THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

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 REPLY BRIEF OF THE APPELLANT

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III. Did the Workers' Compensation Commission's Appellate Panel properly address and reject Hoff's estoppel argument?

Arguments in Reply

I. The Appellate Panel of the Workers' Compensation Commission reversed the Decision and Order of Hearing Commissioner Williams "in its entirety."

In his brief, Hoff argues, inexplicably[1], that the Appellate Panel left "intact the causation findings of Hearing Commissioner Williams" and that the Hearing Commissioner's findings as to "causation" are the "law of the case." (Respondent's Brief p. 6). However, the July 2, 2010 Decision and Order of the Appellate Panel unequivocally states that the Hearing Commissioner's "Decision and Order dated October 29, 2009 is REVERSED in its entirety for the reasons set forth herein

[1] Also inexplicable is Hoff's bald assertion that the Appellate Panel "noted it had no authority to address the remaining errors and exceptions raised by 'Westvaco, which were not previously addressed by the Appellate Panel because the Commission's conclusion regarding the statute of limitations was dispositive." The Appellate Panel's order on remand contains no such statement and addresses no such argument. Hoff's assertion is this regard is simply false and unsubstantiated.

below." (7/2/10 Order p. 7) (emphasis original). Therefore, MeadWestvaco respectfully contends that Hoff's baseless contention that the Appellate Panel left intact any finding or conclusion made by the Hearing Commissioner and Hoff's further contention that the Hearing Commissioner's findings as to "causation" are the "law of the case" are wholly without merit.

If the Appellate Panel's plain statement that the "Decision and Order dated October 29, 2009 is REVERSED in its entirety" were not clear enough, the Appellate Panel's July 2, 2010 Decision and Order goes on to specifically explain why the Hearing Commissioner's findings as to "causation" were being reversed.[2] For example, the Appellate Panel considered the Hearing Commissioner's finding that Hoff "sustained a compensable injury by repetitive trauma on and before October 24, 2000" and concluded that it "is not supported by the evidence in the record or the applicable law." Clearly, this finding as to causation is not the "law of the case" as argued by Hoff. Instead, this finding was reversed because it lacked both evidentiary and legal support.

In addition, the Appellate Panel specifically considered the Hearing Commissioner's inconsistent finding that "Hoff sustained a compensable injury by accident arising out of and in the course and scope of his employment on October 14, 2003." According to the Appellate Panel, "any injury [Hoff] may have sustained on October 14, 2003 could not be said to arise out of or in the course of

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[2] Hoff also claims that the "Order of the Appellate Panel dated July 2, 2010 did not address Commissioner Williams' [sic] findings of fact and conclusion of law regarding causation which [sic] became the law of the case." This statement is also demonstrably false, as explained herein and as plainly stated in the Appellate Panel Order.

his employment as a matter of law" because Hoff was not even working for MeadWestvaco on October 14, 2003. Therefore, this finding as to "causation" by the Hearing Commissioner was not "left intact" as argued by Hoff, but was reversed by the Appellate Panel.

The Appellate Panel also considered the Hearing Commissioner's finding that Hoff "sustained a compensable injury by accident...at MeadWestvaco on October 19, 2003." The Appellate Panel also specifically reversed this finding. The Appellate Panel explained,

> "the Hearing Commissioner 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 [Hoff]." (emphasis added).

Therefore, Hoff's argument that this finding is somehow the "law of the case" is similarly baseless.

As if there were any question whatsoever as to the Appellate Panel's alleged acquiescence to, or affirmation of, the Hearing Commissioner's multiple inconsistent findings as to "causation," the Appellate Panel's Decision and Order plainly states:

> "...[Hoff] presented no evidence that his exposure to noise was 'excessive,' or at a level or duration that could cause hearing loss,

> especially loss that occurred after he was over the age of 60 and retired from working."

Therefore, MeadWestvaco respectfully contends that the inconsistent findings and conclusions made by the Hearing Commissioner as to the dates and alleged causes of Hoff's hearing loss are not the "law of the case" because they were all specifically addressed and reversed, in their "entirety," by the Commission's Appellate Panel in their July 2, 2010 Decision and Order.

II. Hoff's reliance on Pee v. AVM, Inc. is utterly misplaced.

MeadWestvaco respectfully contends that the Workers' Compensation Commission's Appellate Panel correctly concluded that Hoff's claim is barred by S.C. Code Ann. Sec. 42-15-40, as interpreted by the Supreme Court in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003). Despite Hoff's argument's to the contrary, the holding in Schurlknight is not limited to the facts of that case, but instead establishes a clear, bright-line rule for the application of the statute of limitations in a repetitive trauma claim. In fact, the Schulknight decision specifically states:

> "We hold the last day of exposure is the date from which the statue of limitations begins to run in a repetitive trauma case."

According to Hoff, not only does the Supreme Court's clear holding in Schurlknight not apply to his claim, but he purports to rely on the case of Pee v.

ACM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002) in support of his argument that he was not bound by the two (2) year statute of limitations mandated by S.C. Code Ann. Sec. 42-15-40. In fact, Hoff boldly asserts that

> "The Court in Pee held the time for filing a repetitive trauma claim does not begin to run until the Claimant he [sic] becomes disabled and could have discovered with reasonable diligence his condition was compensable..." (Respondents' Brief p. 12)

A careful reading of Pee v. AVM, Inc., reveals that the decision did not address the statute of limitations whatsoever. In Pee, the Court did not render any decision regarding the time for filing, or even reporting, a repetitive trauma claim, or any other type of workers' compensation claim. The sole holding in Pee was as follows:

> "We find a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma."

For Hoff to suggest that the Pee court made any ruling regarding the statute of limitations is simply untenable. Respectfully, the holding of Pee v. AVM, Inc., is in no way contrary to the Workers' Compensation Commission's final decision that Hoff's claim is barred by the statute of limitations, nor does it in any way support the Circuit Court's impermissible findings and conclusions that Hoff's claim is not so barred.

III. The Workers' Compensation Commission's Appellate Panel properly addressed and rejected Hoff's estoppel argument.

According to Hoff, "the Appellate Panel failed to address Hoff's estoppel argument." This statement is patently false. In its July 2, 2010 Decision and Order, the Appellate Panel entered the following finding of fact:

> "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."

Therefore, MeadWestvaco respectfully contends that, not only did the Appellate Panel address the estoppel argument, it rejected this argument based upon substantial evidence and the applicable law.

Of course, each and every Form 50 claim form filed by Hoff alleges that he gave notice of his alleged injury to his employer "on October 4, 2000 in the following manner: verbally to supervisor." This fact alone constitutes substantial evidence in support of the Appellate Panel's finding of fact #7 regarding the issue of estoppel. Furthermore, the Appellate Panel addressed the estoppel issue in its Conclusion of Law #4, as follows:

> "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."

Again, to suggest that "the Appellate Panel failed to address Hoff's estoppel argument" is untenable. More importantly, the Appellate panel properly addressed and disposed of this issue.

Furthermore, it was not within the purview of the Circuit Court to make its own findings of fact on the estoppel issue. *See* Pack v. State Dept. of Transp. 381 S.C. 526, 534, 673 S.E.2d 461, 465 (Ct. App. 2009) (stating "[Q]uestions of fact are decided solely by the Commission, and the court reviewing the Commission's decision lacks authority to determine factual issues, except in jurisdictional matters."(citing Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995)). Even if the Circuit Court had determined the Appellate Panel's findings in this regard were somehow unsupported by substantial evidence, the Circuit Court should have remanded the matter to the Commission. Instead, the Circuit Court made its own findings of fact. This is clearly impermissible and Hoff makes no argument in support of the Circuit Court's usurpation of authority.

Lastly, Hoff appears to suggest that, because MeadWestvaco denies that Hoff's hearing loss is causally-related to his employment, this is tantamount to MeadWestvaco somehow making a misrepresentation. MeadWestvaco admittedly did not inform Hoff that he had a work-related hearing loss because MeadWestvaco does not believe Hoff has a work-related hearing loss. However, this was not a "misrepresentation," nor was it an attempt to "mislead" Hoff. In

fact, the Appellate Panel agreed with MeadWestvaco's denial by stating in its July 2, 2010 Decision and Order that

> "...[Hoff] presented no evidence that his exposure to noise was 'excessive,' or at a level or duration that could cause hearing loss, especially loss that occurred after he was over the age of 60 and retired from working."

Were the Courts to accept Hoff's argument in this regard, it would essentially eliminate the notice and statute of limitations requirements in all denied cases and it would further require a reversal of long-standing jurisprudence, which places the burden on the employee prove compliance with S.C. Code Ann. Sec. 42-15-20 and Sec. 42-15-40. Heretofore, no Court has ever required an employer to instruct an employee to file a disputed claim.

Therefore, based upon substantial evidence in the record and the applicable law, and further based upon the Circuit Court's clear legal error in making its own findings of fact on appeal, MeadWestvaco respectfully requests that the Appellate Panel's finding and conclusion with respect to estoppel contained in the July 2, 2010 Decision and Order be affirmed by the Court of Appeals.

Conclusion

For the reasons set forth herein and in the Appellant's brief in chief, MeadWestvaco respectfully requests that the Orders of the Circuit Court and the Order of the Workers' Compensation Commission on remand be reversed and vacated as a matter of law. MeadWestvaco further requests that the Workers'

Compensation Commission's July 2, 2010 Decision and Order be affirmed in accordance with the Administrative Procedures Act.

Respectfully submitted,

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Mount Pleasant, South Carolina

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

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PROOF OF SERVICE

The undersigned hereby certifies that the above-named Respondent, Virgil Hoff, was served with a copy of the attached Initial Reply Brief of the Appellant this 15th day of October 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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October 15, 2015

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October 15, 2015

The Honorable Jenny Abbott Kitchings
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Re: Virgil A. Hoff v. MeadWestvaco
W.C.C. File No.: 0031077
Appellate Case No.: 2015-001001
Carrier File No.: A367102654
Date of Accident: October 24, 2000 (alleged)

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the Initial Reply Brief of the Appellant, with accompanying Proof of Service, in the above-referenced case. By copy of this letter, I am serving the other counsel of record with a copy of our Brief. If you should have any questions, please do not hesitate to contact me.

Yours very truly,

Kirsten L. Barr

Kirsten L. Barr

KLB/cnd/les
Enc.
cc: Cynthia Busler, Matrix Absence Management (w/enc.) (email only)
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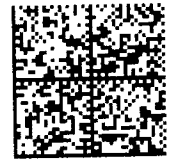
4530\923\l-COA – Initial Reply Brief of Appellant



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