216 Va. 27
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SUPREME COURT OF VIRGINIA
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MAR 7 1975
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 741191

CLINCHFIELD COAL CO.,

Appellant,

v.

LUTHER M. KINCAID,

Appellee.

APPENDIX TO BRIEF OF APPELLANT

J. THOMAS FOWLKES
Of Counsel

PENN, STUART & ESKRIDGE
208 East Main Street
Abingdon, Virginia 24210
Counsel for Appellant

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REPORT OF AUDIOLOGICAL AND HEARING AID EVALUATION

Filed March 5, 1973

Bristol Regional Speech and Hearing Center
March 5, 1973

SS # 229-40-0810
District 28, Local 1098

Re: Kincaid, Luther Matthew
WM BD: 8-27-33
Box 402
Dante, Russell Co., Va.
Tel. No. 495-2271

Referred By: Nelson E. Link, M.D., 249 Midway St., Bristol, Tenn.

Mr. Luther Kincaid was seen at the Bristol Regional Speech and Hearing Center on March 1, 1973 for an audiological and hearing aid evaluation.

Audiological Diagnosis:

Mild sensori-neural hearing loss in the right ear and a mild to moderate sensori-neural hearing loss in the left ear.

History:

Mr. Kincaid reported that his hearing level has been decreasing several years and that during the last two months he has had more difficulty. There is no current history of ear infections or earaches. Tinnitus is experienced in both ears constantly. The major difficulty hearing is experienced when talking, with people at a distance, in groups of people, and with certain individuals.

Audiological Test Results:

Pure tone averages for the speech range frequencies, using ANSI standard, right ear 40 dB., left ear 55 dB. Comparison of air and bone conduction sensitivity indicates the hearing loss is sensori-neural in nature. See enclosed audiogram.

Speech audiometry was conducted and the speech reception thresholds were right ear, 38 dB., left year, 50 dB. These threshold levels are in good agreement with the pure tone findings. Speech discrimination

scores were, right ear 68%; left ear, 64%. The low discrimination scores indicate that Mr. Kincaid has a very difficult time following and understanding conversational speech.

Hearing Aid Test Results:

Mr. Kincaid was tested while wearing three behind-the-ear hearing aids that were chosen to meet his amplification needs. The following test results were obtained:

	SRT	*Speech Discrimination Score*
Instrument A	0 dB.	100% (in quiet) 92% (in noise)
Instrument B	0 dB.	100% (in quiet) 84% (in noise)
Instrument C	5 dB.	96% (in quiet) (did not test in noise)

Of the hearing aids tested, Instrument A, the Auditone A-21, provided the best speech discrimination in noise and in quiet. This hearing aid is, therefore, recommended.

Recommendations:

The Auditone A-21 hearing aid is recommended for the left ear. Please order this hearing aid from Mr. Lee Baker, Gate City Drug Center, Gate City, Va. and he will make a home visit to fit the hearing aid.

/s/ William F. Overbey

William F. Overbey
Clinical Audiologiat
Clinicial Audiologist

Director
WFO/js
cc: Dr. W. A. Davis
UMWA

APPLICATION FOR HEARING

Filed March 8, 1974

File No. .....

Employee: Luther M. Kincaid
Employer: Clinchfield Coal Company and/or Jewell Ridge Coal Company, Lebanon, Va.

Date of Accident: April 1, 1973
Average Weekly Wage: $200 + or —
Place Where Accident Occurred: Russell County, Virginia
Nature of Injury or Occupational Disease: Hearing loss

* * *

The applicant requests a hearing before the Industrial Commission of Virginia on the grounds of:

* * *

(2) Occupational Disease ☒

* * *

Signature of Applicant: Luther M. Kincaid

By: /s/ S. Strother Smith, III

Address: Box 402, Dante, Va. 24237

Signed this 7th day of March, 1974

* * *

MEDICAL REPORT OF DR. NELSON E. LINK
Filed August 15, 1974

OTOLARYNGOLOGY ASSOCIATES P. C.
[LETTERHEAD OMITTED]
August 15, 1974

Mr. Dennis E. Jones
White, Elliott & Bundy
160 East Main Street
Abingdon, Va. 24210

Re: Luther M. Kincaid

Dear Mr. Jones:

I am enclosing a copy of the Audiological and Hearing Aid Evaluation done on Mr. Luther Kincaid on March 5, 1973. I saw him on January 30, 1973 for the chief complaint of being hard of hearing. He gave me the history of being a roof bolter for about six years duration in the mines without ear protectors. He had tinnitus during this period of time and it was my opinion that his hearing difficulty was noise induced. I am sending you a copy of the Hearing Aid Evaluation and a copy of the Audiogram per your request.

Thank you.

Sincerely,

/s/ Nelson E. Link
Nelson E. Link, M.D.

TRANSCRIPT OF HEARING
Filed June 28, 1974

[1] * * *

Hearing before Commissioner Evans at Lebanon, Virginia on June 28, 1974.

All witnesses having been duly sworn, the following testimony was taken:

Luther M. Kincaid, Claimant

By Mr. Jones:

Q Mr. Kincaid, how long have you been employed by Clinchfield Coal Company? A Altogether? Oh, about nineteen years.

Q How long have you been in the mines? A It'll be eight years in August.

Q And, what is the nature of your job? A Roof bolting.

Q Is that a machine? A Right; roof bolter.

Q You work a regular eight-hour shift?

[2] Q Is that the only noise that you're exposed to? A Right, them stoffers is what it is. They make the noise.

Q What makes the noise? A The stoffers.

Q What's that? A Well, it's something like a jack hammer turned upside down that you drill the top.

Q And, how does this stoffer operate? A Oh, just like a jack hammer; just the same thing.

Q Is it a constant vibration? A Oh, yeah.

Q And, is there an exhaust on it? A No.

Commissioner Evans: Is it operated by air?

A Air.

Q What does of noise does it emit? Is it just a hum? A No, it sounds like about fifty people in a barrel hitting on it and you down in it.

Mr. Fowlkes: I'd say that's an accurate statement.

Q Have you operated that roof bolter ever since you've been in the underground mine? A Up 'til here lately; oh, I'd say this year, they changed the machine and put a fencer in. That's a rotary drill and now all the noise is behind you now.

[3] Q When did you first start noticing the loss of hearing? A Oh, last February, I believe it was, in '73.

Q Is that when you first went for medical examinations? A Right.

Q What doctors did you go see? A I went and seen Dr. Davis first and he referred me to Dr. Crockett and Dr. Crockett referred me to Dr. Overbey at the Speech and Hearing Center.

Q Now, Dr. Davis—is that Dr. Davis in Dante? A Dante, right.

Q And, where's Dr. Crockett? A He's in Bristol.

Q Did Dr. Crockett run any examinations on your hearing? A Right.

Q And, what date was that? A That was—I believe it was around the last of February of '73; around the 27th, I believe it was, if I'm not mistaken.

Q What did Dr. Crockett tell you? A Well, he said I had about forty percent loss of hearing and what I had, I wouldn't get it back and to take care of whatever I did have.

Q And, he then referred you to Dr. Overbey? A Right.

Q Now, when you saw Dr. Overbey, what did he do with you? A Well, he run me through the same tests as Dr. Crockett.

Q And, what did Dr. Overbey tell you? [4] A Well, he told me about the same thing, that I had the loss and wanted to know what kind of work I was doing and I told him and so, he got the hearing aid and things fitted up and it worked out pretty good.

Q Did he examine your ears without a hearing aid? A Right, with and without.

Q And, after he examined them without a hearing aid, did he use a variety of hearing aids on you when he checked you? A A variety, yes.

Q Was that to determine the proper type of hearing aid or to— A Right; well, one of them was a test but one of them was he just wanted to see could I hear.

Q That's all the questions I have.

Commissioner Evans: Do you have any medical reports? I have— Is William Overbey an M.D.?

Mr. Fowlkes: No, he's an audiologist.

Commissioner Evans: Did he see any medical doctor?

By Mr. Fowlkes:

Q You said you saw Dr. Crockett? A Dr. Crockett, yes.

Q You saw him before—

[5] Mr. Fowlkes: He is an E.N.T. Specialist.

Commissioner Evans: Do you have Dr. Crockett's report?

Mr. Jones: No, Your Honor, we don't have it in this file.

Mr. Fowlkes: We don't have a copy of it. We have a copy where Dr. Link who is with Dr. Crockett, saw him in '68 but that's the only one we have.

Commissioner Evans: If you'll get a report from Dr. Crockett and file it with the Commission and send a copy to Mr. Fowlkes.

(Off the record)

By Mr. Fowlkes:

Q Mr. Kincaid, what was the date in March last year that you saw Dr. Crockett? A I believe it was the 25th or the 27th of March.

Q Of March, of '73? A Right.

Q Well, now let's see, was it February or March? A Well, February is when I went and seen Dr.—when I first went over to Dr. Crockett for my hearing and he examined me.

Q All right. And, did he tell you at that time you had a hearing loss? [6] A Right.

Q Did he tell you it was due to working in the mines with a roof bolter? A He asked me what kind of job I was doing and I told him—explained how it worked and everything and so, he sent me back home and then he sent me a questionnaire and I filled that out and then, I had to go back to Dr. Oberbey.

Q That's at the Speech and Hearing Clinic? A Right.

Q But Dr. Crockett told you in the latter part of February of '73 what was the reason for your hearing loss? A Right, right.

Mr. Fowlkes: That's all I have.

(Off the record)

Mr. Fowlkes: When Dr. Crockett's report is filed, we'd like to take leave to cross examine Dr. Crockett on the basis of what he says there.

Commissioner Evans: I assume Dr. Crockett knows our system of rating. It's in the speech tone 500—the decibel loss of 500, 1000 and 2000, I believe it is.

(Case concluded)

* * *

OPINION BY COMMISSIONER EVANS

Filed September 9, 1974

Hearing before Commissioner Evans at Lebanon, Virginia, on June 28, 1974.

Claimant was employed by the defendant as a roof bolter for a period of approximately eight years at an average weekly wage of $200.00. The nature of the employment exposed him to almost constant loud noise. Claimant noticed a diminition in his hearing ability and underwent medical examinations during January and March of 1973. On April 1, 1973, he was advised that he had a hearing loss which, in the opinion of the attending physician, was attributable to the noise encountered in his employment.

The audiogram covering claimant's hearing ability discloses that he has a 40 decibel hearing loss in the right ear and a 55 decibel hearing

loss in the left ear. Under the Industrial Commission of Virginia's guide for determining hearing loss, the diminition in hearing ability equals 38.3% loss of hearing in the right ear and 63.3% loss of hearing in the left ear.

Award

An award is hereby entered in behalf of Luther M. Kincaid against Clinchfield Coal Company providing for the payment of specific disability benefits at the rate of $70.00 a week beginning April 1, 1973, and continuing thereafter for a period of 50.80 weeks and covering 38.3% loss of hearing in the right ear and 63.3% loss of hearing in the left ear.

All compensation due under this award having accrued, payment shall be made in one sum upon receipt of same and the file then closed.

APPLICATION FOR REVIEW

Filed September 16, 1974

Comes now the defendant, by counsel, and applies for a review of an opinion entered by Commissioner Evans in the above-styled case on September 9, 1974.

Clinchfield Coal Company
By Counsel

Penn, Stuart & Eskridge
208 East Main Street
Abingdon, Virginia 24210

By /s/ J. Thomas Fowlkes
J. Thomas Fowlkes
Counsel for Defendant

Certificate Of Service

I, J. Thomas Fowlkes, counsel for defendant, certify that I have this 13th day of September, 1974, forwarded a copy of the foregoing Application for Review to Dennis E. Jones, Esq., claimant's counsel of Record.

/s/ J. Thomas Fowlkes
J. Thomas Fowlkes

REVIEW OPINION

Filed November 8, 1974

* * *

Review before the Full Commission at Richmond, Virginia, November 6, 1974.

Miller, Commissioner, rendered the opinion.

The full Commission upon review adopts the findings of fact and conclusions of law contained in the decision and award of September 9, 1974.

Accordingly, the said decision and award of September 9, 1974 appealed from are

Affirmed.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Filed November 15, 1974

* * *

Notice Of Appeal

Comes now the defendant, Clinchfield Coal Company, and hereby files Notice of Appeal to the Supreme Court of Virginia of the award entered by Commissioner Evans in the above-styled case on September 9, 1974, which award was affirmed by the full Commission by opinion dated November 8, 1974.

Assignments Of Error

Comes now defendant, Clinchfield Coal Company, and assigns the following errors to the award entered in the above-styled case:

I.

Commissioner Evans erred in holding that the claimant's Application for Hearing was filed in a timely manner, as required by *Va. Code Ann.* § 65.1-52.

II.

Commissioner Evans erred in holding that the diagnosis of the occupational hearing loss was first communicated to the claimant within one year from the date he filed his Application for Hearing.

III.

The evidence before the Commission in the above-styled case was insufficient to support the findings of fact and conclusions of law of Commissioner Evans and the full Commission.

Clinchfield Coal Company
By Counsel

Penn, Stuart & Eskridge
208 East Main Street
Abingdon, Virginia 24210

By /s/ J. Thomas Fowlkes
J. Thomas Fowlkes
Counsel for Defendant

Certificate Of Service

I, J. Thomas Fowlkes, counsel for defendant, certify that I have this 14th day of November, 1974, forwarded a copy of the foregoing Notice of Appeal and Assignments of Error to Dennis E. Jones, Esq., P. O. Box 600, Lebanon, Virginia, claimant's counsel of record.

/s/ J. Thomas Fowlkes
J. Thomas Fowlkes