WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1- 5658/20**
Appellant:	**Thomas Carney**
Respondent:	**Pacific National (NSW) Pty Ltd**
Date of Decision:	**19 February 2021**
Citation No:	**[2021] NSWWCCMA 36**

Appeal Panel:

Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr Robert Payten**
Approved Medical Specialist:	**Dr Joseph Scoppa**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 16 December 2020 Thomas Carney (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Henley Harrison, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 20 November 2020.

2. The respondent to the Appeal is Pacific National (NSW) Pty Ltd (the respondent), which was insured by Employers Mutual Limited as agent for NSW Self Insurance Corporation at the relevant times.

3. 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 assessment was made on the basis of incorrect criteria,
    - the MAC contains a demonstrable error.

4. 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 ground(s) of appeal on which the appeal is made.

5. 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.

6. 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

7. In these proceedings, the appellant is claiming lump sum compensation in respect of hearing loss as a result of the injury on 30 June 2003 that occurred in the course of his employment as a train driver with the respondent.

8. The matter was referred to the AMS, Dr Henley Harrison, in a Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 21 October 2020 for assessment of whole person impairment (WPI) of hearing loss as a result of the injury on 30 June 2003. The referral under "Previous awards or settlements" noted: "1992 -11.76% - BHL, 1999 – 9.8% further BHL".

9. The AMS examined the appellant on 11 and 12 November 2020. He assessed current binaural hearing loss of 21.9% or 11% WPI and noted that the binaural hearing impairment for which compensation was previously aid was 21.24% which was 0.97% of the current hearing impairment of 21.9%. The AMS concluded that the remaining percentage, 0.3% was the percentage of WPI to be compensated and 0.3% of the WPI of 11% was 0.33% which rounded down resulted in 0% WPI.

PRELIMINARY REVIEW

10. The Appeal 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. The appellant did not request that he be re-examined by an AMS, who is a member of the Appeal Panel.

12. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the appellant to undergo a further medical examination because there was sufficient evidence by way of medical reports and clinical investigations on which to make a determination.

EVIDENCE

Documentary evidence

13. 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

14. 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

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

16. The appellant's submissions lodged with Application to Appeal Against the Decision of Approved Medical Specialist included the following:

    (a) The AMS made a demonstrable error pursuant to s327(3)(d) of the 1998 Act by incorrectly referring to the right ear as the better ear for the frequencies the AMS considered as being affected by occupational noise exposure (Ground A).

(b) The AMS made a demonstrable error pursuant to s327(3)(d) of the 1998 Act , or otherwise made the assessment on incorrect criteria (s327(3)(c))of the 1998 Act, by failing to include the loss at the lower frequencies (Ground B).

(c) That the AMS made a demonstrable error pursuant to s327(3)(d) of the 1998 Act, or otherwise applied incorrect criteria (s327(3)(c)) of the 1998 Act, in not assessing the appellant's tinnitus as severe and not applying a loading (Ground C).

(d) The appellant accepted the audiogram obtained by the AMS.

(e) In respect of Ground A, the AMS stated that he apportioned the hearing loss to the better hearing ear. The appellant agrees that when an audiogram presents an asymmetrical hearing loss the assessment of occupational hearing loss should be based on the better hearing ear with an equal amount allowed for the worse hearing ear.

(f) The AMS based his assessment of occupational hearing loss on the air conduction thresholds obtained for the right ear at the frequencies 2000Hz to 4000Hz. He allowed an equal amount for the left ear.

(g) However, the right ear, which the AMS stated is the better hearing ear, was not the better hearing ear at 3000Hz and 4000Hz. At 3000Hz the air conduction threshold recorded for the left ear was 80dB. This was 5dB better than the threshold of 85dB recorded for the right ear. At 4000Hz the air conduction threshold recorded for the left ear was 80dB. This was 10dB better than the threshold of 90dB recorded for the right ear.

(h) The AMS therefore made a demonstrable error. His reasoning was inconsistent with the results of the audiogram and he erroneously referred to the right ear as the better ear. At two of the three frequencies he deemed to be occupational hearing loss, the left ear was the better ear.

(i) Considering the frequencies from 2000Hz to 4000Hz only, the correct approach would have been to accept the loss at 2000Hz in the right ear and an equal amount for the left, and to accept the loss at 3000 and 4000Hz in the left ear and an equal amount in the right when assessing the appellant's occupational hearing loss.

(j) In respect of Ground B, the AMS (at pp 2 – 3 of the MAC) took a very comprehensive work history of 43 years exposure to loud an intense noise. Five years of this was noise exposure involving driving noisy tractors without cabins from 1960 – 1965, followed by 38 years employment with the respondent where the appellant was exposed to jackhammers, machine hammers, trains, detonators and sometimes chainsaws for the first two or three years. The AMS noted the noise was present for most of each working day. The AMS then took a history of exposure to noise from steam trains and diesel-electric trains for 8 – 11 hours per day for 35 or 36 years. The noise was such that the appellant had to raise his voice and sometimes shout for someone with normal hearing to understand him a distance of one metre.

(k) This was evidence of a significant history of prolonged, constant, continuous, frequent and intense exposure to loud noise for a period of 43 years. This was a significant history of exposure to loud noise to which substantial weight must be given.

(l) The AMS assessed the binaural hearing loss only taking into account the hearing losses found on his audiogram at the frequencies 2000, 3000 and 4000Hz in the right ear with an equal amount of hearing allowed for the left ear.

(m) The AMS made a demonstrable error or otherwise applied incorrect criteria by failing to also include the loss at the lower frequencies from 500 Hz to 1500 Hz in the right ear and equal amount for the left ear.

(n) The AMS provided his reasoning at point 9 of the MAC stating that "even on the right side the audiogram is not consistent with solely occupational hearing loss because there is excessive involvement of the lower frequencies inconsistent with being due to noise because although noise can affect the lower frequencies, it does ot [sic] do so to this extent."

(o) The right ear was the better hearing ear from 500Hz to 2000Hz. The only exception was at 1500Hz where the thresholds recorded in the left and right ear were equal. However, this was of no significance because the hearing loss at 1500Hz in both the left and right ear was 11.2%. Any assessment of occupational hearing loss in the lower frequencies should therefore be based on the right ear with an equal amount allowed for the left.

(p) The AMS recorded the following thresholds in the right ear for the frequencies he stated were not consistent with occupational hearing loss: at 500Hz, 30dB, at 1000Hz, 40dB, and at 1500Hz, 55dB.

(q) When analysing the audiogram the losses recorded in the right ear at 500 and 1000 Hz fell within the category of a mild hearing loss. The loss at 1500Hz fell within the category of a moderate hearing loss. Contrary to what the AMS has stated, the losses at these frequencies were not excessive at all.

(r) When interpreting an audiogram, the history of noise exposure must be considered. The greater the exposure the greater the likelihood that the lower frequencies have been affected. In this case the AMS took a history of 43 years of intense noise exposure and this history of noise exposure warranted the inclusion of the lower frequencies.

(s) The decision of *Shone v Country Energy* (2007) NSWWCCMA 18 (*Shone*) provided at [19] that frequencies below 2000Hz can be taken into account depending on the facts in each individual matter including the nature and duration of occupational noise exposure and the extent of all the hearing losses including those at the lower frequencies below 2000 Hz. It also provides at [24] that neither the AMA 5 or the Guidelines required that hearing losses at low frequencies (500, 1000 and 1500 Hz) not be considered.

(t) The facts of the present matter and those of *Shone* were similar as in *Shone* the worker had a history of 49 years exposure to noise. In the present matter there was a history of 43 years exposure to noise.

(u) In a case where there is a history of noise exposure for more than 40 years, the lower frequencies must be considered. Though the AMS has considered the lower frequencies in the present matter, he incorrectly excluded them as not being consistent with occupational hearing loss.

(v) In this respect the appellant relied on *Shone* where the thresholds obtained by the AMS in *Shone* in the lower frequencies were extremely similar to those obtained by the AMS in the present case. In the present case, the AMS recorded a threshold of 30dB in the right ear at 500Hz. In *Shone*, the Medical Appeal Panel accepted a worse threshold of 35dB in the right ear and 40dB in the left at 500Hz as being consistent with occupational hearing loss. Contrary to what the AMS stated, there was not an excessive involvement in the lower tones. All of the thresholds recorded in the right ear from 0.5 kHz to 2.0kHz were consistent with occupational hearing loss.

(w) Dr Fagan (at p7 of the Application to Resolve a Dispute (ARD)) has, correctly included the losses at the lower frequencies as being consistent with occupational hearing loss.

(x) Dr Howison (at pp 4-5 of the Reply to ARD) provided no explanation of why he did not consider the lower frequencies and his opinion should not be given any weight. Based on his explanation that noise induced hearing loss was typically bilaterally symmetrical and progressive from the low to high frequencies, there was really no reason why he did not also include the lower frequencies.

(y) In respect of Ground C, Part 9.11 of the Guidelines allow a loading of up to 5% BHL for severe tinnitus.

(z) The AMS, at p 4 of the MAC, recorded a history of “tinnitus which is constantly present but which does not trouble him particularly and which does not interfere with his sleep.” Based on this, the AMS did not consider the tinnitus to be severe. The AMS erred and committed a demonstrable error, or otherwise applied incorrect criteria, in not assessing the appellant’s tinnitus as severe and not applying a loading.

(aa) The appellant at paragraph 11d of his statement (p 3 ARD) stated: “I also hear a constant ringing sound in my ears. I first noticed it about 20 years ago. Sometimes the tinnitus I suffer from makes it very difficult for me to concentrate. The tinnitus also sometimes affects my ability to fall asleep because the ringing is more noticeable at night when everything is quiet. It can sometimes take me a few hours to fall asleep because the ringing sound simply won’t go away.”

(bb) Constant tinnitus is a severe condition, regardless of how well the applicant is coping. If the appellant has learnt to deal with condition it’s only a factor for the AMS to consider but it does not remove the severity from the condition.

(cc) Paragraph 9.11 of the Guidelines is satisfied and a loading for severe tinnitus should be applied. The AMS was in error in not doing so. The approach of Dr Fagan (p 5 and p 8 ARD) was correct and his opinion should be followed and a loading of 3% applied.

(dd) The MAC should be revoked and a new MAC issued that calculates the occupational hearing loss from 0.5 – 2.0 kHz in the right ear and an equal amount for the left, and 3.0 – 4.0 kHz in the left ear and an equal amount in the right. This provides an occupational BHL of 42.6% after deduction for presbycusis. A loading for severe tinnitus of 3% BHL should also be applied. The occupational BHL then becomes 45.6%. This converts to 23% WPI.

(ee) The previous claims in 1992 and 1999 total 21.24% BHL. Applying the formula at part 9.15 of the Guidelines, the current binaural hearing impairment is 45.6% and the WPI is 23%. The BHI for which compensation was previously paid is 21.24%, which is 46.6% of the current BHI of 45.6%. The remaining 53.4% is the percentage of WPI to be compensated. 53.4% of 23% WPI = 12.2% WPI, rounded down to 12% WPI.

(ff) The MAC should be revoked and a new MAC issued that states the appellant has a further 12% WPI for the injury deemed to have occurred on 30 June 2003.

17. The respondent's submissions attached to the Notice of Opposition Against the Decision of Approved Medical Specialist include the following:

(a) In respect of Ground A, the appellant argued that the AMS's determination of the right ear being the better ear as a result of occupational hearing loss was a demonstrable error as the left ear was better at lower frequencies. The respondent disagrees and submits that the AMS correctly applied his assessment of which ear was the better one when presented with asymmetrical hearing loss.

(b) The hearing in the right ear does not need to be better at every frequency for the purposes of determining that it is the better ear. The AMS was required to determine which ear was the better ear as a result of occupational hearing loss. The AMS clearly illustrated why he felt the lower frequencies were unrelated to the appellant's employment before assessing the right ear as the better ear and then correctly applying the Guidelines in assessing the binaural hearing loss.

(c) In respect of Ground B, the appellant suggested that despite the comprehensive work history taken by the AMS, insufficient weight was given to this history.

(d) The appellant argued that the decision in *Shone* should have resulted in the AMS assessing the lower frequencies as being related to the length of employment with the respondent. The respondent submitted that the AMS correctly utilised his clinical judgement in assessing whether the lower frequencies were affected solely by the appellant's employment, stating that on the right side the audiogram was not consistent with solely occupational hearing loss because there was excessive involvement of the lower frequencies inconsistent with being due to noise. The AMS stated that although noise can affect the lower frequencies, it did not do so to this extent.

(e) The AMS was not required to apply *Shone* if he feels that the individual circumstances before him are different to those in *Shone*. The decision in *Shone* simply allows an AMS to determine that lower frequencies are employment related if, after consideration of the worker's occupational history, he or she feels it appropriate.

(f) The AMS has taken and considered the appellant's work history in depth. There was no obligation on the AMS to give the occupational history sole weight in assessing the reason for hearing loss at lower frequencies.

(g) The AMS therefore, when applying his clinical judgement, correctly applied the Guidelines in determining that the lower frequencies were not solely work related.

(h) In respect of Ground C, the assessment of the tinnitus as not being severe was based on the appellant's presentation and assessment. His prior statement was clearly inconsistent with his presentation at the assessment. The AMS was not required to give more weight to the statement as opposed to his findings on examination. Indeed, to do so, would itself constitute a demonstrable error.

(i) The assessment of tinnitus not being severe was therefore the only correct assessment the AMS could have made given the appellant reported it as such on examination.

(j) The MAC should be confirmed.

FINDINGS AND REASONS

18. 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.

19. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 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.

20. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the s 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.

21. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

22. In this matter, the Registrar has determined that he is satisfied that a ground of appeal under s 327(3 (d) is made out in relation to the failure to include losses at the lower frequencies in the assessment of occupational hearing loss.

23. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above. The Appeal Panel was satisfied that the AMS carried out a comprehensive and careful examination of the appellant, obtained a reliable audiogram and an accurate and detailed history of his employment dating back many years, as well as a detailed and accurate history of the injury and onset of symptoms and subsequent related events and treatment.

Assessment of the hearing loss

24. The AMS, under "Work history including previous work history if relevant", noted:

> "With the Respondent, he was at first a fettler for two or three years after he commenced in 1965. In this position he was exposed to loud noise from jackhammers (which he used himself) machine hammers which were used to drive in what are called dog spikes (the spikes that hold rail onto sleepers) machinery used to lift rails so that sleepers could be inserted underneath them, passing trains, detonators and also sometimes chainsaws. He worked eight hours a day five days a week and the noise was present most of the working day. Obviously, this noise had the potential to damage hearing. After that he became a train driver driving steam trains and diesel-electric trains (not purely electric trains as the statement says). On the foot plates of the steam trains he would have to raise his voice and sometimes shout for someone with normal hearing to understand him at a distance of about 1 m. The diesel-electric trains were a bit quieter but still he would have to raise his voice for someone with normal hearing to understand him at a distance of about one metre which suggests that over an eight hour working day the noise had the potential to damage hearing. He worked shifts of 8-11 h/day, 5-7 days per week. Although the diesel-electric trains were quieter later on in his employment, it was only in the last few years of his employment that hearing protection was issued and worn. From the description given I believe that his work as a train driver had the potential to damage hearing and probably did do so. I note that he had two settlements for this, one in 1992 for 11.76% BHI and another in 1990 for 9.48% BHI. He finished with the respondent in 2003. Prior to working for the Respondent Mr Carney worked on various farms in New South Wales, much of the time driving noisy tractors without cabins. This was for about five years after he left school at the age of 14 years. I believe that this farm work also probably damaged hearing. He ceased work in about October 2016 as stated in his statement and I confirmed the details of employment after his time with the respondent. None of the later employment appears to have had the potential to damage hearing."

25. Under "Details and dates of special investigations" the AMS noted:

> "The audiogram showed a bilateral sensorineural deafness, generally worse on the left side and affecting all compensable frequencies. The total binaural hearing impairment (BHI) derived from this audiogram is 52.5% A copy of the audiogram accompanies this report. Please note however that not all of this deafness is occupational deafness ('industrial deafness')."

26. Under "Summary of injuries and diagnoses" the AMS noted: "Bilateral sensori-neural deafness partly due to occupational deafness and partly due to another cause or causes probably at least partly constitutional."

27. Under "reasons for assessment" the AMS noted:

> "There is 11% whole person impairment.
> However after taking into account the previous settlements, there has been an increase of 0% whole person impairment since the last settlement.
> In making that assessment I have taken account of the following matters:-
> As stated above the history and examination are consistent with a diagnosis of occupational hearing loss but the audiogram is not consistent with that being the sole cause of the hearing loss. This is firstly because occupational hearing loss is usually fairly symmetrical and there is a significant difference between the right

> and left sides. I have therefore apportioned the occupational hearing loss to the better hearing ear, the right. However even on the right side the audiogram is not consistent with solely occupational hearing loss because there is excessive involvement of the lower frequencies inconsistent with being due to noise because although noise can affect the lower frequencies, it does ot (sic) do so to this extent. I have therefor apportioned the occupational hearing loss to the frequencies 2000 cps and above on the right side. This apportionment gives 28.7% BHI."

Whether the right ear was the better ear for the frequencies considered

28. The appellant submitted that the AMS made a demonstrable error by incorrectly referring to the right ear as the better ear for the frequencies the AMS considered as being affected by occupational noise exposure.

29. The Appeal Panel noted that the AMS said that the better hearing ear was the right ear, yet the audiogram attached to the MAC showed that the losses at 3000Hz and 4000Hz were greater in the right ear than in the left ear. Only the loss at 2000Hz was greater in the left ear. The conclusion by the AMS that the right ear was the better ear was inconsistent with the results of the audiogram. The Appeal Panel was satisfied that the AMS erred in making a finding that the right ear was the better hearing ear.

Failure to include the loss at the lower frequencies

30. The appellant submitted that the AMS made a demonstrable error, or otherwise made the assessment on incorrect criteria, by failing to include the loss at the lower frequencies.

31. It was accepted in *Shone* that it can be appropriate to include hearing loss at lower frequencies where the worker was employed in a noisy environment on a regular basis for a long period of time ranging from 28 years to 40 years.

32. In this case the appellant was employed consistently on a full-time basis for about 43 years in a noisy environment as noted by the AMS (pp 2-3 of the MAC). The appellant submitted that in the presence of such extensive exposure to noise loss at the lower frequencies should be included in the assessment.

33. The Appeal Panel accepts that the decision in *Shone* is authority for the proposition that all frequencies must be considered and not automatically excluded from consideration. The Appeal Panel accepts that it cannot assume that loss at 500, 1000 and 1500 Hz is to be disallowed on the basis that these frequencies are not generally involved in noise induced hearing loss. Any such assumption is inconsistent with the medical criteria set out in Chapter 9 of the Guidelines. Whether these frequencies should be taken into account when assessing occupational noise-induced hearing loss depends on the facts in each individual matter including the nature and duration of occupational noise exposure and the nature and extent of all the hearing losses including those below 2000Hz.

34. However, the decision in *Shone* does not automatically mean that the lower frequencies are to be included in the calculation of industrial deafness, rather lower frequencies are to be included if the audiometric configuration is consistent with industrial deafness and if there is a long period in noisy employment. In this matter the appellant has a long history in noisy employment. The question was whether the audiometric configuration at the lower frequencies was consistent with industrial deafness.

35. The AMS expressed the opinion that the appellant suffered from pre-existing conditions or abnormalities, namely, an excess loss of uncertain origin (non-occupational) in the lower frequencies and age related hearing loss. The AMS wrote:

> "However even on the right side the audiogram is not consistent with solely occupational hearing loss because there is excessive involvement of the lower frequencies inconsistent with being due to noise because although noise can affect the lower frequencies, it does ot [sic] do so to this extent. I have therefor apportioned the occupational hearing loss to the frequencies 2000 cps and above on the right side."

36. The Appeal Panel carefully considered the submissions made by the parties and the evidence in this matter, in particular, the audiogram obtained by the AMS. For the loss at the lower frequencies to be included in the assessment of noise-induced hearing loss, not only must the assessor be satisfied as to the nature and duration of occupational noise exposure, but also as to the nature and extent of all the hearing losses including those below 2000Hz.

37. The Appal Panel reviewed the audiogram attached to the MAC. The nature and extent of the hearing losses were shown in the audiogram. The Appeal Panel was satisfied that the losses at 0.5 and 1.0 kHz were within the category of a mild hearing loss and the loss at 1.5 kHz fell within the category of a moderate learning loss. The Appeal Panel did not consider that the losses at these levels were excessive and considered that the losses at these frequencies should be included in the assessment of occupational hearing loss. The Appeal Panel considered that the loss at the lower frequencies (0.5,1.0 and1.5 kHz) were consistent with occupational hearing loss particularly given the history of noise exposure. The shape of the audiogram is consistent with sensorineural hearing loss due to noise trauma as there is an increased hearing loss from low to high tones with relative sparing of the low tones in comparison to the high tones.

38. The Appeal Panel concluded that the failure to include loss at the lower frequencies was an error.

39. The Panel considered, given the period of exposure and profile of the audiogram, that the loss at 500 Hz, 1000Hz and 1500Hz should be taken into account in the assessment. However, an apportionment was required to the better hearing ear because occupational hearing loss is usually fairly symmetrical and the audiogram showed some asymmetry between the frequencies apart from at 1500 Hz.

Tinnitus

40. The appellant submitted that the AMS made a demonstrable error or otherwise applied incorrect criteria in not assessing the appellant's tinnitus as severe and not applying a loading.

41. The AMS under "History relating to the injury" noted:

> "He also has tinnitus which is constantly present but which does not trouble him particularly and which does not interfere with his sleep. I therefore do not consider it to be severe."

42. The appellant in his statement dated 11 July 2019 stated:

> "I also hear a constant ringing sound in my ears. I first noticed it about 20 years ago. Sometimes the tinnitus I suffer from makes it very difficult for me to concentrate. The tinnitus also sometimes affects my ability to fall asleep because the ringing is more noticeable at night when everything is quiet. It can sometimes take me a few hours to fall asleep because the ringing sound simply won't go away."

43. The Guidelines at Part 9.11 allow a loading of up to 5% BHL for severe tinnitus and provide that “Assessment of severe tinnitus is based on a medical specialist’s assessment.”

44. Dr Fagan, in his report dated 4 December 2018, noted that the appellant reported constant tinnitus in both ears. He wrote: “Sleep induction and concentration on certain daily tasks is sometimes affected. He first noticed it 25 years ago.” Dr Fagan believed that a loading of 3% binaural hearing loss for severe tinnitus should be made.

45. Dr Howison, in a report dated 28 October 2019, noted that the appellant described a cicada-like tinnitus but this did not affect his sleep or concentration and so could not be considered severe.

46. The Appeal Panel was satisfied that the AMS’s assessment of tinnitus was based on the history provided in his examination of the appellant. The statement of the appellant was inconsistent with the history given to the AMS and to Dr Howison. The Appeal Panel considered that the AMS was entitled to make that assessment based on his own clinical judgement and in accordance with Clause 9.11 of the Guidelines.

47. The Appeal Panel was satisfied that the AMS, in describing the tinnitus as not being severe, made no error and did not apply incorrect criteria. The Appeal Panel agreed with the AMS that the tinnitus was not severe and therefore no loading should be applied for tinnitus

48. The Appeal Panel having found the errors set out above proceeded to re-calculate the occupational hearing loss based on the audiogram attached to the MAC.

49. The Appeal Panel considered that the BHI should be calculated on the basis of the better ear in each frequency. Using the audiogram attached to the MAC, the total binaural hearing loss was 52.5%. The calculation of occupational hearing loss from 500 – 2000Hz was based on the right ear and an equal amount for the left, and from 3000 - 4000 Hz was based on the left ear and an equal amount in the right. This provided an occupational BHI of 49.4% from which deductions were made of 6.8% for presbycusis. There was no addition made for tinnitus. Therefore, the adjusted total BHI was 42.6%.

50. The resultant total BHI of 42.6% = 21 % WPI. The binaural hearing impairment for which compensation was paid previously was 21.24%, which is 49.9% of the current BHI of 42.6%. The remaining percentage, 50.1%, is the percentage of WPI to be compensated. 50.1% of the WPI of 21% = 10.5%, which is rounded up to 11% WPI.

51. For these reasons, the Appeal Panel has determined that the MAC issued on 20 November 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*.

K Ivanovska

Karolina Ivanovska
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **5658/20**
Applicant: **Thomas Carney**
Respondent: **Pacific National (NSW) 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 Henley Harrison 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
30 June 2003	**500**	**45**	**50 8.1**	**30**	**30 2.8**	4.3	2.8
	1000	**55**	**60 14.0**	**40**	**40 8.0**	9.1	8.0
	1500	**55**	**55 11.2**	**55**	**55 11.2**	11.2	11.2
	2000	**65**	**60 10.5**	**60**	**60 9.4**	9.6	9.4
	3000	**80>**	**70 9.1**	**85>**	**70 9.5**	9.2	9.1
	4000	**80>**	**70 8.9**	**90>**	**79 9.8**	9.1	8.9
			61.8		**50.7**		49.4
TOTAL % BHI: 52.5							
Less Pre-existing non-related loss: 3.1							
Less Presbyacusis correction: 6.8							
Add % of severe tinnitus: 0							
Adjusted total % BHI: 42.6 **Resultant total BHI of 42.6%= 21% WPI (table 9.1)**							
Previous claims = 21.24%, which is 49.9% of current BHI of 42.6%. This leaves 50.1% of 21% WPI to be compensated, which equals 10.5%, rounded up to 11% whole person impairment (9.15) **WPI= 11%**							

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

Carolyn Rimmer
Arbitrator

Robert Payten
Approved Medical Specialist

Joseph Scoppa
Approved Medical Specialist

19 February 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*

K Ivanovska

Karolina Ivanovska
Dispute Services Officer
As delegate of the Registrar