THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The South Carolina
Workers' Compensation Commission

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SC Court of Appeals

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

WCC File No. 1321802

Appellate Case No. 2016-000510

Rodney Ward, Claimant,

Appellant,

v.

ArcelorMittal Georgetown, Inc., Employer, and
New Hampshire Insurance Company, Carrier,

Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the South Carolina Workers' Compensation Commission correctly determined that the Single Commissioner's findings of fact and conclusions of law related to whether the Claimant's claim was barred by the statute of limitations, whether the Claimant's claim was barred by the doctrine of laches, and whether the Claimant failed to sustain his burden on proving a compensable injury were the law of the case?

II. Did the South Carolina Workers' Compensation Commission err when it found that the Claimant failed to give timely notice of this repetitive trauma hearing loss to his employer?

III. Did the South Carolina Workers' Compensation Commission err when it found that the Claimant failed to timely file his claim for repetitive trauma hearing loss?

IV. Did the South Carolina Workers' Compensation Commission err when it ruled the Claimant's claim was barred by the equitable doctrine of *laches*?

V. Did the South Carolina Workers' Compensation Commission err when it found that the Claimant failed to prove causation of his repetitive trauma hearing loss was sustained while employed by the Employer?

STATEMENT OF THE CASE

The Claimant/Appellant Rodney Ward ("Claimant") filed a Form 50 with the South Carolina Workers' Compensation Commission ("Commission") on May 21, 2007 alleging that he sustained a compensable injury by accident due to hearing loss in both ears on February 21, 2007, while employed with his former employer. (R. pp. 155-157.) On August 2, 2007, the Claimant's counsel notified the Commission that he was withdrawing the Form 50 and that a hearing was no

longer needed. (R. p. 158.). The Commission subsequently noted that the Form 50 was withdrawn. (R. p. 159.)

On July 21, 2014, the Claimant filed a Form 50 with the Commission alleging yet again that he sustained a repetitive trauma injury to both ears on October 31, 2013. (R. p. 38.) The Employer/Carrier, ArcelorMittal Georgetown, Inc. and New Hampshire Insurance Company (collectively, "ArcelorMittal"), filed a Form 51 ("Employer's Answer to Request for Hearing") denying the injury and raising the defenses of notice, statute of limitations, and *laches*, among other defenses. (R. p. 39.)

In the Claimant's pre-hearing brief, he claimed that he sustained repetitive trauma hearing loss to both ears during his employment with ArcelorMittal and that he provided notice to ArcelorMittal on July 21, 2014 but that ArcelorMittal knew of the Claimant's hearing loss through hearing tests which were periodically performed during his employment. (R. p. 41.) ArcelorMittal's pre-hearing brief noted the facts in controversy included, among other issues, whether the Claimant would satisfy his burden of proving a compensable repetitive trauma injury while as a result of exposure to noise in his work environment at ArcelorMittal, whether the Claimant gave timely notice, whether the Claimant's claim was barred by the statute of limitations, whether the Claimant's hearing loss occurred prior to his employment with ArcelorMittal, and if any amount of hearing loss resulted from

his employment with ArcelorMittal, what amount should be apportioned to ArcelorMittal. (R. pp. 42-43.)

This case was originally heard before Commissioner T. Scott Beck ("Single Commissioner") on April 28, 2015. (R. p. 1.) At the hearing before the Single Commissioner, the parties presented their positions, examined the Claimant, and submitted APA exhibits. (R. p. 83; R. p. 85, line 3 – p. 88, line 25.) At this hearing, the Claimant also submitted a memorandum on the legal issues. (R. p. 86, lines 17-21; R. pp. 44-55.)

On August 20, 2015, the Single Commissioner denied the Claimant's claim for repetitive trauma hearing loss. (R. p. 14.) The Single Commissioner found that "[t]he Claimant was aware he had a compensable workers' compensation claim related to hearing loss as early as 2000 when, by his own admission, he realized his hearing was declining and he believed it was related to his employment," that "[a]t the latest, the Claimant was aware he had a compensation workers' compensation claim related to hearing loss in 2007, based on his testimony that he retained a lawyer because he knew his hearing had declined and he believed his hearing loss was related to his work with [ArcelorMittal]," that "[ArcelorMittal] was prejudiced by the Claimant's unreasonable delay in pursing his claim," and that "[t]here is insufficient evidence to establish the Claimant's hearing loss was caused by his employment with [ArcelorMittal]." (R. pp. 9-10, ¶¶ 13-14, 16, 19.)

On September 25, 2015, the Claimant timely filed a Form 30 Request for Commission Review of the Single Commissioner's Decision and Order but asserted only two errors: (1) whether the Commissioner misapprehended the meaning of King v. International Knife & Saw-Florence, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011), when he found the Claimant's case did not meet the requirements of S.C. Code Ann. §42-15-20(C) (Supp. 2015) and S.C. Code Ann. §42-1-10 (Supp. 2015), and (2) whether the Commissioner committed error when he found the Claimant knew or should have known his condition was compensable in 2007. (R. p. 40.) The parties submitted briefs to the Commission, and on November 17, 2015, an Appellate Panel of the Commission heard the matter. (R. pp. 56-65[1]; R. pp. 66-77; R. p. 15; R. p. 107.)

On February 29, 2016, by unanimous vote, the Appellate Panel affirmed the Single Commissioner's Decision and Order. (R. pp. 21-37.) The Appellate Panel noted that the Claimant did not allege error as to the Commission's determination that the claim was barred by the statute of limitations and by the doctrine of *laches* and the determination that the Claimant failed to sustain his burden to prove a compensable injury with ArcelorMittal. As such, the Appellate Panel noted that it did not have the authority to reach these issues, and the Single Commissioner's

[1] Interestingly, the Claimant's brief to the Appellate Panel failed to reference King or how the Commission misapprehended the meaning of this case. Additionally,

findings of facts and conclusions of law on these issues were the law of the case. (R. p. 25.)

On March 7, 2016, the Claimant served and filed his notice of appeal. This appeal follows.

STATEMENT OF FACTS

The facts of this appeal are best set forth by the Commission in its findings of fact. The Commission found as follows:

> IT IS FOUND AS A FACT THAT:
>
> 1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
>
> 2. At the time of the injury, the average weekly wage being earned by the Claimant was the sum of $2,133.31, resulting in a compensation rate of $743.72.
>
> 3. The Claimant worked for [ArcelorMittal] and its predecessor companies at the steel mill in Georgetown, SC, from 1970 until 2013.
>
> 4. [ArcelorMittal] began operating the mill in 2004.
>
> 5. The Claimant was exposed to high nose levels in his employment with [ArcelorMittal] and its predecessor companies, but there is no documentation in evidence to establish the exact noise levels to which the Claimant was exposed during the period [ArcelorMittal] operated the mill.

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the Claimant's brief to this Court fails to reference King, which was cited by both the Single Commissioner and Appellate Panel.

6. The Claimant did not wear hearing protection whatsoever during the first approximately ten years of his employment at the mill, before [ArcelorMittal] operated the mill.

7. Beginning around 1980, the Claimant wore hearing protection every day he worked at the mill.

8. The Claimant specifically admitted that he wore hearing protection in all areas of the mill every day that he worked during the entire period [ArcelorMittal] operated the mill.

9. The Claimant began wearing hearing aids in 2007.

10. The Claimant retained an attorney in 2007.

11. The Claimant admitted that he was aware in 2007 that he had hearing loss and he believed his hearing loss was caused by his work at the mill.

12. The Claimant filed a Form 50 hearing request on May 21, 2007, alleging hearing loss resulting from his employment with [ArcelorMittal]. The Claimant subsequently withdrew this hearing request on August 2, 2007. It appears the Claimant abandoned this claim, as we can find no other documentation to conclude otherwise.

13. The Claimant was aware he had a compensable workers' compensation claim related to hearing loss as early as 2000 when, by his own admission, he realized his hearing was declining and he believed it was related to his employment.

14. At the latest, the Claimant was aware he had a compensable workers' compensation claim related to hearing loss in 2007, based on his testimony that he retained a lawyer because he knew his hearing had declined and he believed his hearing loss was related to his work with [ArcelorMittal].

15. The Claimant was aware of his rights under the South Carolina Workers' Compensation Act and unreasonably neglected to pursue his claim in a timely fashion.

16. [ArcelorMittal] was prejudiced by the Claimant's unreasonable delay in pursuing his claim.

17. Dr. Fry opined that the Claimant's hearing worsened between 2007 and 2013, but Dr. Fry did not state that the Claimant's employment with [ArcelorMittal] more likely than not caused the Claimant's increased hearing loss.

18. Dr. Farrell opined, with a reasonable degree of medical certainty, that the Claimant's hearing loss pre-dated his work with [ArcelorMittal] and that it is not the result of his employment with [ArcelorMittal].

19. There is insufficient evidence to establish that the Claimant's hearing loss was caused by his employment with [ArcelorMittal].

(R. pp. 31-33.)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of the Commission's decisions and establishes the "substantial evidence rule" as the standard for reviewing the Commission's factual findings. S.C. Code Ann. § 1-23-380 (Supp. 2015); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). An appellate court can reverse or modify the Commission's decision only if the Claimant's "substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); see § 1-23-380(5)(d),(e).

"The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001). **"Where there is a conflict in the evidence, . . . the findings of fact of the Commission are conclusive."** Id. at 492-93, 541 S.E.2d at 528 (emphasis added). "[W]hether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007) (*citing* Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006)).

ARGUMENTS AND CITATION OF AUTHORITY

I. The Commission correctly determined that the Single Commissioner's findings of fact and conclusions of law related to whether the Claimant's claim was barred by the statute of limitations, whether the Claimant's claim was barred by the doctrine of laches, and whether the Claimant failed to sustain his burden on proving a compensable injury were the law of the case

The Claimant only asserted two errors in his Form 30 Request for Commission Review: (1) whether the Commissioner misapprehended the meaning of King v. International Knife & Saw-Florence, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011), when he found the Claimant's case did not meet the requirements of §42-15-20(C) and §42-1-10, and (2) whether the Commissioner committed error when he found the Claimant knew or should have known his condition was compensable in 2007. (R. p. 40.) Despite only raising two errors in his Form 30, the Claimant's brief to the Appellate Panel raised the same four issues that he raises in his brief to this Court. (See R. pp. 58-59.) ArcelorMittal noted in its brief to the Appellate Panel that all issues except those raised in the Form 30 were not preserved for appeal. (See R. pp. 70-71.) ArcelorMittal also noted these issues were not preserved at the hearing before the Appellate Panel. (R. p. 108, lines 15-24.)

In Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712, 716 (1940), Judge Dennis held that "all findings of fact and law by the Hearing Commissioner became and are the law of the case, except only those within the scope of the exception of defendant and the notice given to the parties by the Commission."

The Supreme Court of South Carolina affirmed Judge Dennis's findings and conclusions. Id. at 723.

"Due process requires that litigants receive notice of the issues to be met on trial, hearing or appeal." Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (*citing* Ham) (finding the full commission did not have authority to reach an issue which was not raised in the application for review). Only issues within the application for review under S.C. Code Ann. §42–17–50 (Supp. 2015) are preserved for appeal to the Appellate Panel. Ham, 7 S.E.2d at 716; Green, 311 S.C. at 80, 427 S.E.2d at 687; Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) ("an unchallenged ruling, 'right or wrong, is the law of [the] case and requires affirmance'") (*quoting* Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970)).

In the present case, the Claimant failed to allege an error with the Single Commissioner's findings and conclusions that his claim was barred by the statute of limitations,[2] that his claimed was barred by the doctrine of *laches*,[3] and that he failed to sustain his burden to prove a compensable injury with the ArcelorMittal.[4] Any of these unappealed grounds is sufficient to affirm the Appellate Panel's

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[2] (R. p. 9, ¶¶ 9-13; R. p. 12, ¶ 5.)

[3] (R. p. 9, ¶¶ 15-16; R. pp. 12-13, ¶¶ 6-7.)

[4] (R. pp. 9-10, ¶¶ 17-19; R. pp. 10-11, ¶¶ 1-2.)

opinion as each became the law of the case when exception was not taken to them in the request for commission review. Brading v. County of Georgetown, 327 S.C. 107, 113, 490 S.E.2d 4, 7 (1997) (noting "where decision is based on more than one ground, appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case"). The Appellate Panel properly affirmed these findings of fact and conclusions of law which were the law of the case. (R. p. 25.) The Appellate Panel's findings of fact are supported by substantial evidence, and its conclusions of law are not affected by any error. Shealy, 341 S.C. at 454, 535 S.E.2d at 442. For these reasons, its order should be affirmed.

II. The Commission correctly determined that the Claimant failed to give timely notice of his repetitive trauma hearing loss.

S.C. Code Ann. § 42-15-20(C) states:

> In the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

In King, this Court interpreted and applied the South Carolina Workers' Compensation Act's notice requirement for repetitive trauma claims. 395 S.C. 437,

718 S.E.2d 227. The King court held that a claimant's repetitive trauma condition is not compensable and "the 90-day reporting clock does not start" until the condition either requires medical care or interferes with a claimant's ability to work. Id. at 231, 718 S.E.2d at 444-45. Here, the Claimant sought medical treatment for his hearing loss as early as February 21, 2007. He was prescribed hearing aids in 2007 and reported February 21, 2007 as the date of injury on the 2007 hearing loss claim which he brought and later abandoned. (R. p. 93, line 22 – p. 94, line 15; R. p. 95, lines 2-5; R. p. 102, line 16 – p. 105, line 11; R. pp. 113-114, 155-156.) The "90-day reporting clock" started on February 21, 2007. The Claimant was, by his own admission, aware that he had a compensable claim when he hired a lawyer and filed a Form 50 Notice of Claim and requested a hearing in 2007. (See R. p. 103, line 20 – p. 105, line 11.) The Claimant disputed in his testimony that he intended to file a claim in 2007, but he admitted that he took the hearing test to his attorney. (Id.; see also R. pp. 155-158.) While the Claimant denied being aware of his 2007 claim or that there was a hearing set, he was copied on the letter filing the 2007 Form 50 (R. p. 155) and the letter withdrawing the same. (R. p. 158.) The Claimant abandoned his 2007 claim in August 2007 and did not give ArcelorMittal notice of the present claim until seven years later. (See R. p. 158; R. p. 38.) Substantial evidence in the record supports the Appellate Panel's finding that the

Claimant had hearing loss in 2007, which required medical care, e.g., hearing aids, and that he failed to give ArcelorMittal timely notice of this claim.

The Claimant's assertion that ArcelorMittal had "actual knowledge of the hearing loss" is incorrect. (Appellant's Br. p. 8). ArcelorMittal administered periodic hearing tests, but these test results indicated that the Claimant's hearing did not decline from the time ArcelorMittal began operating the plant until the end of the Claimant's employment. The Claimant's binaural impairment based on the testing provided on August 21, 2002, the last day of testing with his former employer (Georgetown Steel), was 20.937%, whereas the binaural impairment based on the last testing with ArcelorMittal was 20.312%. (See R. p. 43; R. pp. 150-154.)

Unlike the employers in Mize v. Sangamo Electric Company, 251 S.C. 250, 161 S.E.2d 846 (1968), and Dawkins v. Capitol Construction Company, 252 S.C. 536, 167 S.E.2d 439 (1969), ArcelorMittal was prejudiced by the Claimant's delay in pursing his repetitive trauma hearing loss claim. ArcelorMittal lost the opportunity to provide treatment from 2007 until 2014 which according to the Claimant may have prevented additional injuries. Further, contemporaneous witnesses, such as co-workers and supervisors, from 2007 would be extremely difficult to identify and depose. The Commission correctly found that ArcelorMittal was prejudiced by the Claimant's unreasonable delay in pursing his claim. (R. p. 33, ¶ 16.)

This Court need not look to the unpublished opinion of the Tennessee Special Workers' Compensation Panel (Luna v. GAF Fiberglass Corporation, 2002 WL 975147 (Tenn. 2002)) or the opinion of the Tennessee Supreme Court (George v. Building Materials Corporation of America, 44 S.W.3d 481 (Tenn. 2001)) for how to determine notice in a repetitive trauma hearing loss case.[5] Neither of these cases is binding on this Court. Further, this Court already determined the notice clock, i.e. "the ninety-day reporting clock," begins to run when the injured employee discovers or should have discovered that he qualifies to receive benefits for medical care, treatment, or disability due to his condition. King, 395 S.C. at 231, 718 S.E.2d at 444.

The Pennsylvania case of Boeing Helicopter Company v. Workmen's Compsation Appeal Board (McCanney), 629 A.2d 184 (Pa. Commw. Ct. 1993), supports the Commission's determination that the Claimant knew or should have known of his hearing loss in 2007, when he sought medical treatment from his own doctor. Unlike the claimant in Boeing Helicopter, the Claimant was provided with his employer's hearing tests and sought medical care and treatment in 2007 for his repetitive trauma hearing loss. As such, under King, substantial evidence in the record supports the conclusion that the Claimant failed to timely provide

[5] Rockwell International v. Reed, 804 P.2d 460 (Okla. Civ. App. 1990), is similarly unpersuasive in light of Oklahoma having a statute that specifically allowed the

ArcelorMittal with notice of his repetitive trauma hearing loss, and this conclusion is not affected by an error of law. Shealy, 341 S.C. at 454, 535 S.E.2d at 442. For these reasons, the Commission's order should be affirmed.

The Claimant's assertion that the Claimant had a "prior or preexisting hearing impairment, returned to work in the same noisy conditions, suffering a new and more extensive hearing loss" is not preserved for review on appeal, for the reasons set forth in Section I, *supra*. (See Appellant's Br., p. 9.) The Claimant failed to challenge the factual finding that "[t]here is insufficient evidence to establish that the Claimant's hearing loss was caused by his employment with [ArcelorMittal]." (R. p. 10, ¶ 19; R. p. 40.) As such, this finding became the law of the case. Ham, 7 S.E.2d at 716; Green, 311 S.C. at 80, 427 S.E.2d at 687; Charleston Lumber, 338 S.C. at 175, 525 S.E.2d at 871. The Claimant's argument that this is a "new" hearing loss is nothing more than an attempt to rebut the previously unchallenged ruling that he failed to establish that his hearing loss was caused by his employer. (Appellant's Br., pp. 9-10.) First, this unchallenged ruling is the law of the case. Second, even if the Court finds this issue was preserved, substantial evidence supports the Commission's finding, as discussed in Section V, *infra*.

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tolling of the statute of limitations in 1981, a statute which was later repealed. South Carolina has no such statute.

III. The Commission correctly determined the Claimant failed to timely file his claim for repetitive trauma hearing loss.

As noted in Section I, *supra*, ArcelorMittal respectfully asserts that the Claimant failed to preserve this issue for appellate review. Assuming, *arguendo*, that this issue is properly preserved, the conclusion that the Claimant failed to timely file his claim for repetitive trauma hearing loss is not affected by an error of law and is supported by substantial evidence.

S.C. Code Ann. § 42-15-40 (Supp. 2015) states that a claimant's right to compensation for a repetitive trauma injury 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 portion of the statute was added by the Legislature, effective July 1, 2007, overruling the South Carolina Supreme Court's prior contrary decision in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2002) (holding the "last day of exposure" is the date from which the statute of limitations begins to run in a repetitive trauma case, rather than when claimant first discovered that he had a work-related injury).[6]

[6] The Claimant's Memorandum on Legal Issues presented to the Single Commissioner ignored that the Legislature reversed Schurlknight's "last day of exposure" rule when it revised § 42-15-40 in 2007. (R. pp. 44-55.) The Legislature's 2007 revision to § 42-15-40 to include the plain language of the discovery rule—that a repetitive trauma injury claim is barred unless filed "within two years after the employee **knew or should have known** that his injury is

In the present case, the Claimant was aware his hearing had declined in 2007 and believed at that time it was related to his employment with ArcelorMittal. (R. p. 93, line 22 – p. 94, line 15; R. p. 95, lines 2-5; R. p. 102, line 16 – p. 105, line 11; R. pp. 113, 155-156.) The Claimant filed a claim on May 21, 2007, which was subsequently withdrawn on August 2, 2007. (R. pp. 155-158.) As such, on July 1, 2007, when § 42-15-40 was amended to overrule the "last day of exposure" rule espoused in Schurlknight and to provide a two year statute of limitations from the time when one knew or should have known that his injury was compensable, the Claimant was receiving medical treatment in the form of hearing aids and was consulting with an attorney, who had already filed a claim on his behalf. The Claimant even admitted that in 2007 he understood that he had hearing loss and that he believed it was due to his employment. (R. p. 105, lines 8-11.) Despite knowing in 2007 that his claim was compensable, the Claimant withdrew his 2007 claim and did not file the present claim until 2014. (R. p. 158; R. p. 38.) The Claimant failed to file his claim within two years after he knew his injury was compensable, and as a result, his claim is barred by the statute of limitations.

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compensable"—is clear and manifestly reflects the Legislature's intent to expressly apply the discovery rule to repetitive trauma injury claims. See Henry-Davenport v. School Dist. of Fairfield County, 705 S.E.2d 26, 27-28, 391 S.C. 85, 86-89 (S.C. 2011) (holding the legislature, in enacting S.C. Code Ann. § 59-54-15 in 1998, overruled the Court's prior decision on the same issue).

Contrary to the Claimant's assertion, a doctor's opinion linking the claimant's alleged injury to his employment, stated with a reasonable degree of medical certainty, is not an essential element of the statute of limitations defense. (Appellant's Br., pp. 10-11.) All that is required is evidence that the Claimant did not file his claim for compensation within two years of the date he "knew or should have known" his injury was compensable. See § 42-15-40. Michau v. Georgetown County, 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012) stands for the proposition that if one is offering "medical evidence" in the form of "expert opinion or testimony," then it must be stated to a reasonable degree of medical certainty. Neither Michau nor § 42-15-40 (or any portion of the South Carolina Workers' Compensation Act) requires medical evidence linking the repetitive trauma injury to the work environment in order for the statute of limitations to begin to run in a repetitive trauma injury case. Had the Legislature so intended, it could have expressly provided so in the language of amended § 42-15-40. See, e.g., Consumer Advocate for the State of S.C. v. S.C. Dep't of Ins., 397 S.C. 599, 603, 725 S.E.2d 708, 710 (Ct. App. 2012) (noting that "[h]ad the legislature intended to make publication a requirement only for overall increases, it could have amended section 38–73–910 to specify it is only concerned with 'overall' increases as it did in other paragraphs of section 38–73–910").

The plain and unambiguous language of § 42-15-40 must be applied. "If a statute's language is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Henry-Davenport, 705 S.E.2d at 28, 391 S.C. at 88 (*quoting* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000)). "For a 'repetitive trauma injury' . . ., 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 . . . ." § 42-15-40.

Given the Claimant's admitted knowledge in 2007 of his hearing loss, which he believed was related to his employment, in combination with his retention of an attorney and pursuit of a claim, the Claimant cannot reasonably contend that he was unaware of this claim until less than two years before the date he filed this claim in 2014. The Commission's findings of fact are supported by substantial evidence, and its conclusions of law are not affected by any error. Shealy, 341 S.C. at 454, 535 S.E.2d at 442. For these reasons, its order should be affirmed.

IV. **The Commission correctly concluded the Claimant's claim was barred by the equitable doctrine of *laches*.**

As noted in Section I, *supra*, ArcelorMittal respectfully asserts that the Claimant failed to preserve this issue for appellate review. Assuming, *arguendo*, that this issue is properly preserved, the conclusion that the Claimant's claim was barred

by the equitable doctrine of *laches* is not affected by an error of law and is supported by substantial evidence.

South Carolina courts have defined *laches* as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). South Carolina courts have acknowledged the applicability of the doctrine of *laches* in the workers' compensation setting. See Richey v. Dickinson, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004) (affirming the dismissal of a workers' compensation claim after an eleven-year period of inaction between the cancellation of the hearing and the filing of the second Form 50). "A claimant must prosecute his [workers' compensation] claim in a timely fashion or it may be barred by the doctrine of *laches*." McMillian v. Midlands Human Res., 305 S.C. 532, 533, 409 S.E.2d 443, 444 (Ct. App. 1991). If a party knows of his rights but does not timely assert them and that delay causes his adversary to incur expense or otherwise detrimentally change its position, then, under the doctrine of *laches*, equity will refuse to enforce those rights. Richey, 359 S.C. at 612, 598 S.E.2d at 309. The party asserting *laches* must show (1) negligence of the other party; (2) that party's opportunity to act sooner; and (3) as a result, the asserting party suffered material prejudice. Id. *Laches* is a defense that operates independently from the statute of limitations. The court, or

in the present case, the Commission was vested with wide discretion in determining what was an unreasonable delay. See Ham v. Flowers, 214 S.C. 212, 221, 51 S.E.2d 753, 757 (1949).

In the present case, the Claimant believed in 2007 that his hearing loss was related to his employment with ArcelorMittal. (R. p. 105, lines 8-11.) He alleged compensable hearing loss, filing a hearing request in 2007, but he later withdrew that request and abandoned the claim. (R. pp. 155-159.) The Claimant did not pursue the present claim until 2014, similar to the claimant in Richey who waited eleven years after his hearing was cancelled before filing a second Form 50. (R. p. 38.) Richey, 359 S.C. at 611, 598 S.E.2d at 309.

The Claimant's seven-year delay in pursuing his claim was unreasonable. The Claimant was negligent in his delay. (R. p. 32, ¶¶ 14-15; R. pp. 36-37, ¶ 7.) He had the opportunity to act sooner but did not. (Id.) The Claimant offered no reasonable explanation for his seven-year delay in seeking another hearing. Furthermore, ArcelorMittal was materially prejudiced by this delay. (R. p. 33, ¶ 16; R. pp. 36-37, ¶ 7.) As a result of the Claimant's unreasonable delay, ArcelorMittal was denied the opportunity to provide medical treatment, remove the Claimant from exposure to high noise levels, or take other measures to minimize the Claimant's alleged injuries or prevent further hearing loss, should the claim have been found compensable when the Claimant originally filed in 2007. Furthermore, contemporaneous witnesses,

such as the Claimant's co-workers and supervisors from 2007, would be extremely difficult to identify and depose. (R. p. 29.) The Single Commissioner and the Appellate Panel correctly determined that the ArcelorMittal was prejudiced by the Claimant's unreasonable delay in pursuing his claim. The Commission's determination that this claim was barred by the doctrine of *laches* is supported by substantial evidence and not affected by an error of law. Shealy, 341 S.C. at 454, 535 S.E.2d at 442. For these reasons, its order should be affirmed.

V. **The Commission correctly concluded the Claimant failed to prove causation of his repetitive trauma hearing loss was sustained while employed by ArcelorMittal.**

As noted in Section I, *supra*, ArcelorMittal respectfully asserts that the Claimant failed to preserve this issue for appellate review. Assuming, *arguendo*, that this issue is properly preserved, the finding that the Claimant failed to prove causation of his repetitive trauma hearing loss was sustained while employed by ArcelorMittal is supported by substantial evidence.

S.C. Code Ann. § 42-1-172 (Supp. 2015) defines "repetitive trauma injury" and provides that "an injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular

duties of his employment and the injury." Additionally, an injury must result from an accident that arose out of and in the course of the claimant's employment to be compensable under the South Carolina Workers' Compensation Act. Bickley v. South Carolina Electric & Gas Co., 259 S.C. 463, 467, 192 S.E.2d 866, 868 (1972). The burden is on the claimant to prove such facts as will render the injury compensable, and such an award must not be based on surmise, conjecture, or speculation. Brady v. Sacony of St. Matthews, 232 S.C. 84, 87, 101 S.E.2d 50, 51 (1957).

In the present case, the Appellate Panel correctly concluded that there was insufficient evidence to establish that the Claimant's hearing loss was caused by his employment with ArcelorMittal. (R. p. 33, ¶ 19.) The Appellate Panel as the final arbiter of the facts found that "Dr. Fry opined that the Claimant's hearing worsened between 2007 and 2013, but Dr. Fry did not state that the Claimant's employment with [ArcelorMittal] more likely than not caused the Claimant's increased hearing loss." (R. p. 33, ¶ 17.) "Dr. Farrell opined, with a reasonable degree of medical certainty, that the Claimant's hearing loss pre-dated his work with [ArcelorMittal] and that it is not the result of his employment with [ArcelorMittal]." (R. p. 33, ¶ 18; see also R. pp. 148-149.) "Where there is a conflict in the evidence, . . . the findings of fact of the Commission are conclusive." Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528.

"The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]. It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]." Shealy, 341 S.C. at 455, 535 S.E.2d at 442. (*citing* Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969) and Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)).

A finding of compensability would be purely speculative and contrary to the substantial evidence, in light of the lack of any conclusive medical evidence stated to a reasonable degree of medical certainty that the Claimant's hearing loss more likely than not worsened due to his employment with the Employer. Cf. Brady, 232 S.C. at 87, 101 S.E.2d at 51. As a result, the Appellate Panel's order should be affirmed. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528; Shealy, 341 S.C. at 454, 535 S.E.2d at 442.

Dr. Fry's September 11, 2014 report is insufficient to establish that the Claimant sustained a compensable repetitive trauma injury resulting in hearing loss in his employment with ArcelorMittal. He merely stated that "[i]t is felt that Mr. Ward's bilateral sensorineural hearing loss is due to his continued industrial noise exposure." (R. p. 109.) He does not opine as to whether the alleged worsening of the Claimant's hearing impairment from 2007 to 2014 was, more likely than not, related to any noise exposure the Claimant may have had in his employment with ArcelorMittal. To the contrary, substantial evidence, including the persuasive

opinion of Dr. Farrell, indicated that the Claimant's hearing loss pre-dated his work with ArcelorMittal and that the Claimant did not sustain hearing loss due to his work with ArcelorMittal. The Claimant began working at the steel mill in Georgetown in 1970, for ArcelorMittal's predecessor, and he did not wear any hearing protection during the first ten years of work for ArcelorMittal's predecessor. (R. p. 31, ¶¶ 3-6; R. p. 101, lines 4-21.) As such, the Claimant did not sustain any injury during his work with the ArcelorMittal, and the "last injurious exposure" rule regarding successive carriers as articulated in Geathers v. 3V, Inc., 371 S.C 570, 641 S.E.2d 29 (2007), does not apply to render ArcelorMittal liable for the Claimant's alleged repetitive trauma hearing loss. The Commission's findings of fact are supported by substantial evidence, and its conclusions of law are not affected by any error. Shealy, 341 S.C. at 454, 535 S.E.2d at 442. For these reasons, its order should be affirmed.

CONCLUSION

The Claimant wishes to proceed as if Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2002), remains intact. It does not. As such, the Commission's decision and order must be affirmed.

Respectfully submitted,

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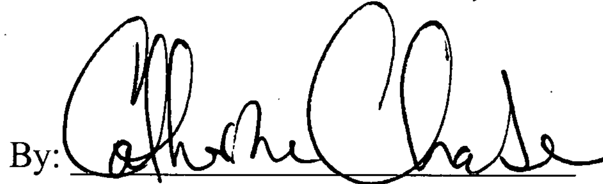

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Charleston, South Carolina

Dated: December 1, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 02 2016
SC Court of Appeals

Appeal From The South Carolina
Workers' Compensation Commission

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

WCC File No. 1321802

Appellate Case No. 2016-000510

Rodney Ward, Claimant,

Appellant,

v.

ArcelorMittal Georgetown, Inc., Employer, and
New Hampshire Insurance Company, Carrier,

Respondents.

CERTIFICATION FOR FINAL BRIEF OF RESPONDENTS

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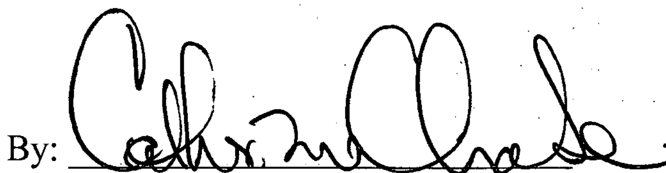
I, Catherine H. Chase, do hereby certify that the Final Brief of Respondents ArcelorMittal Georgetown, Inc. and New Hampshire Insurance Company complies with Rule 211(b), *SCACR*. Additionally, the undersigned hereby certifies that the Final Brief of Respondents complies with the Supreme Court Order of April 15, 2014.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP



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