THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

File No. WCC 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.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

Hoff filed his WCC Form 50 on October 22, 2003 asserting he sustained injuries to his skin, ears, and lungs as a result of his work as a plant mechanic on or about October 4, 2000, the last date of his employment. The Defendants filed a WCC Form 51 denying the claim and asserting the claim was barred by failure to give notice under Section 42-15-20 and failure to file his claim under Section 42-15-40. By his Form 50 dated June 9, 2009, Hoff requested a hearing before the S.C. Workers' Compensation Commission on or about October 4, 2000. By their Form 51 dated June 18, 2009, Defendants asserted numerous defenses, including all affirmative defenses under the Act.

At his hearing on August 27, 2009, Hoff presented the opinions of Dr. Russell Kitch of Lowcountry ENT, P.A. Dr. Kitch's report dated October 14, 2003 was the first time a physician associated Hoff's hearing loss with his employment at Westvaco. Dr. Kitch's office note states under the Impression/Plan section "Noise induced pattern sensorineural hearing loss, by patient's history and current findings, entirely consistent with industrial noise exposure sustained at Westvaco between 1958 and 2000 as the etiology of the loss" (R. p. 91, lines 13-15)

The Defendants offered the opinions of Dr. Joseph Sataloff of Pennsylvania who, after receiving Hoff's serial audiograms from employer's plant, work history, medical reports, and Hoff's deposition, opined Hoff sustained some percentage of hearing loss as a result of his employment.

However, Dr. Sataloff stated Hoff's aging, hereditary factors, genetic, and diabetes could have contributed to his hearing loss. Defendants also submitted the report of Dr. Robert K. Sataloff, son of Dr. Joseph Sataloff, dated July 13, 2009 in which he opined Hoff's severe bilateral sensorineural hearing loss could not have been caused by his occupational noise exposure while employed with Westvaco.

Based on the evidentiary submissions of the parties and testimony of Claimant at the single Commissioner hearing on August 27, 2009, the Commission issued its Order dated October 29, 2009 finding Hoff's testimony was "very credible" and that he sustained a compensable injury by accident to his right and left ears as a result of binaural hearing disability caused by excessive noise exposure on the job. (R. p.12, line 15) In addition, Westvaco was held responsible for Hoff's medical treatment to be provided by Dr. Russell Kitch including hearing aids, if recommended by Dr. Kitch. The single Commissioner also provided Hoff with an award of permanent disability due to his hearing loss of 49.5 weeks at his $507.34 compensation rate.

The Defendants' timely appealed the Order of the single Commissioner by filing a Form 30 Request for Commission Review, *de novo,* on November 12, 2009 citing nineteen grounds for appeal. Hoff filed a Memorandum of Law arguing his claim was timely filed and reported to Westvaco following Dr. Kitch's diagnosis of work related hearing loss. He also argued Westvaco was estopped from asserting a notice or statute of limitations defense and that his

hearing loss was causally related to his employment.

The Appellate Panel of South Carolina Workers' Compensation Commission issued its Order dated July 2, 2010 making seven Findings of Fact and five Conclusions of Law focusing exclusively on Hoff having failed to timely file his claim within the two years date of Claimant's last day of employment in October of 2000 when he retired. (R. pp. 19-22)

Hoff timely appealed the Order of the Appellate Panel to the Circuit Court on July 27, 2010 alleging grounds and exception for appeal which collectively argued the Commission erred in failing to find Defendants were estopped from asserting the statute of limitations under Section 42-1-40 as a defense and the Commission erred in applying the statute of limitations holding in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2003) rather than holding the statute of limitations for filing Hoff's claim did not begin until he knew or should have known he sustained a compensable hearing loss. Defendants did not cross-petition for review of the Commission's Order which left intact the single Commissioner's findings regarding causation of Hoff's hearing loss.

Hoff's appeal was heard by the Circuit Court who reversed the Appellant Panel Order on January 15, 2013 finding it was affected by an error of law and remanded the claim to the Commission for further proceedings consistent with his findings. Westvaco filed a notice of appeal to the Court of Appeals which appeal was dismissed as interlocutory.

On remand, the Appellant Panel applied Judge Nicholson's Circuit Court rulings of law to the findings of fact and reinstated the decision of the single Commissioner by Decision and Order of the Appellate Panel dated October 11, 2013 (R. pp. 47-54).

Westvaco filed a Petition for Judicial Review from the remand decision of the Appellant Panel on November 11, 2013 requesting the Circuit Court reverse findings of fact not previously appealed by Defendants under Section 42-17-60 and requesting one Circuit Court judge reverse the prior rulings of law made by another Circuit Court judge. By the Order dated April 7, 2015, the Circuit Court affirmed the Order of the Commission dated October 11, 2013. Defendants, by their appeal to this Court continue to argue facts not preserved on appeal and argue the Circuit Court erred in making its own findings of fact on appeal regarding the statute of limitations and estoppel.

ARGUMENTS

I. WESTVACO IS BARRED FROM ARGUING "CAUSATION" OF HOFF'S HEARING LOSS DUE TO THE LAW OF THE CASE.

Hoff's claim was originally decided by single Commissioner Williams on October 29, 2009 who found both Hoff's hearing loss causally related to his 42 years of employment at Westvaco and he had sustained a 30% binaural hearing disability directly related to his work place noise exposure at Westvaco. Commissioner Williams required Westvaco to provide hearing aids for Hoff as recommended by Dr. Russell Kitch. Westvaco appealed the Order of

Commissioner Williams to the Appellate Panel, challenging both his findings of causation and rulings to the applicable statute of limitations for filing a claim. The Appellate Panel reversed Commissioner Williams' Order exclusively ruling the claim was time barred but leaving intact the causation findings of Commissioner Williams. Section 42-17-60 governs the conclusiveness of awards and provides:

> Award of the Commission, as provided in Section 42-17-40, if not reviewed in due time, ... is binding as to all questions of fact. However, either party to the dispute, within 30 days from the date of award or within 30 days after receipt of notice to be sent by registered mail of the award, but not after, whichever is the longest, may appeal the decision of the Commission to the [Circuit Court]. 1

The decision of the Appellate Panel ruling Hoff's claim was time barred was a final decision of the Commission.

Within the thirty (30) day period, Hoff petitioned for a Judicial Review on the ground that the Appellate Panel's ruling on the statute of limitation issue was affected by an error of law. Westvaco choose not to cross petition for review the ground of causation that the Appellate Panel failed to reverse or address in its Findings of Fact, Conclusions of Law, or Order of Commissioner Williams. Thus, Hoff's hearing loss was directly and causally related to his employment with Westvaco became the "law of the case." See Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005); Green v. City of

1 2007 amendment of the Act, substituted "Court of Appeals" for Court of Common Pleas of the county in which the alleged accident happened, or in which the employer resides or has his principle place of business...

Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993). (Findings of fact not within the scope of an exception in a prior appeal become the law of the case, Brunson at p.872).

After receiving the case on remand from the Judge Nicholson and reversing the Appellate Panel's ruling on the statute of limitations, the 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. As the Appellate Panel ruled, Hoff contends this court does not have jurisdiction to review the findings of fact which Westvaco did not appeal. The Order of the Appellate Panel dated July 2, 2010 did not address Commissioner Williams' findings of fact and conclusions of law regarding causation which became the law of the case (R. pp.18-35).

II. HOFF'S CLAIM WAS TIMELY FILED WITHIN TWO YEARS OF WHEN HE KNEW OR SHOULD HAVE KNOWN OF A COMPENSABLE CLAIM.

Hoff's hearing loss claim was timely filed within two years of the date he knew or should have known of his compensable hearing loss.

The decision of the single Commissioner may be reversed if substantial rights of the Claimant have been prejudiced because the administrative findings are clearly erroneous in view of the substantial evidence on the record as a whole. Mullinax v. Winn-Dixie Stores, Inc. 318 S.C. 431, 458 S.E.2d 76, rehearing denied (1995), appealed dismissed (S.C.Ct.App. 1995). In an appeal

from the S.C. Workers' Compensation Commission, the appeal court may not substitute its judgement of the Commission as to the weight of the evidence on questions of fact, but may reverse if the decision is effected by error of law. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599, rehearing denied, cert. granted in part, aff'd as modified (S.C.Ct. App. 1999).

When the Commission's findings give rise to the one reasonable inference, the question becomes one of law which the courts may review. Kinsey v. Champion An. Service Center, 268 S.C. 177, 232 S.E.2d 720 (SC 1977). In the present case, Hoff has filed two WCC Form 50s alleging he sustained a loss of hearing and injury to his ears as a result of either noise or environmental exposure while employed with Westvaco. Hoff has consistently contended his last date of employment was October 4, 2000. By his Form 58 Pre-Hearing Brief dated August 10, 2009, Hoff contended he sustained binaural hearing loss on October 4, 2000 (ROA #8). He relied upon the opinions of Dr. Russell Kitch supporting he sustained a compensable injury arising out of and in the course and scope of his employment.

Hoff contends prior to October 14, 2003, it would have been impossible for him to file a claim for compensable hearing loss because he had not been diagnosed with an industrial noise exposure hearing loss. After obtaining a diagnosis of industrial noise related hearing loss caused directly by his employment at Westvaco between 1958 and 2000 (42 years), Hoff timely filed his claim for benefits with his WCC Form 50 dated October 22, 2003 (R. p. 61).

There is no factual dispute that Hoff's last date of employment was October 4, 2000. The question this Court must determine is whether the statute of limitations for filing a claim in keeping with Section 42-15-40 begins on October 4, 2000 or the date Hoff was first diagnosed with a work related hearing loss on October 14, 2003. Hoff argues that prior to October 14, 2003 he was unaware of any causal relationship between his hearing loss and 42 years of employment with Westvaco, neither the ninety (90) day notice requirement under Section 42-15-20 or the two years statute of limitations, Section 42-15-40, began to run until Hoff became disabled and could have discovered with reasonable diligence his hearing loss was compensable. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369, (S.C.Ct.App. 2005); Mauldin v Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992).

The undisputed evidence in the record establishes the employer began administering hearing tests to Claimant and other employees as early as 1981. Presumably, the testing began because of the risk of hearing loss to employees and the government required audiograms, according to Defendants' expert (R. p.110). Even though the opinions of Hoff's expert Dr. Kitch and Westvaco's expert Dr. Joseph Sataloff differ as to the extent of any workplace noise induced hearing loss, both agree Hoff sustained substantial hearing loss and Dr. Sataloff

agreed some of Hoff's hearing loss is related to his employment at Westvaco.[2]

Hoff, whose testimony was found to be "very credible" by the Commissioner [3], testified that while he was aware his hearing was declining during his 42 years at Westvaco, he was never advised by Westvaco that his hearing loss pattern fitted that of an industrial noise induced hearing loss following his hearing tests by Westvaco from 1981 to 2000. Rather, he testified when he inquired about the hearing loss results, Westvaco failed to reveal this critical knowledge to him so he could take the appropriate action to protect the statute of limitations and file a claim for hearing loss. Hoff's uncontradicted testimony was as follows:

Q. Now, were you provided any sort of hearing test while you worked at Westvaco?

A. Yes.

Q. And who actually administered those tests?

A. The nurses at first aid.

Q. Would you ever meet with them or review the test results of those tests?

A. Right.

Q. When would you do that in relationship to when the test was administered?

---

2 Sataloff report of 4/21/04 "most of his [Hoff] compensable hearing loss developed after 1980 in 1981 it was 3.8% this is the maximum amount of hearing loss that could be attributed to any occupational etiology." (ROA #10, p.24)

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hearing tests that his hearing was "normal and still holding" (R. p.260, lines 17-18).

On the same day the Court issued its opinion in Schurlknight, the Court also issued its claim in Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785, 787 (2002), a repetitive trauma injury claim, like hearing loss, involving a carpal tunnel injury. The Court held carpal tunnel injuries are compensable as an injury by accident if the injury is "unexpected." In the present case as in Pee, Hoff's hearing loss was caused by his work activities. The Court in Pee held the time for filing a repetitive trauma claim does not begin to run until the Claimant he becomes disabled and could have discovered with reasonable diligence his condition was compensable (see Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369, (Ct.App. 2005); Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)). Hoff did not learn his hearing loss was compensable until October 14, 2003 after which he filed his claim for hearing loss on October 22, 2003 notifying Westvaco he sustained an injury by accident on his last date of employment. Because Hoff timely filed his claim within ninety (90) days of discovering his accident and within two years of becoming disabled and discovering his claim was compensable, his claim is not barred by Section 42-15-40 or Section 42-15-20.

III. THE DEFENDANTS ARE ESTOPPED FROM ASSERTING HOFF'S CLAIM WAS UNTIMELY BECAUSE WESTVACO MISLED HOFF REGARDING THE CAUSE OF HIS INJURY.

Hoff in his *de novo* appeal to the Appellate Panel, submitted a Memorandum of Law timely raising the issue of estoppel. The equitable doctrine of estoppel applies to workers' compensation claims. (Bilton v. Best Western Royal Motor Lodge, 382 S.C. 634, 321 S.E.2d 63 (Ct.App. 1984) and Russell v. Driver's Leasing Service, Inc., 282 S.C. 358, 318 S.E.2d 579 (Ct.App. 1984)). Hoff argued to the Appellate Panel that contrary to what the employer's nurses told Hoff, his audiology test results began to show "compensable" hearing loss around 1980. The failure of Westvaco to advise Hoff of the true results of his audiology testing estopped Westvaco from arguing Hoff failed to timely file a claim for hearing loss when it was Westvaco who incorrectly told Hoff his hearing was "normal and still holding".

Because the Appellate Panel failed to address Hoff's estoppel argument, he raised the estoppel argument again before the Circuit Court. The Circuit Court agreed with Hoff and found Westvaco concealed the results of Hoff's audiology testing which prevented Hoff from learning the true nature of his hearing loss and filing a claim for workers' compensation benefits (R. p.43, lines 15-18).

The uncontradicted evidence in the record established that as early as 1980 Hoff's hearing test provided by Westvaco showed he sustained work related noise induced hearing loss. Hoff's testimony was that after undergoing the annual hearing tests, Hoff would ask the plant nurse the result of the testing. He testified he was told after each hearing test that his hearing was "normal

and still holding." The results of his hearing tests showed otherwise. Hoff's hearing was not "normal" nor was it "still holding." In fact, the test results showed a steady decline in Hoff's hearing which according to Dr. Kitch was "entirely consistent with industrial noise exposure sustained at Westvaco between 1958 and 2000..."

The elements of estoppel with regards to the party asserting estoppel are:

1. Lack of knowledge in the means of knowledge of the truth as to the facts in question.
2. Reliance upon the conduct of the party estopped.
3. Action based thereon of such character as to change his position prejudicially.

As to the party being estopped, the essential elements are:

1. Conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
2. Intention, or at least expectation, that such conduct shall be acted upon by the other party;
3. Knowledge, actual or constructive, of the real facts.

Langdale v. Harris Carpets, 395 S.C 194, 204, 205, 717 S.E.2d 80,85 (Ct.App. 2011) To be entitled to claim equitable estoppel, the party invoking the doctrine must show he was misled to his detriment. S.C. State Hwy. Dept. v. Metts, 270

S.C. 73, 240 S.E.2d 816 (1978). Hoff lacked the knowledge his hearing tests showed his hearing loss was related to his noise exposure at Westvaco. There is no evidence he knew or was given the test results. Hoff relied upon the representation of Westvaco and was prejudiced to his detriment by not being able to bring a claim for hearing loss prior to independently obtaining a hearing test from Dr. Kitch.

Westvaco's conduct in failing to tell Hoff the truth of his hearing test results constitutes a false representation or concealment of material facts. Westvaco's misrepresentation of Hoff's hearing test results caused Hoff not bring a worker's compensation claim.

Finally, the record shows Westvaco had actual knowledge of the true facts of Hoff's hearing loss test as reflected by the reports of Dr. Russell Kitch whose analysis showed Westvaco had the knowledge Hoff's hearing loss fit the classic pattern of industrial noise induced hearing loss yet failed to reveal that information to Hoff (R. p.43, lines 15-18).

Having established all of the elements of equitable estoppel, Westvaco should not be allowed to benefit from their misrepresentations to Hoff regarding the nature, extent, and cause of his hearing loss. As stated by the S.C. Supreme Court, "The principle of estoppel in equity stands upon the very foundations of right and fair dealing. It considers and weights the conduct of men and their dealings with each other, and gives that effect...to their actions which...justice dictate[s]." Russell v. Driver's Leasing Service, Inc., 282 S.C. 358, 318 S.E.2d

579 (Ct.App. 1984). Estoppel arises when a person, in reliance on what another has done or said, changes position to his detriment and the other person then attempts to repudiate or evade the consequences of his action or speech. Russell at 581.

CONCLUSION

Based on the foregoing, Hoff contends the Commission's findings on the issue of causation of Hoff's hearing loss were not appealed and are the law of the case. This Court should affirm the Order of the single Commissioner establishing his claim was timely filed within ninety (90) days of his accident and within two years of the date Hoff knew or should have known of his compensable hearing loss. This Court should also affirm the Circuit Court's ruling the Defendants are estopped from asserting the statute of limitations or notice defenses.

Respectfully submitted,

Dated: 11-23-2015 By: 

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on Appellant by depositing a copy of it in the US Mail, postage prepaid on November 24 2015, addressed to their attorney of record, Kirsten Barr, Esq. and Geoffrey Wendt, Est. PO Box 2167, Mt. Pleasant, SC 29465.

November 25 2015

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