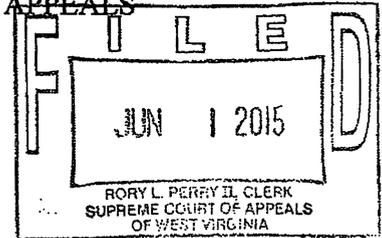


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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA



Pioneer Pipe, Inc., Employer,

Appellant,

v.

CJCN NO. 2014010112
SUPREMEM COURT NO. 15-0397

Stephen Swain, Claimant,
Brayman Construction and
J & J General Maintenance Inc.,

Appellee.

BRIEF ON BEHALF OF APPELLEE
J & J GENERAL MAINTENANCE INC.

Jeffrey B. Brannon
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II. ASSIGNMENTS OF ERROR

This claim is before this Court pursuant to an appeal filed by Pioneer Pipe, Inc. (hereinafter "Pioneer") from the Order of the Board of Review dated April 3, 2015. The Board of Review affirmed the Decision of the Office of Judges dated November 6, 2014, which affirmed an August 1, 2013 Order issued in Claim No. 2014002593 which denied the claimant's application for benefits filed with the Claims Administrator for Brayman Construction, and which modified the September 20, 2013 Order in Claim No. 2014010112 which denied the claimant's application for hearing loss benefits filed with the Claims Administrator for J & J General Maintenance (hereinafter "J & J"), and held that "J & J General Maintenance was not the last employer to subject the claimant to excessive occupational noise, and 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."

It is J & J's position that the September 20, 2013 order denying the claimant's application for benefits was correct and consistent with the law applicable to this claim. The claimant failed to establish that he was exposed to the required hazardous noise exposure during his employment with J & J, failed to establish that he was exposed to sixty continuous days of hazardous noise exposure with J & J, and failed to establish that he was last exposed to hazardous noise while employed by J & J. Insofar as the Board of Review's April 3, 2015 Order affirmed the Office of Judges Decision dated November 6, 2014, which properly DISMISSED J & J as a potential chargeable employer in this matter, that Order was correct and should be affirmed.

III. STATEMENT OF THE CASE

The claimant herein, Stephen Swain, is presently sixty-one years old with a date of birth of March 31, 1954. The claimant is a resident of Proctorville, Ohio, and was a thirty-three year member of the International Union of Operating Engineers Union (IUOE Local 132).

Procedurally, the Office of Judges consolidated two separate claims "for hearing purposes only" by Order dated February 27, 2014, and extended the time frames for all parties in both claims until May 15, 2014. Thereafter, by Order dated July 2, 2014, the Office of Judges formally consolidated the protests, added Pioneer Pipe as an additional potentially chargeable

employer, denied the Motion to Dismiss filed by J & J, denied the Motion to Add Early Construction as a potential chargeable party filed by J & J, and extended the time frames until September 30, 2014.

The "Employees' and Physicians' Report of Occupational Hearing Loss" submitted by the claimant in Claim No. 2014002593 appears to be signed by the claimant on April 29, 2013. (Exhibit A). The claimant alleged a hearing loss injury with a date of last exposure of March 21, 2013. On this form, the claimant indicates he worked for Brayman Construction from "7/2011" to 8/2012". This form does not even mention J & J General Maintenance. The form indicates the claimant became aware of his hearing loss on May 1, 2013, when he saw Dr. Charles Abraham. The claimant also indicates he stopped working because he retired.

The "Employees' and Physicians' Report of Occupational Hearing Loss" form was signed by Dr. Abraham on May 2, 2013. Dr. Abraham indicated the claimant's chief complaint was hearing loss with a diagnosis code of 389.10. Dr. Abraham further rated the claimant's hearing loss at 19.43% whole person medical impairment ("WPMI") from the alleged work related hearing loss.

The claim file in Claim No. 2014002593 also contains a report from Dr. Abraham dated May 2, 2013. (Exhibit B). Dr. Abraham again stated his recommendation of an impairment rating of 19.43%. However, Dr. Abraham also indicated the claimant had complaints of hearing loss long before he worked for J & J, as follows:

His employment history of thirty-three years has involved several companies including Huntington Piping, Eddie Lambert Construction, Charleston, West Virginia Local#132, etc. In the patient's early career no hearing protection was used when he operated large machinery such as bulldozers. Mr. Swain noted that as the years have progresses the hearing protection has improved greatly. He has not been offered audiograms during his career. He served in the United States Air Force as a munitions loader from 1973 until 1979. He was not exposed to gunfire. Mr. Swain had an audiogram upon his discharge.

The patient complained of a hearing loss that he began noticing over ten years ago. This hearing loss seems to be progressively getting worse. He complained of tinnitus, first beginning as

“crickets” then changing to “ringing,” and now a “roar.” Mr. Swain hears equally on both sides. The patient must turn the television up too loudly for others and has great difficulty understanding conversations when there is background noise.”

The claim file in both claims contains the claimant’s time cards from J & J Maintenance. (Exhibit C). These records indicate that the claimant worked for J & J from October 1, 2012, through March 13, 2013, however, **these records show only fifty-three actual days worked for J & J.**

The undersigned, on behalf of J & J submitted in Claim No. 2014010112 the claimant’s union history which indicates that he worked out of the Union Hall from January 1, 1980, through April 24, 2013, and that he last worked for Pioneer Pipe, Inc. (Exhibit D).

Pioneer Pipe has submitted the claimant’s time card for the week ending March 23, 2013, which establishes that the claimant worked for Pioneer Pipe as an operator, ten hours per day on March 18, 2013, March 19, 2013, March 20, 2013, and March 21, 2013. (Exhibit E).

A hearing was held in this matter on April 1, 2014, at which time the claimant testified. (Exhibit F). The claimant testified regarding his work history and noise exposure history. The claimant reviewed a copy of his time card as submitted by J & J General Maintenance, Inc., and acknowledged that it accurately reflected the dates which he worked for J & J Maintenance, Inc. More specifically, on direct examination, the claimant testified as follows:

Q. ...working? Who was the last employer that you worked for?

A. That’s being Pioneer Pipe.

Q. And according to this work history that we have, you had worked for them during the month of March of 2013 last year.

A. Yeah, that’s correct. I think that was the last job I done. Yeah.

JUDGE MOREDOCK: Mr. Swain, excuse me a second. Pioneer Pike? P-I-K-E?

CLAIMANT: Pioneer Pipe.

JUDGE MOREDOCK: Pipe.

CLAIMANT: Down in Parkersburg.

JUDGE MOREDOCK: Okay. Thank you. Go ahead, Mr. Lowry.

BY MR. LOWRY:

Q. According to the ...your worksheet, it...it indicates that you worked 40 hours for them. Does that sound about right?

A. Yeah. I think that...it was like a four...four 10 week. It was a small job.

Q. Where was that job located?

A. At Nitro. The old chemical plant there is Nitro that makes diesel fuel...additives for diesel fuel. And the name...I...I can't remember. I can get the name, but the plant...but it's kind of a funny name. They change these plant' names so much, I don't ... I can't remember what the name of the plant was.

Q. Okay. Was that...did you work inside or outside on that job?

A. Inside. Inside the plant.

Q. And what kind of equipment were you operating?

A. A picker...a crane. I think it was a 45-ton (inaudible).

Q. Were you exposed to loud noise in that job?

A. Yes, I was.

Q. What type of...what was the source of the noise that...that you were exposed to in that job/

A. Well, we were putting up a steel frame for equipment to sit on. We had a compressor there. The iron workers had what they call a rattle gun. I mean, the thing is just unbelievable. And you've got JLGs there, and welders, and a crane. I mean the crane is...basically, when you run a crane, you run it wide open, you know, because that's the best way to...it makes it smoother. You have to run a crane high idle, I mean, high speed.

Q. How were those cranes powered? What type of engines do they have?

A. Diesel.

Q. On...on this particular job, could you indicate how loud the noise was, how...how well you could hear or not hear when you were inside the plant there?

A. Well, my foreman, I mean, if he was giving me instructions, he'd have to come up to me and use a I...your know, raise his voice. You're not going to talk like we are.

(Tr. pp. 8-10). Thus, the claimant alleged that he was last exposed to hazardous noise while employed by Pioneer Pipe and described in detail the noise he was allegedly exposed to.

Regarding his employment with J & J the claimant testified that the majority of his work was outside, not inside.

By Decision dated November 6, 2014, the Administrative Law Judge affirmed the August 1, 2013 order and modified the September 20, 2013 order stating "J & J General Maintenance was not the last employer to subject the claimant to excessive occupational noise, and 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." (Exhibit G).

Pioneer Pipe appealed this Decision to the Board of Review and the Board, by order dated April 3, 2015, affirmed the Office of Judges Decision dated November 6, 2014. (Exhibit H).

IV. SUMMARY OF ARGUMENT

The claimant worked only fifty-three days for J & J General Maintenance and was not the employer on the claimant's date of last exposure, thus J & J General maintenance was properly dismissed as the chargeable employer in this matter. When read *in para materia* West Virginia Code § 23-4-1 *et seq.*, West Virginia Code § 23-4-6b(g), and West Virginia Code § 23-4-15 *et seq.*, require that an employee establish that he was exposed to hazardous (excessive or unusual) noise and that he had sixty days of exposure to hazardous noise with an employer within the three years immediately preceding the date of last of last exposure before that employer can be held chargeable for a claim. Even though the rationale of the Board of Review and the Office of Judges is clearly erroneous, the Board of Review properly affirmed the dismissal of J & J General Maintenance, Inc., as a chargeable employer in this matter, as the claimant failed to establish that he was exposed to hazardous noise while employed with J & J Maintenance or that he was exposed to hazardous noise while employed by J & J Maintenance for as much as sixty days in the three years preceding his date of last exposure. Accordingly, the J & J Maintenance was properly dismissed as a chargeable employer in this claim.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented by the employer's brief and record before the Court. Therefore, the employer respectfully submits that oral argument is not needed for this appeal.

VI. ARGUMENT

A. Standard of Review

West Virginia Code § 23-5-15(b) states that in this Court's review of a Final Order by the Board of Review that it shall consider the record before the Board of Review and give deference to the Board of Review's findings, reasoning and conclusions, in accordance with the following:

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and 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 provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing 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 based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

(d) 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 re-weighing 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.

W. Va. Code § 23-5-15(c)-(d). With due consideration to this standard of review, while the legal basis of the Board's Order is flawed, the Board properly affirmed the dismissal of J & J General Maintenance as a chargeable employer in the claimant's claim for hearing loss benefits.

The only issue before this Court related to J & J General Maintenance is whether the order of the Board of Review dated April 3, 2015, was correct and not clearly wrong in affirming the dismissal of J & J as a chargeable employer in this claim when the claimant failed to establish that he was exposed to the required hazardous noise exposure during his employment with J & J, failed to establish that he was exposed to as much as sixty days of hazardous noise exposure with J & J, and has failed to establish that he was last exposed to hazardous noise while employed by J & J. In fact, the claimant's own testimony establishes that he last worked on March 21, 2013, for Pioneer Pipe and that he only worked for J & J for fifty-three days. Furthermore, the claimant failed to submit any evidence in support of his protest, other than his testimony.

In the instant claim, neither the Board of Review nor the Office of Judges erred in dismissing J & J as the chargeable employer as the claimant failed to establish that he was exposed to the required hazardous noise exposure during his employment with J & J, failed to establish that he was exposed to sixty continuous days of hazardous noise exposure with J & J, and has failed to establish that he was last exposed to hazardous noise while employed by J & J. Insofar as the Board of Review dismissed J & J as the chargeable employer the Decision was clearly correct.

It must be remembered that the claimant has the burden of proof for establishing his claim. 93 CSR 1, see also Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E.2d 498 (1965) (Syl.pt 3) ("In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence there was a causal connection between such disability and his employment"). Further, "[w]here proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim." Clark v. State Workmen's Compensation Comm'r, 155 W. Va. 726, 187 S.E.2d 213 (1972) (Syl.pt 4). Simply stated, benefits should not be paid from a workers' compensation policy "unless there be a satisfactory and convincing

showing" that the claimed disability actually resulted from the claimant's employment. Whitt v. State Workmen's Compensation Comm'r, 153 W. Va. 688, 693, 172 S.E.2d 375, 377 (1970) (quoting Machala v. Compensation Comm'r, 108 W. Va. 391, 397, 151 S.E. 313, 315 (1930)).

B. The claimant has failed to establish that he was exposed to hazardous noise during his employment with J & J and has failed to meet his statutory requirement to establish that his hearing loss is related to his employment with J & J.

In the instant claim, the claimant failed to submit any reliable evidence in this claim which establishes that he was exposed to hazardous noise during his employment with J & J, failed to submit any evidence that he suffers from any hearing loss related to his fifty-three days of employment with J & J, failed to submit evidence that he was exposed to hazardous noise for as much as sixty days with J & J, and failed to submit evidence that he was last exposure to hazardous noise while employed by J & J..

"Where an employee files his application for workmen's compensation benefits, based on the occurrence of an occupational disease other than silicosis, to entitle him to an award, he must establish that the disease was contracted in the course of and resulted from the employment: **it is not sufficient to establish that the employment resulted in an aggravation of a disease existing at the beginning of such employment.**" Bannister v. State Workmen's Compensation Comm't, 154 W. Va. 172, 174 S.E.2d 605 (1970) (Syl.pt 3). In the instant claim, the claimant's own testimony establishes that the claimant suffered from hearing loss years before he began employment with J & J. Thus, under Bannister the claimant was not entitled to file a claim against J & J.

An Occupational Disease is defined by statute as follows:

For the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment is compensable except when it follows as an incident of occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease shall be considered to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances: (1) That there is a direct causal connection between the conditions under 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 a 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 and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction: Provided, That compensation shall not be payable for an occupational disease or death resulting from the disease unless the employee has been exposed to the hazards of the disease in the State of West Virginia over a continuous period that is determined to be sufficient, by rule of the board of managers, for the disease to have occurred in the course of and resulting from the employee's employment. An application for benefits on account of an occupational disease shall set forth the name of the employer or employers and the time worked for each. The commission may allocate to and divide any charges resulting from such claim among the employers by whom the claimant was employed. The allocation shall be based upon the time and degree of exposure with each employer.

W. Va. Code § 23-4-1 (2003). (Emphasis added). Thus, occupational hearing loss claims must be analyzed under the occupational disease statute. This Court has stated that:

When a claim for occupational pneumoconiosis alleging asbestosis or any other disease defined by W. Va. Code, 23-4-1 1990, as occupational pneumoconiosis is filed, the Commissioner must follow the processing system for occupational pneumoconiosis claims and limit the initial determination to exposure and other non-medical facts as required by W. Va. Code, 23-4-15b 1990, **When a claim for occupational disease is filed, the Commissioner is to follow the usual processing procedure for personal injury claims and, because an occupational disease is alleged, the Commissioner must apply the six criteria outlined in W. Va. Code, § 23-4-1 1990, to determine if the alleged disease was "incurred in the course of and resulting from employment."**

Newman v. Richardson, 186 W.Va. 66, 410 S. E. 2d 705 (1991) Syl. pt. 2. (Emphasis added). In Marlin v. Bill Rich Construction, Inc., 198 W. Va. 635, 482 S.E.2d 620 (1996), this Court addressed in detail the requirements of West Virginia Code § 23-4-1. The Court stated:

We note that W. Va. Code § 23-4-1 also provides that occupational diseases other than occupational pneumoconiosis are to be compensated under the Workers' Compensation Act as an "injury" or "personal injury". Again, the statute requires that any such disease be "*incurred* in the course of and resulting from employment." (Emphasis added.) This Court has determined that "W. Va. Code § 23-4-1, provides coverage for each new occupational disease as medical science verifies it and establishes it as such, without the need for special legislative recognition by addition to the scheduled diseases." Syl. pt. 2, in part, *Powell v. State Workmen's Compensation Commissioner*, 166 W. Va. 327, 273 S.E.2d 832 (1980).

"Unlike traumatic injuries, the causal connection for occupational diseases must be established by showing exposure at the workplace sufficient to cause the disease and that the disease actually resulted in the particular case." *Id.*, at 336, 273 S.E.2d at 837 (1980). Moreover, W Va. Code § 23-4-1 stated six criteria to be used in evaluating the causal connection between employment and the occupational disease, "[The] six criteria [in W. Va. Code § 23-4-1] make it clear that the occupational disease need not have been foreseen or expected before its contraction. It thus follows that **if the claimant can establish** the statutory criteria defining an occupational disease, the claim is to be held compensable." *Powell*, 166 W. Va. at 334, 273 S. E.2d at 836 (1980). Furthermore, "if studies and research clearly link a disease to a particular hazard of a workplace, a prima facie case of causation arises upon a showing that the claimant was exposed to the hazard *and is suffering* from the disease to which it is connected," *Id.* at 336, 273 S.E. 2d at 837 (Emphasis added).

Marlin v. Bill Rich Construction, Inc., 198 W. Va. 635, 646-647, 482 S.E.2d 620, 631-632 (1996) (emphasis added). Thus, this Court has clearly stated that in a claim for an occupational disease, such as is alleged in this claim, the claimant has the burden of establishing the six criteria set forth in West Virginia Code § 23-4-1.

In short, the claimant is required to establish that there is a causal connection between his employment and the alleged occupational disease. In the instant claim, the claimant has failed to do so. There is no evidence to support the claimant's allegation that he was exposed to hazardous noise during his fifty-three days of employment with J & J. "Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim." *Clark v. State Workmen's Compensation Comm'r*, 155 W. Va.

726, 187 S.E.2d 213 (1972) (Syl.pt 4). The only evidence the claimant submitted was his testimony. The claimant's testimony clearly does not rise to the level of evidence contemplated by the statute or by this Court's decision in Marlin.

Additionally, pursuant to Bannister supra as the claimant testified that he first noticed his hearing loss in 2003 or 2004, prior to his employment with J & J, his claim cannot be compensable against J & J. Thus, J & J was properly dismissed as a chargeable employer in this claim.

C. The claimant is statutorily barred from filing a claim against J & J and statutorily barred from receiving benefits for occupational hearing loss from J & J.

It is J & J's, position that the claimant was not even eligible to file an application for hearing loss benefits against it, nor is the claimant entitled to receive any benefits for a hearing loss claim filed against J & J, as the claimant worked less than sixty days for J & J.

It must be remembered that "[t]he workmen's compensation system of this State is created by and based upon statute." Bailes v. State Workmen's Compensation Comm'r, 152 W. Va. 210, 212, 161 S.E.2d 261, 263 (1968) (citing Blevins v. State Compensation Comm'r, 127 W. Va. 481, 33 S.E.2d 408 (1945)). "The right to workmen's compensation is wholly statutory and is not in any way based on the common law. The statutes are controlling and the rights, remedies and procedure provided by them are exclusive." Bailes v. State Workmen's Compensation Comm'r, 152 W. Va. 210, 212, 161 S.E.2d 261, 263 (1968) (citing Dunlap v. State Compensation Director, 149 W. Va. 266, 140 S.E.2d 488 (1965)).

The applicable statute, West Virginia Code § 23-4-15(c), sets forth the statutory requirements for filing an occupational hearing loss claim and states:

To entitle any employee to compensation for occupational disease other than occupational pneumoconiosis under the provisions of this section, the application for compensation shall be made on the form or forms prescribed by the Insurance Commissioner, and filed with the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, within three years from and after the day on which the employee was last exposed to the particular occupational hazard involved or within three years from and after the employee's occupational disease was made known to him or her by a physician or which he or she should reasonably have known,

whichever last occurs, and unless filed within the three-year period, the right to compensation under this chapter shall be forever barred, such time limitation being hereby declared to be a condition of the right and therefore jurisdictional, or, in case of death, the application shall be filed as aforesaid by the dependent of the employee within one year from and after the employee's death, and such time limitation is a condition of the right and hence jurisdictional.

West Virginia Code § 23-4-15(c) (2010). This section must be read in *pari materia* with West Virginia Code § 23-4-6b(g) which sets forth the *minimum requirements* for the amount of time a claimant must have been exposed to excessive noise to be eligible to file a hearing loss claim and for an employer to be considered a chargeable employer, and states as follows:

(g) 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. The allocation is based upon the time of exposure with each employer. In determining the allocation, the Insurance Commissioner shall consider all the time of employment by each employer during which the claimant was exposed and not just the time within the three-year period under the same allocation as is applied in occupational pneumoconiosis cases.

W. Va. Code § 23-4-6b(g)(2009). When these statutes are read in *pari materia* it is clear that to be eligible to file a claim against an employer for occupational hearing loss the claimant must establish that he was exposed to hazardous noise for as much as sixty days in the three years immediately prior to the date of last exposure. Thus, there is a two prong test: 1) was the claimant exposed to hazardous noise; and 2) was there as much as sixty days of exposure to hazardous noise in the three years immediately preceding the date of last exposure. If the claimant fails to establish either of these prerequisites he is not eligible for benefits.

In the instant claim, the evidence of record is clear and irrefutable; **the claimant worked only fifty-three days for the J & J between October 1, 2012, and March 13, 2013.** The evidence of record, including the claimant's testimony, establishes that even this fifty-three days was not continuous, as the claimant worked four day work weeks as follows:

4 day work weeks between October 1, 2012, and November 21, 2012;

Worked only 1 day between November 22, 2012, and December 10, 2012;

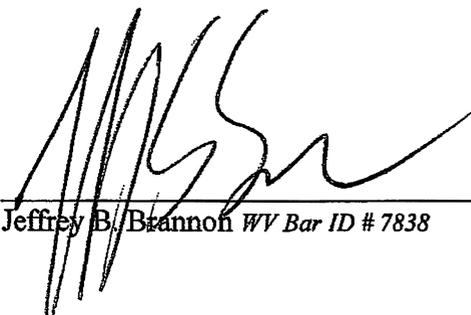
Did not work for J & J Maintenance, Inc., from December 20, 2012, through January 28, 2013; and

Did not work for J & J Maintenance February 4, 2013, through March 4, 2013.

There is no dispute that the claimant only worked fifty-three days between October 1, 2012, and March 13, 2013, for J & J. The claimant acknowledged this fact during his testimony before the Office of Judges. Accordingly, as the claimant did not have the requisite sixty days of continuous hazardous noise exposure as required by statute, the claimant is not eligible to file a claim against J & J. As the claimant did not have sufficient exposure with J & J to file the claim and is statutorily barred from pursuing a claim against J & J, the Decision of the Office of Judges was clearly correct in dismissing J & J as the chargeable employer and the order of the Board of Review was likewise clearly correct.

VII. CONCLUSION

For all of the reasons set forth above, J & J requests that this Court AFFIRM the Order of the Board of Review dated April 3, 2015, insofar as it affirmed the dismissal of J & J as a chargeable employer in this claim.



Jeffrey B. Brannon WV Bar ID # 7838

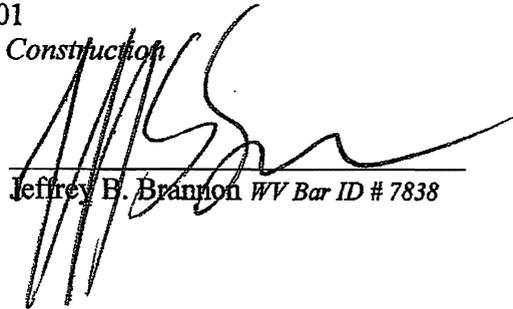
CERTIFICATE OF SERVICE

I, Jeffrey B. Brannon, attorney for the Respondent/Appellee, J & J General Maintenance Inc., hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Appellee, J & J General Maintenance Inc." was served upon the Appellant and all parties by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 29th day of May, 2015 addressed as follows:

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