WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6176/20**
Applicant: **Thi No Dang**
Respondent: **Canadian Bacon Pty Ltd**
Date of Determination: **4 February 2021**
Citation No: **[2021] NSWWCC 37**

The Commission determines:

1. That there is an award for the respondent.

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

Kerry Haddock
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 KERRY HADDOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Dispute Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. The applicant, Thi No Dang (Ms Dang), was employed by the respondent, Canadian Bacon Pty Ltd, as a process worker. She has sustained noise-induced hearing loss, the deemed date of injury being 28 May 2019.

2. ICare Workers Insurance (iCare) issued Ms Dang with a notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 17 May 2019. It disputed liability solely on the basis that it had been unable to contact her or the respondent since the claim was lodged. This claim is not in evidence.

3. Ms Dang then made a claim by letter to EML dated 28 May 2019. She claimed permanent impairment compensation pursuant to section 66 of the *Workers Compensation Act 1987* (the 1987 Act) in respect of 15% whole person impairment (WPI); and the cost of hearing aids in the sum of $5,262.30, pursuant to section 60 of the 1987 Act.

4. ICare issued Ms Dang with a further section 78 notice dated 22 October 2019. It disputed that she was entitled to either lump sum compensation or hearing aids, because her hearing loss did not arise in the course of her employment.

5. The applicant commenced proceedings in the Workers Compensation Commission, in Matter Number 6286 of 2019. She claimed permanent impairment compensation pursuant to section 66 of the 1987 Act in respect of 15% WPI; and the cost of hearing aids, pursuant to section 60 of the 1987 Act.

6. The medical dispute was referred to Approved Medical Specialist (AMS), Dr Paul D Niall. Dr Niall was requested to assess the degree of the applicant's permanent impairment; and provide an opinion as to whether the provision of hearing aids was reasonably necessary.

7. Dr Niall issued a Medical Assessment Certificate (MAC) on 28 January 2020.

8. The applicant discontinued the proceedings before a Certificate of Determination was issued.

9. The claim for compensation in these proceedings is made pursuant to section 60 of the 1987 Act, in the amount of $5,262.30, for the cost of hearing aids.

10. The Application to Resolve a Dispute (the Application) in this matter was lodged on 23 October 2020.

11. The respondent lodged its Reply on 16 November 2020. It confirmed that the matters in dispute were in accordance with the dispute notices issued.

ISSUES FOR DETERMINATION

12. The parties agree that the following issue remains in dispute:

    (a) Is the treatment reasonably necessary medical treatment as a result of the injury?

PROCEDURE BEFORE THE COMMISSION

13. The matter was listed for conciliation/arbitration hearing by telephone on 20 January 2021. Mr Stephen Hickey of counsel, instructed by Mr Michael Tran, appeared for the applicant; and Mr Stuart Grant of counsel, instructed by Ms Eloise Cotchett, appeared for the respondent. Ms Jenny Mitchell attended as iCare's representative. Ms Dang was present and had the assistance of Ms Ha Vuong, an interpreter in the Vietnamese language.

14. 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.

EVIDENCE

Documentary Evidence

15. 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) Application to Admit Late Documents, dated 2 December 2020 and attached documents, filed by the respondent and admitted by consent.

Oral Evidence

16. There was no application by either party to call oral evidence or cross-examine any witness.

FINDINGS AND REASONS

Evidence of the applicant, Thi No Dang

17. Ms Dang made a statement dated 28 November 2019.

18. Ms Dang stated that she was born in Vietnam and lived in Saigon, which is now known as Ho Chi Minh City. There was no active fighting where she lived; and she was not exposed to any war-related noise.

19. Ms Dang came to Australia in 1989, with her son, who was then aged 10. She did not work outside the home while her son was still at school.

20. Commencing in about 1998, Ms Dang worked for Primo Smallgoods for several months. She commenced work for the respondent in 2000 and had worked full-time since then. She had been notified that the factory was to close; and all the workers were to be made redundant in two weeks.

21. The applicant described her work in an area where sausages, cabanossi and frankfurts were made. There were three machines, two of which were for cutting meat, and one for mincing meat. Ms Dang's job involved pushing a trolley of tubs containing smoked meats from the bacon area to her area of work. The bacon area was noisy, but not as noisy as the area where she worked. However, there was still a lot of noise, as there were two large blades constantly cutting bacon.

22. Ms Dang stated that it was constantly very noisy in the factory. She was unable to speak to other workers in a normal speaking voice but had to stand very close to them and yell loudly. Everyone did the same thing. No one was provided with hearing protection, as she had been at Primo.

23. Ms Dang has noticed difficulty hearing for the last five or so years. She has difficulty hearing the television and has to turn up the volume very high. Her family and friends very often have to repeat what they say to her.

Medical Evidence

Medical Assessment Certificate – Dr Paul D Niall

24. Dr Niall examined Ms Dang on 22 January 2020 and issued a MAC on 28 January 2020.

25. Dr Niall recorded a history that accorded with the applicant's evidence. He noted that the hearing on her left side was said to fluctuate with irregular frequency. She had had tinnitus for four to five years, mainly left "buzzing" tinnitus.

26. Dr Niall had been provided with the Application and Reply and their attachments, which are not in evidence in these proceedings. He noted that the applicant confirmed the history recorded in her statement and the documents.

27. The AMS recorded that the applicant was exposed to noise from four meat processing machines, including slicing, dicing, grinding and chopping machinery. There were about 10 employees in her section; and she believed one employee with 30 years' service had hearing problems. Ms Dang had previously worked for Primo in a quieter area, using earmuffs.

28. Dr Niall opined that most of Ms Dang's working hours (for a total of 38 hours per week) entailed exposure to noise at levels that were likely to be hazardous. He diagnosed occupational noise-induced hearing loss (industrial deafness). Ms Dang also had additional hearing loss of uncertain aetiology. Specifically, her hearing loss at lower frequencies was not due to noise exposure; and he excluded it from "the compensation assessment".

29. Dr Niall assessed 6.7% binaural hearing loss (BHL), but deducted 5.2% BHL for pre-existing non-related loss, so the adjusted BHL was 1.5%. This equates to 0% WPI.

30. Dr Niall did not consider that the provision of hearing aids was reasonably necessary medical treatment for the applicant's injury because of the nature and severity of her hearing loss.

Professor Paul Fagan – Ear, Nose and Throat Specialist

31. Professor Fagan reported to the applicant's solicitors first on 22 February 2018.

32. Professor Fagan recorded a history that Ms Dang had become aware of hearing loss in recent years. She felt that it was in "either ear" and was progressing. She had a great deal of problems where there was background noise; and speech became unintelligible. She had trouble using the telephone and her television needed to be tuned to a level that was unacceptable to others. She had not used hearing aids.

33. Ms Dang had intrusive and constant tinnitus that interfered with her sleep. Professor Fagan classified it as severe. He recorded that she had sought treatment for it but had been told none was available.

34. Professor Fagan recorded no history of recreational or non-occupational noise exposure; trauma or surgery to Ms Dang's head or ears; childhood ear infection; or exposure to oto-toxic drugs.

35. As regards the applicant's work for the respondent, Professor Fagan recorded that she worked in the middle of four very loud machines, cutting meat and putting it into trolleys. The ambient noise, both steady state and impulse noise, was extremely loud. There were 30 colleagues in her work area and to communicate she had to yell quite loudly. She had never had hearing protection (assumed to mean in the employ of the respondent, given the applicant's own evidence that it was provided by Primo). Ms Dang worked a normal 38-hour week, with some overtime.

36. Professor Fagan opined that the respondent was Ms Dang's last noisy employer; and she had industrial hearing loss. He assessed her whole person impairment as 15%. He further opined that hearing aids were reasonable treatment for her hearing loss.

37. Professor Fagan again reported to the applicant's solicitors on 9 April 2020.

38. Professor Fagan noted that the AMS had assessed the applicant with a total BHL of 6.7%, of which 1.5% was work related.

39. Professor Fagan opined that, for a patient with a total hearing loss of 6.7%, hearing aids were reasonably necessary, that is, it is treatment that is appropriate, accepted, effective; and there are no better alternatives. The applicant's noise induced hearing loss constituted more than one-fifth of her total hearing loss. It was therefore a "material contributing factor" to the need for hearing aids.

Dr Kenneth Howison – ENT Surgeon

40. Dr Howison reported to iCare first on 27 August 2019.

41. Dr Howison recorded a history that Ms Dang was exposed in the course of her employment with the respondent to the noise of machinery; trolleys; and 30 other workers in her work area. She had to shout to be heard by colleagues one metre away. He therefore concluded that she was exposed to noise that was sufficient to be responsible for causing industrial deafness.

42. The history obtained by Dr Howison was otherwise consistent with those obtained by Dr Niall and Professor Fagan. The applicant complained of a "swishing" sound in her ears that interfered with her sleep and concentration.

43. Dr Howison reported that he tried several times to obtain an accurate pure tone audiogram, but it was not possible. His observation of Ms Dang talking to the interpreter was not consistent with the result he was obtaining. He therefore recommended a Cortical Evoked Response Audiogram (CERA), as it does not require a patient's cooperation.

44. It appears that Professor Fagan referred the applicant for a CERA assessment with Precision Hearing, which reported on 20 September 2019.

45. Precision Hearing reported that converted CERA results indicated mild/moderate bilateral sensorineural hearing loss. Using all frequencies, Ms Dang had 33.7% BHL, which equated to 17% WPI. If only 2,000 to 4,000 Hz were used, her BHL was 11.1%, which equated to 6% WPI.

46. Dr Howison again reported on 30 September 2019, after being provided with the CERA results.

47. Dr Howison noted that noise induced hearing loss is typically bilaterally symmetrical and progressive from the low to the high frequencies. In the left ear on the pure tone audiogram Ms Dang's loss of hearing at frequency 4.0 kHz was less than at 3.0 kHz. This was not consistent with noise induced hearing loss. Her loss of hearing in the right ear at 4.0 kHz was less than at 2.0 kHz, which was again not consistent with noise induced hearing loss.

48. Dr Howison concluded that the applicant's CERA and second behavioural test were inconsistent with noise induced hearing loss. The CERA was the more accurate representation of her hearing.

49. Dr Howison opined that the applicant had not sustained hearing loss due to industrial noise. She had mild/moderate sensorineural hearing loss of unknown origin. Her employment with the respondent was not the main contributing factor to her hearing loss. There is individual sensitivity to noise exposure and Ms Dang did not have industrial deafness.

50. In Dr Howison's opinion, Ms Dang does require hearing aids but they are not required for noise induced hearing loss. He did not assess her hearing loss as he did not consider that she had noise induced hearing loss. He did not consider Professor Fagan's audiogram was a true representation of Ms Dang's hearing.

51. Dr Howison's final report is dated 26 November 2020. He agreed with Dr Niall that the applicant does not require hearing aids as a result of noise-induced hearing loss. While he reiterated his opinion that the applicant does not have noise-induced hearing loss, he opined that she does not require hearing aids for BHL of only 1.5%.

SUBMISSIONS

52. The submissions of counsel have been recorded, and I do not propose to reiterate those submissions in these short reasons. I set out below a summary of counsel's submissions.

53. Mr Hickey, for the applicant, submitted that I would have regard to the applicant's statement regarding her difficulties in hearing her family and friends and the television.

54. Mr Hickey further submitted that Dr Niall's opinion is binding as to the extent of Ms Dang's hearing loss. The issue remains whether hearing aids are reasonably necessary, bearing in mind his assessment. His opinion as to the reasonable necessity of hearing aids is not binding.

55. Mr Hickey submitted that it is not possible to determine whether Dr Niall was referring to the applicant's BHL of 1.5%, or her whole hearing loss, in expressing his opinion, as he used the phrase "treatment for the injury…" When we look at the applicant's difficulty in hearing, set out in her statement and Dr Fagan's evidence, she has significant difficulties.

56. Turning to Dr Howison's evidence, Mr Hickey submitted that he initially confirmed that the applicant's noise exposure was likely to be causative of industrial deafness; and she would benefit from hearing aids. His final opinion was that she did require hearing aids, but not for noise-induced hearing loss.

57. Professor Fagan has commented on the MAC and opined that for a total of 6.7% BHL, hearing aids are reasonably necessary. Mr Hickey submitted that if it is accepted that 6.7% BHL is an appropriate measure for the supply of hearing aids, the question is whether the work-related loss of hearing materially contributed to the need for hearing aids.

58. Mr Hickey referred to the decision of Deputy President Roche in *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 (*Murphy*), submitting that an injury does not have to be the only, or even a substantial, cause of the need for treatment. The applicant need only establish on a common sense test of causation that her injury materially contributed to the need for treatment – referring to the decision in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*).

59. Mr Hickey submitted that, if 6.7% BHL is the threshold where hearing aids are reasonably necessary, I would find that the 1.5% BHL that is work-induced materially contributed to Ms Dang's hearing loss, as it further reduces her ability to hear.

60. Mr Hickey also referred to the decision of Roche DP in *Diab v NRMA Ltd* [2014] NSWWCCPD 72 (*Diab*); and his discussion of the authorities at paragraphs 76 to 88.

61. Mr Grant, for the respondent, submitted that he did not take issue with the applicant as to the relevant case law. He referred to the decision of the Court of Appeal in *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 321, in which the Court took a similar approach to that in *Murphy*.

62. Mr Grant submitted that we are dealing with a relatively low hearing loss. There is no evidence that 1.5% BHL is of itself sufficient to warrant hearing aids. There is evidence against this, from Dr Howison, in his most recent report, and the AMS.

63. Mr Grant submitted that the AMS has said that hearing aids are not reasonably necessary because of the nature and severity of the applicant's hearing loss. He must mean all the loss, as he refers to other matters above this.

64. Mr Grant submitted that BHL of 6.7% is not of itself enough to require hearing aids; and if that approach is taken, the applicant fails. The second option is that Professor Fagan said that hearing aids are reasonably necessary and the applicant has some support from Dr Howison. However, Dr Howison opined that hearing aids were not necessary for 1.5% BHL, and therefore are inappropriate treatment.

65. Mr Grant submitted that, if I were to take the view that the AMS is correct, that is the end of the matter. He submits that Professor Fagan does not say whether 5.2% BHL is enough. There is not sufficient evidence to say 5.2% BHL is enough.

66. Mr Grant finally submitted that, taking into account the evidence of the AMS and the deficiencies in Professor Fagan's evidence, the applicant has failed to establish the reasonable necessity of the medical treatment.

67. In reply, Mr Hickey submitted that the point of *Murphy* was to enquire whether the injury made a material contribution to the need for treatment. If a hearing loss of 1.5% BHL made a material contribution, then I would need to consider whether that loss, added to 5.2% BHL, reaches a level of hearing loss that makes the treatment reasonably necessary.

DISCUSSION AND FINDINGS

68. The applicant must establish on the balance of probabilities that the medical treatment she claims, that is, the provision of hearing aids, is reasonably necessary as a result of injury arising out of or in the course of her employment with the respondent.

69. Deputy President Roche considered the meaning of "reasonably necessary" in *Diab*. He held at [86]:

> "Reasonably necessary does not mean "absolutely necessary" (*Moorebank* at [154]). If something is "necessary", in the sense of indispensable, it will be "reasonably necessary". That is because reasonably necessary is a lesser requirement than "necessary". Depending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish that the treatment claimed is one of those treatments. A worker certainly does not have to establish that the treatment is "reasonable and necessary", which is a significantly more demanding test that many insurers and doctors apply."

70. Deputy President Roche cited the decision of Judge Burke in *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32 (*Rose*) with approval and stated:

> "[88] In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose*…namely: 7 (a) the appropriateness of the particular treatment; (b) the availability of alternative treatment, and its potential effectiveness; (c) the cost of the treatment; (d) the actual or potential effectiveness of the treatment, and (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective. [89] With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts. [90] While the above matters are 'useful heads for consideration', the 'essential question remains whether the treatment was reasonably necessary' (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression 'no reasonable prospect' should be understood, '[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content'".

71. Both counsel referred to the decision of Roche DP in *Murphy*. Roche DP held that an injury does not have to be the only, or even a substantial, cause of the need for treatment. He said at [58] that "Ms Murphy only has to establish, applying the common sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

72. In this matter, the applicant's evidence regarding exposure to noise in the respondent's employment is quite brief. Her total hearing loss has been assessed by AMS Dr Niall as 6.7% BHL, of which only 1.5% BHL resulted from injury in the respondent's employ.

73. The opinion of the AMS as to the reasonable necessity of hearing aids is not conclusive evidence: section 326(2) of the 1998 Act, but is evidence that may be considered in these proceedings.

74. The common sense test referred to in *Kooragang* was discussed in *Comcare v Martin* [2016] HCA 43 (*Martin*), when doubt was raised as to its correctness and applicability. It should be borne in mind that *Martin* concerned the Commonwealth workers' compensation scheme.

75. The Court cautioned (at [42]):

> "Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any 'common sense' approach to causation which can provide a useful, still less universal, legal norm…"

76. In *Crosland v Gregelle Michory Pty Limited* [2017] NSWWCC 17 (at [34]), Arbitrator Sweeney provided the following useful summary of the effect of the decision in *Martin*:

> "Since the decision in *Comcare v Martin* [2016] HCA 43 (*Martin*), doubts have been expressed as to whether the 'common sense' approach to causation proposed by *Kooragang Cement* is still applicable. It is unlikely, in my opinion, that the decision in *Martin* alters the principles applicable to causation under the 1987 Act. While the phrase 'results from' appears in both the NSW and Commonwealth legislation, it must be read in its statutory context. Nonetheless, in determining causation issues, it is probably best to adopt the counsel of eminent judges during previous debates on the meaning of the phrase 'results from' and to apply the words of the Act, leaving exegesis of the phrase to the Presidential Unit of the Commission."

77. It is necessary to examine the medical evidence in determining whether the necessity for medical treatment results from the injury.

78. I do not accept the applicant's submission that it is not possible to determine whether Dr Niall was referring to the applicant's BHL of 1.5%, or her whole hearing loss, in expressing his opinion, because he used the phrase "treatment for the injury…"

79. In providing his opinion as to whether the provision of hearing aids was reasonably necessary medical treatment, Dr Niall responded, in paragraph 11 of the MAC:

> "My opinion concerning hearing aid provision takes into consideration **all** the foregoing and **all** of the material in 10b and 10c below" [sic above] (emphasis in original).

80. Dr Niall then went on to opine that "Hearing aid provision is not considered a reasonably necessary treatment for the injury in this matter because of the nature and severity of the hearing loss".

81. I agree with the respondent's submission that Dr Niall was referring to the entirety of Ms Dang's hearing loss, as he said "*because of the nature and severity of her hearing loss"* [emphasis added]. He did not refer only to that part of Ms Dang's hearing loss that resulted from her employment. I therefore accept that, in Dr Niall's opinion, the provision of hearing aids is not reasonably necessary medical treatment for the applicant.

82. There is, however, evidence from Professor Fagan, who was provided with the MAC, that supports the reasonable necessity of the treatment. He opined that, with a total BHL of 6.7%, hearing aids were reasonably necessary, that is, treatment that is appropriate, accepted, effective; and there are no better alternatives. As the applicant's noise induced hearing loss constituted more than one-fifth of her total hearing loss, it was a "material contributing factor" to the need for hearing aids. As the respondent submitted, he did not say whether 5.2% BHL alone would be sufficient to satisfy the test of reasonable necessity of medical treatment.

83. Dr Howison does not accept that the applicant has industrial deafness. He initially opined that she does require hearing aids but not for noise induced hearing loss. In his final report, he opined that hearing aids were not necessary for 1.5% BHL (while at the same time not resiling from his opinion that Ms Dang does not have industrial deafness).

84. The result of *Murphy* is that the applicant does not have to establish that the injury is the sole, or even a substantial, cause of the need for medical treatment. She need only establish that it materially contributed to that need.

85. Having regard to the entirety of the medical evidence, I am not persuaded that the applicant's injury materially contributed to the need for hearing aids. In my view, Dr Niall's opinion is that the treatment is not reasonably necessary even for a total of 6.7% BHL. While his evidence is not to be regarded as conclusive, I have found it persuasive.

86. I do not accept that a contribution of one-fifth of the applicant's hearing loss constitutes a material contribution to the need for treatment. A BHL of 1.5% is a very low assessment; and it is unclear from Professor Fagan's evidence that he regards 5.2% BHL as sufficient to require hearing aids. Professor Fagan also initially assessed the applicant with 30.1% BHL (converted to 15% WPI), and made no deduction, whereas the AMS assessed a total of 6.7% BHL, of which only 1.5% BHL resulted from Ms Dang's employment. I have therefore approached Professor Fagan's evidence with some caution.

87. Dr Howison expressed the opinion that the applicant required hearing aids for 6.7% BHL, but not for 1.5% BHL. He has not expressed any opinion as to the material contribution of 1.5% BHL to the applicant's total BHL. He also did not assess the applicant's hearing loss after reviewing the CERA report. His evidence is therefore of somewhat limited assistance.

88. The applicant has not established that the proposed medical treatment, that is the supply of hearing aids, is reasonably necessary medical treatment as a result of the injury. There will therefore be an award for the respondent.