WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1416/20**
Applicant: **Maxwell Quick**
Respondent: **Newcastle City Council**
Date of Determination: **19 May 2020**
Citation: **[2020] NSWWCC 163**

The Commission determines:

1. The Respondent pay the Applicant's section 60 expenses in respect of the provision of hearing aids upon production of accounts and/or receipts in accordance with the applicable Workcover Hearing Aids Fee Order.

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

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application), the applicant, Mr Maxwell Quick, seeks compensation under section 60 of the *Workers Compensation Act 1987* (the 1987) in respect of the provision of hearing aids as a result of injury on the form of industrial deafness deemed to have occurred in 2006.

2. The respondent is Newcastle City Council (the Council). The Council was self- insured at the relevant time by Council of the City of Newcastle for the purposes of workers compensation.

3. The Council denied liability for the claim for hearing aids.

ISSUES IN DISPUTE

4. There is no dispute that Mr Quick has suffered injury in the form of industrial deafness or sensorineural loss which is agreed deemed to have occurred in 2006 and that the Council is the last noisy employer.

5. Mr Quick seeks an order under section 60 of the 1987 Act in respect of the provision of hearing aids as a result of the injury deemed to have occurred in 2006.

6. The Council disputes that hearings aids are reasonably necessary as a result of the injury agreed deemed to have occurred in 2006. The Council seeks that an award be made in its favour.

7. In the event Mr Quick is successful the parties agree on the form of order as follows:

> "The Respondent pay the Applicant's section 60 expenses in respect of the provision of hearing aids upon production of accounts and/or receipts in accordance with the applicable Workcover Hearing Aids Fee Order."

PROCEDURE BEFORE THE COMMISSION

8. The parties attended a conciliation arbitration by telephone on 16 April 2020. The parties were both legally represented by counsel. Mr Quick was represented by Ms Grotte of counsel and the Council was represented by Mr Doak of counsel. Conciliation took place however the parties were unable to come to a resolution of the matter. I'm 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've 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 entire dispute.

EVIDENCE

Documentary evidence

9. The following documents filed on behalf of each party were admitted into evidence before the Commission by consent and taken into account in making this determination:

For Mr Quick:

(a) The Application and all documents attached.

For the Council:

(a) The Reply and all documents attached

Oral evidence

10. Mr Quick did not seek leave to adduce further oral evidence.

11. The Council did not seek leave to cross-examine Mr Quick.

FINDINGS AND REASONS

12. There is no dispute that Mr Quick suffered an injury at work in the form of industrial deafness or sensorineural hearing loss. There is no dispute that the Council was the last noisy employer.

13. Mr Quick seeks an order under section 60 of the 1987 Act for hearings aids.

14. The Council disputes that hearing aids are reasonably necessary as a result of the injury deemed to have occurred in 2006.

15. I must determine, on the balance of probabilities, whether the treatment in the form of hearing aids is reasonably necessary as a result of injury deemed to have occurred in 2006. This determination must be made on the evidence and in accordance with the law.

16. Section 60 (1) of the 1987 Act provides as follows:

> **"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)."

17. Deputy President Roche in *Diab v NRMA* [2014] NSWWCCPD 72 (*Diab*) provided a useful summary of the authorities dealing with whether medical expenses are "reasonably necessary" as a result of injury as required under section 60 and set out the approach that is to be adopted.

18. Deputy President Roche in *Diab* said as follows:

> "76. 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) 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.'
>
> 77. The Commission has applied this test in several cases (see, for example, *Ajay Fibreglass Industries Pty Ltd t/as Duraplas Industries v Yee* [2012] NSWWCCPD 41 at [67]).
>
> 78. In addition, the Commission has been guided by, and generally followed, the decision of Burke CCJ in *Bartolo v Western Sydney Area Health Service* [1997] NSWCC 1; 14 NSWCCR 233 (*Bartolo*), where his Honour said, at 238D:
>
> > '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.'
>
> 79. The Arbitrator quoted and applied these statements in the present matter. Subsequent appellate authority suggests that this approach may not be strictly correct.
>
> 80. The Court of Appeal considered the meaning of 'reasonably necessary' in *Clampett v WorkCover Authority (NSW)* (2003) 25 NSWCCR 99 (*Clampett*). That case concerned whether proposed home modifications for a paraplegic were 'reasonably necessary' having regard to the nature of the worker's incapacity. Grove J (Meagher and Santow JJA agreeing) noted that the trial judge had sought guidance from *Rose* and *Pelama Pty Ltd v Blake* (1988) 4 NSWCCR 264 (*Pelama*), another decision by Burke CCJ where his Honour applied the principles discussed in *Rose* and *Bartolo*.
>
> 81. Grove J referred to the dictionary definition of 'necessary' as being 'indispensable, requisite, needful, that cannot be done without' (Shorter Oxford English Dictionary, 3rd ed) and 'that cannot be dispensed with' (Macquarie Dictionary).

82. His Honour added, at [23]–[24]:

> '23. The essential issue is what effect flows from conditioning such qualities as "reasonably". The consequence is to moderate any sense of the absolute which might otherwise be conveyed by the word "necessary" if it stood alone. In order to contemplate such moderation it is apt to consider surrounding circumstances, but the question to be addressed is whether modification of a worker's home, having regard to the nature of the worker's incapacity, is reasonably necessary. In contemplation of what might be "reasonably necessary" there is this statutory obligation specifically to have regard to the nature of the worker's incapacity. It provides emphasis towards moderating the meaning of "necessary" in this context.
>
> 24. The statute does not inhibit inquiry as to what may be thought reasonable in all, or in any particular, circumstances but its terms clearly point to predominant attention being paid to the nature of the worker's incapacity. In my opinion, to reject the appellant's proposal on the basis that expenditure is to be made on premises of which he is a weekly tenant is an elevation rather than a moderation of the meaning of "necessary".'

83. It is important to remember that Grove J's reference in the above passages was in the context of a claim for home modifications under s 59(g). That subsection is restricted to claims for modification of the worker's home or vehicle directed by a medical practitioner 'having regard *to the nature of the worker's incapacity*' (emphasis added). Apart from s 59(f), which deals with care (other than nursing care), there is no such restriction in the other subsections in s 59.

84. In *Wall v Moran Hospitals Pty Ltd t/as Annandale Nursing Home*, Burke CCJ, unreported, Compensation Court of NSW, 30 June 2003, Burke CCJ acknowledged (at [10]) that, contrary to *Rose* and *Pelama*, *Clampett* held that the word 'reasonably' was 'effectively used as a diminutive and moderated the effects of the word "necessary"'.

85. The approach in *Clampett* is consistent with the modern approach to statutory interpretation, which is to construe the language of the statute, not individual words (*Sea Shepherd Australia Limited v Commissioner of Taxation* [2013] FCAFC 68 per Gordon J (Besanko J agreeing)). Thus, 'reasonably necessary' is a composite phrase in which necessity is qualified so that it must be a reasonable necessity (Giles JA (Campbell JA agreeing) in *ING Bank (Australia) Ltd v O'Shea* [2010] NSWCA 71 at [48] (*O'Shea*)). The Court, Bathurst CJ, Beazley and Meagher JJA, followed this approach in *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2012] NSWCA 445 at [113] (*Moorebank*).

86. Reasonably necessary does not mean 'absolutely necessary' (*Moorebank* at [154]). If something is 'necessary', in the sense of indispensable, it will be 'reasonably necessary'. That is because reasonably necessary is a lesser requirement than 'necessary'. Depending on the circumstances, a range of different treatments may qualify as 'reasonably necessary' and a worker only has to establish that the treatment claimed is one of those treatments. A worker certainly does not have to establish that the treatment is 'reasonable and necessary', which is a significantly more demanding test that many insurers and doctors apply. Dr Bodel and Dr Meakin were both wrong to apply that test.

87. Giles JA added (at [49] in *O'Shea*) that the qualification whereby the necessity must be reasonable calls for an assessment of the necessity having regard to all relevant matters, according to the criteria of reasonableness. His Honour was talking in the context of whether an easement should be granted under s 88K of the *Conveyancing Act* 1919, which provides that 'the Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement'. However, his Honour's observations are applicable in the present matter and are clearly consistent with *Clampett*.

88. 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.

89. 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.

90. While the above matters are 'useful heads for consideration', the 'essential question remains whether the treatment was reasonably necessary' (*Margaroff v Cordon Bleu Cookware Pty Ltd* (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression 'no reasonable prospect' should be understood, '[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content'."

19. As Deputy President Roche said in *Diab* each case will depend on its own facts.

20. Turning then to an examination of the evidence in this case.

21. Mr Quick gave evidence in a statement dated 26 February 2020. He gave evidence about his exposure to noise in the course of his employment with the Council. This is not the subject of dispute.

22. He gave evidence about his trouble hearing and the difficulty and frustration that this causes him in social situations and in family life as follows:

> "I have trouble hearing and understanding people when they are speaking from a distance, when they are not directly facing me or otherwise when in group conversation or the presence of background noise. I find it very frustrating when I am in social situations. I need someone to look at me while they are talking to me otherwise I have trouble understanding them.

> I have trouble hearing my wife and grand-daughters when they speak to me. My family complains that they have to repeat themselves to me as I do not hear them. Sometimes I get sick of asking people to repeat themselves and I so I just nod although I do not know what is actually being said. People often comment that I am yelling or talking very loudly. I listen to the television at quite a high volume in order to hear it.
>
> When I am driving I struggle to hear the person sitting next to them because I am not facing them."

23. Mr Quick gave evidence that he has not engaged in noisy hobbies and has had no illnesses or injury affecting his hearing apart from the work injury.

24. Mr Quick went onto give evidence that he suffers from tinnitus: "Most of the time, I suffer from ringing in my ears I have learned to put up with this."

25. Mr Quick gave evidence that he wants to be fitted with hearing aids because he believes that they would "greatly improve my quality of life".

26. Mr Quick was not cross-examined about his evidence.

27. The evidence Mr Quick gave about his hearing difficulties is consistent with that reported by Mr Quick to National Hearing Care and Dr Scoppa, Ear Nose and Throat Physician, whose reports are in evidence. It is also noted that the difficulties Mr Quick reports with his hearing, and consequential impact on his ability to communicate effectively, are considered by National Hearing care and Dr Scoppa to be consistent with the losses found under audiometric testing that they each conducted.

28. Mr Quick wants hearing aids to ameliorate the deleterious effects that his hearing difficulties have on his day to day life.

29. Mr Quick relies upon a report by National Hearing Care dated 15 November 2017. Mr Quick attended upon National Hearing Care on 15 November 2017 for a hearing assessment. National Hearing Care took a consistent history of noise exposure and conducted an audiometric testing which was reported as revealing the following:

> "a mild sloping to severe high frequency sensorineural hearing loss bilaterally. Speech recognition testing was consistent with the audiogram."

30. It was noted that Mr Quick's responses were consistent.

31. The following findings were recorded:

> "The binaural percentage loss (1500, 2000,3000, 4000 Hz with correction applied for presbycusis is calculated to be 6.7%."

32. National Hearing Care noted Mr Quick's hearing difficulties to result in the following functional limitations:

> "Mr Quick has significant difficulties hearing speech across a distance, television, groups and the presence of background noise."

33. In view of their findings they recommended hearing aids with particular features as set out in their report.

34. Mr Quick also relies on the opinion of Dr Scoppa, Ear, Nose & Throat physician and medicolegal consultant, who provided a report dated 25 August 2018, after examination of Mr Quick on 16 August 2018.

35. Dr Scoppa recorded a consistent history of progressive hearing loss and the impact on Mr Quick's daily life as follows:

> "He gave a history of progressive hearing loss for many years. He has difficulty understanding speech in background noise. He has difficulty understanding speech on television and over the telephone. He has difficulty communicating at home with his wife, and when socialising with family and friends. He struggles when trying to chat with his granddaughter."

36. Dr Scoppa noted a history of tinnitus and the frustration it causes Mr Quick as follows:

> "He gave a history of bilateral constant high-pitched ringing and boozing tinnitus for several years. He is annoyed and distracted by the tinnitus because it often interferes with activities of duality living such as sleep and concentration."

37. Dr Scoppa took a consistent history of noise exposure during the course of employment. He considered the council was the last noisy employer. This is not in dispute.

38. Dr Scoppa noted no noisy hobbies or military service or other causes of hearing loss.

39. Dr Scoppa conducted an ENT examination which revealed no abnormality.

40. Dr Scoppa went on to conduct an audiological evaluation which he reported as follows:

> "I carried out pure tone audiological testing in a suitable sound attenuated environment, with a calibrated audiometer. A photocopy of this investigation is enclosed. Responses were prompt, consistent and repeatable, and I am satisfied that I obtained a reliable audiogram, The pure tone audiogram showed a bilateral sensorineural hearing loss."

41. Dr Scoppa went onto calculate the hearing loss in accordance with the 1988 NAL Tables. He arrived at binaural loss before correction for presbycusis at 14.5% and a binaural loss after correction for presbycusis at 7.0%

42. Dr Scoppa calculation of WPI was 5%.

43. Dr Scopa considered that Mr Quick was consistent in his presentation noting:

> "Mr Quick's presentation was constant with the history obtained, the results of physical examination and the results of audiometric testing."

44. Dr Scoppa diagnosed:

> "In my opinion in view of the history of occupational noise exposure as documented in this report and my audiological findings of Mr Quick binaural loss of 7.0% or 5%WPI is due to industrial deafness.
>
> The hearing loss is permanent and stable and has reached maximal medical improvement."

45. Dr Scoppa considered that Mr Quicks hearing loss can be helped by the provision of hearing aids. He opined:

> "Mr Quick hearing loss is permanent but can be helped by the use of hearing aids, and in my opinion given the history of hearing loss and tinnitus and my audiological findings treatment with bilateral digital hearing aids is indicated and reasonably necessary for the rehabilitation of the noise induced hearing loss injury."

46. The Council relies on the opinion of Dr Dhasmana in a report dated 18 February 2006.

47. Mr Quick notified injury on 9 January 2006 and he was referred by the Council to Dr Dhasmana by letter dated 10 January 2006. He retired from the council on 13 January 2006.

48. Dr Dhasmana saw Mr Quick on 8 February 2006 and provided a report of the same date.

49. Dr Dhasmana took a consistent history of noise exposure in his employment.

50. She noted no other sources of noise outside employment or other causes of hearing loss.

51. Relevantly she noted the following at the time of her assessment:

> "Tinnitus: not severe
> Telephone: left ear
> Hearing problem with background noise: No
> Television: Ok"

52. She conducted an ENT examination which was normal.

53. She conducted her own audio-metric testing in a sound proof booth from which she concluded:

> "Audiogram shows bilateral high frequency Sensio neural hearing loss.
> The configuration is probably consistent with the diagnosis of acoustic trauma."

54. She reported her results as follows:

> "Calculations of permanent binaural hearing impairment due to probable acoustic Tirumala, using 1988 NAL tables was 4.7%
> Presbycusis correction: 1.3%
> Binaural hearing loss after presbycusis correction: 3.4%
> The whole person impairment (WPI) was 0%."

55. Her opinion as to hearing aids recommendation was simply expressed as "not recommended".

56. Dr Dhasmana assessed Mr Quick shortly after he left his employment with the Council. Her assessment of hearing loss thresholds, the nature and extent of hearing loss due to noisy employment and the degree of WPI represent the opinion of one expert whose report is in evidence in these proceedings. Her assessment in respect of the degree of permanent impairment due to industrial deafness does not have same binding effect which is conferred on an assessment by an Approved Medical Specialist (AMS) to whom a dispute is referred by the Registrar of the Commission. An assessment by an AMS appointed by the Commission in respect of whole person impairment as a result of injury in the form of hearing loss would be conclusively presumed to be correct. Dr Dhasmana's assessment contained in her report dated 18 February 2006 is the opinion of one expert that must be weighed in the balance with all of the other evidence that is before me.

57. Dr Scoppa was asked to comment on Dr Dhasmana's report of 8 February 2006 and he did so in his report dated 25 August 2018. Dr Scoppa provided a reasoned explanation for why his opinion differed from Dr Dhasmana on the need for hearing aids as a result of injury. He wrote as follows:

> "You request my opinion on Dr Dhasmana's opinion in his report dated 18 February 2006 where he assessed M Quick as having sustained a binaural hearing loss of 3,4%. I found slightly higher thresholds as recorded above. I was aware of Dr Dhasmana's findings, but was unable to reproduce them during my testing. As I was satisfied that I obtained a reliable audiogram I preferred my own test.
>
> I also note that Dr Dhasmana assessed Mr Quick's tinnitus at the time as not being severe, whereas I obtained a history of severe tinnitus significantly fact-finding activities of daily living. This is not surprising because tinnitus severity can vary from time to time.
>
> From the point of view of requirement for hearing aid treatment in my opinion the social, recreational and occupational needs that may have been present in 2006 bear no relationship the same needs that are in force some 12 years later in 2018, even if the hearing loss has not changed significantly. This is because change in circumstances can change the requirement for communicating, as has occurred in this instance with Mr quick who reported that he is very upset that he is unable to communicate clearly with his granddaughter because of difficulty hearing her high-pitched voice.
>
> In addition, the occurrence of severe tinnitus at the present time that is due to industrial deafness is aggravating his hearing loss, and this is acknowledged by the Worker Cover Guides that allow for a loading of an extra binaural loss to be added to the percentage hearing loss if severe tinnitus is present.
>
> On the basis of the above comments in my opinion hearing aids are reasonably necessary treatment for the currently assessed industrial deafness assonated with severe tinnitus, notwithstanding that Dr Dhasmana opined that they were not reasonably necessary for the same injury when he assessed MR Quick 12 years ago in 2006."

58. I have to determine, on the balance of probabilities, whether hearing aids are reasonably necessary as a result of the injury deemed to have occurred in 2006.

59. Counsel for the Council submitted that Dr Scoppa provided no reason for preferring his own audiological results to that of Dr Dhasmana. Dr Scoppa's report must be read as a whole. He very clearly described earlier in his report the conditions under which he conducted the test (suitable sound attenuated environment, with a calibrated audiometer) and that the responses he obtained were "prompt, consistent and repeatable". He was satisfied that he obtained a reliable audiogram. As an ENT expert he is entitled to rely on his own audiological results, elicited under test conditions where responses are found to be repeatable, that are found on the day of his examination. Dr Scoppa has provided a reasoned explanation for why hearings aids are reasonably necessary as a result of injury to address the difficulties Mr Quick now faces.

60. Mr Quick gives clear uncontradicted evidence of the difficulties he faces in his day to day life with his hearing problems. His communication problems that arise by reason of his hearing difficulties impacts his family life and impacts his social life. He gives this history to Dr Scoppa. Dr Scoppa considers that Mr Quick's report of his difficulties is consistent with what was found by him on audiometric testing of Mr Quick whose responses under that test were consistent and repeatable. I note these difficulties were not being experienced to the extent now suffered when Mr Quick was assessed by Dr Dhasmana in February 2006.

61. Dr Scoppa gives a reasoned explanation for why his opinion on the need for hearing aids differs from that of Dr Dhasmana. He explains that he found severe tinnitus and explains that the severity of tinnitus can vary from time to time. He explains that communication needs change over time such as to render hearing aids reasonably necessary. He explained:

> "…the social, recreational and occupational needs that may have been present in 2006 bear no relationship the same needs that are in force some 12 years later in 2018, even if the hearing loss has not changed significantly. This is because change in circumstances can change the requirement for communicating, as has occurred in this instance with Mr quick who reported that he is very upset that he is unable to communicate clearly with his granddaughter because of difficulty hearing her high-pitched voice."

62. When I weigh all of the evidence in the balance, I prefer for the reasons set out above, the evidence given by Mr Quick supported by the opinion of National Hearing Care and Dr Scoppa to the opinion of Dr Dhasmana.

63. I am satisfied on the balance of probabilities that hearing aids are reasonably necessary treatment as a result of the injury deemed to have occurred in 2006.

64. In the event that this was my finding, the parties agreed on the following form of order:

    (a) The Respondent pay the Applicant's section 60 expenses in respect of the provision of hearing aids upon production of accounts and/or receipts in accordance with the applicable Workcover Hearing Aids Fee Order.