

15-0397

**STATE OF WEST VIRGINIA  
WORKERS' COMPENSATION OFFICE OF JUDGES**

IN THE MATTER OF:

JCN: 2014002593  
2014010112

Stephen Swain,  
CLAIMANT

D.L.E.: 08/31/2012  
03/13/2013

and

Brayman Construction, J&J General  
Maintenance, Inc., Pioneer Pipe, Inc.,  
EMPLOYER

**DECISION OF ADMINISTRATIVE LAW JUDGE**

**PARTIES:**

Claimant, Stephen Swain, by counsel, Lawrence B. Lowry.  
Employer, J&J General Maintenance, Inc., by counsel, Jeffrey B. Brannon.  
Employer, Brayman Construction Corp, by counsel, Lisa Warner-Hunter.  
Employer, Pioneer Pipe, Inc., by counsel, James Heslep.

**ISSUES:**

1. The claimant protested the Claim Administrator's Order of August 1, 2013 for Brayman Construction in Claim number 2014002593. The claim for occupational hearing loss was denied, noting the claimant was not employed by Brayman Construction on his last day of exposure to excessive occupational noise.

2. The claimant protested the Claim Administrator's Order of September 20, 2013 for J&J General Maintenance in Claim number 2014010112, which denied the Claim for occupational hearing loss noting that the claimant did not have sufficient noise exposure with J&J General Maintenance.

**RECORD CONSIDERED:**

See record considered attached.

8. In a report dated May 2, 2013, Dr. Abraham noted the claimant had a 33-year work history operating heavy machinery. The claimant started noting some problems with his hearing 10 years ago. Dr. Abraham found the claimant had a bilateral sensorineural deafness consistent with his history of noise exposure with a whole man impairment of 19.43%.

9. At a hearing on April 1, 2014, the claimant testified he was a heavy equipment operator for 32 years. He worked inside and outside. He notes he was subjected to loud noises from his employment as well as equipment being run around him when he worked. He worked out of the union hall and worked numerous jobs in his career. He noted he had introduced his union worksheet. His last employment was with Pioneer Pipe. He worked 40 hours for them. He operated a crane inside the plant and was subjected to loud noise, including compressors and a rattle gun. He did use ear plugs but had to take them out for conversations. He worked for J&J General Maintenance in October through December 2012 and in February and March of 2003. He worked mostly outside running machinery. He did work some inside. He was subjected to loud noise and he did wear ear plugs but he had to take them out for conversation. He worked for Brayman Construction from July 2011 through August 2012. He ran an excavator and dozer most of the time on the job. He worked outside and was subjected to loud noise but it was not as bad as working in the plants. He worked for Early Construction for one day in August of 2012. He never had an audiogram prior to May 1 of 2013. He noted that his union work record that was introduced into the record was accurate. He wore hearing protection for the last 10 to 12 years of his work life. At this hearing, motions of counsel to consolidate both claims for decision was granted, but the motion to add Early Construction and Pioneer Pipe, Incorporated, as additional possible chargeable employers was denied.

10. By Administrative Law Judge's Order of July 2, 2014, it was found that the motion to add Early Construction Company as a chargeable company remained denied, but that the motion to add Pioneer Pipe, Inc., as a potential chargeable employer was now granted.

11. The closing argument of the employer, Brayman Construction, was considered in the rendering of this Decision.

**DISCUSSION:**

The issue is whether the claimant's hearing loss is compensable under the West Virginia Workers' Compensation law. Under W.Va. Code §§23-4-1, 23-4-6b, and 23-4-15(c) benefits are granted when there is a hearing loss from trauma or from exposure to hazardous levels of noise in the course of and as the result of the claimant's employment. A factual determination is made from the evidence as to whether the claimant's hearing loss is related to his employment. The application must be filed within three years after the latest of the following events: (a) the day on which the employee was last exposed to excessive occupational noise; or (b) the date that the claimant was told of his occupational hearing loss by a physician; or (c) the date which the claimant should reasonably have

known that his hearing loss was caused by his occupational exposure. Holdren v. Workers' Compensation Commissioner, 181 W.Va. 337, 382 S.E. 2d 531 (1989).

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

Contrary to the date of last exposure noted on the Claim Administrator's Orders, it is found that this record supports that the claimant's last exposure to excessive noise with Brayman Construction was August 31, 2012 and his last exposure to excessive noise with J&J General Maintenance, Inc., was March 13, 2013, and the record also demonstrates that the claimant's last exposure to excessive noises with Pioneer Pipe, Inc., was March 21, 2013. As noted in an Administrative Law Judge Order of July 2, 2014, beginning on January 1, 2006, the Office of the Insurance Commissioner elected to no longer allocate hearing loss claims in West Virginia Workers' Compensation claims pursuant to the discretionary authority found in §23-4-6b(g), and therefore, the chargeable employer will be the last employer with whom the claimant was exposed to hazardous noise in the course of and resulting from employment. It is found that the record establishes that the claimant was subjected to excessive occupational noise by all three of the employers noted in the style of this Decision. The claimant's last exposure to excessive noise was on March 21, 2013 when he was employed by Pioneer Pipe, Incorporated, and therefore, Pioneer Pipe, Incorporated is found to be the sole chargeable employer in the subject claim. This Decision only deals with the issue of chargeability, and now the permanent partial disability issue may be addressed.

**CONCLUSIONS OF LAW:**

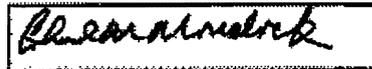
In accordance with the record and facts, it is found that Pioneer Pipe, Incorporated, is the sole chargeable employer.

Accordingly, It is hereby ORDERED that the Claim Administrator's Order of August 1, 2013 is AFFIRMED, and it is hereby ORDERED that the Claim Administrator's Order of September 20, 2013 is MODIFIED and it is found that J&J General Maintenance was not the last employer to subject the claimant to excessive occupational noise, therefore, J&J General Maintenance is not a chargeable employer in the subject claim but Pioneer Pipe, Inc., is found to be the chargeable employer in the subject claim.

**APPEAL RIGHTS:**

Under the provisions of W.Va. Code §23-5-12, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or action of the Administrative Law Judge. **The appeal shall be filed directly with the Workers' Compensation Board of Review at P.O. Box 2628, Charleston, WV, 25329.**

Date: November 6, 2014



**Charles Moredock  
Administrative Law Judge**

CMM:lkc

cc: STEPHEN SWAIN  
LAWRENCE B LOWRY - COUNSEL FOR CLAIMANT  
J & J GENERAL MAINTENANCE INC  
JEFFREY B BRANNON - COUNSEL FOR EMPLOYER  
BRAYMAN CONSTRUCTION CORP  
LISA WARNER HUNTER - COUNSEL FOR EMPLOYER (ADDITIONAL)  
PIONEER PIPE INC  
JAMES HESLEP - COUNSEL FOR EMPLOYER (ADDITIONAL)  
BRICKSTREET MUTUAL INSURANCE CO  
WESTFIELD INSURANCE CO.  
THE CHARTER OAK FIRE INS. CO.

Stephen Swain

JCN: 2014002593  
2014010112

JCN: 2014010112  
Date: November 6, 2014

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of September 20, 2013, regarding REJECTION OF CLAIM OCCUPATIONAL DISEASE.

EVIDENCE SUBMITTED:

Employer Evidence

Document Type: Not Specified  
Document Date: 1/1/1980  
Submit Date: 5/5/2014  
Author: STEPHEN SWAIN

Document Type: Not Specified  
Document Date: 10/28/2011  
Submit Date: 4/2/2014  
Author: OOJ/ALJ DECISION

Document Type: Not Specified  
Document Date: 5/29/2012  
Submit Date: 4/2/2014  
Author: WV. BAORD REVIEW ORDER

Document Type: Not Specified  
Document Date: 3/18/2013  
Submit Date: 9/19/2014  
Author: STEPHEN SWAIN

Document Type: Not Specified  
Document Date: 3/18/2013  
Submit Date: 9/19/2014  
Author: PIONEER PIPE, INC.

Document Type: Not Specified  
Document Date: 3/23/2013  
Submit Date: 9/19/2014  
Author: STEPHEN SWAIN

Document Type: Not Specified  
Document Date: 9/10/2013  
Submit Date: 11/19/2013  
Author: STEPHEN SWAIN WORK HISTORY

Document Type: Not Specified

Stephen Swain

JCN: 2014002593  
2014010112

Document Date: 9/20/2013  
Submit Date: 10/21/2013  
Author: WESTFIELD INSURANCE ORDER

**CLOSING ARGUMENTS:**

Party Submitted: Employer  
Letter Date: 5/23/2014  
Party Submitted: Employer  
Letter Date: 5/23/2014  
Party Submitted: Employer  
Letter Date: 10/10/2014

**HEARING TRANSCRIPTS:**

Hearing Date: 4/1/2014

Stephen Swain

JCN: 2014002593  
2014010112

JCN: 2014002593  
Date: November 6, 2014

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of August 1, 2013, regarding REJECTION OF CLAIM OCCUPATIONAL DISEASE.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified  
Document Date: 1/1/1980  
Submit Date: 4/1/2014  
Author: WORK HISTORY DEAIL REPORT

Document Type: Not Specified  
Document Date: 4/29/2013  
Submit Date: 1/15/2014  
Author: EMPLOYEES & PHYSICIANS REPORT OF HEARING LOSS

Document Type: Not Specified  
Document Date: 5/2/2013  
Submit Date: 1/15/2014  
Author: DR. CHARLES ABRAHAM, MD.

Document Type: Not Specified  
Document Date: 8/1/2013  
Submit Date: 1/15/2014  
Author: CLAIMS ADMINSTRATOR ORDER

Document Type: Not Specified  
Document Date: 9/10/2013  
Submit Date: 1/15/2014  
Author: J & J GENERAL MAINTENANCE, INC./WORK HISTORY

Employer Evidence

Document Type: Not Specified  
Document Date: 10/28/2011  
Submit Date: 4/2/2014

Stephen Swain

JCN: 2014002593  
2014010112

Author: OOJ/ALJ DECISION

Document Type: Not Specified

Document Date: 5/29/2012

Submit Date: 4/2/2014

Author: WV. BAORD REVIEW ORDER

Document Type: Not Specified

Document Date: 3/18/2013

Submit Date: 9/25/2014

Author: STEPHEN SWAIN

Document Type: Not Specified

Document Date: 3/18/2013

Submit Date: 9/25/2014

Author: PIONEER PIPE, INC.

Document Type: Not Specified

Document Date: 3/23/2013

Submit Date: 9/25/2014

Author: STEPHEN SWAIN

**CLOSING ARGUMENTS:**

Party Submitted: Employer

Letter Date: 5/23/2014

**HEARING TRANSCRIPTS:**

Hearing Date: 4/1/2014

**STATE OF WEST VIRGINIA**  
**WORKERS' COMPENSATION OFFICE OF JUDGES**  
P.O. Box 2233, Charleston, WV 25328  
Telephone (304) 558-0852

IN THE MATTER OF:

RE:

Stephen Swain,  
CLAIMANT

JCN: 2014002593  
2014010112

and

DLE: 8-31-2012  
3-13-2013

Brayman Construction  
J & J General Maintenance Inc.  
Pioneer Pipe, Inc.,  
EMPLOYERS

**ORDER DENYING MOTION FOR RECONSIDERATION**

The claim is in litigation due to the claimant's protests to the Claim Administrator's Order of August 1, 2013 denying application for benefits, and September 20, 2013 denying application for benefits.

By motion of November 24, 2014, the employer, Pioneer Pipe Inc., moved for the Administrative Law Judge Decision of November 6, 2014 to be reconsidered. The motion noted that the claimant had only been employed by Pioneer Pipe Inc. for 4 days and therefore, cannot be found to be a chargeable employer. The Administrative Law Judge Order of July 2, 2014 found that the chargeable employer will be found to be the last employer with whom the claimant was exposed to hazardous noise in the course of and resulting from employment regardless of the length of the exposure. The Administrative Law Judge Decision of November 6, 2014 found that the claimant was last exposed to excessive occupational noise while employed with Pioneer Pipe Inc. and therefore, they were found to be the sole chargeable employer. The claimant's work record was introduced into evidence and the Decision of Administrative Law Judge took into account that the claimant had far less than 60 days exposure with Pioneer Pipe Inc. when determining they were the sole chargeable employer as they were the last employer that subjected the claimant to excessive occupational noise.

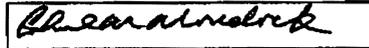
In accordance with the above the employer's motion to reconsider the Administrative Law Judge Decision of November 6, 2014 is DENIED.

Stephen Swain

JCN: 2014002593  
2014010112

All of which is accordingly Ordered.

Date: January 5, 2015



Charles Moredock  
Administrative Law Judge

CMM:sc

cc: STEPHEN SWAIN  
LAWRENCE B LOWRY - COUNSEL FOR CLAIMANT  
BRAYMAN CONSTRUCTION  
LISA WARNER HUNTER - COUNSEL FOR EMPLOYER  
J & J GENERAL MAINTENANCE INC  
JEFFREY B BRANNON - COUNSEL FOR EMPLOYER (ADDITIONAL)  
PIONEER PIPE INC  
JAMES HESLEP - COUNSEL FOR EMPLOYER (ADDITIONAL)  
BRICKSTREET MUTUAL INSURANCE CO  
WESTFIELD INSURANCE CO.  
THE CHARTER OAK FIRE INS. CO.

**STATE OF WEST VIRGINIA  
WORKERS' COMPENSATION BOARD OF REVIEW**

PIONEER PIPE, INC.,  
Appellant

Appeal No. 2049999  
JCN: 2014002593 & 2014010112

v.  
STEPHEN SWAIN,  
BRAYMAN CONSTRUCTION,  
and J & J GENERAL MAINTENANCE, INC.,  
Appellees

**ORDER**

The following case is an appeal by the employer, Pioneer Pipe, Inc., from a final order of the Workers' Compensation Office of Judges dated November 6, 2014, which addressed the claims administrator's order dated August 1, 2013, in JCN 2014002593, and the claims administrator's order dated September 20, 2013, in JCN 2014010112. The Administrative Law Judge held that Pioneer Pipe, Inc., is the chargeable employer.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals.

Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated November 6, 2014, which relate to the

STEPHEN SWAIN

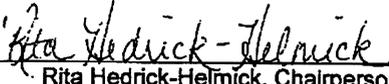
Appeal No. 2049999

issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved.

Accordingly, it is ORDERED that the final order of the Workers' Compensation Office of Judges dated November 6, 2014, is hereby AFFIRMED.

From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Supreme Court of Appeals within thirty days from the date of this order. The appeal shall be filed with Rory L. Perry, II, Clerk of the West Virginia Supreme Court of Appeals, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

DATED: APRIL 3, 2015

  
Rita Hedrick-Helmick, Chairperson

cc: PIONEER PIPE, INC.  
JAMES HESLEP  
BRICKSTREET INSURANCE  
STEPHEN SWAIN  
LAWRENCE B. LOWRY  
BRAYMAN CONSTRUCTION  
LISA WARNER HUNTER  
THE CHARTER OAK FIRE INSURANCE COMPANY  
J & J GENERAL MAINTENANCE, INC.  
JEFFREY B. BRANNON  
WESTFIELD INSURANCE COMPANY

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## APPENDIX B - REVISED RULES OF APPELLATE PROCEDURE WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

FILED

MAY - 5 2015

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

Complete Case Title: Pioneer Pipe, Inc. v. Stephen Swain, et al

Petitioner: Pioneer Pipe, Inc. Respondent: Stephen Swain

Counsel: James W. Heslep Counsel: Lawrence Lowry

Claim No.: 2014015342 Board of Review No.: 2049999

DOI/DLE: 3/21/2013 Date Claim Filed: 4/29/2013

Date and Ruling of the Office of Judges: 11/6/2014

Date and Ruling of the Board of Review: 4/3/2015

Issue and Relief Requested on Appeal:

Seeking reinstatement of claims administrator's order rejecting the claim.

### CLAIMANT INFORMATION

Claimant's Name: Stephen Swain

Nature of Injury: Noise exposure

Age: 60 Is the claimant still working? Yes  No  Where? \_\_\_\_\_

Occupation: Heavy equipment operator No. of years? 32

Claim compensable?  Yes  Order date? OOJ - 11/6/2014

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### ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): N/A Old Fund or New Fund (please circle one)

Date Last Employed: \_\_\_\_\_

Total PPD awards: \_\_\_\_\_ (add dates of orders on separate page)

Date and findings of PTD Review Board: \_\_\_\_\_

List compensable conditions in this claim: Noise-induced hearing loss

(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?  
Yes  No

Are there any related petitions currently pending below? Yes  No   
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case?

Yes  No

If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

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**Statutory Notice of Filing Petition for Appeal**  
May 07, 2015

**Pioneer Pipe, Inc. v. WVOIC/Stephen Swain, Brayman  
Construction, and J & J General Maintenance, Inc.**  
Supreme Court No.15-0397  
Petition for Appeal Filed: May 05, 2015

**Board of Review Information**  
Claim Number: 2014010112 ✕  
Appeal Number: 2049999  
Order Date: April 03, 2015  
✕ 2014 002593

Dear Interested Persons:

Statutory notice pursuant to W.Va. Code § 23-5-15 is hereby given that a petition for appeal from the final order of the Workers' Compensation Board of Review has been filed in the above-captioned case.

**In future correspondence or filings, please refer to the Supreme Court case number. DO NOT use the claimant's social security number on any papers filed with the Court.**

Refer to Rule 12 of the Rules of Appellate Procedure for more information.

Once the case is mature, the papers filed in this matter will be passed directly to the Court for consideration. You will be advised of the Court's decision in writing.

Sincerely, Rory L. Perry II, Clerk of Court

---

*Notice Provided to:* Workers' Compensation Commission, Workers' Compensation Board of Review and to the following counsel of record:

**Counsel for Petitioner:**

James Heslep  
400 White Oaks Blvd.  
Bridgeport, WV26330

**Counsel for Respondent(s):**

Lisa A. Warner Hunter  
James Mark Building  
901 Quarrier Street  
Charleston, WV25301

Jeffrey B. Brannon  
400 Tracy Way, Suite 110  
Charleston, WV25311

Lawrence B. Lowry  
I.U.O.E. Trust Building-636 Fourth Ave.  
Post Office Box 402  
Huntington, WV25708-0402