WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **988/20**
Applicant: **David Charles Mamo**
Respondent: **CSR Ltd**
Date of Determination: **31 March 2020**
Citation: **[2020] NSWWCC 102**

The Commission determines:

1. The applicant sustained an injury in the form of sensorineural hearing loss arising out of or in the course of his employment with respondent on 4 November 1994 (deemed).

2. The applicant's employment was a substantial contributing factor to his injury.

3. The respondent was the last employer who employed the applicant in an employment to the nature of which the injury, sensorineural hearing loss, was due for the purposes of section 17(1)(a)(i) of the *Workers Compensation Act 1987*.

4. The provision of bilateral digital hearing aids is reasonably necessary as a consequence of the applicant's injury.

The Commission orders:

5. The respondent is to pay medical expenses in respect of the supply and fitting of bilateral digital hearing aids on production of accounts and/or receipts pursuant to section 60 of the *Workers Compensation Act 1987*.

6. I remit this matter to the Registrar for referral to an Approved Medical Specialist pursuant to section 321 of the *Workplace Injury Management and Workers Compensation Act 1998* for assessment of binaural hearing loss due to injury arising out of or in the course of the applicant's employment with the respondent on 4 November 1994 (deemed).

7. The documents to be reviewed by the Approved Medical Specialist are:

    (a) Application to Resolve a Dispute and attached documents, and
    (b) Reply and attached documents.

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

Glenn Capel
Senior 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 GLENN CAPEL, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. David Charles Mamo (the applicant) is 56 years old and was employed by CSR Ltd (formerly Murphy Transport Solutions Pty Limited and McCaffrey Services Transport Ltd) (the respondent) as a truck driver from 1988 until 4 November 1994.

2. On 18 November 2019, the applicant's solicitor served a notice of claim on the respondent for lump sum compensation and for the payment of medical expenses resulting from noise induced hearing loss.

3. On 5 December 2019, CSR Ltd as a self-insurer (the insurer) issued a notice pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), disputing that the applicant had suffered an injury and that his employment was the main contributing factor. The insurer denied that the applicant was exposed to noise and that the respondent was the last noisy employer. Finally, it disputed that the applicant was entitled to lump sum compensation and the payment of medical expenses. It cited ss 4, 4(b), 17, 60 and 66 of the *Workers Compensation Act 1987* (the 1987 Act).

4. On 10 February 2020, the insurer issued a further notice pursuant to s 78 of the 1998 Act in similar terms.

5. By an Application to Resolve a Dispute (the Application) registered in the Workers Compensation Commission (the Commission) on 24 February 2020, the applicant claims lump sum compensation for binaural hearing loss pursuant to s 66 of the 1987 Act and the payment of medical expenses pursuant to s 60 of the 1987 Act as a result of injury arising out of or in the course of his employment with the respondent on 4 November 1994 (deemed).

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.

ISSUES FOR DETERMINATION

7. At the commencement of the arbitration hearing, the respondent's counsel, Mr Grimes, made the following concessions:

    (a) there was no medical evidence to dispute that the applicant sustained an injury in the form of sensorineural hearing loss in both ears arising out of or in the course of his employment with respondent on 4 November 1994 (deemed);
    (b) there was no medical evidence to dispute that the applicant's employment was a substantial contributing factor to his injury;
    (c) there was no evidence to dispute that the respondent was the last employer who employed the applicant in an employment to the nature of which the injury was due for the purposes of section 17(1)(a)(i) of the 1987 Act;
    (d) there was no medical evidence to dispute that the applicant had suffered a loss of hearing in his ears as result of exposure to noise during the course of his employment with the respondent, and
    (e) there was no medical evidence to dispute that the provision of bilateral hearing aids was reasonably necessary as a consequence of the applicant's injury.

8. Despite these concessions, Mr Grimes indicated that the insurer maintained its position as set out in the dispute notices.

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

    (a) whether the applicant sustained injury in the form of sensorineural hearing loss due to exposure to noise during the course of his employment with the respondent and whether his employment was a substantial contributing factor – ss 4(b)(i) and 9A of the 1987 Act;

    (b) whether the respondent was a noisy employer and if so, whether it was the last noisy employer who employed the applicant in employment to the nature of which the injury was due – s 17(1)(a)(ii) of the 1987 Act;

    (c) quantification of the applicant's entitlement to lump sum compensation – s 66 of the 1987 Act, and

    (d) the respondent's liability in respect of medical expenses – s 60 of the 1987 Act.

10. The parties agreed that in the event that the applicant succeeded in the dispute, his claim should be referred to an Approved Medical Specialist (AMS) for assessment.

EVIDENCE

Documentary evidence

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

    (a) Application to Resolve a Dispute and attached documents, and
    (b) Reply and attached documents.

Oral evidence

12. Neither party sought leave to adduce oral evidence or cross examine any witnesses.

REVIEW OF EVIDENCE

Applicant's statement

13. In a statement dated 19 February 2020, the applicant provided details of his employment with the respondent.

14. When he commenced employment in 1988 as a general freight and pneumatic tanker driver, he transported castor and granulated sugar to various soft drink factories. He worked five days per week for eight to ten hours per shift, and he often performed overtime.

15. The applicant stated that he initially drove a MAN pneumatic tanker, which was an old, rigid vehicle that made a lot of noise when he was driving. The pneumatic pump, which was located very close to the driver, made constant noise. After three or four months, he was allocated a Volvo F7, which was a slightly newer rigid tanker. The pneumatic pump was located near the driver and he was again exposed to the noise of the pump when driving. Another vehicle that he occasionally drove, a N 10 Volvo with a trailer was less noisy, because the pump was located at the back of the truck and the motor was not used when unloading the vehicle.

16. The applicant stated that he loaded and unloaded the tanker approximately three times per shift. Unloading took approximately one hour, depending on the type of sugar and the speed of the receiving silos. He was exposed to the noise of unloading for approximately three hours per shift.

17. The applicant stated that when he unloaded the sugar, he stood directly in front of the pneumatic pump. He was exposed to noise from the pneumatic pump as well as the truck motor that ran at the same time. His delivery sites were frequently in enclosed areas, near walls or in tunnels which amplified the noise. The noise when he unloaded the truck in a tunnel at the CSR wharf in Pyrmont was unbearable. He had to scream to be heard by someone standing near him, and the noise was like the noise emitted by an extremely loud ride on lawn mower. He was not provided with any hearing protection. His prior employer, Pittmans, was also noisy.

18. The applicant provided a chronology of his employers and a description of the noise to which he was exposed after he left the employ of the respondent on 4 November 1994 as follows:

    (a) Mobil

        (i) 1994 to 2001: He worked for 44 hours per week with some overtime as a fuel tanker driver. He delivered about three or four loads of petrol per shift. Loading and unloading was via gravity feed and it took an hour and a half to two hours.
        (ii) He drove more modern trucks such as a 1990 Scania S113, a MACK Valueliner and a Kenworth 95-97 with a 10.5 litre CAT motor. He was only exposed to the fuel for a few minutes every time he hooked up to load and unload.
        (iii) The trucks had near silent engines and used gravity feeds rather than pneumatic pumps. The gravity feed did not produce any noise.

    (b) Cootes Transport

        (i) September 2001 to 2014: He worked five days per week for nine to nine and a half hours per day with some overtime as chemical and fuel tanker driver. He delivered four to five loads per shift. Loading would take forty minutes to an hour, depending on the type of chemical.
        (ii) He drove more modern trucks such as 108 Kenworths, Century Class Freightliners, MAC Trident Trucks and 402 Kenworths. He was only exposed to the fuel when he hooked up to load and unload.
        (iii) The trucks used gravity feeds, were fitted with quiet motors and were not noisy.

    (c) Tony Farmers Landscapes

        (i) 2001 to 2006: He worked as a landscaper primarily on residential sites. He did paving, turf laying and irrigation installation. He was not exposed to any noise during the course of this employment.

    (d) John L Pearce

        (i) 2014 to September 2018: He worked for 40 hours per week on 14 hour shifts as a fuel tanker driver. He delivered about three loads per shift. Loading and unloading would take an hour and a half to two hours per shift. Each delivery took about 25 minutes to load and 30 to 40 minutes to unload.

(ii) He drove modern and quiet trucks such as a T490 Kenworth and on occasionally an A B Double SAR Kenworth. He was only exposed to the fuel for a few minutes when he hooked up to load and unload.
(iii) The trucks used gravity feed for loading and unloading, which was less noisy.

(e) Gascorp

(i) 2018 to date: He works for 10 to 11 hours per day for five days per as a fuel tanker driver. He delivers three to four loads per shift via gravity feeds. Each delivery takes about 15 minutes to load and 30 minutes to unload.
(ii) He drives a 2005 rigid eight wheeler SM 10 Volvo truck which is "incredibly quiet" and he can barely hear the engine. He is only exposed to the fuel when he is hooking up and unloading.

19. The applicant stated that he experienced ringing in his left ear in around 2003 and he noticed that his hearing was deteriorating in about 2008. He experienced ringing in his right ear in or around 2013.

20. The applicant stated that he had constant tinnitus and his hearing loss had severely impacted on his social life. He had difficulty talking to his family and friends. He struggled to watch television and he was unable to hear conversations in large groups or in crowded spaces with background noise. His wife was becoming increasingly frustrated because she had to constantly repeat herself. He had not been exposed to severe noise outside of his employment and he considered that his hearing loss was a direct result of his employment with the respondent.

Report of Dr Scoppa

21. Dr Scoppa reported on 11 November 2019. He recorded that the applicant had been employed as a fuel tanker driver with Mobil from 1994 to 2001, Cootes Transport from September 2001 to 2014, John L Pearce from 2014 to September 2018 and Gascorp since September 2018. He drove modern trucks with quiet motors for each employer, and he was not exposed to noise. He also worked as a landscaper from 2001 to 2006 with Tony Farmers Landscapes and he was not exposed to loud noise.

22. Dr Scoppa recorded that the applicant worked for the respondent as a pneumatic tanker driver from 1988 to 1994. He transported castor and granulated bulk sugar to various soft drink factories for use in soft drink manufacture. He worked for eight to ten hours per day and he was exposed occupational noise from truck motors located adjacent to the driver's seat, and when he stood next to the pneumatic pump when he was loading and unloading the freight. He noted that the applicant transported up to three loads per day.

23. Dr Scoppa reported that the noise level while driving, loading and unloading was such that he had to raise his voice in order to communicate with a person standing about a metre away. This was consistent with the noise level being above 85 dBA. The applicant was also exposed to similar noise when he worked as a pneumatic tanker driver delivering flour and cement powder for Pittmans from 1984 to 1988.

24. The applicant stated that he had experienced progressive hearing loss for many years, and it had become more apparent over the last five years. He has difficulty understanding speech on the telephone, on the television and in the presence of background noise. He had difficulty communicating at home with his wife, family and friends. He had experienced bilateral constant high pitched ringing and buzzing tinnitus for several years.

25. Dr Scoppa believed that the applicant's hearing loss was not entirely due to industrial deafness and he considered that only the hearing loss at 1500 Hz and above was due to industrial deafness, whilst that at 500 Hz and 1000 Hz was unrelated. He assessed 14.9% binaural hearing loss due to industrial deafness.

26. Dr Scoppa was satisfied that the respondent was the last noisy employer and that the employment had the tendencies, incidents, and/or characteristics that would give rise to a real risk of boilermakers' deafness, or deafness of a similar origin. He stated that the applicant's employment was a substantial contributing factor to his injury, and he recommended that the applicant be provided with bilateral digital hearing aids.

Report of Dr Howison

27. Dr Howison reported on 7 January 2020 and 6 February 2020. He noted that the applicant was not exposed to noise when he was employed by Mobil, Tony Farmers Landscapes, Cootes Transport, and John L Pearce. Further, he is not exposed to noise in his current job with Gascorp.

28. The applicant advised that he worked for the respondent from 1988 to 1 January 1994 as a general freight and pneumatic tanker driver transporting bulk sugar used in soft drink manufacture. He was exposed to the noise of old vehicles with the motor adjacent to the driver's seat and when loading and unloading sugar. He was also exposed to the noise of the pneumatic pump. He had to shout to be heard by colleagues at a distance of one metre. No hearing protection was worn. The applicant was exposed to similar noise at Pittmans from 1984 to1988.

29. Dr Howison reported that the applicant had been aware of loss of hearing for the last 10 years. He had trouble understanding speech in the presence of background noise, difficulty with the television and the telephone and he had problems interacting with friends and family. He experienced tinnitus that sometimes affected his concentration. There was no history of any other noise exposure.

30. Dr Howison was satisfied that the applicant was exposed to an eight hour equivalent of continuous A-weighted sound pressure level of 90 dBA or above, and this was of a sufficient level to cause industrial deafness. The loss of hearing at the frequency 1500 Hz was not due to noise exposure.

31. Dr Howison diagnosed binaural high tone sensori-neural noise induced deafness and he assessed 12.7% loss of hearing and a non-occupational loss of 5.6%. He stated that the applicant's employment with the respondent had the necessary tendencies, incidents and characteristics that were capable of causing noise induced hearing loss. The respondent was the last noisy employer. He recommended the use of bilateral digital hearing aids.

32. Dr Howison commented that, based on the paper *Occupational Noise and its Potential for Health Issues,* it was possible that some of the applicant's hearing loss may have been due to exposure to ototoxins when he worked as a fuel tanker driver, but there was no way of differentiating between damage caused by ototoxins and damage caused by loud noise. He confirmed that the respondent was the last noisy employer.

Section 78 Notices

33. In the dispute notice dated 15 December 2019, the insurer described the issues relevant to its decision to deny liability as follows:

"In his report dated 11 November 2019, Dr Scoppa recorded a history of employment with McCaffrey Services Transport Ltd and thereafter as a tanker driver with a number of employers as well as a landscape gardener following cessation with McCaffrey. It would appear from the report of Dr Scoppa that you have been employed as a tanker driver with a number of companies for well over 20 years.

At this time, CSR Limited does not agree that you sustained any injury, being hearing loss, arising out of or in the course of employment with McCaffrey Services Transport Ltd. Further, CRS Limited does not agree that your employment with McCaffrey Services Transport Ltd was the main contributing factor to any bilateral hearing loss sustained by you.

Section 17 of the *Workers Compensation Act 1987* deals with hearing loss claim and provides an injury, being a loss or further loss of hearing, which is of such a nature as to be caused by a gradual process is, for the purposes of the Act, deemed to have happened at the time notice of the injury is given if employed in employment to the nature of which the injury was due.

Alternatively, s 17 of the *Workers Compensation Act 1987* provides that where a worker is not employed in employment to the nature of which the hearing loss injury was due, the injury is deemed to have happened on the last day on which the worker was employed in an employment to the nature of which the injury was due.

You were employed by McCaffrey Services Transport Ltd as a truck driver for a little over 5 years. Thereafter, you were employed by a number of other companies as a truck driver for over 20 years as well as a landscape gardener. Your subsequent employment possessed the necessary tendencies, incidents or characteristics which could give rise to hearing loss. As such, your employment with McCaffrey Services Transport Ltd was not the last employment you were employed in, to the nature of which any hearing loss was due (which is denied in any event)."[1]

34. In the dispute notice dated 10 February 2020, the insurer referred to the following matters as being relevant to the dispute:

"In his report dated 11 November 2019, Dr Scoppa recorded a history of employment with McCaffrey Services Transport Ltd and thereafter as a tanker driver with a number of employers as well as a landscape gardener following cessation with McCaffrey. It would appear from the report of Dr Scoppa that you have been employed as a tanker driver with a number of companies for well over 20 years. Dr Scoppa recorded the following relevant history:

- From 1988 to 1994 you were employed by Murphy Transport Solutions Pty Limited, formerly McCaffrey Transport Ply Limited as a tanker driver. You were exposed to noise from truck motors located adjacent to the driver's seat and from loading and unloading of freight.
- From 1994 to 2001 you were employed by Mobil Oil as a fuel tanker driver. You drove a modern trucks fitted with a quiet motor and were not exposed to noise.
- From 2001 to 2006 you were employed by Tony Farmers Landscapes carrying out general landscaping work usually on residential sites and were not exposed to noise.

[1] Application, pp 21 to 22.

- From September 2001 to 2014 you were employed by Cootes Transport as a fuel tanker driver. You drove a modern truck fitted with a quiet motor and were not exposed to noise.
- From 2014 to September2018 you were employed by John L Pearce as a fuel tanker driver. You drove a modern truck fitted with a quiet motor and were not exposed to noise.
- From September 2018 to the date of the report, you were employed by Gascorp as a Fuel Tanker Driver. You drove a modern truck fitted with a quiet motor and were not exposed to noise.

Dr Scoppa opined that from the description of your employment history, your employment with Murphy Transport Solutions Pty Limited was the last noisy employer. On that basis Dr Scoppa recommended hearing aids and assessed you to have 14.9% binaural hearing loss.

Arrangements were made for you to be examined by Dr Ken Howison, ear, nose and throat surgeon. Dr Howison assessed you on 6 December 2019, and provided a report dated 7 January 2020. Dr Howison recorded a similar history of employment as described in the report of Dr Scoppa. That is, you were exposed to noise of the motor of the vehicle you were driving a vehicle. Dr Howison recorded you were then employed as a fuel tanker driver with Mobil Oil, Cootes Transport, John L Pearce and Gascorp, during which time you drove modern vehicles
and were not exposed to noise. On the basis of the history provided by you to Dr Howison, he opined your employment with Murphy Transport Solutions Ply Limited was the last noisy employment. Dr Howison assessed you to have 12. 7% binaural hearing loss.

In a supplementary report dated 7 January 2020, Dr Howison opined your employment as a fuel tanker driver may have exposed you to ototoxins. Such exposure to ototoxins may have contributed to your bilateral sensori-neural hearing loss, however, there was no way of being able to differentiate between the damage caused by the same and the damage caused by noise.

A supplementary report was sought from Dr Ken Howison which was provided on 6 February2020. Dr Howison was asked to comment upon whether your employment as a fuel tanker driver over a period of more than 25 years possessed the necessary tendencies, incidents or characteristics of a type which could give rise to a hearing loss. Dr Howison reiterated the history provided by you in respect of your employment. In particular, that you denied being exposed to loud noise during your employment as a fuel tanker driver. On the basis of your employment history as described, Dr Howison opined your employment with Murphy Transport
Solutions Pty Ltd was the last noisy employer.

On 16 December 2019, you provided particulars of your subsequent employment. You stated your employment as a fuel tanker driver involved shifts lasting 10 to 12 hours of which 1.5 to two hours of the shift involved loading and unloading activities and the balance driving activities. You stated you drove the following vehicles/trucks:

- 1990 Scania between 1994 and 2001
- MAC Valueliner between 1994 and 2001
- Kenworth between 1994 and 2001
- 108 Kenworth between 2001 and 2014
- Centric Class Freightliner between 2001 and 2014
- MAC Trident Truck between 2001 and 2014
- 402 Kenworths between 2001 and 2014
- 2014 Four Railroad Kenworth between 2014 and September2018
- 2005 Volvo Fuel Tanker between September 2018 to date.

The vehicles driven by you in subsequent employment were not modem vehicles. You drove the above vehicles for between 8 and 10.5 hours per day in subsequent employment. Your subsequent employment as a fuel tanker driver over a period of more than 25 years possessed the necessary tendencies, incidents or characteristics of a type which could give rise to a hearing loss.

Section 4 of the *Workers Compensation Act 1987* defines an injury to be a personal injury arising out of or in the course of employment and includes a disease injury if employment was the main contributing factor to the contraction, aggravation, acceleration, exacerbation or deterioration of the disease condition. CSR Limited does not agree that you sustained any injury, being hearing loss, arising out of or in the course of employment with McCaffrey Services Transport Ltd. Further, CSR Limited does not agree that your employment with McCaffrey Services Transport Ltd was the main contributing factor to any bilateral hearing loss sustained by you.

Section 17 of the *Workers Compensation Act 1987* deals with hearing loss claim and provides an injury, being a loss or further loss of hearing, which is of such a nature as to be caused by a gradual process is, for the purposes of the Act, deemed to have happened at the time notice of the injury is given if employed in employment to the nature of which the injury was due.

Alternatively, s 17 of the *Workers Compensation Act 1987* provides that where a worker is not employed in employment to the nature of which the hearing loss injury was due, the injury is deemed to have happened on the last day on which the worker was employed in an employment to the nature of which the injury was due.

You were employed by McCaffrey Services Transport Ltd as a truck driver for a little over 5 years. Thereafter, you were employed by a number of other companies as a truck driver for over 20 years as well as a landscape gardener. Your subsequent employment possessed the necessary tendencies, incidents or characteristics which could give rise to hearing loss. As such, your employment with McCaffrey Services Transport Ltd was not the last employment you were employed in to the nature of which any hearing loss was due (which is denied in any event)."[2]

RESPONDENT'S SUBMISSIONS

35. Mr Grimes submits that the applicant bears the onus of showing that his employment caused industrial deafness. The applicant did not have the benefit of expert evidence of the noise levels to which he was exposed, although the authorities confirm that this is not fatal to the claim. It is essential that a worker presents detailed evidence of the nature and extent of noise exposure to the expert for his consideration and comment. It was generally accepted under the *Occupational Health and Safety Regulation 2001* that a workplace is unsafe and a risk to health if any person is exposed to noise levels that exceeded an eight hour noise level equivalent of 85 dBA.

36. Mr Grimes submits that one should be cautious about accepting the applicant's evidence regarding noise exposure. His statement does not support the finding of the threshold of 85 dBA. There is no evidence regarding the extent of the noise when he was driving the trucks. On any view of the history in his statement, the applicant was not exposed to noise for eight hours above 85 dBA, and it seems that the exposure was for only three hours.

37. Mr Grimes submits that the history contained in the applicant's statement was inconsistent with the opinions of the qualified specialists. The history in his statement of the onset of ringing in the left ear in 2003, deterioration in 2008 and ringing in the right ear in 2013 is contrary to the history recorded by Dr Scoppa of a progressive loss over the past five years.

[2] Application, pp 12 to 14

38. Mr Grimes submits that according to the reply to the request for particulars, the applicant's solicitor indicated that the applicant could not recall when he first began experiencing his hearing loss. Dr Scoppa reported problems since 2003 and Dr Howison reported that the period was 10 years. There were different histories and one needs to assess the applicant's reliability as a historian regarding his exposure to noise. The ringing in the ears was not consistent with binaural hearing loss.

39. Mr Grimes submits that the histories given to the doctors are contradicted by the applicant's statement, which has the most recent and clearest history. There is no reference to the eight hour threshold, and the doctors used throw away lines in their reports. Therefore, one could not accept the doctors' opinions on causation and noisy employment. Given the concerns regarding the reliability of the histories, there was not a fair climate for the doctors to express their opinions, consistent with the reasoning in *Paric v John Holland (Constructions) Pty Ltd*[3], *Makita (Australia) Pty Ltd v Sprowles*[4] and *Hancock v East Coast Timbers Products Pty Ltd* [5].

40. Mr Grimes submits that the applicant may have been exposed to excessive noise of more than 85 dBA for three hours per shift, but not on a continuous basis for eight hours.

41. Mr Grimes submits that the applicant did not particularise the dates that he drove the various vehicles for the respondent from 1998 to 1994. He indicated that all of the vehicles that he drove when he was a fuel tanker driver were more modern and quiet, but this evidence cannot be accepted due to the lack of information about the age of the vehicles and the years in which they were made. One cannot accept that these vehicles were not noisy and if one accepted that the trucks that the applicant drove for the respondent were noisy, one could draw an inference that the fuel tankers were also noisy.

APPLICANT'S SUBMISSIONS

42. The applicant's counsel, Mr Tanner, submits that the respondent does not present a case based on medical evidence, and there is no lay evidence to challenge the evidence of the applicant.

43. Mr Tanner submits that Dr Howison recorded a detailed history and concluded that the applicant had 12.7% binaural loss as a result of exposure to noise at the respondent. Everything that was recorded by Dr Howison has not been challenged by any evidence as to the noise levels to which the applicant was exposed from 1998 to 1994. Often statements are obtained from lay witnesses to dispute a worker's evidence regarding noise exposure, so there was no reason not to accept the history recorded by Dr Howison.

44. Mr Tanner submits that Dr Howison accepted that the respondent was the last noisy employer, and it was significant that he was qualified by the respondent. Given his opinion, it is astonishing that the insurer disputed liability when it issued the dispute notice one month later.

45. Mr Tanner submits that the insurer referred to the opinions of Drs Scoppa and Howison in its notice dated 10 February 2020, and it was incumbent on the insurer to determine liability in accordance with its own specialist, Dr Howison. The notices were drafted without proper consideration of the medical evidence and whist it was suggested that the subsequent employment had the necessary tendencies, incidents and characteristics that were capable of causing noise induced hearing loss, there was no medical evidence to support that contention. The assertion that the fuel tankers were not modern was not based on any evidence.

[3] [1985] HCA 58 (*Paric*).
[4] [2001] NSWCA 305; 52 NSWLR 705 (*Makita*).
[5] [2011] NSWCA 11 (*Hancock*).

46. Mr Tanner submits that Dr Howison is an experienced independent medical examiner with a vast knowledge in hearing loss claims. He was qualified by the insurer, and if he considered that the subsequent employers were noisy, he would have said so. There was no medical evidence to support the respondent's factual scenario.

47. Mr Tanner submits that Dr Scoppa is an experienced AMS and he was satisfied that based on the history given by the applicant, the noise levels were in excess of 85 dBA. His conclusion was similar to that of Dr Howison. There is no evidence to the contrary to reject their opinions.

48. Mr Tanner submits that according to the respondent, the applicant's statement lacks precision regarding the levels of noise to which he was exposed, but the applicant said that he was exposed to a lot of noise and that it was "unbearable", suggesting a high level of noise. It is suggested that the applicant was not exposed for a period of eight hours, but Dr Scoppa recorded that the applicant was exposed to noise throughout his shift.

49. Mr Tanner submits that the respondent suggests that an inference can be drawn that the subsequent employment was noisy, merely because the applicant drove trucks. The suggestion that the respondent was not a noisy employer and the subsequent employers were noisy is a demonstrable contradiction.

50. Mr Tanner submits that the applicant suffers deafness as a result of exposure to noise during the course of his employment with the respondent and the provision of hearing aids is reasonably necessary. His claim should be referred to an AMS for assessment.

REASONS

Did the applicant sustain an injury due to exposure to noise during the course of his employment at the respondent from 1988 to 4 November 1994? – s 4(b)(i) of the 1987 Act

51. Section 4 of the 1987 Act (prior to the 2012 amendments) defines injury as follows:

> "In this Act-
>
> ***Injury***-
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes-
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor; and
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration; and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers Compensation Dust (Diseases) Act* 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined."

52. In order to be satisfied that an injury has occurred, there must be evidence of a sudden or identifiable pathological change[6]. Further, the word 'injury' refers to both the event and the pathology arising from it[7].

[6] *Castro v State Transit Authority (NSW)* [2000] NSWCC 12; 19 NSWCCR 496.
[7] *Lyons v Master Builders Association of NSW Pty Ltd* (2003) 25 NSWCCR 422 [429] (Neilson CCJ).

53. The issue of causation of an injury must be determined based on the facts in each case. In *Kooragang Cement Pty Ltd v Bates*[8], Kirby J stated:

> "The result of the cases is that each case where causation is in issue in a workers compensation claim must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from' is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation."[9]

54. The applicant bears the onus of proof to establish on the balance of probabilities that his employment with the respondent carried the risk of him suffering from industrial deafness. The level of noise and the length of exposure are relevant, and these matters need to be the subject of expert evidence[10].

55. The summary of the authorities undertaken by Deputy President Roche in *Dawson t/as The Real Cane Syndicate v Dawson*[11]gives some guidance regarding the nature of evidence that is required to establish noisy employment.

56. The Deputy President confirmed that it was preferable to call an acoustics expert to give evidence of the level of noise to which the worker was exposed during the period of employment, but the absence of a noise level study was not fatal to a claim. He stated:

> "Whilst it is not necessary for a worker to call an acoustics engineer in every case of boilermaker's deafness, it is not sufficient for a worker to merely say 'my employment was noisy and I have boilermaker's deafness'. It is always essential that he or she present detailed evidence (if no acoustics expert is to be relied on) of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the 'tendency, incidents or characteristics' of that employment are such as to give rise to a real risk of boilermaker's deafness."[12]

57. According to the applicant's statement, he worked five days per week for eight to ten hours per shift, plus overtime. He drove old pneumatic tankers and he was exposed to constant noise from the motors and pumps located near the cabin when he was driving. In other words, he was exposed to noise whilst driving for five to seven hours per shift (before overtime). One vehicle was less noisy because the pump was at the rear.

58. The applicant stated that he was exposed to the combined noise of the pump and motor for three hours per day when unloading sugar, and delivery sites were often in enclosed areas which amplified the noise. He was not, as submitted by Mr Grimes, only exposed to noise for three hours per shift when he was loading and unloading the vehicle.

59. The applicant indicated that he had to scream to be heard and he had no hearing protection. He described the noise when he unloaded at the CSR wharf in Pyrmont as unbearable. His evidence is consistent with noise exposure throughout his entire shift. Significantly, the applicant's evidence has not been challenged by any evidence adduced by the respondent.

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[8] (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*).
[9] *Kooragang*, [463].
[10] *Galdemar v Asta Enterprises Pty Ltd* [1998] NSWCC 47; 17 NSWCCR 155 [18] (Neilson CCJ)
[11] [2008] NSWWCCPD 35 (*Dawson*).
[12] *Dawson*, [44].

60. Therefore, the applicant has described the level of noise and the length of exposure consistent with the principles discussed in *Dawson,* and I see no reason to question the reliability of his evidence, even allowing for the significant passage of time since 1994.

61. The Court of Appeal in *Blayney Shire Council v Lobley*[13]held that a worker must show that the relevant employment had the "tendencies, incidents or characteristics" to cause industrial deafness. Cole JA (Kirby ACJ and Rolfe AJA, agreeing) stated:

> "It follows from these authorities (*Smith v Mann* [1932] HCA 30; (1932) 47 CLR 426; *Tame v Commonwealth Collieries Pty Ltd* (1947) 47 SR (NSW) 269 and *Commonwealth v Bourne* [1960] HCA 26; (1960) 104 CLR 32) that in determining whether, at the time when notice of injury was given, Mr Lobley was 'employed in an employment to the nature of which the injury was due', 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 a type which could give rise to the injury in fact suffered."

62. The histories recorded by Drs Scoppa and Howison are remarkably similar, and they are not inconsistent with the applicant's statement. What is apparent is that the applicant's hearing loss has been of gradual onset, and any discrepancies are not material, when one analysis the evidence in its entirety.

63. Any inadequacies or inconsistencies in the applicant's statement might well be explained by a lack of attention or experience on the part of the person who drafted the document for the applicant. Certainly, I would expect that the histories recorded by experienced medico-legal specialists such as Drs Scoppa and Howison would most likely be more reliable and accurate.

64. Dr Scoppa reported that the applicant worked for eight to ten hours per day, loaded and unloaded three deliveries, and he was exposed to noise from truck motors and pneumatic pumps. He had to raise his voice in order to communicate, which was consistent with a noise level above 85 dBA.

65. Dr Howison reported that the applicant was exposed to noise of the truck motor and the pneumatic pump that were located close to the driver's seat. He had to shout to be heard. He was satisfied that the applicant was exposed to an eight hour of continuous noise of 90 dBA or above.

66. Both doctors accepted that the applicant's employment had the "tendencies, incidents, or characteristics" that would give rise to a real risk of hearing loss, and Dr Scoppa stated that the applicant's employment was a substantial contributing factor to his injury.

67. The injury dispute identified in the Section 78 notices was based on the assertion that the respondent was not a noisy employer, and the applicant's subsequent employment was noisy. The insurer referred to the reports of Drs Scoppa and Howison, and despite acknowledging their opinions that implicated the respondent, the insurer maintained that the applicant had not suffered an injury without providing any explanation. Such a position was untenable and contrary to the evidence.

68. All of the evidence is supportive of the applicant having sustained an injury in the form of sensorineural hearing loss as a result of exposure to noise during the course of his employment with the respondent from 1988 to 4 November 1994 (deemed). There is no evidence to suggest otherwise.

[13] (1995) 12 NSWCCR 52 (*Lobley*).

69. In the circumstances, I am satisfied on the balance of probabilities that sustained an injury in the form of sensorineural hearing loss arising out of or in the course of his employment with respondent on 4 November 1994 (deemed).

70. Further, when one has regard to the factors to be taken into account when determining whether employment was a substantial contributing factor in s 9A(2) of the 1987 Act, and the principles discussed in *Badawi v Nexon Asia Pacific Pty Ltd*[14]and *Van Wessem v Entertainment Outlet Pty Ltd*[15], I am satisfied that the applicant's employment was "real and of substance", such that it was a substantial contributing factor to his injury.

Was the respondent the last noisy employer who employed the applicant in an employment to the nature of which the injury was due? – s 17 of the 1987 Act

71. Section 17 of the 1987 Act provides:

> "17 (1) If an injury is a loss, or further loss, of hearing which is of such a nature as to be caused by a gradual process, the following provisions have effect:
>
> (a) for the purposes of this Act, the injury shall be deemed to have happened:
>
> (i) where the worker was, at the time when he or she gave notice of the injury, employed in an employment to the nature of which the injury was due - at the time when the notice was given, or
>
> (ii) where the worker was not so employed at the time when he or she gave notice of the injury - on the last day on which the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice,
>
> (b) the provisions of section 61 of the 1998 Act shall apply to or in respect of the injury as if the words "as soon as practicable after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury" were omitted therefrom,
>
> (c) compensation is payable by
>
> (i) where the worker was employed by an employer in an employment to the nature of which the injury was due at the time he or she gave notice of the injury - that employer, or
>
> (ii) where the worker was not so employed—the last employer by whom the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice…".

72. The applicant's evidence regarding his exposure to noise at his subsequent employers is unchallenged. He did not drive pneumatic pump trucks after 1994. He described the vehicles as modern and they relied on gravity feeds rather than pneumatic pumps for loading and unloading petrol and chemicals. He stated that they were quiet or silent.

73. At Mobil, he delivered about three or four loads of petrol per shift and it took an hour and a half to two hours to load and unload per shift. There was no suggestion that he was exposed to any noise, and certainly not constant noise for eight hours.

[14] [2009] NSWCA 324; (2009) 75 NSWLR 503.
[15] [2011] NSWCA 214.

74. The applicant indicated that at Cootes Transport, loading took 40 minutes to one hour to load the truck and he did four to five loads per shift. Loading would take 40 minutes to an hour to load the truck, depending on the type of chemical. The trucks were quiet and were not noisy.

75. When the applicant worked for Tony Farmers Landscapes, he did some paving, so he may have been exposed to the noise of brick cutters, sand compactors and other landscaping machinery. However, I would expect that any noise would have been intermittent, as he also did turf laying and installed irrigation systems. I also have no reason to doubt the applicant's evidence that the was not exposed to any noise during the course of this employment.

76. At John L Pearce, it took 25 minutes to load and 30 to 40 minutes to unload. He did about three loads per shift. Loading and unloading would take an hour and a half to two hours per shift, and he was not exposed to noise.

77. In his current position with Gascorp, the applicant delivers three to four loads per shift. It takes 15 minutes to load and 30 minutes to unload each delivery. The truck that he drives is "incredibly quiet".

78. Drs Scoppa and Howison obtained consistent histories from the applicant regarding the nature of any noise exposure after he left the employ of the respondent. They were satisfied that the applicant's employment with the respondent had "tendencies, incidents, or characteristics" that would give rise to a real risk of hearing loss. Even after further questioning by the respondent's solicitor, Dr Howison maintained his opinion that the respondent was the applicant's last noisy employer.

79. In the dispute notice dated 5 December 2019, when the report of Dr Scoppa was available, the insurer stated:

> "Your subsequent employment possessed the necessary tendencies, incidents or characteristics which could give rise to hearing loss".

80. In the dispute notice dated 10 February 2020, after the insurer had received the three reports of Dr Howison, it stated:

> "The vehicles driven by you in subsequent employment were not modern vehicles. You drove the above vehicles for between 8 and 10.5 hours per day in subsequent employment. Your subsequent employment as a fuel tanker driver over a period of more than 25 years possessed the necessary tendencies, incidents or characteristics of a type which could give rise to a hearing loss."

81. This conclusion drawn by the case manager, Maria Joshua, was not based on any factual or expert evidence, such as noise studies undertaken on the vehicles or reports from witnesses with the specialist expertise in fuel tanker noise. It is true that some of the vehicles were not "modern", but some were quite contemporary. There is no evidence to establish what was an "old" vehicle and how it differed from a "modern" vehicle.

82. Further, whether an employment has the "tendencies, incidents, or characteristics" is matter of expert evidence, such as that provided by Drs Scoppa and Howison. The case manager ignored the opinions of the experienced and well credentialled medico-legal specialists and came to inappropriate decision in the absence of evidence to support her conclusion.

83. Mr Grimes submits that if the trucks that the applicant drove for the respondent were noisy, one could draw an inference that the fuel tankers were also noisy.

84. In *G v H*[16], when considering the inferences to be drawn in a Family Law matter where a party declined to undergo a paternity test in contravention of a court order, the High Court stated:

> "An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law".[17]

85. The High Court continued:

> "……as earlier indicated, the inferences must be consistent with the other evidence. In all the circumstances of the present case, the "just" inference to be drawn was that it was more probable than not that the outcome of the court-ordered test would be unfavourable to G. And given the accuracy of the test, that must lead to the finding that, on the probabilities, he was the father of the child."[18]

86. In *Raulston v Toll Pty Ltd*[19], Deputy President Roche discussed the principles relating to the drawing of inferences. He stated:

> "…the following principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506 (cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmarnan Concrete Pty Ltd* [1996] HCA 140; 140 ALR 227) are relevant (I have substituted "Arbitrator" for "trial judge" where appropriate):
>
> (a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'.
>
> (b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the "fact of the [Arbitrator's] decision must be displaced". It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.
>
> (c) It may be shown that an Arbitrator was wrong "by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong."

87. The reasoning in *Raulston* was cited with approval by Deputy President Wood in *Australia and New Zealand Banking Group Limited v Khullar*[20]*,* when she held that an inference drawn by an arbitrator at an accident occurred during "peak hour" was available to the arbitrator, because this was "consistent with human experience that in a Sydney suburb on a week day in June, traffic will be heavier around 7.20 am than at most other times of the day".[21]

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[16] [1994] HCA 48, (*G v H*).
[17] *G v H*, (per Brennan and McHugh JJ), [4].
[18] *G v H*, (per Deane, Dawson and Gaudron JJ), [22].
[19] [2011] NSWWCCPD 25 (*Raulston*).
[20] [2020] NSWWCCPD 3, *Khullar*,
[21] *Khullar*, [63].

88. It is clear from these authorities that an inference is an exercise of reasoning based on human experience to establish the existence of a fact that is based on the existence of some other facts. However, any inference must be consistent with the other evidence.

89. In this matter, the only evidence regarding the noise levels of the fuel tankers driven by the applicant after he left the employ of the respondent is contained in the applicant's statement and the histories recorded by Drs Scoppa and Howison. As I have no reason to question the veracity of the applicant's evidence, and given that he has been a truck driver for 36 years, I consider he would be in the best position to say which vehicles were noisy and which were not. If I were to infer that the fuel tankers that he drove after 1994 were noisy, such an inference would be contrary to his unchallenged evidence.

90. The situation may have been different if the respondent had adduced evidence that challenged the applicant's evidence. For example, if there were noise level studies undertaken on the actual vehicles, or on similar vehicles that showed that they were noisy, so that one might infer that the trucks driven by the applicant might have emitted similar noise. Further, if the respondent had adduced lay evidence regarding the noise emitted by the applicant's trucks or similar vehicles that challenged the evidence of the applicant, it may have been possible to draw the appropriate inference. To suggest that one fuel tanker must be noisy because a pneumatic pump truck was noisy, when both vehicles were entirely different, is illogical and without merit.

91. In the circumstances, I am satisfied that the respondent was the last noisy employer who employed the applicant in an employment to the nature of which his injury was due.

Medical Expenses – s 60 of the 1987 Act

92. The medical evidence of Drs Scoppa and Howison support the need for digital hearing aids. The provision of hearing aids is an appropriate, accepted and effective form of treatment for industrial deafness, and it comes at a minimal cost. Hearing aids have the potential of improving the applicant's quality of life and there is really no alternative non-invasive treatment.

93. I am satisfied on the balance of probabilities that the provision of bilateral digital hearing aids is reasonably necessary as a result of the injury sustained by the applicant on 4 November 1994 (deemed).

Quantification of the applicant's entitlement to lump sum compensation – s 66 of the 1987 Act

94. I will remit the applicant's claim to the Registrar for referral to an AMS to assess the binaural loss of hearing due to injury sustained on 4 November 1994 (deemed).

Comment

95. Although the respondent is a self-insurer and is not bound by the *Model Litigant Policy for Civil Litigation* (the Model Litigant Policy), given the manner in which this claim and litigation has been managed and conducted, it would be of benefit to the insurer to reflect upon how scheme agents are expected to conduct litigation and apply some of the principles to its claims management model.

96. According to the Model Litigant Policy, the State and its agencies are obliged to act honestly, fairly, consistently and promptly in handling claims and litigation, not cause unnecessary delay in the handling of claims and litigation, pay legitimate claims without litigation, and endeavour to avoid litigation, wherever possible.

97. One could not say that, given the evidence that the insurer had in its possession before it issued the Section 78 Notices, its actions were reflective of such commendable principles.

FINDINGS

98. The applicant sustained an injury in the form of sensorineural hearing loss arising out of or in the course of his employment with respondent on 4 November 1994 (deemed).

99. The applicant's employment was a substantial contributing factor to his injury.

100. The respondent was the last employer who employed the applicant in an employment to the nature of which the injury, sensorineural hearing loss, was due for the purposes of s17(1)(a)(i) of the 1987 Act.

101. The provision of bilateral digital hearing aids is reasonably necessary as a consequence of the applicant's injury.

ORDERS

102. The respondent is to pay medical expenses in respect of the supply and fitting of bilateral digital hearing aids on production of accounts and/or receipts pursuant to s 60 of the 1987 Act.

103. I remit this matter to the Registrar for referral to an AMS pursuant to s 321 of the 1998 Act for assessment of binaural hearing loss due to injury arising out of or in the course of the applicant's employment with the respondent on 4 November 1994 (deemed).

104. The documents to be reviewed by the AMS are:

    (a) Application to Resolve a Dispute and attached documents, and
    (b) Reply and attached documents.