

**Appellate Panel Decision and Order Dated July 2, 2010**

**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.

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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.

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**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 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 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 this binaural hearing loss including hearing/digital aides if recommended by Dr. Kitch pursuant to *Dodge v. Brucoli, 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." Schurilknight 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 statute 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.<sup>1</sup>

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:

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<sup>1</sup> 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 statute 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.*

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**We hold the last day of exposure is the date from which the statute of limitations begins to run in a repetitive trauma case.” Schurknight 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 Schurknight, 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 Schurknight 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 statute of limitations begins to run in a repetitive trauma case." Because the Claimant admits that he last 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 Schurknight, *supra*.

### Order

IT IS, THEREFORE, ORDERED that, based upon S.C. Code Ann. § 42-15-40 and upon precedent set forth in Schurknight 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

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Andrea C. Roche, Commissioner

WE CONCUR:

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G. Bryan Lyndon, Commissioner

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David W. Huffstetler, Commissioner

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;

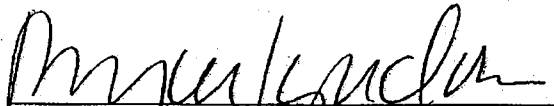
IT IS FURTHER ORDERED that the claim for an alleged injury to the ears and hearing on or before October 4, 2000 is hereby DENIED and DISMISSED WITH PREJUDICE.

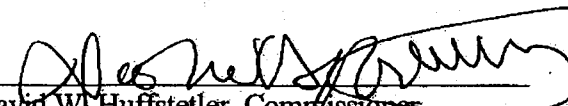
IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION

  
Andrea C. Roche, Commissioner

WE CONCUR:

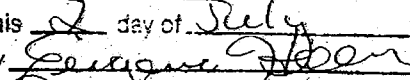
  
G. Bryan Lyndon, Commissioner

  
David W. Huffstetter, 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.

mme  
klb

This 2 day of July, 2010  
By   
Administrative Assistant to the Commissioner