearing in the left ear (the latter noted as being a 100% impairment less 15% pursuant to section 68A of the 1987 Act).

30. Mr Gardiner stated that between 2000 and 2004 he was employed by the Department of Finance and Administration as a driver. Between 2004 and 2006, he was employed by SE Timber as a showroom sales consultant. Neither of these two workplaces were noisy employment.

31. On 5 December 2005, Mr Gardiner underwent a pre-employment audiogram at the request of the respondent conducted by Dr Crocker.[11]

32. Mr Gardiner stated that he was employed by the respondent between 2006 and 16 December 2019, when he took a voluntary redundancy. He was exposed to loud noise in the course of his employment with the respondent initially as an electrical supplies operative, then as a standby officer and finally as a rescue officer. There was no issue that Mr Gardiner's employment with the respondent was noisy employment.

33. Mr Gardiner stated that, whilst he had always been provided with hearing protection by his noisy employers in the form of earplugs and earmuffs, it was not always practical to wear them, because it was necessary for him to hear his colleagues out on the job site in order to work safely. This was particularly the case whilst employed by the respondent.

34. Mr Gardiner stated that since 16 January 2020, he has been employed by Woolworths as a casual stock-take team member.

35. Mr Gardiner stated that, as a result of his hearing impairment he experiences difficulties communicating with his family and friends, who constantly complain about his hearing and him missing bits of conversations. He currently experiences difficulties communicating with his colleagues and customers at Woolworths. He is always asking people to repeat themselves and this causes him a lot of frustration. He experiences difficulties watching television and speaking over the telephone. He experiences difficulties hearing when people are speaking to him from another room and finds that he needs to be face-to-face and lip

[9] ARD at pages 1-4
[10] ARD at pages 20 and 21
[11] Reply at page 9

read whilst listening. He experiences hearing difficulties particularly in group situations where there is a lot of background noise. This causes him much embarrassment and discomfort. He experiences difficulties hearing in open spaces, such as shopping centres and anywhere where background noise is present, such as, pubs or restaurants.

36. On 7 November 2019, Mr Gardiner attended Miranda National Hearing Care for a hearing assessment. In evidence, there is a report by Ms Millar dated 7 November 2019 and attached audiometric testing report and hearing instrument quote.[12]

37. Ms Millar reported that the audiometric testing revealed a mild to moderate sensorineural hearing loss in the right ear and a profound hearing loss in the left ear. Ms Millar took a history of Mr Gardiner's noise exposure in the course of his employment with the respondent which was consistent with the evidence. She noted the profound hearing loss in the left ear as a result of the accident in 1999. However, she incorrectly referred to it as non-work related. She took a history of the current hearing difficulties experienced by Mr Gardiner which was consistent with the evidence.

38. Ms Millar calculated the percentage loss of hearing in Mr Gardiner's right ear, based on the NAL 1998 Tables at 22.2%. The binaural percentage loss of hearing was calculated at 33.7%. However, she noted that the left ear had a profound hearing loss from a non-work-related injury. Ms Millar opined that Mr Gardiner would very likely benefit from the use of a suitable hearing aid in the right ear, which would significantly improve his hearing acuity in the areas of difficulty he reported to her. She then went on to recommend the make and model of a suitable hearing aid and provided a quotation for its supply and fitting.

39. On 9 December 2019, Mr Gardiner consulted Dr Scoppa at the request of his lawyers. In evidence, there is a report by Dr Scoppa dated 9 December 2019.[13]

40. Dr Scoppa took an employment history and a history of Mr Gardiner's current hearing difficulties which was consistent with the evidence.

41. On ENT examination, Dr Scoppa observed no abnormality. Both eardrums and ear canals were normal. The Weber test was lateralised to the right and the Rinne test was positive on both sides. On audiological evaluation, Dr Scoppa observed that responses were prompt, consistent and repeatable. He was satisfied that he had obtained a reliable audiogram. The pure tone audiogram demonstrated a bilateral sensorineural hearing loss. There was moderate to severe loss in the right ear and total loss of hearing in the left ear. In accordance with the 1998 NAL Tables, Dr Scoppa calculated Mr Gardiner's percentage hearing loss as follows:

Left ear before correction for presbyacusis	100.0%
Left ear after correction for presbyacusis	98.7%
Right ear before correction for presbyacusis	29.5%
Right ear after correction for presbyacusis	28.2%
Binaural hearing loss (BHL) before correction for presbyacusis	40.3%
BHL after correction for presbyacusis	39.0%

In relation to occupational hearing loss, Dr Scoppa calculated Mr Gardiner's percentage hearing loss as follows:

[12] ARD at pages 40-45
[13] ARD at pages 22-28

Left ear before correction for presbyacusis	29.5%
Left ear after correction for presbyacusis	28.2%
Right ear before correction for presbyacusis	29.5%
Right ear after correction for presbyacusis	28.2%
BHL before correction for presbyacusis	29.5%
BHL after correction for presbyacusis	28.2%

42. Dr Scoppa then went on to assess the binaural hearing impairment (BHI) and WPI as follows:

Total BHI (section 9.9):	40.3%
BHI not due to industrial deafness:	10.8%
BHI due to industrial deafness:	29.5%
Add loading for severe tinnitus (section 9.11):	0%
Less presbyacusis correction (section 9.10):	1.3%
Total BHI due to industrial deafness:	28.2%
A binaural hearing impairment of 28.2% = a WPI of (WorkCover Guides, Table 9.1)	14%

43. Dr Scoppa opined that Mr Gardiner's hearing loss was not entirely due to industrial deafness because industrial deafness is typically bilaterally symmetrical, and his audiogram demonstrated an unacceptable asymmetry due to the presence of a greater hearing loss in the left ear. He further opined that the hearing loss in the right ear was consistent with and due to industrial deafness and that such loss and an equal degree of loss in the left ear occurred as a result of the occupational noise exposure. The hearing loss in the left ear was due to the head trauma sustained in Mr Gardiner's 1999 accident.

44. Dr Scoppa opined that Mr Gardiner's description of his occupational noise exposure with the respondent was of a type to be a substantial contributing factor to the development of industrial deafness.

45. Dr Scoppa then dealt with the issue of the calculation of Mr Gardiner's further hearing loss due to industrial deafness, noting that, he was compensated for a binaural hearing loss of 15% WPI relating to a deemed injury in February 1999. In this regard, Dr Scoppa stated:

> "The methodology to be used to make allowance for a previous claim for industrial deafness is contained in paragraph 9.15 of the WorkCover Guides for the Evaluation of Permanent Impairment, 4th Edition, April 2016. As per these Guides I have made the following calculations in Mr Gardiner's case:
>
> - The current binaural hearing impairment (BHI) is 28.2%
> - The current WPI is 14%
> - The BHI for which compensation was paid previously is 15.0 % which is 53% of the current BHI of 28.2%.
> - The remaining percentage, 47%, is the percentage of WPI to be compensated.

- 47% of the current WPI of 14% is 6.58, or 7% after rounding off.
- He has therefore sustained a further loss of 7% WPI since his last claim due to industrial deafness."[14]

46. On the basis of the history of hearing loss and his audiological findings, Dr Scoppa opined that Mr Gardiner's hearing loss is permanent but can be assisted by the use of a monaural right ear digital hearing aid and that such an aid is reasonably necessary for the rehabilitation of the noise induced hearing loss.

47. On 13 January 2020, Mr Gardiner consulted Dr Fernandes at the request of the respondent. In evidence, there is a report by Dr Fernandes dated 15 February 2020.[15]

48. Dr Fernandes took an employment history and a history of Mr Gardiner's current hearing difficulties which was consistent with the evidence.

49. On clinical examination, Dr Fernandes observed that, on the left side, the BAHA insertion site demonstrated a depressed scar. The Rinne test was positive on both sides and the Weber test was not lateralised. Otherwise, there was nothing significant on otorhinolaryngological examination relevant to the hearing loss.

50. Dr Fernandes diagnosed a noise induced hearing loss in the upper middle and treble frequencies; and access loss of uncertain origin that was non-occupational in the bass and lower middle frequencies; age-related hearing loss; and an additional excess loss of traumatic origin that was non-noise induced on the left side.

51. Dr Fernandes stated that he was satisfied that an accurate hearing test was achieved on audiogram. He opined that Mr Gardiner had an asymmetric hearing loss, with the left side being worse than the right side. Dr Fernandes reported the audiogram as follows:[16]

Frequency Hz	**Left dB**		**Right dB**		**Total % BHI**	**Occupational % BHI**
	Air	**Bone**	**Air**	**Bone**		
500	85	30	5	5	3.2	0.0
1000	90	30	10	10	4.2	0.0
1500	95	70+	35	35	7.1	4.5
2000	100+	70+	45	45	7.1	6.1
3000	100+	70+	50	45	5.4	4.8
4000	100+	70+	45	45	4.3	3.5
					31.3	18.9

52. Dr Fernandes noted that:

> "Noise induced hearing loss is essentially symmetric, as in most occupational environments, the ears are exposed to similar sound levels bilaterally, even when the apparent noise source comes from one side. Hence in the instant case, the left

[14] ARD at page 26
[15] Reply at pages 1-9
[16] Reply at page 5

> ear is equated to the right. As a result, the hearing loss on the right side has been taken into consideration for the calculation of noise induced hearing loss on the left side. The excess loss on the left side is not noise induced."[17]

53. Dr Fernandes reported that frequencies below 1.5 kHz were not included in the calculation because the historical noise exposure was not suitable or sufficient to cause a noise induced hearing loss at those frequencies, as the cumulative emission levels were not high enough to involve those frequencies.

54. Dr Fernandes concluded that, after consideration of the nature and duration of occupational noise exposure and the nature and extent of all the hearing losses, including those at 0.5, 1 and 1.5 kHz, the hearing losses at 1.5 kHz, 2 kHz, 3 kHz and 4 kHz were caused by Mr Gardiner's occupational noise exposure. Dr Fernandes found a BHL of 18.9% and deducted 1.3% for presbyacusis, leaving a figure of 17.6%. He then deducted the past claims of 15% WPI, being 85.23% of the current BHL of 17.6%, leaving a balance of 14.77% of current WPI of 9%, amounting to a WPI of 1.329% further loss. The rounded WPI resulted in converting the further hearing loss to 1% WPI.

55. Dr Fernandes' comment on Dr Scoppa's report appeared incomplete. He noted that Dr Scoppa obtained higher thresholds. He then referred to hearing aids being reasonably necessary as a result of compensable injury and that the "client" would benefit from open fit bilateral hearing aids to reduce the occlusion effect and with feedback suppression capabilities and directional microphones, which improves hearing in background noise. I found this puzzling as Mr Gardiner has a total hearing loss in the left ear and a conventional hearing aid for the left ear would provide no benefit. The respondent posed a specific question to Dr Fernandes relating to the 14% WPI outcome of the pre-employment audiogram dated 5 December 2005 and Dr Scoppa's currently expressed opinion of 14% WPI. I found it difficult to make sense of that specific question as recorded by Dr Fernandes. Perhaps, it was better phrased in the respondent's letter of instructions. However, the letter of instructions was not in evidence. In any event, Dr Fernandes responded as follows:

> "With this provided information, I can agree that the requirement for the hearing aid specifically relates to hearing loss prior to Mr Gardiners [sic] employment with Ausgrid (then Energy Australia) from 27/2/2006."[18]

56. In evidence, there is a supplementary report by Dr Scoppa dated 4 April 2020[19] issued at the request of Mr Gardiner's lawyers. Dr Scoppa was requested to review the additional documentation provided to him and referred to in his supplementary report. Such documentation included Dr Fernandes' report dated 15 February 2020. Further, Mr Gardiner's lawyers posed four questions to him.

57. In response to the first question, Dr Scoppa responded that Mr Gardiner's employment with P & O Ports Limited contributed to his industrial deafness, as well as his employment with the respondent.

58. In response to the second question, Dr Scoppa opined that Mr Gardiner's employment with the respondent did expose him to levels of noise which would be considered of a nature sufficient to cause industrial deafness.

59. In response to the third question as to whether Mr Gardiner sustained any further hearing loss whilst employed by the respondent and noting the pre-employment audiometric assessment, Dr Scoppa responded in the affirmative and opined that he had suffered a further loss of 5% WPI for the reasons discussed in his answer to the fourth question.

---

[17] Reply at page 5
[18] Reply at page 6
[19] ARD at pages 29-39

60. In response to the fourth question requesting comment on the opinion of Dr Fernandes, Dr Scoppa provided a comparison of the available audiograms. Dr Scoppa referred to two audiograms by Dr Crocker dated 5 December 2005 and a 16 October 2019. He also referred to an audiogram by Dr Ng dated 16 January 2007 and the audiogram by Dr Fernandes dated 13 January 2020. Of course, Dr Scoppa also referred to the audiogram he conducted on 9 December 2019. He did not refer to the audiogram conducted by Ms Millar dated 7 November 2019. Dr Crocker's audiogram dated 16 October 2019 and Dr Ng's audiogram dated 16 January 2007 are not in evidence. Nevertheless, Dr Scoppa provided a table setting out the left and right ear thresholds in dB over a range of 500 Hz to 8000 Hz.

61. In analysing his table, Dr Scoppa noted that Mr Gardiner's left ear hearing loss has remained severe to profound from December 2005 to January 2020, except for the audiogram of Dr Ng dated 16 January 2007, which demonstrated much better hearing. In view of the other three audiograms, Dr Ng's audiogram was the inconsistent one.

62. Dr Scoppa stated that in analysing his table, it demonstrated a progressive hearing loss in the right ear from the pre-employment audiogram dated 5 December 2005 to the present time, except for the audiogram of Dr Fernandes that demonstrated a minimal deterioration at 1500 Hz.

63. Dr Scoppa stated:

> "In my opinion because of the profound hearing loss that affected the left ear in the industrial accident of 1999, after that date of injury further industrial deafness could only affect the better right ear because the left ear was for all intents and purposes a useless ear. In such cases of the presence of only one good ear it is my understanding that any further industrial deafness that occurs in a person with only one functional ear is deemed to be a binaural rather than a monaural loss. This rule is also used when assessing industrial deafness in a case where there is an asymmetrical hearing loss, and the industrial deafness loss in the better ear is deemed to also be present in the worse ear.
>
> Thus, when assessing whether further industrial deafness occurred from the date of the pre-employment audiogram of 5 December 2005 to my assessment and that of Dr Fernandes only the loss in the right ear needs to be considered, as the left ear was profoundly affected in the accident of 1999."[20]

64. Dr Scoppa enclosed computer-generated audiograms for all available tests showing the percentage of hearing loss present at the time of testing. There was no objection taken by the respondent in this regard. When excluding Dr Ng's audiogram due to the inconsistency referred to above and the early date of testing, Dr Scoppa reported the following losses present in the right ear in the remaining audiograms:

    (a) 5 December 2005 audiogram (Dr Crocker): 16.7% hearing loss.

    (b) 16 October 2019 audiogram (Dr Crocker): 28.4% hearing loss.

    (c) 9 December 2019 audiogram (Dr Scoppa): 28.2% hearing loss.

    (d) 13 January 2020 audiogram (Dr Fernandes): 17.6% hearing loss.

[20] ARD at page 32

65. After extrapolating the above-mentioned figures, Dr Scoppa stated:

> "Thus it is clear that the hearing loss in the right ear has progressed from 16.7% to 28.4% based on Dr Crocker's two audiograms. I note that I and Dr Crocker found almost identical losses. Dr Fernandes found significantly less loss of 17.6%, yet still slightly higher than the loss of 16.7% found by Dr Crocker in December 2005.
>
> …
>
> Thus on these figures Mr Gardiner sustained a further loss due to industrial deafness of 14% - 9% equals 5% WPI since the pre-employment audiogram. My audiogram also shows an identical further loss of 5% WPI. Dr Fernandes' audiogram shows a slight further loss of 17.6 - 16.7 equals 0.9% binaural hearing loss, equating to the same WPI of 9%"[21]

66. Dr Scoppa opined that, as Dr Crocker carried out both audiograms, he would consider the latter's audiograms to be the two better ones to use for comparison. He stated that such comparison demonstrated that Mr Gardiner's industrial deafness involving the right ear increased from a 9% WPI in December 2005 to a 14% WPI on 16 October 2019.

67. Dr Scoppa opined that Dr Fernandes erred in deducting 14% WPI as being due to industrial deafness based on the pre-employment audiogram because the 14% WPI was based on the total binaural hearing loss of 28.3% which, in turn, was caused by a combination of industrial deafness and acute traumatic hearing loss. Dr Scoppa clarified his opinion as follows:

> "The loss in the right ear on this pre-employment audiogram was 16.7% due to industrial deafness, and assuming an equal amount of loss in the left ear then the binaural hearing loss due to industrial deafness was 16.7% or a WPI of 9% (WorkCover Guides Table 9.1).[22]

68. Mr Gardiner sought a finding of a further 11.7% loss of hearing in his right ear making a total industrial deafness loss of 28.4% in his right ear (14% WPI), as a result of his employment with the respondent. I decline to make any finding in relation to WPI. My task is to determine the issue at hand, namely, whether the supply and fitting of a right ear monaural hearing aid proposed by Ms Millar and Dr Scoppa is reasonably necessary treatment as a result of the industrial deafness alleged to have been sustained by Mr Gardiner on 11 December 2019 within the meaning of section 60 of the 1987 Act.

69. I accept the respondent's submission that the question of material contribution must be addressed globally, because industrial deafness forms part of the overall hearing loss which requires the hearing aid. It is not merely a mathematical exercise: *Bikesic*. There was no issue that Mr Gardiner's employment with the respondent over the 13.5-plus year period from 27 February 2006 to about 13 December 2019 was "noisy" employment. I accept Mr Gardiner's evidence in this regard and take it into account in considering the question of material contribution. I have also taken into consideration that the work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under section 60 of the 1987 Act.

70. In relation to the medical evidence in this matter, the principles in relation to the acceptance of expert opinions in the Commission are well known. Rule 15.2(3) of the Workers Compensation Commission Rules 2011 provides that "evidence based on speculation or unsubstantiated assumptions is unacceptable". The case law makes it clear that the *Evidence Act 1995* does not apply to proceedings in the Commission. *Hancock v East Coast Timbers Products Pty Ltd*[23] (*Hancock*) is authority for the proposition that in a non-evidence-

[21] ARD at page 33
[22] ARD at page 33
[23] *Hancock v East Coast Timbers Products Pty Ltd* [2011] NSWCA 11; 80 NSWLR 43

based jurisdiction such as the Commission, the question of acceptability of expert evidence will not be one of admissibility but one of weight. Further, it is well established in the authorities such as *Paric v John Holland (Constructions) Pty Ltd,*[24] *Makita*; *South Western Sydney Area Health Service v Edmonds*[25] (*Edmonds*); and *Hancock*; that there must be a "fair climate" on which a doctor can base an opinion. Whilst it is accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, more than a mere "ipse dixit" (an assertion without proof) is required.

71. The relevant principles from *Makita* and onward are a guide to the weight to be given to experts' reports. *Makita* set out that the requirement for the admissibility of an expert opinion is that it must be established on the facts on which the opinion is based from a proper foundation for the opinion. The opinion of an expert requires demonstration of the examination of the scientific or other intellectual basis of the conclusions reached. The expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience and in which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded. The reasoning must be exposed demonstrating a particular specialised knowledge.

72. I found some parts of Dr Fernandes' report difficult to follow. He found that Mr Gardiner suffered noise induced occupational hearing loss and found that a further loss had been suffered. However, he opined that, in considering the pre-employment audiogram dated 5 December 2005 and the WPI assessment in Dr Scoppa's first report, the requirement for the hearing aid specifically related to Mr Gardiner's employment with P & O Ports Limited. He failed to expose the reasoning behind his opinion in this regard.

73. On the other hand, in his supplementary report, Dr Scoppa exposed, in some detail, the reasoning behind the methodology he applied, the opinions he expressed and the conclusion he reached, in relation to the progression of Mr Gardiner's right ear hearing loss since the commencement of his employment with the respondent. By preferring Dr Scoppa's evidence, I am not making a finding in relation to WPI. It is for the reasons referred to above that I prefer the evidence of Dr Scoppa over that of Dr Fernandes. I prefer the findings in Dr Crocker's audiograms and the audiogram of Dr Scoppa over the findings in Dr Ng's audiogram for the reasons expressed by Dr Scoppa.

74. I am satisfied on the balance of probabilities that Mr Gardiner has established that the industrial deafness deemed to have been sustained by him on 11 December 2019 in the course of his employment with the respondent, materially contributed to the need for the proposed right ear monaural hearing aid.

75. Accordingly, I find that Mr Gardiner has discharged the onus of proving that the supply and fitting of a right ear monaural hearing aid proposed by Ms Millar and Dr Scoppa is reasonably necessary treatment as a result of the industrial deafness deemed to have been sustained by him on 11 December 2019 within the meaning of section 60 of the 1987 Act.

CONCLUSION

76. My determination and orders are set out in the Certificate of Determination attached to this Statement of Reasons.

[24] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58.
[25] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421.