

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

VIRGIL HOFF, Employee/Claimant,
Petitioner,

vs.

MEAD WESTVACO, Self-Insured
Employer/Defendant,

Respondent.

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-10-06041

ORDER

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JULIE J. ARMSTRONG
CLERK OF COURT

This matter came to be heard before me in Charleston, SC on July 19, 2012. **SC Court of Appeals**

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 from the final Decision of the South Carolina Workers' Compensation Commission filed July 2, 2010.

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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 its 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:

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- (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 misled 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 Shuriknight 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. Metropolitan 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."

JN
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 Shuriknight 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.

JA

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

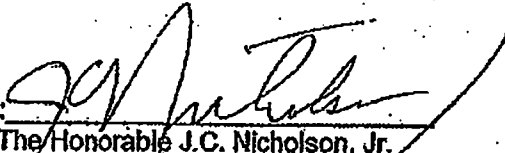
IT IS HEREBY ORDERED that based upon an application of the proper statute of limitations the date for filing a claim did not begin to run until Hoff knew or should have known he suffered a compensable hearing loss in October 2003;

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

JAN. 14, 2013
~~October 2012~~

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