WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **6529/19**
Applicant: **Lionel Eric Calvert**
Respondent: **State of New South Wales – Campbelltown Hospital**
Date of Determination: **10 February 2021**
Citation No: **[2021] NSWWCC 44**

The Commission determines:

1. The respondent is to pay the cost of the supply and fitting of bilateral hearing aids pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act) and in accordance with the current Workers Compensation (Hearing Aid Fees Order).

2. Pursuant to s 66 of the 1987 Act, the respondent is to pay the applicant $21,500 in respect of 16% permanent impairment deemed to have been suffered on 1 July 2002.

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

Catherine McDonald
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 CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Lionel Calvert was employed by Campbelltown Hospital (the Hospital) as a maintenance fitter between 1984 and 2002. He claimed compensation for noise-induced hearing loss suffered in that employment.

2. Mr Calvert came to Australia from South Africa in 1982. He worked between 1950 and 1982 as a shipwright in Durban.

3. It is conceded that Mr Calvert was employed in noisy employment in both South Africa and NSW.

4. The issue which the Hospital seeks that I determine is the extent of the deduction to be made from the assessment of permanent impairment in respect of the period of noise-exposure in South Africa.

PROCEDURE BEFORE THE COMMISSION

5. The matter has a long procedural history. Mr Calvert is now over 90 years old and in poor health.

6. The proceedings were commenced in late 2019. They were listed for conciliation conference and arbitration hearing on 13 February 2020 when Mr McManamey of counsel appeared for Mr Calvert and Mr D Anderson, solicitor, appeared for the Hospital. Defences under s 254 and s 261 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) were withdrawn.

7. The parties agreed that the matter be referred to an Approved Medical Specialist (AMS) to assess permanent impairment as a result of the injury deemed to have been suffered on 1 July 2002. The agreement they reached was that the AMS also be asked the following questions as a general medical dispute:

    (a) On the balance of probabilities, what was (and is) the applicant's binaural hearing loss due to the effects of exposure to noise whilst employed in South Africa?

    (b) Are bilateral hearing aids reasonably necessary medical treatment as a result of noise exposure in NSW?

8. The Commission referred the file to the first AMS, Dr S Fernandes, who issued a Medical Assessment Certificate (MAC) on 25 March 2020. Though no objection has been taken to Dr Fernandes appointment, he had examined Mr Calvert in the past on behalf of the Hospital. Mr Calvert filed an appeal, because of the obvious conflict of interest, the Registrar appointed a different AMS as an alternative to an appeal.

9. Dr R Payten assessed Mr Calvert as an AMS and prepared a MAC dated 28 August 2020. The second AMS assessed 17% whole person impairment (WPI) and deducted one-tenth under s 323 of the 1998 Act in respect of the noise-induced hearing loss suffered in South Africa. He considered that hearing aids were reasonably necessary as a result of the noise exposure in NSW.

10. The Hospital filed a Medical Appeal and the Appeal Panel prepared a detailed statement of reasons dated 15 December 2020. The Appeal Panel rejected the Hospital's submission that a s 323 was irrelevant to the task of the AMS. After considering the authorities, the Appeal Panel followed the decision of Garling J in *Pereira v Siemens Ltd* [1] where His Honour said that loss of hearing due to prior overseas employment was a matter which potentially attracted the operation of s 323(2) of the 1998 Act. It noted that the effect of s 68B of the *Workers Compensation Act 1987* (the 1987 Act) was that s 323 of the 1998 Act applied to s 17 of the 1987 Act except that there was to be no deduction in respect of employers who would be liable to contribute under s 17. The Appeal Panel rejected the argument that it was appropriate to deduct from an assessment of permanent impairment in respect of employment outside NSW.

11. The Appeal Panel determined that the AMS made a factual error in his approach to s 323 and re-assessed the extent of the loss under s 323. It rejected the Hospital's submission that a linear approach should be adopted to the assessment. It found that the extent of the deduction was difficult to determine and made a deduction of one-tenth, which was not at odds with the available evidence, so that the outcome in the MAC prepared by the second AMS was correct.

12. The second AMS assessed 58.5% binaural hearing loss and deducted 23.9% for presbycusis. He did not make an allowance for tinnitus. The adjusted binaural hearing loss was 34.6% which converts under Table 9.1 of the *Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) to 17% WPI. One-tenth of the binaural hearing loss assessment is 3.46% which is rounded to 3.5%. When that percentage is deducted from 34.6%, the resulting binaural hearing loss is 31.1% which converts to 16% WPI.

13. The matter came back to me for a telephone conference on 14 January 2021 because it was necessary that the question of hearing aids be determined. The Hospital sought to argue that the assessment of the deduction for hearing loss suffered outside NSW is a matter for an arbitrator and not an AMS. The parties sought a prompt hearing because of the state of Mr Calvert's health. As an alternative, I ordered written submissions which are summarised below.

14. The Hospital asked if the claim for hearing aids was pressed. I did not receive any information that it was not. In those circumstances, it is appropriate to order that the Hospital pay the cost of the supply and fitting of bilateral hearing aids pursuant to s 60 and in accordance with the current Workers Compensation (Hearing Aid Fees Order).

EVIDENCE and SUBMISSIONS

15. I have had regard to the Commission's file in making this determination though the point is a legal one. I have read the MACs and the Appeal Panel decision.

16. Mr Anderson prepared submissions on behalf of the Hospital which remain on the file.

17. The Hospital submitted that the determination of the extent of the deductible proportion under s 323 is a matter for an arbitrator and not an AMS and, in the present case, the deductible proportion is 61.56%.

18. Mr Anderson submitted that the definition of medical dispute in s 319 of the 1998 Act includes:

> "(d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,"

[1] [2015] NSWSC 1133.

19. He said that s 326 provides that a MAC is conclusively presumed as to certain matters including:

> "(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,"

20. Mr Anderson said that the omission of the phrase "and the extent of that proportion" was significant and the result was that the opinion of the AMS on the extent of the deduction was therefore evidence but not conclusive evidence in proceedings before the Commission. He said that the powers of the Appeal Panel are to either confirm or issue a new MAC, which give it no more than the status provided by s 326. Because the Appeal Panel can only consider a matter as to which the certification of the AMS is conclusively presumed to be correct, the Appeal Panel was also not able to conclusively determine the extent of the deductible proportion under s 323. Mr Anderson said that the reliance by the Appeal Panel on *Vannini v Worldwide Demolitions Pty Ltd*[2] was misplaced.

21. With respect to the extent of the deduction, Mr Anderson said that the deduction should be 61.56% in accordance with the assessment made by Dr Payten, the second AMS, for which he gave detailed reasons. Those reasons amply prove why "the so-called 10% default deduction" was at odds with the available evidence. Mr Anderson said that there was evidence to show that the deduction was not difficult to determine because the worker said that in 1983, one year after his arrival in Australia, he was turning the television up so loud that it disturbed his neighbour. Mr Calvert was only 52 at the time.

22. Mr Anderson also submitted that Dr Raj, qualified on behalf of Mr Calvert, attributed his hearing loss to working for 52 years "in the noisiest industry" which is "known to cause severe industrial deafness" so that the "inescapable inference" was that any hearing protection provided was wholly inadequate. Dr Howison also noted that Mr Calvert was exposed to very loud noise whilst working in South Africa and that "surely" Dr Howison would have pointed out that it was ameliorated by hearing protection if that was the case.

23. Mr Anderson submitted that there should be an award for the respondent on the claim for lump sum compensation.

24. Mr McManamey prepared submissions on behalf of Mr Calvert. He said that s 326(1)(a) of the 1998 Act provides that the MAC is presumed to be correct with respect to "the degree pf permanent impairment as a result of the injury" and that s 322 provides that the impairment is to be assessed in accordance with the Guidelines. The Guidelines provide at paragraph 1.28 that the proportion of impairment due to any previous injury or pre-existing condition is to be deducted from the degree of permanent impairment assessed by the assessor.

25. Mr McManamey said that the combined effect of s 323 and the Guidelines is that the deduction is part of the process of determining permanent impairment. He said there is no determination of the degree of permanent impairment resulting from an injury until the s 323 deduction has been made.

26. He argued that the Hospital's argument has a fundamental problem in that the MAC issued by the AMS and confirmed by the Appeal Panel is conclusively presumed to be correct and I must accept the assessment of 16% WPI as a result of the injury. Mr McManamey said that the Hospital's argument would require me to go behind the MAC to determine if the reasoning was correct which I do not have the power to do. The Hospital's argument sought that I determine if there was a demonstrable error in the MAC and sought to raise the arguments rejected by the Appeal Panel.

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[2] [2015] NSWCA 324.

FINDINGS AND REASONS

27. It is relevant to consider the sections to which both parties have referred in the context of Part 7 of the 1998 Act.

28. Section 319 of the 1998 Act includes the following definition of medical dispute:

> "***medical dispute*** means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim—
>
> (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),
>
> (b) the worker's fitness for employment,
>
> (c) the degree of permanent impairment of the worker as a result of an injury,
>
> (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
>
> (e) the nature and extent of loss of hearing suffered by a worker,
>
> (f) whether impairment is permanent,
>
> (g) whether the degree of permanent impairment of the injured worker is fully ascertainable."

29. Section 320 deals with the appointment of AMSs and ss 321 and 321A deal with the referral of a medical dispute to an AMS. Section 322 provides that the assessment is to be undertaken in accordance with the Guidelines and s 322A provides that there can only be one assessment of permanent impairment.

30. Section 323 provides:

> "**323 Deduction for previous injury or pre-existing condition or abnormality**
>
> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
>
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.
>
> **Note**—
>
> So if the degree of permanent impairment is assessed as 30% and subsection (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).
>
> (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter.

(4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this section.

(5) (Repealed)

Note—

Section 68B of the 1987 Act makes provision for how this section applies for the purpose of calculating workers compensation lump sum benefits for permanent impairment and associated pain and suffering in cases to which section 15, 16, 17 or 22 of the 1987 Act applies."

31. Section 324 deals with the powers of an AMS on assessment and s 325 sets out the requirements of a MAC.

32. Section 326 provides:

"**326 Status of medical assessments**

(1) An assessment certified in a medical assessment certificate pursuant to a medical assessment under this Part is conclusively presumed to be correct as to the following matters in any proceedings before a court or the Commission with which the certificate is concerned—

(a) the degree of permanent impairment of the worker as a result of an injury,

(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,

(c) the nature and extent of loss of hearing suffered by a worker,

(d) whether impairment is permanent,

(e) whether the degree of permanent impairment is fully ascertainable.

(2) As to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings."

33. When the sections are read in context, it is clear that the omission of the words "and the extent of that proportion" does not have the effect that the Hospital contends for. A medical dispute may concern the extent of the deduction – for example, the parties may agree about the extent of permanent impairment but disagree about the extent of the deduction. The definition provides *that* disagreement is a medical dispute which can be referred to an AMS.

34. The assessment is undertaken in accordance with the sections which follow, including s 323 which applies when "assessing the degree of permanent impairment resulting from an injury." Such an assessment is made by an AMS. Once the MAC has been prepared in accordance with ss 324 and 325, s 326 deals with the assessment certified in the MAC. That assessment, including the extent of pre-existing impairment, is presumed to be correct.

35. Common sense also dictates that if an AMS *has* assessed the proportion of permanent impairment due to a previous injury, the extent of the assessment he or she has made is presumed to be correct.

36. In any event, the question of the extent of permanent impairment, including the appropriate deduction has been determined by the Appeal Panel. The Hospital seeks, in effect that I reassess the extent of permanent impairment by allowing a larger deduction in respect of the hearing loss suffered in South Africa. It did not refer me to any other sections which would give me the power to make that assessment.

37. I decline to do so because an arbitrator does not have jurisdiction to reconsider the decision of the Appeal Panel.

38. Referring to submissions made to the Appeal Panel and not reproduced in this matter, Mr McManamey said that Mr Calvert did not concede that employment outside NSW did not give rise to a s 323 deduction. While the legislation does not have extra-territorial application[3], s 323 applies to any previous injury or pre-existing condition or abnormality. Whatever the cause, the evidence about the volume of his television and the opinions of the medical experts on that subject suggests that Mr Calvert suffered some hearing loss before he commenced employment with the hospital. That is a pre-existing condition within the meaning of s 323, in the same way that hearing loss from a noisy pastime would be.

39. Because no Certificate of Determination has been issued, it is appropriate that the orders made include an order that the Hospital pay Mr Calvert $21,500 under s 66 in respect of 16% permanent impairment deemed to have been suffered on 1 July 2002.

[3] *A & G Engineering Pty Ltd v Civitarese* (1996) 14 NSWCCR 158, 41 NSWLR 41.