

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Derrick L. Williams, Commissioner

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SC Court of Appeals

File No. W.C.C. 0031077
CCP 2013-CP-10-6723 (2010-CP-10-6041)
Appellate Case No. 2015-001001

Virgil A. Hoff, Employee,.....Respondent,

v.

Mead Westvaco, Self Insured Employer,.....Appellant.

INITIAL BRIEF OF THE APPELLANT

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Statement of Issues on Appeal

- I. Did Judge Nicholson err as a matter of law in making his own findings of fact on appeal with respect to the statute of limitations?
- II. Did Judge Nicholson err as a matter of law in making his own findings of fact on appeal with respect to estoppel?
- III. Did Judge Nicholson err as a matter of law in reinstating a prior decision of a Hearing Commissioner, which had been reversed in its entirety by unanimous order of the Workers' Compensation Commission's Appellate Panel?
- IV. Are Judge Nicholson's inconsistent findings and conclusions, which the Commissioner was forced to adopt on remand, unsupported by substantial evidence?
- V. Is Hoff's claim is barred by the statute of limitations?
- VI. Is Judge Nicholson's award of medical benefits under S.C. Code Ann. § 42-15-60 unsupported by substantial evidence and contrary to the applicable law?
- VII. Is Judge Nicholson's mandate that the Commission to give "greater weight" to the opinion of Dr. Kitch, than to the opinions of Dr. Joseph Sataloff and Dr. Robert Sataloff,

improper and in excess of judicial authority?

- VIII. Is Judge Nicholson's finding and conclusion that an Employer/Employee relationship existed "at the time of Hoff's injury by accident" arbitrary, capricious, without evidentiary support, contrary to the applicable law, and made in excess of judicial authority?
- IX. Is Judge Nicholson's finding that Hoff's hearing loss was caused by an accident arising out of and in the course of his employment unsupported by substantial evidence and the applicable law and otherwise made upon unlawful procedure?
- X. Is the award of benefits for a 30% loss of hearing unsupported by substantial evidence?

Statement of the Case

MeadWestvaco seeks review and reversal of the Workers' Compensation Commission's October 11, 2013 Decision and Order, which was entered at the instruction of the Honorable J.C. Nicholson, Jr., in his January 15, 2013 remand Order and affirmed by the Honorable Deadra L. Jefferson by Order dated April 10, 2015.¹ MeadWestvaco respectfully contends that Judge Nicholson erred as a

¹ Note that the case number for the first Circuit Court Appeal, heard by Judge Nicholson, is 2010-CP-10-6041 and the order issued by Judge Nicholson bears this case number. Following remand, the second Circuit Court Appeal, heard by Judge Jefferson, was assigned case number 2013-CP-10-6723. Unfortunately,

matter of law in reversing the Commission's final Decision and Order dated July 2, 2010 with respect to the application of the statute of limitations, S.C. Code Ann. § 42-15-20, and erred in making his own findings of fact on appeal. MeadWestvaco further contends that the findings of fact made by Judge Nicholson, entered by the Commission on October 11, 2013 as instructed, and affirmed by Judge Jefferson are arbitrary, capricious, and otherwise not supported by substantial evidence in the record and that the conclusion of law with regard to the application of S.C. Code Ann. § 42-15-20 (the statute of limitations) to a repetitive trauma case conflicts with clear precedent from the South Carolina Supreme Court. Therefore, MeadWestvaco respectfully requests that Judge Nicholson's January 15, 2013 remand Order, the Workers' Commission's October 11, 2013 Order on remand, and the April 15, 2015 Order of Judge Jefferson be reversed in their entireties and that the Commission's Decision and Order dated July 2, 2010 be affirmed in accordance with the Administrative Procedures Act because it is supported by both substantial evidence and the applicable law.

The Respondent, Hoff, retired from MeadWestvaco in October 2000 at the age of sixty. On October 22, 2003 — 3 years after his retirement — Hoff filed a Form 50 with the Workers' Compensation Commission alleging accidental injuries to his "skin; ear and lungs on or about October 4, 2000 (discovery rule)." Hoff's Form 50 states that "[n]otice of the accidental injury was given to the

the order drafted by Hoff's counsel and ultimately endorsed by Judge Jefferson bears the earlier case number, 2010-CP-10-6041.

employer on or about October 4, 2000 in the following manner: Notified Supervisor.” MeadWestvaco denied the claim in its entirety and raised the statute of limitations as a defense by Form 51 dated November 10, 2003.

Hoff did not request a hearing before the Workers’ Compensation Commission until six (6) years later on April 29, 2009, at which time he claimed that his alleged October 4, 2000 injury was caused by “[e]xposure to chemicals.” On June 9, 2009, Hoff claimed for the first time that he suffered “hearing loss” due to exposure to chemicals on October 4, 2000 and averred that he notified his supervisor of this alleged injury on that same date, October 4, 2000. This claim was also denied by MeadWestvaco and the statute of limitations was again raised as a defense.

A hearing was held before Hearing Commissioner Derrick L. Williams on August 27, 2009 and an Order was issued on October 29, 2009 in favor of Hoff. MeadWestvaco filed a Form 30 Request for Commission Review, on November 12, 2009 raising 19 exceptions on appeal, including the fact that Hearing Commissioner Williams’s Order contains numerous inconsistencies with regard to the date and mechanism of the alleged accident, the date his claim was filed, and the date notice was given and the Order is otherwise affected by an error of law with regard to the proper application of the statute of limitations.

The Workers’ Compensation Commission’s Appellate Panel held a review hearing on March 15, 2010 and issued its final, unanimous, Decision and Order on July 2, 2010, concluding 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.” The Appellate Panel further found that “[t]here 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.” In addition, the Appellate Panel specifically reversed the Hearing Commissioner’s finding that Hoff sustained a compensable injury to his hearing due to repetitive trauma based on the greater weight of the evidence.

Hoff appealed the Commission’s July 2, 2010 Decision and Order to the Court of Common Pleas on July 27, 2010 and was heard by the Honorable J.C. Nicholson, Jr., in Charleston on July 19, 2012. By Order dated January 16, 2013, Judge Nicholson reversed the Commission’s final Decision and Order and entered his own findings of fact on appeal. Judge Nicholson found, contrary to the Appellate Panel and even contrary to Hoff’s own pleadings, that Hoff “did not know or could have known he suffered a compensable hearing loss until he was diagnosed by Dr. Kitch on October 14, 2003²” and that MeadWestvaco “misrepresented or concealed the results of Hoff’s audiology tests.” After concluding that neither the two year statute of limitations set forth in S.C. Code Ann. § 42-15-40, nor the Supreme Court’s holding in Schurilknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003), applied to Hoff’s repetitive trauma claim, Judge Nicholson made his own finding that Hoff “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 [Williams] filed on October 29, 2009 is remanded [sic] to the Commission to reinstate the Hearing Commissioner's Decision and Order."

MeadWestvaco appealed Judge Nicholson's January 16, 2013 Order directly to the South Carolina Court of Appeals. By Order dated February 9, 2013, the Court of Appeals concluded that Judge Nicholson's Order was not immediately appealable and dismissed the appeal. The claim was then remanded to the Commission's Appellate Panel to adopt the findings and conclusions mandated by Judge Nicholson's Order. Pursuant to Judge Nicholson's command, the Appellate Panel "reinstated" the findings of fact and rulings of law from Hearing Commissioner Williams's October 29, 2009 Order, which the Appellate Panel had previously reversed and vacated, by Order dated October 11, 2013.

MeadWestvaco appealed the October 11, 2013 Commission Order to the Court of Common Pleas on November 12, 2013, raising 22 errors and exceptions. The appeal came before the Honorable Deadra L. Jefferson, who issued an order affirming the Commission's October 11, 2013 Order on remand, without addressing any of the arguments raised by MeadWestvaco. The present appeal followed.

Arguments

I. Judge Nicholson erred as a matter of law in making his own findings of fact on appeal with respect to the statute of limitations.

The Workers' Compensation Commission entered a final Decision and Order in this claim on July 2, 2010. It was the unanimous decision of the Commission's Appellate Panel that Hoff "failed to timely and properly file the claim within the two-

year statute of limitations” and that; therefore, Hoff “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.” In denying the claim, the Commission relied upon Schurlnight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003), in which 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.”

The Commission found that the Hoff’s “hearing loss was known to him for many years prior to October 22, 2003 and had been confirmed by annual audiograms.” Of course, Hoff’s own pleadings repeatedly aver that he gave notice of his claim on October 4, 2000, which is the date of his retirement. As a result, Commission found that his “last day of exposure” was October 4, 2000 and this finding is obviously supported by substantial evidence. However, Hoff did not file any claim for any alleged injury to his ears until three (3) years later, on October 22, 2003, which is clearly outside the two-year statute of limitations set forth in S.C. Code Ann. § 42-15-40 and as interpreted by the Supreme Court in Schurlnight v. City of North Charleston, *supra*.

The Honorable J. C. Nicholson, Jr., reversed the Commission’s final Decision and Order on January 14, 2013 based upon his own findings of fact contrary to those made by the Commission. MeadWestvaco respectfully contends that Judge Nicholson exceeded his authority and jurisdiction and otherwise erred as a matter of law in making his own findings of fact on appeal and in failing to affirm the Commission’s final Decision and Order, which is supported by substantial evidence in the record and the applicable law.

It was previously well-settled that, in a workers' compensation case, the Commission is the ultimate fact finder. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel and it is not the task of the court to weigh the evidence as found by the commission. DeBruhl v. Kershaw Co. Sheriff's Dept., 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990). An appellate court, as the circuit court sat in this case, must affirm the findings made by the commission if they are supported by substantial evidence. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The substantial evidence test "need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment." Instead, a judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

Instead of considering whether substantial evidence in the record (including the Hoff's Form 50 stating that he gave notice of his injury to his supervisor verbally on October 4, 2000, Hoff's testimony that he knew he was having hearing problems dating back to the 1970s, the fact that he saw a hearing specialist in 1980, and even Dr. Kitch's statement that Hoff was aware that he had a hearing loss noted on plant audiograms in 2000) supported the Commission's finding that Hoff's "hearing loss was known to him for many years prior to October 22, 2003 and had been confirmed by annual audiograms;" and instead of applying the two-year statute of limitations from the last date of exposure as instructed by the Supreme Court in Schurlnight, Judge Nicholson simply ignored the evidence upon which the Commission's decision was based and ignored the Supreme Court's holding in Schurlnight, without any attempt to distinguish the clear and unequivocal holding of that case. Instead, Judge

Nicholson's order states "the undersigned finds Hoff did not know and could not have known he suffered a compensable hearing loss until he was diagnosed by Dr. Kitch on October 14, 2003."

As explained by the Court of Appeals in the seminal case of Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 380, 440 S.E.2 401, 403 (1994),

"In reversing the workers' compensation commission, the circuit court found its own facts contrary to those found by the commission. This was error because although the evidence conflicted, the commission's findings were supported by substantial evidence. An appeal in a workers' compensation case is not a new trial. Circuit court judges are not at liberty to decide the case as if there had been no decision by the workers' compensation commission."

MeadWestvaco respectfully contends that Judge Nicholson took such an impermissible liberty in this case and his findings of fact on appeal (which the Commission was ordered to adopt and which Judge Jefferson affirmed) should be reversed. MeadWestvaco further contends that the Commission's July 2, 2010 finding that Hoff's "hearing loss was known to him for many years prior to October 22, 2003 and had been confirmed by annual audiograms," should be affirmed based upon substantial evidence, including Hoff's own pleadings.

II. Judge Nicholson erred as a matter of law in making his own findings of fact on appeal with respect to estoppel.

In its final Decision and Order of July 2, 2010, the Workers' Compensation Commission found Hoff

“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 decided him, so as to estop the Defendant from asserting the statute of limitations as a defense to this claim.”

The Commission's finding in this regard is supported by no less than Hoff's own pleadings, including his Form 50 (Request for Hearing), which plainly states that he gave notice of his claim to MeadWestvaco on October 4, 2000 and his Form 58 (Pre-hearing Brief), which makes no mention whatsoever of an estoppel argument. In addition, the opening argument offered by Hoff's attorney at the evidentiary hearing before Commissioner Williams is devoid of any estoppel argument or allegations of misconduct. Even Hoff's own doctor stated that Hoff was aware that he had a hearing loss noted on plant audiograms when he retired in the year 2000. MeadWestvaco respectfully contends that this constitutes substantial evidence in support of the Commission's finding that Hoff “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.”

Instead of following the Administrative Procedures Act's mandate that the circuit court's role is appellate only and is limited to deciding whether the commission's decision is supported by substantial evidence, Judge Nicholson chose

to reverse the Commission's finding and enter his own findings of fact on appeal. See Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994) (holding that circuit court judges are not at liberty to decide a case as if there had been no decision by the Workers' Compensation Commission). According to his January 14, 2013 Order, Judge Nicholson stated "I find Westvaco's actions meet the elements of estoppel" and he goes on to make a myriad of "findings" without citing single shred of actual evidence. MeadWestvaco respectfully contend that Judge Nicholson lacked the authority and jurisdiction to make such findings of fact on appeal and that his findings should be reversed as a matter of law.³ Instead, MeadWestvaco respectfully requests that the Commission's findings of fact, as stated in the July 2, 2010 Decision and Order, be affirmed based upon substantial evidence and the proper application of the Administrative Procedures Act.

III. Judge Nicholson erred as a matter of law in reinstating a prior decision of a Hearing Commissioner, which had been reversed in its entirety by unanimous order of the Workers' Compensation Commission's Appellate Panel.

Judge Nicholson's January 14, 2013 Order states the following:

³ Note that the issue of estoppel is not mentioned in the Hearing Commissioner's findings or conclusions, which Judge Nicholson order reinstated on remand. This is because the issue was not raised at the original hearing before Hearing Commissioner Williams.

“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 October 29, 2009 is remanded [sic] 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.”

The Hearing Commissioner’s October 29, 2009 Order had been “reversed in its entirety” by an unanimous Appellate Panel Decision and Order dated July 2, 2010, which constituted the final Order of the Commission. According to the Appellate Panel, not only did the Hearing Commissioner err in failing to find and conclude that Hoff’s claim was barred by the statute of limitations, but the Hearing Commissioner’s inconsistent findings with respect to the date and alleged mechanism of Hoff’s hearing loss were “not supported by the evidence in the record or the applicable law.” According to the Appellate Panel, Hoff “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.”

As argued above, Judge Nicholson did not address whether the Commission’s findings of fact were supported by substantial evidence because he chose, instead, to enter his own findings of fact on appeal. Included in these findings was his mandate that the Commission “reinstate” the Hearing Commissioner’s findings and conclusions that had previously been reversed by the Commission’s Appellate Panel based upon the greater weight of the evidence and proper application of the law. “In

effect, what the circuit court did here in reinstating the [hearing] commissioner's award was to determine the facts from conflicting evidence. Only the commission is authorized to do this." Baldwin v. James River Corp., 304 S.C. 485, 487, 405 S.E.2d 421, 422 (Ct. App. 1991) (citing Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967)). As the Court of Appeals concluded in Baldwin, *supra*, Judge Nicholson's Order should be reversed and vacated, along with the Commission's order on remand and the order of Judge Jefferson affirming it on appeal.

IV. Judge Nicholson's inconsistent findings and conclusions, which the Commissioner was forced to adopt on remand, are not supported by substantial evidence and should be reversed.

By its final Decision and Order dated July 2, 2010, the Commission's Appellate Panel found that Hoff alleged "his accidental injury occurred on October 4, 2000"⁴ and that Hoff "presented no evidence that his exposure to noise was 'excessive' or of a level or duration that could cause hearing loss." (ROA #16, p.10). However, inexplicably, Judge Nicholson reversed these findings and ordered that the Commission adopt the following finding instead:

"Hoff sustained a compensable injury by repetitive trauma on and before October 24, 2000 [sic], the date he filed his claim for benefits under the South Carolina Workers' Compensation Act for his

⁴ All of Hoff's pleadings allege October 4, 2000 as the date of injury.

hearing loss [sic]. Hoff's hearing loss in both ears was caused by excessive noise exposure on his job at MeadWestvaco."

This finding is wholly untenable. Not only was Judge Nicholson without authority to reverse the Commission's original finding that was supported by substantial evidence, not only was Judge Nicholson without authority to weigh the evidence and make his own findings of fact on appeal, but this new finding is not supported by substantial evidence or the applicable law. Hoff's Form 50 alleges that his hearing loss was due to "[e]xposure to chemicals," not noise, and the Commission properly found that his noise exposure was not "excessive." Furthermore, Hoff claims his accidental injury occurred on October 4, 2000, not October 24, 2000. Hoff was not even working at MeadWestvaco on October 24, 2000. In addition, Hoff clearly did not file any claim on October 24, 2000. Nothing about this finding is supported by any evidence and; therefore, even if Judge Nicholson had the power or authority to make such a finding, it should be reversed based upon the total absence of evidentiary support.

In addition to this inexplicable finding of fact, Judge Nicholson went on to require that the Commission adopt the following 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, this new finding on remand should also be reversed as it is without any evidentiary support.⁵ To further illustrate the arbitrary and capricious nature of Judge Nicholson's remand instructions, the Commission was required to "reinstate" the following "Order" by the Hearing Commissioner:

"IT IS, THEREFORE, ORDERED, 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..."

Indeed, in a single order the Commission has been required by Judge Nicholson to enter three (3) inconsistent dates of accident and find three (3) different alleged

⁵ Note that the Commission was also ordered by Judge Nicholson to find that Hoff "reached maximum medical improvement on October 14, 2003," the same date Judge Nicholson 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. In fact, the Claimant has never received any medical treatment. This is further illustrative of the arbitrary and capricious nature of Judge Nicholson's Order and the Commission's Decision and Order on remand, which was affirmed by Judge Jefferson.

mechanisms of injury, 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.

Therefore, Judge Nicholson's Order, the Commission's October 11, 2013 Decision and Order on remand, and Judge Jefferson's order should all be reversed. Fragosa v. Kade Construction, Inc., 407 S.C. 424, 755 S.E.2d 462 (Ct. App. 2013) (holding that when there are inconsistent findings of fact, a reviewing court should remand the case to the Worker's Compensation Commission for clarification).

Judge Nicholson's Order, the Order of the Commission on remand, and the Order of Judge Jefferson all fail to explain the obvious and very crucial inconsistencies between the findings of fact, the conclusions of law, and the only claim that was before the Commission, *i.e.*, *whether the Claimant sustained an injury by accident on October 24, 2000 as a result of exposure to chemicals*. At no time was MeadWestvaco ever put on notice of any alleged accident on October 24, 2000, or October 14, 2003, or October 19, 2003 and MeadWestvaco was not given the opportunity to defend such a "claim," as is their statutory and constitutional right. On this basis alone, MeadWestvaco respectfully contends that the Orders of Judge Nicholson, the Commission's October 11, 2013 Order on remand, and the Order of Judge Jefferson should be reversed in their entireties.

V. The claim is barred by the statute of limitations.

According to the Appellate Panel's July 2, 2010 Decision and Order, Hoff's claim for an October 4, 2000 repetitive trauma injury was not filed until October 22, 2003 and is, therefore, barred by S.C. Code Ann. § 42-15-40, which states that

"the right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident." This is a completely accurate statement of the law and the facts of this case. However, in accordance with Judge Nicholson's improper weighing of the evidence on appeal, the Commission was forced enter the following conclusion of law on remand:

"Under S.C. Code Anno., [sic] § 42-15-40, Hoff timely filed his claim for benefits under the Act. Section 42-15-40, [sic] 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. DynaColor/Jackrabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992)."

However, the South Carolina Supreme Court has specifically rejected the application of Mauldin's "discovery rule" in repetitive trauma cases, such as Hoff's hearing loss claim, and created a bright line test for the applying the statute of limitations. 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 statute of limitations begins to run in a repetitive trauma case.” Schurlnight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003) (emphasis added).

Therefore, the seminal legal issue is whether Hoff 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, Hoff's last day of exposure could be no later than October 4, 2000, the last day he actually worked at MeadWestvaco, as found by the Commission's Appellate Panel in its July 2, 2010 Decision and Order. Because the Claimant did not file any claim until October 22, 2003, more than three (3) years after he last worked at MeadWestvaco, the Commission's July 2, 2010 Decision and Order properly concluded that Hoff's claim cannot be considered timely as a matter of law. MeadWestvaco respectfully contends that it was error for Judge Nicholson to reverse this conclusion and to require the Commission to enter inconsistent findings and conclusions on remand and for Judge Jefferson to affirm this conclusion on appeal.

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, Hoff has known that he had problems with his hearing since the 1970s. (ROA#11, p. 30). He first saw a doctor about his problems with his hearing in 1980. (ROA#10, p.9). Throughout the 1980s Hoff complained of problems with his hearing at his annual audiogram. (ROA#10, pp. 8-9). Hoff admits that he discussed the results of each audiogram with the

MeadWestvaco Medical Department. (ROA#11, p31). 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 Hoff 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.**" (RO A#10, p. 3) (emphasis added).

It is clear that Hoff was not only aware of problems with his hearing at the time of his retirement in October 2002, but he was also aware that his audiograms showed a hearing loss. Perhaps more importantly, the Claimant's own pleadings state that he gave notice of his injury to his employer on October 4, 2000, which certainly begs the question how Hoff knew enough to report an alleged injury, yet lacked sufficient awareness to file an actual claim. The Appellate Panel's July 2, 2010 finding that Hoff "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" is supported by both substantial evidence and the applicable law and should have been affirmed by Judge Nicholson.

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 claim,

Judge Nicholson's Order, the Commission's October 11, 2013 Order on remand, and the Order of Judge Jefferson should be reversed because these orders were made in contravention of the applicable law, without support of substantial evidence, and are otherwise in excess of judicial authority. Instead, the Commission's original conclusion that the claim is barred by S.C. Code Ann. § 42-15-40, as construed by the South Carolina Supreme Court in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003), should be affirmed.

VI. The award of medical benefits under S.C. Code Ann. § 42-15-60 is not supported by substantial evidence and is contrary to the applicable law.

Judge Nicholson required the Commission enter the following cursory conclusion on remand, without citing any evidentiary support:

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 [sic] 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 [sic] 593 (Ct. App. 1999) and § 42-15-60 SC. Code of Laws [sic], 1976."

Pursuant to S.C. Code Ann. § 42-15-60, the Commission has authority to award medical treatment beyond ten weeks from the date of an injury if it will "tend to lessen the period of disability." The burden is upon the Claimant to prove, with

actual evidence, that there is such additional medical treatment that would tend to lessen the period of disability caused by the accident. Of course, an award in his favor may not rest on mere surmise, conjecture, or speculation, but must rest on evidence of sufficient substance to afford a reasonable basis for it. Bartley v. Allendale County School Dist., 381 S.C. 262, 672 S.E.2d 809 (Ct. App. 2009).

In fact, in Lee v. Harborside Café, the Commission and the Court of Appeals denied the claim for additional medical benefits because

"none of the letters written by Lee's doctors directly address Lee's ability to return to work and whether any future medical treatments would forestall Lee from being incapacitated." 350 S.C. 54, 564 S.E.2d 354 (2002).

In reversing the award of future medical benefits, the Court emphasized the fact that there was no evidence that any proposed future medical treatment would "tend to lessen the period of disability." In the present case, there is no evidence that Hoff even requires medical treatment and there is certainly no evidence that any future medical treatment would "lessen his period of disability," as expressly required by S.C. Code An. § 42-15-60 and the appellate decisions interpreting that statute, including Lee, supra, and Dodge v. Broccoli, Layman & Clark, 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999) (holding that "an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability.").

At no time did any doctor ever recommend any medical treatment for Hoff. His attorney sent Hoff for a one-time evaluation with Russell Kitch on October 14, 2003. Dr. Kitch did not recommend any medical treatment for Hoff according to his

October 14, 2003 report. (ROA#10, p.4). Hoff never returned to Dr. Kitch over the next six (6) years prior to the hearing. While Hoff's attorneys did correspond with Dr. Kitch on September 2, 2005, Dr. Kitch makes no mention of additional medical evaluation, treatment, or hearing aids at that time. Hoff's attorneys again corresponded with Dr. Kitch on April 28, 2009, but again, Dr. Kitch made no recommendation for any medical treatment or even further evaluation of his current condition.

Judge Nicholson's conclusion regarding Hoff's entitlement to medical treatment, which the Commission was required to adopt, is based on purely impermissible surmise, conjecture, and speculation. *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (holding that an award may not rest upon surmise, conjecture, or speculation) and *Wynn v. People's Natural Gas Co. of S.C.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961) (“[an award] must be founded on evidence of sufficient substance to afford a reasonable basis for it.”). Therefore, MeadWestvaco respectfully requests that this vague and cursory finding with regard to future medical treatment, as well as the speculative conclusions and "award" of future medical treatment with Dr. Kitch, be reversed.

VII. Judge Nicholson's mandate that the Commission to give “greater weight” to the opinion of Dr. Kitch, than to the opinions of Dr. Joseph Sataloff and Dr. Robert Sataloff, is improper and in excess of judicial authority.

According Judge Nicholson's remand instructions, Dr. Kitch's opinion as to the cause of Hoff's hearing loss is entitled to greater weight than the other expert medical opinions in the record, including those of Dr. Joseph Sataloff and Dr. Robert Sataloff. MeadWestvaco respectfully contends that Judge Nicholson exceeded his judicial authority by judging the credibility of the witnesses and weighing the evidence on appeal. It has been long held that

“The final determination of witness credibility and the weight to be accorded evidence is reserved to the full commission [Appellate Panel] and it is not the task of the four to weigh evidence as found by the Commission.”

and

“It is not within the court’s power to decide the weight of the evidence...supports contrary findings from those of the commission.”

Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 380-381, 440 S.E.2d 401, 403-404 (Ct. App. 1994) (citing DeBruhl v. Kershaw Co. Sheriff’s Dept., 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990)).

By requiring the Commission to adopt a finding as to the weight of one expert opinion against others, Judge Nicholson has usurped the Commission’s role as the ultimate fact finder, when his appellate role was limited to determining whether “a reasonable mind might reach the same conclusion as that reached by the commission.” Even if an appellate court were to reverse the

Commission on a legal issue, the matter should be remanded to the Commission to weigh and judge the credibility of the witnesses in accordance with the Administrative Procedures Act. Therefore, MeadWestvaco respectfully requests that Judge Nicholson's finding regarding the weight of the evidence and the credibility of the witnesses, which the Commission was mandated to adopt and Judge Jefferson affirmed, be reversed by the Court of Appeals.

VIII. Judge Nicholson's finding and conclusion that an Employer/Employee relationship existed "at the time of Hoff's injury by accident" is arbitrary, capricious, without evidentiary support, contrary to the applicable law, and was made in excess of judicial authority.

Judge Nicholson required the Commission to make inconsistent findings and conclusions as to Hoff's alleged accident date: October 24, 2000, October 14, 2003, and/or October 19, 2003. However, the record reveals that Hoff was not working at MeadWestvaco on any of these dates. Because Hoff, himself, never alleged that he was injured on October 24, 2000, October 14, 2003, or October 19, 2003, MeadWestvaco could not raise the nonexistence of an employment relationship under S.C. Code Ann. §§ 42-1-130, 42-1-140 and 42-1-150 as a defense to such claims.

Judge Nicholson's conclusory finding in this regard and concomitant vague legal conclusion⁶ (which the Commission was forced to adopt and Judge Jefferson affirmed) are not supported by substantial evidence or the applicable law and were otherwise made in excess of judicial authority and upon unlawful procedure and ; therefore, MeadWestvaco respectfully requests that they be reversed. It is illustrative of the arbitrary and capricious nature of Judge Nicholson's remand instructions that Hoff would be a considered an "employee" of MeadWestvaco after he admittedly ceased working at the mill.

IX. Judge Nicholson's finding that Hoff's hearing loss was caused by an accident arising out of and in the course of his employment is not supported by substantial evidence or the applicable law and was otherwise made upon unlawful procedure and should be reversed.

Because the Commission's October 11, 2013 Order, which was entered consistent with Judge Nicholson's remand instructions (and affirmed by Judge Jefferson), contains so many internal inconsistencies regarding such crucial issues as the date of the accident and the mechanism of injury, it is difficult for MeadWestvaco to adequately address each error. However, it is clear that substantial evidence in the record does not support a finding or conclusion that Hoff

⁶ Note that the legal conclusion in this regard is impermissibly cursory and vague: "Under S.C. Code Anno. [sic] § 42-1-140, Hoff was a covered employee at the time in question." Of course, it is wholly unclear what time was in question, as the same order contains three different alleged accident dates.

sustained hearing loss as a result of (1) an accident, (2) arising out of, and (3) in the course of his employment as required by S.C. Code Ann. § 42-1-160.

The South Carolina Supreme Court has explained that "a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma." Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002). In the present case Hoff failed to present any competent evidence of "trauma" or "traumatic events" arising out of or in the course of his employment at MeadWestvaco. See Schurnight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 195. According to Judge Nicholson, Hoff's hearing loss was "caused by excessive noise exposure on his job." However, Hoff presented no evidence that his exposure to noise at work was "excessive."

Exposure to noise is universal. Every person is exposed to noise every day. However, only certain levels and durations of noise can cause hearing loss. For Hoff to prove that his noise exposure was "traumatic," as required by the law, he was required to present evidence that his exposure to noise was of such a level and duration that could cause hearing loss. Hoff simply failed to do so. The Occupational Health and Safety Administration has deemed that employees may be safely exposed to 90 dBA for up to 8 hours each date, even without attenuating hearing protection. (ROA#10, p.32, 29 C.F.R. § 1910.95). Here Hoff admits that he started wearing hearing protection, attenuating his noise exposure, in 1970. Given this admission and his failure to present evidence that his attenuated noise exposure exceeded permissible, safe levels, Hoff failed to meet his burden of proving "repetitive trauma" in his employment. For this reason, it was wholly speculative and improper for Judge Nicholson to make an affirmative finding under

S.C. Code Ann. § 42-1-60 or award benefits in this case and Judge Nicholson's Order, the Commission's October 11, 2013 remand Order, and the Order of Judge Jefferson should be reversed.

Unfortunately, the Commission, in accordance with Judge Nicholson's remand instructions, also made inconsistent conclusions of law with respect to the application of S.C. Code Ann. § 42-1-160:

Under S.C. Code Anno., [sic] § 42-1-160, Hoff sustained a compensable injury by accident arising out of and in the course 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.

It is unclear, but this conclusion appears to suggest that Hoff did not have an "accident" until his lawyers sent him to Dr. Kitch for an opinion on the cause of his long-standing hearing loss. However, an "accident" is defined as an "unlooked for and untoward event" that causes an injury. Pee v. AVM, 352 S.C. 167, 573 S.E.2d 785 (2002). Is the event for which MeadWestvaco has been found liable a doctor's appointment? Did Dr. Kitch's opinion in October 2003 cause his injury? This is what Judge Nicholson required the Commission to conclude and Judge Jefferson affirmed. Since Hoff was not working for MeadWestvaco on October 14, 2003 (having retired three years earlier), any accident on this date clearly did not "arise out of or "in the course of his employment. Therefore, this conclusion is premised, not only on pure speculation, but is wholly contrary to the applicable law, made upon unlawful authority, and should be reversed.

In keeping with the overall theme of inconsistency, the Commission was required by Judge Nicholson's remand order to conclude yet a third possible "accident" scenario under S.C. Code Ann. § 42-1-160:

"...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..."

Again, Hoff was not an employee of, and was not working for, MeadWestvaco on October 19, 2003. As a matter of law, anything that may have occurred on October 19, 2003 cannot be considered to have occurred "within the period of employment, at a place where the employee reasonably may be in the performance of his duties and while fulfilling his duties or engaged in something incidental thereto." Douglas v. Spartan Mills, 140 S.E.2d 173 (1965). Therefore, any alleged accident on October 19, 2003 did not "arise out of or "in the course" of the Claimant's employment with MeadWestvaco, which ended in October 2000 and the Commission's required finding on remand in this regard, which was affirmed by Judge Jefferson, should be reversed as a matter of law.

X. The award of benefits for a 30% loss of hearing is not supported by substantial evidence and should be reversed.

MeadWestvaco respectfully contends that the present claim is barred by S.C. Code Ann. § 42-15-40's statute of limitations and further contends that Hoff did not sustain any injury by accident arising out of or in the course of his employment at any time. However, even if the his claim were timely and that he had affirmatively proven that his hearing loss was caused by an accident arising out of and in the course of his employment, MeadWestvaco respectfully contends that Hoff does not have a 30% loss of hearing as a result of any such alleged accident based on substantial evidence.

Hoff retired from MeadWestvaco in October 2000. Immediately prior to his retirement, Hoff was administered a final annual audiogram on September 26, 2000. (APA p. 16). Based upon Hoff s September 26, 2000 audiogram and S.C. Code Reg. 67- 1102, Hoff's binaural hearing loss (from any cause) was 16.25% at the time of his retirement. (APA p.29). This is the most hearing loss that could possibly be attributed to his employment. However, Judge Nicholson required the Commission to award Hoff benefits for a 30% binaural hearing loss because Hoff's hearing continued to deteriorate after his retirement. After his retirement, Hoff's hearing problems increased significantly and by 2003, Hoff'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." (ROA#10, p.24) (emphasis added).

Hoff has not had his hearing tested since 2003; however, Hoff 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." (ROA#10, p. 24, p.26). Even Dr. Kitch, who evaluated Hoff on a single occasion in 2003 at the request of Hoff's attorneys, 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." (ROA#10 p. 6). However, between 2000 and 2003, Hoff's hearing impairment nearly doubled, increasing from 16.25% to 30%. (APA pp. 28-29).

MeadWestvaco respectfully contends that there is no evidence to support Judge Nicholson's improper finding, which the Commission was required to adopt and which Judge Jefferson affirmed, that the hearing loss Hoff sustained after his retirement (at a time when he was over the age of 60) is in any way related to his past employment with MeadWestvaco. For this reason, MeadWestvaco respectfully requests that the award under S.C. Code Reg. 67-1102 and S.C. Code Ann. § 42-9-30 be reversed.

Conclusion

For the reasons stated herein above, MeadWestvaco respectfully requests that the Commission's October 11, 2013 Decision and Order, which was entered as instructed by Judge Nicholson in his order of remand, be reversed in its entirety, as it is not supported by substantial evidence, it is contrary to the applicable law, it is arbitrary and capricious, and is otherwise in excess of judicial authority and made upon unlawful procedure. MeadWestvaco further requests that the orders of Judge Nicholson and of Judge Jefferson be reversed and vacated. Lastly, MeadWestvaco respectfully requests that the July 2, 2010 Decision and Order of the Workers' Compensation Commission's Appellate Panel, denying the claim based upon substantial evidence and proper application of the statute of limitations, be affirmed by the Court of Appeals.

Respectfully submitted,


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August 10, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Derrick L. Williams, Commissioner

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SC Court of Appeals

File No. W.C.C. 0031077
CCP 2013-CP-10-6723 (2010-CP-10-6041)
Appellate Case No. 2015-001001

Virgil A. Hoff, Employee,.....Respondent,

v.

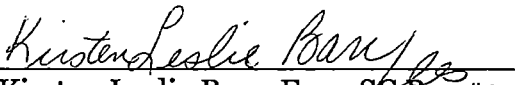
Mead Westvaco, Self Insured Employer,.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Respondent, Virgil Hoff, was served with a copy of the attached Initial Brief of the Appellant and Designation of Matter this 10th day of August 2015 by depositing a copy of the same in the United States Mail, postage prepaid addressed to his counsel of record as follows:

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