

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**BABCOCK & WILCOX CONSTRUCTION
COMPANY, INC.,
Employer Below, Petitioner**

FILED
July 19, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 100757 (BOR Appeal No. 2043996)
(Claim No. 2008033340)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent**

and

**JOEL A. RANDOLPH,
Claimant Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 9, 2010, in which the Board affirmed a January 5, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's denial of Mr. Randolph's application for occupational noise induced hearing loss on January 22, 2009. The appeal was timely filed by the petitioner. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. 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. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. 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.

The Board of Review affirmed the Office of Judge's Order holding Mr. Randolph's

application for occupational noise induced hearing loss compensable. Babcock & Wilcox Construction Co., Inc. (“Babcock & Wilcox”) argues that, during Mr. Randolph’s employment, he worked in a fabrication yard that was free of excessive noise, and his responsibilities were limited to inside the protective cab of a piece of equipment. Further, a sound level survey conducted at the work site found that the decibel levels around the heavy equipment that Mr. Randolph operated ranged from 66.8 decibels to 84.5 decibels. Babcock & Wilcox asserts that most experts state that it requires 90 decibels of noise to cause hearing loss. Thus, Babcock & Wilcox argues that Mr. Randolph has not established that his claimed disability resulted from his employment with Babcock & Wilcox.

The Office of Judges, however, noted that the sound level survey was not conducted during the period of time in which Mr. Randolph was employed by Babcock & Wilcox. (June 9, 2010 Office of Judges Order, p. 5.) The Office of Judges also relied on *Harrison v. Workers Comp. Comm’r*, 181 W. Va. 598, n.4, 383 S.E.2d 780, n.4 (1989) in asserting that Mr. Randolph is not obligated to establish that he “sustained hazardous noise impairment with a particular period of employment or employer[.]” *Id.* Although there is evidence that Mr. Randolph had hearing loss prior to his employment with Babcock & Wilcox, it is not dispositive of the issue of whether Babcock & Wilcox is appropriately chargeable. *Id.* at p. 6. Rather, Mr. Randolph’s application was accompanied by medical documentation from Dr. John Wyllie opining that Mr. Randolph’s hearing loss was directly attributable to or perceptively aggravated by industrial noise exposure. *Id.* Additionally, Mr. Randolph testified that summer heat necessitated the removal of the protective glass in the equipment cab to facilitate the flow of fresh air, which diminished the effectiveness of the protective cab. *Id.* at p. 3. Thus, the Office of Judges found that a preponderance of the evidence suggests that Mr. Robinson has incurred occupational hearing loss in the course of and resulting from employment and that Babcock & Wilcox exposed Mr. Randolph to the risk of hazardous noise during its employment of him. *Id.* at p. 6. The Board of Review reached the same reasoned conclusion in its decision of April 26, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board’s findings, reasoning and conclusions, there is insufficient support to sustain the decision. Therefore, the compensability of Mr. Randolph’s claim for occupational noise induced hearing loss is affirmed.

Affirmed.

ISSUED: July 19, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh