

Appellate Panel Decision and Order dated October 11, 2013

**DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

**COMMISSION PANEL: THE HONORABLE MELODY L. JAMES, CHAIR; THE
HONORABLE ANDREA C. ROCHE; THE HONORABLE AVERY B.
WILKERSON, JR.**

SCWCC FILE NO.: 0031077

Virgil Hoff,

Claimant

v.

Mead Westvaco,

Self-Insured Employer,

Defendants.

Pursuant to the Order of the South Carolina Court of Appeals filed August 9th, 2013
Per notice timely and properly served upon all Parties of Interest.

Appearances: Malcolm M. Crosland, Attorney for Claimant

Kristen L. Barr, Attorney for Defendants

Filed:

10-11-13

STATEMENT OF THE CASE

This matter was originally decided by a Decision and Order of the single Commissioner, filed October 29th, 2009. The single Commissioner found that Claimant sustained a compensable injury by accident to his right ear and left ear by sustaining binaural hearing disability as a result of excessive noise exposure arising out of and in the course and scope of his employment with Defendants. The single Commissioner further found that the first date Claimant knew or should have known that he had suffered compensable hearing loss was on October 19th, 2003 and that, therefore, notice and filing were timely made under the Workers' Compensation Act. The single Commissioner awarded Claimant medical treatment and permanent disability.

Defendants appealed this decision to the Full Commission. On July 2nd, 2010 the Appellate Panel of the South Carolina Workers' Compensation Commission issued its Decision and Order reversing the holding of the single Commissioner. The Appellate Panel found that Claimant's date of accident was his last day of injurious exposure in October, 2000, and that therefore Claimant was barred from receiving benefits under the Act pursuant to the statute of limitations provided for in S.C. Code § 42-15-90 (1976, as amended).

Claimant appealed this decision to the Court of Common Pleas for Charleston County. On January 14th, 2013 Judge J.C. Nicholson, Jr., issued the Decision and Order of the court, reversing the holding of the Full Commission. Judge Nicholson held that the final decision of the Full Commission was affected by errors of law and that based upon an application of the proper statute of limitations the date for filing a claim did not begin to run until Claimant knew or should have known he suffered compensable hearing loss in October, 2003. He further held that Defendants was estopped from raising the statute of limitations as a defense because of Defendant's concealment or misrepresentation of pertinent information from the Claimant. Judge Nicholson ordered that the claim was timely filed, Claimant was entitled to the benefits awarded by the Decision and Order of the single Commissioner, and that the matter be remanded to the Full Commission to reinstate the Decision and Order of the single Commissioner.

Defendants appealed this decision to the South Carolina Court of Appeals. On August 9th, 2013, the Court of Appeals issued its Order, dismissing Defendant's appeal because the circuit court's order was not immediately appealable. Therefore, this matter has been returned to the Workers' Compensation Commission to reassemble the Appellate Panel¹ to issue its Decision and Order consistent with the holding of the circuit court.

In accordance with the Decision and Order of Judge Nicholson, dated January 14th, 2013, the Appellate Panel adopts the findings of fact and rulings of law of the single Commissioner, dated October 29th, 2009 as its own.

FULL COMMISSION FINDINGS OF FACT

1. 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.
2. 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.
3. 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.
4. 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.

¹ The Appellate Panel assigned to this matter originally consisted of Commissioners Andrea C. Roche, G. Bryan Lyndon, and David W. Huffstetler. Commissioners Huffstetler and Lyndon have since retired. Therefore, Commissioners Melody L. James and Avery B. Wilkerson, Jr., have replaced them as members of this Appellate Panel.

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.

5. 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.
6. 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.
7. 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 fully 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.
8. 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.
9. 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)

10. 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.
11. 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 related to his workplace noise exposure while working for MeadWestvaco.
12. Hoff reached maximum medical improvement on October 14, 2003.
13. 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. Brucoli, et.al*, 514 S.C.2d 593 (Ct. App. 1999) and §42-15-60, SC. Code of Laws, 1976.

FULL COMMISSION RULINGS OF LAW

1. Under S.C. Code Anno., § 42-1-130, Hoff was a covered employee at the time in question.
2. Under S.C. Code Anno., § 42-1-140, the Defendant/Employer was a covered employer under the Act.
3. Under S.C. Code Anno., § 42-1-40, average weekly wage is defined.
4. 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." *Schurknight 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).

5. 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).
6. 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.
7. 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

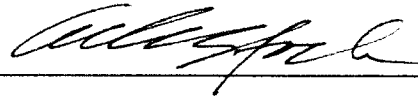
IT IS THEREFORE ORDERED that the Claimant, Virgil Hoff, sustained a compensable injury by accident to his right ear and left ear by sustaining a binaural hearing disability as a result of excessive noise exposure on his job and occurred out of and in the course and scope of his employment at MeadWestvaco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

IT IS FURTHERMORE ORDERED that 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

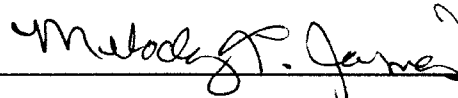
IT IS FURTHERMORE ORDERED that the Claimant, Virgil Hoff, is entitled to and award for permanent disability due to his binaural hearing loss and therefore, shall

receive 49.5 weeks of compensation at his applicable compensation rate of \$507.34 per week from the Defendants.

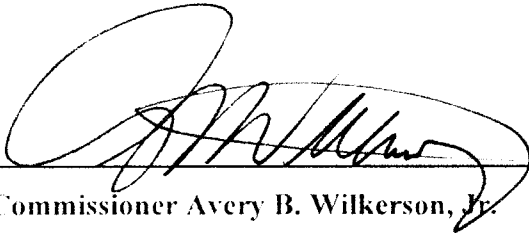
AND SO IT IS ORDERED!



Commissioner Andrea C. Roche



Commissioner Melody L. James



Commissioner Avery B. Wilkerson, Jr.

Columbia, South Carolina

CERTIFICATE OF SERVICE

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

By Valerie Deller on October 11, 2013