THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Avery B. Wilkerson, Jr., and R. Michael Campbell, II
Commissioners

Case Number: 2016-000507

Jack Woodward, Claimant, Appellant,

v.

ArcellorMittal Georgetown, Inc., Employer, and
New Hampshire Insurance Company, Carrier Respondents.

INITIAL BRIEF OF APPELLANT

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ISSUES ON APPEAL

1. Whether the Appellate Panel erred when it found that Appellant failed to give timely notice, of his repetitive trauma hearing loss, to Employer.

2. Whether the Appellate Panel erred when it found that Appellant failed to timely file his claim (Form 50) of his repetitive trauma hearing loss.

3. Whether the Appellate Panel erred when it ruled Appellant's claim was barred by the equitable doctrine of *laches*.

4. Whether the Appellate Panel erred when it found that Appellant failed to prove causation of his repetitive trauma hearing loss was sustained while employed by Employer.

STATEMENT OF THE CASE

This appeal concerns a Workers' Compensation claim submitted by the Claimant/Appellant for workplace noise-induced repetitive trauma hearing loss, culminating upon his retirement from Employer on March 31, 2014

Jack Woodward (herein Claimant) worked at the Georgetown steel making facility for over 38 years. He began his tenure at the mill in the casting area where he remained as a quality control technician for 12 years, then worked throughout the mill as an electrician in the maintenance department for the next 20 years. (APA 16 - 18). During his last 6 years with ArcelorMittal, he worked exclusively in the melt shop - the noisiest portion of the mill.

As his periodic hearing tests indicate, he started working at the mill with nearly perfect hearing (APA 14, June 24, 1975 hearing test .625% binaural hearing loss) and ended with significant binaural hearing loss (APA 2, September 10, 2013, 29.00%). In a side-by-side comparison of the two audiological evaluations of Claimant at the same office between 2006 and 2013, the Claimant's

binaural audiograms show a loss of 23.83% in 2006 and falling to 29.00% in 2013, during which time he was solely employed by ArcelorMittal in the melt shop.

The case was heard by the Honorable T. Scott Beck on April 28, 2015. Commissioner Beck signed the Decision and Order(D&O) on August 4, 2015, denying the claim. The Appellate Panel of the Full Commission heard the case on November 17, 2015 and issued its own D&O, affirming the Single Commissioner in full February 29, 2016

STATEMENT OF FACTS

The Claimant is 60 years of age and worked in the steel mill in Georgetown for 39 years, 8 months, retiring on March 31, 2015. He performed jobs including maintenance air-conditioning and electric work, and worked all over the mill but mainly on the melt floor, which he testified was the noisiest part of the mill. He testified the working conditions were extremely loud. He further testified as to his current hearing problems but also testified that his hearing problems never disabled him from performing his job. Finally, the Claimant testified that it is his belief that working in the steel mill gradually caused his hearing loss. (D&O, p. 6).

On cross-examination, the Claimant testified that there was no hearing protection in use when he started working at the steel mill in June, 1975, and that he probably worked the first eight 10 ten years without any hearing protection. He testified that hearing protection gradually became available and required, that the wearing of hearing protection was much more strictly required by the time ArcelorMittal took over the plant, and that he always wore hearing protection once he started working for ArcelorMittal. The Claimant testified he started to realize at some point "way back when" that his hearing was not as good as it had been, but he never thought to seek medical attention or do anything about it, The Claimant testified that he filed a claim against Georgetown Steel sometime around 2003 and that ArcelorMittal was included in that claim. The

Claimant agreed that ArcelorMittal was dismissed from that 2003 claim and that the claim was settled with one of the employers or carriers in 2007 whereby he was paid some money for hearing loss the same claim in which ArcelorMittal had been a defendants.(D&O, p. 6, 7).

The Claimant testified that ArcelorMittal did not become involved with the steel mill in Georgetown until after 2003. The Claimant was given a baseline hearing test by ArcelorMittal in September or 2004, the point in time at which it began operating the steel mill facility. (D&O, p.7).

APA submissions and exhibits in the record include sound level surveys dated June 30, 1975, July 1 , 1983, February 6, 1984, February 6, 1991, and April 7, 1993 (APA #6, pgs. 21-28) all of which pre-date ArcelorMittal's ownership of the steel mill; copies of Employer meeting notes regarding noise levels in the mill dated February 16, 2000, and May 23, 2000 (APA #7, pgs. 28-32); and copies of OSHA reports to the steel mill regarding noise levels dated from November 28, 1995, through October 3, 2002 (APA #8, pgs, 33-52), all of which pre-date ArcelorMit1al's ownership of the mill Dr. Terry Fry prepared a report on December 23, 2013, in which Dr. Fry indicated the Claimant reached maximum medical improvement on July 3, 2006, and sustained a 28% medical impairment to the right ear and a 23% medical impairment to the left ears (APA p. 2).

The Claimant underwent a hearing test performed on September 9, 2004 indicating the Claimant had a moderate loss of hearing in both his left and right ears resulting in a 19.0625% binaural hearing impairment, (APA D. pgs. 68-70). The Defendants' submissions also include a report from Dr. Howard A. Farrell dated December 27, 2013 which documents that the Claimant always used ear plugs while employed at ArcelorMittal, but did not use ear protection consistently while employed

at the steel mill from June, 1975, through 2003. Dr. Farrell stated that the Claimant has a bilateral high frequency sensorineural hearing loss that is consistent with loud noise exposure but further stated his opinion, within a reasonable degree of medical certainty that the Claimant's hearing damage occurred prior to his employment with ArcelorMittal Georgetown, LLC (APA #9, pgs. 53-55).

STANDARD OF REVIEW

The Administrative Procedures Act applies to appeals from decisions of the [Workers' Compensation] Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the Commission, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct.App.2002). "Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." *Lockridge v. Santens of Am., Inc.*, 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct.App.2001). "Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." *Id.* at 515, 544 S.E.2d at 844. An appellate court may reverse the Commission when the Commission's decision is based on an error of law. *Corbin,* 351 S.C. at 617, 571 S.E.2d at 95. Certain situations involve a mixed question of law and fact. Statutory interpretation is a question of law. *South Carolina Uninsured Employers' Fund v. House,* 360 S.C. 468, 602 S.E.2d 81 (Ct.App.2004). But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial

evidence standard. *Bursey v. South Carolina Dep't of Health & Envtl. Control,* 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006). "[A]n appellate court may reverse the Commission when the Commission's decision is based on an error of law." *Corbin v. Kohler Co.,* 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct.App. 2002).

1. THE SINGLE COMMISSIONER ERRED WHEN HE FOUND THAT APPELLANT FAILED TO GIVE TIMELY NOTICE OF HIS REPETITIVE TRAUMA HEARING LOSS, TO EMPLOYER.

The Single Commissioner adopted the Employer's stance to penalize Claimant because he had symptoms of a repetitive trauma (hearing loss), but continued to work. These facts are nearly identical to *Ralph Schurlknight*[1], who worked as a fireman for twenty four (24) years and noticed an onset of hearing loss in the later years of employment. Our Supreme Court, in rejecting the discovery rule in hearing loss repetitive trauma cases, reasoned that such a rule would prejudice a Claimant who discovers symptoms of a repetitive trauma but continues to work. The importance here of the *Schurlknight* holding to Mr. Woodward's case, is our Supreme Court has decided a Claimant such as Mr. Woodward will not be precluded from bringing a claim by continuing to do the job in the environment provided by the Employer. Must the Claimant who continues to work after becoming aware of a hearing impairment file a workers' compensation claim each time he has an increase in hearing loss? The obvious answer is no.

Workers' Compensation must adopt a standard for persons affected by repetitive trauma (especially hearing loss) who continue their employment where employer and Claimant are aware

[1] *Schurlknight v. City of North Charleston,* 352 S.C. 175, 574 S.E. 2d 194 (2003)

of employee's continued injurious exposure. Some types of repetitive exposure, such as noise, can result in increased injury resulting in progressive hearing impairment. That increased impairment however may have little or no effect on the employee's ability to perform his job.[2] However, the impairment can and does affect the employee's quality of life and his overall functioning in society. The hearing loss also limits Mr. Woodward, should he try to work in some other job where hearing is more important. Claimant returned to work at the Steel Mill, now under ArcelorMittal management. ArcelorMittal had constructive, if not actual, knowledge of Claimant's hearing loss at the time he returned to work in the mill. As was previously noted, Claimant had a binaural hearing loss of 23.38% in 2006. By 2013 his hearing loss had increased to 29%.

Employees, situated as Mr. Woodward, are faced with a dilemma:

(1) Does he file his claim when he first becomes aware of his impairment and its cause?
(2) Does he wait until leaving the job before filing his claim?
(3) If he files, is compensated and then continues to work and suffers more injuries and impairment, is he precluded from filing again?
(4) If he does not file when he becomes aware of his hearing impairment, continues to work and then files a claim when he leaves the job, is he barred by statute of limitations and notice requirements?

Surely, a claimant should not be required to file a claim each time his hearing deteriorates. That would mean filing multiple claims as the impairment increases; arguably, every day.

When the employer has actual knowledge of the injury, the notice requirement is deemed satisfied, so long as the employer is not prejudiced. *Mize v. Sangamo Electric Company*, 251 S.C. 250, 161 S.E.2d 846 (1968). Here, ArcelorMittal, who purchased the Georgetown steel mill, is imputed with

[2] The noise level on the melt floor is so extreme that employees use hand signals to communicate. Theoretically, a totally deaf person could perform the job.

knowledge of audiograms performed on employees by former owners/employers. The burden is upon the employer to prove prejudice. *Id.* Where there is evidence the employer had actual knowledge of every pertinent fact required of a written notice, the notice requirement was satisfied. *Dawkins v. Capitol Construction Co.*, 252 S.C. 536, 167 S.E. 2d 439 (1969). In both *Mize* and *Dawkins*, the employer had actual knowledge of the accidents. Here, ArcelorMittal had actual knowledge of the hearing loss of the Claimant. ArcelorMittal administered periodic hearing tests and knew of the Claimant's hearing loss before the Claimant knew. ArcelorMittal's actual knowledge of the "accidents" satisfies the notice requirement of § 42-15-20. Two Tennessee cases are on point with this case. In *Luna v. GAF Fiberglass Corp.*, 2002 WL 975147 (Supreme Ct. Tenn. 2002), the Claimant did not know the results of the employer administered hearing tests. In another Tennessee case, the court found the notice requirement satisfied when the employer had actual knowledge of the claimant's hearing loss. *George v. Building Materials Corp.*, 44 S.W. 3d 481(Tenn. 2001). *See also, Rockwell International v. Reed*, 804 P.2d 460 (Oklahoma App. 1990) (employer had notice of claimant's injury and neglected to advise claimant of his right to file claim after employer sponsored hearing tests); *Boeing Helicopter Co. v. Workmen's Comp. Appeal Bd.*, 629 A.2d 184 (Penn. Cmwlth. 1993) (Employer waived notice requirement due to its knowledge of claimant's hearing loss); *Duquesne Light Co. v. W.C.A.B.*.450 A.2d 1100 (Penn. Cmwlth. 1982) (employee not penalized for giving notice to employer before fully diagnosed with disabling injury).

Here, Employer was not prejudiced. It had actual or constructive knowledge of the noise levels in its facility and it had actual or constructive notice of Appellant's hearing tests. Additionally, Employer provided noise attenuation protection to its employees.

Certainty and uniformity require that the employee who continues to work after suffering impairment, know what his options and requirements are. After all, South Carolina law requires the workers' compensation act be construed liberally in favor of coverage. *Ellison v. Frigidaire Home Products*, 371 S.C. 159, (2006). Pursuant to *Curiel v. Environmental Management Svcs*, 376 S.C. 23 (2007), the Commission is required to consider Claimant's pre-existing hearing impairment along with the new and further injury to his hearing.[3] The "new injury" concept is further supported by *Ellison v. Frigidaire Home Products*, 371 S.C. 159, (2006). "[C]laimant's present injury was properly considered in combination with his preexisting impairment, to determine eligibility for benefits. See also, *Butts v. C.R. England Trucking*, 2008 WL 9832868 (S.C. App.), 2008) (Unpublished Opinion) which followed the *Ellison* standard. Here we have Claimant with a prior or preexisting hearing impairment, return to work in the same noisy conditions, suffering a new and more extensive hearing loss. The former claim was settled through mediation. The evidence clearly shows Appellant suffered an additional or "new" hearing loss after he began work for ArcelorMittal. (APA 1). Dr. Fry's opinion, to a reasonable degree of medical certainty, states that Appellant suffered an additional 5% hearing loss during the time he worked for ArcelorMittal. Although Defendant's Doctor, Howard Anthony Farrell opines that Appellant's hearing loss is attributable to former mill owners (APA 53-57), it must be kept in mind that Dr. Fry has been Appellant's ENT for at least eight years. She has had more contact with which to form an opinion than a Doctor who sees

[3] Interpreting §42-9-400(a)

Appellant only one time. The Single Commissioner's finding of failure to give timely notice is clearly in error.

2. THE SINGLE COMMISSIONER ERRED WHEN HE FOUND THAT APPELLANT FAILED TO TIMELY FILE HIS CLAIM (FORM 50) OF HIS REPETITIVE TRAUMA HEARING LOSS.

The time limitation for filing a workers Compensation claim is set out in §42-15-40.[4] The question is therefore, when did Appellant become aware he had a compensable hearing loss? For Appellant to know he had a compensable loss, it is not enough for him to suspect such. Medical evidence is required by statute to prove the causation of the hearing loss to workplace noise. In fact, the medical evidence must be stated to a "reasonable degree of medical certainty." §42-1-72 (C,D) S.C. Code Ann.[5] That standard is required for all medical evidence. *Michau v. Georgetown County*, 396 S.C. 589 (2012). Here, the medical evidence linking the hearing loss and the work environment is a letter from Dr. Terry Fry, MD, FACS, dated November 19, 2014. (APA 1). In her letter, Dr. Fry states Appellant's binaural hearing loss increased from 24% to 29% in seven years. It is November 19, 2014 that Appellant knew he had an additional work related hearing loss. That is the date from which

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[4] §42-15-40....For a "repetitive trauma injury" as defined in Section 42-1-172, the right to compensation is barred unless a claim is filed with the commission within two years after the employee knew or should have known that his injury is compensable but no more than seven years after the last date of injurious exposure. This section applies regardless of whether the employee was aware that his repetitive trauma injury was the result of his employment.

[5] §42-1-172

(C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.

(D) A "repetitive trauma injury" is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.

the two year filing requirement begins to run. Your attention is directed to the last paragraph of Section 1, above, discussing the "new" accident and the credibility of Dr. Fry over Dr. Farrell. The Single Commissioner committed error when he found the Appellant failed to timely file his claim.

3. THE SINGLE COMMISSIONER ERRED WHEN HE RULED APPELLANT'S CLAIM WAS BARRED BY THE EQUITABLE DOCTRINE OF *LACHES*.

The Single commissioner's ruling that Appellant's claim is barred by *laches* is misplaced. He cites "neglect for an unreasonable and unexplained length of time under circumstances requiring diligence to do what should have been done"... as the basis for *laches*. However, our Supreme Court requires more. "Delay alone in the assertion of a right does not constitute laches." *Grossman v. Grossman,* 242 S.C. 298, 130 S.E.2d 850 (1963). The party pleading *laches* must prove injury, prejudice, expenses, change of position or disadvantage. *Archambault v. Sprouse*, 215 S.C. 336 (1949); *Arceneaux v. Arrington,* 284 S.C. 500, 503(Ct.App. 1985). The Single Commissioner failed to articulate facts sufficient to constitute *laches*. "Whether the plaintiff is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Privette v. Garrison,* 235 S.C. 119 (1959). In this case, Defendant/Employer has shown no element of laches except delay. (See also Appellant's argument in Section 1 at p. 6-7). The Single Commissioner should be reversed on his finding of laches and the Appellate Panel should make its own finding that laches does not apply here.

4. **THE SINGLE COMMISSIONER ERRED WHEN HE FOUND THAT APPELLANT FAILED TO PROVE CAUSATION OF HIS REPETITIVE TRAUMA HEARING LOSS WAS SUSTAINED WHILE EMPLOYED BY, EMPLOYER.**

The law in South Carolina places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability (wherein the Supreme Court adopted the last injurious exposure rule). *Geathers v. 3V, Inc.*, 371 S.C. 570, 641 S.E.2d 29 (2007). The Court held this to be true, even if the prior injury significantly contributed to the final condition. Id at 347.

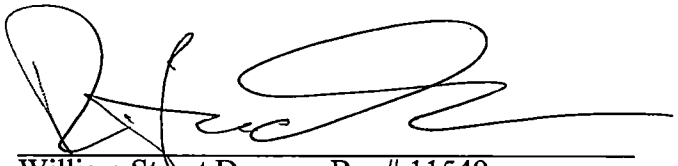
"...[O]nce a rebuttal presumption is established that the Claimants hearing impairment is work-related, the employer (here ArcelorMittal) with whom the Claimant was last injuriously exposed to hazardous noise shall be exclusively liable for benefits does not require a Claimant to prove that the last employment caused a measurable hearing loss, liability is imposed exclusively" on the employer with whom the Claimant was last injuriously exposed to the hazardous noise. AMJUR WORKERS Section 186. Here Claimant was exposed to the harshest noise in the mill during his last six years of employment and, although not required to do so, can show a measurable hearing loss which all doctors point his hazardous exposure to noise at the ArcelorMittal plant as the cause of his hearing loss. In fact, on April 6, 2006, Claimant was diagnosed by Dr. Fry with a 24% binaural hearing loss. On June 29, 2006, Claimant was diagnosed by Dr. Arthur LaBruce a 27% binaural hearing loss. The Claimant's hearing continued to deteriorate during seven more years of exposure from the loud noises at the mill and was determined on November 19, 2014 to have a 29% binaural hearing loss

by Dr. Terry Fry. (APA1).

CONCLUSION

This Court should reverse the Appellate Panel, ordering the that the Appellant gave timely notice to his Employer and timely filed his claim within the staute of limitations. Further, this Court should reverse the Appellate panel determination of Laches. Finally, this Court should reverse the Appellate Panel's determining Appellant had not met his burden of proof under §42-1-172 for a repetitive trauma hearing loss.

Respectfully submitted,



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