

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Workers' Compensation and Rehabilitation Act 2003 - s. 550 - appeal to commission

Bradley Applin AND Q-COMP (WC/2011/293)

VICE PRESIDENT LINNANE

14 May 2012

DECISION

- [1] This is an appeal by Bradley Applin (Appellant) against a decision of the Review Unit of Q-COMP (Q-COMP) dated 3 August 2011. That Q-COMP decision confirmed an earlier decision of WorkCover Queensland (WorkCover) not to accept the Appellant's claim for compensation as he did not sustain an injury within the meaning of that term in s. 32 of the *Workers' Compensation and Rehabilitation Act 2003* (Act). At the relevant time the Appellant was employed by Hindmarsh Construction Qld Pty Ltd (Employer) as a Contract Administrator at its Hudson Road Albion premises.

Brief History of the Claim

- [2] The Appellant lodged a Notice of Claim for Damages dated 31 March 2011 with WorkCover (Exhibit 1) in respect of an injury being bilateral hearing loss and tinnitus suffered by him in the course of his employment on or about 7 April 2008. On 24 June 2011 WorkCover provided the Appellant with written notice of its decision to reject his claim on the basis that he had not sustained an "injury" within the meaning of that term in s. 32 of the Act (Exhibit 2).
- [3] On 28 June 2011 the Appellant lodged an application for review of that WorkCover decision to Q-COMP (Exhibit 3). Q-COMP provided reasons for its decision to confirm the WorkCover decision in correspondence dated 3 August 2011 (Exhibit 4). It is against this Q-COMP decision that the Appellant currently appeals.

Issue for Determination

- [4] The issue for determination in this appeal is whether the Appellant suffered a personal injury, that injury being a bilateral hearing loss and tinnitus, within the meaning of that term in s. 32 of the Act. Section 32 of the Act relevantly provides as follows:

"32 Meaning of injury

- (1) An *injury* is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury."

Q-COMP conceded that the Appellant was a worker at the relevant time.

Onus of Proof

- [5] The Appellant carries the burden of proof on the balance of probabilities: see *Rossmuller v Q-COMP*¹. The Appellant thus must prove, on the balance of probabilities, that the claim is one for acceptance i.e. that:
- the Appellant suffered an injury being bilateral hearing loss and tinnitus;
 - the bilateral hearing loss and tinnitus arose out of, or in the course of, his employment with the Employer; and
 - the employment with the Employer was a significant contributing factor to the bilateral hearing loss and tinnitus.

Evidence

- [6] The Appellant relied upon the evidence of the following witnesses:
- the Appellant himself;

¹ *Rossmuller v Q-COMP* (C/2009/36) at para [2] - Decision <<http://www.qirc.qld.gov.au>>

- Ms Lucy Applin, the Appellant's wife;
- Dr Terry Coyne, a Neurosurgeon and Spinal Surgeon, who provided a medical report dated 4 November 2010 (Exhibit 6);
- Dr Julie Agnew, an Ear, Nose and Throat Surgeon who provided a medical report dated 1 October 2010 (Exhibit 8 page 28); and
- Dr Fiona Bisshop, the Appellant's general medical practitioner whose patient notes are Exhibit 13.

[7] Q-COMP relied upon the evidence of the following witnesses:

- Mr Alan Murphy, a Contracts Administrator employed by the Employer at the relevant time and the employee said to have caused the trauma to the Appellant's ear (Mr Murphy); and
- Mr Ashley Timm, also a Contracts Administrator employed by the Employer at its Albion office at the relevant time and now employed by the Employer as a Contracts Manager in Canberra.

[8] **Appellant's Evidence:** By the Notice of Claim for Damages (Exhibit 1) the mechanism of injury is described in question 38 as follows:

"I was sitting at my desk when co-worker Alan Murphy clapped his hands over my ears, physically contacting both ears with his hands."

[9] It was the Appellant's evidence that on a date somewhere around 7 April 2008 or sometime in April/May 2008, he was seated at his workstation performing duties when Mr Murphy walked up behind him and clapped his hands over the Appellant's ears. In the Notice of Claim for Damages the injury is said to have occurred on 7 April 2008. The Appellant said that he instantly turned around and said "I don't believe you just did that" and that Mr Murphy responded "I hardly even touched you" and Mr Murphy just laughed. The Appellant's evidence is that Mr Murphy had walked out from the toilet area and was walking towards the rear of where the Appellant was seated. He approached the Appellant from the Appellant's left side and got better contact with the Appellant's left ear than he did the right ear. According to the Appellant, Mr Murphy's hands were clammy and when he clapped his hands over the Appellant's left ear it cupped over the ear and formed a seal over that ear.

[10] The Appellant formed the view that Mr Murphy did not intend to harm him in this incident. Rather the Appellant's evidence was when Mr Murphy clapped his hands over the Appellant's ears he was acting in a playful manner or playing a prank on him.

[11] As for the date of the incident, the Appellant was of the view that Mr Murphy had been employed by the Employer for one or two months prior to the incident. The Appellant had sought to establish the date on the incident by requesting information from the Employer on when Mr Murphy commenced employment with the Employer. This information however was not provided with the Employer appropriately relying upon privacy legislation. The Appellant had made no record of the date of the incident and so the date was approximate.

[12] According to the Appellant, various employees were in the vicinity of the Appellant when the incident occurred. Exhibit 9 identified the location of those employees with A referring to where the Appellant was seated with his back to Mr Murphy's path of travel, Luke Bruvel was seated at B and Ashley Timm was standing at C. The toilet entrance/exit was located to the rear of all three employees and the dotted line indicted the path of travel of Mr Murphy upon exiting the toilet. It was the Appellant's evidence that Mr Bruvel was seated in his cubicle at the time and that the partition between he and Mr Bruvel was approximately 1.4 metres in height. Mr Timm was standing at the time talking to Mr Bruvel with both employees located to the left of the Appellant.

[13] Immediately following the incident, the Appellant noticed a high pitched sound or noise vibrating in his ear but thought that it would go away. He indicated that, at times, he could zone out from the noise if a lot was happening or if he was talking to someone. However, if he was in a quiet area where nothing was happening then the noise seemed quite loud and intense such that he thought others could hear the noise on such occasions. At this time the Appellant was studying an urban planning course at the Queensland University of Technology and found it difficult concentrating during lectures. He had commenced this study in mid 2005.

[14] The Appellant did not seek any medical attention for the ringing in his ear until he visited his general medical practitioner, Dr Bisshop, on 29 October 2008. The Appellant said that whilst his wife had encouraged him to seek medical attention prior to this time he had not done so given that he was working full-time and also studying full-time. Even as of 29 October 2008 the Appellant did not visit the doctor in respect of the ringing in his ear but rather attended his general practitioner for a sore leg. The Appellant did however mention the tinnitus

on this occasion as Dr Bisshop has recorded this in her patient notes. The Appellant thought that he had visited Dr Bisshop in respect of an ingrown hair issue however Dr Bisshop's records noted that the visit was essentially in respect of "right groin node sore and sensitivity over right buttock skin". As at 29 October 2008, the Appellant had not noticed any hearing loss following the incident in April/May 2008 and Dr Bisshop's patient notes revealed specifically that there was no hearing loss at that time relying on the information given to her by the Appellant.

- [15] The Appellant did not advise Dr Bisshop on this occasion how the ringing in his ear occurred. He said that he was more interested in knowing what had happened and what he could do about the ringing in his ear. The next occasion when he attended upon Dr Bisshop in respect of his ear was 6 July 2010 because the ringing in his ear was starting to drive him "crazy". It is to be noted that the Appellant attended at the Central Brunswick Medical Centre for consultations with medical practitioners on thirteen occasions between the visit on 29 October 2008 and the visit on 6 July 2010. On each of those thirteen occasions there is no record of any complaint of tinnitus or hearing loss. It is somewhat surprising that the Appellant did not mention the tinnitus on any of those occasions given his evidence that, at times, he thought that those around him could hear the noise vibrating in his ear.
- [16] The Appellant also recalled another occasion when Mr Murphy played a prank on him. This incident was said to have occurred on 24 September 2009 when Mr Murphy placed a box over his head when the Appellant was standing at the photocopier and Mr Murphy was walking past the photocopier with the box in his hand. When the box was placed on his head the Appellant said that he panicked and said "whatever you do don't clap and don't hit the box". The Appellant said that Mr Murphy then pulled the box off his head and continued walking towards his office.
- [17] The Appellant said that he informed Medy Hassam about this later incident when he had a one-on-one meeting with her sometime around mid 2010. He said that he also mentioned it to Brian Murphy, the Employer's Occupational Health and Safety Manager in Queensland. The Appellant said that as a result of him mentioning this matter and the earlier ear clapping incident to Brian Murphy there appeared to be some investigation undertaken of the matter with Colleen Avery becoming involved. Ms Avery was the Employers National Human Resource Manager. Some discussion about the clapping of the ears incident appeared to have taken place between the Appellant and Ms Avery at this time. There is an e-mail from Ms Avery dated 1 July 2010 wherein she advised the Appellant that Mr Murphy was unaware of any incident where he clapped his hands over the Appellant's ears. In an e-mail dated 4 October 2010 to both Ms Hassam and Ms Avery, the Appellant provided further details of the incident the subject of his claim for compensation.
- [18] The Appellant's evidence was that shortly after this e-mail he noticed Mr Murphy and David Scott, the Employer's Construction Manager and the supervisor of both the Appellant and Mr Murphy, talking. Exhibit 11 identified the seating arrangements at that time with E being where Mr Scott was seated, F being where Mr Murphy was seated during the discussion and D where the Appellant was then seated. On this occasion the Appellant said that he saw Mr Murphy re-enacting the incident and said that he heard Mr Murphy say "I only touched him".
- [19] The Appellant completed an Employer Incident Notification Form on 7 July 2010 (Exhibit 10 page 46) where he gave the following description of the incident:

"Alan Murphy clapped his hand over my ears from behind after exiting the men's toilet (left ear ringing) on 7 April 2008 at 10.30 a.m."

- [20] On that document there is a caveat to the date of 7 April 2008 where the Appellant wrote "only approx - early April late May". Further elaboration of the incident was given on the following page (Exhibit 10 page 47) which was required to be completed by the Appellant's supervisor with involvement from the Appellant. That elaboration also included details of the box incident and provided as follows:

"I ... was sitting at my desk with my back to the corridor when Alan Murphy after washing his hands walked out of the toilet and up behind me and clapped his hands over my ears physically contacting both ears with both of his hands. As his hands were [sic] still moist the hand that hit my left ear was cupped and sealed over the left ear leaving me with a ringing in my ear, the hand that hit the right ear didn't make as good contact as the hand that hit the left ear but still left me with a ringing in the right ear. My instant reaction was one of shock and intimidation. I didn't know what to do and I said 'I can't believe you just did that'. Alan joked and said 'I hardly even touched you'.

Friday 24th October 2009 I ... was making my way to the photo copier and Alan Murphy was walking in the opposite direction to me and toward his office with a box in his hands, as he went past me he put the box he was carrying over my head, my immediate thought was he would then hit the box. I am very aware of the

problem with my hearing since the first incident and I said to Alan Murphy 'don't hit the box' he pulled the box back off of my head and continued to his office."

- [21] Under cross-examination the Appellant admitted that he had not mentioned the tinnitus or hearing loss problem to Dr Bisshop in 2009 even though he had seen Dr Bisshop on eight occasions in that year.
- [22] In his evidence the Appellant was clear about what he said to Mr Murphy immediately following the clapping of the ears incident and could also clearly recall Mr Murphy's response. Yet he could not recall the date of the incident. Under cross-examination the Appellant explained his ability to recall what was said on the occasion and not the date stating that it was a "pretty traumatic experience". If it was such a traumatic experience one would expect the Appellant to have visited a medical practitioner prior to 28 October 2008 and further would have completed an Incident Notification Form at a time prior to 7 July 2010.
- [23] The evidence revealed that the Appellant was having issues at work at least from September 2009 (Exhibit 12 pages 65-70) particularly with Mr Scott, his supervisor. These documents were e-mails sent from one of the Appellant's e-mail servers to another of his e-mail servers. The Appellant's evidence was that these e-mails were intended to be a record of the events that were happening at work at the time. The Appellant was cross-examined as to why he made records of these matters but that no record was made of the clapping of the ears incident. The Appellant responded by saying that in 2009 there were issues at the workplace whereas in 2008 there were no such issues.
- [24] **Lucy Applin's Evidence:** The only evidence of Ms Applin that I rely upon is her evidence that:
- she had tried to encourage the Appellant to go to the doctor about the ringing in his ear for some time prior to him eventually seeing Dr Bisshop on 29 October 2008; and
 - the Appellant told her about an incident at work some time in 2008.
- [25] **Ashley Timm's Evidence:** Whilst Mr Timm is currently employed by the Employer in Canberra he was not employed in the Brisbane office on 7 April 2008 having left the employ on 4 April 2008. If Mr Timm was at work when the incident occurred then the incident must have occurred prior to 7 April 2008. Whilst Mr Timm recalled working with both the Appellant and Mr Murphy prior to his leaving on 4 April 2008 and subsequent to his return to the Brisbane office in or about April 2009 he did not see any incident as described by the Appellant. Mr Timm agreed that the partition that separated him from the Appellant at the relevant time was about 1.5 metres in height.
- [26] **Mr Murphy's Evidence:** Mr Murphy is not currently employed by the Employer having been dismissed from that employment in December 2011. He commenced working for the Employer in February 2008 as a Contracts Administrator. The Appellant was an existing employee at the time. When Mr Murphy first commenced employment with the Employer he was on a working holiday visa visiting from Ireland. After six months of employment with the Employer (around August/September 2008) the Employer became his sponsor and this enabled him to continue employment in Australia.
- [27] In respect of the clapping of hands over the Appellant's ears incident, Mr Murphy denied ever hitting the Appellant "across the ears" or at all. In examination-in-chief, Mr Murphy said that he "heard about the allegation months, possibly a year or more after the allegation" from Mr Scott. When asked where he had this conversation with Mr Scott he responded by saying in the vicinity of D in Exhibit 11. Mr Murphy's evidence-in-chief was that Mr Scott had only just heard about the allegation and that he very briefly described the allegation to him i.e. that he was alleged to have hit the Appellant on the ears. Mr Murphy then said that his response to the allegation was "[w]ell, I haven't heard anything more about this" or "I'd never heard anything about it since". His evidence then was that he didn't even know what date it had occurred and then said "it was an absolute surprise at the time to both of us". That paragraph of evidence does not ring true. Mr Murphy's statements that he had not heard "anything more about" the incident and that he hadn't heard "anything about it since" would indicate that he had at least been apprised of the incident on a previous occasion. Yet he went on to state that it was an "absolute surprise at the time" to him.
- [28] Further, in his evidence-in-chief, Mr Murphy was asked whether he made any hand gestures during this discussion with Mr Scott. His response was that "during the conversation probably several gestures ... he wasn't a witness to it, he hadn't heard it described to him apart from the report and we had an open conversation as to what possibly could have been alleged here and I could ... easily have made some form of hand gestures in the conversation". In this piece of evidence Mr Murphy appeared to be stating that Mr Scott hadn't heard the incident described to him apart from a "report".
- [29] Under cross-examination, Mr Murphy said he could recall a discussion with Mr Scott around the area E and F in Exhibit 11. He then stated that it was the "first time I heard about it" and that Mr Scott did not have any

information "other than what was written down" and that they both were trying to figure out what the allegation was about. Mr Murphy then said he went through a process of trying to figure out what "was in this allegation that was completely news to us at that point". Later in cross-examination, Mr Murphy denied seeing anything in writing until a conversation he had in preparation for this hearing i.e. in recent weeks. Mr Murphy said that his recollection was that Mr Scott described the event to him and he could not recall whether Mr Scott was reading from a document or just describing the event.

[30] Later in cross-examination, Mr Murphy said that his recollection of the meeting with Mr Scott was that they just discussed the allegation, however, he then admitted that it was not the first time he had heard about the allegation. Mr Murphy then stated that Mr Scott had told him about the allegation on a previous occasion some "months and months" previously. Given that:

- the Incident Notification Form (Exhibit 10 page 46) was dated 7 July 2010;
- the meeting between Mr Scott and Mr Murphy was said to have occurred sometime in October 2010; and
- the two discussions Mr Murphy had with Mr Scott were months apart;

it would seem that the first of those discussions may have been around the time that the Incident Notification Form was lodged by the Appellant with the Employer. In light of this subsequent evidence, Mr Murphy's earlier evidence that the first occasion he became aware of the allegation was in the meeting with Mr Scott in October 2010, was clearly wrong.

[31] Whilst Mr Murphy admitted that:

- the office at the relevant time was an office where pranks occurred;
- he was part of such conduct,
- the culture of the office was such that there was good camaraderie and also a bit of mischief and pranks; and
- he was involved in the mischief and pranks;

he stated that clapping the Appellant around the ears was not what he would regard as a prank. Mr Murphy said that his version of a prank in the office environment was to place cello tape over a mouthpiece or to play with people's voice mails but that striking someone across the head was not a prank.

[32] In examination-in-chief, Mr Murphy said that he could not recall putting a box on the Appellant's head at any time. His response was not that it never happened. It was Mr Murphy's evidence that in neither discussion with Mr Scott was the allegation of him putting a box on the Appellant's head raised with him. In the Incident Notification Form signed on 7 October 2010 the box incident was said to have occurred on 24 October 2009. In the Appellant's e-mail dated 4 October 2010 forwarded to both Ms Hassam and Ms Avery he stated that this incident occurred on 24 September although no year is given.

[33] The meeting with Mr Scott to which Exhibit 11 referred must have been conducted after the receipt of the e-mail of 4 October 2010 and the receipt of the Incident Notification Form. Both the clapping of the hands over the Appellant's ears and the box on the Appellant's head incidents were mentioned in about the same amount of detail in the Incident Notification Form. I find it unusual that only one of those incidents was referred to by Mr Scott in that meeting in October 2010 particularly in circumstances where Mr Murphy's evidence was that the clapping of the hands over the Appellant's ears incident had already been raised with him by Mr Scott some months earlier.

[34] Mr Murphy said that no one from the Employer ever sat him down and said "[t]hese allegations are made against you. Here are the allegations" i.e. he never had that conversation with any Employer representative.

[35] **Medical Evidence:** Dr Bisshop's patient's notes (Exhibit 13) of 29 October 2008 recorded the reason for the Appellant's visit to her on that date as being "sore leg" however it is then noted "tinnitus left ear recently, no hearing loss, no headaches". In her examination-in-chief, Dr Bisshop said the word "recently" would imply something that had occurred in the previous six months. I accept Dr Bisshop's evidence in this regard as under cross-examination she explained that, at no time, had it been mentioned to her that the Appellant was alleging that the injury occurred in April 2008 i.e. approximately six months prior to his visit with her on 29 October 2008. The reference to "no hearing loss" was something she was told by the Appellant as no testing of the Appellant's hearing had been undertaken at the time. Dr Bisshop said that as the Appellant's deficiency in hearing was at the high frequency range, it was not a deficiency that would always be discernable especially

when such a deficiency initially arose. According to Dr Bisshop, a person may not notice a high frequency loss unless the person is in a particularly noisy environment.

[36] The Appellant next visited Dr Bisshop complaining of hearing loss on 6 July 2010 and on this occasion the hearing loss was the reason for the visit. Dr Bisshop on this occasion noted the following:

"left-sided tinnitus and reduced hearing ever since someone clapped their hands hard over his ears a couple of years ago at work

would like hearing checked [sic] again as has noticed deterioration

did have audiology in 2007 so could compare with this

referral to Attune for audiometry".

[37] The Appellant was referred by Dr Bisshop to Dr Agnew in correspondence dated 22 July 2010 (Exhibit 8 page 27). Dr Agnew is an Ear, Nose and Throat Surgeon and she examined the Appellant sometime prior to providing a medical report dated 1 October 2008 (Exhibit 8 page 28) to Dr Bisshop. In that medical report Dr Agnew reported that the Appellant "had not really noticed any problems with his ears until mid 2008 when he received a clap over both ears from a co-worker" and that "from this time on he noticed tinnitus in the left ear and decreased hearing".

[38] According to Dr Agnew, the Appellant had no associated ear pain, ear discharge or vertigo and there was no family history of deafness. After receiving a work history from the Appellant, Dr Agnew concluded that for the past seventeen years of employment the Appellant's work had been noise free and that otherwise he was in good health. On examination, Dr Agnew recorded that the Appellant's hearing in his right ear was within normal limits however there was a mild to moderate high frequency sensorineural hearing loss in his left ear. Because there was a significant asymmetry between the right and left ears, Dr Agnew arranged for the Appellant to have a MRI scan to exclude a retrocochlear lesion or any other reason for the asymmetrical hearing loss. Dr Agnew also then referred the Appellant to Dr Coyne for an opinion on the MRI findings i.e. the finding of a "prominent loop of the left anterior inferior cerebella artery entering the left porus acousticus with possible compression of the left VII and VIII nerve root complex".

[39] After receiving Dr Coyne's medical report dated 4 November 2010 (Exhibit 6), Dr Agnew wrote to Dr Bisshop conveying her understanding of Dr Coyne's report i.e. that Dr Coyne felt that the Appellant's problem was more "likely related to the acoustic trauma" and that he did not feel that anything should be done regarding the prominent anterior inferior cerebella artery (Exhibit 8 page 34).

[40] In correspondence to the Appellant's Solicitors dated 30 March 2012 (Exhibit 8 page 35) Dr Agnew said that "trauma could cause tinnitus", that "a clap over the ears can cause tinnitus", that she would expect symptoms such as tinnitus following trauma to develop immediately after the trauma and that the symptoms that may be expected following acoustic trauma were "hearing loss, tinnitus and/or vertigo".

[41] In examination-in-chief, Dr Agnew agreed that if the Appellant's evidence of the trauma event were accepted then the incident was consistent with causing both tinnitus and/or hearing loss. Dr Agnew stated that if the tinnitus came on immediately following the trauma then it was more likely to be related to the trauma. Similarly the significant drop off in the three year period between the audiology reports would, according to Dr Agnew, indicate that it was more likely that something had occurred in that period rather than an age-related degeneration.

[42] Under cross-examination, Dr Agnew said that:

- it would be unusual for a person of the age of the Appellant to have hearing problems attributable to constitutional factors;
- usually with ageing and noise exposure she would expect the hearing loss to be very similar on both sides whereas the dip in the Appellant's case was only in one ear i.e. any hearing loss related to ageing or noise was usually a symmetrical loss;
- hearing loss can arise from a small leak of perilymph from the round window or from the pressure changes in the perilymph which can cause changes to the hair cells in the cochlear and in the balance organ, semicircular canal;
- even if the force applied to each ear was equal, it would depend upon the pressure that fell onto the ears and how the cupping was on each ear that would determine the damage to the ear;

- she would expect the symptoms of tinnitus and hearing loss to emerge immediately after trauma to the ear;
- the Appellant's hearing loss was at one frequency only and that frequency was not one of the major speech frequencies. Thus it may go unnoticed for a period of time however she would expect any hearing loss would occur from the time of the incident;
- the audiology report of 2010 indicated a deterioration in hearing from the earlier audiology report undertaken in 2007;
- if the hearing loss was from an acoustic trauma she would expect that the hearing loss would have stayed very similar from the time of the trauma;
- the hearing test in 2010 did not have the appearance of an age related hearing loss because firstly, the hearing loss was only in one ear and that did not usually happen with age-related hearing loss, and secondly, the loss was mainly affecting just the one frequency (i.e. the four kilohertz frequency) and an age-related hearing loss does not normally affect just the one frequency; and
- the Appellant has a mild to moderate high frequency sensorineural hearing loss on the left.

[43] Dr Coyne, a specialist in Neurosurgery and Spinal Surgery, provided a Medical Report dated 4 November 2010 (Exhibit 6). In that medical report Dr Coyne recorded that a work colleague of the Appellant had "unexpectedly clapped his hands over" the Appellant's ears "with force". According to that Report the Appellant told Dr Coyne that "immediately following" the clapping "he was aware of left-sided tinnitus, which has persisted". The Appellant further advised Dr Coyne that "over time" this had "become a significant problem for him" and that the tinnitus affected his daily activities and had disturbed his sleep. In reviewing the MRI, Dr Coyne stated that the Appellant reported "his tinnitus coming on following a discrete episode of trauma, and I wonder if this may not be a more likely cause of his tinnitus" rather than the findings outlined in the Radiology Report (Exhibit 8 page 32).

[44] In a record of a telephone conference with Dr Coyne on 13 March 2012, he confirmed that:

- the vascular compression syndrome of the 8th nerve finding in the MRI was exceptionally rare; and
- if there was another potential cause for the damage to the Appellant's hearing loss, and it would seem the more logical, then it would probably be the more likely cause i.e. the clapping of the hand over the Appellant's ear would seem the more likely cause of the Appellant's condition.

[45] In saying this, Dr Coyne did state that local trauma to the ear was more in the field of an ear, nose and throat surgeon rather than his field of expertise i.e. neurosurgery. As a general principle however Dr Coyne said that local trauma to the ear could well cause tinnitus and, if the history provided by the Appellant was correct, then such trauma would seem the most likely cause of the Appellant's tinnitus and hearing loss.

Submissions

[46] **Appellant:** Dr Cross, Counsel for the Appellant, provided a written outline of submission. The Appellant further submitted that:

- it would seem a remarkable assertion for the Appellant to make if the clapping of the ears incident did not occur as recounted by him;
- the Appellant had been consistent in his account of the incident to each of the medical practitioners and in the Incident Notification Form completed on 7 July 2010;
- the Appellant's e-mail to Mr Bruvel of 7 July 2010 (Exhibit 10 page 41) also recorded a consistent account as follows:

"Hey you were here working here back when Alan walked out [sic] the toilets and clapped his hand s [sic] over my ears weren't you?"

and a further e-mail to Mr Bruvel on the same day which recorded the following:

"Brian was talking about getting our hearing tested before site works, so I told him about the trouble I have had with my left ear since, now they are telling me to go and get hearing tests, he was asking me when it happened, it was that long ago the only way I could gauge it was by who was working here George Aronis or yourself, I remember or Ashley there also but he had been here for a while."

It would be highly unusual if an event had not occurred for a person such as the Appellant to write such an e-mail to another person asking whether they remembered the incident.

- that the injury suffered by the Appellant was consistent with the mechanism alleged and that no other mechanism of injury was proffered i.e. it was consistent with causing tinnitus and hearing loss. There is nothing in Dr Bisshop's patient notes to suggest that the Appellant had suffered tinnitus or hearing loss prior to April 2008. The medical evidence supported a finding that the Appellant's tinnitus and hearing loss was not age-related and/or resulting from noise;
- Dr Agnew's evidence was that the deficiency recorded in the 2010 audiology report was inconsistent with age-related or noise induced loss of hearing and was more likely attributable to an acoustic trauma;
- when the Appellant visited Dr Agnew he was unaware of what he was suffering from or what his deficiencies were and the result of that visit was that his account of the incident was entirely consistent with the trauma alleged;
- the Appellant would not have been a person who would have known prior to attending Dr Agnew that acoustic trauma could cause high frequency deficiency and tinnitus. This assertion was not tested in the course of the hearing;
- Mr Murphy's response to the allegation that he put a box over the Appellant's head was bizarre i.e. that he could not recall, rather than, he didn't do it or he definitely didn't do it;
- there was an incentive for Mr Murphy to lie in 2010 i.e. he was receiving an income of \$110,000 plus per annum, he was on a sponsored visa with the Employer being the sponsor, he gave a version of events that protected his interest and once having given his version of the event it was difficult to resile from that version; and
- the Appellant's evidence and that of Mr Timm could both be believed. The Appellant's evidence was that after the clapping of Mr Murphy's hands over his ears he looked back and saw Mr Timm looking down and he expected that Mr Timm had seen the event. Mr Timm may not have seen the incident but the incident could still have occurred.

[47] On the balance of probabilities it was submitted that the Commission should find that the Appellant suffered an "injury" as defined in s. 32 of the Act being a bilateral hearing loss and tinnitus. In those circumstances, the Commission should set aside the decision of Q-COMP dated 23 August 2011 and substitute a decision that the Appellant had sustained an "injury" as defined in the Act.

[48] **Q-COMP:** Mr Lippett, Counsel for Q-COMP, submitted that there was only one issue for determination i.e. whether the employment was a significant contributing factor to the Appellant's injury. If the Commission accepted that the ear clapping incident occurred then the appeal must be upheld.

[49] Q-COMP contended that the Appellant was an unreliable witness as was Ms Applin. I indicated during the Q-COMP submission that, unless I was convinced strongly otherwise, I did not intend to take much from Ms Applin's evidence, particularly as a corroborative witness, as I did not find her evidence to be terribly persuasive. As for the Appellant's evidence, Q-COMP submitted that I should consider the following:

- the Appellant did not report the ear clapping incident to any superior or colleague in 2008 or 2009 although the Appellant did give evidence that he told Brian Murphy, the Employer's Queensland Occupational Health and Safety Manager, sometime in 2009 and that he did nothing about the complaint. The suggestion that Mr Murphy ignored the Appellant's complaint on this occasion is difficult to accept when, on another occasion in 2009, Brian Murphy assisted the Appellant complete an Incident Notification Form after he injured his wrist. Some caution in the acceptance of the Appellant's evidence in this regard was suggested as it was difficult to accept that the Employer's Occupational Health and Safety Manager would disregard such a complaint, if made. Brian Murphy was listed as a witness for the Appellant with both Q-COMP and the Commission being informed only at the commencement of the hearing that his evidence would not be relied upon;

- Mr Timm, who it was said was standing close by when the incident occurred could not recall any such incident;
- no Incident Report was completed until 7 July 2010. Whilst it may be understandable that an Incident Report was not lodged immediately after the incident there was no explanation as to why such a report was not completed when the issue became a problem for the Appellant. The Appellant had completed an Incident Notification Form when he hurt his wrist at work in 2009 and so was well aware of the need to complete such a form. Ultimately it was Brian Murphy's suggestion that resulted in the Appellant completing the Incident Notification Form in July 2010;
- the first comment to a medical practitioner about the problem was on 29 October 2008 however there was no mention made about an ear clapping incident at work;
- whilst the Appellant told Dr Bisshop on 29 October 2008 that he had no hearing loss, the account he gave Dr Agnew was that he had not really noticed any problems with his ears until mid 2008 when he received a clap over both ears from a co-worker and "from this time on he noticed tinnitus in the left ear and decreased hearing";
- the fact that the Appellant did not return to see Dr Bisshop between 29 October 2008 and 6 July 2010 about his tinnitus and hearing loss even though he gave evidence that in mid 2009 the tinnitus was driving him "crazy". The Appellant's excuse was that he was focusing on his work and studies at the time however the Appellant did visit the Central Brunswick Medical Centre where Dr Bisshop worked on thirteen occasions during that same period;
- it was not until July 2010 that the Appellant mentioned any detail of the incident to any medical practitioner;
- the Appellant did not record this incident although he made several records of incidents occurring at work in 2009;
- if the Appellant's version of the incident was accepted then that would mean that Mr Timm's account must be discarded and there was no apparent reason not to accept Mr Timm's evidence; and
- Mr Murphy was clearly a prankster and he knew there would be consequences if he admitted to the ear clapping incident. Why then would he put his job at risk by clapping his hands over the Appellant's ears. He was clear in his evidence that he did not view physical contact as a prank. Given that Mr Murphy had been terminated from his employment with the Employer in December 2011, he had no reason to try and protect the Employer.

[50] Ultimately Q-COMP submitted that the issue for determination was whether the acoustic trauma suffered by the Appellant was the incident he described as occurring in April/May 2008 or whether it was some other incident.

Conclusion

[51] The issue for determination is whether I accept the Appellant's version of the incident. If I do then clearly the injury to the Appellant arose out of, or in the course of the Appellant's employment with the Employer and was a significant contributing factor to his tinnitus and bilateral hearing loss. Whilst I have expressed a number of concerns with the Appellant's evidence, his account of the incident remained consistent throughout i.e. to his general practitioner, Dr Agnew, Dr Coyne, in the Incident Notification Form and in his evidence before the Commission.

[52] The Appellant's evidence as to the extent of his suffering from tinnitus in the period to 22 July 2010 was difficult to accept. Whilst he had mentioned the tinnitus to Dr Bisshop on 29 October 2008 he did not seek any medical attention for the problem until his visit to Dr Bisshop on 22 July 2010 i.e. two years and three months after the injury was said to have occurred. If the tinnitus was causing the Appellant the concern that he complained of in his evidence, then it would seem most unusual for him not to have mentioned the problem at some time during the thirteen visits to the Central Brunswick Medical Centre between those dates. I suspect that the extent of the tinnitus may have been somewhat exaggerated by the Appellant.

[53] The Appellant at all times stated that there was no intent on the part of Mr Murphy to harm him. It was a prank or practical joke. Clearly Mr Murphy was a practical joker - it was in his nature to play pranks. Throughout Mr Murphy's evidence often it was suggested that he "hit" the Appellant on the ears or, as Mr Murphy himself described it on one occasion as "striking" the Appellant on the ears. The use of such words gave the impression that the Appellant was contending that Mr Murphy intended to assault him. That was never the Appellant's

contention. I have formed the view that Mr Murphy was playing a practical joke on the Appellant when he went past him and clapped his hands over both the Appellant's ears. Mr Murphy being the prankster would probably not have given any thought to the fact that he may have caused injury to the Appellant. It appeared to me that it was a prank that went wrong and the Appellant has been left with a permanent hearing loss and tinnitus.

[54] The fact that Mr Murphy enjoyed playing pranks is supported by the box incident. It was not Mr Murphy's evidence that such an incident did not occur. Rather his evidence was that he did not recall the incident. I prefer the evidence of the Appellant in respect of the box incident.

[55] I accept the Appellant's account of the mechanism of injury to his left ear. I prefer the evidence of the Appellant to that of Mr Murphy on the clapping of hands incident. The evidence of Dr Agnew was that if I accept the Appellant's evidence of the trauma event then such an incident was consistent with causing both tinnitus and/or hearing loss. The Appellant was also assisted by having had an audiology report taken in 2007 so that it could be compared with the audiology report conducted in 2010. This showed that the Appellant had suffered a mild to moderate high frequency sensorineural hearing loss in his left ear subsequent to the 2007 report. Dr Coyne also concluded that the clapping of a hand over the Appellant's left ear would seem the more likely cause of his condition. The fact that the Appellant did not notice the hearing loss in the left ear for some time was consistent with the medical evidence given that the loss was only in the four kilohertz frequency which was a deficiency that was not always discernable especially in its initial stages.

[56] I thus find that the Appellant has discharged the onus placed on him and determine that:

- the Appellant suffered an injury being bilateral hearing loss and tinnitus;
- that the injury arose out of, or in the course of the Appellant's employment, with Hindmarsh Construction Qld Pty Ltd; and
- that his employment with Hindmarsh Construction Qld Pty Ltd was a significant contributing factor to the injury.

[57] In those circumstances I uphold the appeal in WC/2011/293. I set aside the decision of Q-COMP dated 3 August 2011 and determine that the Appellant's claim is one for acceptance given that he suffered an injury within the meaning of that term in s. 32 of the Act.

[58] I determine and order accordingly.

D.M LINNANE, Vice President.

Hearing Details:

2011 November 15
2012 March 13
April 3

Appearances:

Dr G. Cross of Counsel, instructed by Everingham Lawyers for the Appellant.
Mr F. Lippett of Counsel, directly instructed by Q-COMP.

Released: 14 May 2012