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THE NEW COMPENSATION LAWS

WITH RESPECT TO INDUSTRIAL DEAFNESS

THE MORE THINGS CHANGE THE MORE THEY STAY THE SAME *

Dr. Stan Stylis **FRCS**

The ensuing remarks are focussed on **primarily on industrial deafness,** perhaps the commonest condition involved with workers compensation. As executives of the Australasian College of ENT Physicians, we have expended great personal and joint effort to communicate with the authorities involving much time, expense and effort only to be stonewalled by the top parliamentary officials. Other parties such as lawyers and the Labor Council have also been active. We ourselves, concentrating on Industrial Deafness, have had courteous discussions with the various parties otherwise. It is difficult to ascertain if anyone is listening, but by the constant revisions it appears the message is getting through; however these do not seem to be fully thought through leading to further confusion.

After observing these revisions I feel compelled to describe two prime matters.

1. The plight of those specifically involved in **INDUSTRIAL DEAFNESS** (my personal experience) but possibly applying throughout the Workers Compensation field and includes the officers of the WCA & WCC, lawyers , Hearing aid providers and their staffs not yet even mentioning the workers themselves.

2. The **CONCLUSION** **that <u>all</u> cases of industrial deafness making claims either for hearing aids alone or for lump sum payment (with or without claiming hearing aids) will have to be seen by a lawyer.**

All members of the compensation services, by now highly trained personnel in servicing the needs of government, have suffered an undeserved betrayal by the State government.

Primarily included are the workers themselves; as an example, workers who have not put in claim, not wishing to harm the employer's business, or concerned at holding their job so as not to threaten the family livelihood by unfair dismissal over a claim, have suffered the consequences. Furthermore, the financial burden insisted upon by the Legislators of the worker being responsible for legal fees imposes harmful antipathy.

The effect on the service establishments such as the Workers Compensation Authority and the Workers Compensation Commission must also had been immense as they have had to scramble in an attempt to comply with ill conceived changes, errors in planning and inability to reach a satisfactory protocol. **Every action and decision opens up new problems**. The confusion has caused the professionals to appear foolish when confronted by workers that don't quite understand a lack of guidelines to process their claim.

No one has been spared by the politicians; external services such as lawyers, medical specialists, audiologists and hearing aid providers, and not least associated staff. The latter anticipate from the utterings of government and worry about losing their job. Many experienced staff have been lost. Young lawyers have lost their jobs

with legal firms. Livelihoods and practices have been devastated by the sudden, ill planned action of the NSW Government in creating a vacuum that has existed for the last **seven months** which has caused confusion , worry and despair.

No one is saying that governments should not seek to change programs if it appears that it would be advantageous, but the community expects that it be done with intelligence, with consultation with people who are involved in all facets of the workings and with a sensitivity of the consequences on all players; not to hijack the valuable personnel that have faithfully carried out the government's requirements for years.

We have spent hours trying to rearrange our own practice and protocol only to see repeated changes in direction by the legislators. .

Obviously all this was not the prime intention of the Parliament. Their error was in not consulting the people on the factory floor resulting in inadequate planning and failing to consider all the consequences. Now we are witnessing the old adage in that the more the efforts, laws and guidelines have changed, the more they stay the same..... in the meantime destroying a system which has developed over ten years involving hundreds of experienced workers in all the various entities such as the WCA & WCC, the Medicolegal reporters and AMSs, the Law firms with the vital role in connecting the worker with the others, the insurance officers who have to check on the status of the worker and his claim, and the arbitrators.

Instead of measures that would solve the aims of the politicians by imposing them on top of the hard established system, Parliament sought to reinvent the wheel which appears to be turning backwards again.

It is not that other means are not available; without deep consideration and open to contradiction are the following options.

Keep the basic system as is; *reduce the monetary lump sums; introduce statutes of limitation of a reasonable and fair degree (in time or age); eliminate some vague and unmeasurable factors; reduce the paperwork; limit reasons for appeal; discourage opportunities for challenges and appeals; better education of the claims officers who feel they have to question every minor point to justify their position; enforce limitation of the enquiries to medicolegal reporters by insurance officers (who question medical matters that they don't know anything about and expecting reporters to write a book about it); cease splitting hairs in both medical and legal aspects; encourage consideration of the overall picture rather than focus on some single specific minor issue; exclude noise reports***; *it seems workers are strongly encouraged to make claims at one end and then other bureaucrats are flat out trying to stop the claims at the other end.* **Give way a little to a claim so to save a lot more in costs.**

A great problem was created by the government insisting that all systems be lumped under the same umbrella. You can't mix fruit with clothes **just for convenience.** Who thought that one out ? A 10% impairment of one part is **not** equivalent to 10% of another. What do you prefer; 30% impairment of your heart or brain or sight or 30% impairment of your elbow? Industrial Hearing Loss was always separate for valid reasons; disconnecting it, albeit altered, can easily be achieved painlessly to alleviate some of the problems.

Too late now ?

These events remind me of an old *Greek idiom **<μια μεγαλη τριπα εισ το νερο> .**
Our president translates it as **"DIGGING A BIG HOLE IN WATER"**
– splash! splash ! .... everybody gets wet but no hole..... read on-

Protocol was laid down (gazette No.128) for claiming hearing aids where a General Practitioner is to refer a worker to an Ear Specialist for assessing a hearing problem. It was directed at those suffering from industrial deafness that would only be eligible to the use of hearing aids to alleviate their distress and advised that a report from the Ear Specialist was to be sent to the insurer together with a Certificate of Injury. It was stated that the insurer would pay the cost of this report and give approval for the hearing aids to the HA provider.

Whilst some insurers have followed this direction, already two or three (from the few that have been processed in the last month or so) have come back with a series of questions as is indicated in a letter from the insurer*** which is appended. These questions are all of non medical nature and rightly fall within the scope of a lawyer's investigation and advice to the worker. They are non medical matters and can't possibly be clarified by a medical specialist. Firstly, the doctors are not qualified to have the knowledge and secondly, they would not know how to go about it and thirdly, any error in the advice given can be legally challenged by the worker, a risk that cannot be taken by a Specialist outside his realm of expertise.

It figures therefore, because of these requirements by insurers (which are justified) the worker has to seek legal advice. To do so under the new law, they are personally responsible for the fees.

Whilst these fees may be recouped by a successful lump sum payment claim , in cases where the question is solely of hearing aids, there is no such payment available; so that whether the worker obtains his hearing aids or not, he is out of pocket for fees that he would be unable to afford. Perhaps he will be required to give the lawyer one of his two hearing aids in recompense! (can you imagine a lawyer's market trying to swap a right one for a left one.)

Therefore all claims for hearing aids alone, whether before or after 2002, would be caught up in this circumstance and consequently are required to consult a lawyer. The lawyer would direct the worker as to what forms and evidence are required to be subjected, means of obtaining proof of employment, searching for details of previous claims, inform the worker as to his rights according to the law, and in responding to the insurer' demands and questions and in correlating the medical reports and their employment status. It is not just the matter of the worker asking his employer.

Claims for lump sum payment (with or without a claim for hearing aids) this would also require a lawyer to handle the whole case and the complexities.

The authorities cannot ask the insurers to drop their enquiries as it is imperative they confirm the legality of the worker and his claim. I cannot see any other way.

There are other facets too numerous to debate but I leave you with these compelling conclusions.

1. **All claims for industrial deafness whether for lump sum payment or hearing aids only, will require the services of a lawyer.**

2. **The question of payment of the professionals being burdened on the worker is unworkable and warrants aggressive action by their union**.

   At the least, successful claims should ensure the insurer covers gazetted fees to each professional directly. Dividing a lump sum is disastrous for all; possession seems to become the whole part of the law.

3. Inefficiency and short sightedness has been used in trying to ram through policy without thinking about process and that legislation on the run, that is dead and buried before it sees the light of day, is in no one's interest.

Please pass me a towel**.**

Dr. S Stylis **FRCS**
AMS for Workers Compensation Commission

These principles have been discussed and endorsed by the three executives of ACENTP

Footnotes :

*** **see appended insurance letter.**

** **see EJournal Australasian College ENT Physicians Vol 2 No2 (2013) (** www.acentp.org)

* It seems that governments are getting more intellectual in applying Greek and French concepts to compensation legislation!
"*Plus ca change, plus c'est la meme chose." Coined by Alphonse Karr (1849) and applied to Government in that "the more governments changed the more they resemble each other". The proverb became used much more widely but it appears here it is being claimed by government once again!*

WCA = Workers Compensation Authority
WCC = Workers Compensation Commission
AMS = Approved Medical Specialist

A copy of this letter will be sent to the various authorities with whom we have been involved in discussions on these issues

See extract from Insurer's letter on next page.

<< Due to the fact that all the required particulars have not been supplied, we are unable to process this matter further.

In order to proceed with this matter would you please arrange for the following information to be forwarded:

1. Is it alleged the Applicant was employed directly by the Respondent? If so, please furnish evidence of such employment with AMCOR PACKAGING AUSTRALIA P/L or in the form of tax returns for a 3 year period 1 year post and prior to the deemed year claimed and/or group certificates. We are unable to proceed further with this claim until your client's proof of employment with our insured is provided.

2. When is it alleged that employment ceased with AMCOR PACKAGING AUSTRALIA P/L? Please provide us with his resignation/termination letter, employment separation certificate from his employment with our insured evidencing same. This information is detrimental and required to ensure that Allianz is the correct insurer on risk.

   (a) What are the circumstances of the Applicant's employment ceasing with the Respondent?

3. In respect of all post-injury employers, please state:

   (a) Name and address of the Employer/s.
   (b) Period/s during which the Applicant was employed.
   (c) Reason for termination of employment, if applicable.
   (d) Capacity in which Applicant employed and duties performed.
   (e) Sources of noise to which the Applicant was exposed whilst undertaking these duties.
   (f) Did the Applicant sustain any injuries whilst so employed? If so, furnish full particulars of same.
   (g) Was hearing protection provided to the Applicant whilst carrying out this employment?

4. If the Applicant has not obtained suitable post-injury employment, why not?

**If your client has not returned to paid employment post "December 2012" please provide details of Centrelink or Disability benefits to support nil employment.

We note pursuant to s. 282 of the Workplace Injury Management and Workers Compensation Act 1998 we are not required to determine the above claim until all relevant particulars are received.

Once the above requested information has been received we will refer your client for an independent medical examination due to the extent of impairment claimed.

We look forward to receipt of your reply at your earliest convenience. **>>**

LIMITED VALUE OF NOISE STUDIES IN THE DIAGNOSIS OF INDUSTRIAL DEAFNESS

Stan STYLIS FRCS

I write this to provide my colleagues a reference to supply an answer to the constant presentation of noise reports by employers/insurers to support their objection to a claim for compensation by workers who have had chronic exposure to industrial noise. It may avoid wasting time in providing your own argument and indeed remove the obfuscation caused to all members of the legal process by such Noise Reports.

As ENT specialists we all are aware of my arguments. Perhaps the most important principle I espouse is that **Noise reports play a minimal role if any in the Diagnosis of industrial deafness. Read on .....**

1. General and important points with respect to noise studies in reality, noise studies play a secondary consideration in the diagnosis of industrial deafness. The diagnosis of any biological system, in fact decisions of anything in life, depend on the consideration of a number of criteria. Rarely can a diagnosis be based on one single criterion. The most important is the **history** (including the **type of noise** to which the worker has been exposed, the **intensity** of the noise, the **period** over which the worker has been exposed to this noise, exclusion of other conditions that could lead to damage of the hearing). Then there is the **examination** itself (examination of the ear canal and eardrum and the appearance of any past or current disease or surgical scars) the **conformation of the audiogram**, absence of any other cause, the consideration of **anatomy**, **past history,** the **differential diagnosis** and these factors supersede any noise studies. Perhaps, on a rare occasion, if there is any significant doubt after considering these issues, then the noise studies may be taken into account.

Just as in clinical practice, it is akin to Doctors making a diagnosis purely on an x-ray where in many x-rays are misleading and can lead to serious errors. The x-ray must be in sync with the other criteria of the case. The experience of the medico legal reporter is also a consideration.

The sound engineers are not diagnosticians, audiologists are not diagnosticians and neither are legal professional advisors. Without an examination without using a tuning fork , without understanding anatomy, physiology, embryology, how can one make a diagnosis? A simplistic one based only numerical figures? Certainly not!

Whether the voice has to be raised so that workmates standing beside him can hear him, or hearing a voice the distance of one metre. Previous complaints to the management for the issuance of hearing protection by the employer.

2. Confusion commonly exists in thinking as to the regulation covering work exposure to noise as administered by the WorkCover Authority of NSW. [**Factories (Health and Safety Hearing Conservations) Regulations 1979 and WHS Regulation 2011**]. These regulations only register recommendations of noise levels that should not be exceeded. **They are for the guidance of the manufacturers** as to whether he is complying with government standards. They are not to be construed, that workers cannot suffer any hearing loss at to noise levels below the maximum level stipulated. They are not diagnostic tests.

I would also quote from the National Acoustic Laboratories (March 1998 under the title of "Attenuation and use of hearing protectors", 8th edition the following paragraph).

"The National Standard for Occupational Noise [NOHSC:1007(1993)] published by the National Occupational Health and Safety Commission, Worksafe Australia, recommends a "national standard for exposure to noise in the occupational environment is an eight hour equivalent continuous A-weighted sound pressure level, $L_{Aeq,8hr}$ of 85dB(A)" and "for peak noise, the national standard is a peak noise level, L_{peaks} of 140dB(lin)". Most Australian States and Territories have now accepted this exposure standard and NAL recommends that this be followed.

This is not to imply that below 85dB(A) safe conditions exist and above that level conditions are unsafe. It is just that an $L_{Aeq,8hr}$ of 85dB(A) is considered to represent an acceptable level of risk to hearing health. It is generally accepted that it is not until the level falls below 75dB(A) that there is a negligible level of risk".

3. Noise studies are subject to many fallacies and problems

Workers have told me, and the reports support their accusations sometimes with written evidence from co-workers, of actions **instigated by the employer** such as the following -

a) The machines to be examined are not the machines that the worker has worked on; they may have been selected by the employer. They may have been replaced with newer models.

b) Segregating machinery that is noisy. So that by one means or another in order to prevent a particular machine being tested.

c) Arranging for the noise study to be done on the day when the factory is not working to its usual capacity

d) Having the workers who do not usually do the job in question performing the task because this is supposed to be noisy.

e) Providing machines not used before by the worker concerned, so that the machine being test is not really the machine that was utilised.

f) They have not been subjected to the same stresses and strain which lead to variation in the noise output, depending on the load placed on the machine e.g. a machine that is idling, such as the jackhammer or a motor vehicle as compared to its noise where it is functioning and cutting through harder substrates or vehicles and driving with a full load and driving uphill.

g) Microphones put on a worker who doesn't normally perform the same duties.

h) The employer may ensure that some of the machines are not working on the day the noise studies are being done

i) Some studies performed previously may be produced by an employer giving noise levels but not stating from how far away they have been measured.

One insurer's defence provided a Noise Report from a **US**A Aviation Authority (US Department of Transportation, Federal Aviation Administration) and, hidden in small print, it is stated that the noise levels are taken from "***6500 metres from the start of takeoff roll, and 2000 metres from the runway threshold for approach***". Extrapolation of the figures to the area of the worker actually proved my case. Yet left to the lawyers and uninitiated it would have been a lay down misere for the insurer. I haven't sighted that reference since then!

Shall I relate cases where ENT specialists present a true claim only to withdraw it when the insurer sends a noise report; the ENT is intimidated and abandons his correct and professional clinical analysis. I make short work of the insurer's case but find it difficult to save embarrassment for the reporting doctor.

Other factors -

j) The noise engineer may have some bias in favour of the person who has briefed him; he follows instructions as to what machines and where the noise studies are to be conducted. I would not believe that a professional noise engineer would deliberately supply false figures.

k) Having noise studies performed is a very costly exercise and one that can't be afforded in defence.

l) Noise studies are used to obfuscate with confusing symbols and formulae. Doctors, lawyers and insurers are not expected to fully understand the various mathematical parameters appearing in noise studies. They give a false air of plausibility. You are not Physicists or mathematicians. There are hidden fallacies which are experienced in situations in other fields of human endeavour. It probably exists in the arguments to do with global warming, and on economical models predicting profits which can render you bankrupt.

One has to be careful about accepting such complex principles to be applied equally to all situations despite the wide variety of the circumstances. The subject is too complex to apply an overruling acceptance based on one parameter.

Noise engineers are entitled to conclude the level of noise in the factory **at the time they took the measurements** and on which machines they took the measurements; that's it, purely and simply. They cannot claim that this is the noise to which the worker has been subjected. Nor can they diagnose or deny Industrial Deafness.

4. WORKER CONFUSION

Workers are motivated by false impressions that they must nominate one employer or another as being a noisy one. They often state that other jobs were not noisy, because they mistakenly consider that this would sometimes jeopardise their claim. Often workers would insist that some previous employer is the noisy one and "that's where it all occurred, Doctor", because they have assessed that, that particular job was much noisier than the jobs elsewhere; whereas in fact they may be currently working in a noisy job which is perhaps not quite so noisy, or they fail to distinguish between the types of noise.

5. PERSONAL IDIOSYNCRASY

Noise studies do not take into consideration the sensitivity of a worker's hearing…. a personal idiosyncrasy. Such sensitivities exist in any biological system such as human physiology.

One person has skin sensitive to light or sunshine or detergents or touch, and another one not so. One person's eyes are sensitive to bright light and another one is not so. One person's intestines are sensitive to too much roughage, or spices and so on.

Two people working side by side for the same period of time, say using a jackhammer for fifteen years, yet one of them suffers a severe industrial deafness and the other one does not. **Yet the noise studies would find that the noise dose has been the same in both cases.** How can the noise engineer explain that ? The sensitivity and makeup of each person is different. **This is a serious fault in accepting the validity of denying the diagnosis on the basis of a noise report ... in fact this factor alone almost renders a noise report irrelevant.**

6. HISTORICAL EVIDENCE SCIENTIFIC FALLIBILITY

What an education it has been to have lived through the changes in standards and regulations that have occurred over the last fifty years. I was appearing in court over those years when the insurance barristers stood up boldly to deny

compensation to the worker unless noise breached the standard of 95 decibels. (I have a feeling that originally it was 100 decibels.) Those giving evidence in support of an assessment, could not dent these prevailing threshold claims. At times the lawyers, in their ignorance, were insulting to us in effort to justify their fee. A few years later, these thresholds were lowered to 90 decibels and of course since then it has been lowered to 85 decibels,

Yet without apology or showing some understanding and humility the same thing is happening today; that is, insurers and their legal advisors continue to boldly use the same tactics hoping to batter and confuse the gentler players with this hocus pocus into believing them.

Should we go back and reassess all these decisions based on the noise dose demanded in the past? How many claims were lost that would have succeeded a year after.

I can only reiterate the principle, that one criterion must not overshadow the whole picture and a host of other factors.

FINAL COMMENT

Experience has shown that noise studies have generally been very deceptive; **It is erroneous to accept them as the overriding evidence in deciding cases of industrial deafness.** Almost invariably they fail to sway the clinical and obvious situation and often fail to affect the final legal decision.

It doesn't need a genius, nor any remarkable noise engineer to tell us whether this man's occupation was noisy or not. Most of us regard his history as a noisy one with an understanding of grinders and lathes and milling machines are generally known to be noisy. The literature abounds with noise levels of different tools of trade and of procedures and provide the hazardous time exposures. We do not see lawyers or doctors or insurance officers suffering from industrial deafness.

If a factory is constantly involved with workers subjected to Industrial deafness, one can't easily question the conclusion that this is a noisy employer regardless of the noise report.

I cannot warm myself up to the strict mathematical calculations carried on brief periods of time, sometimes in artificial circumstances. The findings of the experienced Ear Specialist in considering the details of proper consultation and assessment remain paramount. The addition to this hazardous exposure times and the personal idiosyncrasy that prevails in biology, renders Noise Studies of little importance in the diagnosis of Industrial Deafness.

Noise studies are deceptive and provide a false plausibility beyond their intention. By succumbing to commentary on the specifics of a noise study performed is only providing the study with a status it does not deserve.

Stan Stylis FRCS

These principles have been discussed and endorsed by the three executives of ACENTP