WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **5189/19**
Applicant: **Geoffrey Alfred Hall**
Respondent: **Busways North Coast EMP Pty Limited**
Date of Determination: **6 January 2020**
Citation: **[2020] NSWWCC 4**

The Commission determines:

1. The respondent will pay the costs of and associated with the supply of hearing aids pursuant to the Workers Compensation (Hearing and Fees) Order 2019.

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Geoffrey Alfred Hall, the applicant, brings an action against Busways North Coast EMP Pty Limited, the respondent, for a declaration pursuant to s 60(5) that the respondent bear the costs of the supply of binaural hearing aids.

2. A s 78 notice was issued on 5 June 2019 and the Application to Resolve a Dispute (ARD) and Reply were duly lodged thereafter.

ISSUES FOR DETERMINATION

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

    (a) whether the respondent was the last noisy employer, and
    (b) whether the supply of hearing aids is reasonably necessary.

PROCEDURE BEFORE THE COMMISSION

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

EVIDENCE

Documentary evidence

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

    (a) ARD and attached documents;
    (b) Reply and attached documents;
    (c) applicant's submissions, and
    (d) respondent's submissions.

FINDINGS AND REASONS

6. Mr Hall made a statement on 12 July 2019. He was born in October 1945, leaving school in about 1960. Mr Hall set out his employment history:

    - 1963 to 1966 employed by Warren Kenway was an apprentice mechanic. His employment was not noisy.

    - 1966 to 1968 employed by the Australian Army as a driver. This employment involved working in noisy conditions. Hearing protection was not provided.

    - 1968 to 1997 employed by various employers as a motor mechanic and driver. Employment was noisy and no hearing protection was provided.

    - 1997 to 2000 self-employed as a truck driver. Employment was not noisy as the trucks were modern and the cabs were fairly sound proof as a result.

    - 2000 to 2001 employed by Kundle Transport as a mechanic and driver. Employment was noisy and no hearing protection was provided.

    - 2001 to 2005 employed by Mills Earth Moving as a driver and motor mechanic. This employment was noisy and hearing protection was not provided.

- 2005 to 2007 unemployed, recovering from a heart operation.
- 2007 to March 2016 employed by the respondent as a mechanic and bus driver. This employment was noisy.

7. Mr Hall then described the circumstances of his employment with the respondent. He said that he ran the workshop and he worked up to 16 hour shifts. He spent from 6.00 am to 5.00 pm in the workshop where he worked on older models of buses that were particularly noisy such as Mercedes, Volvos, Scanias and Toyotas. Working on the buses entailed working when the engines were running and this noise was "quite loud and droning".

8. Mr Hall also said he was exposed to the noise of knocker tools and heavy impact rattle guns when he was conducting repairs under the bonnet of the buses.

9. Mr Hall said he was also required to do the school run which began in the early afternoon depending on where he was going. He would do the school run one to three times per week and he said that there was a lot of noise on the school bus. He said that children in particular are very noisy.

10. He said that when he first started employment with the respondent, the buses Mr Hall drove were very loud and had very noisy engines. When the buses were idling there was a high pitched loud sound and the bus would shake with momentum. He said at night he was called out to attend broken down buses along The Lakes Way. This involved exposure to both the noisy traffic passing and also doing repairs with his head next to the engine which was running.

11. Mr Hall said that since 2016 he had been employed full time by Subaru Corporation as a mechanic and was not working in noisy conditions. He described those conditions saying that he worked in a workshop and his job was to service customers' vehicles, mostly using hand tools. He said that the most noise he was exposed to was when he was required to change tyres using a rattle gun. The maximum he said he would change the tyres on one vehicle per day. If he was required to change tyres, which was about three times a week, he was exposed to the noise of the rattle gun for about 10 minutes in changing the tyres.

12. Mr Hall then discussed his appointment with Dr Sylvester Fernandes, the Ear Nose Throat and Facial Plastic Surgeon retained as a medico-legal referee by the respondent.

13. Mr Hall said that on 1 May 2019 he attended a medical examination with Dr Fernandes. He referred to the report of Dr Fernandes dated 2 May 2019. Mr Hall said[1]:

> "On page 2 of Dr Fernandes' report he notes a source of noise at my employment with Subaru Corporation is welding. However, I do not weld as part of my employment and I never have at Suburu Corporation. We do not even have welding equipment in the workshop so there is no welding by anyone else in my presence. He also wrote that I am exposed to the noise of hammering but I am never exposed to the noise of hammering during my employment with Suburu Corporation nor have I ever been. Myself and other workers are not required to hammer anything as part of our mechanic's duties. There is no hammering in the workshop."

14. Mr Hall described the problems he was encountering with his hearing loss and he expressed the wish that he be fitted with hearing aids as he believed they would greatly improve the quality of his life.

[1] ARD page 27

15. Mr Hall lodged a Hearing Instrument quote in the sum of $5,468.41 from National Hearing Care.

16. He relied on the report of Dr Peter Macarthur, Ear Nose and Throat Head and Neck Surgeon dated 2 May 2018. Dr Macarthur took a consistent history of Mr Hall's employment. In particular the history he took of Mr Hall's employment with the Subaru Corporation was consistent. Dr Macarthur recorded [Mr Hall] was only exposed very occasionally to the noise of a rattle gun and always uses ear protection. He said[2] that Mr Hall would benefit greatly from the supply of binaural digital hearing aids with the specific characteristics that he set out.

17. Dr Macarthur concluded that Mr Hall was suffering from a bilateral mild to high bilateral mid to high tone sensori-neural deafness due to exposure to loud noise in his work as a driver/mechanic for more than 45 years. He said[3]:

> "I believe his last noisy employer was Busways North Coast EMP Pty Ltd. In my opinion, his employment there was employment of the nature to which the disease boilermaker's deafness is due i.e. that that employment was of the nature whereby its tendencies, incidents and characteristics gave rise to a material risk of noise induced hearing loss."

18. The respondent relied on the report of Dr Fernandes and an undated report from "Vipac", Engineers and Scientists on Occupational Noise. Dr Fernandes gave a most informative report, commenting on such cases as *Shone v Country Energy* [2007] NSWWCCMA 18 and *Swan v Sydney County Council* [2016] NSWWCCMA 57. Dr Fernandes gave helpful and reasoned examples of the manner in which audiograms were interpreted and an explanation as to causation regarding hearing loss.

19. Dr Fernandes took a consistent history of Mr Hall's employment record, noting that he had been working at Subaru Motors for three years, but noting also that the employment there was noisy- even accepting that protection was warn. He said[4]:

> **"Relevant last employer (with respect to noise induced hearing loss i.e. on balance of probabilities these employments have the necessary 'incidents, tendencies and characteristics' so as to give rise to a real risk of a person suffering noise induced hearing loss there from):** Subaru Motors
>
> **Source of hazardous steady- state, fluctuating, intermittent and impact noise at such employment:** Rattle guns, welding, hammering"

20. Dr Fernandes commented on other medical reports, saying relevantly[5]:

> "1. Dr. P. Macarthur uses higher thresholds based on an audiogram provided by a hearing aid clinic (Taree Audiology & Hearing Aid Clinic)
>
> 2. ….
>
> 3. On p 2 of his report, Dr. P. Macarthur states, '... he has been employed by Subaru Corporation Corporation (sic) ..... he is only exposed **very occasionally** to the noise of a rattle gun ..... protection.'(**my emphasis**). This statement is contrafactual as per the history that I obtained."

[2] ARD page 15
[3] ARD page 15
[4] Reply page 6
[5] Reply page 10

21. Dr Fernandes considered that the hearing aids were "not reasonable and necessary" because in the audiogram that he obtained, the speech reception frequencies were not significantly affected.

22. The document lodged by "Vipac" consisted of two pages obtained, it would appear, from the internet. It was undated. The first page announced that Vipac had a team of experts with nearly 50 years' experience in acoustics, environmental noise and vibration. It gave some very general information as to the health effects of noise and the identity of the main noise affected industries. It referred to the obligation of employers to supply a safe environment regarding noise and suggested that it might be able to help identify hazards.

23. Under the heading "Example Noise Levels" a list of occupations was given, along with noise levels next to it. In that list was the word "rattle gun" and noise levels given at 110dB. I was not advised as to what length of exposure was necessary to damage hearing, nor its intensity in the circumstances in which Mr Hall was working. I was not advised as to whether all rattle guns were the same or whether some had different levels of noise. I was not advised as to whether the environment in which the rattle gun was used was relevant to the amount of noise that it would emit. I was not advised as to the circumstances under which the reading of 110dB was obtained.

SUBMISSIONS

24. I called for written submissions as I determined that this matter was one that could properly be dealt with on the papers following a teleconference. Written submissions were duly lodged.

25. The respondent kindly surveyed the evidence including Mr Hall's statement and reports of Dr Macarthur and Dr Fernandes.

26. The respondent acknowledged that Mr Hall had disputed the part of the history obtained by Dr Fernandes, in that Mr Hall denied that he performed any welding or hammering work with his current employer. The respondent acknowledged that Dr Macarthur noted that Mr Hall was supplied with hearing protection, although Mr Hall himself did not address that topic.

27. The respondent then considered the evidence surrounding the use of the rattle gun and, working on Mr Hall's estimate of changing four tyres on a vehicle about three times a week, said that such exposure would have been sufficient to categorise his employment with Subaru as being noisy. The worker was, it was asserted, exposed to noise of approximately 110dBA for greater than a "safe period of time". The respondent also submitted that whilst Mr Hall gave evidence about his work practices in changing tyres, he did not comment about his co-workers who could also be using tools in the workshop such as the rattle gun.

28. The onus of proof lies upon Mr Hall, it was submitted, and his failure to join Subaru had "prejudiced" the respondent.

29. I was then referred to the well-known legal test in *Blayney Shire Council v Lobley*[6] which is whether employment had the "tendencies, incidents or characteristics" that could give rise to sensori-neural hearing loss.

30. The evidence that Mr Hall was using a rattle gun, and his failure to address the noise exposure from co-workers was such that I could, as I understood the submission, infer that the other co-workers were using pneumatic tools such as rattle guns. Accordingly I could find that Mr Hall's exposure to noise was increased to the extent that it could be said that his employment gave rise to a real risk of injury within the definition of *Lobley.*

[6] [1995] 12 NSWCCR 52 (*Lobley*)

31. I was referred to clause 56(1) of the NSW Work Health & Safety Regulations 2017, which stated that exposure to a rattle gun, say at 110dB, would be safe for less than two minutes per day, and that therefore Mr Hall's exposure to the sound of a rattle gun for up to 10 minutes on any given day was sufficient to establish that Subaru was the last noisy employer. The respondent pointed to the fact that Mr Hall was supplied with hearing protection as further evidence that pneumatic tools such as a rattle gun/impact wrenches, were considered to be noisy by the employer. It was submitted that there was no evidence that the hearing protection provided by Subaru was sufficient to exculpate Subaru from any hearing loss claim.

32. Mr Hall made a comprehensive submission in reply in which I was referred to s 17 of the *Workers Compensation Act 1987* (the 1987 Act) (which governs hearing loss cases) and I was also given, in some greater detail, the history of the well-known requirement that when determining whether employment gives rise to a real risk of industrial deafness, '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 the type which could 'give rise to the injury in fact suffered.'

33. I was referred to *Smith v Mann*[7]*, Blayney Shire Council v Lobley & Anor* and *Dawson & Ors t/as The Real Cane Syndicate v Dawson*[8].

34. In considering the evidence, Mr Hall submitted that the history relied upon by Dr Macarthur was consistent with his own evidence, and that I could accept Dr Macarthur's opinion that employment with Subaru was not employment to which the nature of the injury was due.

35. The evidence of Vipac was of little weight, it was submitted as indeed was Dr Fernandes' opinion.

36. In the case of Vipac Mr Hall noted that the entity was not engaged in conducting an assessment or survey of the actual noise Mr Hall had been exposed to. Indeed the extract that was supplied was specifically stated as being an example. It could not be inferred that all models and all types of rattle guns emitted exactly the same noise level. In turn, that meant that it could not be inferred that Mr Hall was exposed to 110dB during his employment with Subaru Corporation.

37. Moreover, Mr Hall argued, even if rattle guns used in employment with Subaru did emit 110dB, there was no expert evidence to support the respondent's allegation that exposure of a maximum of 10 minutes per day throughout the week was sufficient to give rise to a real risk of industrial deafness. Dr Fernandes' opinion did not engage with this issue, as his opinion was based on incorrect facts and assumptions. It was submitted that Dr Fernandes had fallen foul of the principles in *Makita (Australia) Pty Ltd v Sprowles,*[9] as the assumptions upon which Dr Fernanes' report was based was not proven by supporting facts.

38. Mr Hall submitted that the respondent did not adduce any evidence that tended to establish the facts upon which Dr Fernandes has based his opinion. That is to say, that there had been welding and hammering going on during Mr Hall's employment with Subaru.

39. I was then referred to the relevant authorities regarding reasonably necessary including the leading authority of Deputy President Roche in *Diab v NRMA Ltd*[10] which in turn cited *Rose v Health Commission (NSW)*[11]*.*

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[7] (1972) 47 CLR 426 (*Smith*)
[8] [2008] NSWWCCPD 35 (*Dawson*)
[9] [2001] NSWCA 305 (*Makita*)
[10] [2014] NSWWCCPD 72 (*Diab*)
[11] (1986) 2 NSWCCR 32 (*Rose*)

DISCUSSION

40. The submissions of Mr Hall must be accepted.

41. This case is an example of shifting evidentiary onus as described in *Greif Australia v Ahmed.*[12] In that case DP Roche considered the circumstances in which the evidentiary onus shifts in proceedings in the Commission. He referred to *Brown v Lewis*[13] and said at [54]:

> "In *Lewis*, Mason P stated at [83], 'the plaintiff bears the ultimate onus of proof. In some matters there may be a shifting of the evidentiary onus (eg *Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158) but the ultimate persuasive onus remains with the plaintiff.' In the Commission, the ultimate persuasive onus remains with the applicant worker (Mr Ahmed). However, where the worker has made out a prima facie case that his or her condition has resulted from a compensable work injury and that employment was a substantial contributing factor to that injury, the onus of adducing evidence that the condition has resulted from some pre-existing condition rests with the employer (see Barwick CJ, Kitto and Taylor JJ in *Purkess v Crittenden* (1965) CLR 114 164 at 168… Their Honours added that in the absence of such evidence a plaintiff would be entitled to succeed 'if his evidence be accepted' (at 168)."

42. It was not correct, with respect, for the respondent to submit that the onus was on Mr Hall to refer to any possible noise that might have been emitted by fellow workers. The evidence of Mr Hall and his medico-legal referee Dr Macarthur was sufficient to establish a prima facie case that the respondent was the last noisy employer.

43. It was not Dr Fernandes' evidence that the use of the rattle gun alone had been responsible for his opinion that the employment at Subaru was noisy. His opinion relied upon the accuracy of all the facts on which he was relying. Whilst the respondent did not press the issue of whether Mr Hall had been involved in welding and hammering as was suggested by Dr Fernandes, the respondent nonetheless selected the one element of Dr Fernandes' factual assumption that was common to Mr Hall's case, the use of the rattle gun. The respondent did not explain how it was that I should ignore the other assumptions by Dr Fernandes that had not been proved, namely, the welding and the hammering.

44. Mr Hall's statement challenging the history taken by Dr Fernandes was made on 12 July
2019. The teleconference did not occur until 1 November 2019, and no evidence had been adduced by the respondent to support the opinion by Dr Fernandes.

45. Whilst the respondent has endeavoured to simply rely on the rattle gun as being a source that will comply with the test in *Lobley*, that reliance does not succeed.

46. Firstly, there is no reliable evidence that Mr Hall was exposed to noise levels of 110dB when he used the rattle gun. Secondly, as submitted by Mr Hall, there was no attempt to investigate the actual environment in which Mr Hall was working.

47. I also accept Mr Hall's submission that there is no scientific evidence before me that the use of the rattle gun on the occasions mentioned by Mr Hall could have given rise to a real risk of industrial deafness.

[12] [2007] NSWWCCPD 229 (*Greif Australia*)
[13] (2006) NSWCA 87 (*Brown*)

48. Once Mr Hall's evidence was before the respondent regarding the deficiencies in Dr Fernandes' report, the evidentiary onus then shifted to the respondent to establish the factual basis upon which its expert had based his opinion. That was not done, I therefore accept Mr Hall's evidence.
49. As to whether the hearing aids are reasonably necessary, I accept Dr Macarthur's opinion that they are, and I accept Mr Hall's evidence about the difficulties he is encountering because of his deafness.

50. I reject Dr Fernandes' opinion. The history taken by Dr Fernandes was the same as that taken by Dr Macarthur about difficulty understanding conversation against background noise and trouble understanding telephone conversations. On the face of that history it was difficult to comprehend Dr Fernandes' opinion, which was simply based on his audiogram.

51. Moreover, Dr Fernandes was mistaken when he used his expression "reasonable and necessary" as the legal test is whether the s 60 expense is "reasonably necessary"[14].

DECISION

52. For the above reasons the respondent will pay the costs of and associated with the supply of hearing aids pursuant to the Workers Compensation (Hearing and Fees) Order 2019.

[14] See s 60(1) of the 1987 Act