THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-06041

Virgil Hoff,..... Respondent,

v.

Mead Westvaco, Self-Insured,..... Appellant.

NOTICE OF MOTION & MOTION TO DISMISS

MEAD WESTVACO SELF-INSURED'S APPEAL

Please take notice that the Respondent, Virgil Hoff, by and through his undersigned counsel, under S.C. Rules of Appellate Practice Rule 240, moves for an Order dismissing the appeal of Mead Westvaco Self-Insured as it was improperly filed. The Respondent's Motion is based upon the attached Memorandum in Support of the Respondent's Motion to Dismiss.

Malcolm M. Crosland, Jr.
The Steinberg Law Firm
P.O. Box 9
Charleston, SC 29408
(843) 720-2800 (phone)
(843) 722-1190 (fax)
S.C. Bar No.: 8934

June 7, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-06041

Virgil Hoff,..... Respondent,

v.

Mead Westvaco, Self-Insured,..... Appellant.

RESPONDENT'S MEMORANDUM IN SUPPORT OF

MOTION TO DISMISS

MEAD WESTVACO, SELF-INSURED'S APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Introduction

The Respondent (hereinafter "Hoff") moves for a dismissal of the Appellant, Mead Westvaco, Self-Insured's (hereinafter "Westvaco") Appeal on the grounds the Appeal is improvidently filed because the Order of the Court below is interlocutory.

Background

This claim arose when Hoff filed WCC Form 50, Notice of Claim and/or Request for Hearing dated December 15, 2005 and an Amended WCC Form 50, dated June 9, 2009 seeking compensation for binaural hearing loss he alleged was caused by workplace noise exposure. Westvaco filed a Form 51, Employer's Answer to Request for Hearing dated May 28, 2009, denying Hoff sustained an injury by accident; contracted an occupational disease; and that Hoff's claim qualified for benefits under the South Carolina Workers' Compensation Act. Westvaco also asserted the claim was barred because Hoff failed to provide notice of injury within the period prescribed by the South Carolina Workers' Compensation Act. A hearing was held in North Charleston, South Carolina on August 27, 2009 before the single Commissioner. The Commissioner found Hoff timely filed his claim for benefits under the South Carolina Workers' Compensation Act and that Hoff sustained permanent binaural hearing loss as a direct result of his exposure to loud noises while working for Westvaco. By his Order dated October 29, 2009, the Commissioner ordered Westvaco to provide hearing aids if recommended by Hoff's treating physician and awarded Hoff 49.5 weeks of compensation at his applicable compensation rate of $507.34 per week.

Westvaco timely appealed the single Commissioner's Order. Westvaco argued Hoff's claim was barred by the two (2) year statute of limitations under §42-15-40; there was insufficient evidence to prove Hoff's hearing loss was caused by an accident arising out of and in the course of his employment; the Hearing Commissioner's finding and conclusion that an Employer/Employee relationship existed "at the time of Hoff's injury and accident," was arbitrary and without

evidentiary support; the Hearing Commissioner erred by giving "greater weight" to the opinion of Dr. Kitch over Dr. Sataloff; and the Hearing Commissioner erred in his application of §42-15-40. By its Decision and Order dated July 2, 2010, the Appellant Panel reversed in its entirety the Decision and Order of the single Commissioner and held Hoff failed to timely and properly file the claim within the two (2) year statute of limitations mandated by §42-15-40.

Hoff timely appealed the Commission's Final Order to the Ninth Judicial Circuit Court of Common Pleas and argued his claim was timely. Hoff further argued that even if his claim wasn't timely filed the Defendants were estopped from asserting a statute of limitations defense. The matter was heard by the Honorable J.C. Nicholson, Jr., on July 19, 2012. Judge Nicholson found the Commissions' Appellate Panel erred in its application of Schurlknight v. The City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003) and §42-15-40.

The Order dated January 14, 2013, remanded Hoff's claim to the Commission to issue an order based upon the Circuit Court's ruling of law regarding §42-15-40 and estoppel.

Argument

Under the South Carolina Rules of Appellate Procedure, Rule 240, an interlocutory order is not immediately appealable. *See* Montjoy v. Asten-hill Dryer Fabrics, 316 S.E.2d 52, 446 S.E.2d 618 (1994) and Leviner v. Sunoco Products Company, 339 S.C. 492, 530 S.E.2d 127 (2000). An order directing an agency to issue an order based upon the Circuit Court's ruling of law is not a "final judgment." It is an interlocutory order and decides nothing on the merits; instead it instructs the Commission to render a decision on the merits.

Because Westvaco's Appeal was filed prior to the entry of a final order from the Commission, this Court should accordingly dismiss Westvaco's Appeal and remand this matter to the Commission for a decision in accordance with the Circuit Court's instructions.

Conclusion

For the reasons stated herein, Hoff requests that the Court dismiss Mead Westvaco's Appeal in its entirety.

Malcolm M. Crosland, Jr.
The Steinberg Law Firm
P.O. Box 9
Charleston, SC 29408
(843) 720-2800 (phone)
(843) 722-1190 (fax)
S.C. Bar No.: 8934

June 7th, 2013
Charleston, South Carolina

Received 11/9/09

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 0031077

VIRGIL HOFF, Employee,

Claimant,

vs.

MEAD WESTVACO, Employer, and

SELF-INSURED/MEAD WESTVACO, Carrier,

Defendants.

DECISION & ORDER

HEARING: Held in North Charleston, SC, South Carolina on August 27, 2009 at 11:00 AM.

APPEARANCES: Claimant represented by The Steinberg Law Firm, L.L.P., Charleston, South Carolina, with David T. Pearlman, Esquire and Malcolm M. Crosland, Jr., Esquire, appearing.

Defendants represented by Trask & Howell LLC, with Kirsten L. Barr, Esquire, appearing.

PURPOSE OF THE HEARING: To determine the issues as set forth on SCWCC Form No. 50.

DECISION AND ORDER: Derrick Williams, Commissioner

FILED: October 29, 2009.

STIPULATIONS

FIRST: This claim was heard before the undersigned Commissioner on August 27, 2009, in accordance with notices timely and properly served upon all parties of interest.

SECOND: The parties had no objection to the jurisdiction of the Commission over the parties or the subject matter of this claim or to the venue of the Hearing in North Charleston County.

THIRD: The Claimant has an average weekly wage of $897.41 making for an applicable compensation rate of $507.34 per week applicable to this claim.

FOURTH: The Commission's file and the Commissioner's notes, with the exception of any self-serving declarations and unstipulated medical reports, were made a part of the record.

FIFTH: At all relevant times, the Claimant was an employee working for the Employer, MeadWestvaco, which employer was subject to the provisions of the South Carolina Workers' Compensation Act, therefore, the South Carolina Workers' Compensation Commission has jurisdiction over the parties and issues presented in this claim.

APA SUBMISSIONS AND EXHIBITS

The following medical records, documents, and depositions were submitted by the parties under the Administrative Procedure Act and the Regulations of the Commission, without objection:

On behalf of the Claimant:

APA #	PROVIDER	TYPE OF REPORT	DATED	NUMBER OF PAGES	PAGES
1	Russell Kitch, MD	Office notes	10/14/03-4/28/09	6	1-6

EXHIBIT	PROVIDER	TYPE OF REPORT	DATED	NUMBER OF PAGES	PAGES
2.	Mead Westvaco Personnel file	personnel file excerpt	6/16/00	1	7

On behalf of the Defendants:

APA #	PROVIDER	TYPE OF REPORT	DATED	NUMBER OF PAGES	PAGES
3.	MeadWestvaco Audiograms		5/12/81-9/26/00	9	8-16
4.	MeadWestvaco		11/26/90-12/13/99	6	17-22
5.	Joseph Sataloff, MD		4/21/04	2	23-24
6.	Robert Sataloff, MD, DMA		7/13/09	2	25-26
7.	Russell Kitch, MD		5/29/09	1	27
8.	Hearing Loss Calculation Chart		2/3/89-10/6/03	3	28-30
9.	29 CFR § 1910.95		4/1/04	16	31-46
10.	Joseph Sataloff, MD	CV	undated	4	47-50
11.	Robert Sataloff, MD, DMA	CV	2/18/09	98	51-148

STATEMENT OF THE CASE

This claim comes before the Commission upon the filing by the Claimant (hereinafter "Hoff") of a WCC Form No. 50, Claimant's Request for Hearing, dated April 29, 2009 and amended WCC Form No. 50, dated June 9, 2009. Hoff seeks compensation for disability caused by binaural hearing loss he asserts was caused by his employment with MeadWestvaco. The Defendants, by their WCC Form No. 51, Employer's Response to Claimant's Request for Hearing, dated May 28, 2009, deny the compensability of Hoff's hearing loss and had asserted various defenses to Hoff's claim for benefits under the Act.

The Defendants state Hoff's claim for binaural hearing loss was initially filed on October 14, 2003, and was not timely filed within the two (2) year statute of limitations for filing claims as set forth in Section 42-15-40, S.C. Code of Laws, 1976. The Defendants also claim they were not provided timely notice of Hoff's accident under Section 42-15-20, S.C. Code of Laws, 1976. Additionally, the Defendants assert Hoff's binaural hearing loss is not causally related to his employment at MeadWestvaco. Instead, the Defendants assert Hoff's hearing loss is more likely the result of aging, noise induced by hunting or Hoff's diabetes.

Hoff asserts that after completing high school in 1958 he obtained employment at the MeadWestvaco plant in North Charleston, South Carolina. Hoff last worked in the plant in October of 2000. From 1958 until the year 2000 Hoff never worked anywhere other than for the Employer, MeadWestvaco, in its North Charleston, South Carolina plant. Hoff asserts he was initially assigned to the paper machine area of the plant where very loud machines ran throughout his work shift. After he performed a brief apprenticeship in other areas of the plant, he returned to the paper machine area of the plant where he worked until approximately 1970 as a brokeman. In 1970, his job description changed to pipefitter/mechanic. He remained a pipefitter/mechanic in the paper machine area until the early 1990's when he was moved to the tool rooms located directly underneath the paper machine area. Hoff asserts that during the entire course of his employment at MeadWestvaco, he was subject to very loud noise exposure which caused injury to both his ears. He states he was not provided with foam ear plug hearing protection by the Employer until sometime in the early to mid 1970's. He states the foam ear plug hearing protection was not entirely effective in protecting his ears from the loud noises generated by the paper winding machines and

paper wooling machines located in the department where he worked.

BIOGRAPHICAL INFORMATION

Name:	Virgil Hoff
Age:	69; DOB: 4/19/40
SSN:	251-58-9187
Marital Status:	Married
Military Background:	N/A
Educational Background:	12th grade
Prior work history:	None. Hoff has worked his entire working life for the Employer, MeadWestvaco.

REVIEW OF THE EVIDENCE

Hoff testified in addition to his APA submissions. The Defendants offered no testimony but relied on the cross examination of Hoff, and its APA submissions.

Hoff is sixty-nine (69) years old. He testified consistent with the biographical information set forth above. He graduated from the twelfth (12) grade. Following graduation he began employment in July of 1958 with Westvaco, the predecessor to the Defendant, MeadWestvaco Corporation. Other than working at Westvaco, Hoff stated he had no other employment during the course of his life. He last worked at the Westvaco plant in North Charleston, South Carolina, in October of 2000.

After beginning work for Westvaco in 1958, Hoff was assigned to the number 1 and number 2 paper machines. The number 1 and number 2 paper machines produced paper and were powered by steam motors. The steam motors are half as big as an automobile. Hoff remained assigned to the number 1 and number 2 paper machines for approximately eleven and a half (11 ½) years. While working at the number 1 and number 2 paper

machines, he performed shift work forty (40) hours per week eight (8) hours a day. Lunch was eaten at his work site near the number 1 and number 2 paper machines.

Hoff stated he was not provided any hearing protection whatsoever from when he began employment at Westvaco in 1958 through 1970. Prior to his employment at Westvaco, he was not exposed to any loud noises for a prolonged period of time. The paper machines he worked around generated loud, high frequency sound. He stated that if he stood next to a co-worker at a normal distance while speaking in a normal voice, his co-worker would not be able to understand him. During a normal shift working with the number 1 and number 2 paper machines, at least one machine operated continuously with no downtime. Hoff worked near the paper machines which were producing paper. He stated he had no reason to be near a machine that was not operating during the course of his shift.

In 1970, Hoff was moving into the pipe shop area of the plant as an apprentice. A pipefitter at the Westvaco plant fabricates and installs as well as troubleshoots machinery in the plant. He worked until 1985 as a pipefitter when his job description changed to a mechanic. For the first six (6) months in the pipefitter apprentice program he worked in the paper machine area where he worked from 1959 to 1970. His work then rotated through several other areas of the plant for six (6) months. After completing his four (4) year apprenticeship he went back to work in the paper machine area where he worked from 1958 to 1970. He stated the other areas of the plant where he worked during his four (4) year apprenticeship were as loud as the paper machine area where he worked from 1958 to 1970. Hoff remained working in the paper machine area until he retired in 2000.

As part of his work as a pipefitter he used steel cutters and a cutting torch. The cutting torch was pneumatically powered and made a "terrible noise especially on stainless

steel pipe." (Tr. p.14) Hoff stated that the noise in the paper machine where he worked through most of his career at Westvaco the noise generated in that area of the plant did not change. It was always noisy. He stated, "It was noisy when I got there; it was noisy when I left." (Tr.p.5-6)

Hoff stated that in the area of the paper machines the temperature was "very hot." (Tr.p.16:11) Beginning around the early 1970s he stated hearing protection was provided to him. Because the temperature in the paper machine room was so hot, he perspired and that caused the hearing protection he was provided to loosen. Even wearing the hearing protection did not eliminate loud noise generated in the paper machine room. (Tr.p.17:18-21)

Hoff testified all areas of the plant where he worked exposed him to loud sounds except for the plant warehouse or storage area where he very rarely worked. He stated that approximately 99% of the time he worked in the plant he worked in the paper machine area. During the last seven (7) or eight (8) years of his employment, Hoff worked in the tool room area where he handed out tools for mechanics, pipefitters and iron workers. The first tool room where he worked was located underneath the number 3 paper machine. The area where he physically worked in the tool room was approximately only fifty (50) or sixty (60) feet from the paper machine. He worked in this tool room for five (5) to six (6) years. He described the noise level as "noisy" in the tool room. Each shift lasted eight (8) hours. He was provided a thirty (30) minute lunch break which was taken in the tool room where he worked. Hoff was then assigned to a second tool room located underneath the number 3 paper machine winder/re-winder. He described the job of a re-winder machine as re-winding the paper into a roll after it came off of the paper machine. He stated the re-winder machine generates loud sound. Where he physically worked in the tool room was

approximately ten (10) to fifteen (15) feet from the re-winding machine.

Hoff testified regarding his general health while working for the employer. He testified that towards the end of his employment he was diagnosed with arthritis. In addition, he was diagnosed with sarcoidosis which finally cleared up. In the year 2000 he was diagnosed with diabetes. Because the management of his diabetes was so effective, he came off of any diabetes medication. He has since been placed back on medication and "I run at pretty good levels with it now." (Tr.p.22:25-p.23:1) He was not diagnosed with diabetes in either the 1960's, 1970's, 1980's or 1990's.

Hoff stated that in his private life he was not exposed to loud prolonged sounds or noise. He acknowledged he hunted but did not start hunting until the 1960's or later. He only hunted deer. He described the deer season in South Carolina running from August 15th to January 1st. He stated that although he would hunt each season, he did not actually discharge his gun every season. He stated, "For seven years one time that gun did not fire." (Tr.p.24:14) During a normal year if he wasn't hunting he did no target practicing or discharged his weapon for any reason other than hunting. (Tr.p.24:20-21)

Hoff stated he was provided regular hearing tests while employed at Westvaco. The tests were administered by the first aide nurse at the plant. After being tested, he would review the results of the test with the nurses in the first aide department. As years progressed, it was his understanding his hearing was normal. He was never advised by anyone was Westvaco his hearing loss was related to his employment at Westvaco. Because he felt like his hearing was declining, he was evaluated by Dr. Russell Kitch in 2003. After being tested by Dr. Kitch, Hoff understood the cause of his hearing loss was as a result of his noise exposure at Westvaco.

At the time of his hearing, Hoff did not wear a hearing aide. He would like to be

fitted for a hearing aide. Other than the opinions of Dr. Russell Kitch which relate his hearing loss to his work at Westvaco, Hoff stated he has not been advised by anyone else his hearing loss was caused by his work at Westvaco.

Hoff was cross-examined by the Defendants. Hoff acknowledged that he thought he had problems with his hearing going back into the 1970's but was never informed by anyone at the plant that he was diagnosed with a hearing problem. Hoff also acknowledged that he hunted deer with a shotgun and a rifle and did not wear hearing protection when he hunted. Hoff acknowledged that he used a chainsaw or other power tools occasionally around his home. He stated that while using a chainsaw he wears earplugs or hearing protection.

The undersigned asked Hoff if he had filed any workers' compensation claims prior to the claim for his hearing loss. He responded he had not. Hoff stated he probably shot less than ten (10) deer in his lifetime while hunting. He denied doing any other hunting other than deer hunting. He stated that he used earplugs while working in the plant, he could still hear noise with the earplugs in his ears. At times, he would have to remove the earplugs to communicate with co-employees depending on the noise level around him or how close he was to the equipment that was running.

Both parties submitted medical evidence into the record. The audiogram results interpreted by the office of Dr. Russell D. Kitch of Lowcountry ENT indicate that Hoff presented to the audiologist complaining of a decrease in hearing and a long history of noise exposure. Based upon the audiogram, Dr. Kitch, an ENT physician, noted no history of auditoxic medication or chemotherapy and no history of audiological surgery, trauma or recurrent infection. Dr. Kitch noted Hoff had no significant non-employment related noise exposure. After conducting a thorough physical examination of Hoff and reviewing his

audiometric testing, Dr. Kitch diagnosed "noise induced pattern sensorineural hearing loss" and that his hearing loss was "entirely consistent with industrial noise exposure sustained at Westvaco between 1958 and 2000 as the etiology of the loss." (APA p.4) Dr. Kitch assigned a 30% binaural hearing impairment to Hoff based upon his hearing loss caused by his employment at Westvaco. Dr. Kitch also reviewed Hoff's audiometric testing results from Westvaco going back to 1989. He found the audiometric hearing test results from Hoff's testing at Westvaco to be "consistent with the expectations for noise induced hearing loss, with the majority of damage occurring in the early years of exposure, then tends to level off, particularly if hearing protection is being used." (APA p.6) Kitch stated, "Based on this history and the absence of other significant noise exposure outside of his employment at Westvaco, it is my opinion that within a reasonable degree of medical certainty Mr. Hoff's hearing loss is attributed to noise exposure in the workplace at Westvaco. As an additional point of clarification, Mr. Hoff was forty-eight years old when he had the audiogram obtained at Westvaco in 1989 where findings as noted showed similar loss to the current studies. This negates the contribution of age related hearing loss as a factor in his impairment rating." (APA p.6)

Also included as part of the APA evidence submitted into the record were the audiology test results from Westvaco from 1981-2000. In addition, the reports of Dr. Joseph Sataloff dated April 21, 2004 and Dr. Robert T. Sataloff dated July 13, 2009 were placed into evidence. The doctors Sataloff reviewed the audiograms performed at Westvaco. They performed no physical exam of Mr. Hoff. The Sataloff's found nothing in the record to indicate Mr. Hoff's noise exposure increased after 1972 when hearing protection was provided to him by the Employer. Because Hoff's hearing loss worsened after 1972, Dr. Robert Sataloff opined his hearing loss could not be explained on the basis

of his occupational noise exposure. (APA p.26) The April 21, 2004 report of Dr. Joseph Sataloff acknowledges Hoff had a substantial bilateral high frequency hearing loss going as far back as 1972 when his first audiogram was performed at Westvaco. He opined Hoff's hearing loss could be due to presbycusis (aging), hereditary factors, genetic factors and diabetes. While he acknowledged Hoff's hearing loss grew worse after 1981, he opined it could not possibly be due to any occupational cause. (APA p.24) This is based upon the presumption that occupational hearing loss does not progress once the subject is removed from the noisy environment.

Based upon the evidence presented in the record, it is clear to the undersigned Hoff did in fact sustain binaural hearing loss as a direct result of his exposures to loud noises while working for the Employer.

FINDINGS OF FACT

Based upon the stipulations, the testimony of witnesses, and the APA submissions, the undersigned Commissioner makes the following findings of fact as required by S.C. Code Anno., § 42-17-40, 1976:

FIRST: The South Carolina Workers' Compensation has jurisdiction over this claim, with the venue being proper in Charleston County. Hoff was a covered employee and the Employer was a covered employer under the Act. The Employee/Employer relationship existed at the time of Hoff's injury by accident.

SECOND: This claim was heard before the undersigned Commissioner on August 27, 2009, in accordance with hearing notices timely and properly served upon all

parties of interest.

THIRD: Hoff's average weekly wage at the time of his accident was $897.41 per week, allowing for an applicable compensation rate of $507.34 per week applicable to this claim.

FOURTH: Hoff worked for the Employer since 1958 through 2000. The Employer did a decent job since the early 1970s in terms of providing hearing protection to its employees, prior to the 1970s, hearing protection was not mandatory. Hoff worked a substantial number of years for Westvaco without hearing protection. There is no evidence in the record contradicting Hoff's testimony that no hearing protection was required or worn from 1958 to the early 1970s.

FIFTH: There was no history of any prior employment which contributed to Hoff's hearing loss. Hoff's employment with MeadWestvaco is the only job he has ever had since graduating high school in 1958.

SIXTH: Hoff is a very credible witness. This is based upon his testimony at the hearing, the undersigned's observations of him at the hearing and his answers to my direct questioning. I have no reason to doubt whatsoever the veracity of Hoff's testimony.

SEVENTH: The record is devoid of any evidence Hoff has any family history of hearing loss. Hoff has no exposure to chemicals or medications which would affect his hearing. Although Hoff has done some hunting since the mid-1960s, it was not at the level which would contribute to his hearing loss. The minor

number of times he even discharged his gun does not affect the undersigned's decision regarding the relationship between his employment and his hearing loss. Although Dr. Joseph Sataloff and Dr. Robert Sataloff are both well respected and well known authorities regarding hearing loss, neither physician ever physically examined Hoff. I find it difficult to full assess a Claimant's hearing loss solely from a view of his medical records. I do not find it wholly persuasive Hoff's diabetes has any relationship to his hearing loss. I place greater weight to the opinion of Dr. Kitch who actually examined and treated Hoff than the opinion of Dr's Sataloff for the foregoing reasons.

EIGHTH: Hoff sustained a compensable injury by repetitive trauma on and before October 24, 2000, the date he filed his claim for benefits under the South Carolina Workers' Compensation Act for his hearing loss. Hoff's hearing loss in both ears was caused by excessive noise exposure on his job at MeadWestvaco.

NINTH: Hoff provided timely and proper notice of his injury by accident and timely filed his claim for benefits under the Act within two (2) years of the date that he knew, with reasonable diligence, of his compensable claim. There is no evidence in the record Hoff was aware his hearing loss was related to his employment with the Employer until Dr. Russell Kitch offered his opinion his hearing loss was consistent with the noise exposure he sustained with the Employer between 1958 and 2000. Dr. Kitch's opinion was offered on

October 14, 2003. Hoff timely filed his claim for benefits for his hearing loss on October 22, 2003, well within the ninety (90) day notice requirement of Section 42-15-20 and the statute of limitations pertaining to the filing of a claim for benefits under Section 42-15-40. The evidence reflects Hoff's hearing loss occurred over time while employed by MeadWestvaco. Dr. Kitch noted Hoff's hearing loss was consistent with industrial noise exposure sustained at Westvaco between 1958 and 2000. (APA p.4) He also stated, "This is consistent with the expectations for noise induced hearing loss, where the majority of the damage to hearing occurs in the early years of exposure, then tends to level off, particularly if hearing protection is not being used." (APA p.6)

TENTH: Hoff exercised reasonable diligence by inquiring from the Employer what the cause of his hearing loss was during the course of his employment when he received audiogram testing. Hoff diligently provided notice of his accident and filed his claim within the statutory requirements of the Act after becoming aware of his compensable injury.

ELEVENTH: Dr. Kitch both physically examined Hoff and reviewed his audiometric testing and, found the Claimant sustained a 30% binaural hearing loss as a result of his workplace exposures. Therefore, I find Hoff has sustained a 30% binaural hearing disability causally directly related to his workplace noise exposure while working for MeadWestvaco.

TWELFTH: Hoff reached maximum medical improvement on October 14, 2003.

THIRTEEN: Dr. Russell Kitch shall be the authorized treating physician with regard to Hoff's binaural hearing loss for purposes of future medical treatment. The Defendants are responsible for Hoff's future causally related medical treatment relating to his binaural hearing loss including hearing/digital aides if recommended by Dr. Kitch pursuant to Dodge v. Bruccoli, et.al, 514 S.C.2d 593 (Ct. App. 1999) and §42-15-60, SC. Code of Laws, 1976.

CONCLUSIONS OF LAW

Based upon the findings of fact set forth above, the undersigned Commissioner makes the following conclusions of law as required by S.C. Code Anno., § 42-17-40:

FIRST: Under S.C. Code Anno., § 42-1-130, Hoff was a covered employee at the time in question.

SECOND: Under S.C. Code Anno., § 42-1-140, the Defendant/Employer was a covered employer under the Act.

THIRD: Under S.C. Code Anno., § 42-1-40, average weekly wage is defined.

FOURTH: Under S.C. Code Anno., § 42-1-160, Hoff sustained a compensable injury by accident arising out of and in the course and scope of his employment on October 14, 2003, when he was first notified his binaural hearing loss was causally related to his employment with the Employer. § 42-15-20 of the Act provides that notice of an accident must be provided to the employer within ninety (90) days after its occurrence. Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985) The Claimant is not required to provide notice of an accident to the employer until he is aware he has a "job related" accident. The language in Section 42-15-20, with regard to notice should be

liberally construed in favor of claimants. Ethridge v. Montsanto, Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Here, the Claimant's hearing loss is akin to repetitive trauma injuries such as carpal tunnel syndrome. Our Courts have ruled that repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini-accidents." Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (S.C. 2002) When applying Section 42-15-20 to repetitive trauma injuries, the Workers' Compensation Commission shall determine the statutory notice requirement begins to run the employee "...becomes disabled and could discover with reasonable diligence his condition is compensable." Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (S.C. App. 2005).

FIFTH: Under S.C. Code Anno., § 42-15-40, Hoff timely filed his claim for benefits under the Act. Section 42-15-40, requires the filing of a claim within two years of the date Hoff discovered the causal relationship between his injury and his employment. Mauldin v. Dyna-Color/Jackrabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992).

SIXTH: Under S.C. Code Anno., § 42-9-30(19), covers compensation for the loss of hearing. Regulation 67-1102 governs the method for determining hearing impairment.

SEVENTH: Under S.C. Code Anno., § 42-15-60 and Dodge v. Bruccoli, et.al, the Claimant is entitled to related and necessary medical care and treatment which will tend to lessen the period of disability despite the Claimant having reached maximum medical improvement.

ORDER AND AWARD

Based on the foregoing findings of fact and conclusions of law it is hereby:

ORDERED, ADJUDGED AND DECREED, the Claimant, Virgil Hoff, sustained a compensable injury by accident to his right ear and left ear by sustaining a binaural hearing disability as a result of excessive noise exposure on his job and occurred out of and in the course and scope of his employment at MeadWestvaco on October 19, 2003; and, it is further,

ORDERED, ADJUDGED AND DECREED, the Claimant, Virgil Hoff, shall receive ongoing medical care and treatment from Dr. Russell Kitch of Lowcountry ENT and shall be provided with any hearing/digital hearing aides if recommended by Dr. Kitch with the Defendants remaining responsible for the maintenance of Hoff's hearing aides in keeping with the holding in Dodge v. Bruccoli, et.al, 514 S.E.2d 593 (Ct. App. 1999); and, it is further,

ORDERED, ADJUDGED AND DECREED, the Claimant, Virgil Hoff, is entitled to and award for permanent disability due to his binaural hearing loss and therefore, shall receive 49.5 weeks of compensation at his applicable compensation rate of $507.34 per week from the Defendants.

AND IT IS SO ORDERED.

No hearing costs are assessed.

The Honorable Derrick L. Williams
S.C. Workers' Compensation Commissioner

Columbia, South Carolina

MMC
KLB

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 6th day of Nov, 2009

By Rhett G Smith
Administrative Assistant to the Commissioner

Rec'd 7/2/10

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S

APPELLATE PANEL

W.C.C. FILE NO. 0031077

Virgil A. Hoff,	EMPLOYEE/RESPONDENT,
-v-	
MeadWestvaco,	SELF-INSURED EMPLOYER/ APPELLANT.

Appellate Panel Review held in Columbia, South Carolina on March 15, 2010 per notices timely and properly served on all parties in interest.

Appellate Panel Decision and Order filed

July 2, 2010.

APPEARANCES:

Claimant/Respondent represented by
Malcolm M. Crosland, Jr., Esquire, Steinberg Law Firm, Charleston, South Carolina.

Defendant/Appellant represented by
Kirsten L. Barr, Esquire, Trask & Howell, LLC, Mt. Pleasant, South Carolina.

Statement of the Case

The parties were heard by Commissioner Williams on August 27, 2009 in Charleston, South Carolina. On October 29, 2009, Commissioner Williams issued the following:

FINDINGS OF FACT

FIRST: *The South Carolina Workers' Compensation has jurisdiction over this claim, with the venue being proper in Charleston County. Hoff was a covered employee and the Employer was a covered employer under the Act. The Employee/Employer relationship existed at the time of Hoff's injury by accident.*

SECOND: *This claim was heard before the undersigned Commissioner on August 27, 2009, in accordance with hearing notices timely and properly served upon all parties of interest.*

THIRD: *Hoff's average weekly wage at the time of his accident was $897.41 per week, allowing for an applicable compensation rate of $507.34 per week applicable to this claim.*

FOURTH: *Hoff worked for the Employer since 1958 through 2000. The Employer did a decent job since the early 1970s in terms of providing hearing protection to its employees, prior to the 1970s, hearing protection was not mandatory. Hoff worked a substantial number of years for Westvaco without hearing protection. There is no evidence in the record contradicting Hoff's testimony that no hearing protection was required or worn from 1958 to the early 1970s.*

FIFTH: *There was no history of any prior employment which contributed to Hoff's hearing loss. Hoff's employment with MeadWestvaco is the only job he has ever had since graduating high school in 1958.*

SIXTH: *Hoff is a very credible witness. This is based upon his testimony at the hearing, the undersigned's observations of him at the hearing and his answers to my direct questioning. I have no reason to doubt whatsoever the veracity of Hoff's testimony.*

SEVENTH: *The record is devoid of any evidence Hoff has any family history of hearing loss. Hoff has no exposure to chemicals or medications which would affect his hearing. Although Hoff has done some hunting since the mid-1960s, it was not at the level which would contribute to his hearing loss. The*

minor number of times he even discharged his gun does not affect the undersigned's decision regarding the relationship between his employment and his hearing loss. Although Dr. Joseph Sataloff and Dr. Robert Sataloff are both well respected and well known authorities regarding haring loss, neither physician ever physically examined Hoff. I find it difficult to full assess a Claimant's hearing loss solely from a view of his medical records. I do not find it wholly persuasive Hoff's diabetes has any relationship to his hearing loss. I place greater weight to the opinion of Dr. Kitch who actually examined and treated Hoff than the opinion of Dr's Sataloff for the foregoing reasons.

EIGHTH: *Hoff sustained a compensable injury by repetitive trauma on and before October 24, 2000, the date he filed his claim for benefits under the South Carolina Workers' Compensation Act for hearing loss. Hoff's hearing loss in both ears was caused by excessive noise exposure on his job at MeadWestvaco.*

NINTH: *Hoff provided timely and proper notice of his injury by accident and timely filed his claim for benefits under the Act within two (2) years of the date that he knew, with reasonable diligence, of his compensable claim. There is no evidence in the record Hoff was aware his hearing loss was related to his employment with the Employer until Dr. Russell Kitch offered his opinion his hearing loss was consistent with the noise exposure he sustained with the Employer between 1958 and 2000. Dr. Kitch's opinion was offered on October 14, 2003. Hoff timely filed his claim for benefits for his hearing loss on October 22, 2003, well within the ninety (90) day notice requirement of Section 42-15-20 and the statue of limitations pertaining to the filing of a claim for benefits under Section 42-15-40. The evidence reflects Hoff's hearing loss occurred over time while employed by MeadWestvaco. Dr. Kitch noted Hoff's hearing loss was consistent with industrial noise exposure sustained at Westvaco between 1958 and 2000. (APA p.4) He also stated, "This is consistent with the expectations for noise induced hearing loss, where the majority of the damage to hearing occurs in the early years of exposure, then tends to level off, particularly if hearing protection is not being used." (APA p.6)*

TENTH: *Hoff exercised reasonable diligence by inquiring from the Employer what the cause of his hearing loss was during the course of his employment when he received audiogram testing. Hoff diligently provided notice of his accident and*

filed his claim within the statutory requirements of the Act after becoming aware of his compensable injury.

ELEVENTH: *Dr. Kitch both physically examined Hoff and reviewed his audiometric testing and, found the Claimant sustained a 30% binaural hearing loss as a result of his workplace exposures. Therefore, I find Hoff has sustained a 30% binaural hearing disability causally directly related to his workplace noise exposure while working for MeadWestvaco.*

TWELFTH: *Hoff reached maximum medical improvement on October 14, 2003.*

THIRTEEN: *Dr. Russell Kitch shall be the authorized treating physician with regard to Hoff's binaural hearing loss for purposes of future medical treatment. The Defendants are responsible for Hoff's future causally related medical treatment relating to this binaural hearing loss including hearing/digital aides if recommended by Dr. Kitch pursuant to Dodge v. Bruccoli, et.al, 514 S.C. 2d 593 (Ct. App 1999) and §42-15-60, SC. Code of Laws, 1976.*

CONCLUSIONS OF LAW

Based upon the findings of fact set forth above, the undersigned Commissioner makes the following conclusions of law as required by S.C. Code Anno., § 42-17-40:

FIRST: *Under S.C. Code Anno., § 42-1-130, Hoff was a covered employee at the time in question.*

SECOND: *Under S.C. Code Anno., § 42-1-140, the Defendant/Employer was a covered employer under the Act.*

THIRD: *Under S.C. Code Anno., § 42-1-40, average weekly wage is defined.*

FOURTH: *Under S.C. Code Anno., § 42-1-160, Hoff sustained a compensable injury by accident arising out of and in the course and scope of his employment on October 14, 2003, when he was first notified his binaural hearing loss was causally related to his employment with the Employer. § 42-15-20 of the Act provides that notice of an accident must be provided to the employer within ninety (90) days after its occurrence. Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985) The Claimant is not required to provide notice of an accident to the employer until he is aware he has a "job related" accident. The language in Section 42-15-20, with regard to notice should be liberally construed in favor of claimants. Ethridge v. Montsanto, Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Here, the Claimant's hearing loss is akin to repetitive trauma injuries such as carpal tunnel syndrome. Our Courts have*

ruled that repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini-accidents." Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (S.C. 2002) When applying Section 42-15-20 to repetitive trauma injuries, the Workers' Compensation Commission shall determine the statutory notice requirement begins to run the employee "...becomes disabled and could discover with reasonable diligence his condition is compensable." Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (S.C. App. 2005).

FIFTH: *Under S.C. Code Anno., § 42-15-40, Hoff timely filed his claim for benefits under the Act. Section 42-15-40, requires the filing of a claim within two years of the date Hoff discovered the causal relationship between his injury and his employment. Mauldin v. Dyna-Color/Jackrabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992).*

SIXTH: *Under S.C. Code Anno., § 42-9-30(19), covers compensation for the loss of hearing. Regulation 67-1102 governs the method for determining hearing impairment.*

SEVENTH: *Under S.C. Code Anno., § 42-15-60 and Dodge v. Bruccoli, et.al, the Claimant is entitled to related and necessary medical care and treatment which will tend to lessen the period of disability despite the Claimant having reached maximum medical improvement.*

ORDER AND AWARD

Based on the foregoing findings of fact and conclusions of law it is hereby:

ORDERED, ADJUDGED AND DECREED, *THE Claimant, Virgil Hoff, sustained a compensable injury by accident to his right ear and left ear by sustaining a binaural hearing disability as a result of excessive noise exposure on his job and occurred out of an in the course and scope of his employment at MeadWestvaco on October 19, 2003; and it is further*

ORDERED, ADJUDGED AND DECREED, *the Claimant, Virgil Hoff, shall receive ongoing medical care and treatment from Dr. Russell Kitch of Lowcountry ENT and shall be provided with any hearing/digital hearing aides if recommended by Dr. Kitch with the Defendants remaining responsible for the maintenance of Hoff's hearing aides in keeping with the holding in Dodge v. Bruccoli, et.al, 514 S.E.2d 593 (Ct. App. 1999); and, it is further,*

ORDERED, ADJUDGED AND DECREED, *the Claimant, Virgil Hoff, is entitled to and award for permanent disability due to his binaural hearing loss and therefore, shall receive 49.5 weeks of compensation at his applicable compensation rate of $507.34 per week from the Defendants.*

AND IT IS SO ORDERED.

Within the statutory period, counsel for the Defendant filed an Application for Review in the case setting forth its reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on March 15, 2010. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, the Defendant respectfully argues the following:

1. The Hearing Commissioner's inconsistent findings and conclusions should be reversed based on the legal pleadings of the parties, the evidence presented, and a proper application of the law.

2. The claim is barred by the statue of limitations.

3. There is no evidence that could support an award of medical benefits under S.C. Code Ann. § 42-15-60.

4. The Hearing Commissioner's decision to give "greater weight" to the opinion of Dr. Kitch than to the opinions of Dr. Joseph Sataloff or Dr. Robert Sataloff is specious.

5. The Hearing Commissioner's finding and conclusion that an Employer/Employee relationship existed "at the time of Hoff's injury by accident" is arbitrary, capricious, and without evidentiary support.

6. The Hearing Commissioner's findings and conclusions that the Claimant's hearing loss was caused by an accident arising out of and in the course of his employment is not supported by the greater weight of the evidence and should be reversed.

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. 42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Panel has determined that the Hearing Commissioner erred in failing to find and conclude that the claim is barred under § 42-15-40, the statute of limitations, as a matter of law. Accordingly, the Decision and Order dated October 29, 2009 is REVERSED in its entirety for the reasons set forth herein below.

Evidence Summary

The Claimant is 69 years old. He has not worked for the past nine (9) years. He retired from MeadWestvaco in October 2000. For the last eight (8) years of his employment (*i.e.*, between 1992 and 2000), the Claimant was suffering with Rheumatoid arthritis and MeadWestvaco made light duty work available to the Claimant in a tool room. In the tool room, the Claimant simply handed out tools to the mechanics and pipe fitters. Prior to that time, the Claimant worked as a pipe-fitter, a job that entailed the use of "small tools" for tightening bolts and installing or removing pipe. The Claimant admits that he has been required to wear hearing protection at all times at work since 1970. He further admitted that the hearing protection used at work was so effective; he could not even understand a face-to-face conversation with a co-worker while wearing his hearing protection.

The Claimant's medical records reveal that he suffers from Rheumatoid arthritis, a known cause of hearing loss. It was the Claimant's Rheumatoid arthritis that ended his

work as a pipe-fitter in the early 1990's. (APA pp.17-19). In addition, the Claimant is an insulin-dependent diabetic and "30% of individuals with diabetes develop high frequency hearing loss of the type present in Mr. Hoff." (APA p. 23). The Claimant admits he began having problems with his ears and hearing even before 1980. (APA p. 9). At his annual audiograms, the Claimant would complain of difficulty with background noise, discrimination, and ringing in his ears. (APA pp. 8-9). The Claimant reported that he saw an ear specialist and had his hearing independently tested in Walterboro in 1980. (APA p.9). The Claimant is a hunter and has been shooting a 30.06 rifle, without hearing protection, for most of his life and continued to do so after his retirement in 2000. The Claimant admits that the only explosions that have ever occurred near his ears are those from the blast his rifle and his shotgun. Of course, most medical experts agree that" use of these guns can produce a significant amount of high frequency hearing loss." (APA p. 23).

At the time the Claimant stopped working at MeadWestvaco in October 2000, he had a 16.25% binaural hearing loss based on an audiogram that was discussed with him at the time it was administered. (APA p.29). After his retirement, the Claimant's hearing problems increased significantly and by 2003, the Claimant's hearing loss had nearly doubled to 30%. (APA p. 30). According to Dr. Joseph Sataloff,

> "His additional hearing loss could be due to presbycusis, that is aging, hereditary factors, genetic factors and diabetes. It is evident that between 1981 and the present time his hearing got worse, but it could not possibly be due to any occupational cause." (APA p.24).

The Claimant has not had his hearing tested since 2003; however, the Claimant admits that his hearing has gotten even worse since that time, despite the fact he has not

been working. According to the uncontradicted medical evidence in the record, "occupational hearing loss is not progressive after a maximum loss is incurred approximately 10 to 12 years after initial exposure" and "occupational hearing loss does not progress once the subject has been removed from the noisy environment." (APA p. 24, p.26). Even Dr. Kitch, who evaluated the Claimant on a single occasion in 2003 at the request of the Steinberg Law Firm, conceded that with noise-induced hearing loss "the majority of the damage to the hearing occurs in the early years of exposure, then tends to level off, particularly if hearing protection is being used." (APA p. 6). However, between 2000 and 2003, the Claimant's hearing impairment nearly doubled, going from 16.25% to 30%. (APA pp. 28-29).

Discussion

This matter came before the South Carolina Workers' Compensation Commission pursuant to the Claimant's Form 50 dated June 9, 2009, alleging that he sustained an injury by accident on October 4, 2000, affecting the "ears, hearing loss" as a result of "[e]xposure to chemicals." This claim was denied by Form 51 dated June 18, 2009 and MeadWestvaco further argued that the claim was barred by § 42-15-20 for failure to give notice, and by S.C. Code Ann. § 42-15-40 for failure to file a claim within the statute of limitations. The Claimant's Form 58, dated August 10, 2009 reaffirmed that he was claiming an injury by accident on October 4, 2000. He never claimed that his alleged hearing loss occurred on any date other than October 4, 2000.

However, the Hearing Commissioner inexplicably found that the Claimant

> *"sustained a compensable injury by repetitive trauma on and before **October 24, 2000**, the date he filed his claim for benefits under the South Carolina Workers' Compensation Act for his hearing loss. Hoff's hearing loss in both ears was caused by excessive noise exposure on his job at MeadWestvaco."* (emphasis added).

This finding is not supported by the evidence in the record or the applicable law. The Claimant did not file any claim with the Commission on October 24, 2000 – his claim was not filed until three (3) years later – on October 22, 2003. Furthermore, the Claimant's Form 50 claims his accidental injury occurred on October 4, 2000, not October 24, 2000. In addition, the Claimant presented no evidence that his exposure to noise was "excessive," or of a level or duration that could cause hearing loss, especially loss that occurred after he was over the age of 60 and had retired from working.

In addition to this inexplicable finding of fact, the Hearing Commissioner went on to enter a wholly inconsistent conclusion of law:

> *"Under S.C. Code Anno. [sic] § 42-1-160, Hoff sustained a compensable injury by accident arising out of and in the course and scope of his employment on **October 14, 2003**, when he was first notified his binaural hearing loss was causally related to his employment with the Employer."* (emphasis added).

At no time did the Claimant allege any injury by accident on October 14, 2003. In fact, the Claimant was not working for MeadWestvaco on October 14, 2003, having retired more than three (3) years earlier. Therefore, any injury the Claimant may have sustained

on October 14, 2003 could not be said to arise out of or in the course of his employment as a matter of law.[1]

The Hearing Commission's Decision and Order, in the "Order and Award" section (page 17), states:

> *"ORDERED, ADJUDGED AND DECREED, the Claimant, Virgil Hoff, sustained a compensable injury by accident to his right ear and left ear by sustaining a binaural hearing disability as a result of excessive noise exposure on his job and occurred out of and in the course and scope of his employment at MeadWestvaco on* ***October 19, 2003****..."*(emphasis added).

Indeed, in a single Decision and Order the Hearing Commission has referenced three different possible dates of accident and three different possible mechanisms of accident, none of which are supported by the evidence in the record or the applicable law and none of which were even alleged by the Claimant.

Having failed to accurately determine a precise accident date, it was obviously difficult for the Hearing Commissioner to properly address the seminal issue in this case: *Whether the claim is barred by S.C. Code Ann. § 42-15-60.* However, it is clear that the Hearing Commissioner did not properly apply the law to this case, under any possible factual scenario. According to the Hearing Commissioner:

---

[1] Note that the Hearing Commissioner also found that Hoff "reached maximum medical improvement on October 14, 2003," the same date the Hearing Commissioner concludes is the date of accident. There is no evidence to support this finding regarding maximum medical improvement, as it was not addressed by any medical expert.

"Hoff provided timely and proper notice of his injury by accident and timely filed his claim for benefits under the Act within two (2) years of the date that he knew, with reasonable diligence, of his compensable claim.

Of course, the South Carolina Workers' Compensation Act requires that any claim be filed "within two years after an accident," as clearly and unequivocally required by S.C. Code Ann. § 42-15-40. Therefore, the Hearing Commissioner's finding of fact with regard to the whether the claim was timely and properly filed within the two-year statue of limitations must be reversed as a matter of law.

In addition to the erroneous factual finding, the Hearing Commissioner further entered the following erroneous conclusion of law:

"Under S.C. Code Anno., [sic] § 42-15-40, Hoff timely filed his claim for benefits under the Act. Section 42-15-40, requires the filing of a claim within two years of the date Hoff discovered the causal relationship between his injury and his employment. Mauldin v. Dyna-Color/Jackrabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992)."

However, the "discovery rule" applied in Mauldin, simply does not apply in repetitive trauma cases such as the case at bar. According the South Carolina Supreme Court,

> "Repetitive trauma injuries, unlike the injury in Mauldin, which occurred on a specific date but simply was misdiagnosed, have a gradual onset caused by the cumulative effect of repetitive traumatic events, or "mini accidents.
>
> ***

> **We hold the last day of exposure is the date from which the statue of limitations begins to run in a repetitive trauma case."** Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003) (emphasis added).

Therefore, the legal issue before the Appellate Panel is whether the Claimant filed a claim within two years of the last day of exposure to chemicals, or noise, or whatever it is he now claims as the cause of his hearing loss. Obviously, the Claimant's last day of exposure could be no later than October 4, 2000, the last day he actually worked at MeadWestvaco. Because the Claimant did not file any claim until October 22, 2003, more than three (3) years after he last worked at MeadWestvaco, his claim cannot be considered timely as a matter of law.

Furthermore, even if the Mauldin case has not been so clearly distinguished by the Supreme Court in Schurlknight, its holding would still not apply to the case at bar. In Mauldin, the employee was misdiagnosed as having a knee sprain, when she actually had a meniscal tear. Here, the Claimant has known that he had problems with his hearing since the 1970s. (Hrg. Transcript p. 30). He first saw a doctor about his problems with his hearing in 1980. (APA p.9). Throughout the 1980s the Claimant complained of problems with his hearing at his annual audiogram. (APA pp. 8-9). The Claimant admits that he discussed the results of each audiogram with the MeadWestvaco Medical Department. (Hrg. Transcript p.31). In fact, his medical records reveal that the results of his September 26, 2000 audiogram were discussed with him at the time of the test. Even

the records of Dr. Kitch, whom he saw only on time on October 14, 2003, stated that the Claimant had

> *"a long history of high frequency hearing loss that has been causing him more problems socially over the last few years since he has retired from work...He worked at Westvaco for approximately 44 years, until 2000...**He is aware that he had a hearing loss noted on plant audiograms at that time.**"* (APA p. 3) (emphasis added).

Therefore, it is clear that the Claimant was not only aware of problems with his hearing at the time of his retirement in October 2000, but he was also aware that his audiograms showed a hearing loss. He was not misdiagnosed in the years prior to his retirement in 2000, he simply failed to file a workers' compensation claim within the two year statute of limitations. Therefore, even if the South Carolina Supreme Court had not so clearly held that he so-called "discovery rule" does not apply in a repetitive trauma case, it would not apply in the present claim because the Claimant knew that he had hearing loss prior to his retirement in October 2000.

Conclusion

After carefully considering the evidence in the record, as well as the briefs and arguments presented by the parties, the Appellate Panel makes the following:

Findings of Fact

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.

2. The Claimant filed his Form 50 on October 22, 2003 alleging an injury by accident involving his ears on October 4, 2000. The Claimant did not file any claim for any problem with his ears or hearing prior to October 22, 2003. This fact is undisputed.

3. The Claimant did not subsequently amend his claim to allege any other accident date. Therefore, the claim pending before the Commission involves an alleged "repetitive trauma" accident on or before October 4, 2000.

4. The Claimant does not presently allege that his alleged injury to his hearing/ears was caused by any occupational disease. Instead, the claim is one for an injury by accident ("repetitive trauma") under S.C. Code Ann. § 42-1-160.

5. The Claimant last worked at MeadWestvaco in October 2000 and; therefore, his last exposure to any condition of his employment, whether repetitive or otherwise, would have occurred prior to his retirement in October 2000.

6. The Defendant raised the statute of limitations, S.C. Code Ann. § 42-15-40 as a defense by Form 51 dated November 10, 2003 (*i.e.*, well within thirty days of the initial Form 50). Thereafter, the Defendant timely filed Forms 51 on May 28, 2009 and June 18, 2009 raising S.C. Code Ann. § 42-15-40 as a defense. Therefore, the Defendant did not waive this defense, but timely preserved it and raised the issue before both the Hearing Commissioner and the Appellate Panel.

7. The Claimant does not allege and otherwise presented no evidence to suggest that his failure to file a claim prior to October 22, 2003 was due to any conduct on the part of the Defendant that could have misled or deceived him, so as to estop the Defendant from asserting the statute of limitations as a defense to this claim.

Conclusions of Law

1. The Claimant alleges an injury to his ears and hearing by accident ("repetitive trauma") arising out of and in the course of his employment on October 4, 2000 pursuant to S.C. Code Ann. § 42-15-60. The Claimant makes no claim for an occupational disease under S.C. Code Ann. § 42-11-10.
2. The Claimant first filed his claim for an alleged injury to his ears and hearing on October 22, 2003 when he filed a Form 50 in accordance with S.C. Code Reg. 67-206(B). The Claimant did not file any "claim" for any alleged injury to his ears or hearing prior to October 22, 2003.
3. The Defendant timely and properly raised S.C. Code Ann. § 42-15-40, the statute of limitations, as a defense to this claim by Forms 51 filed on November 10, 2003, May 28, 2009 and June 18, 2009, in accordance with S.C. Code Reg. 67-603. The Defendant continued to maintain this defense by its Form 58, pre-hearing brief, and at the hearings before both the Hearing Commissioner and the Appellate Panel. At no time did the Defendant waive this defense.
4. Pursuant to S.C. Code Ann. § 42-15-40, "the right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident." Because the Claimant alleges an accident date of October 4, 2000, but did not file any claim with the Commission until October 22, 2003, his claim was not filed within two years. There is no evidence or allegation of any misconduct on behalf of the Defendant that could have resulted in the Claimant's three year delay in filing his claim. Therefore, the claim is time-barred as a matter of law.

5. While the Claimant argues that the provisions of S.C. Code Ann. § 42-15-60 do not apply to this claim pursuant to Mauldin v. Dyna-Color/Jackrabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992), the Claimant's argument is misplaced and has otherwise been affirmatively rejected by the South Carolina Supreme Court. Unlike the injury in Mauldin, the Claimant's hearing loss was not ever "misdiagnosed." Instead, the Claimant's hearing loss was known to him for many years prior to October 22, 2003 and had been confirmed by annual audiograms. More importantly; however, in Schurlknight v. City of North Charleston, 352. S.C. 175, 574 S.E.2d 194 (2003), the South Carolina Supreme Court determined that the holding of Mauldin was inapplicable in a "repetitive trauma" claim such as the one presently advanced by the Claimant. Instead, the Supreme Court stated, "[w]e hold the last day of exposure is the date from which the statue of limitations begins to run in a repetitive trauma case." Because the Claimant admits that he lasted worked for MeadWestvaco in October 2000, his last possible "day of exposure" was in October 2000. Therefore the two year statute of limitations imposed by S.C. Code Ann. § 42-15-40 expired no later than the end of October 2002. Because no claim was filed until October 2003, the claim is barred pursuant to both the plain language of S.C. Code Ann. § 42-15-40 and the Supreme Court's holding in Schurlknight, *supra*.

Order

IT IS, THEREFORE, ORDERED that, based upon S.C. Code Ann. § 42-15-40 and upon precedent set forth in Schurlknight v. City of North Charleston, 352. S.C. 175,

574 S.E.2d 194 (2003), the Claimant failed to timely and properly file the claim within the two-year statute of limitations, which began to run on the last day of alleged exposure in October 2000 when the Claimant admittedly retired;

IT IS FURTHER ORDERED that the Claimant is not entitled to and the Defendant shall have no liability for any benefits under the South Carolina Workers' Compensation Act as a result of the alleged October 4, 2000 accident;

IT IS FURTHER ORDERED that the claim for an alleged injury to the ears and hearing on or before October 4, 2000 is hereby DENIED and DISMISSED WITH PREJUDICE.

IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, Commissioner

WE CONCUR:

G. Bryan Lyndon, Commissioner

David W. Huffstetler, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 2 day of July 2010

By _____

Administrative Assistant to the Commissioner

MMC
KLB

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-10-6041

HOFF
PLAINTIFF(S)

Mead Westvaco
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
2013 JAN 15 AM 11:32
JULIE J. ARMSTRONG
CLERK OF COURT

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Commission's final Decision is reversed.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2117
Judge Code

1/14/13
Date

For Clerk of Court Office Use Only

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-10-06041

VIRGIL HOFF, Employee/Claimant,

Petitioner,

vs.

MEAD WESTVACO, Self-Insured Employer/Defendant,

Respondent.

ORDER

This matter came to be heard before me in Charleston, SC on July 19, 2012. Present at the hearing were Malcolm M. Crosland, Jr. of The Steinberg Law Firm, L.L.P., Attorney for the Petitioner and Kirsten Barr of Trask and Howell, L.L.C., Attorney for the Respondent. The purpose of the hearing was to consider the Petition for Judicial review form the final Decision of the South Carolina Workers' Compensation Commission filed July 2, 2010.

The court file contains the Petition for Judicial Review filed on July 27, 2010. The Respondent prepared and filed a record of proceedings before the South Carolina Workers' Compensation Commission including: the Decision and Order of the Appellant Panel filed July 2, 2010; the Decision and Order of Commissioner Derrick L. Williams filed October 29, 2009; transcript of the hearing for Commissioner Williams on August 27, 2009; the evidentiary submissions of the parties (APA #'s 1-11; pages 1-148); the WCC Form 50, Request for Hearing, dated June 9, 2009 and June 18, 2009; WCC Form 51, dated May 28, 2009 and November 10, 2003; Petitioner's Form 58, Pre-

Hearing Brief with attachments dated July 27, 2009; and Respondent's Form 58 Pre-Hearing Brief and attachments dated August 17, 2009; the WCC Form 30 dated November 12, 2009; Appellant's Brief dated January 28, 2010; Claimant's/Respondent's Brief dated February 25, 2010. Both parties filed Memorandum of Law at the hearing.

Section 42-17-60, SC Code Anno., 1976, of the Workers' Compensation Act, governs appeals from the Commission and provides in its applicable part:

> The award of the Commission...is conclusive in finding as to all questions of fact. However, either party to the dispute within thirty (30) days from the date of the award...may appeal from the decision of the commission to the Court of Common Pleas...for errors of law under the same terms and conditions as govern appeals and ordinary civil actions. Notice of Appeal must state the grounds of the appeal or the alleged errors of law."

Section 1-23-380 (g), SC Code Anno.,1976, of the Administrative Procedures Act, also governs appeals from administrative agencies and provides:

> (g) The court shall not substitute it's judgment for the agency as to the weight of evidence on the questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision of substantial rights of the appellant have been prejudice because of the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of Constitutional and Statutory Provisions;
> (2) In excess of Statutory Authority of the agencies;
> (3) Made upon lawful procedures;
> (4) Affected by other error of laws;
> (5) Clearly erroneous in light of liable in substantial evidence of the whole record; or
> (6) Arbitrary or capricious or clearly unwarranted exercise of discretion.

The Petition for Judicial Review alleges the Petitioner's substantial rights were prejudiced because the Commission's decision was affected by errors of law on the following grounds:

(1) The Commission erred on a matter of law because it failed to consider the

only evidence in the record established by preponderance of the evidence the Respondent was estopped from asserting the two year Statute of Limitations applicable to the filing of a claim barred Hoff's claim when substantial evidence established the employer mislead Hoff into believing his hearing tests were not abnormal when in fact they were abnormal and consistently showed Hoff had industrial noise induced hearing loss.

(2) The Commission erred as a matter of law in ruling Hoff's claim was time barred because his claim was not filed within two (2) years of the date that he knew or should have known his hearing loss was related to his employment with Westvaco.

(3) The Commission erred in applying the Statute of Limitations holding in Shurlknight The City of North Charleston, 352 S.C.175, 574 S.E.2d 194 (2003) when the correct statute of limitations did not begin to run until Hoff knew or should have known of his compensable injury, i.e. when he was first diagnosed with a compensable work related hearing loss on October 4, 2003.

(4) The Commission erred in failing to find Hoff's hearing loss compensable in light of the reliable, probative and substantial evidence on the whole record.

When determining whether a work related injury is compensable, the Workers' Compensation Act is liberally construed to provide coverage rather than non-coverage in order to further the beneficial purposes for which it was enacted. Shealy v. Aiken Co. 341 SC 448, 535 S.E.2d 438 (S.C. 2000) citing Dickert v. Metropoliten Life Ins. Co., 411 S.E.2d 672 (S.C. App. 1991). "From admitted or established facts the question of whether an accident is compensable is the question of law and this is not an invasion of the fact/finding field of the Commission on the part of the Court." Jordan v. Dixie Cheverlot, Inc., 218 SE 73,61, S.E.2d 654 (S.C. 1950); Sylvan v. Bros Inc., 225 S.C. 429, 82 S.E.2d 794 (S.C. 1954); Sturkie v. Ballanger, 268 S.C. 536, 235 S.E.2d 120 (S.C. 1977).

The material facts are established and not in dispute. By all accounts Hoff was a good employee who spent his entire work life with Westvaco. The uncontradicted evidence is that Hoff began working for Westvaco in 1958 and was exposed to loud

noises from the plant machinery throughout his career. No appeal was taken from the Commission's finding Hoff was a credible witness. Hoff continued working until the early 1980's without being provided hearing protection of any kind. In the early 1980's testing at Westvaco indicated noise levels required the use hearing protection under the OSHA standards. Hoff was provided with hearing "plugs" but testified they were ineffective in eliminating the extremely loud noise caused by the industrial equipment to which he was exposed as a planned mechanic. Hoff's exposure to loud noises continued until he retired in October 2000. Westvaco periodically tested Hoff's hearing. The audiology tests showed a noise induced hearing loss that was worsening. Westvaco did not advise Hoff of the audiology results and misrepresented that his hearing was "normal and still holding."

The first ground for review is that the Commission's decision was affected by error of law because it improperly applied the last date of work under the holding in the case of Shurlknight The City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003) rather than two years from the date Hoff knew he had suffered a hearing loss causally related to his employment. Hoff's claim was an injury by accident ("repetitive trauma") as defined by Section 42-1-160, S.C. Code Anno., 1976 as amended. The Respondents contend that since Hoff last worked at Westvaco plant in October 2000, he had to have filed his claim no later than October 2002 to be timely. This Court does not agree. The undisputed evidence in the record establishes Hoff did not become aware he had a compensable hearing loss until he was diagnosed with a noise induced hearing loss caused by his employment at Westvaco by Dr. Russell Kitch on October 14, 2003. The time for giving notice under Section 42-15-20, SC Code Anno., 1976 as amended, and filing a claim under Section 42-15-40, SC Code Anno., 1976 as

amended, could not begin to run until Hoff became disabled and could have discovered with reasonable diligence his condition was compensable. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (S.C. Ct. App. 2005); Mauldin 416 S.E.2d 639 (S.C. 1992). It is illogical to required Hoff to give notice or file a claim for hearing loss before he becomes aware he has a compensable injury. Under the holdings of Bass, *supra.* and Mauldin, *supra.*, the undersigned finds Hoff did not know or could have known he suffered a compensable hearing loss until he was diagnosed by Dr. Kitch on October 14, 2003.

There is an additional reason the decision of Commission Hoff's claim was not timely filed is affected by an error of law. The second ground for review is that the Commission erred in failing to find Westvaco was estopped from raising the statute of limitations as a defense. The equitable doctrine of estoppel applies to workers' compensation claims. *See:* Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984) and Russell v. Drivers Leasing Service, Inc., 282 S.C. 358, 318 S.E.2d 579 (Ct. App. 1984). The elements of estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. Langdale v. Harris Carpets 395 S.C. 194, 204, 205, 717 S.E.2d 80, 85 (Ct. App. 2011).

A review of the evidence shows there was uncontroverted and unrebutted evidence presented at the hearing establishing Westvaco was aware of Hoff's hearing loss when the audiology hearing tests were performed by Westvaco beginning in 1980. Despite the audiology testing showing Hoff suffered significant hearing loss, Hoff was

never told by Westvaco of the test results. Rather, when he was called by the Westvaco nurse to review the audiology test results, he was lead to believe his hearing was "normal and still holding." Even according to the Defendant's expert, Dr. Sataloff, Hoff's hearing loss was present as early at 1972 and the Westvaco audiology test results began to show "compensable" hearing loss. To successfully assert estoppel, a party must show a (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estoppel, and (3) prejudicial change in position. Langdale at 205, 85.

I find Westvaco's actions meet the elements of estoppel. First, Westvaco falsely represented to Hoff his audiogram test results showed his hearing was "normal and still holding" when, in fact, Hoff's hearing had been declining as far back as 1972 when Hoff's first audiogram was performed by Westvaco. Second, Westvaco had the expectation that Hoff would not seek to file a claim for workers' compensation benefits if he was told his hearing was normal and not declining due to noise exposure at the Westvaco plant. Finally, Westvaco had actual knowledge of the true results of Hoff's audiogram test results since the early 1970's which established Hoff's bilateral high frequency hearing loss was consistent with noise induced hearing loss. Hoff's actions also meet the elements of estoppel. The record below establishes Hoff had no knowledge of the true results of his audiogram test results until he was evaluated by his own physician, Dr. Russell Kitch, who issued his report on October 14, 2003. Second, it is undisputed Hoff relied upon the representations of Westvaco's nursing staff who conducted the Westvaco in house audiogram test on an annual basis. When Hoff would inquire as to the results of his audiogram results he was never advised by the Westvaco nursing staff his audiogram results were abnormal. Finally, by Hoff not being

advised of the nature and extent of the hearing loss revealed by the Westvaco audiograms, he was not in a position to bring a claim for workers' compensation benefits during his employment at Westvaco. Accordingly the record below establishes Westvaco is estopped from asserting Hoff did not timely file a claim for workers' compensation benefits.

Because the Commission's decision applied the incorrect statute of limitations and failed to apply the equitable doctrine of estoppel to Hoff's claim, the Commission Decision and Order must be reversed.

IT IS HEREBY ORDERED that the final decision of the South Carolina Workers' Compensation Commission filed on July 2, 2010 is affected by errors of law and is reversed; and

IT IS HEREBY ORDERED that based upon an application of the proper statute of limitations the date for filing a claim did not begin to run until Hoff knew or should have know he suffered a compensable hearing loss in October 2003;

IT IS HEREBY ORDERED that the undisputed facts Westvaco is estopped from raising the statute of limitations as a defense because Westvaco misrepresented or concealed the results of Hoff's audiology tests preventing Hoff from learning the true nature of his hearing loss and filing a claim for workers' compensation benefits; and

IT IS HEREBY ORDERED that Hoff's claim was timely filed and he is entitled to an award for his permanent partial hearing loss, medical treatment, and hearing aids as set forth in the Decision and Order of the Hearing Commissioner filed on October 29, 2009 is remanded to the Commission to reinstate the Hearing Commissioner's Decision and Award based on the Court's rulings of law and

IT IS SO ORDERED

By: _____
The Honorable J.C. Nicholson, Jr.
Court of Common Pleas
Charleston, South Carolina

JAN. 14, 2013
~~October ____, 2012~~

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-06041

Virgil Hoff,..... Respondent,

v.

Mead Westvaco, Self-Insured,..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Appellant, Mead Westvaco, Self-Insured, was served with a copy of the attached Motion to Dismiss MeadWestvaco, Self-Insured's Appeal on this 7th day of June, 2013 by depositing a copy of the same in the United States Mail, certified, return receipt requested, postage prepaid addressed to its' attorney of record as follows:

Kristen L. Barr, Esquire
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465

RECEIVED
JUN 10 2013
SC Court of Appeals

Malcolm M. Crosland, Jr.
The Steinberg Law Firm
P.O. Box 9
Charleston, SC 29408