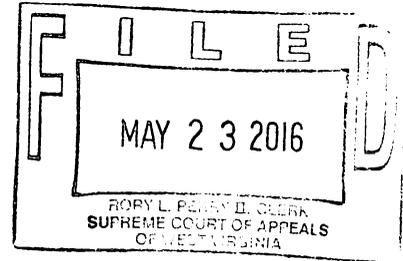


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



PIONEER PIPE, INC.,

Petitioner,

and

Sup. Ct. No.: 15-0397
App. No.: 2049999
JCN: 2014010112
CRN: 2014015432
DLE: 03-21-13

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

Respondents.

**PIONEER PIPE, INC.'S
REPLY TO RESPONDENT STEPHEN SWAIN**

JAMES W. HESLEP

STEPTOE & JOHNSON PLLC
400 WHITE OAKS BOULEVARD
BRIDGEPORT, WV 26330
(304) 933-8000

ATTORNEY FOR PETITIONER
PIONEER PIPE, INC.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
STATEMENT OF THE CASE.....	4
ARGUMENT	5
 W. VA. CODE § 23-4-6b(g) ESTABLISHES THE THRESHOLD FOR CHARGEABILITY OF AN OCCUPATIONAL HEARING LOSS CLAIM AND PERMITS THE INSURANCE COMMISSIONER TO CHOOSE WHETHER THE CHARGES FOR SUCH A CLAIM WILL BE DIVIDED AMONG THE CLAIMANT’S PRIOR EMPLOYERS. 	
CONCLUSION.....	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Page

West Virginia Code § 23-4-6b [2013]6

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

PIONEER PIPE, INC.,

Petitioner,

and

Sup. Ct. No.: 15-0397
App. No.: 2049999
JCN: 2014010112
CRN: 2014015432
DLE: 03-21-13

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

Respondents.

**PIONEER PIPE, INC.'S
REPLY TO RESPONDENT STEPHEN SWAIN**

STATEMENT OF THE CASE

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 petitioned for appeal from this decision as it resulted 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 chargeable claim for occupational hearing loss benefits against that employer. The Office of Judges and the Board of Review openly stated in their underlying orders that they will not abide by that statutory requirement.

On May 5, 2016, Pioneer received briefing from Respondent Stephen Swain ("Swain"). Swain argues that the Office of Judges and the Board of Review properly identified Pioneer as the chargeable employer in this claim based upon a policy interpretation from the Offices of the Insurance Commissioner regarding division of charges among multiple employers in occupational hearing loss claims. Pioneer now replies that Swain's position is unreliable. While the Insurance Commissioner does hold the authority to determine whether to divide the charges related to an occupational hearing loss claim amongst the claimant's previous employers, the Insurance Commissioner holds no authority to abrogate the chargeability threshold found at W. Va. Code § 23-4-6b(g). No employer may be identified as a chargeable employer in an occupational hearing loss claim unless it has exposed the claimant to hazardous noise for at least 60 days in the three years preceding the date of last exposure.

ARGUMENT

W. VA. CODE § 23-4-6b(g) ESTABLISHES THE THRESHOLD FOR CHARGEABILITY OF AN OCCUPATIONAL HEARING LOSS CLAIM AND PERMITS THE INSURANCE COMMISSIONER TO CHOOSE WHETHER THE CHARGES FOR SUCH A CLAIM WILL BE DIVIDED AMONG THE CLAIMANT'S PRIOR EMPLOYERS.

W. Va. Code § 23-4-6b(g) establishes the threshold for chargeability in an occupational hearing loss claim, and it grants the Insurance Commissioner the authority to choose whether those charges will be borne by a single employer or a combination of the claimant's prior employers. In relevant part, the section 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 Insurance Commissioner may *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.¹

(Emphasis added). As noted in Pioneer's Petition for Appeal, chargeability of an occupational hearing loss claim is premised upon 60 days of hazardous noise exposure with an employer. The 60-day exposure requirement is the threshold for any declaration of chargeability. The Insurance Commissioner has no authority to delete the 60-day exposure requirement found in the statute. The language of the statute is clear—no employer may be deemed to be chargeable if the claimant did not have 60 days of hazardous noise exposure with that employer.

To hold otherwise creates an absurd result, as evidenced by this claim. The claimant is 62 years old. He reported a work history of more than 33 years in and around industrial noise. He worked for Pioneer for four days of a 33-year generalized noise exposure, yet Pioneer has been deemed to be 100% responsible for the claimant's noise-induced hearing loss. While the merits of the 60-day exposure threshold established by the Legislature can

¹ Pioneer erroneously cited the previous version of this statute in its Petition for Appeal.

certainly be debated, that threshold does have the dual benefits of acknowledging that noise-induced hearing loss does not occur within the first moment of employment and being properly adopted by the Legislature. The position adopted by the Office of Judges and the Board of Review enjoys no such rational basis.

Pioneer does agree, however, that the Insurance Commissioner holds the explicit authority to determine whether the costs of a compensable occupational hearing loss claim are split among the claimant's prior employers during the relevant three years preceding the date of last exposure. Again, the Legislature made its intent on that issue very clear in the statute. It did not grant the Insurance Commissioner the authority to ignore the 60-day threshold for chargeability, though.

For these reasons, Pioneer respectfully requests that the underlying decision of the Board of Review be reversed.

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)

Step toe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330

Attorney for Petitioner
Pioneer Pipe, Inc.

102100.02166

CERTIFICATE OF SERVICE

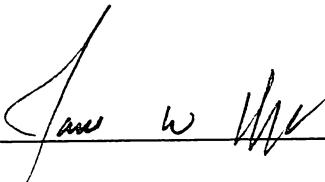
I hereby certify that on the 20th day of May, 2016, I served the foregoing "Pioneer Pipe, Inc.'s Reply to Respondent Stephen Swain" upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Lawrence B. Lowry, Esq.
P.O. Box 402
Huntington, WV 25708-0402

Jeffrey B. Brannon, Esq.
Cipriani & Werner
United Center, Suite 750
500 Virginia Street, East
Charleston, WV 25301

Lisa Warner Hunter, Esq.
Pullin Fowler & Flanagan
901 Quarrier Street
Charleston, WV 25301

BrickStreet Mutual Insurance Company
400 Quarrier Street
Charleston, WV 25301



A handwritten signature in black ink, appearing to read "Swain", is written over a horizontal line.