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SC Court of Appeals

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: 2016-000510

Rodney Ward, Claimant, **Appellant,**

v.

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

INITIAL BRIEF OF APPELLANT

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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 to the full Commission 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 October 31, 2013.

Rodney Ward (herein Appellant) has been employed by the Georgetown steel making facility since October 2, 1970. Due to long time exposure to high noise levels on his job, Appellant has suffered hearing loss due to a repetitive trauma injury. For purposes of this case, the Appellant's date of injury is his last day worked, October 31, 2013. Appellant gave notice to Employer on October 31, 2013. Appellant was diagnosed with hearing loss by Dr. Terry Fry in February of 2007 where he was found to have 23% hearing loss. Appellant was

examined again by Dr. Terry Fry on March 4, 2014 and found that his impairment had increased from 23% to 31%.

The case was heard by the Honorable T. Scott Beck on April 28, 2015. Commissioner Beck signed the Decision and Order on August 20, 2015, denying the claim. Appellant filed a Form 30, Request for Commission Review appealing the Decision and Order on September 1, 2015.

The Full Commission Appellate Panel heard arguments on review of Commissioner Beck's Decision and Order on November 17, 2015. The panel affirmed in full Commissioner Beck's Decision and Order, adopting his findings of fact and conclusions of law. The appellate panel filed its Decision and Order on February 29, 2016. The Appellant filed his Notice of Appeal with this Court on March 7, 2016.

STATEMENT OF THE FACTS

The Claimant is 66 years old and a high school graduate. He worked for the Employer and its predecessor companies at the steel mill in Georgetown, South Carolina, from 1970 until 2013. The Claimant worked in various capacities as a laborer and a supervisor. (Hrg. Tr. p. 11; D&O, p.7).

The Claimant testified that he was not required to wear hearing protection early in his career at the mill. He said that, for at least ten years from 1970 until roughly 1980, he wore no hearing protection whatsoever. Beginning around 1980, and to a greater degree in 2003, employees were required to wear hearing protection in every part of the mill. (Hrg. Tr.

p. 12-13; D&O, p. 7). The Claimant testified that he always wore hearing protection after the plant began requiring employees to wear hearing protection around 1980. The Claimant specifically testified thal he wore hearing protection every day since the Employer began operating the mill. (Hrg. Tr. p. 21-22; D&O, p.7). The Claimant described the noise in the mill as a "constant grinding" and "humming." He testified thal the noise level was such that it was impossible to have a normal conversation with a co-worker and that he would have to use hand signals when communicating (Hrg. Tr. p. 15-16; D&O, p. 7). The Claimant testified that he worked about 60 hours a week from 2003 until his retirement in 2013. (Hrg. Tr. p. 18; D&O p. 7).

The Claimant testified that he started using hearing aids in 2007. (Hrg. Tr. p. 22; D&O, p.8). He stated that, even in a setting with no background noise, he could not carry on a normal conversation without hearing aids. (Hrg. Tr. p. 18-19; D&O p. 8). The Claimant asserted that he does not have any "loud noise hobbies" such as hunting, However, he did admit that he mows grass as "mission work" and for some pay He stated that he mows five or six yards a week He uses a gas powered riding mower and a gas powered trimmer, The Claimant asserted that he wears hearing protection when he operates those pieces of machinery because he is aware that loud noises can damage hearing (Hrg. Tr. p. 17, 20; D&O, p. 8). The Claimant testified that he began to notice a decline in his hearing around 2000 and that he felt at that time his hearing loss was related to noise at the mill, (Hrg. Tr. p. 22-23; D&O, p.8). He suspected the mill noise was a possible cause of his hearing

problems. (Deposition of Rodney Ward, 9/18/2014, p. 20, l. 23 - p. 21, l. 2). The Claimant admitted that, in 2007, he took the results of a hearing test to his attorney. (Hrg. Tr. 25; D&O p.8). The Claimant's attorney filed a Form 50 hearing request on May 21, 2007, alleging hearing loss related to the Claimant's employment with the Employer. A hearing was scheduled to occur on September 11, 2007, but the Claimant's attorney voluntarily withdrew his Form 50 on August 2, 2007, and the hearing was cancelled. (APA p. 71-75).

The Claimant underwent an audiological evaluation under Dr. Terry Fry on February 21, 2007. (APA, p. 6). An "individual ear handicap" worksheet indicates the Claimant had a 23% binaural hearing impairment on June 29, 2007. (APA. 4). "The Claimant underwent another audiological evaluation with Dr. Fry on March 4, 2014 According to Dr. Fry, that test revealed a 31% binaural hearing impairment. In a statement dated September 11 2014, Dr. Fry stated that the Claimant's hearing loss was due to "his continued industrial noise exposure." The Claimant submitted various OSHA reports, noise studies, surveys, and citations encompassing the period from June 10, 1975, until December 3, 2002 (APA p. 8-39).

The Claimant saw Dr. Howard Farrell on September 12, 2014, and underwent additional audiological testinge Dr. Farrell concluded that the Claimant exhibited 32.51% binaural hearing loss. Dr. Farrell reviewed the Claimant's work hearing tests from both Georgetown Steel and ArcelorMittal. Dr. Farrell stated that the Claimant's hearing tests

while working for the prior employers are "not notably than his current test with bi-lateral nerve hearing loss," For instance, the Claimant exhibited 20.9375% binaural hearing impairment on August 21, 2002, the final work study performed while Georgetown Steel Company, LLC, operated the mill (APA p. 48). After ArcelorMittal began operating the mill, the Claimant exhibited 20.3125% impairment in his last hearing study on August 1, 2012 (APA p. 60).

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).

ARGUMENTS

1. THE APPELLATE PANEL ERRED WHEN IT FOUND THAT APPELLANT FAILED TO GIVE TIMELY NOTICE OF HIS REPETITIVE TRAUMA HEARING LOSS, TO EMPLOYER.

The appellate panel adopted the Employer's stance to penalize Appellant 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. Ward's case, is our Supreme Court has decided a Appellant such as Mr. Ward 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

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

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 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. Ward, should he try to work in some other job where hearing is more important.

Appellant returned to work at the Steel Mill, now under ArcelorMittal management. ArcelorMittal had constructive, if not actual, knowledge of Appellant's hearing loss at the time he returned to work in the mill. As was previously noted, Appellant had a binaural hearing loss of 23.38% in 2006. By 2013 his hearing loss had increased to 29%.

Employees, situated as Mr. Ward, 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?

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[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.

(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 Appellant 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). 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 Appellant. Employer administered periodic hearing tests and knew of the Appellant's hearing loss before the Appellant 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 Appellant 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 Appellant'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 Appellant's injury and neglected to advise Appellant 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 Appellant'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 Appellant'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

[3] Interpreting §42-9-400(a)

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 Appellant 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 withdrawn. 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 8% 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 40-45), it must be kept in mind that Dr. Fry has been Appellant's ENT for at least seven years. She has had more contact with which to form an opinion than a Doctor who sees Appellant only one time. The appellate panel's finding of failure to give timely notice is clearly in error.

2. THE APPELLATE PANEL ERRED WHEN IT 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

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§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.

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." §42-1-172 (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 December 11, 2014. (APA 1). In her letter, Dr. Fry states Appellant's binaural hearing loss increased from 23% to 31% in seven years. It is on December 11, 2014 that Appellant knew he had an additional work related hearing loss. That is the date from which 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 appellate panel committed error when it found the Appellant failed to timely file his claim.

3. THE APPELLATE PANEL ERRED WHEN IT RULED APPELLANT'S CLAIM WAS BARRED BY THE EQUITABLE DOCTRINE OF *LACHES*.

The appellate panel's ruling that Appellant's claim is barred by *laches* is misplaced. It cites "neglect for an unreasonable and unexplained length of time under circumstances

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[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.

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 appellate panel 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. The appellate panel should be reversed on its finding of laches and the Court of Appeals should make its own finding that laches does not apply here.

4. 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.

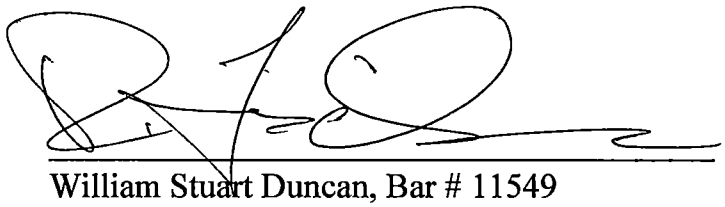
The law in South Carolina places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability (wherein the Supreme Court adopted the last injurious exposure rule). *Geathers v. 3V, Inc.*, 371 S.C. 570, 641 S.E.2d 29 (2007). The 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 Claimant's 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 Appellant 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, in February, 2007 Appellant was diagnosed by Dr. Fry with a 23% binaural hearing loss. The Claimant's hearing continued to deteriorate during seven more years of exposure from the loud noises at the mill and he was determined on December 11, 2014 to have a 31% binaural hearing loss by Dr. Terry Fry. (APA1).

CONCLUSION

This Court should reverse the Appellate Panel, ordering that the Appellant gave timely notice to his employer and timey filed his claim within the statute of limitations. Further, this Court should reverse the Appellate Panel determination of Laches. Finally, this Court should reverse the Appellate Panels 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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