

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4369/19
Applicant: Robert Hanzlicek
Respondent: Protech Management Pty Limited
Date of Determination: 19 December 2019
Citation: [2019] NSWCC 411

The Commission determines:

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for determination of the permanent impairment arising from the following:

Date of injury:	28 February 2019 (deemed)
Body system referred:	Hearing
Method of assessment:	Whole person impairment

2. The documents to be referred to the AMS to assist with their determination are to include the following:

- (a) This Certificate of Determination and Statement of Reasons;
- (b) Application to Resolve a Dispute and attachments;
- (c) Reply and attachments;
- (d) Applicant's Application to Admit Late Documents (AALD) dated 25 October 2019 and attachments, and
- (e) Respondent's AALD dated 2 October 2019 and attachments.

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.

A MacLeod

Ann MacLeod
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This is a claim for permanent impairment compensation in respect of 15% whole person impairment (WPI) for binaural hearing loss, allegedly suffered by Robert Hanzlieck (the applicant) whilst in the employ of Protech Management Pty Limited (the respondent) between February 2017 and the deemed date of injury of 29 February 2019.
2. The applicant worked as an aluminium cutter at the respondent's factory, and there is no issue the respondent was his last noisy employer.
3. The respondent denies the current claim on the basis that in 2004, the applicant submitted a claim for 12% WPI arising from an alleged binaural hearing loss on a previous employer. The fact of that claim, and that no compensation was ever paid in respect of it, is not in issue.

ISSUES FOR DETERMINATION

4. The parties agree that the only issue remaining in dispute is whether the proceedings should be dismissed as they relate only to a further 3% WPI over and above the 12% which was claimed in 2004, or whether the claim should be referred to an Approved Medical Specialist (AMS).
5. If the applicant succeeds, the matter will be sent to the Registrar for referral to an AMS. By contrast, the respondent submits these proceedings should be dismissed, for the reasons discussed below.

PROCEDURE BEFORE THE COMMISSION

6. 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. The parties were informed of my intention to determine the dispute without holding a conciliation conference or arbitration hearing.
7. The parties attended a hearing on 3 December 2019. At the hearing, Mr B Carney of counsel represented the applicant, and Mr G Guest, solicitor represented the respondent.

EVIDENCE

Documentary evidence

8. 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;
 - (c) Applicant's Application to Admit Late Documents (AALD) dated 25 October 2019 and attached documents, and
 - (d) Respondent's AALD dated 2 October 2019 and attached documents.

Oral evidence

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

FINDINGS AND REASONS

Should the applicant's claim be dismissed or referred to an AMS?

10. The respondent's case is the applicant's claim should be dismissed, as he previously brought a claim alleging 12% WPI in 2004 against another employer. Given the current claim is for 15% WPI, Mr Guest submitted this claim is no more than one for 3% WPI relating to a new injury, and therefore does not meet the threshold for an award for compensation.
11. Mr Carney noted the prior claim was made against an employer with whom the applicant was working as a labourer. He noted the applicant said his work with the respondent was noisier than that employment and made his hearing worse.
12. The fact the respondent was the last noisy employer for whom the applicant worked is not in dispute. It is also accepted the applicant was not paid compensation for that claim.
13. Mr Carney submitted the appropriate respondent in this claim is the last noisy employer, which is the respondent. He said the previous claim may be something which the AMS may take into account, although his primary submission was the last noisy employer is responsible for a claim for hearing loss under section 17 of the *Workers Compensation Act 1987* (the 1987 Act).
14. I accept the proposition in Mr Carney's primary submission referred to in [13] above, for the reasons set out below. There being no issue the respondent was the last noisy employer, in my view it is appropriate to refer the matter to an AMS and have them assess the applicant's hearing loss in accordance with the requirements of section 17 of the 1987 Act.
15. Mr Guest submitted that in light of the previous claim, there can be no question the applicant suffered an earlier injury with a former employer, and the current claim is thereby limited to 3% WPI and accordingly misconceived, requiring it to be struck out.
16. I do not accept that submission. Whilst a claim was made against a former employer, there was no finding as to permanent impairment, only a medical report asserting a 23% binaural hearing loss, being 12% WPI. Likewise, no compensation for permanent impairment was ever paid.
17. Some guidance as to the effect on a subsequent action of a prior claim against a different employer is found in the decision of Deputy President Roche in *Downer EDI Works Pty Ltd v McLuckie* [2014] NSWCCPD 57 (*McLuckie*). In that matter, the worker made two separate claims for compensation against different employers, both relating to the development of skin cancer.
18. In 2005, Mr *McLuckie* made a claim in respect of a 19% WPI arising from skin cancer. Proceedings in relation to that claim were ultimately discontinued. In 2008, he made a claim in respect of 36% WPI against the later employer, also for skin cancer. In both claims, the skin cancer was alleged to have arisen by virtue of a disease of gradual process relevantly caused by the nature and conditions of his employment.
19. Given the nature of Mr *McLuckie*'s alleged injury, he relied on sections 15 and 16 of the 1987 Act. For relevant purposes, those sections are in the same terms as section 17, namely that they deem compensation payable by the last employer for whom an applicant worked in relevant employment which caused or contributed to the relevant disease process.

20. The later employer in *McLuckie* alleged, analogous to the respondent here, that because previous proceedings had been commenced against an older employer, the deemed date of injury was the date the first claim was made (in the current matter, in 2004).
21. At first instance, Arbitrator Sweeney in *McLuckie* held that even though the applicant had made claims on two different dates against different employers, as the later claim was nominated as the relevant date of injury in the proceedings at issue, the applicant was entitled to prove that claim. The arbitrator found the fact Mr *McLuckie* had made an earlier valid claim that gave rise to an earlier notional date of injury did not prevent him from pressing the later claim. Mr *McLuckie* could “make an election” as to the claim on which he relied, and the earlier claim did not provide the later employer with a defence against the later claim. The employer appealed, and the arbitrator’s reasons on this aspect were upheld by Deputy President Roche.
22. In my view, the circumstances of this case are analogous to those in *McLuckie*. The applicant made a previous claim for hearing loss against a different employer in respect of which no permanent impairment compensation was paid, and now seeks to prosecute a claim for hearing loss against the last noisy employer, the respondent. Consistent with the reasoning in *McLuckie*, I find the applicant is entitled to prove that claim. For the following reasons, I find the claim relevantly proven.
23. There is no issue the respondent was the last noisy employer. That much was, quite properly, admitted at the hearing. Moreover, the applicant gives uncontested evidence that his hearing worsened though the course of his employment with the respondent, and his claim is for a significant impairment, namely 15% WPI. In light of the decision in *McLuckie*, I decline to apportion any impairment between this claim and the previous one. The applicant is entitled to prosecute this matter, and to have his level of impairment assessed. I therefore decline to request the AMS apportion liability between the respondent and the previous employer.
24. Although the respondent asserts the claim is misconceived as it seeks only a further 3% WPI and is therefore under the threshold for permanent impairment compensation, such a finding would, in my view, be contrary to the decision in *McLuckie*. An examination of the provisions of section 17 of the 1987 Act reveals they are relevantly on the same terms as those discussed in *McLuckie*, namely they sheet home liability to the last relevant employer. As already noted, in this matter there is no issue the respondent is the last such employer.
25. Mr Guest submitted the claim also faced difficulty because the claim form failed to disclose the previous claim. I do not agree with that submission. The fact of the previous claim is before the commission and is well known to the parties. Moreover, the respondent admits it is the last noisy employer. Were that issue in dispute, it may well be the fact of the non-disclosure has some impact on the applicant’s credit. But that matter is not in issue, and in any event the respondent was aware of the prior claim well in advance of the hearing.
26. I also note and accept Mr Carney’s submission that the Claim Form specifically directs an injured worker not to complete details of any previous claims if they relate to noise induced hearing loss (see page 12 of the Application). Given this is the case, I do not believe the respondent can take any comfort from the applicant’s omission of the previous claim, which omission was in accordance with the directions on the claim form itself.
27. Mr Guest submitted I have the power to make a finding in relation to WPI. That submission was made in the context of a broader one to the effect the applicant’s claim against the respondent was only for a further 3% WPI, and in accepting that submission, I could dismiss the claim as it failed the threshold test for permanent impairment compensation. Whilst it is the case that arbitrators now have power to make WPI assessments, I decline to do so in this matter. In my view, the interests of the parties and of justice are best served by the permanent impairment arising from the applicant’s injury being determined by an AMS.

28. On balance, I am of the view the evidence establishes the applicant suffered an injury by way of binaural hearing loss in the course of his employment with the respondent, which was the last noisy employer of the applicant, and accordingly the matter will be remitted to the Registrar for referral to an AMS to determine the permanent impairment arising from that injury.