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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-06041

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SC Court of Appeals

Virgil Hoff,.....Respondent,

v.

MeadWestvaco, Self-Insured,.....Appellant.

FINAL BRIEF OF THE APPELLANT

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Statement of the Issues on Appeal

I. Did the Circuit Court err as a matter of law in reversing the Workers' Compensation Commission's finding and conclusion that Hoff's claim is barred by S.C. Code Ann. § 42-15-40?

II. Are Circuit Court's findings and conclusions regarding Hoff's untimely equitable argument without evidentiary support and otherwise contrary to the applicable law?

III. Did the Circuit Court err as a matter of law in impliedly finding that Hoff sustained a compensable injury and is entitled medical and compensation benefits?

Statement of the Case

The Respondent, Virgil Hoff, retired from MeadWestvaco in October 2000. (R. p.242, lines 17—18). Three years later, on October 22, 2003, Hoff's attorneys filed a Form 50, Notice of Claim, alleging that he had sustained an accidental injury to his "skin; ear and lungs on or about October 4 200" [sic] due to "noise and environmental exposure." (Form 50 dated 10/22/03). (R. p.61). Hoff's Form 50 further states that "Notice of the accidental injury was given to the employer on or about October 4, 2000 in the following manner: Notified Supervisor." (R. p.61).

MeadWestvaco contends it was first notified about the alleged injuries after receiving the Form 50 on October 24, 2003, at which time a Form 12A, First Report of Injury was prepared and filed with the Workers' Compensation Commission. (R. p.60). MeadWestvaco denied the claim in its entirety by

Form 51 dated November 10, 2003. (R. p.64). MeadWestvaco specifically claimed S.C. Code Ann. § 42-15-20 (failure to give notice) and S.C. Code Ann. § 42-15-40 (2 year statute of limitations) as defenses to the claim. (R. p.65).

Hoff did not pursue his claim for the next 6 years. On April 29, 2009, Hoff filed a Form 50 hearing request and amended his claim to allege an injury by accident to the "skin, ear and lungs" due to "exposure to chemicals" on October 4, 2000." (R. p.66). Hoff did not check the box to allege a "repetitive trauma" injury on his Form 50. Hoff's April 29, 2009 Form 50 also states that "Notice of the accidental injury was given to the Employer on October 4, 2000 in the following manner: verbally to supervisor." MeadWestvaco timely responded with a Form 51 dated May 28, 2009 and again denied the claim and raised both § 42-15-20 (failure to give notice) and S.C. Code Ann. § 42-15-40 (2 year statute of limitations) as defenses to the claim. (R. pp.68–69).

Hoff then amended his hearing request by Form 50 dated June 9, 2009. (R. p.70). The amended Form 50 still alleged an accidental injury on October 4, 2000 due to "exposure to chemicals" and still made no allegation of any injury due to "repetitive trauma;" however, Hoff dropped his claim for injuries to his skin and lungs and added a new claim for hearing loss. (R. p.70). Again, Hoff stated that "Notice of the accidental injury was given to the Employer on October 4, 2000 in the following manner: verbally to the supervisor." MeadWestvaco timely responded with a Form 51 denying the claim and raising both failure to give notice and the statue of limitations as defenses. (R. pp.72-73).

On August 10, 2009, Hoff filed a Form 58, pre-hearing brief alleging that he sustained an injury by accident on October 4, 2000. (R. p 74). Hoff did not check the box on the Form 58 to claim an injury due to "repetitive trauma." However, his Form 58 alleges "exposure to noise" as the cause of his new hearing loss claim for the first time, even though the hearing was set on his Form 50 alleging "exposure to chemicals." Hoff's Form 58 does not raise any argument regarding estoppel. (R. pp.74—78).

MeadWestvaco filed a responsive Form 58, pre-hearing brief, on August 17, 2009. (R. pp. 79–86). MeadWestvaco again raised both § 42-15-20 (failure to give notice) and S.C. Code Ann. § 42-15-40 (2 year statute of limitations) as defenses to the claim, arguing that no notice was given and no claim was filed until three (3) years after Hoff last worked at MeadWestvaco. MeadWestvaco further argued that:

> "[Hoff] is a hunter and has been shooting rifles all of his life. In addition, [Hoff] is a diabetic and diabetes is a known cause of sensorineural hearing loss. [Hoff] admits that he wore hearing protection from the mid 1970's until he retired in 2000. There is no evidence that he was ever exposed to injurious levels/durations of noise at [MeadWestvaco]. More importantly, [Hoff's] hearing has significantly deteriorated since his retirement, going from a 16.25% binaural hearing impairment in September 2000 to a 30% binaural hearing impairment in 2003." (R. p.79).

MeadWestvaco further relied upon the expert medical opinion of Dr. Robert Sataloff, who stated that Hoff's hearing loss "could not have been caused by his occupational noise exposure." (R. p.111).

The claim came before former Commissioner Derrick L. Williams for a hearing on August 27, 2009 in North Charleston, South Carolina. (R. p.236). After receiving testimony and the documentary evidence submitted by the parties, Hearing Commissioner Williams issued a Decision and Order dated October 29, 2009 by which he found that Hoff

> "*sustained a compensable injury by repetitive trauma on and before* ***October 24, 2000****, the date he filed his claim for benefits under the South Carolina Workers' Compensation Act for his hearing loss. Hoff's hearing loss in both ears was caused by excessive noise exposure on his job at MeadWestvaco."* (emphasis added)."[1] (R. p.13).

In addition to this finding of fact, the Hearing Commissioner went on to enter a 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*

[1] Of course, Hoff did not file any claim with the Commission on October 24, **2000** – his claim was not filed until three (3) years later – on October 22, **2003**. Furthermore, the Hoff's Form 50 claims his accidental injury occurred on October **4**, 2000, not October **24**, 2000. Of course, Hoff's Form 50 does not allege any injury due to noise exposure, but claims his injury was caused by "chemical exposure."

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).[2] (R. p.15).

Further adding to the inconsistencies, the "Order and Award" section of the Hearing Commission's Decision and Order states:

"ORDERED, ADJUDGED AND DECREED, 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****..."*(emphasis added). (R. p.17).

Indeed, in a single Decision and Order the Hearing Commissioner referenced three different accident dates and two different mechanisms of injury, none of which were even alleged by Hoff in his Forms 50.

In addressing whether Hoff's claim is barred by S.C. Code Ann. § 42-15-60, the Hearing Commissioner found:

"Hoff provided timely and proper notice of his injury by accident and timely filed his claim for benefits under the Act

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[2] At no time did Hoff allege any injury by accident on October 14, 2003. In fact, Hoff was not working for MeadWestvaco on October 14, 2003, having retired more than three (3) years earlier.

within two (2) years of the date that he knew, with reasonable diligence, of his compensable claim." (R. p.13).

In addition to this finding, the Hearing Commissioner further entered the following conclusion of law:

"Under S.C. Code Anno., [sic] § 42-15-40, Hoff timely filed his claim for benefits under the Act. Section 42-15-40, 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. Dyna-Color/Jackrabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992)." (R. p.16).

The Hearing Commissioner did not make any reference to the Supreme Court's decision in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003), which held that the "discovery rule" applied in Mauldin does not apply in repetitive trauma cases.

MeadWestvaco filed a Form 30, Request for Commission Review, on November 12, 2009, alleging 19 errors and exceptions. After briefs were filed by both parties, a three-member Appellate Panel of the Workers' Compensation Commission heard oral arguments in Columbia, South Carolina on March 15, 2010. (R. pp.314—316). Thereafter, the Appellate Panel issued the Commission's final Decision and Order on July 2, 2010, reversing and vacating the October 29, 2009 Order of the Hearing Commissioner. (R. pp.18—35). The Appellate Panel entered its own findings of fact and conclusions of law and ultimately ruled that Hoff's claim was barred by S.C. Code Ann. § 42-15-40, as interpreted by the South Carolina Supreme Court in

Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003).[3]

Hoff filed a Petition for Judicial Review in the Charleston County Court of Common Pleas on July 26, 2010. (R. p.351). The matter was originally called for a hearing before the Honorable J.C. Nicholson, Jr., in Charleston South Carolina on May 2, 2012; however, Hoff was not prepared to proceed. The hearing was then rescheduled for July 19, 2012. In his brief to the Circuit Court, Hoff raised a single argument:

> *"The Commissioner's findings of fact and conclusions of law Hoff did not provide timely notice of his accident, did not timely file his claim and did not sustain a compensable hearing loss as a result of his employment with MeadWestvaco is not supported by substantial evidence and must be reversed."* (A. p.5).

Therefore, the only issue preserved for appeal was whether the Commission's final Decision and Order dated July 2, 2010 is supported by substantial evidence. After oral arguments, Judge Nicholson emailed Hoff's attorney to "submit a proposed order ... reversing the July 2, 2010 Order of the Appellate Panel of the South Carolina Workers' Compensation Commission" (A. p.13). Judge Nicholson did not elucidate the basis for his ruling; however, he

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[3] Having denied and dismissed the case pursuant to S.C. Code Ann. § 42-15-40, the Appellate Panel did not address the merits of Hoff's claim.

ultimately endorsed the Order as proposed by Hoff's attorneys on January 14, 2013. (R. pp. 37—46).

According to the January 14, 2013 Circuit Court Order,

- *"[t]he material facts are established and not in dispute," (R. p.39);*
- *"it is illogical to required [sic] Hoff to give notice or file a claim" within the two year period prescribed by S.C. Code Ann. § 42-15-40 and Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003) and; therefore, the claim is not barred because it was filed within two years after Hoff's attorneys obtained an evaluation with Dr. Kitch (R. p.41); and*
- *MeadWestvaco is estopped from asserting the statute of limitations as a defense. (R. p.42).*

In addition to making numerous findings of fact on appeal and in addition to addressing arguments that were not properly before the Court, the January 14, 2013 Order purports to award benefits and "reinstate" the Hearing Commissioner's order that was vacated by the Commission's Appellate Panel. (R. p.43). Therefore, within the applicable time limits, MeadWestvaco filed the present appeal to the South Carolina Court of Appeals.

Arguments

I. The Circuit Court erred as a matter of law in reversing the Workers' Compensation Commission's finding and

conclusion that Hoff's claim is barred by S.C. Code Ann. § 42-15-40.

The Appellant, MeadWestvaco, has consistently and repeatedly raised the statute of limitations set forth in S.C. Code Ann. § 42-15-40 (1990) as a defense and bar to Hoff's claim for workers' compensation benefits.[4] (R. pp.65, 69, 73, 79, 240–241). According to the plain terms of § 42-15-40, "the right to compensation ...is barred unless a claim is filed with the commission within two years after an accident." Therefore, the question should be simple and straightforward: *did Hoff file his claim within two years after his alleged accident?*

According to the Forms 50 filed by Hoff on October 22, 2003, April 29, 2009, and June 29, 2009, the alleged accident occurred on October 4, 2000 and Hoff claims to have given notice of this accident verbally to his supervisor on that same date. (R. pp.61, 68, 72). However, because it is undisputed that Hoff did not file any claim until October 22, 2003, the Commission properly found and concluded that Hoff did not file his claim within the two year statute of limitations mandated by S.C. Code Ann. § 42-15-40.

According to Hoff, S.C. Code Ann. § 42-15-40 does not apply because his attorneys did not obtain a doctor's opinion supporting his hearing loss

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[4] Although Hoff never filed a claim for hearing loss due to repetitive trauma, he ultimately argued his claim in this manner and the claim has always been treated as a repetitive trauma claim by the Workers' Compensation Commission and the Circuit Court.

claim until three years after he retired, citing the case of Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) ostensibly in support of his argument. In Mauldin, the claimant was misdiagnosed with arthritis in her knee. The Commission made a finding of fact that Mauldin filed her claim within two years after she discovered that her true problem was a torn medial meniscus. However, the Commission found that, unlike the facts in Mauldin, it was

> *"clear that [Hoff] was not only aware of problems with his hearing at the time of his retirement in October 2000, but he was also aware that his audiograms showed a hearing loss. He 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."* (R. p.31).

In support of this finding, the Commission cited evidence that Hoff "has known that he had problems with his hearing since the 1970s." (R. p.265, lines 12–19; p.30). The Commission further noted that Hoff "first saw a doctor about his problems with his hearing in 1980. (R. p.96)" and that "[t]hroughout the 1980s [Hoff] complained of problems with his hearing at his annual audiogram. (R. pp.95–96)." (R. p.30). The Commission also found that Hoff "admits that he discussed the results of each audiogram with the MeadWestvaco Medical Department. (R. p.266)" and that "his medical records reveal that the results of his September 26, 2000 audiogram were discussed with him at the time of the test." (R. pp.30–31). In fact, the

Commission found that even the records of Dr. Kitch, who evaluated Hoff at the request of his attorneys, state 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 MeadWestvaco for approximately 44 years, until 2000...****He is aware that he had a hearing loss noted on plant audiograms at that time.****"* (R. p.90) (emphasis added). (R. p.31).

Hoff, himself, testified that it was his personal belief that his hearing loss was "because of the noise where [he] worked." (R. p.263). Therefore, substantial evidence in the record supports the Commission's finding and conclusion that not even the liberal discovery rule could render Hoff's claim timely.

Furthermore, Hoff stated on each and every pleading he filed with the Commission that he gave notice of his accidental injury to MeadWestvaco by verbally informing a supervisor on October 4, 2000. (R. pp.61, 68, 72). Therefore, the Commission properly rejected Hoff's inconsistent argument that he was not aware of the injury he claims to have reported on October 4, 2000 until he saw a doctor on October 14, 2003. To hold otherwise would be to reject the overwhelming consensus of authority:

> "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or

> inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action."

Skull Creek Club Ltd. Partnership v. Cook and Book, Inc., 313 S.C. 283, 289, 437 S.E.2d 163, 166 (Ct. App. 1993) (quoting Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964)); *see also* Mellon Bank, N.A. v. Carroll, 314 S.C. 468, 445 S.E. 2d 466 9 (Ct. App. 1994); Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

In addition, the Commission properly recognized that the Supreme Court has squarely rejected application of the discovery rule in "repetitive trauma" claims, such as the one presently advanced by Hoff.[5] In Schurlknight v. City of North Charleston, 352. S.C. 175, 574 S.E.2d 194 (2003), the South Carolina Supreme Court refused to apply the discovery rule in a repetitive trauma hearing loss claim because it would work "to the prejudice of an employee who discovers symptoms of a repetitive trauma injury but continues to work." The Court stated, "[w]e hold the last day of exposure is the date

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[5] Hoff never filed a claim alleging any injury due to repetitive trauma or any injury that was gradual in onset. The Form 50 upon which the hearing was set describes an accident occurring on October 4, 2000 due to an alleged exposure to chemicals. (R. p.70). Although Hoff never filed a repetitive trauma claim, and although the Form 50 upon which the hearing was set did not allege injurious noise exposure, the Commission and the Circuit Court treated Hoff's claim as a claim for repetitive trauma caused by noise exposure.

from which the statue of limitations begins to run in a repetitive trauma case," noting the "added advantage of fixing an outside date for filing."

Hoff admits he lasted worked for MeadWestvaco in October 2000; therefore, his last possible "day of exposure" was in October 2000. (R. p.242, lines 17–20) (R. p.32, #5). Therefore, the Commission properly concluded that Hoff's claim filed in October 2003 is barred pursuant to both the plain language of S.C. Code Ann. § 42-15-40 and the Supreme Court's holding in Schurlknight, *supra*.

On appeal, the Circuit Court summarily concluded that it was "improper" and "illogical" to for the Commission to apply the Supreme Court's holding in Schurlknight to Hoff's repetitive trauma claim. Despite the Supreme Court's clear pronouncement to the contrary, the Circuit Court ruled that the statute of limitations does not run from the last day of exposure in Hoff's repetitive trauma claim. However, the Circuit Court chose not to apply its interpretation of the discovery rule to the Commission's findings or to Hoff's judicially binding statements in his pleadings. The Circuit Court chose not to remand the case to the Commission for additional findings. Instead, the Circuit Court chose to make its own findings of fact on appeal, which is clearly beyond the scope of its authority on appeal. *See* Lawson v. Hanson Brick America, Inc., 393 S.C. 87, 710 S.E.2d 711, 713 (Ct. App. 2011) (holding that it is improper for the Circuit Court to weigh the evidence and engage in fact finding); *see also* Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) (holding that neither the appellate courts, nor the circuit court may substitute its judgment for that of the

Commission as to the weight of the evidence on questions of fact, citing S.C. Code Ann. § 1-23-380(A)(6) (Supp.2000); Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 516, 526 S.E.2d 725, 728 (Ct.App.2000)); Oglesby v. Greenville YWCA, 250 S.C. 490, 494, 158 S.E.2d 907, 909 (1968) (stating that"[u]nder our workmen's compensation law the Commission sits in lieu of a jury and neither the Circuit Court nor this Court may interfere with its findings of fact unless there is an absence of evidence to sustain the findings of the Commission."). Despite the Circuit Court's limited authority on appeal, the Circuit Court Order plainly states:

> *"the undersigned finds Hoff did not know and could have known [sic] he suffered a compensable hearing loss until he was diagnosed by Dr. Kitch on October 14, 2003."* (R. p.41).

Not only was it improper for the Circuit Court to make its own findings of fact on appeal, but the Circuit Court failed to cite any evidence in support of its improper finding, suggesting that the evidence was "undisputed." However, MeadWestvaco respectfully contends that substantial evidence in the record supports the Commission's contrary 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," including the records of MeadWestvaco, the testimony of Hoff, and even the report of Dr. Kitch. (R. p.90). Furthermore, the Circuit Court's finding is wholly inconsistent with Hoff's own statement in his pleadings that he gave verbal notice of his alleged accidental injury to his supervisors on October 4, 2000. (R. pp.61, 68, 72).

Therefore, had the Circuit Court applied the appropriate substantial evidence standard of review, the Circuit Court should have affirmed the Commission's findings. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) (holding that "[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive."); *see also* Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) (acknowledging that despite conflicting evidence, either of different witnesses or of the same witness, a finding of fact by the commission is conclusive); Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct.App.1999).

Furthermore, the Circuit Court erred in its interpretation and application of the discovery rule itself. According to the South Carolina Supreme Court, statutes of limitations do not begin to run

> "when advice of counsel is sought or a full-blown theory of recovery is developed. The date of discovery is not when the plaintiff discovers a witness to support or prove his case." Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993) (emphasis added).

Instead, the "standard as to when the limitations period begins to run is objective, rather than subjective." Gibson v. Bank of American, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). Here, the statute of limitations began to run when Hoff knew, or by the exercise of reasonable diligence could

have known, that he might have a hearing loss claim, "not when advice of counsel is sought or a full-blown theory is developed." Gibson, *supra*, citing Burgess v. Am. Cancer Soc'y, 300 S.C. 182, 187, 386 S.E.2d 798, 800 (Ct. App. 1989) and Grillo v. Speedrite Products, Inc., 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000)(quoting Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). Nevertheless, the Circuit Court's equates the "date of discovery" with nothing more than the date his attorneys hired a doctor to endorse his claim. The Circuit Court wholly ignores the Commission's findings and the substantial evidence showing that Hoff had long been aware of his hearing loss and knew or should have known he could file a workers' compensation claim within 2 years after his retirement. Perhaps more importantly, the Circuit Court's finding and conclusion that "Hoff did not know and could have known [sic] he suffered a compensable hearing loss until he was diagnosed by Dr. Kitch on October 14, 2003" is wholly inconsistent with Hoff's repeated statements in his pleadings that he gave actual notice of his hearing loss claim on October 4, 2000, a statement by which he should be judicially bound. (Forms 50).

Based on the foregoing, MeadWestvaco respectfully contends that the Circuit Court erred as a matter of law in making its own findings of fact on appeal, erred as a matter of law in failing to apply the substantial evidence standard of review, erred as a matter of law permitting Hoff to take positions inconsistent with his own pleadings, erred as a matter of law in wholly disregarding the Supreme Court's holding in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003), and erred as a matter of law

in its interpretation and application of the discovery rule. Therefore, MeadWestvaco seeks reversal of the Circuit Court's Order and an affirmation of the findings and conclusions of the Workers' Compensation Commission, which are supported by substantial evidence in the record and the applicable law.

II. The Circuit Court's findings and conclusions regarding Hoff's untimely equitable argument are without evidentiary support and are otherwise contrary to the applicable law.

According to the Circuit Court, MeadWestvaco "falsely represented" audiogram test results to Hoff (R. p.42) and induced him to believe his hearing was normal, with the intention that Hoff would not file a workers' compensation claim and; therefore, MeadWestvaco is estopped to raise the statute of limitations as a defense. The Circuit Court did not cite any evidence in the actual record in support of these spurious findings and MeadWestvaco respectfully contends that it never made any false representation to Hoff regarding his hearing loss, which was well known to Hoff for many years prior to his retirement. As discussed herein, above, the Commission found that it was

> *"clear that [Hoff] was not only aware of problems with his hearing at the time of his retirement in October 2000, but he*

was also aware that his audiograms showed a hearing loss." (R. p.31).[6]

Of course, Hoff's estoppel argument is wholly inconsistent with his repeated statements in legal pleadings that he gave actual notice of his hearing loss claim on October 4, 2000.

Furthermore, Hoff never raised an estoppel argument to the Commission and failed to properly raise the estoppel argument in his brief to the Circuit Court; therefore, it was not properly preserved for appeal. Houck v. State Farm Fire & Cas. Ins. Co.,366 S.C. 7, 620 S.E.2d 326 (2005) (observing an argument is effectively abandoned if the appellant's brief treats it in a conclusory manner). None of Hoff's Forms 50 raise an estoppel argument and the issue was not raised on his pre-hearing brief. Furthermore, Hoff's brief to the Circuit Court raises only a single argument:

> *"The Commissioner's findings of fact and conclusions of law Hoff did not provide timely notice of his accident, did not timely file his claim and did not sustain a compensable hearing loss as a result of his employment with MeadWestvaco* ***is not supported by substantial evidence*** *and must be reversed."* (emphasis added). (A. p.5)

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[6] Although the Court may conduct a *de novo* review of the evidence on equitable issues, MeadWestvaco respectfully contends that the greater weight of the evidence supports a finding that Hoff was never induced by false representations to believe that his hearing was normal.

While Hoff did include two conclusory statements in the penultimate paragraph of his brief to the Circuit Court, MeadWestvaco respectfully submits that this is insufficient to preserve the issue for appellate review and the estoppel issue should not have been addressed in the Circuit Court's Order. *See* D.R. Horton, Inc. v. Wescott Land Co., LLC, 398 S.C. 528, 730 S.E.2d 340 (Ct. App. 2012) (holding that an argument was abandoned on appeal when the brief contained only a conclusory argument, despite citation of authority).

Unlike the Circuit Court, the Commission cited actual evidence in the record to support its finding, including the Hearing Transcript (R. p.265), which contains the following testimony at lines 16 through 19:

> *Q. Well, what did you think? Were you having problems with our hearing? Because you testified that you were having hearing problems in the 1970s.*
>
> *A. Well, I thought that I was.*

MeadWestvaco respectfully contends that this testimony weighs against a finding that Hoff believed his hearing was normal until October 2003.

Similarly, the Commission noted that Hoff "first saw a doctor about his problems with his hearing in 1980" and that "[t]hroughout the 1980s [Hoff] complained of problems with his hearing at his annual audiogram," the APA submissions contained in the Record at pages 95 and 96. In the Record at page 95 is Hoff's serial audiogram from 1989 to 1994, upon which Hoff noted "fluctuating hearing loss" and occasional ringing in his ears. In the Record at page 96 is Hoff's serial audiogram from 1981 to 1989, upon which Hoff noted

that he had difficulty hearing and occasional ringing in his ears. Hoff also reported that he had seen an ear specialist in Walterboro in 1980 and had his hearing tested. (R. p.96). In 1997, Hoff completed a medical history questionnaire and checked "yes" in response to the question of whether he had "defective hearing. " (R. p.107). At the time of his retirement in October 2000, Hoff underwent a final audiogram at work, which showed a "significant threshold shift" in his right ear, which was "[d]iscussed at time of test" and the plant nurse recommended retesting in 6 months." (R. p.103). MeadWestvaco respectfully contends that these records also weigh against a finding that Hoff believed his hearing was normal until October 2003; however, the Circuit Court fails to even mention them.

In fact, even Dr. Kitch, who evaluated Hoff at the request of his attorneys, 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 MeadWestvaco for approximately 44 years, until 2000...****He is aware that he had a hearing loss noted on plant audiograms at that time.****"* (R. p.90) (emphasis added).

Perhaps most importantly, Hoff repeatedly stated in legal pleadings that he gave actual, verbal notice of his hearing loss claim to his supervisor on October 4, 2000. (R. pp.61, 68, 72). For the Circuit Court to find that Hoff was unaware that he had a hearing problem or hearing loss until October

2003 requires a complete disregard of Hoff's medical records, Hoff's testimony, the statements of Hoff's own expert, and Hoff's own legal pleadings.

While Hoff testified that it was his understanding, at an unspecified point in time, that his hearing "was normal and still holding," this testimony is contrary to his medical records and his testimony that he knew he was having hearing problems as early as the 1970s, as well as his repeated statement in legal pleadings that he gave actual notice of his hearing loss claim on October 4, 2000. Furthermore, there is simply no evidence in the record that anyone at MeadWestvaco ever purposely misled Hoff with the intention that he would not file a workers' compensation claim, or that MeadWestvaco "prevented Hoff from learning the true nature of his hearing loss and filing a claim for workers' compensation benefits." For the Circuit Court to engage in such speculation is simply untenable and without any evidentiary support. *See* Tims v. J.D. Kitts Const., 393 S.C. 496, 503, 713 S.E.2d 340, 343 (Ct. App.2011) (stating that "a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it") (internal citations omitted); *see also* Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E.2d 372 (1942) (noting that speculation is "not favored in equity").

As such, MeadWestvaco respectfully requests that the Court of Appeals reverse the Circuit Court and enter its own finding and conclusion that MeadWestvaco should not be estopped from raising the statute of limitations in this claim. Instead, the Court of Appeals should conclude Hoff is bound by

his own statement that he gave actual notice of a hearing loss claim on October 4, 2000 and cannot now be heard to complain, in advance of an equitable argument, that he was unaware he had a claim until some three years later. *See* Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct.App.2004) (stating that "'[h]e who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" (quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945)).

III. The Circuit Court erred as a matter of law in reinstating the award of the Hearing Commissioner and in impliedly finding that Hoff sustained a compensable injury and is entitled to medical and compensation benefits.

The final Decision and Order of the Workers' Compensation Commission does not address whether Hoff sustained any injury by accident arising out of or in the course of his employment under S.C. Code Ann. § 42-1-160 or whether Hoff is entitled to any benefits under the Workers' Compensation Act because the Commission's conclusion that the claim was barred by S.C. Code Ann. § 42-15-40 was dispositive. However, after reversing the Commission on the statute of limitations, the Circuit Court took the liberty of finding that Hoff was "entitled to an award for his permanent partial hearing loss, medical treatment, and hearing aids." (R. p.43).

MeadWestvaco respectfully submits that, even if Hoff's claim is not barred by the statute of limitations, it was beyond the scope of the Circuit Court's authority to award benefits for a claim that the Commission has not even found to be compensable. *See* Lawson v. Hanson Brick America, Inc., 393 S.C. 87, 710 S.E.2d 711, 713 (Ct. App. 2011) (holding that it is improper for the Circuit Court to weigh the evidence and engage in fact finding).

Despite the Circuit Court's suggestions to the contrary, the evidence in this case is not "undisputed" and the questions of whether Hoff sustained an injury by accident arising out of and in the course of his employment and whether and to what extent he may be entitled to medical or compensation benefits are not questions of law for a reviewing court to determine. *See* Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct.App.1995) (holding that that only when the evidence is susceptible of but one reasonable inference does the question become a matter of law). For example, Hoff admits that he was required to wear hearing protection at all times at work since 1970. (R. p.271 line 21 through p.272 line 10; R. p.274 lines 9–25). He further admitted that the hearing protection used at work was so good, he could not even understand a face-to-face conversation with a co-worker while wearing his hearing protection. (R. p.273, lines 18—24).

In addition, Hoff is an insulin-dependent diabetic and "30% of individuals with diabetes develop high frequency hearing loss of the type present in Mr. Hoff." (R. p.110). Hoff is also hunter and has been shooting a 30.06 rifle, without hearing protection, for most of his life and continued to do so after his retirement in 2000. (R. p.267, line 23 through p.269, line 20;

R. p.110, p.273 lines 2—5; He admits that the only explosions that have ever occurred near his ears are those from the blast his rifle and his shotgun. (R. p.269, line 25 through p.270 line 2). Of course, most medical experts agree that "use of these guns can produce a significant amount of high frequency hearing loss." (R. p. 110).

At the time Hoff retired in October 2000, Hoff had a 16.25% binaural hearing loss based on an audiogram that was discussed with him at the time it was administered. (R. p.116). After his retirement, Hoff's hearing problems increased significantly and by 2003, his hearing loss had nearly doubled to 30%. (R. p.117). According to Dr. Joseph Sataloff, most of Hoff's hearing loss occurred after 1980, because

> "In 1981 it was 3.8%. This is the maximum amount of hearing loss that could be attributed to any occupational etiology. His additional hearing loss could be due to presbyacusis 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.**" (R. p.111) (emphasis added).

Despite this evidence, the Circuit Court impliedly found, not only that Hoff sustained a compensable injury, but that he was entitled to medical treatment, hearing aids, and an award of benefits for 30% loss of hearing. MeadWestvaco respectfully submits that these implied findings should be reversed as a matter of law.

Furthermore, Hoff has not had his hearing tested since 2003; however, he admits that his hearing has gotten even worse since that time, despite the fact he has not been working. (R. p.260 line 25 through p.261 line 5). According to the un-contradicted 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." (R. pp.110–111; p.112). Even Dr. Russell Kitch, who evaluated Hoff on a single occasion in 2003 at the request of the Steinberg Law Firm, 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." (R. p.93). However, between 2000 and 2003, Hoff's hearing impairment nearly doubled, going from 16.25% to 30%. (R. pp.116–117). Therefore, even if the fact finder – the Commission – finds that Hoff sustained a compensable injury, the question of whether and what extent he is entitled to medical or compensation benefits remains in dispute and will require careful weighing of the evidence. Of course, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

The record also contains the following opinion of Dr. Robert Sataloff:

> "It is my opinion to a reasonable degree of medical certainty that Mr., Virgil A. Hoff has severe bilateral sensorineural hearing

loss that could not have been caused by his occupational noise exposure." (R. p.113).

Given the opinion of Dr. Robert Sataloff, as well as the other evidence in the record, the evidence on the question of whether Hoff sustained any injury by accident arising out of or in the course of his employment and the question of whether or to what extent he is entitled to medical or compensation benefits under the Act was simply not one to be decided by the Circuit Court on Appeal. "[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." Pack v. State Dept. of Transp. 381 S.C. 526, 534, 673 S.E.2d 461, 465 (Ct. App. 2009) (citing Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995)).

Nevertheless, the Circuit Court ordered that the Hearing Commissioner's award be "reinstated," despite the fact that it was reversed and vacated by the Commission's Appellate Panel. "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, 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)). Therefore, MeadWestvaco respectfully requests that the Court of Appeals reverse the Circuit Court's findings of fact, both explicit and implicit.

Conclusion

Based on the arguments set forth herein above, the Appellant, MeadWestvaco, respectfully requests that the Order of the Circuit Court be reversed in its entirety. MeadWestvaco further requests that the final Decision and Order of the South Carolina Workers' Compensation Commission be reinstated and affirmed by this honorable Court, in accordance with the Administrative Procedures Act and S.C. Code Ann. § 42-15-40.

Respectfully submitted,

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Certificate of Counsel

The undersigned hereby certifies that the Final Brief of the Appellant and the Final Reply Brief of the Appellant comply with Rule 211, SCACR and Supreme Court Order **2014-04-15-02**, dated April 15, 2014, requiring redaction of personal data identifiers.

November 25, 2015

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THE STATE OF SOUTH CAROLINA
In The 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.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Respondent, Virgil A. Hoff, was served with a bound copy of each of the enclosed Final Brief of the Appellant and the Final Reply Brief of the Appellant, this 25th day of November 2015 by depositing the same in the United States Mail, postage prepaid addressed to each of his counsel of record as follows:

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