

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

HOLBERTON, Layne

v

TASMEA LIMITED

JURISDICTION: South Australian Employment Court – Return to Work Act 2014 – Hearing and Determination

CASE NO/S: ET-23-05520

HEARING DATE: 19 and 20 November 2024

JUDGMENT OF: His Honour Deputy President Judge Calligeros

DELIVERED ON: 11 February 2025

CATCHWORDS:

Application for review of the rejection of a claim seeking provision of hearing aids to ameliorate noise induced hearing loss (NIHL) – The applicant brought the claim against an employer other than the employer whom he was last employed by – HELD: 1. Section 188(2) of the Return to Work Act 2014 deems the injury to have occurred immediately prior to when notice of injury is given and, subject to proof to the contrary, to have arisen out of employment where a worker was last exposed to noise capable of causing NIHL – The applicant was not exposed to noise capable of causing NIHL in employment subsequent to employment with the respondent and has provided proof to the contrary to rebut the second presumption in s 188(2) – 2. Based on the evidence of Dr Tomich, which is accepted, the respondent has rebutted the second presumption in s 188(2) – The decision rejecting the claim is confirmed.

Transfield Services (Australia) Pty Ltd v Sellar [2012] SAWCT 41

Makita v Sprowles [2001] NSWCA 305

Onody v Return to Work Corporation of South Australia [2019] SASCFC 56
WorkCover Corporation and Anor v Perre [1999] SASC 564; (1999) 76 SASR 95

Return to Work Corporation of South Australia v Renfrey [2019] SASCFC 26

REPRESENTATION:

Counsel:

Applicant: Mr S Hurburgh

Respondent: Ms A Wells

Solicitors:

Applicant: Industrial Deafness Australia Legal

Respondent: FCW Lawyers

- 1 This decision concerns a claim for noise induced hearing loss (NIHL). The parties agree that the applicant, Layne Holberton, has NIHL as a result of employment, but do not agree which employer is responsible for the injury under the *Return to Work Act 2014* (RTW Act). The compensation in issue is the cost of a set of hearing aids which Mr Holberton wishes to purchase. The respondent is Tasma Limited (Tasma). Mr Holberton was employed by Ottoway Engineering Pty Ltd (OE), a company owned and operated by Tasma.
- 2 Mr Holberton asserts that the last employment in which he was exposed to noise capable of causing hearing loss was employment with OE where he was employed as a manager between August 2012 and August 2016. OE fabricates pipes. Whilst working for OE, Mr Holberton worked mainly in an office adjacent to a workshop. He also worked in the workshop.
- 3 Subsequent to being employed by OE, Mr Holberton was employed by Ecospec Pty Ltd from 9 January 2017 to 5 January 2018.
- 4 Since January 2018 Mr Holberton has worked as the managing director of Tube Solutions Pty Ltd (Tube Solutions) performing essentially the same work that he performed for Ecospec. Mr Holberton is the sole director and shareholder of Ecospec, which was registered in 2006. He does not receive a regular wage from Tube Solutions but takes an annual dividend.
- 5 Mr Holberton claimed compensation for NIHL from Tasma in November 2020 whilst acting as sole director of Tube Solutions.

Issue

- 6 Whilst put slightly differently by each party, the issue here is whether employment with OE was employment in which Mr Holberton was last exposed to noise capable of causing NIHL under s 188(2) RTW Act.

Non-expert evidence

- 7 Mr Holberton produced an evidence affidavit, gave some oral evidence and was cross-examined.
- 8 Mr Holberton was born on 13 April 1961. During the 4 years he was employed by OE, Mr Holberton worked 8 hours per day, 5 days per week, spending 1 to 2 hours each workday in the workshop. He was exposed to noise from welders, grinders, cutting equipment, cranes, forklifts and noise associated with pipe fabrication such as grinding and hammering. He wore earplugs whilst in the workshop.

9 A description of Mr Holberton's employment before OE is set out in his Statement of Issues and Contentions in this way:¹

12. From 2009-2013, the Applicant worked for Tube Solutions which contracted with the Respondent. The Applicant was involved with overseeing the fabrication of pipework for the naval ships that were being built in South Australia.

13. The Applicant worked out of a shared workshop, working approximately 7 hours a day in an office and 1 hour in the workshop. The Applicant was exposed to noise from welders, grinders, cutting equipment and hammering sounds whilst in the workshop.

14. From 2006-2009 the Applicant worked as a part-time stockbroker for himself during this period of time and was not exposed to noise capable of causing NIHL.

15. From 1982-2005, the Applicant was employed by Walker Australia Pty Ltd (previously Tenneco Automotive), which was responsible for making exhaust systems for cars in Australia. From 1982-1991, the Applicant worked as a toolmaker and was exposed to loud noise.

16. For the period 1991-1998, the Applicant's role was project engineer, and from 1998-2006, the Applicant was employed in a managerial role, working out of an office which was next to the factory floor. The Applicant was required to wear earplugs at all times except whilst working in the office.

17. From 1978-1982, the Applicant was employed as a factory worker with Dobbie Dico where he was exposed to noise.

10 In his affidavit Mr Holberton stated that Tube Solutions is contracted to provide services to Ecospec, and the work he performed for Ecospec is similar to his role as managing director of Tube Solutions. In each role he mostly worked/works from home and he occasionally attended/attends at a work site. When on-site, Mr Holberton does not perform any hands-on work or operate any machinery.

11 Mr Holberton explained that when he started with OE in 2012, it was at premises at Duncan Court, Ottoway. The workshop moved from there to Plymouth Road, Wingfield in around 2014. Mr Holberton said 50 to 60 people worked at the Duncan Court premises while 80 to 100 people worked at Plymouth Road. He estimated the size of the premises at about 3,000 square metres at Duncan Court and about 5,000 square metres at Plymouth Road. At Duncan Court he worked in an office with brick walls or similar.

¹ Exhibit T1, Trial Book (TB), 16.

- 12 In cross-examination Mr Holberton acknowledged that most of his employment prior to working with OE was performed in noisy environments. He explained that at Plymouth Road, his office was located where mostly supervisors worked, at one end of the premises, in a construction two storeys high and comprised of Besser concrete blocks.
- 13 Mr Holberton explained that when working for Ecospec and Tube Solutions, he would visit sites for a few hours each week. The work of each company involves repairing or replacing failing concrete, frequently by the use of jackhammers. He agreed the work was noisy and said that employees are required to wear category 5 earplugs. He agreed that the earplugs do not eliminate the noise completely. He explained that when he was on site and had to talk to an employee, nearby workers would stop using noisy equipment so he could have a conversation. He explained that he only went on-site to talk to employees about the work. For that reason, Mr Holberton described his exposure to noise whilst employed by Ecospec as minimal.
- 14 Mr Holberton stated that working with noise at OE was different to Ecospec because everyone would continue working and making noise while he was on the workshop floor at OE. Although he wore hearing protection when working for OE, he would remove it when he needed to have conversations with one of the workers he supervised. It was put to him that workers in close proximity to where he was having a conversation at OE would stop work while he was talking. He said he could not give a yes or no answer to the question because his focus was on the conversation he was having.
- 15 In re-examination Mr Holberton said that he would only attend on-site whilst working for Ecospec once a week on average for a couple of hours each week. Most of his time was spent working in his office at home.
- 16 Gareth Hose is a civil engineer who was employed by OE as operations manager between 2013 and 2015. He described OE as a wholly owned subsidiary of E&A Limited which later became Tasma.
- 17 There were few material differences between the evidence of Mr Hose and that of Mr Holberton. Mr Hose emphasised the requirement to use personal protective equipment (PPE), including hearing protection, whilst in the OE workshop. He said that it was necessary to remove earplugs to have a conversation on the workshop floor, it would only be for between 30 seconds and a few minutes duration.
- 18 Mr Hose also stated that the vast majority of Mr Holberton's communications at work with OE would have been with other supervisors rather than staff.

- 19 Mr Hose agreed that noise made by grinding, hammering and cutting was present in the workshop almost constantly on any given workday. Mr Hose agreed that whilst a person being spoken to by a supervisor in the workshop would stop performing work, other workers nearby did not.

Medical evidence

- 20 Mr Holberton relied on the expert evidence of Dr Paul Fagan, ear, nose and throat surgeon. In his first report, Dr Fagan expressed the view that based on his statement, Mr Holberton's exposure to noise whilst working for OE "was more than sufficient to cause NIHL".² He disagreed with Dr Tomich who described Mr Holberton as being office-based whilst working for OE. He agreed with Dr Tomich that Mr Holberton's self-employment, did not contribute to his hearing loss.
- 21 In a report dated 11 November 2024, Dr Fagan stated that based on Mr Holberton's affidavit, the duties performed for Ecospec and Tube Solutions did not cause any noise-induced hearing damage.
- 22 Dr Fagan disagreed with a statement in the second report produced by Dr Tomich that the LAeq 8 hour exposure to noise at OE was 62db(A). He stated that the noise survey was a snapshot of the full 8 hours and made no allowance for variations in sound pressure or the characteristics of the noise. Dr Fagan opined that, based on Mr Holberton's description of the OE workshop, the ambient sound pressure was likely to be "in the vicinity of 91dB for which the period of safe exposure is 2 hours".³
- 23 In oral evidence Dr Fagan agreed that Mr Holberton had a greater degree of hearing loss in the right ear, particularly in the lower frequencies. He agreed that the left-sided loss cannot solely be attributed to noise given the appearance of the audiogram. He also agreed that NIHL occurs in the 2,000 Hz to 4,000 Hz range.
- 24 It was put to Dr Fagan that Dr Tomich stated no measurable increase in hearing loss had taken place since the time of a 2014 audiogram. Dr Fagan said there was no answer to that question. He said that the test-retest margin of error with audiograms can be greater with subjects over 60 years of age. It was then put to Dr Fagan that the 1% increase between the 2014 audiogram and the 2020 audiogram made it likely there had been no deterioration. Dr Fagan repeated his earlier answer. He was then asked whether the progression from 2014 and 2020 appeared to be due to constitutional and age-related factors.
- 25 This exchange then took place:⁴

² Report 23 February 2024, TB 62.

³ Report 11 November 2024, TB 66.

⁴ Transcript (Tr) 36.23 – 37.11.

MS WELLS: Can I ask you to accept for one moment that Mr Holberton's evidence is, in fact, that at Ottoways, at least between 2014 and 2016, when he was working in the office, that being for about six hours a day, he could not hear any noise from the workshop, and that when he was in the workshop he was required to wear earplugs as part of the compulsory PPE and did so. I'm asking you to assume those facts.

WITNESS: Yes.

MS WELLS: With those facts in mind, that would change your answer to question 1, wouldn't it?

WITNESS: No.

MS WELLS: Well, it would have to because you've added together the noise exposure of the one to two hours of being directly in the workshop, and the remaining six hours where you've assumed he's heard that noise from the office. You've come to a conclusion, I suggest, on the basis of the combination of those two noise exposures.

WITNESS: I think the noise exposure – and if I have that information about the office, I don't believe it's particularly important, because the two hours, certainly two hours, on a repetitive basis in the workshop, even with hearing protection, is not going to – is going to subject him to noise which is capable of damaging his hearing. And it's well known that hearing protection can never be used for a hundred per cent of the time.

And I've even done some work on that myself by asking a series of a hundred consecutive clients that I assessed for noise-induced hearing loss if they were able to wear their hearing protection a hundred per cent of the time. The answer was always no for reasons of communication or safety, or discomfort or sweating. So that I can't agree with you that – I'm sorry, if you've asked me to say that that period with Ottoway would not have damaged his hearing. I couldn't agree with you.

- 26 Dr Fagan was questioned about his view that the ambient sound pressure on the workshop floor at OE was likely to be 91dB. He said he arrived at that view based on the description given. It was put to him there was no objective evidence to base his assessment on. He said that there rarely is. He said it was his impression that the noise was sufficient to cause NIHL. A short time later Dr Fagan said that wearing earplugs was not really relevant to assessing NIHL because while using hearing protection was a good idea, it is not foolproof. The following exchange then occurred:⁵

⁵ Tr 39.23 – 40.11.

MS WELLS: Well, just taking that idea, if it's the exposure to sound pressure, and you say in your supplementary report that at that level of 91 decibels, the period of safe exposure is two hours – yes?

WITNESS: Yes.

MS WELLS: Then if Mr Holberton was only in the workshop for one to two hours a day, exposed to that level of noise, then he was within the safe levels of exposure, even on your estimate of the noise level, wasn't he?

WITNESS: That's assuming that the PPE is doing the job perfectly. And that's an assumption.

MS WELLS: I thought you said that that didn't matter, and it was the sound pressure over a period of time?

WITNESS: That is true. I did say that.

MS WELLS: So we can conclude then that he was within the safe level regardless of whether he was wearing hearing protection in that one to two hours?

WITNESS: On what basis – sorry, if I – just to clear that up, how can we assume that?

MS WELLS: I'm going on what you've said is the safe level of exposure at that noise level of 91 decibels. At the top of your report on page 66 you say the safe level of exposure is two hours.

WITNESS: Yes, I did say that.

MS WELLS: And he is within that time period, isn't he? One to two hours?

WITNESS: Yes.

- 27 It was then put to Dr Fagan that much of the on-site work Mr Holberton did for Ecospec and still does as managing director of Tubing Solutions was in the flight path of Adelaide Airport and within 5 kilometres of where planes depart and land. Dr Fagan said that he needed to know about the duration of the exposure to that noise. He was asked to answer the question based on his own experience of planes flying overhead when departing or landing. He said that he was unable to answer the question.
- 28 Dr John Tomich is an ear, nose and throat surgeon whose evidence Tasma relied upon.
- 29 Some of the views held by Dr Tomich in relation to this matter are described in the recitation of the evidence of Dr Fagan.

30 In his first report dated 9 August 2023, Dr Tomich noted a binaural hearing loss which was greater in the right ear, particularly in the lower frequencies. There had been Meniere's disease. The losses at 2,000 to 4,000 hertz were considered relevant and a 9.7% binaural loss was recorded.

31 Given the occupational history and the presence of Meniere's disease, the 2014 assessment of 7.3% binaural loss or 4% whole person impairment (WPI) was recommended to be "taken as an indication of his noise induced hearing loss that can be attributed to the whole [of] his earlier hazardous noise exposure which ceased in about 2006".⁶

32 In his second report dated 8 April 2024, Dr Tomich stated the following:⁷

Re: 5 Noise induced hearing loss is a gradual and accumulative condition. This occupational history of employment as described with Tenneco Automotive would suggest that his employment would have contributed to the total present noise induced hearing loss. However, without objective noise dose evidence and without serial audiometry, this is impossible to apportion in any objective fashion.

Re: 6 This has already been addressed in my responses above, but in particular my opinion has relied on the worker's occupational history as stated and comparison of the relevant audiometry.

33 In his second report, Dr Tomich was asked to comment on a statement of Mr Holberton dated 18 January 2024. By reference to paragraphs 8 to 12 of that statement, Dr Tomich wrote:⁸

Having given due regard to this additional information, it would indeed be difficult to refute that his employment with Ottoway Engineering as described was not capable of being a significant contributing cause of his presenting hearing loss.

34 In cross-examination, Dr Tomich was asked whether he maintained the views expressed in his second report. He said that he did not. Dr Tomich was challenged about the change of view. He agreed that his second report was based on paragraphs 8 to 12 of Mr Holberton's statement. He also agreed that he was asked by the second report request to describe the likely noise level at the OE workshop and had written "[w]ithout objective noise data measurement it was impossible to give any opinion...".⁹

⁶ TB 32

⁷ TB 39.

⁸ Ibid.

⁹ Ibid 38.

- 35 Tasma requested a third report from Dr Tomich by letter dated 1 July 2024. The eight page long letter refers to discussions between Dr Tomich and the executive chairman and the group counsel of Tasma and details the work history and exposure to noise at OE. A third report dated 13 August 2024 commenced with a statement that Dr Tomich was satisfied that employment with OE was not capable of causing NIHL. The duration of employment was stated to be from 2014 to 2016. Dr Tomich corrected the commencement date to 2012 in oral evidence.
- 36 In cross-examination, Dr Tomich said he calculated the exposure to noise for the 2 hours Mr Holberton spent each working day on the workshop floor at OE at 90dB. He explained by reference to various considerations why he did not think that exposure was capable of causing NIHL.¹⁰ It was then put to him that the explanation must be qualified by his earlier answer that without any objective noise data it was impossible to know whether that was correct. Dr Tomich replied:¹¹

WITNESS: I agree with that, but again, it's a matter of experience, and when you have been involved in this work for some time, you have a concept of the understanding of the likely noise exposure in a given situation. The only objective way to have obtained what I am saying is to have been there with a dosimeter or a noise survey level going back to 2014 to 2016 and that's, I think, blatantly not available. So, therefore, based on experience of what I've read, what I've learnt, that is sort of – those are the – those figures are recognised scientifically accepted.

MR HURBURGH: But based on your experience, you would accept that welders and grinding and fabrication of pipework can give rise to noises capable of causing hearing loss. You accept that.

WITNESS: Your Honour, I've just made that point. A noise can be continuous, intermittent or impulse. That's a very generic statement we've heard, so, therefore, you have to drill down to see what that is. There are other factors involved. With background noise, there's a lot of low – when you look at the spectral analysis of the sound of background noise, it's often biased towards low frequency, which give a perception of being louder than what it should be and what it is when you measure it. There's always that extra factor of that low tone rumble in any factory.

- 37 Dr Tomich was asked to assume that Mr Holberton had a hearing test with the Corporate Health Group on 7 April 2014 which recorded a 7.3% binaural hearing loss.¹² Dr Tomich said he did not assume that the test was accurate. He was then taken to his draft report dated 20 May 2024.¹³ The

¹⁰ Tr 63.21 – 64.35.

¹¹ Tr 64.42 – 65.17.

¹² Tr 67.34-37; TB 45 at 9.

¹³ TB 49-51.

draft report is very similar to the third report. Dr Tomich agreed that the first and second dot points in the report were important to his reasoning. He said the third dot point, which stated there was no demonstrable increase in binaural loss between 7 April 2014 and 1 June 2020, was “part of the story”.¹⁴ He accepted that it had always been his view that the progression of hearing loss was due to constitutional factors.

- 38 Dr Tomich was then asked about Tasma’s advice to him that the level of noise in the workshop was 62dB and about his question to Tasma about whether Mr Holberton was a ‘contractor’. He was taken to this passage in his third report where he stated that Mr Holberton was not exposed to noise capable of causing NIHL whilst working for OE:¹⁵

The reported Ottoway Engineering factory noise level of 62db(A). If this in fact means an LAeq 8 hour exposure of 62db(A), then this magnitude of sound is well within the accepted safety levels, and would not be capable of causing a noise induced hearing loss. Even if there were limited short periods of intermittent noise exposure much greater than 85db, it is considered unlikely that this would cause a noise induced hearing loss.

- 39 Dr Tomich said that he did not rely on that information even though it was set out in his report. It was then put to him that must mean that he relied on the two audiometric tests to form his view. He agreed, but added that he also had regard to the amount of time Mr Holberton spent on the workshop floor. Counsel then put to him that answer was inconsistent with his answer that his opinion was based on the two audiometric tests. Dr Tomich then referred again to his mistaken understanding that Mr Holberton was working in a naval shipyard. He was then asked, if that was the explanation for changing his view, why was it not mentioned in his third report.

Respondent’s submissions

- 40 Counsel for Tasma referred to Tasma’s Statement of Facts, Issues and Contentions which provides:¹⁶
1. The applicant’s noise induced hearing loss was the result of his employment during the period from 1977 to 2005.
 2. There is no demonstrable increase in the applicant’s hearing loss between 7 April 2014 and 1 June 2020. The 1% difference is within the test/retest margin of error and falls within the Dobie Criteria.

¹⁴ Tr 69,34.

¹⁵ TB 61.

¹⁶ TB 19.

3. The progression of the applicant's hearing loss from 6.3% to 9.7% between 2020 and 2023 is at the marginal limit of the Dobie Criteria for test/retest variation and is due to either:
 - 3.1 constitutional related factors; or
 - 3.2 the applicant being exposed to noise at a level capable of causing noise induced hearing loss during the Ecospec Employment and the Tube Solutions Employment.
4. Accordingly, the applicant must provide proof that:
 - 4.1 the Employment was employment capable of causing noise induced hearing loss; and
 - 4.2 the applicant was not exposed to noise at a level capable of causing noise induced hearing loss during the Ecospec Employment and/ the Tube Solutions Employment.
5. The applicant has not provided proof that the Employment was employment capable of causing noise induced hearing loss. In any event, the evidence demonstrates that the noise to which the applicant was exposed in the Employment was not at a level capable of causing noise induced hearing loss.
6. Accordingly, the Tube Solutions Employment was the last employment capable of causing noise induced hearing loss in the absence of the applicant providing proof that it was in fact the Employment.
7. In the alternative, if the Tube Solutions Employment was not the last employment capable of causing noise induced hearing loss in the absence of the applicant providing proof that it was in fact the Employment, the last employment capable of causing noise induced hearing loss was the Ecospec Employment.

41 Counsel referred to *Transfield Services (Australia) Pty Ltd v Sellar*,¹⁷ where Jennings PJ said of s 113(2) of the *Workers Rehabilitation and Compensation Act 1986*, which is identical to s 188(2) of the RTW Act:¹⁸

In my view the proper construction of s 113(2) is as follows.

Having identified the most recent employment capable of causing noise induced hearing loss, there is an evidentiary presumption that it is that employment that has caused all of the hearing loss. The quantum of that entitlement is contingent upon the year in which the

¹⁷ [2012] SAWCT 41.

¹⁸ *Ibid* [29]-[31], [33].

disability was sustained. Thus identifying the date is important. In cases where the worker has not retired from employment on account of age or ill-health, that date is deemed to be the date of the giving of notice of the disability.

I think it is incumbent upon a worker, who selects an employer at an earlier point in time than the last employer to be the employer whose employment last exposed the worker to noise capable of causing noise induced hearing loss, to establish that later employment was not so capable. To use the words of Mullighan J in *Perre* that position accords with fairness and commonsense as the worker will be in the best position to know whether or not he or she was exposed to noise capable of causing noise induced hearing loss at a subsequent place of employment.

...

It follows that if a worker introduces evidence about subsequent employment that suggests that he or she was not exposed to noise capable of causing noise induced hearing loss, an evidentiary burden will shift to the relevant compensating authority if it contends that that is not so.

- 42 Counsel submitted that based on Dr Tomich's revised view, the highest level of continuous noise Mr Holberton was exposed to was 84dB and 85dB was said to be the threshold for NIHL. That view was said to be consistent with the 1% increase in binaural hearing loss recorded between the 2014 audiogram and the 2020 audiogram. That was in contrast to the increase from 6.3% to 9.7% from the 2020 audiogram to the 2023 audiogram. In relation to Dr Fagan's comments about the test/retest margin of error with older subjects, counsel submitted that evidence does not satisfy the test of admissibility set out in *Makita v Sprowles*.¹⁹
- 43 Counsel submitted that Dr Fagan made a significant concession when he accepted that he had assumed that Mr Holberton was still exposed to a material level of noise whilst in his office and that fed into his conclusion. Counsel added that Dr Fagan's comment that wearing hearing protection is not significant is curious given his reliance upon Mr Holberton wearing category 5 ear plugs in performing work for Tube Solutions.
- 44 Counsel submitted that the evidence did not establish there had been exposure to noise capable of causing NIHL in employment with OE.

Applicant's submissions

- 45 Counsel for Mr Holberton did not disagree with how counsel for Tasma framed how the law operates in this case. He said Mr Holberton had

¹⁹ [2001] NSWCA 305.

provided evidence to rebut being exposed to noise capable of causing NIHL in employment he performed subsequent to employment with OE and the evidentiary onus therefore rested with Tasma. Counsel said that on-site visits of 1 or 2 hours a week in employment with Ecospec combined with the noisy work ceasing when Mr Holberton was close to workers on-site was sufficient to shift the evidentiary onus.

46 Counsel submitted that Dr Tomich premised his views on the 2014 audiogram being a pre-employment audiogram when it was performed during employment with OE and at about the time of the move from the Ottoway premises to the Wingfield premises.

47 It was submitted that Dr Tomich's explanation for the change of view between his second and third reports lacks credibility as no explanation of the change appears in the draft or final forms of the third report, and no mention is made of naval ships. Counsel said that whilst Mr Holberton's statement mentions naval ships, no reference is made to naval shipyards.

48 In relation to the subcontracting issue, counsel observed that Mr Holberton's statement mentions working on a subcontract basis for OE between 2009 and 2013. However, taxation returns show that was an error, and it is clear that Mr Holberton was employed by OE by 1 August 2012.

49 Counsel submitted that the new pieces of information Dr Tomich received between the dates of his second and third reports, the advice from Tasma that the noise level in the workshop was 62dB and the erroneous assumption about the commencement date of employment.

50 Counsel also criticised Dr Tomich's shift from saying that he could not estimate noise levels in the OE workshop in the absence of objective data to asserting that the level was likely to be about 91dB in oral evidence.

Consideration

51 Relevantly to this proceeding, s 9 of the RTW Act provides:

(1) Subject to this section, an injury is not compensable under this Act unless it is established on the balance of probabilities that it arises from employment.

(2) Subsection (1) operates—

(a) subject to the qualification that if a worker suffers an injury of a kind referred to in the first column of Schedule 2 and has been employed in work of a type referred to in the second column of Schedule 2 opposite the injury, the worker's injury is presumed, in the absence of proof to the contrary, to have arisen from employment; and

(b) subject to Schedule 3.

(3) If a worker retires or is retired from employment on account of age or ill-health and the worker makes a claim for noise induced hearing loss after the expiration of 2 years from the date of the retirement, subsection (2)(a) does not apply in relation to that claim.

52 The presumption in s 9(2) conditions or qualifies the satisfaction required by s 9(1) in the case of certain injuries, one of which is NIHL. Section 9(3) does not apply. Mr Holberton worked was exposed to noise in employment after 1 July 2015 when the RTW Act commenced to operate. Whilst he has not been employed by Tube Solutions, he was employed by Ecospec subsequent to 1 July 2015 and that work involved exposure to noise.

53 Claims for NIHL are subject to the presumption in s 188(2) of the RTW Act:

Subject to this section, where a claim is made under this Act in respect of noise induced hearing loss by a worker (not being a person who has retired from employment on account of age or ill-health), the whole of the loss will be taken to have occurred immediately before notice of the injury was given and, subject to any proof to the contrary, to have arisen out of employment in which the worker was last exposed to noise capable of causing noise induced hearing loss.

54 Section 188(2) is an exception to s 188(1) which provides that in the case of injuries that develop gradually or are a disease, the injury is taken to have occurred when a worker first becomes totally or partially incapacitated for work by the injury.

55 The date on which s 188(2) takes the whole of the hearing loss to have occurred is not able to be rebutted,²⁰ but it does not follow that the employment a worker is engaged in on the date when they claim for NIHL is the employment responsible for the injury because the presumption is subject to proof to the contrary and can be rebutted.

56 The main difficulty in deciding this matter arises from the expert evidence about the employment in which Mr Holberton was last exposed to noise capable of causing NIHL. In the passage of Dr Fagan's evidence set out earlier, he did not disagree, based on answers given in cross-examination, that 2 hours exposure to noise in the OE workshop each work-day was not sufficient to cause NIHL. On the other hand, while Dr Tomich expressed that view in his third report and in oral evidence, his second report accepts that the exposure to noise at OE was sufficient to cause NIHL. The explanation given by Dr Tomich for his change of view was the subject of criticism by counsel for Mr Holberton and must be scrutinised.

²⁰ Except where the claim is made after retirement from employment on account of age or ill health.

Mr Holberton's evidence

57 Mr Holberton was a straightforward and reliable witness. He did not downplay the noise he was exposed to throughout his working life and acknowledged the extent of the noise he was exposed to whilst employed by Ecospec. I accept his evidence and make findings of fact based upon it.

58 Mr Holberton is not, and has not ever been, an employee of Tube Solutions. Whilst he performs work that benefits Tube Solutions, there is no contract of employment between Tube Solutions and Mr Holberton and he performs work in his capacity as sole shareholder and sole director. If Mr Holberton had been employed by Tube Solutions, I would still not find there was exposure to noise capable of causing NIHL in that employment given the similarity of the work performed for Tube Solutions and employment with Ecospec.

Exposure to noise at Ecospec

59 Mr Holberton was employed by Ecospec after being employed by OE and prior to being sole director of Tube Solutions. The duties he performed for Ecospec and Tube Solutions are essentially the same. As *Sellar* and the authorities referred to later in these reasons show, if there was exposure to noise capable of causing NIHL in employment with Ecospec, OE will rebut the second presumption in s 118(2).

60 Most of the time Mr Holberton spent working for Ecospec was in his home office. He only spent a few hours on-site each week. Whilst the concrete remediation work Ecospec performed created significant noise levels, the noise ceased in the very short periods of time Mr Holberton was on site and in the proximity of where work was being performed in order to talk to employees. Mr Holberton did not perform any hands-on work for Ecospec. The site he most often attended was the Glenelg Wastewater Treatment Plant. Given that Mr Holberton employed the workers who were making noise, and as his specific purpose in going near the noise was to communicate with the workers, it is not surprising they were required to stop work when he needed to speak to one of them. Dr Fagan and Dr Tomich both considered that Mr Holberton's employment with Ecospec was unlikely to have caused hearing loss. I accept that evidence.

61 The suggestion that there was exposure to noise capable of causing NIHL whilst working for Ecospec under the Adelaide airport flight path also fails. The exposure to the noise of a jet taking off or landing is short based on my own experience of being under a jet at or soon after take-off or just before landing. I am entitled to do so as it was on that basis Dr Fagan was questioned about the issue. Evidence on the subject of the noise created by jets during take-off and landing was not led. There is insufficient evidence to find that during the few hours each week Mr Holberton was present at

the Glenelg Wastewater Plant, he was exposed to noise capable of causing NIHL by reason of jets taking off and landing.

- 62 I am satisfied that Mr Holberton was not exposed to noise capable of causing NIHL whilst employed by Ecospec.

Exposure to noise in employment with Ottoway Engineering

- 63 Mr Holberton was employed by OE for about four years between about August 2012 and August 2016. A 7 April 2014 audiogram that Dr Tomich relied upon was taken after Mr Holberton commenced employment with OE. It recorded a 7.3% binaural hearing loss. A Freedom Hearing audiogram dated 1 June 2020 recorded a 6.3% binaural loss. Dr Tomich said the apparent reduction in hearing loss between the two audiograms was within the test/retest margin of error. He stated in his first report that the original reading of 7.3% binaural hearing loss should be accepted. The audiogram he performed in August 2023 recorded a 9.7% binaural loss.

- 64 Dr Fagan's evidence was undermined by answers he gave in cross-examination. He accepted that the level of noise in the OE workshop was likely to be 91db when in his report he had described it as being between that and 100dB. In the passage of his evidence set out earlier, he agreed that an exposure to workshop noise for between 1 and 2 hours per day at a level of 91dB was not likely to cause NIHL despite his original, contrary view. Dr Fagan also expressed the view that hearing protection made little difference to the likelihood of sustaining NIHL. That view is contrary to safe industrial practice and based upon his own generalised conclusions of fact drawn from talking to patients rather than the evidence. The evidence about the use of hearing protection was not really in issue between the parties. Mr Holberton used hearing protection when working in the workshop at OE for 1 to 2 hours a day. In his statement he said he and others had to raise their voice when communicating but did not say that he removed earplugs to communicate. In his affidavit he stated that he did remove one or both earplugs in the workshop at times to communicate but did not suggest that was for very long. Mr Hose stated that most communication by a supervisor was with other supervisors in the quiet office environment. I accept that evidence.

- 65 I do not accept Dr Fagan's evidence that Mr Holberton's use of hearing protection made no difference to the level of noise he was exposed to and prefer Dr Tomich's view. The evidence shows hearing protection was worn constantly when there was exposure to noise at OE for between 1 and 2 hours a day, other than when talking to employees, which I find was a small part of those 1 to 2 hours.

- 66 Before considering the explanation Dr Tomich gave for changing his view it is useful to describe the factual errors made by both parties.

67 Paragraph 12 of Mr Holberton's statement of 18 January 2024 provides:²¹

Prior to this and from 2009 -2013, I subcontracted to Ottoway, where I looked after the fabrication of pipe work for the naval ships that were being built in Adelaide. I worked out of a shared workshop that was noisy, spending around 7 hours a day in an office and around one hour a day in the workshop. I was exposed to noise from welders, grinders, cutting equipment, hammering sounds and general noisy pipework whenever I was in the workshop.

68 That passage refers to when Mr Holberton was operating Tube Solutions. The dates are incorrect. The period was between 2009 and July 2012. Mr Holberton commenced employment with OE on or about 1 August 2012. The mistake was perpetuated by Mr Holberton's legal representatives in the Statement of Facts Issues and Contentions filed on his behalf on 20 September 2024, and not corrected until his evidence affidavit dated 8 October 2024 was produced. By then Tasma had sought and received Dr Tomich's third report and had filed its own Statement of Facts, Issues and Contentions. The error went uncorrected for 10 months and Tasma perpetuated it. The third commissioning letter sent to Dr Tomich states that Mr Holberton was employed by OE for 2 years between 2014 and 2016, not 4 years between 2012 and 2016. The letter also states that OE "is of the view that the workshop had a noise level of 60dB".²² No basis for that belief has been provided.

69 Turning to the evidence of Dr Tomich, he described two things that made him change his view between his second and third reports. The first was the reference to naval ships in paragraph 12 of Mr Holberton's statement. Dr Tomich said that led him to believe that Mr Holberton was performing different work to the work he performed in the OE workshop.

70 It was put to Dr Tomich in cross-examination that he changed his view because of the timeline provided by Tasma in its commissioning letter. He agreed. It was then put to him that his third report does not mention the naval shipyard belief or that was the explanation for changing view. He agreed. Counsel then took Dr Tomich to the dot points in his third report he said were the basis of his changed view. He agreed that most of the dot points were not from new information and are found in Mr Holberton's statement. The fifth dot point in the third report states:²³

The reported Ottoway Engineering factory noise level of 62db(A). If this in fact means an LAeq exposure of 62db(A), then this magnitude of sound is well within the accepted safety levels, and would not be capable of causing a noise induced hearing loss. Even if there were limited short periods of intermittent noise exposure much greater

²¹ Exhibit A2 [12].

²² Tasma letter, 1 July 2024, TB 53.

²³ TB 61.

than 85db, it is considered unlikely that this would cause a noise induced hearing loss.

- 71 In a draft third report dated 20 May 2024 Dr Tomich stated immediately after the fifth dot point that it was essential he be provided with a copy of the noise survey report for validation. That paragraph does not appear in the final form of the third report nor is there any mention in the third report, or elsewhere in the evidence, of a noise survey report or similar. Dr Tomich said in evidence that he disregarded the advice from Tasma.
- 72 In oral evidence Dr Tomich said that he viewed the asserted LAeq reading of 62dB(A) with scepticism and did not rely on it. He said that the level of noise in a courtroom would be between 55 and 60dB so a noisy factory would produce a higher noise level than 62dB(A). It was put to Dr Tomich that meant his opinion must be based upon two audiometry results Tasma referred to in its commissioning letter. Dr Tomich agreed.
- 73 The issue of time-weighted exposure to noise was then raised. It was put to Dr Tomich that he was aware from when his second report was requested that Mr Holberton was only exposed to factory level noise at OE for between 1 and 2 hours a day. Dr Tomich agreed but then said “that this shipyard influenced my thinking”,²⁴ by which he meant his understanding that Mr Holberton was working in a naval shipyard. The clearest explanation of that view is found in evidence in chief where Dr Tomich said he did not agree with the views he expressed in his second report:²⁵

No, and I refer in particular to paragraph 5 and 6 of that report. When that report was prepared, I was misinformed, shall I say, in my understanding of this worker’s employment. And then when I read the – his statement, in particular points 8 through 12, I was attracted by the term “naval shipyard”, and my knowledge of noise exposure in naval shipyard is often associated with some sort of blasting, so, therefore, I was interpreting the whole of the period that he was attached to Ottoway, as opposed to subcontracting being employed, I construed that as one parcel. Therefore, that sort of made me state in a very double negative way that it would be difficult to refute.

- 74 That explanation was elaborated on by a further explanation of why Dr Tomich no longer adhered to answers 5 and 6 in his second report:²⁶

Now, since that time, his employment as an employee with Ottoway has been clarified by further correspondence and by further discussion with the employer, and it then transcended [transpired]²⁷ that in fact, he was employed by Ottoway Engineering from 2014 to 2016 as an employee, not in a contract relationship. So, therefore,

²⁴ Tr 74.19-20.

²⁵ Tr 58.36-45.

²⁶ Tr 59.1-7.

²⁷ The word “transcended” appears in the transcript but the word “transpired” was used.

that ill-informed interpretation of who employed him, shall we say, was the basis to that, so I no longer adhere to those two paragraphs, 5 and 6, on that page 39.

75 The issue was explored in cross-examination:²⁸

MR HURBURGH: So the opinion that you expressed there you say is biased towards what is said in paragraph 12, and in particular the reference to naval ships.

WITNESS: That is correct.

MR HURBURGH: But that doesn't make any difference, does it, to the actual noise exposure that one suffers, and that comes from what's said at paragraph 10, correct?

WITNESS: That is a – that's a history from a worker that had a slightly different bias because of my intuition to see the word "naval", and therefore that bias to that, but point 10 is a description of his work when he was an employee, and when you read that carefully, you need to consider that he's clearly spelt out there, your Honour, in point 10 he was in a workshop. So, therefore, you have to have a certain period of the day where there's office noise exposure and you need to consider that in addition to any additional noise.

Then you have to consider the fact of him wearing earplugs. So as a mathematical logarithmic addition. So, for example, if you have a quiet office situation, say on the order, let's be generous, 60 decibels dBA sound pressure exposure. Then if you then go into a workshop with all these noises as described, and he's wearing hearing protection in the form of earplugs, there would be that attenuation immediately of at least 10, 15 even 20dB. Let's be careful, let's give it 10dB.

76 Counsel for Mr Holberton asked Dr Tomich if the audiometry provided to him with the third commissioning letter caused him to change his view. Dr Tomich said that it did,²⁹ but also said that time-weighting the exposure to noise was relevant and important. Counsel for Mr Holberton then pointed out that Mr Holberton's description of the time he spent on the workshop floor at OE was provided to Dr Tomich prior to his second report. Dr Tomich responded in this way:³⁰

I'm basing – that first report was on that indication that this shipyard influenced my thinking in terms of his possible – now coming back to when we've got the data or the information correct and that directorship of Tube Solutions and all of that sorted out, which I

²⁸ Tr 62.31 – 63.11.

²⁹ Tr 73.27-32.

³⁰ Tr 74, 19-27.

found very confusing, now I remain of the opinion that that period (indistinct) of time was not capable of causing a noise-induced hearing loss based on we can say reliable scientific assumptions of the likely magnitude of noise exposure while he was in the factory. The variables here is one to two hours. I gave you the worst scenario, with hearing protection, without.

77 Paragraph 12 of Mr Holberton's statement is in these terms:

Prior to this and from 2009-2013 I subcontracted to Ottoway, where I looked after the fabrication of pipework for the naval ships that were being built in Adelaide. I worked out of a shared workshop that was noisy, spending around 7 hours a day in an office and 1 hour a day in the workshop. I was exposed to noise from welders, grinders, cutting equipment, hammering sounds and general noisy pipework whenever I was in the workshop.

78 That paragraph does not describe the use of any hearing protection whilst Mr Holberton was subcontracted to OE. In contrast, paragraphs 8 to 11, which concern the period 2012 to 2016 when Mr Holberton was employed by OE, mention him using earplugs when in the workshop between 1 and 2 hours a day, and not hearing any noise when in his office for the remained of the working day:³¹

WITNESS Your Honour, as I was introduced to this earlier on when I said no to one of my reports, and this is the one you're referring to, that description of 2913, to me I perceive more noise in that – the impression is I've got no objective evidence – that the 2012/2016, and I believe that his period of employment, which although is written down as 2012 to 2016, I gather it's 2014 to 2016. It's probably not relevant, but that description there, "I work five days a week, one to two hours a day in the workshop," the description, and then there's the part about, "We wore earplugs," which I believe relates to that point 8. So 8, 9, 10 and 11, my interpretation of that is taken all together. That's a different description to my hearing ear to what the description of number 12 was.

79 Mr Holberton's statement separately described the noise he was exposed to between 2009 and 2013, and the noise he was exposed to between 2012 and 2016. That suggests that he worked in two different workplaces. While the difference may be referable to the two different premises Mr Holberton worked in whilst employed by OE, the statement does not read in that way and suggests that the 'naval ship' work described in paragraph 12 was different to the OE workshop work. Dr Tomich said that he relied on his understanding of what naval shipyard work involved audiometrically.

80 In his second report, Dr Tomich stated that he relied on "points 8 through 12" of Mr Holberton's statement to conclude that "it would indeed be

³¹ Tr 67.7-17.

difficult to refute that his employment at Ottoway Engineering was not capable of being a significant contributing cause of his hearing loss”.³² That suggests that he took into account the work described in paragraph 12 where the use of hearing protection is not mentioned which he thought was not performed in the OE workshop. Dr Tomich referred to the test in s 7(2)(a) of the RTW Act and not the test in s 188(2), but that was because of how Tasma framed the question. In my view, a plausible explanation was given by Dr Tomich for expressing a misunderstanding of the facts in his second report.

- 81 I accept Dr Tomich’s evidence that being exposed to about 90dB of noise for between 1 and 2 hours per day whilst wearing hearing protection and working in a quiet environment for the rest of the day is unlikely to result in NIHL. In cross-examination, Dr Fagan did not disagree with that view.
- 82 I prefer the evidence of Dr Tomich to that of Dr Fagan where the two differ, particularly in relation to the likely noise level in the workshop and the effect that wearing hearing protection had on that level. I also accept Dr Tomich’s opinion about interpreting the audiometric testing, which he said supported the conclusion reached in his third report.
- 83 Counsel for Mr Holberton was correct to submit that the mistakes and incorrect assumptions in Dr Tomich’s second report should have been detailed and explained in the third report. That much is required by r 65(4) of the *South Australian Employment Tribunal Rules 2024* (Rules). Rule 65(4) was not operative when the report was prepared but the change of view warranted a detailed written explanation. Having said that, there was more obvious non-compliance with the expert witness requirements in the Rules by Dr Fagan. His reports do not comply with the requirements of the current and former r 66 to set out his qualifications, refer to r 66 and explain the basis of the factual assumption made in his report that the level of noise in the OE workshop was likely to be up to 100dB.
- 84 The Full Supreme Court considered the operation of s 188(2) in *Onody v Return to Work Corporation of South Australia*.³³ Stanley J, with whom Parker J agreed on this issue, said the position under s 188(2) of the RTW Act was the same as it was under s 113(2) of the *Workers Rehabilitation and Compensation Act 1986* (former Act), and explained how s 188(2) operated by reference to what the Full Supreme Court said about s 113(2) of the former Act in *WorkCover Corporation and Anor v Perre*:³⁴

...The worker is required to prove that he has noise-induced hearing loss and that he has been employed in work involving exposure to noise. The burden of proof then shifts to the Corporation or an

³² TB 39.

³³ [2019] SASCFC 56.

³⁴ [1999] SASC 564 [28]; (1999) 76 SASR 95, 101 per Mullighan J.

exempt employer, as the case may be. I shall refer only to the Corporation. It must prove that the hearing loss could not have arisen from the employment... but if [the task] cannot be discharged, the policy of the legislation is that the benefit falls to the worker. That position accords with fairness and commonsense as the conditions of the workplace at relevant times may be expected to be more easily established by the employer, and therefore the Corporation, than the employee.

- 85 Kourakis CJ described s 113(2), and by analogy s 188(2), in much the same way in *Return to Work Corporation of South Australia v Renfrey*:³⁵

... [Section] 113(2) deems a date for the occurrence of ‘the whole of the [hearing] loss’ and not just the injury; the irrebuttable presumption is that the whole of the loss occurred immediately before notice of the injury was given. The first limb fixes the date on which the whole of the loss is taken to have occurred and determines the applicable prescribed sum for the purposes of s 43. The second limb of s 113(2) deems the whole of the hearing loss to have arisen out of employment in which the worker was last exposed to noise capable of causing noise induced hearing loss, subject to proof to the contrary. The effect of the second limb of s 113(2) of the WRC Act appears to be threefold. First it makes it clear that the rebuttable presumption enacted by s 31 is preserved. Secondly, unlike other injuries of gradual onset, it deems all of the loss, including hearing loss which is sustained when subsequently employed, as having been sustained in the last employment which was capable of causing it. Thirdly it encourages a single claim against the last employer whose employment was capable of causing the loss.

- 86 Mr Holberton has rebutted the second presumption in s 188(2). As a result, the onus of proof shifted to Tasma. Tasma has also rebutted the second presumption. It follows that rejection of the claim should be upheld.

- 87 Before making orders I wish to make some comments about the standard of expert NIHL reports in Tribunal proceedings. It is not uncommon for such reports to have little detail about the facts, the assumptions made by the expert and the basis for the opinions expressed. Those deficiencies make it difficult to weigh the merits of respective cases and can lead to opinions not contained in reports being expressed for the first time in oral evidence. That in turn can produce unfairness and lead to an adjournment with wasted time and costs. The factual errors made by both parties in this case could have led to that outcome but did not because of the skill and good sense exhibited by counsel.

³⁵ [2019] SASFC 26 [41].

88 NIHL disputes are some of the most litigated and hard fought RTW Act disputes. Litigants in NIHL proceedings are entitled to well considered and expressed expert reports.

Orders

1. The decision under review dated 10 October 2023 is confirmed and the claim for compensation dated 20 October 2020 is rejected.
2. The applicant is entitled to reasonable costs of the proceeding to be agreed or adjudicated.