

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 6519/20  
**applicant:** Evan Skliros  
**Respondent:** Infrabuild (Newcastle) Qantas Ground Services Pty Ltd  
**Date of Determination:** 21 January 2021  
**Citation No:** [2021] NSWCC 26

The Commission determines:

1. The TV Adaptor and SoundClip accessories for the Applicant's hearing aids are reasonably necessary medical treatment, as a result of noise induced hearing loss suffered by the Applicant in the course of his employment.

The Commission orders:

2. The Respondent to pay the costs of TV Adaptor and SoundClip accessories for the Applicant's hearing aids in accordance with section 60 of the *Workers Compensation Act 1987* and the *Workers Compensation (Hearing Aid Fees) Order No 2 2020*.

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

Karen Garner  
**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 KAREN GARNER, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker  
Senior Dispute Services Officer  
**As delegate of the Registrar**



# STATEMENT OF REASONS

## BACKGROUND

1. On or about 15 September 2003, Evan Skliros (the Applicant) commenced employment with Infrabuild (Newcastle) Qantas Ground Services Pty Ltd (the respondent) predecessor.
2. During the Applicant's employment with the Respondent, he has been exposed to noise from but not limited to: motors, pressurised air leaks, hydraulic plant & equipment and the ambient noise of the furnace.
3. The Applicant has reported a history of hearing difficulties for 10 years and a history of experiencing severe tinnitus for approximately the same period.
4. The Applicant contacted Audika on 2 December 2019 to obtain advice about hearing aids to help alleviate his hearing and communication problems. Hearing aids were recommended at a cost of \$5,958.41.
5. The Applicant was examined by Dr Dhasmana, Ear, Nose & Throat Surgeon on 24 March 2020.
6. Dr Dhasmana provided a report dated 24 March 2020.
7. The Applicant made a claim for hearing aids, recommended by Audika, pursuant to s60 of the Workers Compensation Act and in accordance with the applicable *Workers Compensation (Hearing Aid Fees) Order* on or about 6 April 2020.
8. Liability, for the reasonable cost of hearing aids, was approved by GFG Alliance Workers Compensation (GFG Alliance), on behalf of the self-insured Respondent, on 9 April 2020.
9. Audika recommended certain accessories as supplemental to the hearing aids, for the day-to-day functionality for the hearing aids, including a "SoundClip" and "TV Adaptor" (collectively, "the recommended accessories").
10. GFG Alliance did not accept liability for the cost of the recommended accessories, on the basis that "The Sira order for Hearing Aids does not cover accessories".
11. The Applicant underwent a trial of the recommended hearing aids following GFG Alliance's approval.
12. The Applicant pressed the claim for the cost of the recommended accessories on 1 July 2020, relying on a letter provided by his Audiometrist, Ms Suzanne Buckland, in support of the need for the recommended accessories.
13. A section 78 notice was issued by the insurer on 30 July 2020. The section 78 notice acknowledged that the Respondent has accepted liability for the cost of the hearing aids, however, declined the claim for the cost of the recommended accessories.
14. The present proceedings were commenced in the Workers Compensation Commission by an Application to Resolve a Dispute (ARD) filed on 10 November 2020. The Applicant seeks compensation pursuant to section 60 of the *Workers Compensation Act 1987* (the 1987 Act) and the *Workers Compensation (Hearing Aid Fees) Order No 2 2020*.

## PROCEDURE BEFORE THE COMMISSION

15. The parties attended a teleconference on 8 December 2020. Mr Elijah Whittaker, solicitor of MRM Lawyers, represented the applicant. Mr Greg Guest, solicitor of Sparke Helmore Lawyers, represented the respondent.
16. By consent, directions were made at the teleconference that the issues in dispute would be determined by me on the papers after consideration of written submissions to be filed on behalf of the parties.
17. 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

18. I note that the Respondent has accepted liability for the cost of the hearing aids on the basis that the Applicant has work related hearing loss.
19. There is no dispute that:
  - (a) the Applicant's employment with the Respondent was of the tendencies, incidents or characteristics which could give rise to a real risk of injury;<sup>16</sup>
  - (b) the notional date of injury pursuant to section 17 of the 1987 Act is 6 April 2020;
  - (c) the Applicant's hearing loss does not meet the threshold pursuant to section 66(1) of the 1987 Act to claim lump sum compensation, and
  - (d) hearing aids are appropriate treatment for the Applicant for the hearing loss.<sup>17</sup>
20. The Respondent conceded that the total expenses claimed do not exceed the allowable maximum under section 61(2) of the 1987 Act and the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2019* and the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2020*.
21. The issues in dispute are whether the recommended accessories for the hearing aids are:
  - (a) within the definition of medical or related treatment as required by section 59 of the 1987 Act;
  - (b) reasonably necessary medical treatment as a result of the injury, and
  - (c) recoverable by an injured worker, pursuant to the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2020*.<sup>15</sup>

## EVIDENCE

### Documentary evidence

22. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents, and
  - (b) Reply and attached documents.

## Oral evidence

23. Neither party applied to adduce oral evidence or cross-examine any witness.

## Applicant's evidence

24. The Applicant's evidence includes a statement setting out the factual background to the dispute as follows:

- (a) on or about 15 September 2003, the Applicant commenced employment with the Respondent's predecessor;
- (b) during the Applicant's employment with the Respondent, he has been exposed to noise from but not limited to: motors, pressurised air leaks, hydraulic plant & equipment and the ambient noise of the furnace;
- (c) the Applicant has reported a history of hearing difficulties for 10 years and a history of experiencing severe tinnitus for approximately the same period;
- (d) the Applicant contacted Audika on 2 December 2019 to obtain advice about hearing aids to help alleviate his hearing and communication problems. Audika recommended that the Applicant have hearing aids. Audika recommended certain accessories as supplemental to the hearing aids, for the day-to-day functionality for the hearing aids, including a "SoundClip" and "TV Adaptor" (collectively, "the recommended accessories");
- (e) Audika prepared a quote in the amount of \$5,958.41 which included the cost of the recommended accessories;
- (f) the Applicant was examined by Dr Dhasmana, Ear, Nose & Throat Surgeon on 24 March 2020;
- (g) on or about 6 April 2020, the Applicant made a claim for hearing aids, recommended by Audika, pursuant to s 60 of the 1987 Act and in accordance with the applicable *Workers Compensation (Hearing Aid Fees) Order*;
- (h) liability for the reasonable cost of hearing aids, was approved by GFG Alliance Workers Compensation (GFG Alliance), on behalf of the self-insured Respondent, on 9 April 2020;
- (i) GFG Alliance did not accept liability for the cost of the recommended accessories;
- (j) the Applicant underwent a trial of the recommended hearing aids following GFG Alliance's approval;
- (k) the Applicant pressed the claim for the cost of the recommended accessories on 1 July 2020, relying on a letter provided by his Audiometrist, Ms Suzanne Buckland, in support of the need for the recommended accessories;
- (l) the Applicant has obtained benefits from the hearing aids but continues to experience particular difficulty hearing on the telephone and hearing the television. He struggles to hear on the telephone. He has to turn the volume of the television up so loud that it is a disturbance to others. He has been told by his family that he has the television volume too loud and that he speaks too loud on the telephone, and

- (m) the Applicant has been informed that the recommended accessories would help with the functionality of his hearing aids. The SoundClip would allow the telephone to be heard directly into his hearing aid devices. He believes that without the recommended accessories, the hearing aids offer only a limited version of their potential functionality.
25. The Applicant's evidence also includes a report of Dr Paramatma dated 24 March 2020 which states that:
- (a) he examined the Applicant on 24 March 2020 for assessment of permanent hearing impairment;
  - (b) he identified that the Applicant experienced bilateral hearing loss, and
  - (c) he recommended that "Bilateral Digital Hearing aids are reasonably necessary as advised by qualified Hearing aids provider".
26. The Applicant's evidence also includes recommendations and a quotation by Ms Suzanne Buckland, Audiometrist with Audika:
- (a) Ms Buckland recommended that in addition to hearing aids, the Applicant have a SoundClip and TV Adaptor;
  - (b) a quote dated 13 December 2019 for hearing aids also included the cost of a SoundClip (which also appears to be referred to as a Connect Clip) and TV Adaptor. The total amount quoted was \$5,958.41 and this included the amount of \$295.00 for the SoundClip and the amount of \$165.00 for the TV Adaptor;
  - (c) Ms Buckland described the recommended accessories as follows:
    - "Connect Clip – cIt has Android phone so aids will not pair directly with his phone. He does not have Bluetooth in his car, so when driving to and from work, if the phone rings, he has to pull over to answer. The connect clip would give hands free driving and also the ability for him to hear voice from the phone in both ears giving binaural amplification and eliminating room noise – esp important if in any back ground noise situations.
    - TV Adaptor – home environment is a large open plan room with wooden floors, the TV is situated 4.5 mtrs from where he sits, even with hearing aids on, it is unrealistic to hear speech clearly from that distance. To exacerbate this speech clarity would be the interference from any room noises or household sounds such as kettle boiling. His high frequency hearing loss means soft parts of speech become inaudible in BGN even with aids on an even with good BGN reduction capabilities at that distance."

### **Respondent's evidence**

27. The Respondent relied on the same factual evidence as the Applicant.

### **SUBMISSIONS**

28. Written submissions were filed on behalf of the parties as follows:
- (a) Applicant's submissions dated 8 December 2020;
  - (b) Respondent's submissions dated 11 December 2020, and
  - (c) Applicant's submissions in reply dated 22 December 2020.

## FINDINGS AND REASONS

29. Section 60 of the 1987 Act relevantly provides:

“60. Compensation for cost of medical or hospital treatment and rehabilitation etc

- (1) If, as a result of an injury received by a worker, it is reasonably necessary that:
- (a) any medical or related treatment (other than domestic assistance) be given, or
  - (b) any hospital treatment be given, or
  - (c) any ambulance service be provided, or
  - (d) any workplace rehabilitation service be provided,

the worker’s employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2).”

30. There is no dispute that the total expenses claimed do not exceed the allowable maximum under section 61(2) of the 1987 Act and the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2019* and the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2020*.

31. The dispute between the parties centres around the issues of whether the recommended accessories for the hearing aids are:

- (a) within the definition of medical or related treatment as required by section 59 of the 1987 Act;
- (b) reasonably necessary medical treatment as a result of the injury, and
- (c) recoverable by an injured worker, pursuant to the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2020*?

### **Were the recommended accessories within the definition of medical or related treatment pursuant to section 59 of the 1987 Act?**

32. Section 59 of the 1987 Act states:

**“medical or related treatment** means...  
... the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles...”

33. The Applicant submits that the recommended accessories fall within the definition of “artificial aids” for the purpose of the definition of “medical or related treatment” in section 59 of the 1987 Act.

34. The Respondent submits that the recommended accessories do not fall within the definition of “artificial aids” and relies on the decision of *Pacific National Pty Ltd v Baldacchino* [2018] NSWCA 281 (*Baldacchino*) in support of that proposition.

35. In *Baldacchino*, the NSW Court of Appeal approved the definition of “artificial aids” adopted by Huntley JA (with whom Hope JA agreed) in the case of *Thomas v Ferguson Transformers Pty Ltd* [1979] 1 NSWLR 216 at 220-221, that is:

**“An artificial aid, in my opinion, is anything which has been specially constructed to enable the effects of the disability (the result of injury) to be overcome.** The other articles in the subclause, crutches, artificial members, eyes or teeth, are illustrations of this. Because of [the applicant’s] injury, she has lost all capacity for natural progression. The modifications to the car have given her some

capacity to transport herself. It was suggested that, on this basis, the car was an artificial aid, and every person whose capacity to walk was diminished could have a car supplied at the expense of the insurer. It is not necessary to decide whether this conclusion follows. **The essential quality of an artificial aid is that it is an aid specially tailored to the needs of a person, which flowed from the injury.** The artificial aid is specific to an injured person. These modifications have this quality. As an artificial aid is useless unless the person for whom it is provided can use it, the provision of an artificial aid includes the provision of instruction in its use” (emphasis added).

36. The Respondent submits that the recommended accessories are generic electronic products that are not specially tailored to the needs of the Applicant flowing from the injury, particularly given that the Applicant has already been supplied with hearing aids to ameliorate the effects of his industrial deafness.
37. Having regard to the evidence of the Applicant, Dr Dhasmana and Ms Suzanne Buckland (which I accept), I consider that the recommended accessories do fall within the description of “artificial aid” in the manner described in *Baldacchino* for the following reasons:
- (a) the Applicant’s evidence is that, despite the hearing aids, he continues to experience particular difficulty with hearing on the telephone and hearing the television and that he is a disturbance to others when he does so because of those ongoing hearing difficulties;
  - (b) the Applicant’s evidence is that the recommended accessories will work with his hearing aids to rectify those ongoing hearing difficulties;
  - (c) Dr Dhasmana recommended that hearing aids were reasonably necessary “as advised by qualified Hearing aids provider”, and
  - (d) Ms Buckland, Audiometrist, recommended the recommended accessories together with the hearing aids and they were jointly included in the quote dated 13 December 2019. Further, Ms Buckland’s description of the recommended accessories clearly indicates that they address Mr Buckland’s particular needs to ameliorate the effects of his deafness.
38. On that basis, I am satisfied that the recommended accessories are “artificial aids” and within the definition of medical or related treatment as required by section 59 of the 1987 Act.

**Were the recommended accessories reasonably necessary medical treatment as a result of the injury?**

***Reasonably necessary***

39. In *Diab v NRMA Ltd* [2014] NSWCCPD 72 (*Diab*), Roche DP, referring to the decision in *Rose v Health Commission (NSW)* [1997] NSWCC 1; 14 NSWCCR 233 (*Rose*), set out the test for determining if medical treatment is reasonably necessary as a result of a work injury:

“The standard test adopted in determining if medical treatment is reasonably necessary as a result of a work injury is that stated by Burke CCJ in *Rose v Health Commission (NSW)* [1986] NSWCC2; (1986) 2 NSWCCR 32 (*Rose*) where his Honour said, at 48A-C:  
...

- 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.

4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition.”

40. Roche DP also noted that the Commission has generally referred to and applied the decision of Burke CCJ in *Bartolo v Western Sydney Area Health Service* [1997] NSWCC 1; 14 NSWCCR 233 (*Bartolo*):

“The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary.”

41. Roche DP found:

“In the context of s 60 the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in *Rose* (see [76] above), namely:

- (a) the appropriateness of the particular treatment;
- (b) the availability of alternative treatment, and its potential effectiveness;
- (c) the cost of the treatment;
- (d) the actual or potential effectiveness of the treatment, and
- (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.”

42. I will consider whether the recommended accessories were reasonably necessary having regard to the matters set out by Roche DP in *Diab*.

### ***The appropriateness of the medical treatment***

43. It is clear from the evidence of Dr Dhasmana that he relies on the expertise of a “qualified Hearing aids provider” to determine what aids are most suitable to the Applicant having regard to his particular needs.
44. The accepted evidence of the Applicant, Dr Dhasmana and Ms Suzanne Buckland which I outlined above is evidence that the recommended accessories are appropriate artificial aids having regard to the Applicant’s particular circumstances.



### ***The availability of alternative treatment, and its potential effectiveness***

45. There is no evidence of any alternative treatment which would appropriately address the ongoing hearing difficulties which the Applicant continues to experience using his hearing aids.

### ***The cost of the treatment***

46. Ms Buckland's quote dated 13 December 2019 states that the Sound Clip costs \$295 and the TV Adaptor costs \$165.
47. The Respondent has not challenged the cost of the items.

### ***The actual or potential effectiveness of the treatment***

48. I accept Ms Buckland's evidence that the recommended accessories will assist the Applicant to hear on the telephone and hear the television.

### ***The acceptance by medical experts of the treatment as being appropriate and likely to be effective***

49. There is no evidence which contradicts the evidence of Dr Dhasmana and Ms Buckland.
50. I do not accept the Respondent's submission that the recommended accessories are not reasonably necessary because they are "further equipment" to the hearing aids that were previously supplied to the Applicant. It is clear from the recommendations and invoice prepared by Ms Buckland that it was her intention that the recommended accessories were reasonably necessary to be provided to the Applicant at the same time and in addition to the provision of the hearing aids to address the Applicant's hearing loss. It is also clear from the recommendations of Ms Buckland that the recommended accessories address hearing loss in particular situations (when the Applicant is talking on the telephone and watching television) that are not sufficiently addressed by the hearing aids without the recommended accessories.
51. Further, I do not accept the Respondent's submission that an award should be given to the Applicant only in respect of the Sound Clip and not the TV Adaptor. Again, it is clear from the recommendations and invoice prepared by Ms Buckland that it was her opinion that both were reasonably necessary. I accept the Applicant's submission, which appears to be consistent with the evidence of Ms Buckland, that the TV Adaptor operates in a specialised manner and is reasonably necessary to address the Applicant's hearing loss having regard to his particular situation when watching television.
52. Having regard to the matters set out above, I am satisfied that the recommended aids are reasonably necessary medical treatment to treat the Applicant's hearing loss.

### ***As a result of the injury***

53. A commonsense evaluation of the causal chain is required. In *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 at [810] (*Kooragang*), Kirby P (as His Honour then was) 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 now not 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 commonsense 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."

54. In *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 at [57], Roche DP stated:

“... a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pymont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury 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 s 60 of the 1987 Act.

Ms Murphy only has to establish, applying the commonsense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary ‘as a result of’ the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWCCPD 18 at [40]-[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716).”

55. I note that there is no dispute that the Applicant suffered work related hearing loss with a notional date of injury being 6 April 2020 and further that hearing aids are appropriate treatment for the hearing loss.
56. Having regard to the matters set out above, I am satisfied that the recommended aids are reasonably necessary medical treatment, as a result of noise induced hearing loss suffered by the Applicant in the course of his employment.

**Were the recommended accessories recoverable by an injured worker pursuant to the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2020*?**

57. In written submissions, the Respondent conceded that the total expenses claimed do not exceed the allowable maximum under the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2020* and that the Respondent does not continue to press any objection in that regard.
58. Accordingly, subject to the other considerations dealt with in these reasons, I am satisfied that the claim for the recommended accessories could be recoverable pursuant to the *Workers Compensation (Hearing Aid Fees) Order (No 2) 2020*.

**Conclusion**

59. For all the reasons above, I accept that the TV Adaptor and Sound Clip accessories for the Applicant’s hearing aids are reasonably necessary as a result of noise induced hearing loss suffered by the Applicant in the course of his employment with a notional date of injury being 6 April 2020 and that the Respondent should pay the costs of those items.

**SUMMARY**

60. In summary, the following findings and orders are made:

The Commission determines:

- (a) The TV Adaptor and Sound Clip accessories for the Applicant’s hearing aids are reasonably necessary medical treatment, as a result of noise induced hearing loss suffered by the Applicant in the course of his employment.

The Commission orders:

- (a) The Respondent to pay the costs of TV Adaptor and Sound Clip accessories for the Applicant's hearing aids in accordance with section 60 of the 1987 Act and the *Workers Compensation (Hearing Aid Fees) Order No 2 2020*.