

*Gun & Davey*

**Covered**



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## **COVERED CASES**

**WORKCOVER CORPORATION v PERRE**

### **NOISE INDUCED HEARING LOSS - REVISITED**

As indicated in previous issues of *Gun & Davey - Covered*, claims for noise induced hearing loss are usually difficult to determine due to the complex nature of both the relevant law and the various provisions of the Act.

The Full Bench of the Supreme Court of South Australia has recently had reason to revisit these issues in WorkCover Corporation - v - Perre.

The facts in Perre were set out in *Gun & Davey - Covered* Issue 15 and we will not repeat them.

The Full Bench upheld the decision of the WCAT which awarded the worker lump sum compensation pursuant to Section 43 of the Act. Of particular importance is the reasoning they provided.

The Full Court dismissed the Corporation's argument that the words "*any work involving exposure to noise*" in Schedule 2 should be construed as meaning any work involving exposure to noise *capable of causing hearing loss*. The Full Court held that such interpretation would create an additional threshold for workers and may in some cases deny the presumption in Section 31(2).

The Full Court continued that the process is as follows:

1. A worker is required to prove that he has noise induced hearing loss and that he has been employed in work involving exposure to noise.
2. The burden of proof then shifts to the Corporation or exempt employer to prove that the hearing loss could not have arisen from the relevant employment.

Step 2 is the most difficult step. Where it cannot be discharged the policy of the legislation is that the worker is to benefit .

In Perre there were a number of inadequacies with the way the noise level testing was conducted at the employer's work site, including:

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- ❑ noise level testing was not conducted at the location where the worker was exposed to and hence there was no evidence to show that the location at which the noise level testing was undertaken was sufficiently similar to the location where the worker was exposed to noise;
- ❑ there was no evidence to show that the machines tested were the same machines the worker used or if they were the same machines, that they were in either the same condition or substantially the same condition as when used by the worker;
- ❑ the tests relied on hearsay evidence from the employer's representative who was not called to give evidence at the hearing;
- ❑ the report did not consider the noise generated from both machines operating together;
- ❑ the report did not consider evidence from the worker that he was also exposed to noise from machines being operated by others.

The Full Court held that there was no cogent evidence to contradict the evidence of the worker and that the fundamental problem with the Corporation's case was that the factual basis for the assessment was not proved.

This decision highlights the difficulties faced by compensating authorities in rebutting the presumptions of the Act. If noise testing is to be obtained, the following rules of thumb must be followed:

1. Testing must be conducted at the same site as that worked by the worker;
2. Testing should be conducted as soon as possible after the development of the noise induced hearing loss. If the worker has spent a year away from the workplace, the reliability of the testing is reduced due to changes in the workplace;
3. Testing should be conducted on the actual equipment used by the worker. It should be in the same condition or a substantially similar condition to that when it was used by the worker. If the equipment has been replaced since the worker's condition developed, testing will be of little or no use;
4. Equipment should not be tested in isolation. Testing should take into account noise on an overall basis including not only the equipment used by the worker but also noise emanating from equipment at different work stations.

This list is not exhaustive and will depend on the individual circumstances of each case. Tests must be thorough.

Where the worker has been employed in traditionally quiet employment, such as in a library, the presumption will not be too difficult to rebut. If, on the other hand, the worker was employed in traditionally noisy employment, such as a foundry, strict requirements for testing may make it both impractical and expensive to warrant the testing being carried out. Furthermore, in such a circumstance, the testing may simply assist the claim - prove the worker's case for him!.