WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1036/20**
Applicant: **William Bolger**
Respondent: **Brandon Construction Services Pty Ltd**
Date of Determination: **9 June 2020**
Citation: **[2020] NSWWCC 189**

The Commission determines:

1. The applicant suffered injury in the course of his employment by way of binaural hearing loss, with a deemed date of injury of 24 May 2019.

2. As a result of the injury referred to in (1) above, the respondent requires hearing aids, which are reasonably necessary.

3. The respondent is to pay the costs of and associated with the supply and fitting of hearing aids as set out in the Application to Resolve a Dispute.

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 Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. In 1986, the applicant moved to Australia and worked as a sole trader on construction sites for 12 years. During that period, he was exposed to constant loud noise from industrial machinery. He then had a two-year period of work without exposure to noise.

2. In 2003, the applicant began working with the respondent as a plant operator and did so for approximately 14 years, before transferring to a role as a surveyor in the same organisation. In both roles, he was exposed to constant loud noise. He continues to wear hearing protection where possible in the course of his employment.

3. On 23 May 2019, the applicant provided a notice of injury in respect of industrial hearing loss to the respondent. On that day, his solicitors relevantly made a claim for the cost of supplying and fitting hearing aids. On 15 September 2019, the respondent issued a section 78 notice denying liability on the basis the audiological profile of the applicant's hearing loss is inconsistent with noise-induced deafness.

ISSUES FOR DETERMINATION

4. There is no issue the applicant suffers from profound hearing loss. What is in issue is the aetiology of that loss and whether hearing aids are reasonably necessary as a result of a work injury.

PROCEDURE BEFORE THE COMMISSION

5. The matter was heard on 6 May 2020. Mr Craig Tanner of counsel appeared for the applicant, and Mr David Anderson, solicitor, appeared for the respondent. The parties' submissions have been recorded and are referred to later in these reasons.

6. At the arbitration hearing, the respondent noted the issues are whether work condition or conditions account for the applicant's hearing loss (section 4 of the *Workers Compensation Act 1987* (the 1987 Act)) and whether the provision of hearing aids is reasonably necessary as a result of noisy employment with the respondent.

EVIDENCE

Documentary evidence

7. The following documents were in evidence:

    (a) Application to Resolve a Dispute (the Application) and attachments;

    (b) Reply and attachments; and

    (c) The respondent's application to admit late documents dated 30 March 2020 with attached documents.

Oral evidence

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

FINDINGS AND REASONS

The cause of the applicant's hearing loss/ whether the applicant suffered a workplace injury

9. The applicant has the onus of proving on the balance of probabilities that he suffered a work-induced hearing loss. For the following reasons, I find the applicant has proven the presence of a workplace injury.

10. In determining the cause of an injury, the Commission must apply common sense test of causation, which in the workers' compensation context was set out by Kirby P (as he then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 (*Kooragang*).

11. In this matter, having regard to the medical evidence relied upon by the parties, I am satisfied that the applicant's hearing loss was at least in part suffered in the course of his employment.

12. In so finding, I have had regard to the opinions of Dr Scoppa and Dr Harrison, and particularly the views of Dr Jacobson, whose earlier report was in evidence before the Commission.

13. Dr Scoppa has provided two reports in this matter. At the time of the first report, he did not have the benefit of the results of the audiological tests which were carried out at the behest of Dr Jacobson in May 2006. In his report dated 26 May 2006, found at page 30 of the Application, Dr Jacobson noted the pattern of the applicant's then hearing loss as "strongly suggestive of a congenital sensorineural hearing loss." He recommended the applicant have a trial of hearing aids.

14. In his initial report, Dr Scoppa considered the applicant was suffering from 89.9% binaural hearing loss in the left ear and 74.0% binaural hearing loss in the right ear, equating to a finding of 77.3% binaural hearing loss. He found that 49.5% of that loss was not due to industrial deafness, leaving 27.8% due to industrial deafness.

15. In his supplementary report dated 29 December 2019, Dr Scoppa had the benefit of Dr Jacobson's earlier audiogram and revised downwards the amount of binaural hearing loss due to industrial deafness. Dr Scoppa maintained a global loss of 77.3% binaural hearing loss and found that 17.3% was due to industrial deafness.

16. Dr Harrison, IME for the respondent, noted the applicant had suffered hearing loss for over 20 years. He also acknowledged the applicant had been exposed to noisy employment for a long period of time. As was the case with Dr Scoppa, at the time of Dr Harrison's first report he was unaware of the audiology investigations and report carried out by Dr Jacobson. Dr Harrison acknowledged employment can cause hearing loss, however, he did not believe that any of the applicant's hearing loss was due to work owing to the "flat" nature of the findings on the audiogram.

17. Dr Harrison noted in his report found at page two of the Reply that the audiogram was "almost totally flat with no appreciable drop from low to high frequencies, particularly in the compensable frequencies." He diagnosed the applicant as suffering from bilateral sensorineural deafness due to an "unknown cause or causes but possibly due to the condition of cochlear otosclerosis."

18. Notwithstanding Dr Harrison raising the possibility of otosclerosis as the cause of the applicant's hearing loss, he did not go as far as diagnosing it as the cause of the applicant's loss. Mr Tanner criticised Dr Harrison's reasoning in relation to his diagnosis, on the basis that he noted the applicant had been exposed to a noisy employment for a very long period of time, however, discounted the hearing loss as having been caused by it. He provided no reason, Mr Tanner submitted, as to why this is the case.

19. Dr Scoppa dealt with Dr Harrison's view that a flat audiogram and said at page 24 of the Application:

> "Dr Harrison has made a presumptive diagnosis of cochlear otosclerosis as the cause of all the hearing loss shown on his audiogram, but presents no supporting evidence. I agree with Dr Harrison that there is a component of sensorineural hearing loss on his audiogram as well as on mine that is inconsistent with industrial deafness. I disagree with him however that a worker exposed to noise from construction site machinery for about 26 years as in this matter would not have sustained any industrial deafness as a result of that exposure purely on the basis of a flat hearing loss shown on an audiogram."

20. At this point, Dr Scoppa referred to Dr Jacobson's audiogram dated 26 May 2006 and conceded it showed a "cookie bite curve" consistent with familial hearing loss, with sparing of the 3,000 and 4,000 hertz ranges. He noted that the next audiogram of Dr Jacobson, dated 13 July 2017 showed that the losses at the 3,000 and 4,000 hertz levels had deteriorated but that the losses at the 2,000 hertz and below levels had remained relatively stable. He formed the view that the applicant's history of significant occupational noise exposure from 2003 onward is consistent with the fall in hearing levels at 3,000 and 4,000 hertz shown on the second of Dr Jacobson's audiograms, as well as on those of Dr Harrison and Dr Scoppa. Dr Scoppa then revised his assessment to exclude loss at the 2,000 hertz range on his audiogram as being due to industrial deafness and purely assessed the loss at 3,000 and 4,000 hertz.

21. I accept that explanation from Dr Scoppa. The deterioration on the frequency levels of the applicant's hearing which he usually associated with industrial deafness during the period which he works with the respondent is, in my opinion, telling. As Mr Tanner submitted, a long history of hearing loss does not displace industrial deafness also being a cause of a worker's overall hearing loss. The applicant's employment for 12 years as a sole trader and since 2003 with the respondent are all accepted as noisy. Irrespective of whether the cause of the need for hearing aids in 2006, the issue in this matter is whether the need for hearing aids today has been contributed to by noise, and to an extent that issue is actually not in dispute because Dr Harrison also says at page four of the Reply "From the description given of the noise, I reached the conclusion that it had the potential to damage hearing over his working day" and in his supplementary report in the AALD where he states "I cannot absolutely exclude a very small amount of industrial deafness." Nevertheless, Dr Harrison excluded the need for hearing aids being related to employment with the respondent, as that need was present in 2006 when the applicant had only been working with the respondent for three years.

22. In my opinion, the difficulty with Dr Harrison's opinion is that it does not appropriately take into account the significant deterioration of the applicant's hearing in the 300-400 hertz range between the audiogram in 2006 and those carried out more recently. In my view, that deterioration is significant.

23. The accepted deterioration in the applicant's hearing in the frequency ranges usually associated with industrial deafness is, in my view, a compelling factor in the applicant's favour in establishing noise-induced hearing loss in the course of his employment with the respondent. Dr Jacobson's two audiograms demonstrate a significant loss of hearing in the 3,000 to 4,000 hertz range. As a result, I find on the balance of probabilities the applicant has suffered binaural hearing loss in the course of his employment with the respondent.

Reasonable necessity of hearing aids as a result of the applicant's injury

24. Section 60 of the 1987 Act relevantly provides:

> "If, as a result of an injury received by a worker, it is reasonably necessary that: Any medical or related treatment (other than domestic assistance) be given,... the worker's employer is liable to pay..."

25. The meaning of the words "As a result of" in section 60 of the 1987 Act is well-settled by cases such as *Murphy v Allity Management Services Pty Ltd* [2015] NSWWCCPD 49 at [57]-[58] (*Murphy*). The effect of that decision and the line of authority which flows from it is that even if other factors contribute to the need for the proposed treatment, the applicant's claim is not necessarily defeated. That is because a condition can have multiple causes. A work injury such as I have found the applicant suffers does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under section 60.

26. What the applicant has to prove in this matter is, applying the common-sense test of causation as set out in *Kooragang*, that the treatment is reasonably necessary "as a result of the injury". That is, he has to establish the hearing loss caused through his work with the respondent has materially contributed to the need for the hearing aids.

27. The decision in *Murphy* has been followed and applied in a number of presidential decisions including *State of New South Wales v Butler* [2017] NSWWCCPD 47 (*Butler*). In that case, Deputy President Snell cited *Murphy* for the proposition that "a condition can have multiple causes" and stated at [39]:

> "The above involves a finding that the condition of Mr Butler's right knee, and the need for surgery, resulted from the injury of 20 June 2011. Such a finding resulted on the evidence. However, a condition can have multiple causes. In *ACQ Pty Ltd v Cook* the High Court described as "uncontroversial... The proposition that there can be multiple causes of the damage suffered by plaintiff." In *Bushby v Morris* the Privy Council, dealing with the New South Wales legislation, said:
>
> > 'It is well-established in common law context that an injury or incapacity may be attributable to more than one cause, in the legal sense, operating concurrently...
> >
> > There is no room for an artificial rule of law that, in such a situation, no other accident must necessarily be selected as the cause of the incapacity, apparently on an entirely arbitrary or capricious basis.'"

28. Following the decision in *Murphy*, the legal position is clear. The work injury, which I have found the applicant suffers from, does not need to be the sole or even the substantial cause of whether the proposed treatment is reasonably necessary.

29. The question of whether treatment is quite "reasonably necessary" is a separate question to whether medical treatment is "as a result of an injury." Authorities such as *Diab v NRMA* [2014] NSWWCCPD 72 at [76]-[91] make it clear this is the case.

30. In this matter, I am satisfied on the balance of probabilities the medical evidence establishes that the applicant requires hearing aids for his entire loss.

31. Mr Anderson submitted, and I accept, that the applicant has plainly been subjected to a long period of noisy employment whilst working as a sole trader. There is no suggestion any loss occasioned by that employment is compensable under the 1987 Act. There seems to be a little issue between the doctors who have examined the applicant that there is a large degree of non-noise induced hearing loss as well as congenital loss at the lower frequencies.

32. Nevertheless, the deterioration in the applicant's hearing along the frequencies relevant to industrial hearing loss since the 2006 audiogram and the more recent ones is, in my view, consistent with the applicant's employment with the respondent having made a material contribution to the need for hearing aids.

33. The need for hearing aids is acknowledged by a treating Ear Nose and Throat Surgeon Dr Jacobson in 2006. Since that time, the applicant's hearing in the range associated with industrial deafness has worsened, and in my view that is consistent with an ongoing requirement for hearing aids, to which his employment with the respondent has made a material contribution. That view is supported by the audiologist Ms Crisci. In her report dated 24 April 2019 noted the applicant's hearing loss can "be addressed through appropriate amplification which I have quoted for on the following page with specific COSI goals."

34. On balance, I find the preponderance of the medical evidence establishes the provision of hearing aids as an acceptable type of medical treatment and is likely to be effective. There is no suggestion that there are alternative treatments for the treatment of hearing loss. The cost of hearing aids is relatively inexpensive and these matters, together with the applicant's evidence, establish consistent with the principles set out in *Diab* that the provision of hearing aids to the applicant is reasonably necessary.

35. The remaining issue is whether the respondent is liable to pay for the cost of hearing aids "as a result of injury."

36. The respondent relied on the supplementary report of Dr Harrison dated 30 March 2020, were attached to the AALD. In that report, Dr Harrison said "I believe that the need for hearing aids existed before Mr Bolger commenced work with Brandon Construction Services and that his work with Brandon Construction Services has made no material difference to his need for hearing aids."

37. As noted, I disagree with that assertion and note it fails to take into account the deterioration in the applicant's hearing which includes a significant loss in the ranges consistent with industrial deafness in an intervening period of over a decade during which time the applicant remained employed by the respondent.

38. I prefer, instead, the views of Dr Scoppa where he takes into account that decline in the ranges associated with industrial deafness and makes provision for that loss in his assessment.

39. Accordingly, taking into account the applicant's evidence in relation to his exposure to noise together with the medical evidence put forward by the parties in this matter, I am satisfied that the requirement for hearing aids has been brought about as a result of an injury suffered by the applicant in the course of his employment with the respondent.

40. I consider that a contribution of over 20% of the overall hearing loss is "material". Consistent with *Murphy* a condition can take multiple causes. There is no reason why another cause can have a greater contribution, provided the work component is still classified as a material contribution to the need for treatment.

41. For these reasons, I accept the applicant has satisfied the onus of proof that he suffered an injury in the course of his employment with the respondent by way of binaural hearing loss, that as a result of that injury he requires hearing aids.

SUMMARY

42. For the above reasons, the Commission will make the orders set out on page 1 of the Certificate of Determination.