WORKERS COMPENSATION COMMISSION

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

Matter No:	**M2-6529/19**
Appellant	**State of New South Wales**
Respondent:	**Lionel Eric Calvert**
Date of Decision:	**15 December 2020**
Citation No:	**[2020] NSWWCCMA 187**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Henley Harrison**
Approved Medical Specialist:	**Dr Joseph Scoppa**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Mr Lionel Eric Calvert (the respondent) suffered binaural hearing loss injury in the course of employment with the State of New South Wales (the appellant).

2. A claim for compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) was made by letter dated 19 July 2019.[1] The s 66 claim was based on the report of Dr T B Raj dated 12 June 2019.[2]

3. Dr Raj assesses the respondent at 58.1% binaural hearing loss and made a deduction of 12.5% for presbycusis. A further deduction of 10% was made pursuant to s 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) resulting in 41% binaural hearing loss which equated to 20% whole person impairment.

4. Dr Ken Howison was qualified by the appellant and provided reports dated 2 September 2019[3] and 11 October 2019.[4] In those reports, Dr Howison assessed the respondent at 18% WPI for hearing loss after making a 10% deduction pursuant to s 323 of the 1998 Act.

5. Dr Howison was provided with further material by the appellant including a study headed "Occupational Hearing Loss" authored by Mr John May, MD in the American Journal of Industrial Medicine. In a further report dated 24 October 2019, the doctor did not change his previous opinion concerning a 10% deduction.[5]

6. By letter dated 23 October 2019 the appellant denied liability based on ss 254 and 261 of the 1998 Act. The extent of the degree of permanent impairment was also in issue.

[1] Application, pp 4-5.
[2] Application, p 14. We note that the index to the Application incorrectly describes this doctor as Dr Scoppa. No member of the AP had any previously examined the respondent.
[3] Reply p 14.
[4] Reply p 21.
[5] Reply, p 81.

7. The parties entered Consent Orders on 13 February 2020 when the appellant withdrew defences based on ss 254 and 261 of the 1998 Act. The Consent Orders provided:

> "1. Note that the respondent no longer relies on defences under ss 254 and 261 of the *Workplace Injury Management and Workers Compensation Act 1998*.
>
> 2. I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment as a result of noise-induced hearing loss deemed to have been suffered on 1 July 2002.
>
> 3. Concurrently and in respect of a general medical dispute, the AMS is asked:
>
>   a. On the balance of probabilities, what was (and is) the applicant's binaural hearing loss due to the effects of exposure to noise whilst employed in South Africa?
>
>   b. Are bilateral hearing aids reasonably necessary medical treatment as a result of noise exposure in NSW?
>
> 4. The following documents should be sent to the AMS:
>
>   a. Application to Resolve a Dispute:
>
>   b. Reply, and
>
>   c. Application to Admit Late Documents dated 13 January 2020."

8. The respondent was then assessed by Dr Sylvester Fernandes as the Approved Medical Specialist appointed by the Commission. Neither party took any objection to the appointment even though Dr Fernandes had previously seen the respondent as a doctor qualified by the appellant. Following the provision of Dr Fernandes' report, the respondent filed an appeal. Given the obvious conflict, the Commission determined that the assessment provided by Dr Fernandes was void and that a new assessment be undertaken.[6]

9. A Referral was issued by the Registrar on 30 July 2020 generally in accordance with the Consent Orders.

10. The assessment of WPI was then referred to Dr Robert Payten, an AMS, who examined the respondent and provided the Medical Assessment Certificate dated 28 August 2020 (the MAC).

11. We repeat and adopt the findings by the AMS as to noise exposure. The AMS stated:[7]

> "He began working in South Africa in 1950. Initially he spent one year in a noise refinery as a welder and also was involved in noisy shutdowns.
>
> He was then employed by James Brown Engineering and was exposed to loud noise from grinders, hammering steel and welding. He wore ear protection. He then was employed by Dorman Long Shipwrights for 20 years. This was very noisy work during which time he wore ear protection. There were intervals between periods of employment while waiting for a ship to dock and so over a 12-month period he might not be employed for a couple of months.

[6] Decision by Registrar's Delegate dated 27 May 2020.
[7] MAC, p 3.

After 32 years of noisy employment in South Africa he came to Australia in 1981. For two years between 1982 and 1984 he worked as a welder at Anderson Pipe Fittings which was a noisy job. He then worked for the next 20 years at the Campbelltown Hospital as a maintenance man for a period of 18 years from 1984 through to 2002. In his opinion, his employment at the Campbelltown Hospital was noisier than the noise he was exposed to in South Africa. He worked in the plant room in the basement and was exposed to very noisy compressors and also to large air fans. It was necessary to yell to be heard by a person at one metre. He would be in that environment for half a day to a day at a time and at other times he would be doing cooling tower maintenance which was also a noisy job. He wore ear protection all the time but he says it was still very noisy in spite of the ear protection. Without ear protection it was necessary to yell loudly to be heard at a distance of one metre. He retired in 2002 because of his multiple myeloma and has not worked since."

12. The AMS concluded that the respondent suffered from sensorineural hearing loss due to 32 years of noise exposure in South Africa and 20 years in Australia.[8]

13. The respondent was assessed by the AMS as having a binaural hearing loss of 58.5% with no deduction for non-occupational loss. A figure of 23.9% was deducted for presbycusis given the respondent's age which, at the time of the assessment was 79 years. This resulted in an occupational binaural hearing loss of 34.6%.

14. The AMS made a deduction pursuant to s 323 of the 1998 Act of 10% resulting in a final adjusted hearing loss of 31.1% which equates to 16% WPI.

15. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[9] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth guidelines prevail.[10]

THE APPEAL

16. On 25 September 2020, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

17. The WorkCover Medical Assessment Guidelines (the Guidelines) set out the practice and procedure in relation to appeals to Medical Appeal Panels under s 327 of the 1998 Act.

18. The appellant claims that the medical assessment should be reviewed on the ground that the MAC contains a demonstrable error and/or the assessment was made on the basis of incorrect criteria within the meaning of s 327(3) of the 1998 Act.

19. The Appeal was filed within 28 days of the date of the MAC. The submissions in support of the grounds of appeal are referred to later in these Reasons.

[8] MAC, p 4.
[9] The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*.
[10] Clause 1.1 of the fourth edition guidelines.

PRELIMINARY REVIEW

20. The Appeal Panel (AP) 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 AP determined, for the reasons provided subsequently, that a ground of appeal had been established.

21. The appellant did not request a re-examination by an AMS who is a member of the AP. In its written submissions in reply the appellant sought a contradictory order, that is, that the question of the extent of the s 323 deduction be referred back to the Arbitrator.[11]

22. The appellant requested the opportunity to present oral submissions to the AP. The basis of that application was that the "appeal raises fundamental questions of general importance, which still seem to be poorly understood".[12] That request was repeated in email correspondence forwarded to the Commission when the respondent also sought leave to file submissions in Reply.

23. The AP then issued the following direction to the parties. The direction provided:

> "The appellant has leave to file and serve written submission in reply by close of business, Monday, 7 December 2020.
>
> The appellant may wish to address in its submissions in reply at least the following:
>
> 1. Whether the arguments raised by it in the first ground of appeal are inconsistent with the meaning of "as a result of an injury" (see s 319 and 326 of the 1998 Act) and appellant decisions that common law principles of causation are to be applied in respect of this test: see for example *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 31 at [53]-[55].
>
> 2. Why the appellant requires an oral hearing having been provided with an opportunity of making further written submissions.
>
> The Appeal Panel will determine the parties' request to hold an oral hearing and the respondent's request to make further submissions following receipt of the appellant's further submissions. At present the respondent is not granted leave to make further submissions in reply."

24. The appellant filed written submissions on 7 December 2020. The submissions were extensive, portions of which were not in reply and for which leave was not sought.

25. The first ground of appeal raises a legal issue question. We do not agree, given the clear and even recent appellant authority, that an oral hearing is required before two specialist doctors and an Arbitrator. The second ground of appeal raises a normal question commonly addressed by Medical Appeal Panels on the application of s 323 of the 1998 Act. That ground of appeal does not raise, as the appellant suggested, a "fundamental question of general importance".

26. We have considered the appellant's written submissions in reply where it was provided with the fullest opportunity to enlarge of previous submissions. We do not accept that an oral hearing is required. We observe that if the appellant remains aggrieved by the decision then it has the opportunity of bringing proceedings in the Supreme Court. Indeed, given its submissions that observations in *Pereira* were incorrect because the employer's arguments were flawed, that may be the appropriate venue for the appellant to ventilate its submissions of general legal importance.

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[11] Appellant's submissions in Reply, paragraph 37.

[12] Appellant's submissions, paragraph 70.

27. We take into account that the respondent supported the appellant's request that the AP should conduct an oral hearing.

28. We observe that the appellant's use of descriptions of the respondent's submissions such as "false"[13] or "misleading"[14] does not provide confidence that an oral hearing will be an appropriate means of attaining further assistance.

29. The appellant has sufficient opportunity to address the AP in writing and respond to the respondent's submissions. We decline the request to have an oral hearing in the matter.

EVIDENCE

30. The AP has before it all the documents that were sent to the AMS for the original assessment and has referred to portions of the evidence and taken them into account in making this determination.

GROUND OF APPEAL – "Section 323 is Irrelevant"

Submissions

Appellant's submissions

31. The appellant submitted that the entitlement to compensation is governed by s 9, not 17, of the 1987 Act. Given the importance of the certain contentions made by the appellant, it is necessary to set out various portions of the appellant's submissions. The appellant relevantly submitted:

> "36. Like any other injury, the entitlement to compensation for industrial deafness is governed by section 9 of the 1987 Act, not section 17. In turn, section 9 requires the definition of 'worker' (section 4 of the 1998 Act) and 'injury' (section 4 of the 1987 Act) to be satisfied. The quantum of the entitlement is governed by section 66 of the 1987 Act. Section 17 only determines 'who pays', and simplifies that question. It is the other provisions which determine 'what is paid for'. The third word in section 17 itself constitutes an explicit requirement that there be an 'injury' within the meaning of s4 of the 1987 Act. Section 4 captures 'employment' within NSW only, not work in another jurisdiction.
>
> 37. Section 17 can only operate upon an 'injury' to a 'worker'. It should be obvious to observe:
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> (a) that neither section 17. nor any other provision in the 1987 and 1998 Act has extra-territorial operation: *A and* G *Engineering PIL v Civitarese (1996)* **NSWSC** *619;*
>
> (b) that whilst exposed to excessive noise in South Africa, the worker was sustaining micro-traumata, causing sensorineural hearing loss: *Sukkar v Adonis Electrics Pty Ltd [2014) NSWCA 459* at [40] - [41] and authority there cited;
>
> (c) that loss of hearing due to the South African period is separate and distinct from loss of hearing sustained while he was an employee of various entities: *Sukkar* at [40] - [41] and authority there cited;
> (d) that any loss of hearing due to the South African period is the consequence of trauma not sustained as a 'worker', **('uncovered loss');**

[13] Appellant's submissions in Reply, paragraph 27.
[14] Appellant's submissions in Reply, paragraph 24.

(e) that the uncovered loss is not part of the 'injury· to be compensated. It is only the (separate) loss caused in employment as a 'worker' for various entities which is to be assessed (and upon which section 17 can operate). This is the **'covered loss'**;

(f) that only the covered loss can be the subject of section 66 compensation;

(g) that s319(c) of the 1998 Act and allied provisions require the AMS to provide an assessment of permanent impairment of the 'worker' due to 'injury', which cannot include the (separate) uncovered loss. Reference to section 323 is otiose.

(h) most of a person's industrial deafness is acquired in the earlier years of exposure. Nevertheless, provided exposure conditions were similar, apportionment between 'covered' and 'uncovered' loss should be made on a temporal basis: *Cuskelly v New England Milk Industries Pty Ltd* [2020) NSWWCCMA 2.

38. Section 17 does not operate regardless of where or in what circumstances the exposure occurred."

39. There is no authority to support the proposition that the South African exposure forms part of the covered loss."

32. The appellant noted that s 17 created the fiction of deeming a date of injury but did not create "another fiction", that is that "uncovered losses are also somehow captured by that provision".[15]

33. The appellant submitted that the uncovered exposure did not contribute to the loss and there was no pre-existing injury within the meaning of s 323 of the 1998 Act.

34. The appellant referred to paragraph 1.6 of the fourth edition guidelines and noted that the assessor was required to undertake a number of tasks and finally determine the "degree of permanent impairment that results from the injury".

35. The appellant referred to the decision of the Supreme Court in *Pereira v Siemens Ltd*[16] (*Pereira*). The appellant submitted:[17]

> "As already shown, because the covered exposure causes separate and distinct loss of hearing, the uncovered exposure cannot and does not have any role in the calculation of the impairment resulting from the compensable exposure."

36. The appellant observed that the fact that s 323 has no role "may at first bluish seem at odds with the result in *Pereira*", it was submitted that there was "a technical flaw" in the manner in which the employer argued *Pereira* as it was incorrectly assumed and conceded that the s 17 applied to what the appellant described as "uncovered exposure".

Respondent's submissions

37. The respondent conceded that s 17 does not have extra-territorial operation but not in the manner expressed by the appellant. It submitted:[18]

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[15] Appellant's submissions, paragraph 40.
[16] [2015] NSWSC 1133.
[17] Appellant's submissions, paragraph 51.
[18] Respondent's submissions, paragraph 10.

> "The effect of the finding in *Civitarese* is that the employer identified by section 17 is liable to pay compensation for all of the loss or further loss of hearing that is deemed to have occurred on the day determined in accordance with the section."

38. The respondent referred to *Civitarese*, *Russo v New World Services and Construction Pty Ltd*[19] (*Russo*) and *Lennon v TNT Australia Pty Ltd*[20] (*Lennon*) as support for the proposition that:[21]

> "[T]he injured worker was compensated for the entirety of his hearing loss regardless of whether it was actually caused by employment within New South Wales or in employment not subject to the Workers Compensation Acts."

39. The respondent submitted that this conclusion is consistent with the general law of causation that only requires that the injury is a material contributing factor to the loss: *Murphy v Allity Management Services Pty Ltd*.[22]

40. It was noted that s 323 and its predecessor were enacted to modify the common law position. Furthermore, in the context of industrial deafness there is also a deduction due to presbycusis.[23]

41. The case in *Pereira* proceeded on the basis that the deeming provisions in s 17 of the 1987 Act applied with respect of hearing which may have previously occurred outside New South Wales.

42. The respondent submitted that there is no prior injury, previous condition or abnormality as the only loss suffered by the respondent is caused by gradual process.

43. The respondent submitted that the notion introduced by the appellant of a "covered loss" and an "uncovered loss" has no basis in the legislation, is contrary to the provisions of s 17 of the 1987 Act and contrary to general principles of causation.

44. The respondent submitted that the position is different with respect to losses after the deemed date of injury as the subsequent losses do not result from or form part of the injury. *Cuskelly*, referred by the appellant, is such a case. That position contrasted with losses that occurred prior to the deemed date of injury. An example of such a case is *Schofield v Abigroup Ltd*[24] (*Schofield*).

Appellant's submission in Reply

45. The appellant filed extensive submissions, portions of which were not in Reply. The AP does not intend to summarise the extensive document but will address these submissions in the Reasons.

46. However, we observe that we do not accept that the Respondent's submissions were "flawed" and that he failed to "grapple with or contradict" the appellant's fundamental submission that "the condition of industrial deafness is divisible" and is confined to the effects of exposure whilst employed as a worker in the State of New South Wales.[25]

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[19] [1979] 1 NSWLR 330.
[20] [2013] NSWCA 77.
[21] Respondent's submissions, paragraph 11.
[22] [2015] NSWWCCPD 49.
[23] Appellant's submissions, paragraphs 13-14.
[24] [2016] NSWSC 954 at [33].
[25] Appellant's submission in Reply, paragraphs 4(b) and 5.

Reasons

47. The AP does not accept the appellant's submissions on this ground of appeal.

48. It is accepted by the appellant that the respondent suffered an injury deemed to have occurred on 1 July 2002. That acceptance of injury by the respondent satisfied the requirement in ss 4, 9 and 9A of the 1987 Act. It is a distraction to return to these sections within the submissions when injury is not in dispute.

49. The effect of s 17 of the 1987 Act meant that the respondent suffered injury by way of hearing loss deemed to have occurred on 1 July 2002. There is no dispute that the respondent was employed and working in New South Wales when injury is deemed to have occurred.

50. In those circumstances the AMS is required to assess, pursuant to s 326 of the 1998 Act[26], the degree of permanent impairment "as a result of an injury". That test is not dissimilar to the wording of s 66 of the 1987 Act which provides that a worker is entitled to compensation if injury "results in a degree of permanent impairment".

51. The appellant's primary submissions focused on s 17 and to a lesser extent, s 9, and did not address the relevant test of causation provided by s 66 of the 1987 Act and s 326 of the 1998 Act once injury has been accepted.

52. In its submissions in reply the appellant asserted that the respondent did not challenge its "well established propositions referred to at paragraphs 37(b) – (c)"[27] of its initial submissions. Given what flows from its reply submissions, it is necessary to repeat that aspect of the appellant's submissions. The appellant initially submitted [at paragraph 37(b) - c)]:

> "(b) that whilst exposed to excessive noise in South Africa, the worker was sustaining micro-traumata, causing sensorineural hearing loss: *Sukkar v Adonis Electrics Pty Ltd [2014) NSWCA 459* at [40] - [41] and authority there cited;
>
> (c) that loss of hearing due to the South African period is separate and distinct from loss of hearing sustained while he was an employee of various entities: *Sukkar* at [40] - [41] and authority there cited".

53. The appellant's submissions have otherwise misapplied what is set out in *Sukkar* at [40]-[41]. In those passages the Court of Appeal were clearly referring to a "further loss of hearing" which was distinct "from the initial loss of hearing".

54. In *Sukkar*, McColl JA relevantly stated:[28]

> "40. The primary judge rejected the appellant's submissions finding:
>
> '[54] Even if it is accepted...that [the appellant] has suffered only one pathological condition namely, sensorineural hearing loss, the current claim does not arise from the same injury he suffered in 1996. It is a new injury or, as it is described in s 17, it is a 'further loss of hearing which arises from a series of micro traumata between 29 August 1996 and 2012'.'

[26] Reference is often made to s 319 of the 1998 Act. However, that section only defines the meaning of medical dispute. It is s 326 which provides the subset in which certain parts of a "medical dispute" ae conclusively presumed to be correct.
[27] Appellant's submission in reply, paragraph 6.
[28] Sukkar at [40]-[41].

> 41. In this respect, his Honour applied *Eraring Energy v Brownlie [2008] NSWWCCPD 42* (at [38]) and *Manuel v BOC Ltd [2011] NSWWCCPD 20* (at [66]) which held that claims for a further loss of hearing constitute a separate "injury" for the purposes of the deeming provisions of s 17, as distinct from the initial loss of hearing: see primary judgment (at [55] - [56])."

55. The Court of Appeal did not state in this passage and it does not support the appellant's central argument:[29]

> "[T]hat loss of hearing due to the South African period is separate and distinct from loss of hearing while he was an employee of various entitles: *Sukkar* at [40]- [41] and authority there cited."

56. Indeed, McColl JA referred to the acceptance by the President of the worker's submission, without deciding, that the worker suffered "only one pathological condition namely, sensorineural hearing loss". That observation is directly contrary to the appellant's submissions.

57. The appellant asserted, without reference to factual evidence, that the respondent suffered a series of injuries caused by "micro traumata". In any event, findings of fact in other cases do not create legal precedent: *Edwards v Noble*.[30] Similar comments were emphasised by the Full Court of the ACT in *Coles Supermarket Australia Pty Ltd v Harris* when the Court stated:[31]

> "Attempts to use factual precedents and parallels are likely to detract from the legal precedents and so lead to error: *Vairy v Wyong Shire Council*[32]; *Dederer*.[33]"

58. The AP comprises two otorhinolaryngologists. The appellant's submissions urged the use of the expertise by the AMS[34]. In these circumstances the AP is in the position to state that binaural hearing loss is one pathological condition. That was the conclusion referred to in *Sukkar* at [40] which the appellant adopted in its submission when suggesting that the condition was a "divisible injury" and/or an "uncovered loss".

59. Further, to the extent that comments in *Sukkar* were relevant to this ground of appeal, the following observation by McColl JA does not assist the appellant's case. McColl JA stated:[35]

> "The effect of s 17(1)(a) of the 1987 Act was to operate in the worker's favour, as Barwick CJ explained in *Bain* (at 257), to create a fictional date of injury which could found a compensation claim, even though "the condition is a product of past events". It also created a fictitious 'incident' for the purposes of causation, that being the 'one blow' to which Barwick CJ also referred."

60. The facts in *Sukkar* are obviously relevant because that decision has been taken out of context in the appellant's submissions.

61. The worker initially recovered compensation pursuant to s 66 of the 1987 Act for 12.9% binaural hearing loss in an agreement registered on 29 August 1996.[36] This agreement related to employment in New South Wales.

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[29] Appellant's submissions, paragraph 37(c).
[30] [1971] HCA 54 at [14] per Barwick CJ.
[31] [2018] ACTCA 25.
[32] [2005] HCA 62 at [21], [28]-[32] (McHugh J).
[33] *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42[56]-[58] (Gummow J).
[34] See for example, Appellant's submissions in reply at [34].
[35] *Sukkar* at [84].
[36] *Sukkar* at [25].

62. In June 2012, the worker was assessed at 31.6% binaural hearing loss which equated to 16% whole person impairment. After adjustment of the prior claim of 12.9% hearing loss, the balance of 18.7% equated to 9% WPI.[37]

63. The previous injury referred to in *Sukkar* at [40]-[41] was the prior compensation paid for the 1996 claim. The case had nothing to do with "uncovered loss" or loss outside the state of New South Wales.

64. The Court concluded, based on the clear wording of s 17, that the 2012 claim was a claim for further loss of hearing within the meaning of s 17 of the 1987 Act.

65. The appellant also relied on two Presidential decisions referred to by McColl JA as being relied upon by Keating P at first instance.

66. In *Eraring Energy v Brownlie*[38] no New South Wales employer employed the worker in employment to the nature of which the injury was due after the date of the first claim.[39]

67. In *Manuel v BOC Ltd*[40] the worker ceased employment with the respondent in 1990 with the respondent. In 1995 the worker recovered a sum for 4.58% binaural hearing loss. There was reference at that time to a prior claim for hearing loss.[41]

68. The worker made a further claim for hearing loss in January 2010. That claim was based on a deemed date of injury in January 1990, that is the worker's last day of employment. The Commission rejected the claim on the basis of the reasons set out at [76] of the decision. The Commission was not satisfied that the tendencies, incidents or characteristics of the employment could give rise to injury being the further loss of hearing which had been assessed after the cessation of employment (in 1990) and after the settlement of the prior claim (in 1995).

69. In *Cuskelly v New England Milk Industries Pty Ltd*[42] (*Cuskelly*) the worker accepted that the loss due to exposure to subsequent employment outside the jurisdiction after the notional date of injury was to be ignored in accordance with the Supreme Court decision of *Schofield v Abigroup Pty Ltd*[43].

70. In *Pascoe v Mechita Pty Ltd*[44] (*Pascoe*) the worker received a prior award of hearing loss in November 1995 which was not considered as compensable by the Appeal Panel and is consistent with *Sukkar*. Most of the subsequent loss of hearing was attributed to non-occupational causes.

71. The appellant relied on *Sukkar*, *Manuel, Brownlie*, *Cuskelly* and *Pascoe* to support its principal submission. Indeed, it expressed itself in terms of "at the risk of over repetition".[45] We do not accept that these authorities support its first ground of appeal.

72. It was the appellant's submission, based on a misapplication of observations in *Sukkar*, which founded its argument that any hearing loss due to the period of employment in South Africa was an "uncovered loss". We agree with the respondent's submissions that the phrase "uncovered loss" does not appear in the 1987 or 1998 Act. The phrase is otherwise inconsistent with longstanding authority at the highest Superior Court levels of the test of causation of loss in the workers compensation field.

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[37] This is a paraphrase of *Sukkar* at [26].
[38] [2008] NSWWCCPD 42 (*Brownlie*).
[39] *Brownlie* at [39].
[40] [2011] NSWWCCD 20 (*Manuel*).
[41] *Manuel* at [2].
[42] [2020] NSWWCCMA 2.
[43] [2016] NSWSC 954 at [33].
[44] [2018] NSWWCCMA 34.
[45] Appellant's submissions in reply, paragraph 30.

73. The appellant in its supplementary submissions asserted that the respondent did not challenge the "well established propositions" it set out. We do not accept that the appellant has correctly applied relevant authority.

74. The respondent relied upon a series of contentions which we do not necessarily accept. Indeed, the appellant, submitted in reply, correctly in our view, that *Russo*, *Civitarese* and *Lennon* did not support the respondent's submission set out at [38] herein.

75. The appellant in its reply submissions asserted that the respondent's submissions were "flawed", misconstrued its submissions and created a "false impression". We are not required to address the entirety of the respondent's submissions, such as the reference to s 9AA of the 1987 Act. We do not necessarily accept them. Our Reasons for rejecting the first ground of appeal are limited to what is set out herein.

76. However, we do not accept the appellant's assertion[46] that its principal submission was not challenged by the respondent. It is to the issue of common law test of causation that was raised by the respondent in its opposition and the AP in its Preliminary Review that we now discuss.

77. The AP issued a direction referring the appellant to the recent Court of Appeal decision in *Johnson*. In that case the worker suffered a compensable injury and a subsequent non-compensable injury. The Appeal Panel held that both injuries contributed to the overall impairment and then made an apportionment between the two incidents. The Supreme Court quashed the decision of the Appeal Panel. In the course of his reasons, Garling J at first instance stated:

> "66. It is significant that the Panel did not conclude that the later injury was of a kind or nature that severed the causal chain between the NSW Education injury and the plaintiff's impairment. If it had come to such a conclusion, then it was obliged to find that there was no impairment as a result of the NSW Education injury. However, to the contrary, it concluded that the plaintiff's impairment resulted from the NSW Education injury and the later Hostels injury.
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> 67. The task required by ss 9 and 9A of the 1987 Act is for a determination to be made about whether the relevant employment was a substantial contributing factor to the injury. If it was, then the AMS or the Panel is to assess the permanent impairment, by a clinical assessment of the claimant, as they present on the day of the assessment having regard to the matters set out in Clause 1.6 of the Guidelines. That task does not involve any process of apportionment between injuries.
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> 68. Section 323 of the 1998 Act provides an exception to that general approach, but only in the limited circumstances which that provision contemplates. Here those provisions did not apply."

78. The error identified by both Garling J at first instance and by the Court of Appeal was that the Medical Appeal Panel used notions of s 323 to apply to subsequent injuries. During the course of his Reasons Emmett JA stated:[47]

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[46] Appellant's submissions in Reply at [4(b)].
[47] *Johnson* at [52]-[56], Macfarlan JA agreeing.

> "52. The Worker contends that nothing in the Management Act or the Guidelines displaces the relevant law of causation that has been applied since the enactment of the Management Act, such that "statutory causation" is satisfied if the injury in question is a material contributing cause of the compensable consequence contended for by a worker. Thus, in the case of incapacity, need for medical expense or whole person impairment, the Worker contends, the consequence is the whole consequence and not a proportion or fraction of it.
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> 53. In common law contexts, an injury or incapacity may be attributable, in the legal sense, to more than one cause operating concurrently. There is no difference between the legal view of causation in tort and causation in the field of workers compensation, subject to the qualification that, in a claim for workers compensation, it is unnecessary to prove that the incapacity was the natural and probable consequence of the injury. That is to say, the question of foreseeability does not arise. It is sufficient that the incapacity results from the injury by a chain of legal causation unbroken by a *novus actus interveniens.*
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> 54. Two causation tests are involved in a medical assessment of permanent impairment under Pt 7 of Ch 7 of the Management Act. The first test arises from the provisions of ss 9 and 9A of Compensation Act. That is to say, it must be shown that the injury that gave rise to the impairment in question arose out of or in the course of employment that and that the employment was a substantial contributing factor to the injury. The second test arises from the provisions of ss 319(c) and 326(1)(a) of the Management Act. That is to say, it must be shown that the permanent impairment is as a result of the injury.
>
> 55. The phrase "the degree of permanent impairment of the person as a result of an injury" appears in both ss 319(c) and s 326(1)(a) of the Management Act. That composite phrase requires an enquiry as to the causal connection between the degree, or percentage, of assessed permanent impairment of a worker, on the one hand, and the compensable injury, on the other. That is to say, it was necessary for the AMS and the Appeal Panel to assess the degree, or percentage, of whole person impairment of the Worker that was caused by or is attributable to the First Injury. In doing so, common law principles of causation in tort are to be applied."

79. The respondent otherwise referred to the decision in *Murphy* where the Commission discussed the application of common law principles of causation to the test under s 60 of the 1987 Act that medical expenses "as a result of an injury" are compensable. Various Superior Court decisions are discussed in that decision when Roche DP stated:[48]

> "Moreover, even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.

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[48] *Murphy* at [57]-[58].

> Ms Murphy only has to establish, applying the commonsense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]–[55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716)."

80. Similar principles apply with respect to the entitlement to weekly compensation: *McCarthy v Department of Corrective Services* (*McCarthy*)[49] where Roche DP made similar observations concerning the appropriate test on causation for establishing an entitlement to weekly compensation. Roche DP stated:[50]

> "It is trite law that a loss can result from more than one cause (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; (2009) 83 ALJR 986). The authority of *Calman* is also instructive on this issue. The Court held (at [38], excluding footnotes):
>
> > 'Once the appellant established that his underlying anxiety disorder was an injury within the meaning of the Workers Compensation Act, he was entitled 'to compensation ... under [that] Act' upon proof that his total or partial incapacity for work resulted from that injury. The question then for the Tribunal was whether the appellant's incapacity was causally connected to the underlying anxiety disorder. It has long been settled that incapacity may result from an injury for the purposes of workers' compensation legislation even though the incapacity is also the product of other - even later - causes. Indeed, death or incapacity may result from a work injury even though the death or incapacity also results from a later, non-employment cause. Thus, in *Conkey & Sons Ltd v Miller*, Barwick CJ, with whose judgment Gibbs, Stephen, Jacobs and Murphy JJ agreed, held that it was open to the Workers' Compensation Commission to find from the medical evidence in that case 'that the death by reason of myocardial infarction when it did ultimately occur, 'resulted' from the work-caused injury of the first infarction, even if it could not be said that the final infarction was itself caused by work-caused injury.'"

81. In *Murphy*, Roche DP cited *Sutherland Shire Council v Baltica General Insurance Co Ltd* as authority for the proposition that the injury must "materially contribute to the need for surgery". Those observations probably relate to the decision of Clarke JA, who after a thorough analysis of the law including the observations of Kirby P (as his Honour then was) in *Kooragang Cement Pty Ltd v Bates* stated[51]:

> "I agree with those observations but would add that in the light of the judgment in *Heath*, I do not think there is any impediment to my acceptance of the view that the common law test applies and that the relevant inquiry directs attention to whether the injury caused or materially contributed to the incapacity."

82. Further, in the unanimous decision of the High Court decision in *Calman v Commissioner of Police* (*Calman*) referred to and quoted by Roche DP in *McCarthy*, the High Court went further and stated:[52]

> "39. Whether incapacity results from injury is a question of fact. Upon the findings in this case, however, the answer to that question could admit of only one answer. As a matter of law, the Tribunal was bound to find that the incapacity of the

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[49] [2010] NSWWCCPD 27.
[50] at [148]-[149].
[51] (1994) 35 NSWLR 452 at 463-464.
[52] [1999] HCA 60 at [39]-[40].

appellant resulted from injury within the meaning of s 33 of the Workers Compensation Act. Although the incapacity would not have arisen but for the appellant being told that he was to be transferred, there would have been no incapacity but for the existence of his underlying anxiety disorder. The incident, which was the immediate cause of his incapacity, merely exacerbated the underlying anxiety disorder which continued to exist, notwithstanding that immediately before the incident it manifested no symptoms. In those circumstances, the injury was a contributing cause to the incapacity. As Jordan CJ pointed out in *Salisbury v Australian Iron and Steel Ltd* [20]:

> ‘It is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause[21]. It may be the catalyst which precipitates disability in a medium of disease. But when the stage is reached at which the employment injury ceases to produce effects and could therefore no longer be a contributing cause to any incapacity which may then exist, the right to compensation ceases.’

40. In the present case, the underlying anxiety disorder continued and was capable of producing serious effects if exacerbated or aggravated, as the Tribunal's findings showed. That being so, the Tribunal was bound to find as a matter of law [22] that the appellant's incapacity resulted from injury within the meaning of s 33 of the Workers Compensation Act.”

83. In *Pereira* the Court observed that the loss of hearing due to the prior overseas employment was a matter that potentially attracted the operation of s 323(2) of the 1998 Act.[53] His Honour’s observation is inconsistent with the appellant’s first ground and are consistent with common law principles of causation of loss.

84. The AP rejects the appellant’s submissions that *Pereira* was determined in circumstances where there was “a technical flaw in the employer’s case”.[54]

85. We also add that the appellant’s “uncontroversial”[55] submission, reliant on decisions such as *Civitarese* that s 17 does not have “extra-territorial operation” does not address the issue of the quantification of the extent of the loss. The cases referred to such as *Civitarese* and *Lennon* established settled law that the date of injury was deemed to have occurred on the last date of employment in New South Wales due “to the nature of which the injury was due”.

86. The cases did not support the appellant’s submissions of an exclusion of prior “uncovered loss” and they also did not support the respondent’s submissions outlined at [38] herein. In *Civitarese* the Court held that the last relevant noisy employment was in New South Wales for the purposes of s 17 of the 1987 Act. There was previous employment outside the state. However, the Court did not state one either one way or the other that previous employment was compensable under s 66 of the 1987 Act.

87. The AP applies the approach discussed in *Pereira*. If there is a “technical flaw” in that decision as the appellant submitted, one that the AP does not accept, the appropriate path is to contend in the Supreme Court that the decision should not be followed.

88. In these circumstances we otherwise decline to adopt the approach that is applied with respect to asbestosis and the arguments on that issue in the appellant’s submissions in reply.[56]

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[53] *Pereira* at [108].
[54] Appellant’s submission at [55].
[55] Appellant’s submission at [55].
[56] Appellant’s submissions in reply at [35].

89. Section 322 of the 1998 Act provides that the degree of permanent impairment is assessed in accordance with the relevant Guidelines in force at the time of the assessment. Hearing loss is assessed in accordance with Chapter 9 of the fourth edition guidelines. Chapter 9 provide further exceptions to the common law test of causation of loss such as a deduction for presbycusis correction.[57] Section 323 is another example where the 1998 Act provides a basis to apportion for prior injury.[58]

90. There is no statutory exception in either the 1987 Act, the 1998 Act or the fourth edition guidelines to deduct because of prior employment outside the State of New South Wales.

91. The appellant briefly referred to s 68B(4) in it reply submissions when it stated that paragraph 13 of the respondent's submissions "overlooked section 68B(4) of the 1987."[59]

92. That section was raised by the appellant and does not support its submissions.

93. Section 68B(4) provides that s 323 applies to s 17 of the 1987 Act save that there is to be "no deduction" to impairment that is due to a worker's employment in "previous relevant employment". "Previous relevant employment" is defined in s 68B(4)(b) to mean employers who are liable to contribute under s 17.

94. The clear effect of s 68B is that it expressly provides that s 323 of the 1998 Act applies to s 17 of the 1987 Act. This is grossly inconsistent with its first ground of appeal. Secondly, although not as clear and our reasons are not dependent upon this, the section suggests that as "previous relevant employment" is not considered in s 323, employment not covered by that expression, such as employment in South Africa, may be considered under s 323.

95. Whilst it is it correct that the respondent did not address that section, that provision only supports the decision in *Pereira* that a s 323 deduction is appropriate where there is evidence of causation of loss from prior overseas noise.

96. In those circumstances we agree with the respondent's submission that sensorineural hearing loss is assessed in terms of applying common law principles to the causal test provided by s 66 of the 1987 Act and s 326 of the 1998 Act, subject to the express exceptions in Chapter 9 of the fourth edition guidelines.

97. The medical opinions provided by Dr Raj, Dr Howison and the AMS all establish that the respondent's sensorineural hearing loss satisfies the test proscribed by s 326, that is, that the impairment is as a result of an injury.

98. The AP rejects the first ground of appeal.

GROUND OF APPEAL – Section 323 of the 1998 Act

Submissions

Appellant's submissions

99. The appellant submitted that the AMS "explicitly found, on the balance of probabilities, about 61.5% of the Respondent's loss is due to the uncovered loss."[60]

[57] Paragraph 9.10 of the fourth edition guidelines.
[58] *Johnson* at [109].
[59] Appellant's submission at [12].
[60] Appellant's submissions, paragraph 59.

100. The appellant asserted that “medico in this field” commonly fail to properly assess a deductible proportion on the basis that the exact quantum of any deduction is not measurable. It was submitted that both Dr Raj and Dr Howison “adopted the so-called section 323 default 10% deduction.”[61]

101. The appellant referred to the terms of s 323(2) and submitted that the 10% deduction made by the AMS was “patently at odds with the available evidence”.[62] The respondent referred to the “erroneous approach” taken by Dr Raj and Dr Howison and submitted that scientific exactness is not required, that there was “nothing unusual in courts and tribunals making these types of assessments, notwithstanding deficiencies and gaps in the available direct evidence” and the self-evident purpose of s 323(2) is to prevent claimant receiving an unjustified windfall.[63]

102. The appellant questioned how it could be said that the process was “difficult” or “costly”[64]. Reference was made to the “experience and expertise of the AMSs” who could apply their “judgement to the available evidence”. It was said that this approach was undertaken in *Cuskelly v New England Milk Industries Pty Ltd*.[65]

103. The appellant reiterated that scientific exactness is not required and that it could be “inferred” that the AMS felt constrained to apply the default 10% deduction, noting his reference to “supposition”. Reference was made to the observations of the AMS which were inconsistent with the 10% deduction.

Respondent’s submissions

104. The respondent noted that the evidence was that he worked in employment in South Africa that was noisy but not as noisy as in New South Wales. There were periods of “no work” and there was no evidence of noise level testing in either New South Wales or South Africa in order to compare noise levels. No hearing tests or audiograms were conducted prior to 2002. In these circumstances the respondent submitted:[66]

> “The absence of the essential information means that the extent of any deduction is at the very least difficult, if not impossible to determine. The lack of that evidence also means that the deduction of 10% provided by subsection (2) is not at odds with the available evidence.”

105. The respondent noted that the AMS identified the difficulty caused by the lack of information and the assessment was costly to determine because it would have involved carrying out investigations in South Africa to obtain the missing material.

106. The respondent referred to the terms of s 323(3) of the 1998 Act. The lack of evidence made the extent of the deduction difficult to determine.

107. The respondent also submitted that the AMS did not “positively conclude” that the deduction was at odds with the available evidence and rather made an “impermissible exercise of making assumptions”[67] except to the extent that he recognises that on the facts of the case the maximum deduction allowed under the legislation was 10%.

[61] Appellant’s submissions, paragraphs 60-61.
[62] Appellant’s submissions, paragraph 63.
[63] Appellant’s submissions, paragraph 64.
[64] Appellant’s submissions, paragraph 65.
[65] [2020] NSWWCCMA2.
[66] Respondent’s submissions, paragraph 32.
[67] Respondent’s submissions, paragraph 37.

108. The respondent then, inconsistently, submitted that there should be no deduction and the MAC be revoked. The respondent relevantly submitted:[68]

> "37. The AMS did not reach such a conclusion. Rather he engaged in an impermissible exercise of making assumptions to reach a conclusion on the balance of probabilities of what he thought the loss due to employment in South Africa might be. He did this because he was asked this question as part of a non-binding general medical dispute.
>
> 38. He did not ever consider whether the 10% deduction was at odds with the evidence except to the extent that he recognised that on the facts of the case the maximum deduction permitted by the legislation is 10%. In the absence of a properly based finding that a deduction of 10% is at odds with the available evidence this conclusion is correct."

Reasons

109. The AMS referred to the opinions provide by both Dr Raj and Dr Howison how both deducted 10% due to hearing loss sustained in South Africa.[69] The AMS then stated:

> "The extent of the deduction is difficult or costly to determine so in applying the provisions of s.323(2) I assess the deductible proportion as one tenth for the amount of noise trauma sustained during his 32 years of noise exposure in South Africa. (can only be used when not at odds with available evidence)."

110. The AMS was asked to address a general medical dispute question phrased in the following terms:

> "On the balance of probabilities, what was (and is) the applicant's binaural hearing loss due to the effects of exposure to noise whilst employed in South Africa."

111. The AMS stated:

> "Because there is no objective audiometric evidence available which dates from the time he left South Africa or just before he started work in Australia and because there is no noise survey data to indicate how loud was the noise in South Africa or NSW, any estimate of the binaural hearing impairment sustained in South Africa is supposition. However, Mr Calvert says that his work in NSW was noisier than work in South Africa and that he worked 40 hours a week in NSW week in week out, whereas in South Africa there were often breaks of a few weeks in between working on ships in the dock. As a result, he may have worked for only nine or ten months a year, but he is not sure exactly. He wore ear protection in both South Africa and NSW.
>
> I recognise that there is a greater amount of hearing loss sustained due to noise exposure in the first years of noise trauma as compared to the last years and therefore, noise-induced hearing loss is not a linear calculation under normal circumstances, when the noise exposure is the same throughout the history of work. However, in this case, because of the louder noise in NSW as compared to South Africa, and the intermittent nature of his work in South Africa, it is not unreasonable to adopt a linear method to calculate the amount of noise he sustained while in South Africa as compared to NSW.

[68] Respondent's submissions, paragraphs 37-38.
[69] MAC, p 5.

I realise that it is only allowable to deduct 10% of his current binaural hearing impairment to account for noise-induced hearing loss in South Africa and this I have done on his MAC.

However, this is not on the balance of probabilities as to what was the applicant's hearing loss due to the effects of exposure to noise while employed in South Africa."

112. A deduction pursuant to s 323 of the 1998 Act is required if a proportion of the permanent impairment is due to previous injury or due to pre-existing condition or abnormality: *Vitaz v Westform (NSW) Pty Ltd*[70], *Ryder v Sundance Bakehouse*[71] and *Cole v Wenaline*[72].

113. Considering the respondent's submission that the AMS "engaged in an impermissible exercise of making assumptions to reach a conclusion"[73] the AP must conclude that it is accepted by the respondent that the AMS has erred in the approach to s 323.

114. Whilst we are not bound by the parties' submissions, the respondent's concession that there was "an impermissible exercise of making assumptions" makes it difficult other than to uphold this ground of appeal.

115. We also observe that there is merit in the appellant's submission that the AMS applied an incorrect onus of proof based on "scientific exactness" rather than on the balance of probabilities. The statement by the AMS that "this is not on the balance of probabilities"[74], albeit in the context of answering a further question, shows demonstrable error by the misapplication of the relevant standard of proof.

116. In these circumstances our reasons are limited to accepting the parties' common submission that there has been demonstrable error in the factual conclusion reached by the AMS concerning the s 323 deduction. That conclusion is made noting that the respondent did not accept that there should be any deduction pursuant to s 323. This ground of appeal is upheld.

REASSESSMENT

117. Having found error, the AP is required to reassess according to law: *Drosd v Nominal Insurer.*[75]

118. Neither party sought a re-examination by a member of the AP. In those circumstances we adopt the findings made by the AMS concerning the extent of the degree of the loss and the findings made of presbycusis summarised at [13]-[14] herein.

119. We find that the degree of impairment is as a result of injury. We adopt the findings of Dr Raj, Dr Howison and the AMS that the contribution of the loss from the employment in New South Wales was significant. These findings clearly satisfy the common law principles of causation.

120. Section 323 of the 1998 Act relevantly provides:

"(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.

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[70] [2011] NSWCA 254.
[71] [2015] NSWSC 526 (*Ryder*) at [54].
[72] [2010] NSWSC 78 at [29] - [30].
[73] Respondent's submissions at [37].
[74] MAC, p 6.
[75] [2016] NSWSC 1053.

(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 the 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."

121. In *Vannini v Worldwide Demolitions Pty Ltd*[18] (*Vannini*) Gleeson JA stated that an Appeal Panel, when considering the reasoning of an Approved Medical Specialist on the question of causation under s 323, was required to determine "whether any proportion of the impairment was due to any previous injury, or pre-existing condition or abnormality" and if so, "what was that proportion".[19]

122. The onus of proof in establishing the s 323 defence lies on the employer. In *Asbestos Remover & Demolition Contractors Pty Ltd v Kruse* [2017] NSWWCCMA 51, a Medical Panel concluded that the onus of proof was on the employer to establish a non-compensable cause in industrial deafness cases.[20] Reference was made by that Panel to the observations of Barwick CJ in *Sadler v Commissioner for Railways* (1969) 123 CLR 216 and Garling J in *Pereira v Siemens Ltd* [2015] NSWSC 1133.

123. In *Matthew Hall Pty Ltd v Smart*[21] (*Smart*), Giles JA accepted the employer's concession that it bore the onus in establishing a deduction under s 68A (the statutory predecessor to s 323).[22]

124. We agree with the appellant' submission that the relevant onus is on the balance of probabilities and not "scientific exactness". However, we find that the employer's bears the onus under s 323.

125. In his statement the respondent referred to an exposure to noise as a shipwright from 1950 until 1982. He said that he noticed hearing loss "worsening in or around 1997" and went to an audiologist around that time.[76]

126. Dr Raj recorded a history of exposure to noise in South Africa and that, on his arrival from South Africa, "his wife said he did have some hearing loss at that time, but it was mild and had not caused any disability".[77] Based on this history, Dr Raj opined that there was a "history of hearing loss as result of noise exposure in South Africa", the exact quantum was not measurable, and made a one-tenth deduction.[78]

127. Dr Howison recorded a history that the respondent had been "aware of hearing loss for many years" but was unable to identify the exact time of his first awareness.[79] The doctor was unaware of any pre-employment audiograms.

128. In a report dated 11 October 2019, Dr Howison opined that industrial deafness "is not linear" and assessed the hearing loss from employment in South Africa as one-tenth as "a precise figure for hearing loss cannot be given". The doctor noted his responses were based on "scientific exactness" rather than on the balance of probabilities.[80]

[76] Application, pp 1-2.
[77] Application, p 14.
[78] Application, p 16.
[79] Reply, p 15 and p 17.
[80] Reply, p 23.

129. The appellant requested a further report from Dr Howison in response to the following question:[81]

> "You have assessed a 39.9% total binaural hearing impairment due to 'noisy employment', both In South Africa for 32 years, and in NSW for 20 years. On your best judgement, please give your opinion, with an accompanying explanation, as to the proportion of this binaural hearing impairment which was caused by Mr Calvert's employment In South Africa.

130. Dr Howison responded as follows:

> "Noise induced hearing loss cannot be calculated on a pro-rata basis based on the duration of noise exposure. This is precisely why the Workers Compensation Act makes a deduction of 10% when there is no pre-employment audiogram or any audiogram carried out after completing employment in South Africa. Judgement cannot be applied. Patients also have individual susceptibility to noise exposure; some employees can work in loud noise and with no detrimental effect and other employees are unable to work in loud noise without causing significant hearing damage.
>
> I note from the attachment you provided *"Occupational Hearing Loss", John J.* ***May,*** *MD (American Journal of Industrial Medicine 37:112-120 (2000))* states *"noise induced hearing loss is* a *phenomenon which usually progresses over 10-15 years of intensive noise exposure and then tends to progress more slowly thereafter".* This statement makes it clear that it is usually the case but not always the case. My expertise in this field has taught me that judgment is not accurate with limited information available."

131. The AMS recorded a history that the respondent first became aware of hearing loss after coming to Australia and turning the television up louder in 1983.[82] There was a history of exposure to noisy work over an extensive period of work as a shipwright in South Africa.

132. We agree with the finding by the AMS that a portion of the bilateral sensorineural hearing loss was due to exposure in South Africa. That conclusion accords with the respondent's consistent history of exposure to loud noise at work over an extensive period. It was the common opinion of Dr Howison, Dr Raj and the AMS that a proportion of the sensorineural hearing loss was due to work in South Africa and prior to his arrival in 1982 in New South Wales.

133. We observe that we do not accept that this is an assumption based on an absence of evidence. The facts which we rely upon are the respondent's exposure to loud noise at work in South Africa over an extensive period and the history reported to Dr Raj that there was mild hearing loss when the respondent arrived from South Africa. It is also consistent with the history given to the AMS that in 1983, that is in the following year after arriving in New South Wales, the respondent was tuning the television up to such an extent that it bothered the next-door neighbour. It is extremely unlikely that such a change in hearing ability would happen in the short time following his arrival in New South Wales.

134. We do not agree with the appellant's submission that a linear approach should be applied to the hearing loss in the present case. In our view the facts of this case suggest a strong basis for concluding that the proviso in s 323(2) should be applied. We observe that the AMS, when answering a specific question, purported to apply the liner approach without explanation.

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[81] Reply, p 82.
[82] MAC, p 2.

135. As the matter is being reassessed, we are not bound by the opinion expressed by the AMS on that issue. We also observe that it was unusual to ask a general medical question, where no appeal lies[83], with the specific questions asked under s 326 of the 1998 Act.

136. The respondent provided a consistent history of mild hearing loss in or about 1982/1983.

137. Secondly, the appellant urged a use of the expert opinion "of AMSs"[84] . The AP comprises two experts in this specialist field. In that regard we agree with the opinion by Dr Howison expressed in his third report and set out at [130] herein.

138. As the respondent noted, there is an absence of prior evidence of actual noise exposure and the extent of hearing loss as of 1982. There was an absence of prior audiograms and an absence of actual noise exposure in South Africa. That absence of evidence does not assist the appellant who is the party that bore the onus of proof under s 323. Its reply submissions[85] reverses the onus of proof under s 323 when it challenged the respondent's submission about the effectiveness of hearing protection. There is no evidence as to how effective the hearing protection was in either South Africa or in New South Wales. Given that the appellant has accepted that the respondent suffered injury from the employment in New South Wales, there is no dispute that the hearing protection worn in New South Wales was not completely effective. There is no such admission by the respondent as to the effects of the prior employment in South Africa.

139. For these reasons we find that the extent of the deduction is "difficult to determine".

140. Furthermore, we accept that such a deduction is not at odds with the available evidence, specifically the history of mild hearing loss as at 1982. To a lesser extent, our conclusion is also not at odds with the opinions expressed by Dr Raj and Dr Howison that a one-tenth deduction was appropriate.

141. For these reasons we apply the one-tenth deduction pursuant to s 323(2) of the 1998 Act.

142. The appellant in its written submission in reply submitted that s 326 of the 1998 Act does not include the words "and the extent of that proportion" where those words appeared in s 319 of the 1998 Act. It was submitted that the extent of the deduction was not a matter that was conclusively presumed to be correct and was not the subject of an appeal under s 325 of the 1998 Act.

143. It was submitted that this issue be remitted to a Commission Arbitrator for redetermination. This was one of the submissions in reply that fell outside the scope of the grant of leave.

144. No authority was cited by the appellant. As a regular litigant in the Commission, it should be aware that the extent of the deduction is a matter that has been assessed by AMSs and by Appeal Panels and considered to be conclusively presumed to be correct as defined in s 326 of the 1998 Act.

145. The Court of Appeal assumed as much in *Vannini* when Gleeson JA accepted that the proportion of the deduction extended to the concept of what was that proportion. His Honour stated:[86]

> "The position may be different in relation to the second question. A finding as to *the* proportion of permanent impairment due to previous injury, pre-existing condition or abnormality involves matters of degree and impression. The applicable standard of the "proportion" of contributory contribution under s 323 permits some

[83] See s 326 and s 327(2) of the 1998 Act.
[84] Appellant's submissions at [66].
[85] Appellant's submissions in reply at [23].
[86] At [92], Macfarlan JA and Barrett AJA agreeing.

latitude of opinion such as to admit of a range of legally permissible outcomes. That is not to say that such a conclusion is necessarily beyond review by an Appeal Panel on the ground of demonstrable error. However, the resolution of that question should be left to a case where it is dispositive."

146. The AP does not intend to go any further than to refer to recent, binding, and unanimous Court of Appeal authority which is contrary to the appellant's submission on this point.

147. For these reasons provided, the AP concludes that the final determination in the Medical Assessment Certificate is correct, that is, a one-tenth deduction is made pursuant to s 323(2) of the 1998 Act.

DECISION

148. The MAC given in this matter is confirmed.

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

A Reynolds

Antony Reynolds
Dispute Services Officer
As delegate of the Registrar