WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-973/20**
Appellant:	**Kevin Gordon Reid**
Respondent:	**Australian Timber Shutters Pty Ltd**
Date of Decision:	**19 January 2021**
Citation No:	**[2021] NSWWCCMA 10**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Henley Harrison**
Approved Medical Specialist:	**Dr Robert Payten**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 October 2020, Kevin Gordon Reid (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Sylvester Fernandes, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 14 September 2020.

2. The appellant relies on the following ground of appeal under s 327(3)(d) 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 has conducted a review of the original medical assessment but limited to the grounds of appeal on which the appeal is made.

4. The WorkCover Medical Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 . An Appeal Panel determines its own procedures in accordance with the WorkCover Medical 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. Mr Reid commenced employment with Australian Timber Shutters Pty Ltd (the respondent) in June 2006 as a Metal Shutter Assembler. He had been born in New Zealand in 1949 and completed an apprenticeship as a fitter with New Zealand Railways. He came to Australia in 1970 and worked for a number of employers. He was also self-employed for a period of time.

7. It was not until Mr Reid commenced employment with the respondent that he was exposed to noise which was of a nature to give rise to loss of hearing by way of a gradual process.

8. Mr Reid ceased full-time work with the respondent in January 2019 but continued in his employment on a casual basis until June 2019 when he ceased work.

9. Mr Reid noticed problems with his hearing. He was assessed in August 2019 by an Ear, Nose and Throat Specialist, Dr Dhasmana, who tested Mr Reid's hearing and assessed occupational hearing loss of 28.2%. Dr Dhasmana assessed Mr Reid's total occupational binaural hearing impairment including tinnitus and after presbycusis correction at 26.3% which equated to 13% whole person impairment (WPI).

10. Mr Reid was assessed by Dr Scoppa on behalf of the respondent. Dr Scoppa assessed Mr Reid's total occupational binaural hearing impairment, including tinnitus and after presbycusis correction, at 15.9% which equated to 8% WPI.

11. The dispute as to the extent of impairment was referred to the AMS who assessed 12.8% total occupational binaural hearing impairment, including allowance for tinnitus and correction for presbycusis, equating to 7% WPI.

PRELIMINARY REVIEW

12. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

13. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because sufficient information was available to the Panel to enable the appeal to be determined.

EVIDENCE

Documentary evidence

14. 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

15. 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

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

17. In summary, the appellant submits that the AMS had incorrectly assessed hearing loss in the 500, 1000 and/or 1500 Hz ranges as not caused by noise exposure and that the AMS had incorrectly assessed Mr Reid's tinnitus "by failing to take into account the evidence and documents relied upon by both the appellant and the respondent."

18. In reply, the respondent submits that the AMS exercised appropriate clinical judgement in excluding losses at frequencies below 2000 Hz and in assessing the additional impairment in respect of tinnitus.

FINDINGS AND REASONS

19. 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.

20. In *Campbelltown City Council v Vegan,*[1] 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.

Assessment of Hearing Loss.

21. The appellant noted that the AMS had recorded that Mr Reid had been exposed to loud industrial noise over a period of time in the workplace which had contributed to a gradual and progressive hearing loss.

22. The appellant noted the symptoms reported by Mr Reid and the results of physical examination by the AMS.

23. The appellant submitted that "the AMS's findings on examination did not seem to indicate any alternative cause for the lower frequency hearing loss." The appellant also noted the summary of injuries and diagnoses:

> "1. Noise induced hearing loss in the upper and treble frequencies and
>
> 2. an excess loss of uncertain origin (non occupational*) in the bass and lower middle frequencies and
>
> 3. Age-related hearing loss.
>
> [Note]: **There are many possible causes of non-occupational hearing loss. The validity of the finding of a non-occupational contribution to a hearing loss is not conditional on the identification of the medical aetiology thereof, be that identification precise or otherwise. Nor is it necessarily clinically difficult to assess that a component or all of the hearing loss (including where it may be of uncertain medical aetiology or deafness due to an unknown cause or causes) is non-occupational. This depends on the circumstances of the particular case. Also, in hearing loss cases the deduction is not for pre-existing conditions, but it is for hearing loss not due to noisy employment. It can usually be calculated exactly, and the 10% deduction used in other compensation claims is not often needed. Thus, in this case there is no necessity to explain the cause of the low tone hearing*."

24. The appellant further submitted that there was no explanation as to the meaning of the expression "immission levels" used in the phrase "type and duration of noise exposure (immission levels)". The appellant noted that there was no noise survey or "detailed analysis of periods of exposure to noise in the MAC" and submitted "The AMS has considered immission (exposure) levels to noise without any factual basis to do so."

25. The appellant submitted that the audiogram attached to the MAC "shows a bilaterally symmetrical and progressive [*? hearing loss*] from the low to the higher frequencies", noting that the AMS had excluded losses below 2000 Hz is unrelated to noise exposure. The basis of that assumption was not explained in circumstances where this exclusion had the effect of "reducing or extinguishing entitlement" and was contrary to the examples provided in the Guidelines

[1] [2006] NSWCA 284.

26. The shape of the audiogram, it was submitted, indicated noise induced hearing loss. The appellant submitted "The appellant submits that the absence of the explanation of the basis for the assumption in circumstances where the loss otherwise appears to satisfy what typically be considered a noise induced hearing loss and, as such, constitutes demonstrable error."

27. The appellant noted that he had been employed in noisy environment for 13 years. The appellant concluded:

> "Whilst as a matter for medical opinion, the appellant submits that a prolonged period of noise exposure should not stand as a prerequisite for the consideration of the lower frequencies in assessment of his noise induced hearing loss at each case (and the assessment of each audiogram) should be considered on its own merits."

28. The Panel does not accept that the AMS has failed to provide an explanation for his assessment of occupational hearing loss. As noted by the respondent in its submissions, the AMS considered that "the configuration of the audiogram and the relation of the losses in the low frequencies to the higher frequencies is not entirely consistent with occupational hearing loss". The Panel agrees with that assessment. The loss at the lower frequencies is disproportionate to the loss at 2000 Hz. The audiogram obtained by the AMS strongly suggests that losses below 2000 Hz were not caused by exposure to noise in the course of employment. The AMS states that "immission levels" are the type and duration of noise exposure.

29. The reasons for the assessment by the AMS are set out in the MAC. The AMS noted that there had been a history of 13 years of exposure to noise in the workplace. In the Table appearing at page 3 of the MAC, the AMS noted that for 13 years Mr Reid had been exposed to about 40 hours per week of predominantly continuous noise, noting the criteria "employees within 1 m of each other have to raise voice (or shout) to be heard". The Table adequately summarises the noise levels as well as the number of years throughout which Mr Reid was exposed (the "immission levels").

30. The history recorded by the AMS and those observations adequately explain the AMS's assessment when viewed in the light of the audiogram. The impact of noise on hearing is a function both of the loudness of the noise and the length of time to which hearing is exposed. The higher frequencies are the earliest affected and as exposure continues, so the lower frequencies gradually become affected. The appellant referred to the examples contained in Chapter 9 of the Guidelines. Those examples are apposite as they illustrate the point that longer exposure can indeed affect the lower frequencies. Example 9.1 is that of a boilermaker who had 0.8% BHI at 1000 Hz and 1.4% BHI at 1500 Hz after exposure over 30 years

31. Example 9.2 is that of a steelworker with no loss at 1000 Hz and 1.0% loss at 1500 Hz after exposure over 30 years. Example 9.3 involves a boat builder with hearing loss attributable both to noise and solvents over a period of 35 years. There is no loss attributable to noise at 500 or 1000 Hz and 1.4% BHI at 1500 Hz. The examples 9.6 and 9.7 respectively involve a history of 30-year exposure and 20-year exposure with no occupational BHI at 500 Hz or 1000 Hz and 1% occupational BHI at 1500 Hz. Read as a whole the MAC adequately explains the assessment of the AMS.

32. The Panel accepts that exposure over a period of 13 years at the level described by Mr Reid (having to shout to be heard) would be insufficient to give rise to binaural hearing impairment at frequencies below 2000 Hz. This is borne out by the slope of the audiogram which is not typical of noise induced hearing loss below 2000 Hz and suggests a different cause.

33. The Panel agrees with the view of the Medical Appeal Panel in *Swan v Sydney County Council*[2], cited by the respondent, where the Panel in that matter said [at 28]: "There is no requirement for an AMS to identify the causes of non-occupational hearing loss. The causes are various and the AMS is not required, or indeed able, to investigate non-occupational hearing loss". The AMS did not fall into error in not attempting to identify the source of the hearing loss below 2000 Hz.

34. Had error by way of failure to explain his reasoning been established, the Panel would have arrived at the same conclusion as the AMS on the evidence. However, the Panel is satisfied that the MAC adequately sets out the basis upon which the AMS assessed the level of impairment due to occupational hearing loss and no error is demonstrated.

Tinnitus

35. The appellant submitted that the AMS had failed to explain the basis of his assessment of 2% WPI in respect of tinnitus. The appellant pointed to the opinions of the independent medical experts whose reports were in evidence, Dr Scoppa and Dr Dhasmana, who had both assessed 3% in respect of effects of severe tinnitus. The appellant submitted:

> "The appellant submits that the AMS's assessment and opinion as to the severe tinnitus is provided in the MAC, absent rationale for reasoning for distinguishing from the opinions of the medicolegal experts, in circumstances where the assessment has the effect of reducing or extinguishing the appellant's entitlement."

36. The appellant noted the appellant's statement in which he said that he had elected to retire "because of the degree of noise exposure within the respondent's premises". Mr Reid went on to say:

> "I have noticed my hearing problems and the ringing/buzzing noise in my ears, which I understand is called tinnitus, has become much worse. I have noticed it more so since I have retired, because I am not working and therefore, I can't drown out the ringing/buzzing sound with more noise."

37. The appellant noted that "The appellant has deposed to the effects of his severe tinnitus in the statement of evidence attached to the ARD." The appellant submitted "The AMS does not appear to have taken into account the evidence deposed by the appellant."

38. Mr Reid said:

> "I believe that the ringing in my ears creates a further problem with my hearing because it further disturbs the limited hearing I have. It was in part because of the ringing in my years that I sought advice on my hearing impairment from hearing aid provider Hearing Life because I was keen to obtain treatment not only for my hearing loss but also the ringing in my ears."

39. Mr Reid provided a tinnitus questionnaire in which he set out his perceived problems with tinnitus.

40. The respondent submitted: "the respondent submits that the AMS has provided adequate reasoning for his conclusion and the path of reasoning is clearly identifiable upon reading the MAC in its entirety." The respondent noted that the AMS had taken an appropriate history with regard to tinnitus.

41. The AMS noted "Tinnitus: for 2.5 years, constant, unmaskable, high-pitched, does disturb his sleep pattern, does interfere with activities of daily living and he has not sought medical treatment for same"

[2] [2016] NSW WCCMA 57.

42. The Panel accepts that resort to hearing aids can constitute appropriate treatment for tinnitus and the observation by the AMS that Mr Reid had not sought medical treatment for his tinnitus is inconsistent with Mr Reid's statement.

43. There is no evidence to suggest that Mr Reid had not, in fact, been motivated at least in part by the presence of tinnitus to seek treatment by way of the provision of appropriate hearing aids and to that extent the conclusion of the AMS appears to be based on a finding of fact that was not open in the circumstances. The Panel is satisfied that the AMS has not taken into account the evidence of Mr Reid in his statement in this regard. The view that Mr Reid had not sought treatment for his tinnitus appears to form part of the reasoning of the AMS in assessing the degree of severity of tinnitus and accordingly demonstrable error has been established.

44. The assessment of the degree of "severe tinnitus" is a matter of clinical judgement. The first step requires that the AMS determine that the degree of tinnitus suffered by the worker constitutes "severe tinnitus". The AMS has appropriately accepted that Mr Reid suffers "severe tinnitus".

45. The Guidelines permit the addition of from 1% to 5% to the assessed binaural hearing impairment depending on the degree of severity. The Panel is satisfied that the assessment of the respective independent medical experts, Dr Scoppa and Dr Dhasmana, accurately reflect the statement of the applicant and an assessment of an additional 3% in respect of tinnitus is appropriate.

46. Accepting the assessment of binaural hearing impairment (BHI) of the AMS at 26.3%, the extent of WPI attributable to industrial deafness is as follows:

    Total BHI: = 26.3%

    Less non-related loss 10% = 16.3%

    Less presbyacusis correction 5.5% = 10.8%

    Add allowance for severe tinnitus, 3% = 13.8%

    Adjusted total % BHI = 13.8%

47. Table 9.1 provides that binaural hearing impairment of from 12.6% to 14.4% is to be assessed at 7% WPI which is the same level of impairment as assessed by the AMS. Accordingly, it can be seen that the error with respect to assessment of tinnitus does not affect the overall assessment arising from the subject injury, but nevertheless requires adjustment to the Table.

48. For these reasons, the Appeal Panel has determined that the MAC issued on 14 September 2020 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **973/20**
Applicant: **Kevin Gordon Reid**
Respondent: **Australian Timber Shutters Pty Ltd**

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act* 1998.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Sylvester Fernandes and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - calculation of whole person impairment (WPI) for industrial deafness as set out in the Table immediately below in accordance with Chapter 9 of the Guidelines for the Evaluation of Permanent Impairment and 1988 NAL Tables:-

Notional date of injury	Frequency Hz	Left dB HL Air Bone	Right dB HL Air Bone	Total % BHI	Occupational % BHI
17/06/2019	500	25 25	25 25	1.4	0
	1000	30 30	30 30	3.5	0
	1500	40 35	35 35	5.1	0
	2000	45 40	45 40	6.1	6.1
	3000	55 55	50 50	4.9	4.9
	4000	60 55	55 50	5.3	5.3
TOTAL % BHI: 26.3				26.3	16.3
Less Pre-existing non-related loss: 10.0					
Less Presbyacusis correction: 5.5					
Add % of severe tinnitus: 3.0					
Adjusted total % BHI: 13.8					
Resultant total BHI of 13.8 % = 7% whole person impairment (Table 9.1)					

The above assessment is made in accordance with the Guidelines for the Evaluation of Permanent Impairment for injuries received after 1 January 2002.

Mr William Dalley
Arbitrator

Dr Robert Payten
Approved Medical Specialist

Dr Henley Harrison
Approved Medical Specialist

19 January 2021

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar