WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

Matter Number:	**M1-2814/19**
Appellant:	**John Christopher Cuskelly**
Respondent:	**New England Milk Industries Pty Ltd**
Date of Decision:	**8 January 2020**
Citation:	**[2020] NSWWCCMA 2**

Appeal Panel:	
Arbitrator:	**Mr Brett Batchelor**
Approved Medical Specialist:	**Dr Paul Niall**
Approved Medical Specialist:	**Dr Henley Harrison**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 August 2019, John Christopher Cuskelly (the appellant/Mr Cuskelly) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Joseph Scoppa, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 23 July 2019.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel (the Panel) has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. The appellant left school at 15 and was employed as a builder's labourer for 12 Months. He was exposed to a high level of noise from machinery including electric saws. Thereafter, he was employed in a cordial factory where he was exposed to the noise of bottle washers and bottle conveyor belts without ear protection. In approximately 1964 Mr Cuskelly worked for the respondent where he was exposed to the noise of bottle washers, bottle conveyor belts and the packing of bottles. No ear protection was supplied.

7. Thereafter, the appellant went to New Zealand where he engaged in the following employment:

    (a) Watties Cannery, which was very noisy with tin cans on conveyor belts and heavy machinery;

    (b) Tomona Meat works, from 1965 to 1966, where he was exposed to the noise of meat chains and machinery, and buckets clanging on a rail, and

    (c) as a shearing contractor from 1966 to 1967.

8. Mr Cuskelly returned to Australia in 1968. He worked for the Postmaster General's Department (which subsequently became Telecom and later Telstra) from 1968 to 2008. In this employment he was working in noisy situations both above and below ground, in the Sydney CBD, working in footpath manholes, and later in Tenterfield where he was exposed to the noise of bulldozers, backhoes and "ditch witch" machines. He also worked in the vicinity of noisy jackhammers. The appellant wore protection in the form of earmuffs after 2002.

9. From 2008 until (on the evidence) 2018 Mr Cuskelly has been self-employed on his property where he has been exposed to the noise of a tractor, chainsaws, angle grinders and shearing machines. He has worn ear protection whenever exposed to loud noise. Recreationally, the appellant has been exposed to the occasional noise of a motor mower, whipper snipper and chain saw, but wears earmuffs. He has fired .22 rifles occasionally over the years.

PRELIMINARY REVIEW

10. The Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

11. As a result of that preliminary review, the Panel determined that it was not necessary for the worker to undergo a further medical examination because neither the appellant nor the respondent sought re-examination of the worker, and the Panel considers that there is sufficient evidence in the appeal papers on which to base its decision.

EVIDENCE

Documentary evidence

12. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

13. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

14. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel.

Appellant

15. The appellant notes that at p 6 of the MAC the AMS made a deduction for employment outside of New South Wales which post-dated the appellant's employment with the respondent. The appellant contends that the AMS did not have the power to make such a deduction.

16. The appellant draws attention to s 319 (c), (d) and (e) of the 1998 Act, submitting that there is no provision corresponding to subsection (d) in relation to post injury conditions.

17. Alternatively, the appellant submits that if the AMS did have the power to make the deduction, he did not have the power to make the deduction based upon either a mathematical calculation or upon epidemiological data, and that if such a deduction was to be made it had to be made on a proper evidentiary basis. The appellant notes that the AMS has made the deduction based upon a calculation which in turn was based upon an assumption as referred to in subparagraph (viii) on page 6 of the MAC.

18. The appellant submits that the use of epidemiological data, used by the AMS to estimate hearing loss resulting from hearing loss in New South Wales is impermissible, relying on the authority of *Seltsam Pty Ltd v McGuiness; James Hardie & Coy Pty Ltd v McGuiness (Seltsam)*[1].

19. The appellant notes the provisions of s 368 of the 1998 Act (Members of Commission) and that an AMS does not constitute the Commission, and therefore section 354(2) does not apply to an AMS.

Respondent

20. The respondent submits that, in response to the submission that the MAC contains a demonstrable error, the matters set out in the Application to Appeal Against a Decision of Approved Medical Specialist do not form the basis for a ground of appeal, and the MAC does not contain a 'demonstrable error' within the meaning of s 327(d) of the 1998 Act.

21. The respondent submits that, in determining the degree of permanent impairment as a result of an injury in the nature of industrial deafness and in determining the nature and extent of the hearing loss suffered by a worker, the degree of hearing loss due to periods of subsequent noisy employment outside the jurisdiction of New South Wales constitutes a legitimate avenue of inquiry. The respondent disputes the appellant's contention that the AMS did not have power to apply a deduction from the assessment of binaural hearing loss for losses resulting from employment outside of New South Wales which post-dates the deemed date of injury.

22. Further, the respondent disputes the appellant's contention that *Seltsum* is authority for the proposition that it is impermissible to use epidemiological data to estimate the hearing loss resulting from employment in New South Wales. It submits that it was held in that case that epidemiological evidence that exposure to a substance is a possible cause of injury may be used to establish that the exposure is the legal cause of injury. The respondent submits that the decision in *Seltsum* has no relevance to the issues raised in this appeal.

23. The respondent submits that the MAC is correct and should be confirmed.

[1] [2000] NSWCA 29.

Appellant in response

24. The appellant accepts the respondent's submissions that there needs to be an appropriate adjustment for employment outside of the jurisdiction notwithstanding that the employment occurred after the notional date of injury. This is in accordance with the decision of *Schofield v Abigroup Ltd (Schofield)*[2]. However, the appellant submits that the first issue is whether the AMS has the power to make that adjustment, or whether that adjustment must be made by the Commission based on admissible evidence.

25. The appellant notes that the AMS in [10 a.(vi)] of the MAC used the epidemiological data applied by Dr Fernandes in his supplementary report dated 25 June 2018. On p 2 of that report Dr Fernandes used the epidemiological data which shows the progressive level of hearing loss after noise of a certain duration and intensity, to estimate the maximum amount of hearing loss that could be expected to result from the noise exposure of three years. The appellant submits that Dr Fernandes has not identified the levels of the *certain duration and intensity* (emphasis in original) referred to in ISO 1999 and has not discussed how those levels compare to the actual levels to which the appellant was exposed.

26. The appellant submits that there is no indication that Dr Fernandes has assessed the epidemiological data against the facts of the present case in order to support his opinion, nor is there any indication that the AMS has done so. The appellant submits that the deduction made by the AMS, was based upon assumption rather than on a factual basis.

27. The appellant relies on what Garling J found at [99]-[110] in *Pereira v Siemens Ltd.*[3]

FINDINGS AND REASONS

28. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made. An Appeal Panel is limited to determining error as alleged by the appellant but must assess in accordance with the Guidelines. Once error is made out, the Panel may "review" the MAC.

29. In *Campbelltown City Council v Vegan* [4]the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

30. As noted above at [15]-[16], the appellant submits that the AMS did not have power to make a deduction for employment outside New South Wales which post-dated the appellant's employment with the respondent. He makes an alternative submission in the event that there is a finding that the AMS did have such a power.

31. In his submissions in response to the respondent's submissions the appellant accepts that there needs to be an appropriate adjustment for employment outside the jurisdiction, notwithstanding that the employment occurred after the notional date of injury, but maintains its submission that the AMS does not have power to make this adjustment. It still relies on the issue that the adjustment must be made by the Commission based on admissible evidence, having noted in its primary submission that, in accordance with s 368 of the 1998 Act, an AMS does not constitute the Commission. Therefore s 354(2) of the 1998 Act, which provides that the Commission is not bound by the rules of evidence, but may inform

[2] (2016) NSWSC 954
[3] [2015] NSWSC 1133.
[4] [2006] NSWCA 284.

itself on any matter in such manner as the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits, does not apply to an AMS.

32. The respondent relies on *Schofield* to submit that the AMS does have power to apply a deduction from the assessment of binaural hearing loss for losses resulting from employment outside New South Wales which post-dates the deemed date of injury.

33. In *Schofield*, a hearing loss case, Fullerton J made it quite clear that an AMS was required to make an appropriate adjustment for injury that was the result of the worker's employment after the deemed date of injury in the course of employment outside the jurisdiction. Her Honour said at [33]:

> "I regard the construction of s 319(c) of the 1998 Act as it applies in the context of the operation of s 17 of the 1987 Act for which the first defendant contends as the correct construction. That is, that as the plaintiff's last employer in New South Wales at the date of the Notice of Injury, the first defendant was liable under s 17(1)(c)(ii) for the injury to the plaintiff's hearing that had occurred 'in one blow' as at the deemed date of injury by a gradual process predating that date. Accordingly, in assessing the degree of permanent impairment as a result of **that** injury, the Approved Medical Specialist was required to make an appropriate adjustment for injury that was the result of the plaintiff's employment after the deemed date in the course of employment outside the jurisdiction."

34. Section 319(c) of the 1998 Act includes in the definition of "medical dispute" the "degree of permanent impairment of the worker as a result of an injury." In this case the injury is that which is deemed to have occurred on 1 January 1964.

35. The Panel finds that the AMS had jurisdiction to make an appropriate adjustment for injury that was the result of his employment outside New South Wales after 1 January 1964.

36. The appellant takes issue with the use of epidemiological data by the AMS to make a deduction for injury that was the result of employment outside New South Wales and submits that such a deduction, if it was to be made, needed to have a proper evidentiary basis.

37. In *Pascoe v Mechita Pty Ltd*[5] the reliance upon ISO tables 1999 to 2013 (ISO 1999) by the medical appeal panel, whose decision was under challenge in the Supreme Court, was held not to have been permissible as the plaintiff (worker) in that case had been denied procedural fairness by not having been given the opportunity to make submissions on the use by the appeal panel of ISO 1999. In this case the appellant has made submissions in respect of the epidemiological data used by Dr Fernandes and adopted by the AMS.

38. In *Seltsum* Spigelman CJ held at [49] that:

> "Epidemiology is the study of the distribution and determinants of disease in human populations. It is based on the assumption that a disease is not distributed randomly in a group of individuals. Accordingly, subgroups may be identified which are at increased risk of contracting particular diseases."

39. The Panel accepts the respondent's submission that *Seltsum* is not authority for the submission by the appellant that the use of epidemiological data, in this case the ISO 1999, is impermissible. In accordance with the finding in *Seltsum,* epidemiological data may be used to establish that the exposure to a substance as a possible cause of injury. That was a case involving exposure to carcinogenic substances. It is not relevant to the issue raised in the appeal in this matter.

[5] [2019] NSWSC 454.

40. The Panel notes that the AMS stated at [10.a.(vi)] of the MAC that there is no standard methodology of assessing such cases of industrial deafness as in the present matter. He does refer to the

> "Epidemiological Data from ISO 1999: Australian Standards, as was applied by Dr Fernandes in his supplementary report dated 25 June 2018, where he assessed the maximal occupational BHL sustained in NSW at 2.0%."[6]

41. The AMS then goes on to state in the next paragraph [10.a.(vii)] that he prefers calculation on the years (of exposure) in this case because Mr Cuskelly advised that the exposure to noise throughout his working life was relatively stable. Using the years of exposure method, the AMS then calculates the appellant's hearing loss at 1.41% that can be attributed to industrial deafness sustained as a result of noisy employment in NSW.

42. At [10.a.(ix)] of the MAC the AMS expresses his awareness that industrial deafness does not progress arithmetically with each year of exposure, and that relatively more industrial deafness occurs during the first five years than in later years. However, the Panel recognises that this is generally true only of loss expressed in dB_{HL} terms. (Hearing level (HL) is the sound pressure level produced by an audiometer at a specific frequency. It is measured with reference to audiometric zero. In decibels (dBHL) it refers to the logarithmic ratio of a hearing level – here, the hearing threshold value - to audiometric zero.) When losses are converted, as required, to binaural hearing impairment percentages (BHI) these percentages increase generally linearly with equal hazardous exposures over time (see [44] hereunder). The AMS then however adopts the assessment of Dr Fernandes of probable BHL (binaural hearing loss) of 2%, arrived at by using the epidemiological data. He "would accept this methodology as being a better estimate." However, the Panel does not agree with this.

43. The medical members of the Panel are of the view that, in a difficult case such as this, there are only two ways of assessing hearing loss. They are the years of exposure (or in the Panel's view, best described as the "linear" or "temporal") method, or by using the epidemiological data (ISO 1999) used by Dr Fernandes. The Panel notes that the BHL assessed by Dr Fernandes is similar to that assessed by the AMS using the linear or temporal method.

44. The Panel notes that both methods of assessment have limitations. However, in this regard it agrees with the initial preference expressed by the AMS, that in this case the linear method of assessment is appropriate. This is because although there is greater industrial deafness at the higher tones during the early years of exposure (in dB_{HL} terms), but this tends to linearity (in BHI terms) as the lesion expands through time. This is because the cochlear noise lesion spreads temporally to progressively lower frequencies to which the NAL Table assigns higher values. The Panel also notes the history that Mr Cuskelly provided to the AMS that exposure to noise throughout his working life was relatively stable. This is supportive of the linear view. The epidemiological view (in ISO 1999) of this kind of apportionment is weakened by its never having been definitively canvassed in the published medical literature and because it is not an individual assessment being rather a central measure (an average) with limited account of actual real dispersion about a mean.

45. For this reason, the Panel accepts the assessment of the AMS, at [10.a.(viii)] of the MAC, that the appellant has sustained a BHL of 1.41% as a result of noisy employment in NSW. Thus, in the Panel's opinion the AMS was in error in adopting the assessment of 2% made by Dr Fernandes using the epidemiological method and would better have adopted his own original assessment.

[6] Appeal Papers p 29.

46. The Panel accepts the criticism by the AMS at [10.c.(iii)] of the MAC[7] of the assessment of Dr MacArthur. Further Dr MacArthur does not appear to have made an adjustment for noisy employment outside the jurisdiction which post-dates the notional date of injury.

47. The AMS acknowledges at [10.a.(v)] of the MAC that s 323 (of the 1998 Act) does not apply in this matter because there is a history of long term occupational noise exposure after cessation of employment in NSW. The AMS has included in the fourth column of Medical Assessment Certificate Table 3[8] the percentage loss of BHI, 32.1%, unrelated to industrial deafness (see [11.b.] of the MAC[9]).

48. For these reasons, the Appeal Panel has determined that the MAC issued on 23 July 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons. This certificate is in different form to the certificate attached to the MAC referred to above at [47]. This amended form of certificate makes it quite clear in the fourth (descending) column that the deduction of 32.1% includes non-work related conditions, in this case the hearing loss attributable to the appellant's employment which post-dated his employment in NSW.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

[7] Appeal Papers p 31.
[8] Appeal Papers p 35.
[9] Appeal Papers pp 31-32.

WORKERS COMPENSATION COMMISSION

MEDICAL ASSESSMENT CERTIFICATE

Table 3 - Assessment in accordance with the Table of Disabilities and 1976 CAL Tables for industrial deafness received before 1 January 2002

This Certificate is issued pursuant to section 325 of the *Workplace Injury Management and Workers Compensation Act* 1998.

Matter Number: **2814/19**
Applicant: **John Christopher Cuskelly**
Date of Assessment: **23 July 2019**

Body Part	**Hearing loss**
Date of injury	1 January 1994
Percentage loss of BHI (total BHI, as at the date of examination, from all causes - noise, injuries, conditions and abnormalities)	55.5%
Less proportion due to pre-existing injury, abnormality or condition including non work-related conditions (EXCLUDING previous claims for industrial deafness):	32.1%
Less proportion due to Presbycusis	6.6%
Total percentage loss of Industrial Deafness (including all previous claims as per Table of Disabilities)	16.8% - 1.4% of which sustained in NSW
Percentage loss (previous claims for industrial deafness)	
Percentage loss of industrial deafness for referred injury	**1.4%**

Brett Batchelor
Arbitrator

Dr Paul Niall
Approved Medical Specialist

Dr Henley Harrison
Approved Medical Specialist

8 January 2020

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar