

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

Pioneer Pipe, Inc.,  
Petitioner

vs.) No. 15-0397

Stephen Swain, Claimant Below;  
Brayman Construction, and  
J & J General Maintenance Inc.,  
Employers Below,  
Respondents

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BRIEF ON BEHALF OF RESPONDENT, STEPHEN SWAIN

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**TABLE OF CONTENTS**

I. TABLE OF AUTHORITIES.....1

II. STATEMENT OF THE CASE.....2

III. STATEMENT OF FACTS.....2

IV. ARGUMENT.....5

V. CONCLUSION.....7

## I. TABLE OF AUTHORITIES

### Statutes

West Virginia Code, Section 23-4-1

West Virginia Code, Section 23-4-6b(g)

### Miscellaneous

Notification Regarding Claims Allocation (Exhibit A)

## **I. STATEMENT OF THE CASE**

This case is before the Court upon the appeal filed by the employer, Pioneer Pipe, Inc. to the decision of the West Virginia Workers' Compensation Board of Review dated April 3, 2015. The Board of Review affirmed the order of the Workers' Compensation Office of Judges which held that the Petitioner, Pioneer Pipe, Inc., was the sole chargeable employer in the claim filed by the claimant for occupational hearing loss benefits.

## **II. STATEMENT OF FACTS**

The claimant, Stephen Swain, was a heavy equipment operator who worked for different construction companies from September of 1980 to March 21, 2013. The claimant testified that in the course of his employment as a heavy equipment operator he was subjected to loud noise from not only the equipment that he operated but also other equipment being run around him where he worked. According to his employment records, the claimant worked for a number of different employers from 1980 to 2013. His work record showed that he worked for the employer Brayman Construction from July 2011 through August of 2012; for J & J General Maintenance from October to December 2012 and February and March of 2013; and for Pioneer Pipe, Inc. in March of 2013. He last worked on March 21, 2013 for Pioneer Pipe, Inc.

The claimant was first seen for his hearing loss by Dr. Charles Abraham, an Otolaryngologist, on May 1, 2013. After examining the claimant and reviewing his audiogram which was also done on May 1, 2013, Dr. Abraham reported that the claimant had a bilateral sensorineural hearing loss directly attributable to or perceptively aggravated by industrial noise exposure in the course of and resulting from his employment.

Following his examination by Dr. Abraham, the claimant first filed an occupational hearing loss claim against Brayman Construction Corporation. The claims administrator for Brayman rejected the claim by order dated August 1, 2013 for the stated reason that the claimant was not employed by Brayman on his last day of exposure to excessive occupational noise.

Thereafter, the claimant filed his claim for occupational hearing loss against J & J General Maintenance, Inc. This claim was rejected by the claims administrator for J & J General Maintenance, Inc. by order dated September 20, 2013 for the stated reason that the claimant did not have sufficient noise exposure with J & J General Maintenance, Inc.

The two (2) claims were subsequently consolidated for the purpose of a hearing which was held on April 1, 2014. During the hearing, testimony from the claimant was taken by the parties and a motion was filed to consolidate the two (2) claims. This motion was granted by the Administrative Law Judge. Motions to add additional two potential chargeable employers, Pioneer Pipe, Inc., and Early Construction Company, were also made during the hearing but were denied at that time.

On July 2, 2014, an order was entered in regard to the claimant's occupational hearing loss claims by the Chief Administrative Law Judge. In this order, the Chief Administrative Law Judge granted the motion to add Pioneer Pipe, Inc. as a potential chargeable employer but denied the motion to also add Early Construction as a potential chargeable employer. The order further contained a discussion of West Virginia Code §23-4-6b and the decision of the Office of the Insurance Commissioner that beginning on January 1, 2006 the OIC would no longer allocate hearing loss claims pursuant to their discretionary authority. In the July 1, 2014 order, the Chief Administrative Law Judge also ordered that the chargeable employer, if one is found at all, would be the last employer with which the claimant was last exposed to hazardous noise in the course of

and resulting from employment. Based upon the addition of Pioneer Pipe, Inc. as a potential chargeable employer, the time frame in the matter was extended to allow Pioneer Pipe to be added to the litigation in the claim and to submit any relevant evidence.

Following the addition of Pioneer Pipe, Inc. as a potential chargeable employer and the submission of the consolidated claims, an Administrative Law Judge decision was issued on November 6, 2014. After reviewing all of the facts in accordance with the statutes and the July 2, 2014 decision issued by the Chief Administrative Law Judge, the Administrative Law Judge found that Pioneer Pipe, Inc. was the sole chargeable employer based upon the fact that the company was the last employer for which the claimant was last employed and suffered his last exposure to excessive noise.

On November 24, 2014, counsel for the employer, Pioneer Pipe, Inc., filed a motion for reconsideration of the November 6, 2014 Administrative Law Judge decision, specifically noting that the claimant had only been employed by Pioneer Pipe, Inc., for four (4) days and asserting that, therefore, Pioneer Pipe, Inc., cannot be found to be a chargeable employer. On January 5, 2015, an order was entered by the Administrative Law Judge citing the ALJ order of July 2, 2014 holding 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 November 24, 2014 order further cited that the November 6, 2014 order 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 based upon the claimant's work record even taking into account that the claimant had far less than 60 days exposure with Pioneer Pipe, Inc. Accordingly, the motion to reconsider was denied.

The November 6, 2014 administrative law judge decision was appealed by Pioneer Pipe, Inc., to the Workers' Compensation Board of Review. After the filing of briefs and oral argument by the Petitioner and Respondents in the present appeal, an order was entered by the Board of Review on April 3, 2015 affirming the November 6, 2014 administrative law judge decision.

#### **IV. ARGUMENT**

It is the position of the claimant/respondent that the Administrative Law Judge and Board of Review correctly and properly determined that the claimant was entitled to occupational hearing loss benefits as a result of his work related noise exposure over a period of more than thirty (30) years. It is further the position of the claimant that due to changes in the law and the position taken by the Office of the Insurance Commissioner to no longer allocate chargeability among employers that there are no specific exposure requirements for occupational hearing loss claims and, therefore, the chargeable employer in a hearing loss claim is the last employer for whom the claimant worked and suffered noise exposure.

The requirements for filing a workers' compensation claim are set forth in West Virginia Code Section 23-4-15. The requirements for the three (3) different categories of claims are individually set forth in subsections (a), (b), and (c) of §23-4-15. Subsection (a) applies to claims other than those for occupational pneumoconiosis or other occupational disease and requires an application to be filed within six months from and after the injury. Subsection (b) applies specifically to only occupational pneumoconiosis claims and contains not only the statute of limitations for filing the claim, but also the time of exposure requirement of at least sixty days. The third subsection, subsection (c), applies to all occupational disease claims other than occupational pneumoconiosis which would include occupational hearing loss claims. Therefore, the claim

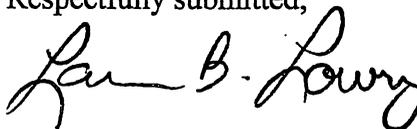
category for occupational hearing loss claims as well as all other occupational disease claims except pneumoconiosis contains no 60 (sixty) minimum exposure requirement as asserted by the petitioner in this case, Pioneer Pipe, as well as the respondent, J & J General Maintenance, Inc.

Although the appellant has asserted that there is a sixty (60) day noise exposure requirement for a hearing loss claim to be filed against an employer, the only reference to “sixty days” (60) of exposure” is stated in code Section 23-4-6b(g) which specifically pertains to the allocation and division of charges among more than one employer for which the claimant has been employed and been exposed to hazardous noise. Although allocation of the charges among employers by the mandatory language “shall”, as a result of the amendment of Section 23-4-6b(g) to the permissive language “may” instead of “shall”, allocation is no longer mandatory. Accordingly, as noted in the attached “Notification Regarding Claims Allocation” as promulgated by the Offices of the Insurance Commissioner (Exhibit A), since July 1, 2006, there are no longer allocations in any occupational disease claims, specifically including occupational hearing loss claims. Therefore, it is respectfully submitted that a sixty (60) day exposure period is no longer relevant to occupational hearing loss claim.

**CONCLUSION**

For all the foregoing reasons and authorities, it is respectfully submitted that the Administrative Law Judge properly and correctly determined that the claimant has a compensable hearing loss claim and that his last employer, Pioneer Pipe, Inc., is the proper chargeable employer. Therefore, the claimant/respondent respectfully requests that the final order of the Workers' Compensation Board of Review dated November 6, 2014 be affirmed.

Respectfully submitted,

A handwritten signature in black ink that reads "Lawrence B. Lowry". The signature is written in a cursive style with a large, stylized initial "L".

Lawrence B. Lowry (WVSB#2260)  
Counsel for the Claimant/Respondent  
Stephen Swain

# Exhibit A

## **NOTIFICATION REGARDING CLAIMS ALLOCATION**

### **Elimination of Claims Allocation on 1/1/06**

This notification is in regard to the practice of claims allocation of workers' compensation claim for occupational pneumoconiosis (OP), occupational disease hearing loss (ODHL) and other occupational diseases (OD), including carpal tunnel syndrome. The relevant provisions of Chapter 23 of the West Virginia Code provide that claims allocation is a discretionary practice. Therefore, beginning on January 1, 2006, the West Virginia Insurance Commissioner, which on that date assumes the regulatory duties formerly belonging to the Workers' Compensation Commission, will no longer be allocating any workers' compensation claims, including, but not limited to, OP, OHL and OD claims.

This decision was made based on a careful analysis of the practice of claims allocation, and the conclusion from that analysis that the benefit of allocating claims would be outweighed by the problems which would be created by attempting to allocate claims in West Virginia's privatized workers' compensation market. It was further based on the fact that the practice of claims allocation does not exist in most other states, and therefore continuing claims allocation in West Virginia could be counter-productive to encouraging a competitive market when the market opens in 2008. Finally, there was significant input received from stakeholders during this process. Although the input received was varied, the general consensus of the stakeholders was that, despite the short-term problems which might occur, if the immediate elimination of claims allocation in West Virginia is in the best interests of the long-term success of West Virginia's workers' compensation insurance market, then they would not oppose such action.

### **What will occur on 1/1/06**

This policy decision not to allocate claims means that the Insurance Commission will not issue any allocation orders. Requests for allocation in all OP, ODHL, and OD claims that have previously been submitted to the Workers' Compensation Commission, but not been

ruled on, will be returned to the employer, or its carrier, and the employer or carrier will then rule on the claim based on the requirements of Chapter 23 and the Workers' Compensation Rules. This means that from the date the employer receives this notification, it must issue a ruling on the claim within the statutorily prescribed time frame in Chapter 23 and/or the Workers' Compensation Rules.

If the Workers' Compensation Commission has already issued an allocation order prior to 1/1/06, the Insurance Commissioner will recognize the order, and the order will be enforceable. The Insurance Commissioner will review all allocation orders which the Workers' Compensation Commission was administering on behalf of self insured employers as of 12/31/05, and will designate a "responsible administrator" for each such allocated claim. The responsible administrator will be the employer with the largest share of allocated liability, or its carrier when the employer is not self-insured.

If the employer with the largest share of liability was an insured employer through the Workers' Compensation Fund during the relevant period of exposure, the responsible administrator will be the Insurance Commissioner's third-party administrator (TPA) for the Workers' Compensation Old Fund, which will be Brick Street Insurance until at least July 1, 2006. Therefore, the claims files for such claims will be transferred from the former Workers' Compensation Commission to Brick Street's TPA division for continued administration.

If the employer with the largest share of liability was a self-insured employer during the relevant period of exposure, the responsible administrator will be the self-insured employer or its TPA. Therefore, the claims files for such claims will be transferred from the former Workers' Compensation Commission to the self-insured employer or its TPA for continued administration. The self-insured employer or its TPA will receive written notice regarding it being the designated responsible administrator for the allocated claim.

The responsible administrator will continue to administer claims pursuant to the provisions of Chapter 23 and the Workers' Compensation rules; however, it will only make payments to

providers and claimants commensurate with its percentage of responsibility. It will then need to send notices to the other responsible parties named in the allocation order to make payments commensurate with their percentage(s) of responsibility within ten (10) days. (These notices will be similar, and have the same general effect, as "pay orders" previously issued by the Workers' Compensation Commission in regard to allocated claims).

On a going forward basis, any claim that would previously have been considered for allocation will be treated by carriers or self-insured employers as any other workers' compensation claim, and should be ruled on, and subsequently administered (if the claim is granted), pursuant to the provisions of Chapter 23 and the Workers' Compensation Rules.

### **Questions and Concerns**

If there are any questions or concerns regarding this notice, please direct all telephone calls to Barbara Spradling with the Claims Services Division of the Insurance Commissioner, at (304) 558-1966 ext. 3130 or 558-5838.

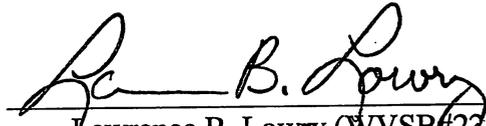
**CERTIFICATE OF SERVICE**

The undersigned, Lawrence B. Lowry, counsel for the Claimant/Respondent, Stephen Swain, hereby certifies that he has served a copy of the foregoing brief upon Petitioner, Pioneer Pipe, Inc., and the Respondent/Employers, Brayman Construction and J & J Maintenance, Inc. by forwarding a true and exact copy thereof in the United States Mail, postage prepaid, this 2<sup>nd</sup> day of May, 2016, addressed as follows:

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