

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3185/19
Applicant: Wafaa Hijazi
Respondent: Bayside Council
Date of Determination: 30 August 2019
Citation: [2019] NSWCC 287

The Commission determines:

1. Pursuant to rule 11.1 of the Workers Compensation Rules 2011, I join Rockdale City Council to these proceedings, noting that the legal representatives of the present respondent, Bayside Council, are also representatives of the Rockdale City Council and support the joinder.
2. I dispense with the requirements of rule 11.1(5), (6) and (7).
3. I amend Part 4 of the Application to Resolve a Dispute by deleting what appears at “place of injury” and substituting the following:

“The premises at which the applicant was working were the same under both Councils. Rockdale City Council merged with Botany Bay Council to form Bayside Council on 9 September 2016.”
4. I admit the Application to Admit Late Documents from Bayside Council dated 29 July 2019.
5. I grant leave to Bayside Council to lodge the Application to Admit Late Documents dated 29 July 2019.
6. There will be an award in favour of the respondent.

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

John Wynyard
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 JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Jackson

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



STATEMENT OF REASONS

BACKGROUND

1. Wafaa Hijazi (the applicant) brings an action against Rockdale City Council and Bayside Council pursuant to s 60 for the supply of hearing aids pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act).
2. A s 74 notice denying liability issued on 4 September 2018. The Application to Resolve a Dispute (ARD) and the Reply were duly lodged and served.

ISSUES FOR DETERMINATION

3. The parties agree that the following issue remains in dispute:
 - (a) Whether Ms Hijazi's employment with Rockdale City Council and/or Bayside Council led to the development of compensable hearing loss.

PROCEDURE BEFORE THE COMMISSION

4. This matter was heard on 30 July 2019. Mr Joe Hallion of counsel appeared for the applicant and Mr Ross Hanrahan of counsel appeared for the respondents. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

5. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply and attached documents;
 - (c) Application to Admit Late Documents (ALD) and attached documents dated 29 July 2019;
 - (d) Paper entitled *Call Centre and Noise-Induced Hearing Loss* published in Bi-monthly inter-disciplinary international Journey, noise and health published by the Department of Health and Human Services Cincinnati, published in the March - April 2016 issue, and
 - (e) *Assessment of Noise Exposure of Call-Centre Operators* by Jacqueline A Patel and Keith Broughton 1 November 2002 published in vol 46 issue 8 of the *Annan's Occupational Hygiene* published by Oxford Academic.

Oral Evidence

6. No application was made in relation to oral evidence.

FINDINGS AND REASONS

7. Ms Hijazi was employed originally by Bankstown City Council which Council merged with Botany Bay Council on 9 September 2016 to form Bayside Council.
8. Ms Hijazi made two statements. In her first statement of 14 October 2018¹ she alleged that she had been employed with Bayside Council from 1996 and that from then until October 2017 had been employed as a Customer Service Officer. She said:

“I worked in either the Council call centre or at the Council front desk. I spent about 50% of my time in each role over the years”.

9. She conceded that there was no significant occupational noise exposure when she was working at the front desk, but that when she worked at the call centre, she said:

“...I was exposed to very loud noise throughout the working day from the continuous ringing of telephones. I worked in conjunction with up to 7 other call centre telephoners answer council telephone enquiries throughout the day. In addition, there was exposure from a very loud photocopier machine that was used throughout the day by other council employees. The noise level in the call centre was such that I had to raise my voice in order to communicate with a person standing 1 metre away”.

10. In a further statement of 27 June 2019 Ms Hijazi acknowledged that she had read the report of a medico-legal specialist retained by the respondent, Dr Ken Howison, ENT Surgeon. She then said²:

“4. In relation to the noise to which I was exposed in the Call Centre for many years there were at least 7 phones all ringing one after another and each of the operators sat about 1 metre away from each other.

5. The photocopying machine was generally between 2-3 metres away at most. There were many times that I had to raise my voice in order to be heard.”

11. Ms Hijazi relied upon the opinion of Dr Joseph Scoppa, ENT Physician who reported in his capacity as medico-legal referee on 19 April 2018. He took a history that Ms Hijazi had progressive hearing loss “for many years but over the last few years it had become more apparent.”
12. Dr Scoppa noted that Ms Hijazi had difficulty in understanding speech in background noise or on television or on the telephone. Dr Scoppa did not take any history of any head or ear injury, of ear infection or ear surgery or of any family history of deafness. There was no history of exposure to ototoxic drugs, or to recreational noise.
13. The employment history that Dr Scoppa took was that Ms Hijazi had been employed with Bayside Council from 1996 to date but to October 2017 as a Customer Services Officer working in either the Council Call Centre or at the Council front desk counter. He took a history that Ms Hijazi spent about 50% of her time in each role over that period. The history that he took regarding the exposure to noise was³:

“She said however that her employment within the call centre had exposed her to very loud noise throughout her working day from the continual ringing of telephones. She worked in conjunction with up to seven other call centre telephonists answering Council telephone enquiries throughout the day. In addition, there was noise exposure from a

¹ ARD 26

² ARD 26[4]

³ ARD 2

very loud photocopy machine that was used throughout the day by other Council employees. She said that the noise level in the call centre was such that she had to raise her voice in order to communicate with a person standing about a metre away. This history is consistent with the noise level being above 85 dBA.

She said it was not practical to use ear protection because she and the other call centre operators were wearing headsets. She said that the headset was used only on one ear, and she alternated the headset location from ear to ear to avoid discomfort.”

14. Dr Scoppa noted that Ms Hijazi had become so concerned about her hearing loss that she consulted with a Dr Farrell and a Dr Pohl, ENT Surgeons. Both surgeons had confirmed the presence of hearing loss.

15. Dr Scoppa carried out an audiological evaluation and reproduced his audiogram⁴. He found that Ms Hijazi’s hearing loss was not entirely due to industrial deafness because of the appearance of the audiogram which indicated that there was mid tone involvement at 1500 and 2000Hz which was unacceptable as being caused by industrial noise. He explained that industrial deafness increasingly caused increasing hearing loss from low to high tones with relatively sparing of the lower mid tones in comparison to the high tones. He said⁵:

“After taking into account Ms Hijazi's history of occupational noise exposure, the number of years that she has worked in noise, and the audiometric configuration shown on my audiogram I have formed the opinion that the hearing loss in both ears at 3000 and 4000 Hz is due to industrial deafness and that the hearing loss in both ears below 3000 Hz is unrelated to industrial deafness for the reasons discussed above.”

16. Dr Ken Howison supplied a report to the insurer on 28 August 2018. He took a consistent history noting that Ms Hijazi said that there were up to 10 employees in the call centre. He noted that there was no noise at the front desk and that Ms Hijazi spent 18 years in the call centre. Dr Howison said⁶:

“From her description of the noise in the call centre I would not consider that Ms Hijazi was working in noise sufficient as to be responsible for the causation of noise induced hearing loss. I feel that if a noise measurement survey was carried out in this call centre with between 6-10 employees that she would not be exposed to noise above 85dB of sound. One needs to be exposed to 85dB of sound or more over an 8-hour working day to cause industrial deafness. After discussing this in detail with Ms Hijazi she tells me that she can hear the telephone ring and this would not be possible if the ambient noise level was above 85dB.”

17. Dr Howison also noted that Ms Hijazi had seen Dr Farrell and Dr Pohl and that they had confirmed the sensori-neural deafness “but did not say that this was caused by her occupation in a call centre.”

18. Dr Howison carried out audiometric testing. He concluded⁷:

“In my opinion, Ms Hijazi's sensori-neural hearing loss is not due to employment with Bayside Council. I do not consider from her description of noise in which she was working that she was working in noise sufficient as to be responsible for the causation of noise induced hearing loss.”

⁴ ARD 6

⁵ ARD 3

⁶ ARD 21

⁷ ARD 22

19. In answer to question 5 from the insurer⁸, Dr Howison said:

“Ms Hijazi was not exposed to sufficient noise to cause industrial deafness.”

20. He noted in answer to further questions that he did not consider employment to possess the tendencies, incidents or characteristics capable of causing noise induced hearing loss. He concluded⁹:

“I would strongly recommend that sound pressure measurements are made in the call centre to completely demonstrate that noise in the call centre is insufficient to cause industrial deafness.”

21. Bayside Council attempted to introduce into evidence the ALD dated 29 July 2019. It contained a statement from Ms Katena Janis, a printout of the hours Ms Hijazi had been working per week since 1996 when employed by both Councils and an email from Ms Carol Hudson, the Team Leader Customer Service to Ms Janis dated 26 July 2019.

22. There was some debate over whether this document could be admitted as Ms Janis’s statement raised for the first time the issue that in fact Ms Hijazi had been employed between 1996 and 9 September 2016 by Rockdale City Council and that it was the amalgamation with Botany Bay Council on that date that formed Bayside Council. It consequently emerged that the majority of the exposure had occurred during the period of employment with Rockdale City Council. It was mooted that an adjournment would be permitted in order for the applicant to consider her position in the light of that evidence but when the legal advisors for Bayside Council announced that they were instructed to also appear for Rockdale City Council, and that they had no objection to a joinder being made instanter, Ms Hijazi elected to continue with her case.

23. Ms Janis was the Return to Work “Wellness Officer and Payroll Officer” at Bayside Council. She had access to Council records which demonstrated that on 15 January 1996 Ms Hijazi began work as a Customer Service Officer, that she was on maternity leave from March 2010 to April 2012 and that she worked between 22 April 2013 and 18 October 2013 with the Development Assessment Unit, which had not been within the call centre. Ms Hijazi had worked as a Customer Service Officer otherwise up until 24 September 2017, since when she has been employed in the role of a Swimming Pool Compliance Officer.

24. Ms Janis said at paragraph 10 of her statement that she liaised with Ms Carol Hudson, Team Leader Customer Service, who had been Ms Hijazi’s supervisor at the relevant time. Ms Hudson provided an email which is attached to her statement.

25. Also attached was a printout of the hours Ms Hijazi had worked with the Council. They showed that between 1996 and 2011 she had been working a 35-hour week. From 20 February 2012 to 21 April 2013 she had been working for 16.50 (which I assume means 16 ½ hours per week) and from 22 April 2013 to 20 October 2013 22 hours per week. Between 21 October 2013 and 1 February 2015, she had been working 16.50 hours per week and from 2 February 2015 to 24 September 2017 when she ceased work as a Customer Service Officer, she was working for 16 hours per week.

26. Ms Hudson said that a “quick glance” at a sample regarding past rosters showed a rotation by Ms Hijazi between the call centre and the front counter of a 50/50 split although perhaps favouring the counter slightly as Ms Hijazi was a very experienced Customer Service Officer. Ms Hudson said that the call centre operated on approximately four to seven staff at any one day and that an average would be five to six. She said that less staff are on the phones over

⁸ ARD 22

⁹ ARD 24

the two-hour lunchbreak between 12.00 to 2.00 pm each weekday and that other call centre staff were rostered administration tasks. Ms Hudson said:

“So, on average about 3 - 5 people maximum on the phones at any one time.”

27. Ms Hudson said that the set up at the call centre where everyone was a metre away from each other was possibly correct but that not all desks were affected. Some were two to eight metres from other desks.

28. Ms Hudson was asked whether she agreed with the assertion that there would be at least seven phones ringing all after one another and she answered:

“I don't think I can recall 7 phones ringing one after the other as we really did not have 7 people on the phones all at once - some staff did administration duties while other staff answered the phones. Others were at break/lunch. It would probably be 3 - 5 people maximum at any one time answering phones”.

29. With regard to the photocopier mentioned by Ms Hijazi Ms Hudson stated that there was a photocopier in the old Customer Service Call Centre located at the entrance to the centre between the counter and the call centre near the entry door. She said that there were two to three call centre desks that would have been two to three metre range of the photocopier. She said:

“I cannot recall noticing that the photocopier was noisy, nor any staff member commenting to me that it was. All copiers make some degree of noise but I would say from my experience that the copier was different to others.”

SUBMISSIONS

30. Mr Hanrahan submitted that the evidence did not satisfy the Loblely test, that is to say that Ms Hijazi's employment had the tendencies, incidents or characteristics that would give rise to a real risk of boilermakers deafness or deafness of a similar origin.¹⁰ Mr Hanrahan submitted that Ms Hijazi's evidence was inconsistent. Whereas on one version she alleged there were a number of simultaneous calls happening, in her later statement she said that there were a number of calls made “in a row”.

31. Mr Hanrahan submitted that I could take judicial notice that measurements at 85dBA over a period of time would lead to hearing impairment, but that it had not been established that such levels had been reached.

32. Mr Hanrahan referred to the evidence that the applicant had seen two other EN&T specialists, whose reports had not been tendered. He submitted that I would expect to see the reports of both those specialists and their absence raised a *Jones v Dunkel* inference that their contents would not assist the applicant.

33. Mr Hanrahan referred to the audiogram results as interpreted by Dr Scoppa that low tones were not typical of industrial noise induced hearing loss.

34. Mr Hanrahan referred to the factual matters contained in the ALD of 29 July 2019 which was eventually admitted to the proceedings. He submitted that since 2012 Ms Hijazi's work hours were of around eight and a half hours per week. Mr Hanrahan submitted that a first reading of both Dr Scoppa's report and Ms Hijazi's statement suggested that Ms Hijazi had been working continuously there on full hours, which has proved not to be the case.

¹⁰ *Blayney Shire Council v Loblely & Another* (1995) 12 NSWCCR 52

35. Mr Hanrahan submitted that the applicant's statement was self-serving and there was no objective contemporaneous evidence to support her allegations regarding the frequency of her exposure to loud noise. Indeed, the evidence tendered by the respondents demonstrated that the information in Ms Hijazi's statements was unreliable.
36. Mr Hallion stressed the duration over which Ms Hijazi had been working for both Councils. She had been doing the duties she described for over 20 years. I was referred to *Dawson*¹¹ regarding the necessity for some scientific basis to be given for the conclusion reached that exposure to noise in employment had caused the necessary tendencies, incidents and characteristics to give a real risk that deafness might follow.
37. He said that that evidence came from Dr Scoppa. Dr Scoppa took into account that Ms Hijazi was only in the noisy area for only 50% of the time, but still found in her favour. I could also rely, Mr Hallion submitted, on the applicant's evidence - particularly that she had to raise her voice to be heard. This fact indeed was one of the examples given in *Dawson* of a scientific basis for inferring a noise level over 85dBA. Dr Scoppa gave that evidence and therefore both on subjective and objective bases supported Ms Hijazi's case.
38. Mr Hallion asserted that on one interpretation of the evidence, I would be satisfied that there was a concurrent quantity of calls being made at the one time, in contra distinction to the history taken by Dr Howison of consecutive calls.
39. Mr Hallion suggested that there would be times when there would be up to seven call centre telephonists talking loudly on the phones - such as when there was a natural disaster in the area. Mr Hallion said that in her second statement Ms Hijazi had said "one after the other" but nonetheless submitted that it was "common sense" that there would be a lot of noise in call centres. Mr Hallion made the same sort of submission in dealing with Ms Hudson's evidence, again calling on common sense to support his submission that there must have been times when there were more than three to five call centre telephonists answering calls at any one time.
40. Mr Hallion submitted that there was no significance in the absence of the reports of Drs Farrell and Pohl. He said that I could assume that they had not been called as to causation, but only to assess whether Ms Hijazi was suffering from hearing loss. He submitted that therefore I was unable to draw a *Jones v Dunkel* inference.
41. Mr Hallion referred to Dr Howison's suggestion that consideration should be given to testing the noise levels in the call centre and submitted that that recommendation could be interpreted as being a lingering doubt of Dr Howison's own opinion.
42. Mr Hanrahan in response submitted that the reports of Drs Farrell and Pohl necessarily dealt with a history as to causation of the loss of hearing by Ms Hijazi. He said the audiograms of both Dr Howison and Dr Scoppa were similar, and that Dr Scoppa did not explain satisfactorily how he decoded his audiogram to come to the finding that there was industrial deafness.

DISCUSSION

43. There is no doubt that Ms Hijazi has been suffering from hearing problems for a considerable period of time, and that indeed she has gone to the trouble of consulting her own experts, Dr Farrell and Dr Pohl.

¹¹ *Dawson and others trading as The Real Cane Syndicate v Dawson* [2008] NSWCCPD 35 (*Dawson*)

44. As it will be seen, it is not necessary to make a decision on whether to draw a *Jones v Dunkel* inference as to the absence of these reports, as Dr Scoppa's opinion itself is not helpful for a number of reasons.
45. The assumptions that Dr Scoppa has made in coming to his conclusion were that Ms Hijazi had worked as a Customer Services Officer either at a call centre or at the front desk counter from 1996 to October 2017. Although Ms Hijazi, on her own evidence, spent only 50% of her time in the call centre, he did not discuss the hours which she worked, and showed no awareness that Ms Hijazi had not been working full time since 2012. The nature of the noise exposure is one of the aspects that is relevant to a determination regarding causation of industrial noise, but an equally important issue is that of duration.
46. It is not clear whether Dr Scoppa was aware of the shorter hours that Ms Hijazi had been working after 2012, and his failure to discuss the reduction in those hours from that time makes it likely that he was unaware of such a reduction. His failure to consider that topic undermines the factual assumptions upon which his opinion was made.
47. Further, I have reservations as to whether exposure to telephone noise as described by Ms Hijazi would indeed reach the level of 85dBA. That is a level of noise intensity which is accepted, as found in the journals handed up by Ms Hijazi, to be a cause of industrial deafness but such exposure was relevant only where there was a duration of exposure for an eight-hour day. Dr Scoppa said that he thought the levels were 85dBA because he was told by Ms Hijazi that she had to shout to be heard. Dr Howison, on the other hand, said if the noise level in the call centre was at 85dBA, the sound of the telephone ringing might not have been heard in any event.
48. Dr Howison made the point that the duration of the exposure at 85dBA had to be of at least eight hours per day, whereas Dr Scoppa failed to consider that aspect of his finding, and I infer that his opinion was based upon an assumption that Ms Hijazi was working full time.
49. I do not accept that an occasional exposure to noise at that level can cause industrial deafness, and I prefer Dr Howison's opinion in that regard. Further, I am not satisfied that Dr Scoppa's opinion that there was a noise level of 85dBA has been made out in any event.
50. In *Dawson DP Roche* said at [44]:

"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."
51. It has sometimes been argued that the 'detailed evidence' in the case with which he was dealing (which he set out at [24-25] were relevant examples that would prove noisy employment. One of these examples was of having to raise one's voice in order to be heard. At [48] the learned DP said:

"Whether the need for workers to shout indicates that the particular employment is noisy depends on the circumstances and evidence in each case."
52. I am not persuaded, if there were a need to shout, that it indicated noisy employment at a level of 85dB. I am more persuaded by the argument by Dr Howison that, were the noise levels of that intensity, a phone ringing would probably not be heard.

53. There was no suggestion by Ms Hijazi that she ever worked more than 50% of her time in the call centre. Her evidence as to the level of noise in the call centre was also somewhat contradictory. In her statement of 14 October 2018, she said that she was exposed to the continuous ringing of telephones and that she worked "in conjunction" with up to seven other call centre employees.
54. Her evidence of 27 June 2019, perhaps using the terminology adopted by Dr Howison, said that there were at least seven phones all ringing one after the other. It is accordingly somewhat contradictory as to her true meaning. Whether another seven phones were ringing around her, or whether only one phone was ringing at a time, (presumably until it was answered and then another phone would ring for someone else to take the next call), was not ascertainable. I was not sure on Ms Hijazi's evidence as to the precise nature of her exposure to the ringing of telephones.
55. The documents attached to the ALD dated 29 July 2019 have presented evidence from Council employees from their records and their evidence was not challenged. I can therefore accept that at no time was Ms Hijazi working full hours after 19 February 2012, up to which time her working week consisted of 35 hours. From then on Ms Hijazi was working either 16½ or 16 hours per week except for that short time when she was away from the call centre with the Development Assessment Unit.
56. This information casts serious doubt on the reliability of the report of Dr Scoppa. He did not discuss the hours that Ms Hijazi had been working, and whilst he noted that Ms Hijazi spent about 50% in the role of a call centre to a telephonist, he was not aware that since 19 February 2012 she was only working 16 or 16 ½ hours per week. That means that exposure must have been in the region of eight to nine hours per week in the call centre.
57. Dr Howison's report noted that there had to be exposure to noise of an intensity of 85dBA over an eight-hour working day before industrial deafness was caused.
58. As to the level of the noise, Dr Scoppa thought that it would be over 85dBA because Ms Hijazi said that she had to raise her voice in order to communicate with a person standing about one metre away.
59. Dr Howison thought that Ms Hijazi's statement to him that she could hear the telephone ring made him doubt whether the noise level was above 85dB because such a noise would not be heard if such an ambient noise level was above that level.
60. I prefer the opinion of Dr Howison. Dr Scoppa did not discuss the duration of exposure at 85dB noise intensity that was required to cause industrial deafness, which in the present circumstances was a significant omission.
61. I was not assisted by the technical evidence handed up. The Noise and Health Journal article dealt with entirely different circumstances concerning one person working from home working an eight-hour day.
62. The article in the Annual's of Occupational Hygiene showed that tests done on 150 call centre operations showed that daily personal noise exposure was unlikely to exceed 85dBA limit.
63. I cannot be sure that the level of exposure in this call centre was of that nature in any event. Both specialists were speculating to a considerable extent. It is not particularly scientific to assess the level of noise based upon an account of a claimant with an interest in the outcome who has reconstructed events of some 18 months prior.

64. During the hearing as there were a number of issues that had to be addressed, as indicated. I made the following orders:

- (a) Pursuant to rule 11.1 of the Workers Compensation Rules 2011, I join Rockdale City Council to these proceedings, noting that the legal representatives of the present respondent, Bayside Council, are also representatives of the Rockdale City Council and support the joinder.
- (b) I dispense with the requirements of rule 11.1(5), (6) and (7).
- (c) I amend Part 4 of the Application by deleting what appears at “place of injury” and substituting the following:

“The premises at which the applicant was working, were the same under both Councils. Rockdale City Council merged with Botany Bay Council to form Bayside Council on 9 September 2016.”
- (d) I admit the ALD from Bayside Council dated 29 July 2019.
- (e) I grant leave to Bayside Council to lodge the ALD dated 29 July 2019.
- (f) There will be an award in favour of the respondent.

