THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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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. 1315152

Appellate Case No. 2016-000507

Jack Woodward, Claimant, Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown
F. Drake Rogers
Catherine H. Chase
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
sbrown@ycrlaw.com
drogers@ycrlaw.com
cchase@ycrlaw.com
Attorneys for ArcelorMittal Georgetown, Inc. and New Hampshire Insurance Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

STATEMENT OF THE ISSUES ON APPEAL

I. **Did the South Carolina Workers' Compensation Commission correctly determine 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 correctly determine 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 correctly determine that the Claimant failed to timely file his claim for repetitive trauma hearing loss?**

IV. **Did the South Carolina Workers' Compensation Commission correctly determine that the Claimant's claim was barred by the equitable doctrine of *laches*?**

V. **Did the South Carolina Workers' Compensation Commission correctly determine 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 Jack Woodward ("Claimant") filed a Form 50 with the South Carolina Workers' Compensation Commission ("Commission") in 2003 alleging that he sustained a compensable injury by accident of hearing loss in both ears on "October 21, 2003" and "2004-present[1]" from his employment with his former employer, Georgetown Steel Corporation, and his current employer,

ArcelorMittal Georgetown, Inc. (R. pp. 162-164.) A hearing was set for June 15, 2007 to determine, among other issues, "whether Mittal Steel is responsible for a portion of Claimant's hearing loss." (R. p. 163.) On August 22, 2007, the Claimant reached a $1,200.00 settlement with Georgetown Steel Corporation. (R. pp. 165-169.)

The remainder of the Claimant's 2003 hearing loss claim was heard on October 23, 2014. (R. pp. 96-99.) The Employer/Carrier, ArcelorMittal Georgetown, Inc. and New Hampshire Insurance Company (collectively, "ArcelorMittal"), were dismissed from the 2003 matter by way of a consent order stating that ArcelorMittal "shall be dismissed from this matter entirely." (R. pp. 170-175; R. p. 99, lines 5-10.)

On November 1, 2013, the Claimant filed a Form 50 with the Commission alleging that he sustained a repetitive trauma injury to both ears on April 4, 2013. (R. p. 36.) 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. 35.)

On June 11, 2014, the Claimant filed an Amended Form 50 in this claim and the 2003 claim alleging injury dates of April 4, 2013 and October 21, 2003. (R.

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[1] The present date was May 25, 2007, the date of the Claimant's Form 58 pre-hearing brief. (R. p. 163.)

pp. 33-34.) On October 23, 2014, the Claimant filed another Amended Form 50 alleging only a date of injury of April 4, 2013. (R. p. 38.) ArcelorMittal filed a Form 51 again 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 November 1, 2013 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 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. pp. 82-84; R. p. 85, line 9 – p. 88, line 4.) At this hearing, the Claimant also submitted a memorandum on the legal issues. (R. p. 85, lines 23-25; R. pp. 44-58.)

On August 4, 2015, the Single Commissioner denied the Claimant's claim for repetitive trauma hearing loss. (R. pp. 11-12.) The Single Commissioner found that "[t]he within matter is clearly a repetitive trauma claim and will, therefore, be analyzed as repetitive trauma," that "[t]he relevant test is when the Claimant discovered or should have discovered he qualified to receive benefits for medical care, treatment, or disability due to his condition," that "[s]ometime around 2003, the Claimant filed claims for hearing loss in both ears as a result of the repetitive trauma of his work at the Georgetown Steel Mill while employed with Georgetown Steel Corporation and ArcelorMittal Georgetown, Inc., alleging dates of accidents of October 21, 2003, and 2004 through the present time (the present time then being May 25, 2007, the date the Claimant's Pre-Hearing Brief was served on the Commission and opposing counsel)," that "[ArcelorMittal] was named as a party defendant in WCC File No. 0326648 and subsequently dismissed via Consent Order dated November 5, 2014. As such, it is clear that the Claimant was aware of a compensable condition by at least August 23, 2007," that "[a]s it relates to an alleged date of repetitive trauma injury of April 4, 2013, the Claimant is misguided in relying on a last date of injurious exposure analysis," and that "[t]he Claimant failed to prove

causation sufficient to entitle him to any benefits as a result of injuries allegedly sustained while working for [ArcelorMittal.]" (R. pp. 8-10, ¶¶ 4, 7, 11, 19, 20, 25.)

On August 17, 2015, the Claimant timely filed a Form 30 Request for Commission Review of the Single Commissioner's Decision and Order and 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. 59-69[2]; R. pp. 70-81; R. p. 13; R. p. 100.)

On February 29, 2016, by unanimous vote, the Appellate Panel affirmed the Single Commissioner's Decision and Order. (R. pp. 18-32.) 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 or the doctrine of *laches* and

[2] Interestingly, the Claimant's brief to the Appellate Panel failed to reference King or how the Commission misapprehended the meaning of this case. Additionally, the Claimant's brief to this Court fails to reference King, which was cited by both the Single Commissioner and Appellate Panel.

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 findings of facts and conclusions of law on these issues were the law of the case. (R. pp. 21-22.)

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. The Claimant's average weekly wage is $1,037.67, with a resulting compensation rate of $743.72.
>
> 3. On November 1, 2013, the Claimant filed a Form 50 request for hearing alleging that he sustained an injury in the form of hearing loss on April 4, 2013, as a result of the repetitive trauma of his work at [ArcelorMittal].
>
> **4. The within matter is clearly a repetitive trauma claim and will, therefore, be analyzed as repetitive trauma.**

5. Since the Defendants have raised notice and statute of limitations defenses in this matter, it is necessary to analyze when the proverbial clock started to tick.

6. The October 19, 2011, Court of Appeals opinion in the case of King v. International Knife and Saw and S.C. Code Ann. § 42-15-20(C) are controlling law.

7. The relevant test is when the Claimant discovered or should have discovered he qualified to receive benefits for medical care, treatment, or disability due to his condition.

8. The Claimant started working at the Georgetown Steel Mill in June of 1975 and retired on March 31, 2015.

9. When the Claimant started working at the Georgetown Steel Mill, hearing protection was not required and he worked in the Steel Mill without hearing protection for the first 8 to 10 to 15 years.

10. Once the Claimant started working for [ArcelorMittal], he always wore hearing protection.

11. Sometime around 2003, the Claimant filed claims for hearing loss in both ears as a result of the repetitive trauma of his work at the Georgetown Steel Mill while employed with Georgetown Steel Corporation and [ArcelorMittal], alleging dates of accidents of October 21, 2003, and 2004 through the present time (the present time then being May 25, 2007, the date the Claimant's Pre-Hearing Brief was served on the Commission and opposing counsel).

12. The Claimant's claims against Georgetown Steel Corporation for hearing loss in WCC File Nos. 0326647 and 0326648 were settled via Order approved and filed with the South Carolina Workers' Compensation Commission on September 14, 2007.

13. [ArcelorMittal] was voluntarily dismissed from the Claimant's claim against [ArcelorMittal] and Georgetown Steel (WCC File No. 0326648) via Consent Order filed and served on November 5, 2014.

14. On September 25, 2004, the Claimant was advised that, based on his hearing test performed on September 9, 2004, he had moderate loss of hearing in both ears and he should see a hearing specialist if he had not already done so.

15. The Claimant was advised again on September 21, 2005, that, based on his hearing test performed on September 16, 2005, he had a moderately severe loss of hearing in both ears and he should see a hearing specialist if he had not already done so.

16. On June 29, 2006, the Claimant was advised by Dr. Arthur LaBruce that he had bilateral hearing loss due to industrial noise trauma over so many years with inadequate ear protection.

17. On July 3, 2006, the Claimant was advised by Dr. Terry Fry that he had hearing loss due to industrial noise exposure and that bilateral hearing aid amplification was recommended.

18. The issue of the Claimant's alleged hearing loss was already litigated in WCC File Nos. 0326647 and 0326648 and resolved on August 23, 2007.

19. [ArcelorMittal] was named as a party defendant in WCC File No. 0326648 and subsequently dismissed via Consent Order dated November 5, 2014. As such, it is clear that the Claimant was aware of a compensable condition by at least August 23, 2007.

20. As it relates to an alleged date of repetitive trauma injury of April 4, 2013, the Claimant is

misguided in relying on a last date of injurious exposure analysis.

21. The Claimant did not give notice of or file a claim for benefits as a result of the alleged subject repetitive trauma hearing loss until filing his Form 50 notice of claim with the South Carolina Workers' Compensation Commission on November 1, 2013.

22. The Claimant did not provide timely notice of his claim, notice within 90 days of the date he discovered or could have discovered by exercising reasonable diligence that his alleged condition was compensable, and his request for benefits is therefore barred.

23. The Claimant did not file his claim for benefits with the South Carolina Workers' Compensation Commission within two (2) years after he knew or should have known that his injury was compensable, so his request for benefits is barred.

24. The Claimant neglected for an unreasonable and unexplained length of time under circumstances requiring diligence to do what should have been done, so his claim for benefits is, therefore, barred under the doctrine of laches.

25. The Claimant failed to prove causation sufficient to entitle him to any benefits as a result of injuries allegedly sustained while working for [ArcelorMittal].

(R. pp. 28-31 (emphasis added).)

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. 61-62.) 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. 74-75.) ArcelorMittal also noted these issues were not preserved at the hearing before the Appellate Panel. (R. p. 101, line 3 – p. 102, line 6; R. p. 103, lines 2-14.)

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,[3] that his claimed was barred by the doctrine of *laches*,[4] and that he

[3] (R. pp. 8-10, ¶¶ 4-19, 23; R. p. 11, ¶¶ 3-4.)
[4] (R. p. 10, ¶ 24; R. p. 11, ¶ 5.)

failed to prove causation sufficient to entitle him to any benefits as a result of injuries allegedly sustained while working for ArcelorMittal.[5] Any of these unappealed grounds is sufficient to affirm the Appellate Panel's 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. pp. 21-22.) 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,

[5] (R. p. 10, ¶ 25; R. p. 11, ¶ 1.)

> 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 444-45. Here, the Claimant was advised on September 25, 2004, that, based on his hearing test performed on September 9, 2004, he had moderate loss of hearing in both ears and he should see a hearing specialist if he had not already done so. On June 29, 2006, the Claimant was advised by Dr. Arthur LaBruce that he had bilateral hearing loss due to industrial noise trauma over so many years with inadequate ear protection. On July 3, 2006, the Claimant was advised by Dr. Terry Fry that he would benefit from bilateral hearing aid amplification. (R. pp. 108; R. pp. 110-116; see also R. p. 95, lines 9-22; R. p. 176, R. p. 177, lines 12-22.) The "90-day reporting clock" started at the earliest, on September 25, 2004[6], and at the latest, on August 22, 2007, when he settled his prior hearing loss claim. (R. p. 169.) The Claimant was, by his own admission, aware that he had a compensable claim when

he filed a claim in 2003, which later involved ArcelorMittal. (See R. p. 93, lines 18-23.) The Claimant even settled part of his 2003 claim on August 22, 2007 and later dismissed ArcelorMittal from this claim. (R. pp. 165-175; R. p. 94, line 22 – p. 95, line 8.) Substantial evidence in the record supports the Appellate Panel's finding that the Claimant was aware of a compensable condition at least by August 2007, for which medical care was recommended, e.g., hearing aids[7], and that he failed to give ArcelorMittal timely notice of this claim.

The Claimant's assertion that ArcelorMittal had "constructive, if not actual, knowledge of the hearing loss" is incorrect. (Appellant's Br., p. 6). 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 he brought the present claim. The Claimant's binaural impairment based on the testing provided on September 9, 2004, the baseline testing with the immediate predecessor to ArcelorMittal, was 19.06%[8], whereas the binaural impairment based on his last hearing testing in December 2013 was 19.06%. (See R. p. 43; R. pp. 159-161; R. pp. 155-156.)

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[6] The Claimant reported at his September 9, 2004 hearing test that he had trouble with hearing loss. (R. p. 160.)

[7] (R. p. 108.)

[8] The first hearing test for ArcelorMittal on September 16, 2005 was also 19.06%. (R. p. 43; R. pp. 157-158.)

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 appropriate treatment from 2007 until 2013 that 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 the Claimant neglected for an unreasonable and unexplained length of time to pursue his claim. (R. p. 31, ¶ 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.[9] 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

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

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 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 settled a hearing loss claim with his prior employer and had been notified by Dr. Fry that he needed medical treatment in the form of hearing aids. (R. pp. 165-169; R. p. 108.) Unlike the claimant in Boeing Helicopter, the Claimant sought medical care and treatment in 2006 for his repetitive trauma hearing loss. The Claimant's pre-hearing brief, dated May 25, 2007, stated: "**The Claimant was tested and evaluated by Dr. Terry Fry on April 6, 2006. It was only then that he became aware of his compensable condition.**" (R. p. 164 (emphasis added).) As such, under King, substantial evidence in the record supports the conclusion that the Claimant failed to timely provide 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, its 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. 8.) The Claimant failed to challenge the factual finding that "[t]he Claimant failed to prove causation sufficient to entitle him to any benefits as a result of injuries allegedly sustained while working for [ArcelorMittal]." (R. p. 10, ¶ 25; R. p. 40.) As such, this finding becomes 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 ArcelorMittal. (Appellant's Br., pp. 8-9.) 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*.

III. The Commission correctly determined the Claimant failed to timely file his claim of his 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).[10]

In the present case, the Claimant was aware his hearing had declined by 2007 and believed at that time it was related to his employment with his previous employer and with ArcelorMittal. (R. pp. 162-164.) The Claimant filed a claim in 2003, subsequently added ArcelorMittal to the claim by at least May 25, 2007, and

[10] 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. p. 46.) 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 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 (2011)

subsequently settled with his prior employer on August 22, 2007. (R. pp. 162-164; R. pp. 165-169.) On July 3, 2006, more than two years after ArcelorMittal began operating the steel mill, Dr. Fry opined that the Claimant's hearing loss was related to "industrial noise exposure" and "recommend[ed] bilaterial hearing aid amplification." (R. p. 108.)

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 knew medical treatment in the form of hearing aids was recommended (R. p. 108) and was consulting with an attorney, who had already filed a claim on his behalf. (R. pp. 162-164.) Despite knowing in 2007 that his claim was compensable, the Claimant settled the 2003 claim against ArcelorMittal in 2014 and brought this claim in 2013. (R. pp. 170-175; R. p. 96; R. p. 99, lines 5-10; R. p. 36; R. pp. 33-34; 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.

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

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(holding the legislature, in enacting S.C. Code Ann. § 59-54-15 in 1998, overruled the Court's prior decision on the same issue).

certainty, is not an essential element of the statute of limitations defense. (Appellant's Br., pp. 9-10.) 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 2006 of hearing loss, which he believed was related to his employment as noted by his filing a claim against his prior employer and ArcelorMittal, 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 2013. 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 and 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 is 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 by 2007, at the latest, that his hearing loss was related to his employment with ArcelorMittal. (R. pp. 163-164.) In September 2004, a baseline hearing test was performed which indicated moderate hearing loss in both ears and recommended that he see a hearing specialist, if he had not already done so. (R. pp. 159-161.) At the same hearing test, the Claimant reported that he was having "trouble with hearing loss." (R. p. 160.) On June 29, 2006, the Claimant was advised by Dr. LaBruce that he had "bilateral hearing loss . . . due to industrial noise trauma over so many years, with inadequate ear protection." (R. p. 110.) On July 3, 2006, Dr. Fry also opined that the Claimant's hearing loss was "due to industrial noise exposure" and recommended "bilateral hearing aid amplification." (R. p. 108.) The Claimant previously pursued a claim in 2006 and 2007, which he subsequently settled. (R. pp. 165-169.) Thereafter, the Claimant allowed his claim against ArcelorMittal to remain stale and did not bring the present claim until 2013, more than six years later, similar to the claimant in Richey who waited eleven years after his hearing was cancelled before filing a second Form 50. (R. p. 36.) Richey, 359 S.C. at 611, 598 S.E.2d at 309.

The Claimant's six-year delay in pursuing his claim was unreasonable. The Claimant was negligent in his delay. (R. pp. 24-26; R. p. 31, ¶ 24; R. p. 32, ¶ 5.) He had the opportunity to act sooner but did not. (Id.) The Claimant offered no reasonable explanation for his six-year delay. Furthermore, ArcelorMittal was materially prejudiced by this delay. (Id.) As a result of the Claimant's unreasonable delay, ArcelorMittal was denied the opportunity to provide appropriate 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 settled with his previous employer 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. 26.) The Single Commissioner and the Appellate Panel correctly determined that the Claimant's delay was unreasonable and unexplained. 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 the Claimant failed to prove causation sufficient to entitle him to any benefits as a result of injuries allegedly sustained while working for ArcelorMittal. (R. p. 31, ¶ 25.) The Appellate Panel reviewed both Dr. Fry's opinion (that the Claimant had suffered an increase in hearing loss from 2006 to 2014 due to exposure to industrial noise) (R. p. 104) and Dr. Farrell's opinion (that "with a reasonable degree of medical certainty . . . [the Claimant's] hearing damage occurred prior to his employment with ArcelorMittal" and that "with a reasonable degree of medical certainty . . . [the Claimant's] hearing loss did not occur while employed with ArcelorMittal"). (R. pp. 152-154.) The Appellate Panel, as the final arbiter of the facts, weighed the evidence in the record[11] and found that the Claimant failed to prove causation sufficient to entitle him to benefits. (R. p. 31, ¶ 25; see also R. pp. 152-154.) **"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 (emphasis added). 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

[11] It should be noted that the OSHA reports and noise studies in the record (R. pp. 120-151) all pre-date ArcelorMittal's 2004 ownership. The only records which are after 2002 are the Claimant's hearing tests and the opinions of Drs. Fry, LaBruce, and Farrell. (R. p. 91, line 23 – p. 92, line 4.)

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. 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

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 1975, for ArcelorMittal's predecessor, and he did not wear any hearing protection during the first 8 to 10 to 15 years of work for ArcelorMittal's predecessor. (R. p. 29, ¶¶ 8-9; R. p. 89, lines 5-24.) Once he started working for ArcelorMittal, he always wore hearing protection. (R. p. 29, ¶ 10; R. p. 89, line 25 – p. 90, line 22.) The Claimant also had non-occupational loud noise exposure and a family history of hearing loss. (R. p. 153.) 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,

YOUNG CLEMENT RIVERS, LLP

By: _____

Stephen L. Brown
F. Drake Rogers
Catherine H. Chase
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
sbrown@ycrlaw.com
drogers@ycrlaw.com
cchase@ycrlaw.com
Attorneys for ArcelorMittal Georgetown, Inc. and New Hampshire Insurance Company

Charleston, South Carolina

Dated: December 1, 2016

THE STATE OF SOUTH CAROLINA
IN THE 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. 1315152

Appellate Case No. 2016-000507

Jack Woodward, Claimant, Appellant,

v.

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

CERTIFICATION FOR FINAL BRIEF OF RESPONDENTS

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown
F. Drake Rogers
Catherine H. Chase
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
sbrown@ycrlaw.com
drogers@ycrlaw.com
cchase@ycrlaw.com
Attorneys for ArcelorMittal Georgetown, Inc. and New Hampshire Insurance Company

I, Catherine H. Chase, do hereby certify that the Final Brief of Respondents Arcelor Mittal Georgetown, Inc. and New Hampshire Insurance Company complies with Rule 211(b), *SCACR*, with one exception. The *Final Brief of Respondents* corrects a citation error from the initial brief. Respondents' counsel previously disclosed this modification to Appellant's counsel.

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

By: _____

Stephen L. Brown
F. Drake Rogers
Catherine H. Chase
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
sbrown@ycrlaw.com
drogers@ycrlaw.com
cchase@ycrlaw.com
Attorneys for ArcelorMittal Georgetown, Inc. and New Hampshire Insurance Company

Charleston, South Carolina

Dated: December 1, 2016