

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2590/19
Applicant: Ivan Bikesic
Respondent: James Hardie Industries Ltd
Date of Determination: 31 January 2020
Citation: [2020] NSWCC 31

The Commission determines:

1. 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.

G Bhasin

Gurmeet Bhasin
Acting/ Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Ivan Bikesic (the applicant) brings proceedings against James Hardie Industries Ltd (the respondent) for lump sum compensation and the cost of hearing aids.
2. There is no issue the applicant worked in noisy employment for the respondent, nor is there any issue that he has suffered some industrial deafness. The claim for permanent impairment compensation was referred to an Approved Medical Specialist (AMS), Dr H Harrison, who issued a Medical Assessment Certificate on 29 July 2019 in which he attributed 2.1% of the applicant's total binaural hearing loss of 19.1% to the noisy employment with the respondent.

ISSUES FOR DETERMINATION

3. The parties agree that the only issue for determination is whether the respondent is liable for the cost of hearing aids, given the findings of the AMS regarding the level of industrial deafness compared with the applicant's overall hearing loss. It is noted there is no issue the proposed hearing aids are a medical necessity. What is in issue is whether they are reasonably necessary as result of the industrial deafness as found by the AMS.

PROCEDURE BEFORE THE COMMISSION

4. The parties attended a hearing on 22 January 2020. I am satisfied 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 the parties have had sufficient opportunity to explore settlement. The parties having been unable to reach an agreed resolution of the dispute, the matter proceeded to hearing.
5. At the hearing, Mr C Tanner of counsel appeared for the applicant and Mr J Vrettos, solicitor, appeared for the respondent.

EVIDENCE

Documentary evidence

6. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute (the Application) and attached documents;
 - (b) Reply and attached documents, and
 - (c) AMS Medical Assessment Certificate (MAC) of Dr Henley C Harrison dated 29 July 2019.

Oral evidence

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

FINDINGS AND REASONS

Issue 1 – are the proposed hearing aids reasonably necessary as a result of the applicant’s industrial deafness?

8. As noted, there is no issue the applicant suffers from some industrial deafness. The AMS found that approximately 11% of the applicant's total binaural hearing impairment from all causes was due to industrial deafness. That is, 2.1% out of the total 19.1% hearing loss.
9. As both parties agree, the issue for determination is whether the industrial deafness makes a material contribution to the overall hearing loss which necessitates the proposed hearing aids. As Deputy President Roche noted in *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 (*Murphy*) at [58]:

“[an applicant] only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates*) (1994) 35 NSWLR 452, that the treatment is reasonably necessary ‘as a result of’ the injury ... that is, she has to establish that the injury materially contributed to the need for [the treatment].”

10. The question of whether an injury materially contributes to the overall requirement for treatment such as hearing aids is not merely a mathematical exercise. As Mr Tanner submitted, one does not embark upon an exercise of simply hiving off that proportion of a worker's deafness which relates to their employment. Rather, he submitted the question of material contribution must be addressed globally, because the industrial deafness forms part of the overall hearing loss which requires the hearing aids. I accept that submission.
11. However, in my view, the applicant has not established on the balance of probabilities that his industrial deafness makes a material contribution to the need for hearing aids. When one considers the findings of the AMS and Dr Howison, Independent Medical Examiner (IME) for the respondent, it is apparent that a small proportion of the applicant's hearing loss is attributable to his work with the respondent. The opinion of the AMS is, in my view, persuasive in circumstances where each party has provided an IME opinion in contrast to the other. Having taken into account all of the medical evidence in this matter, I am not persuaded to accept Dr Fagan, whose findings and opinion were at odds with those of Dr Howison and the AMS, who were in broad agreement as to the nature and extent of the applicant's hearing loss.
12. Whilst the requirement for hearing aids is a separate question to the level of industrial deafness suffered, it is notable that both parties agree the hearing aids are a medical necessity. The applicant must, however, demonstrate that the industrial deafness component of his overall hearing loss materially contributes to the need for the hearing aids.
13. In my view, the applicant has not made out that case. Dr Fagan was asked whether, in his view, the applicant requires hearing aids. He answered in the affirmative. Dr Fagan does not, however, provide any acceptable basis upon which the Commission can find the industrial deafness component materially contributes to the need for the hearing aids, particularly when Dr Fagan's findings as to the extent of the applicant's industrial deafness are at such variance with those of the AMS. I do not say that to criticise Dr Fagan, who answered the question put to him based upon his findings on examination at the time. However, in a matter where there has been an AMS finding to the effect that the level of industrial deafness is a small proportion of the overall hearing loss, there must be some basis provided by the applicant's expert which explains how that relevant component contributes to the need for the proposed treatment. In this matter, there is no such explanation put forward.

14. In reaching this finding, I have taken into account the AMS, who stated that in his view the hearing aids are not reasonably necessary for the occupational hearing loss. I have also taken into account the views of Dr Howison and Dr Fagan, however, neither of the IMEs seem to have substantively addressed the question of whether the industrial deafness materially contributes to the requirement for those hearing aids. To the extent he does so, Dr Howison merely provides a two-sentence conclusion, rather than providing detailed reasons as to why the industrial deafness does not materially contribute to the requirement for hearing aids. Dr Fagan simply states the applicant needs hearing aids, and does so against a background of findings inconsistent with those of the AMS as to the extent of the industrial deafness present.
15. As noted, the applicant bears the onus of proving the accepted need for hearing aids is materially contributed to by the industrial deafness. Despite the cogent submissions of Mr Tanner, absent some persuasive reasoning from Dr Fagan as to why that is so, the applicant has not established the link between the industrial deafness and the requirement for hearing aids on the balance of probabilities, and accordingly there will be an award for the respondent.