WORKERS COMPENSATION COMMISSION

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

Matter No:     WCC3721-2004
Appellant:     John Mullard
Respondent:    Department of Community Services (Stockton Centre)
Date of Determination: 29 March 2005

Appeal Panel:
Arbitrator:    Ms Eraine Grotte
Approved Medical Specialist:  Dr Lorraine Jones
Approved Medical Specialist:  Dr Brian Williams

BACKGROUND TO THE APPLICATION TO APPEAL

On 20 October 2004 John Mullard (‘the Appellant’) made an application to appeal against a
medical assessment (‘the appeal’) to the Registrar of the Workers Compensation Commission (‘the
Commission’). The medical assessment was made by Dr Raymond Carroll, an Approved Medical
Specialist (‘the AMS’) on 27 September 2004.

The Respondent to the Appeal is the Department of Community Services (‘the Respondent’). The
workers compensation insurer in this matter is NSW Treasury Managed Fund (‘the Insurer’).

The matter involves a claim to entitlement under the workers compensation legislation (the
Workers Compensation Act 1987 (‘the 1987 Act’) and the Workplace Injury Management and
Workers Compensation Act 1998 (‘the 1998 Act’)). The WorkCover Medical Assessment
Guidelines (‘the Guidelines’) set out the practice and procedure in relation to appeals to Medical

The Appellant claims, in summary, that the medical assessment by the AMS should be reviewed
on the following grounds (s 327(3) of the 1998 Act):
- the assessment was made on the basis of incorrect criteria,
- the medical assessment certificate contains a demonstrable error.

It appears to the Registrar that at least one of the grounds for appeal exists in accordance with
section 327(4) of the 1998 Act and the Registrar has referred the Appeal to this Appeal Panel (‘the
Panel’) for review of the original medical assessment.

The Appeal was made within 28 days of the date of the medical assessment.
PRELIMINARY REVIEW

The Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines.

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 it was the Panel’s view that there was sufficient evidence before it to enable it to make its determination.

Fresh Evidence

Section 328(3) of the 1998 Act provides that the Appeal Panel is not to receive evidence that is fresh evidence, or evidence in addition to, or in substitution for, the evidence received in relation to the medical assessment appealed against, unless the evidence was not available to the Appellant before the medical assessment, or could not reasonably have been obtained by the Appellant before the medical assessment.

EVIDENCE

Documentary Evidence

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

For the Appellant:
- Terms of Settlement dated 31 March 1990.
- Statement of the Worker

For the Respondent:

The Appellant’s Medical Evidence

The medical evidence is not repeated here in full, however, in summary the relevant medical evidence of the Applicant is as follows:

Dr Finlay-Jones examined the Appellant on 15 October 2003. He obtained a history from the Appellant of deafness progressing for sometime. The Appellant told Dr Finlay-Jones that people have to shout at him and that the telephone is a problem for him and that he has to lipread at times. He also has bilateral tinnitus which is worse at night. According to his report the Appellant told Dr Finlay-Jones that he has worked as a laundryman at the Stockton Centre for 10 years in the noise of “bone-rattlers” which were very old large machines. Prior to this he worked as a boilermaker for 27 years at BHP and left that employment in 1991. Following his examination Dr Finlay-Jones was of the view that the Appellant has a bilateral sensori-neural hearing loss which has been caused by the noise of industry in the order of 37.7%
The medical evidence is not repeated here in full, however, in summary the relevant medical evidence of the Respondent is as follows:

Dr Dhasmana examined the Appellant on 21 July 2003. Dr Dhasmana obtained a similar history to Dr Finlay-Jones. Following his examination of the Appellant Dr Dhasmana was of the view that the pure tone audiogram showed atypical flat bilateral mixed hearing loss with significant conductive component. He noted the higher frequencies of 2000, 3000 and 4000 cps by bone conduction were probably consistent with the diagnosis of acoustic trauma. In his opinion the Appellant had a binaural hearing impairment of 3.2% probably consistent with diagnosis of acoustic trauma and which is considered to be permanent. This translated to 0% whole person impairment. He noted that a “non-compensable component of undetermined etiology was 6%”.

DECISION MADE AFTER PRELIMINARY REVIEW WITHOUT HOLDING AN ASSESSMENT HEARING

The parties agreed to the determination of the matter without an Assessment Hearing.

SUBMISSIONS

Both parties made written submissions, the Appellant’s dated 15 October 2004 and the Respondent’s undated but received by the Commission on 4 November 2004.

The Appellant submitted as follows:

(i) The assessment was made on the basis of incorrect criteria. It was submitted that Dr Carroll supports the Appellant’s claim that his loss is due to industrial deafness and that there is no other injury or causation for deafness. It was submitted that Dr Carroll concluded “it is probable that there is some noise induced hearing loss and upon my test result I would assess it as being probably represented by the threshold elevations at 2000hz and above in either ear as measured by bone conduction. The remainder of the sensorineural hearing impairment is of uncertain origin.”

(ii) It was submitted that Dr Carroll is incorrect in making a deduction of 22.2% pursuant to section 323(2) of the Workplace Injury Management Act. It was submitted that section 323(2) provides that “if the extent of the deduction under this Section (or part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence) it is to be assumed (for the purpose of avoiding disruption) that the deduction (or the relevant part of it) is 10% of the impairment unless the assumption is at odds with the available evidence”. It was submitted that the maximum deductible amount should be 10% of the hearing loss which leaves the Appellant with a compensable amount of hearing loss of 23.31%.

(iii) It was submitted that the failure to only deduct 10% also amounts to a demonstrable error.

(iv) It was submitted that the Appeal should be dealt with on the papers.

The Respondent submitted as follows:

(i) That Dr Carroll obtained an unchallenged history from the Appellant and that he conducted his own relevant clinical examination and audiometric assessment.
(ii) It was submitted that Dr Carroll found a total bilateral hearing loss of 25.9%. He deducted 22.2% for pre-existing/non related loss which left an adjusted bilateral hearing loss of 3.7% which converted to 0% whole person impairment.

(iii) It was submitted that the Appellant has failed to explain how Dr Carroll has based his conclusions on incorrect criteria and that section 323(2) has no place in this appeal. It was submitted that any deduction pursuant to section 323(2) is only applicable if the extent of the deduction will be difficult or costly to determine (because, for example, of the absence of medical evidence) or (for the purpose of avoiding disruption) the deduction is only 10%. However such an assumption is not applicable because medical evidence is present submitted by the Appellant.

(iv) It was submitted that there is no evidence that Dr Carroll erred in the history of the Appellant’s injury or the history of his treatment or subsequent condition. It was submitted that there is no medical evidence submitted with the Appeal stating that Dr Carroll’s examination or his interpretation of his findings on examination or his interpretation of the audiological examination was in error.

(v) It was submitted that the Appeal should be dealt with on the papers.

FINDINGS AND REASONS

17. The role of the Medical Appeal Panel was considered by the Supreme Court in the case of Campbelltown City Council v Vegan [2004] NSW SC 1129. Mr Justice Wood determined that the task of determining whether there has been an appellable error falls to the Registrar. Once the Registrar has determined that an error exists the matter is then referred to the Appeal Panel. The Appeal Panel does not consider whether an error exists. The task of the Appeal Panel is to conduct a review de novo. The review is not limited to errors found. The Appeal Panel is free to conduct a review based on the material properly before it without the need to make any formal findings as to the existence of an error falling within the available grounds of appeal and without being confined to the correction of that error.

17. The Court also held that the Appeal Panel is not obliged to give full reasons. The Panel is of the view however that where its decision will affect the rights of parties it is appropriate to give reasons so that the parties understand the reasons for the decision of the Panel.

18. Although the power of review is far ranging it is nonetheless confined to the matters which can be the subject of appeal. Section 372(2) of the 1998 Act restricts those matters to the matters about which the AMS certificate is binding. This is consistent with the scheme as all other matters are for the determination of the Arbitrator.

19. In this matter the Registrar has determined that at least one of the grounds of appeal exists. The Panel has conducted a review of the material before it and reached its own conclusion.

20. Having considered all the material before it the Panel has determined that the Medical Assessment Certificate should be confirmed for the following reasons:

   (i) Dr Carroll obtained a consistent history from the Appellant worker. He conducted his own clinical examination and audiometric assessment of the Appellant worker. Dr Carroll had regard to all the documentary evidence before him. This is noted in paragraph 6 of the Medical Assessment Certificate.

   (ii) Dr Carroll noted that the results of his clinical examination and audiometric assessment “indicated a relatively flat bilateral sensorineural hearing loss with minor superimposed conductive losses in both ears”. In his opinion “the conductive
components are not noise induced and neither sensorineural configuration is consistent with being so caused due to the flat nature of the impairment”.

(iii) Dr Carroll concluded that “it is probable that there is some noise induced hearing loss present” but that “the remainder of the sensorineural hearing impairment is of uncertain origin”. He calculated this hearing impairment of uncertain origin to be 22.2%.

(iv) Section 323 of the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act) provides:

1. In assessing the degree of permanent impairment resulting from any injury, there is to be a deduction for any proportion of the impairment that is due ….. to any pre-existing condition or abnormality.
2. If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of any absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.
3. The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter.

(v) Accordingly, the deduction of 10% in accordance with section 323(2) of the 1998 Act is only made in circumstances where the extent of a deduction “is difficult or costly to determine” because, for example, there is an absence of medical evidence and the deduction of 10% is not at odds with the available evidence accepted or preferred by the Approved Medical Specialist. In the circumstances of this particular matter, Dr Carroll had medical evidence before him as to the extent of the occupational noise induced hearing loss and the extent of non-noise induced hearing loss. The medical evidence consisted of the medical history obtained by Dr Carroll and his own clinical examination and audiometric findings, which he stated at paragraph 6 of the Medical Assessment Certificate he accepted and upon which he based his assessment. Dr Carroll stated that he preferred his audiogram because he “felt he obtained a valid result”. Dr Carroll found upon his audiogram that in his opinion the “responses were readily volunteered and accurately repeatable” and the results indicated a relatively flat bilateral sensorineural hearing loss with minor superimposed conductive losses in both ears.

(vi) The Panel is satisfied that the sensorineural hearing losses at 2000Hz and above are caused by occupational noise exposure and that the conduction hearing losses, and the sensorineural hearing losses below 2000Hz are not caused by occupational noise exposure and that their cause/causes are of uncertain origin.

(vii) The Panel is not persuaded by the Appellant’s argument that because Dr Carroll stated that any pre-existing condition or abnormality causing any pre-existing non-related hearing losses are of uncertain origin, the maximum deduction should be 10%. The Panel found that Dr Carroll accepted medical evidence and upon this determined firstly part of the hearing loss is related to industrial deafness and secondly, the extent of such loss using correct criteria. Further the Panel found that Dr Carroll accepted medical evidence and upon this determined firstly part of the hearing loss of related to pre-existing condition/s/abnormality/ies and secondly the extent of such hearing loss using correct criteria. The Panel found that a deduction of 10% using section 323(2) would be at odds with the medical evidence accepted by Dr Carroll.

(viii) As stated earlier in this decision Dr Carroll assessed the hearing loss due to a “pre-existing injury, abnormality or condition that is not industrial deafness” at 22.2% and he therefore, in accordance with the provisions of section 323(1) of the 1998 Act
properly deducted this amount from the total binaural hearing loss of 25.9%, leaving a
3.7% binaural hearing loss which converted to 0% whole person impairment.

(ix) Dr Carroll assessed the permanent impairment pursuant to the whole person
impairment regime correctly in accordance with the medical assessment referral which
nominated the date of injury as the date on which the claim was made as agreed by the
parties.

Accordingly, for the reasons set out in this statement of reasons the Panel has determined that the
Medical Assessment Certificate dated 27 September 2004 should be confirmed.

DECISION

For the reasons set out in this statement of reasons, the decision in this matter is that:
the Medical Assessment Certificate given in this matter should be confirmed.

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

REGISTRAR