

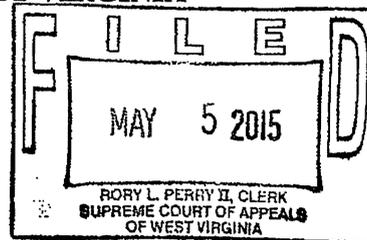
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

15-0397

CHARLESTON



PIONEER PIPE, INC., ✓

Petitioner,

and

Sup. Ct. No.: _____

App. No.: 2049999 ✓

JCN: 2014010112 ✓

CRN: ~~2014015432~~

DLE: 03-21-13 2014002593

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

Respondents.

order date: 4/3/15

**PIONEER PIPE, INC.'S
PETITION FOR APPEAL**

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PIONEER PIPE, INC.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
ASSIGNMENT OF ERROR	4
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	7
STATEMENT REGARDING ORAL ARGUMENT	8
ARGUMENT	9
<p>THE WORKERS' COMPENSATION BOARD OF REVIEW ERRED IN ADOPTING AN INTERPRETATION OF THE WEST VIRGINIA WORKERS' COMPENSATION ACT THAT SPECIFICALLY CONFLICTS WITH THE STATUTORY CHARGEABILITY REQUIREMENT FOR NOISE-INDUCED HEARING LOSS.</p>	
CONCLUSION	13
CERTIFICATION OF APPENDIX	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

	<u>Page</u>
West Virginia Code § 23-4-1f [2013]	10
West Virginia Code § 23-4-6b [2013]	11
West Virginia Code § 23-5-12 [2013]	9
West Virginia Code § 23-5-15 [2013]	10
<i>Barnett v. State Workers' Comp. Comm'r.</i> , 153 W. Va. 796, 172 S.E.2d 698 (1970)	9
<i>Estep v. State Comp. Comm'r.</i> , 130 W. Va. 504, 44 S.E.2d 305 (1947)	9
<i>Gibson v. State Comp. Comm'r.</i> , 127 W. Va. 97, 31 S.E.2d 555 (1944)	9
<i>Newhart v. Pennybacker</i> , 120 W. Va. 774, 200 S.E. 350 (1938)	12
<i>Smith v. State Workers' Comp. Comm'r.</i> , 155 W. Va. 883, 189 S.E.2d 838 (1972)	9

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**PIONEER PIPE, INC.'S
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ASSIGNMENT OF ERROR

This workers' compensation claim is in litigation pursuant to the claimant's protests to the claims administrator's orders of (1) August 1, 2013, denying the claimant's application for occupational hearing loss benefits, and (2) September 20, 2013, denying the claimant's application for occupational hearing loss benefits. By decision dated November 6, 2014, the Office of Judges named Pioneer Pipe, Inc. ("Pioneer") as the sole chargeable employer in this claim on the basis that the claimant's last day of employment occurred with Pioneer. The Office of Judges made this order despite its acknowledgment that the claimant had not worked for Pioneer for 60 consecutive days as required to establish chargeability of a claim under W. Va. Code § 23-4-6b(g). The Board of Review then affirmed the erroneous decision of the Office of Judges on April 3, 2015.

Pioneer now petitions for appeal from this decision as it results from an acknowledged deviation from the plain language of the Workers' Compensation Act. Specifically, evidence on record established that the claimant worked only four days for Pioneer. As such, Pioneer cannot be deemed the chargeable employer in this claim for occupational hearing loss benefits. W. Va. Code § 23-4-6b(g) plainly states that an employee must have worked for 60 consecutive days for an employer to establish a claim for occupational hearing loss benefits against that employer. The Office of Judges and the Board of Review have openly stated in their underlying orders that they will not abide by that statutory requirement. Based on this error, Pioneer respectfully petitions this Honorable Court for appeal from the decision of the Board of Review.

STATEMENT OF THE CASE

The claimant is a 60-year old heavy equipment operator. He worked for multiple employers from a union hall over the course of 32 years. On April 29, 2013, the claimant filed a report of occupational hearing loss.

He reported that his last four employers were Brayman Construction (July 2011-August 2012), Early Construction (one day in August 2012), J&J General Maintenance (October-December 2012), and Pioneer (March 18-21, 2013).

Pioneer introduced the claimant's time sheets for the four days he worked from March 18-23, 2013, as evidence that the claimant had not established the 60 days of employment necessary to make Pioneer a chargeable employer in this matter.

The Office of Judges then issued a decision on November 6, 2014, that named Pioneer as the sole chargeable employer in this matter. The Administrative Law Judge stated that the claim was to be charged against the last employer with which the claimant sustained noise exposure. He failed to make any discussion of the 60-day exposure requirement found at W. Va. Code § 23-4-6b. As such, Pioneer requested reconsideration of the November 6, 2014 decision.

In response to Pioneer's request for reconsideration, the Office of Judges ordered that Pioneer's request be denied. The Office of Judges explained that the Insurance Commissioner's stance against allocation of noise-induced hearing loss somehow abolished the 60-day employment requirement for chargeability of a claim under W. Va. Code § 23-4-6b(g). Based upon this egregious error, Pioneer appealed the Office of Judges November 6, 2014 order to the Board of Review.

By decision dated April 3, 2015, the Board of Review affirmed the decision of the Office of Judges. Based on a clear error of law, Pioneer now petitions this Honorable Court for appeal from the decision of the Board of Review.

SUMMARY OF ARGUMENT

The claimant worked only four days for Pioneer—this fact is undisputed. W. Va. Code § 23-4-6b(g) states that an employee must have 60 days of employment with an employer in order for that employer to be charged with a claim for occupational hearing loss benefits. The Board of Review believes that the Insurance Commissioner's position statement against the allocation of hearing loss claims among employers negates the statutory language of W. Va. Code § 23-4-6b(g). The Insurance Commissioner's statement does not abrogate the 60-day requirement, and the Insurance Commissioner does not have the authority to abrogate the 60-day requirement found in the Workers' Compensation Act. Accordingly, Pioneer may not held liable for this claim under the Workers' Compensation Act.

STATEMENT REGARDING ORAL ARGUMENT

Pioneer requests oral argument on this issue.

ARGUMENT

THE WORKERS' COMPENSATION BOARD OF REVIEW
ERRED IN ADOPTING AN INTERPRETATION OF THE
WEST VIRGINIA WORKERS' COMPENSATION ACT THAT
SPECIFICALLY CONFLICTS WITH THE STATUTORY
CHARGEABILITY REQUIREMENT FOR NOISE-INDUCED
HEARING LOSS.

The Board of Review committed error in affirming the Office of Judges' order finding this claim to be chargeable against Pioneer. Under W. Va. Code § 23-5-12, if a decision of an administrative law judge is appealed, the Board of Review shall reverse the findings of the administrative law judge when the administrative law judge's findings are affected by error of law. In this instance, the Board of Review failed in its responsibility.

The West Virginia Supreme Court of Appeals has defined the "clearly wrong" standard in its review of Workers' Compensation Board of Review decisions. According to the Court, a decision is clearly wrong if it is not supported by the evidence of record, if it is clearly against the preponderance of the evidence, or if it is based upon evidence which is speculative and inadequate. *Gibson v. State Comp. Comm'r.*, 127 W. Va. 97, 31 S.E.2d 555 (1944); *Estep v. State Comp. Comm'r.*, 130 W. Va. 504, 44 S.E.2d 305 (1947); *Barnett v. State Workers' Comp. Comm'r.*, 153 W. Va. 796, 172 S.E.2d 698 (1970); *Smith v. State Workers' Comp. Comm'r.*, 155 W. Va. 883, 189 S.E.2d 838 (1972). The evidence contained in the underlying record clearly shows that the claimant worked only four days for Pioneer. Four days of employment is insufficient occupational exposure to a noise hazard to establish chargeability against an employer under W. Va. Code § 23-4-6b(g). The underlying decisions deeming this claim to be chargeable against Pioneer are, therefore, erroneous.

Statutory law gives deference to orders of the Board of Review when such orders are appealed to the Supreme Court of Appeals. This deference, however, is not absolute. This

Court is empowered to correct decisions that are clearly wrong. West Virginia Code § 23-5-15(d) states the applicable standard of review when such an appeal is made from the Board of Review to the Supreme Court of Appeals:

If the decision of the board effectively represents a reversal of a prior ruling of either the commission or the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is 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. The court may not conduct a de novo reweighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was 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.

In the instant case, the evidence submitted into the record clearly shows that the claimant did not have 60 days of employment with Pioneer. Charging this claim to Pioneer in light of this evidence was clearly wrong on the part of the Board of Review.

Based on the evidence presented in this claim for benefits, the claimant appears to have sustained noise-induced hearing loss. West Virginia Code § 23-4-1(f) provides that occupational hearing loss shall be considered to have been incurred in the course of employment if: (1) there is a direct causal connection between the conditions in which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as the result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is

incidental to the character of the business and not independent of the relation of employer/employee; and, (6) that it appears to have its origin in risk connected with the employment. Once the existence of noise-induced hearing loss is established, the question then turns to that of chargeability.

Simply put, the claimant had insufficient employment with Pioneer to make it responsible for this claim. West Virginia Code § 23-4-6b establishes the threshold for charging an employer with noise-induced hearing-loss benefits. In relevant part, it states:

An application for benefits alleging a noise-induced hearing loss shall set forth the name of the employer or employers and the time worked for each. The commission shall allocate to and divide any charges resulting from the claim among the employers *with whom the claimant sustained exposure to hazardous noise for as much as sixty days* during the period of three years immediately preceding the date of last exposure.

(Emphasis added). Under this standard, the claimant failed to establish that he suffered from hazardous noise exposure while employed by Pioneer for a period of 60 days. W. Va. Code § 23-4-6b(g) requires that an application for hearing loss benefits identify the claimant's employers and the time worked for each. Chargeability of the claim is then premised upon 60 days of hazardous noise exposure with the employer. **The claimant only worked for Pioneer for four days.** His claim cannot be chargeable against Pioneer under W. Va. Code § 23-4-6b(g), but the Office of Judges' decision does not reflect this fact.

While the Offices of the Insurance Commissioner has espoused a policy of not allocating hearing loss claims among multiple employers under W. Va. Code § 23-4-6b(g), it has not espoused any policy alleviating the 60-day exposure requirement. Whereas waiver of the administrative allocation of a claim for benefits could arguably be acceptable under the permissive language of the statute, waiver of an exposure requirement to establish basic chargeability of an occupational hearing loss claim is not defensible. The 60-day exposure requirement for chargeability has been waived with no expression of intent from the Legislature

to do so. Either the Insurance Commissioner has exceeded his authority in deleting a basic standard of chargeability, or the Office and Judges and Board of Review have misinterpreted the Insurance Commissioner's policy on allocation. In either case, clear error has occurred in the underlying decisions.

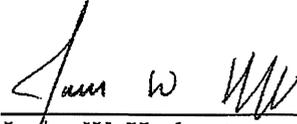
This erroneous deletion of the chargeability standard is ripe for the creation of absurd results. Here, the claimant worked 32 years as a heavy equipment operator. The last four days of his career occurred under the employ of Pioneer. Under the interpretation of the Insurance Commissioner's allocation plan adopted by the Board of Review, Pioneer will now be charged with the entirety of the claimant's hearing loss. This action creates an absurd result and as this Court has repeatedly noted, construction of a statute that produces an absurd result will not be made. *See, e.g., Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938).

While it could be argued that charging an employer with a 32-year history of noise-induced hearing loss after only 60 days of employment is not much less absurd, that is at least a position that the Legislature considered and adopted in creating and implementing W. Va. Code § 23-4-6b(g). Instead, the Office of Judges and Board of Review have decided to act as some sort of super-legislative/judicial authority that can re-write statutes and rule upon them in a single moment. Such an action is beyond the jurisdictional limits of those bodies and clearly erroneous in the application of the Workers' Compensation Act.

As the Office of Judges committed clear error in its underlying decision, the Board of Review should have reversed its finding that Pioneer is a proper chargeable employer in this matter. As reversible error has been committed by the Board of Review, Pioneer's petition for appeal should be granted.

CONCLUSION

For the foregoing reasons, the Board of Review improperly affirmed the decision of the Administrative Law Judge. The Board of Review committed reversible error upon which Pioneer's petition for appeal should be granted.



James W. Heslep (W. Va. Bar No. 9671)

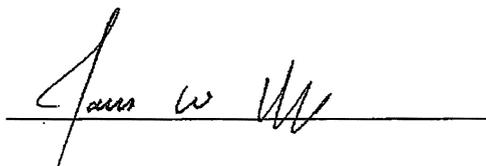
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330

Attorney for Petitioner
Pioneer Pipe, Inc.

102100.02166

APPENDIX CERTIFICATION

I, James W. Heslep, the undersigned counsel for the Petitioner, Pioneer Pipe, Inc., hereby certify that the contents of the Appellant's Appendix are true and accurate copies of items contained in the record considered by the West Virginia Offices of the Insurance Commissioner Workers' Compensation Office of Judges and Workers' Compensation Board of Review in the claimant's protests to the claims administrator's orders dated August 1, 2013, and September 20, 2013.

A handwritten signature in cursive script, appearing to read "James W. Heslep", is written over a horizontal line.

CERTIFICATE OF SERVICE

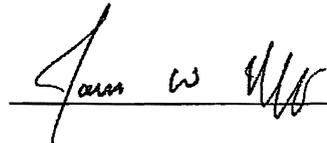
I hereby certify that on the 4th day of May, 2015, I served the foregoing "Pioneer Pipe, Inc.'s Petition for Appeal" upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Lawrence B. Lowry, Esq.
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Huntington, WV 25708-0402

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Charleston, WV 25301



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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.

Supreme Court of Appeals of West Virginia
Office of the Clerk

Rory L. Perry II, Clerk of Court
State Capitol, Room E-317
Charleston, WV 25305

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:

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