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West Virginia Workers' Compensation Law Notes

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"By using the term "may" in W.Va. Code §23-4-6b(g), the Legislature clearly and unambiguously afforded the Insurance Commissioner discretion in deciding whether to allocate and divide charges for a hearing loss claim between various employers, or to charge only one employer."

Steven Swain worked out of a union hall for 33 years as a heavy-equipment operator employed by different construction companies. As such, he was routinely exposed to unusual or excessively loud noise in the course of his employment. He last worked, and was last exposed to the hazards of occupational noise, on March 21, 2013. His employer on that date was Pioneer Pipeline, Inc, for whom Mr. Swain had worked a total of only 40 hours.

On May 1, 2013, an otolaryngologist diagnosed Mr. Swain with bilateral sensorineural hearing loss directly attributable to industrial noise exposure. Mr. Swain then filed claims for workers' compensation benefits for his occupational hearing loss.

The Office of Judges identified Pioneer Pipe and two other employers as being potentially "chargeable" for Mr. Swain's claim.

West Virginia's workers' compensation statutes provide that when a claimant files a hearing loss claim, 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 three years immediately preceding the date of last exposure." However, because the Insurance Commissioner issued a policy statement saying that, because "claims allocation is a discretionary practice" and "does not exist in most other states," the Insurance Commissioner "will no longer be allocating workers' compensation claims to different employers in occupational hearing loss claims." Under this policy, "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."

As such, the administrative law judge found Mr. Swain worked for Pioneer Pipe on March 21, 2013, his date of last exposure to the hazards of occupational noise; accordingly, Pioneer Pipe was ruled to be the sole chargeable employer responsible for paying Mr. Swain's hearing loss claim. Pioneer Pipe appealed the order, but the Board of Review affirmed it by order dated April 3, 2015.

On appeal to the Supreme Court, Pioneer Pipe asked the Court to find that the interpretation of the statutes by the Insurance Commissioner, by the Office of Judges and by the Board of Review are wrong. As noted, the statute provides that 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 three years immediately preceding the date of last exposure." The Insurance Commissioner has interpreted this language as being discretionary, not mandatory. In light of this discretionary language, the Insurance Commissioner has chosen not to allocate and divide charges for hearing loss claims. Rather, the Insurance Commissioner's policy is that the sole chargeable employer is the one that employed the claimant on his or her date of last exposure to hazardous noise. The Insurance Commissioner stated 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 [insurance] market." Moreover, "the practice of claims allocation does not exist in most other states, and therefore continuing claims allocation in West Virginia would be counter-productive to encouraging a competitive [workers' compensation insurance] market."

The Court reluctantly agreed, noting that "as a general rule of statutory construction, the word "may" inherently connotes discretion and should be read as conferring both permission and power. The Legislature's use of the word "may" usually renders the referenced

act discretionary, rather than mandatory, in nature. By using the term "may" in W.Va. Code §23-4-6b(g), the Legislature clearly and unambiguously afforded the Insurance Commissioner discretion in deciding whether to allocate and divide charges for a hearing loss claim between various employers, or to charge only one employer. We also find that there is no limitation in the statute requiring sixty days of exposure to hazardous noise before the Insurance Commissioner may hold an employer solely responsible for a hearing loss claim. The controlling language employed by the Legislature is discretionary, not mandatory, and the Insurance Commissioner has exercised that discretion, made an informed judgment based upon a body of experience, and chosen not to allocate and divide charges for a claim. We see no conflict between the controlling statute and the Insurance Commissioner's actions."

The Board properly affirmed the decision of the Office of Judges, which correctly concluded that under W.Va. Code §23-4-6b(g), Pioneer Pipe is the sole chargeable employer for Mr. Swain's hearing loss.

Noting the injustice, however, the Court stated: "The executive and leglislative branches have created a workers' compensation system that is easier to administer by the Insurance Commissioner, insurance companies and self-insured employers, yet can produce a capricious outcome. Moreover, W.Va. Code §23-4-6b(g) is a confusing, poorly-drafted anachronism, a vestigial flicker of the old workers' compensation system as it operated before it came under the administration of this Insurance Commissioner. This Court has repeatedly recognized that workers' compensation law is a "miasma" that "is a sui generis, jurisprudential hodge-podge that stands alone from all other areas of the law, causing decisions rendered in the workers' compensation realm to be almost wholly unusable in any other area of the law, and vice-versa." - Well said!!

A complete copy of the Court's decision may be found at *Pioneer Pipe, Inc. v. Stephen Swain, Brayman Construction, and J & J General Maintenance, Inc., No. 15-0397, Filed September 19, 2016.*

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ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie West Virginia Workers' Compensation Law Notes invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, mmh@trc-law.com.

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