ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

22306

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.

APPENDIX TO RECORD ON APPEAL

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STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	**COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT** **CASE NO.: 2010-CP-10-06041**
VIRGIL HOFF, Employee/Claimant, Appellant, vs. **MEAD WESTVACO**, Self-Insured Employer/Defendant, Respondents.	**APPELLANT'S BRIEF**

FACTS

The Claimant, Virgil Hoff, hereinafter Hoff, was employed by the Respondent, Mead Westvaco, hereafter Westvaco, for forty-two (42). He continuously worked for Westvaco since 1958. During his employment, he was exposed to significant industrial noises. He worked until the early 1980's without being provided with any hearing protection of any kind. In the early 1980's testing at Westvaco indicated noise levels requiring the use of hearing protection under the OSHA standards. Hoff was provided with hearing "plugs" but testified they were ineffective in eliminating the extremely loud noise caused by the industrial equipment he was exposed to as a plant mechanic. Hoff's exposure to loud noises continued until he retired in October of 2000.

Over the course of his employment Hoff was given periodic hearing tests by Westvaco. The un-contradicted testimony at the hearing came from Hoff who testified 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?

A. Once the test was run, then later they would call you back in the room and review them with you.

Q. And what was your understanding of your tests as they progressed through- - -

A. My understanding was my hearing was normal and still holding.

Q. Ok. Were you ever advised by anybody at Westvaco that you had any hearing loss related to your employment at Westvaco?

A. No.

(Tr.p.25:3-22). When Hoff would meet with Westvaco's nurses to discuss his test results, he testified they would tell him his was "normal and holding."

Hoff was not told he had a compensable hearing loss until he was examined and tested by his private ENT specialist, Dr. Russell Kitch. Dr. Kitch reviewed Hoff's audiograms performed at Westvaco as well as the audiogram conducted by his office and concluded Hoff suffered high frequency, sensorineural hearing loss in a pattern typical of noise induced damage attributable to noise exposure at Westvaco. (APA p. 6). By October of 2000, when Hoff retired, his audiogram already reflected a 16.25%

binaural hearing impairment computed under the applicable WCC regulation. In 2003, when he was tested by Dr. Kitch his audiogram showed a 30% hearing impairment under the regulation. Dr. Kitch opined "[a]s an additional point of clarification, Mr. Hoff was forty-eight years old when he had the audiogram obtained at Westvaco in 1989 with findings as noted showed similar severity of loss to the current studies. This negates the contribution of age related hearing loss as a factor in his impairment rating." Based on the audiogram from 2003, Dr. Kitch assigned a 30% binaural hearing impairment as a direct result of Hoff's hearing loss which he stated showed a "classic pattern typical of noise induced hearing loss." (APA p.6) (Emphasis added).

Westvaco's expert, Dr. Joseph Sataloff, neither examined, tested, nor treated Hoff. Dr. Joseph Sataloff, speculates that because Hoff has mild, diet controlled diabetes his hearing loss must be related to his diabetes because "30% of individuals with diabetes develop high frequency hearing loss." (APA p. 23). Even Dr. Joseph Sataloff concedes a portion of Hoff's hearing loss "could be attributable to...occupational etiology." Dr. Sataloff speculates about a myriad of other possible causes of Hoff's hearing loss but such speculation does not meet the standard for medical opinion testimony and should be given no weight.

STATEMENT OF THE CASE

Hoff filed a WCC Form 50, Request for a Hearing, on October 22, 2003, alleging he sustained injuries by accident to his ears on or about October 4, 2000, his last day of employment in the Westvaco plant. Based upon the testimony of Hoff and the APA and evidentiary submissions of the parties, the Hearing Commissioner issued his Decision and Order dated October 29, 2009, finding Hoff's hearing loss compensable under the

Act, awarding Hoff 49.5 weeks of compensation for his permanent 30% hearing loss disability, and ordered Westvaco to provide hearing aides for Hoff.

Following the filing of the Hearing Commissioner's Decision and Award, Westvaco filed a WCC Form No. 30, Request for Review. Hoff did not file an appeal. Westvaco alleged Hearing Commissioner erred by: (1) finding Hoff's claim was timely filed under Section 42-15-20 and Section 42-15-40; (2) failing to fine Hoff's hearing loss is not related to his employment; (3) by failing to find Hoff was not an employee of Mead Westvaco at the time of his accident; and (4) by failing to find there was no evidence supporting Hoff's entitlement to hearing aids. By its Decision and Order dated July 2, 2010, the Appellate Panel of the South Carolina Workers' Compensation Commission reversed the Hearing Commissioner and held that under Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2002), the statute of limitations applicable to the appellant filing a claim for workers' compensation benefits for his hearing loss began to run on the last day of his exposure to noise which occurred in October 2000. The Commission contends that because Hoff's WCC Form No. 50 Claim for Benefits was not filed until 2003, his claim fails.

Following the Decision and Order of the Appellate Panel, Hoff timely filed this request for review by the Circuit Court on July 27, 2010.

STANDARD OF REVIEW

The Appellate Court shall not substitute its judgment for that of the Workers' Compensation Commission as to the weight of the evidence on questions of fact. A judicial review of a Workers' Compensation decision is governed by the substantial evidence provision in the Administrative Procedures Act. When factual findings are

supported by substantial evidence, the Commission's conclusions must be affirmed. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the Commission reached to justify its action. Howell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987).

However, the decision of the Workers' Compensation Commission 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), appeal dismissed (S.C. Ct. App. 1995). Additionally, in an appeal from Workers' Compensation 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 may reverse the decision if affected 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).

LEGAL ARGUMENT

I. 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 WESTVACO IS NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE AND MUST BE REVERSED.

Hoff, by his WCC Form No. 50, dated October 22, 2003, asserted as a result of noise and environmental exposure, he sustained injuries by accident to his skin, ears and lungs on or about October 4, 2000, the last day he worked in the Defendant's plant. Hoff also claimed the "discovery rule" applied to the filing of his clam for benefits under

the Act. See Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992). By his WCC Form No. 50, Requesting a Hearing, dated June 9, 2009, Hoff again asserted he sustained hearing loss caused by an accident occurring on October 4, 2000. By his WCC Form No. 58, Pre-Hearing Brief, dated July 27, 2009, Hoff again, for the third time, asserted he sustained a compensable hearing loss by accident on October 4, 2000 due to noise and industrial exposure which occurred during the course of his employment with Westvaco.

Westvaco by their WCC Form No. 51, dated November 10, 2003, denied Hoff's claim. They contended his claim was barred by various defenses including South Carolina Code Annotated section 42-15-20 and section 42-15-40 (1976). Westvaco's Amended WCC Form No. 51, dated June 18, 2009, continued to deny Hoff's claim as compensable and raised various defenses, including those applicable to occupational disease claims. Westvaco's WCC Form No. 58, pre-hearing brief, claims for the first and only time in any pleading filed by either party, Hoff's accident date was "October 24, 2000 (alleged)", rather than the October 4, 2000 date claimed by Hoff. Hoff has consistently asserted his date of accident occurred on October 4, 2000, his last date of employment with the Employer, Mead Westvaco.

In addition to the submission of Hoff's APA evidentiary documents Hoff also submitted into the record a Memorandum of Law. In his memorandum, Hoff argued that although his last injurious exposure to excessive noise at Westvaco occurred in October of 2000, he did not become aware of his compensable injury until the diagnosis of the causal relationship between his employment at Westvaco and his hearing loss was made by Dr. Russell Kitch in his report of October 14, 2003. Hoff contends that

because he was unaware of the causal relationship between his hearing loss injury and his employment, neither the ninety (90) day notice requirement (section 42-15-20) or the two (2) year statute of limitations (section 42-15-40), began until Hoff became disabled and could have discovered with reasonable diligence his condition was compensable. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (S.C. Ct. App. 2005); Mauldin, 416 S.E.2d 639 (S.C. 1992).

In Mauldin, the claimant asserted she sustained an injury by accident on January 2, 1985, when she injured her left knee. Mauldin at 20. After reporting the accident to her supervisor, she sought immediate medical treatment at a local hospital. Id. The emergency room physician diagnosed her injury as a "medial collateral sprain". Id. The claim was thereafter handled as a "medical only" claim. Id. No loss time from work resulted from her accident. Id. During the two years following her accident, Mauldin saw her family physician for ongoing knee symptoms and was diagnosed with arthritis. Id. On November 1, 1987, she was diagnosed by an orthopedic surgeon with a "torn medial meniscus" and surgery was ordered. Id.

Mauldin did not file a WCC Form 50 claiming benefits under the Act until December 30, 1987. Id. In addressing the application of section 42-15-40, to Mauldin's claim, the court ruled that because the true nature of her knee condition was misdiagnosed the "discovery rule" was applicable to her claim and that November 1, 1987 was when Mauldin "discovered or reasonably should have discovered" her knee symptoms resulted from her January 2, 1985 accident. Id. at 21. Thus, her claim filed on December 30, 1987 was timely filed. Id. at 22.

Just as the court in Mauldin reasoned, it is illogical to presume Hoff would be required to file a claim with the Commission in keeping with section 42-15-40 unless he first was aware he had a compensable injury. A claimant is not required to file a claim within two (2) years of the date of his accident in compliance with section 42-15-40, until the claimant discovers the causal relationship between his injury and his employment. Mauldin, 416 S.E.2d 639. Likewise it is illogical to presume Hoff would be required to provide notice of an accident to the employer until he is aware an accident has occurred.

In Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785, 787 (2002), our court was charged with determining whether carpal tunnel injuries met the definition of injury by accident. The court noted that carpal tunnel injury occurs over time due to the claimant's exposure to repetitive trauma. The Pee court stated, "[a]s we more recently stated, "in determining whether something constitutes an injury by accident, the focus is not on some specific event, but rather on the injury itself." Id. (citing Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991)). Further, an injury is unexpected, bringing it within the category of accident, if the *worker* did not intend or expect it would result from what he was doing. Citing Colvin v. E.I. Du Pont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955). "Therefore, if an injury is unexpected from a workers' point of view, it qualifies as an injury by accident." Pee at 787. (Emphasis added). Pee clearly established recognition in South Carolina that injuries resulting from repetitive exposure, constitute an injury by accident where the result is unexpected. Thus a hearing loss claim, like a carpal tunnel claim, may be deemed compensable as either an injury by accident or as a repetitive trauma claim.

This is similar to the way an occupational disease claim is treated under the Act. Under section 42-11-110 of the Act, a claimant may elect to bring his claim under the occupational disease section of the Act or as an injury by accident. With regard to repetitive trauma injuries they may also be litigated as an injury by accident or as repetitive trauma claims. However, the choice of law under which the claimant proceeds is elected by the claimant, not the employer.

It is undisputed the first notice Hoff had from any healthcare provider his hearing loss was connected in any way to his employment at Westvaco was the report of Dr. Russell Kitch dated October 14, 2003. Westvaco's assertion that Hoff's claim is time barred must fail because the time for providing notices to Westvaco and for filing his claim under the Act under the holdings of Bass, supra and Mauldin, supra., had not expired when Hoff filed his claim on October 22, 2003.

Westvaco has made brief attempts to distinguish the facts of Hoff's claim from those in Mauldin. While Westvaco argues Hoff knew he had hearing loss reaching back into the 1980's, they fail to acknowledge there is no medical evidence of any kind prior to the report of Dr. Kitch dated October 14, 2003, advising Hoff of a causal relationship between his hearing loss and his employment. The un-contradicted testimony at the hearing from Hoff regarding his knowledge of any relationship between his hearing loss and his work at Westvaco 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?

A. Once the test was run, then later they would call you back in the room and review them with you.

Q. And what was your understanding of your tests as they progressed through- - -

A. My understanding was my hearing was normal and still holding.

Q. Ok. Were you ever advised by anybody at Westvaco that you had any hearing loss related to your employment at Westvaco?

A. No.

(Tr.p.25:3-22)

In keeping with the facts of Mauldin, Hoff, like the claimant in Mauldin, was never told that his hearing loss injury was related to his employment at Westvaco. In fact, Westvaco's nurses who interpreted his annual audiogram test results instructed Hoff his hearing was "normal and holding" when they met with him to discuss the test results.

Contrary to what Westvaco'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 prevents Westvaco from arguing Hoff failed to timely file a claim for hearing loss with Westvaco when it was Westvaco who incorrectly told him his hearing was "normal and still holding." The equitable doctrine of estoppel applies to workers' compensation claims. Bilton v. Best Western Royal Motor Lodge,

282 S.C. 634, 321 S.E.2d 63 (S.C. Ct. App. 1984); Russell v. Drivers Leasing Services, Inc., 282 S.C. 358, 318 S.E.2d 579 (S.C. Ct. App. 1984).

Hoff sustained an accidental injury on October 4, 2000, when he was last exposed to injurious noise conditions on the job with Westvaco. If any percentage of Hoff's 30% compensable hearing loss is age related that fact does not eliminate the compensability of Hoff's entire hearing loss. This is no different than the 60 year old employee with a degenerative back condition who sustains a herniated disc in a lifting accident at work. The South Carolina legislature has not adopted apportionment of impairment for injuries by accident. Westvaco's argument is an attempt to supersede the intent of the legislature as expressed in the South Carolina Workers' Compensation Act and would result in the apportionment of Hoff's hearing loss disability when no such legal authority exists. Notably, Westvaco fails to cite even one case, regulation or statute supporting their apportionment theory.

CONCLUSION

Therefore, because Hoff gave proper and timely notice of his accident and his claim was timely filed, the Hearing Commissioner's Order establishing Hoff's compensable 30% binaural hearing loss must stand.

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By: _____
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July 17, 2012

CERTIFICATE OF MAILING

I hereby certify that on July 17, 2012, I served the Respondent/Defendants in the foregoing matter, with a copy of the attached **Appellant's Brief** by mailing a copy of same via first class mail, postage pre-paid, and addressed as follows:

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The Honorable J.C. Nicholson, Jr.
Charleston County Circuit Court
100 Broad Street, Suite 106
Charleston, SC 29401

By: Kelly Alfreds
Kelly Alfreds, paralegal to
Malcolm M. Crosland, Jr.

Kirsten Barr

From: Nicholson, J. C. <JNicholsonJ@sccourts.org>
Sent: Thursday, July 26, 2012 2:11 PM
To: mcrosland@steinberglawfirm.com
Cc: Kirsten Barr; McDonald, Stephanie P. Secretary (Sarah E. Woodard)
Subject: Hoff v. Mead Westvaco

Dear Mr. Crosland,

Please submit a proposed order to me via email reversing the July 2, 2010 Order of the Appellate Panel of the South Carolina Workers' Compensation Commission. Thank you.

The Honorable J.C. "Buddy" Nicholson, Jr.
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Certificate of Counsel

The undersigned hereby certifies that the Appendix Record on Appeal contains only that material that the Appellant designated in the Motion to Supplement the record on Appeal. The undersigned further certifies that the Appendix to the Record on Appeal complies with Rule 210, 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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