

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 31, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RANDY W. STOUT, Petitioner

vs.) **No. 11-0384** (BOR Appeal No. 2044819)
(Claim No. 2010102990)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
RANDY W. STOUT D/B/A STOUT CONSTRUCTION,
Respondent**

MEMORANDUM DECISION

Petitioner Randy W. Stout, by John Skaggs, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Randy W. Stout D/B/A Stout Construction, by Timothy Huffman, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 4, 2011, in which the Board affirmed a July 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 26, 2009, decision denying the compensability of Mr. Stout's hearing loss claim. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Stout is the sole proprietor of his construction company, Stout Construction. Mr. Stout alleges that he suffers from occupational hearing loss as a result of exposure to occupational noise hazards. On August 26, 2009, the claims administrator denied Mr. Stout's request for hearing loss benefits based on a finding that "there was no policy in force on the date of the alleged claim for the employer listed on your application." On July 9, 2010, the Office of Judges affirmed the claims administrator's decision and held that the preponderance of the evidence shows that Mr. Stout was excluded from coverage under the workers' compensation

insurance policy in effect on the date he was last exposed to occupational noise, which the Office of Judges found to be August 18, 2009.

We agree with the Office of Judges' conclusion that the date of Mr. Stout's last exposure to occupational noise was August 18, 2009. We further agree with the Office of Judges' conclusion that the record shows that Mr. Stout was not covered under a workers' compensation insurance policy from January 1, 2006, to January 1, 2007. However, the record indicates that Mr. Stout was exposed to occupational noise hazards capable of inducing occupational hearing loss prior to January 1, 2006, with dates of exposure reaching as far back as 1976, when Mr. Stout began his construction business. Based on the December 14, 2009, deposition of Mr. Stout, it appears that he was covered under a workers' compensation insurance policy for at least a portion of the time that he was exposed to occupational noise hazards. Therefore, the case is remanded for further development of the evidentiary record for the purpose of determining whether Mr. Stout was covered by a workers' compensation insurance policy at any time that he was simultaneously exposed to occupational noise hazards.

For the foregoing reasons, we find that the decision of the Board of Review is clearly based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed and the case is remanded for further development of the evidentiary record.

Reversed and remanded.

ISSUED: October 31, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin J. Davis