

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-931/19
Appellant:	Annette May Latter
Respondent:	Transfield Pty Ltd t/as Transfield RSA Joint Venture
Date of Decision:	31 July 2019
Citation:	[2019] NSWCCMA 103

Appeal Panel:	
Arbitrator:	Grahame Edwards
Approved Medical Specialist:	Dr Henley Harrison
Approved Medical Specialist:	Dr Joseph Scoppa

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 22 May 2019, Ms Annette May Latter (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Sylvester Valentine Fernandes, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 24 April 2019.
2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):
 - the assessment was made on the basis of incorrect criteria, and
 - the MAC contains a demonstrable error.
3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.
4. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.
5. The assessment of permanent impairment of industrial hearing loss was under the Table of Disabilities because the deemed date of injury is 19 March 1999, the last day on which the appellant was employed in an employment to the nature of which the injury was due before she gave notice of the injury.

RELEVANT FACTUAL BACKGROUND

6. Ms Latter was employed by Transfield Pty Ltd t/as Transfield RSA Joint Venture (the respondent) as the secretary to the Project Manager from 19 March 1998 to 19 March 1999. She was required to work in a demountable building on the construction site of the Port Waratah Coal Services. The demountable building was located about 50 metres from the construction work, and Ms Latter was exposed to industrial noise of harbour dredging, jackhammering, pile driving, pneumatic drills, explosives, warning sirens and alarms, and other construction site noise.

7. The previous noisy employer Ms Latter worked for was Civil & Civic Pty Ltd as a secretary from 1979 to 1989, and while working as a site secretary she was exposed to industrial noise at construction sites for a four year period from 1985 to 1989¹.
8. On 26 October 2019, Ms Latter made a claims upon the respondent for lump sum compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of 24.2% binaural hearing loss (BHL), and the cost of hearing aids as a result of injury within the meaning of s 60 of the 1987 Act.
9. Ms Latter relied upon the forensic medical report of Dr Dhasmania, ear nose and throat specialist, dated 25 September 2018 in support of her claims for lump sum compensation and the cost of hearing aids.
10. On 13 December 2018, Ms Latter was assessed by Dr Macarthur, ear nose and throat specialist, at the request of the respondent.
11. Dr Macarthur assessed Ms Latter to be suffering with 30.7% binaural percentage loss and after correction for presbycusis 21.7% caused by a moderately severe mainly mid tone sensori-neural deafness, not related to loud noise but most likely genetic in origin². Dr Macarthur assessed the BHL to be 16.3%.
12. On 17 January 2019, the respondent issued a notice pursuant to s 78 of the 1998 Act to Ms Latter advising declinature of liability.
13. On 27 February 2019, Ms Latter filed an Application to Resolve a Dispute in the Workers Compensation Commission.
14. On 19 March 2019, the respondent filed its Reply.
15. On 16 April 2019, the Delegate of the Registrar issued an Amended Referral for Assessment of Permanent Impairment and General Medical Dispute to Approved Medical Specialist for assessment pursuant to s 319 of the 1998 Act. The terms of the referral included an assessment whether hearing aids are reasonably necessary.
16. On 3 April 2019, Ms Latter was assessed by the AMS.
17. On 24 April 2019, the AMS issued his MAC.
18. The AMS assessed the percentage loss to be 31.7% before presbycusis correction and after presbycusis correction 0%. The AMS found the hearing loss was not caused by occupational noise exposure, and whilst recommending hearing aids for the total hearing loss, opined they were not reasonably necessary as a result of compensable injury.

PRELIMINARY REVIEW

19. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.
20. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because the appeal could be determined on the documentary evidence; review of the audiograms of the AMS and the independent medical examiners, and the parties' written submissions.

¹ statement of Annette May Latter dated 4 February 2019 – Application to Resolve a Dispute – p 2

² report of Dr Macarthur dated 17 December 2018 – Reply – p 7

EVIDENCE

Documentary evidence

21. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

22. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

23. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.
24. In summary, the appellant submits the assessment was made on the basis of incorrect criteria and that the MAC contains a demonstrable error.
25. The appellant submits that it was accepted by the respondent she was exposed to loud industrial noise during her period of employment with it from 19 March 1998 to 19 March 1999.
26. The appellant submits that Dr Dhasmana opined that her hearing loss was partially caused by noise exposure and partially of uncertain aetiology, and the proportion caused by noise exposure was 24.2% BHL.
27. The appellant submits the AMS accepts some of her hearing loss may have been caused by noise exposure by his comment: "some contribution from hazardous noise exposure may not be totally excluded", which is consistent with the opinion of Dr Dhasmana.
28. The appellant submits the AMS has "overlooked" her case, not that her entire hearing loss is caused by noise exposure rather part of her hearing loss is caused by noise exposure and part of it is due to uncertain aetiology as opined by Dr Dhasmana.
29. The appellant submits the AMS has failed to consider whether the progression of her hearing loss due to uncertain aetiology is distinct from industrial noise induced hearing loss.
30. The appellant submits the AMS has not addressed the matters referred to him in accordance with the terms of referral as to "the degree of permanent impairment of the worker as a result of injury" because his "opinion has been contaminated by the failure to consider of the progression was due to the uncertain aetiology but there was an underlying noise induced hearing loss notwithstanding".
31. In reply, the respondent submits the assessment was not made on the basis of incorrect criteria and that the MAC does not contain a demonstrable error.
32. The respondent submits the issue is whether the appellant has a noise induced hearing loss as a result of her exposure to a noisy employment.
33. The respondent submits the AMS was not satisfied on review of his audiogram and in the exercise of his clinical judgement that the appellant suffers with noise induced hearing loss.
34. The respondent submits the AMS set out his findings in great detail and gave reasons why he disagreed with Dr Dhasmana's opinion that hearing loss was due to "acoustic trauma".

FINDINGS AND REASONS

35. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment, but the review is limited to the grounds of appeal on which the appeal is made.
36. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.
37. The Appeal Panel reviewed the audiograms of the AMS and Drs Dhasmana and Macarthur; the appellant's statement of exposure to industrial noise of about five years with the last noisy employer being the respondent; the forensic medical reports and the MAC.
38. The Appeal Panel has considered the history of occupational noise exposure of about five years
39. The Appeal Panel determines that it not necessary for an AMS, who is a member of the Appeal Panel, to re-examine the appellant and conduct an audiogram because is it satisfied the audiogram was carried out correctly by the AMS, noting the appellant does not challenge or disputes the findings of the AMS's audiogram.
40. It is not disputed that the appellant was employed in an employment to which the nature of the injury was due; and that the deemed date of injury is 19 March 1999. The hearing loss claim is assessed under the Table of Disabilities, and industrial deafness is calculated in accordance with the 1976 Commonwealth Acoustic Laboratory Tables (CAL) that require a mandatory deduction for presbycusis, which applies equally to males and females after the age of 50 years.
41. Industrial deafness typically causes a bilaterally symmetrical sensorineural hearing loss from low to high tones with relative sparing of the low tones in comparison to the high tones with the maximal loss occurring usually at 4000 Hz, and sometimes at 3000 Hz.
42. The Appeal Panel notes the AMS's audiogram shows asymmetry where the hearing loss is significantly worse in the left ear at 4000, 6000, and 8000 Hz.
43. As industrial deafness is typically bilaterally symmetrical, the Appeal Panel concludes the hearing loss in the left ear at 4000 Hz which exceeds the threshold at 4000 in the right ear is not due to industrial deafness.
44. The Appeal Panel agrees with the AMS's observations that the appellant's history does not support Dr Dhasmana's conclusion that the loss in the higher frequencies is due to acoustic trauma for the reasons he gave that acoustic trauma is caused instantaneously by a single blast or explosion noise heard at close range.
45. The Appeal Panel also agrees with the AMS that the overall pattern of hearing loss shown on his audiogram is typical of a so-called "cookie-bite" appearance that is sometimes, but not always associated with a family history of deafness. The hearing loss in such syndromes typically affects the mid tones as shown on the AMS's audiogram. Nonetheless, the presence of such a hearing loss does not prevent the occurrence of superimposed industrial deafness given the nature and duration of the appellant's exposure to occupational or industrial noise.

46. The AMS conceded there is some contribution to the BHL by exposure to industrial noise by his statement³:

“Although the audiogram is not typical of a noise induced hearing impairment, some contribution from hazardous noise exposure may not be totally excluded.”

47. The Appeal Panel finds the AMS erred in not assessing the amount of bilateral industrial hearing loss at 4000Hz as revealed by his audiogram. The frequencies below 4000 Hz are not affected by industrial deafness because the profile of the audiogram does not support this: in particular the frequency 3000 Hz is affected to the same extents as, or more than the frequency 1000 Hz with the frequencies in between being more affected which is entirely inconsistent with industrial and consistent with an unrelated mid-frequency loss. Hence the apportionment of the industrial deafness to the frequency 4000 Hz.
48. The amount of industrial deafness in the left ear at 4000 Hz, which is 30dB, is the same amount as present in the right ear, and therefore the BHL due to industrial deafness is 30dB calculated in accordance with the 1976 CAL Tables.
49. As noted in the table at page five of the MAC, the hearing loss resulting from a 30dB loss in the right ear is 0.8% before correction for presbycusis.
50. The Appeal Panel finds the BHL due to industrial deafness is 0.8% before correction for presbycusis.
51. The BHL is calculated in accordance with the 1976 CAL Tables which requires a mandatory deduction for presbycusis that applies equally to males and females after the age of 50 years. The mandatory presbycusis correction for 30dB loss at 4000 Hz is 0.3%, resulting in a BHL of 0% due to industrial deafness.
52. The Appeal Panel notes that if the deemed date of injury was after 1 January 2002, the BHL assessment would have been under the 1988 National Acoustic Laboratory Tables (NAL), and under those Tables the BHL would have been 0.8% instead of 0% under the 1976 CAL Tables because at Ms Latter’s age, presbycusis correction would not apply if the matter had been assessed under the 1988 NAL Tables.
53. The Appeal Panel notes that there is a mathematical error in the MAC where the AMS has assessed the BHI from all causes at 31.7%. It is clear from the Table at page five of the MAC that the figure of 31.7% refers to the monaural loss in the left ear.
54. The formula for calculating a binaural hearing loss in accordance with the Table of Disabilities is:
- “better ear threshold multiplied by four plus worse ear threshold divided by five”
55. Applying the formula, the correct BHL is $26.5 \times 4 = 106.0 + 31.7 = 137.7$ divided by 5 = 27.5%.
56. The Appeal Panel will correct the Medical Assessment Certificate accordingly.
57. The Appeal Panel agrees that the provision of hearing aids is reasonably necessary for the total hearing loss found by the AMS as recorded in his audiogram.
58. For these reasons, the Appeal Panel has determined that the MAC issued on 24 April 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

³ MAC – p 5

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

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Ann MacLeod
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received before 1 January 2002

Matter Number: 931/19
Applicant: Annette May Latter
Respondent: Transfield Pty Ltd t/as Transfield RSA Joint Venture

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998*.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Fernandes and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Assessment in accordance with the Table of Disabilities for injuries received before 1 January 2002

Table 1 – methods of assessment - Table of Disabilities and 1976 CAL Tables

Body Part (as per Table of Disabilities) Industrial Deafness	Notional date of injury	Percentage loss of BHI (total BHI, as at the date of examination, from all causes - noise, injuries, conditions and abnormalities)	Less proportion due to pre-existing injury abnormality or condition (but excluding previous claims for industrial deafness and presbycusis)	Less proportion due to Presbycusis	Total percentage loss of Industrial Deafness (including all previous claims (as per Table of Disabilities))
Hearing loss percentages	19/03/1999	27.5	26.7	0.8	0.0

Grahame Edwards
Arbitrator

Dr Henley Harrison
Approved Medical Specialist

Dr Joseph Scoppa
Approved Medical Specialist

31 July 2019

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

