WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

This certificate is issued pursuant to s.294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **WCC548-2002**
Applicant: **John Greville Kemp**
Respondent: **Vista Paper Produces Pty Ltd**
Insurer: **NRMA Workers Compensation (NSW) (No 2) P/L**
Insurer Claim No: **97740638**

Date of Determination: **22 April 2003**

The determination of the Commission in this matter is as follows:

I. Respondent to pay the Applicant under Section 66 the sum of $13,260.00 in respect of a 20.4% binaural permanent hearing impairment.

II. Respondent to pay Applicant the sum of $10,000.00 for pain and suffering pursuant to Section 67.

III. Respondent to pay the Applicant's costs as agreed or assessed.

A brief statement of reasons for determination is attached.

Lyn Martin
Manager Arbitral Services

By delegation of the Registrar

WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION

Determination of Claim for *Non-Economic Loss Compensation (Workers Compensation Act 1987, Part 3 Division 4).*

BACKGROUND TO THE APPLICATION

1. On 21st June, 2002 **John Kemp** ('the Applicant') lodged an 'Application to Resolve a Dispute' ('the application') in the Workers Compensation Commission ('the Commission'). The Applicant's employer at the relevant time was **Vista Paper Produces Pty Ltd** ('the Respondent'). The Respondent's workers compensation insurer at the relevant time was NRMA Workers' Compensation (NSW) (No 2) Pty Ltd ('the Insurer').

2. The basis of the Applicant's claim is that he suffered non- economic loss as a result of an injury that arose out of and in the course of his employment with the Respondent as a machine operator.

3. The Applicant claims to have suffered an injury, for which non-economic loss compensation is payable (the injury), to his hearing. The injury occurred on or prior to the Applicant's cessation of employment with the Respondent on the 4th March, 1991.

4. The Applicant notified the Respondent of the injury on 28th February, 2002.

5. On 28th February, 2002 the Applicant lodged a claim with the insurer for non-economic loss compensation for the sum of $23,335.00. The insurer has wholly disputed liability for this claim (*WIMWCA* s281).

ISSUES IN DISPUTE

6. The issues in dispute in this application may be summarised as follows:

Liability:

A teleconference was held in this matter on the 19th February, 2003 and at that conference both parties agreed to accept the AMS Report of the 10th January, 2003 wherein Dr. P. Niall assessed a 20.4% binaural compensable hearing loss. The issues that remain in dispute may be summarised as follows:-

(i) Whether the Applicant's employment activities after his cessation of employment with the Respondent on the 4th March, 1991 as firstly a truck driver and secondly a groundsman was of its nature a type that would contribute to the disease process so that the Respondent would not be regarded as being the last noisy employer.

(ii) The quantum of the Applicant's entitlement to the payment of a lump sum under Section 67.

JURISDICTION

7. The Workers Compensation Commission is established by the *Workplace Injury Management and Workers Compensation Act* 1998 (s 366) to exercise functions under the *Workers Compensation Act* 1987 or any other related legislation. Subject to certain limited exceptions the Commission has exclusive jurisdiction to hear and determine all matters arising under that Act and the *Workers Compensation Act* 1987 (s 105 *WIMWCA*). The Commission aims to provide an independent, fair, timely, accessible and cost effective system for the resolution of disputes under the Workers Compensation Acts (s 367).

8. Chapter 7 of the *Workplace Injury Management and Workers Compensation Act* 1998 creates a 'New claims procedures' for the resolution of workers compensation claims made after 1 January 2002.

Any party to a dispute about a claim may refer the dispute to the Commission for determination except for a dispute about lump sum compensation where only the person making the claim may refer a dispute to the Commission (s 288 *WIMWCA*).

9. The *Workplace Injury Management and Workers Compensation Act* 1998 and the *Interim Workers Compensation Commission Rules* 2001 set out the practice and procedure in relation to disputes in the Commission. The Registrar has directed that I, as Arbitrator, be constituted as the Commission to hear these proceedings (s 375 (2) *WIMWCA*, Rule 28). This decision is final and binding on the parties and is subject to appeal or review only in very limited circumstances (s 350, s 352).

WORKERS COMPENSATION ACT 1987

10. *The Workers Compensation Act* 1987 establishes a comprehensive scheme for the payment of compensation to workers who are injured in the course of their employment. Part 3 of that Act provides for the payment of compensation benefits by way of weekly benefits, medical and related expenses, non-economic loss due to permanent impairment and pain and suffering and damage to property. The Act sets out the way in which compensation entitlements must be assessed and paid including the calculation of weekly entitlements, indexation of benefits, method of payment and the reduction of benefits where other entitlements or alternative compensation is payable.

EVIDENCE

Oral Evidence given at Conference or Formal Hearing

11. The *Workplace Injury Management and Workers Compensation Act* 1998 requires an Arbitrator to use their best endeavours to bring the parties to the dispute to a settlement acceptable to all of them. Where this does not occur the Arbitrator makes an award or otherwise determines the dispute. Parties are not permitted to object to the making

of an award by an Arbitrator who has first tried to facilitate a settlement to the dispute (s 355 *WIMWCA*). In this matter the parties attended a conference/hearing at Penrith on 12th March, 2003. The Applicant was represented by his legal advisor. The Respondent was represented by its legal advisor. At this conference/hearing the parties, with the assistance of the Commission, engaged in an informal mediation process designed to facilitate an agreed settlement of their dispute. The parties were advised at the outset of the conference/hearing that the matter would proceed to determination if they could not reach agreement. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed settlement of the dispute.

12. The Commission is not bound by the rules of evidence and may inform itself on any matter and in such matter as it thinks fit (s 354(2).

Documentary Evidence

13. The following documents were in evidence before the Commission and taken into account in making this determination:

<u>For the Applicant:</u>

(i) Statutory Declaration of the Applicant dated 24th February, 2003.

(ii) AMS Report of Dr. P. Niall dated 10th January, 2003.

(iii) Report of Dr. P.W. Noyce dated 20th January, 2003.

<u>For the Respondent:</u>

(i) Report of Dr. R. Carroll dated 3rd April, 2002.

(ii) AMS Report of Dr. P. Niall dated 10th January, 2003.

(iii) Report of Dr. P.W. Noyce dated 20th January, 2002.

The injury and nature of the claim

14. The Applicant is a 58 year old man with unknown dependents. He commenced employment with the Respondent in about 1979.

15. On 28th February, 2002 he notified the Respondent of the injury and on that date lodged a claim for lump sum compensation for $23,335.00.

16. As a result of the injury the Applicant claims to have suffered a permanent impairment of 20.4% binaural hearing loss.

The Applicant's Medical Treatment and Investigations

17. The Applicant underwent the following investigative procedures to determine the nature of the injury:
Nil

Medico-Legal Assessments

18. (i) Report of Dr. Peter Noyce dated 30th January, 2002 giving a 35.9% binaural hearing loss for the Applicant.
(ii) Report of Dr. R. Carroll dated 3rd April, 2002 gives a 25.24% binaural hearing loss.
(iii) Report of the appointed AMS namely Dr. P. Niall dated 10th January, 2003 gives a 20.4% binaural compensable hearing loss.

SUBMISSIONS

19. Both parties made oral submissions at the hearing in Penrith on the 12th March, 2003.

FINDINGS AND REASONS

20. The Applicant John Kemp originally made claims upon the Respondent under Sections 60, 66 and 67 in respect of an alleged 35.9% binaural hearing loss allegedly suffered as a result of his exposure to excessive noise levels in the employ of the Respondent over two separate periods of time between

approximately 1979 and the 4th March, 1991. After the Application was lodged with the Commission and prior to the teleconference taking place on the 19th February, 2003 the Applicant had been examined by an AMS namely Dr. Paul Niall who after taking into account presbycusis and other factors assessed the Applicant as having a 20.4% compensable binaural loss of hearing. At the teleconference it was agreed between the parties that both would be bound by the medical assessment certificate of Dr. P. Niall dated 10th January, 2003 leaving in effect the only remaining issues being whether or not it was when working with the Respondent that the Applicant was last "employed in an employment to the nature of which the injury was due" and what entitlement, if any, the Applicant would also have under Section 67. The argument foreshadowed at the teleconference by the legal representative for the Respondent was that after ceasing to be employed by the Respondent the Applicant had worked elsewhere in employment "to the nature of which the injury was due" and more particularly when lodging the claim and indeed up to the present the Applicant was employed with Mamre Christian College as a groundsman where he would be expected to be exposed to excessive noise factors.

So far as is relevant to these proceedings Section 17(1) of the Workers' Compensation Act, 1987 provides as follows:-

> "If an injury is a loss, or further loss, of hearing which is of such a nature as to be caused by a gradual process, the following provisions have effect:
>
> (a) for the purposes of this Act, the injury shall be deemed to have happened:
>
> (i) where the worker was, at the time when he or she gave notice of the injury, employed in an employment to the nature of which the injury was due - at the time when the notice was given; or

(ii) where the worker was not so employed at the time when he or she gave notice of the injury - on the last day on which the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice."

Apparently only by reason of the fact that the Respondent Company has been deregistered the legal representatives for the Respondent was not prepared to formally concede that the Respondent was "a noisy employer" but indicated that he would not be calling any evidence to negate the Applicant's assertion that he was exposed in his employment with the Respondent to excessive noise factors to an extent that could cause industrial deafness.

With my leave and after the teleconference took place the Applicant filed a Statutory Declaration dated 24th February, 2003 which declaration was tendered in evidence by the Applicant's solicitor at the Arbitration hearing along with a report of Dr. P.W. Noyce of the 20th January, 2002 and the AMS Report of Dr. P. Niall of the 10th January, 2003. In his Statutory Declaration the Applicant had detailed the noise factors to which he had allegedly been exposed while working with the Respondent. Suffice it to say that that material indicated that the Applicant had indeed been engaged in an employment to the nature of which the injury was due within the meaning of the above detailed Section 17(1) of the Workers' Compensation Act, 1987. In that same Statutory Declaration the Applicant asserted that he did not consider that he had "been exposed to excessive noise levels either at home or at work" since leaving the employ of the Respondent.

At the Arbitration hearing and after we had gone through the conciliation process the Applicant was called to give evidence in chief wherein he re-confirmed his belief that he had not been exposed to excessive noise factors when performing employment duties after leaving the Respondent. He deposed that only some 20-25% of his employment duties with Mamre involve the use of machinery such as lawn mowers, whipper snippers and hand

blowers. He claimed that all of this work was carried out outside in the open air and that he constantly wore ear muffs when using this equipment.

Under cross-examination by the Respondent's solicitor the Applicant admitted that when being examined by Dr. R. Carroll at the request of the insurance company he had told the doctor that he occasionally used chain saws from the time of his commencing employment with Mamre Christian Collage in February, 1993 as a gardener/handyman/maintenance man. The Applicant asserted, however, that the chain saw in question was his own electrical one that gave forth "no real noise". Further the Applicant asserted that all of the machines that he operated in his current employment were no more noisy than the ones that he used in his own home garden.

The legal representative for the Respondent tendered in evidence the report of Dr. P. Niall of the 10th January, 2003, the report of Dr. P. Noyce of the 20th January, 2002 and the report of Dr. R. Carroll of the 3rd April, 2002 before then closing his case not seeking to call any further evidence. It was asserted on behalf of the Respondent that although it was clearly a noisy employer, nevertheless, liability for payment of the monies sought by the Applicant rested not with this Respondent but rather with Mamre Christian College on the basis that it was a later noisy employer. It was argued on behalf of the Respondent that Mamre Christian College would not be able to exculpate itself from liability had it been sued merely because the Applicant had always worn ear muffs when carrying out work with machines and my attention was drawn to the decision of the Court of Appeal in the case of Blayney Shire Council v Lobley and Anor. Reported in NSW CCR Vol 12 @ pg 52. In that case the Court was dealing with an Appeal brought by Blayney Shire Council against the decision of Geraghty CCJ in the Compensation Court. The facts in this case were that Mr. Lobley had claimed lump sum compensation for a binaural hearing loss from both Blayney Shire Council as well as from Timber Industries Pty Limited leaving it up to the Compensation Court to determine which of the two employers would be the one liable under Section 17(1) of the Workers' Compensation Act to meet his compensation claim. The Applicant

had initially worked with Blayney Shire Council in noisy conditions but when subsequently employed by Timber Industries again in noisy conditions the evidence was to the effect that the Applicant had always worn ear muffs in his employment with the latter employer. Geraghty CCJ held that while the work environment without ear muffs and other precautions may have been noisy the employment by Timber Industries was not in the circumstances employment to the nature of which the injury was due. An Award was, therefore, made in favour of the worker against the Appellant Blayney Shire Council and on Appeal the sole issue was whether the employment of the Applicant with Timber Industries was “in an employment to the nature of which the injury was due”.

The Appeal was allowed with the Court of Appeal holding in effect that ‘in determining whether, at the time when notice of injury was given, the worker was “employed in an employment to the nature of which the injury was due”, attention must be directed, not to whether the employment then engaged in actually caused the injury, but whether the “tendencies, incidents or characteristics” of that employment were of a type which could give rise to the injury in fact suffered’.

The Court went on to find that it is sufficient for a claimant worker to establish that the employment in which he was engaged occurred in an environment in which were he unprotected could cause injury of the type suffered by him.

Based on the decision in Lobley’s case the Respondent strongly argued in this matter that it was to the Mamre Christian College that the Applicant should have looked for the compensation that he is now seeking and not to the presently named Respondent as the dicta in Lobley’s case made it clear the mere wearing of ear muffs was irrelevant.

It is important to note that the Applicant in this matter has chosen to bring his claim not against Mamre Christian College but rather against the present Respondent apparently because it is his belief that he has not been exposed

to excessive noise factors in the employ of the College and his evidence appears to make it clear that he is of this belief not merely because he has worn ear muffs but rather because the actual noise factors to which he is exposed at the College are not excessive. It is clear to me that the Applicant has discharged the onus of proving that the Respondent was a noisy employer and this has virtually been conceded by the Respondent's solicitor. It does not profit this Applicant to bring his claims against this Respondent rather than against Mamre Christian College. The amount of money involved is the same no matter which employer is held liable.

The way the Respondent's case has been presented, however, virtually imposes upon it the onus of proving that Mamre Christian College employed the Applicant in circumstances to which the condition of boiler maker's deafness or deafness of a like origin is due. In the case of Callaby v State Transit Authority of New South Wales and Anor which was decided in the Compensation Court by Judge Neilson on the 7th December, 2000 the Applicant had initially brought his lump sum compensation claim for binaural hearing loss against ACI Nylex as Second Respondent and State Transit Authority as First Respondent being uncertain as to which of the two one time employers of his was liable. Before the hearing actually commenced the Applicant sought to discontinue against the State Transit Authority with whom he had worked after leaving the employ of ACI Nylex. However, the Counsel appearing for ACI Nylex announced to Judge Neilson that it was his contention that State Transit Authority was in fact the Applicant's last noisy employer and, therefore, it objected to the Applicant discontinuing against State Transit Authority. Apparently Judge Nielson would not release State Transit Authority from further involvement and made it clear that ACI Nylex as the earlier of the two employers had now "undertaken the burden of establishing that the UTA employed the worker in conditions to which the condition of boiler maker's deafness……..is due". Just as in the Callaby case ACI Nylex was unable to discharge the onus of proving that the State Transit Authority was a noisy employer so do I believe that in this case the Respondent has failed to discharge the onus of proving that Mamre Christian

College is a noisy employer. It was submitted on behalf of the Respondent that the admitted fact that the Applicant wears ear muffs means inferentially that he is in fact exposed to excessive noise in his current employment. This is, however, an inference but it is not the evidence. I must accept the Applicant's' evidence which is uncontradicted and I must not draw inferences ignoring such evidence. The Applicant's claim against the Respondent has, therefore, been established and the Applicant is entitled to an Award under Section 66 for the sum of $13,260.00 in respect of a 20.4% binaural hearing impairment in accordance with the medical assessment certificate of Dr. Paul Niall dated 10th January, 2003.

In relation to the Section 67 entitlement oral evidence was given by the Applicant at the hearing to the effect that he is continuing to suffer bilateral tinnitus as mentioned in the report of Dr. P. Noyce on 20th January, 2002 and has a hissing noise in both ears which he finds to be extremely frustrating. The Applicant further deposes that his wife speaks with a soft voice which causes dissent and furthermore the Applicant gave evidence in relation to his problems using the telephone as well as listening/watching radio and television. The Applicant has now turned 59 years of age and has apparently been experiencing his bilateral tinnitus and hearing loss for the last 11 years. It is my belief that a reasonable amount to allow the Applicant for pain and suffering under Section 67 would be the sum of $10,000.00 on the basis of a one-fifth worst scenario.

I am not making any findings in relation to the provision of a hearing aid as that is to be the subject of discussion between the parties with the likelihood that resolution will be reached.

SUMMARY

21. In summary the resolution of the issues in dispute is as follows:

- The Applicant has discharged his onus of proving it was in the Respondent's employ that he was last exposed to excessive noise factors of a nature that attaches liability to the Respondent under Section 17(1) of the Workers' Compensation Act, 1987.

DECISION

22. For the reasons set out in this statement the decision in this matter is:

(i) Respondent to pay the Applicant under Section 66 the sum of $13,260.00 in respect of a 20.4% binaural permanent hearing impairment.

(ii) Respondent to pay Applicant the sum of $10,000.00 for pain and suffering pursuant to Section 67.

(iii) Respondent to pay the Applicant's costs as agreed or assessed.

For the purposes of the Costs Schedule I hereby determine that this matter is a complex one.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF LEIGH MOFFAT VIRTUE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

REGISTRAR