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Listen to This: Pioneer Pipe v. Swain Reverses 30 Year Old Rule of Law That Limited Workers' Compensation Chargeability Attaching to Employers

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The claimant worked as a heavy equipment operator for various employers over a thirty-three year period, during which he was routinely exposed to loud noises from the machines he operated and from equipment being used around him. The claimant worked for his last employer for a total of forty hours. After he was subsequently diagnosed with hearing loss directly attributable to industrial noise exposure, the claimant filed a hearing loss claim for worker's compensation benefits.

The employer's claims administrator denied the claimant's application for hearing loss benefits. However, the Office of Judges named the employer as the sole chargeable employer in this claim on the basis that the claimant's last day of employment occurred with that employer. The Office of Judges made this decision despite its acknowledgement that the claimant had not worked for the employer for the sixty consecutive days required to establish chargeability of a claim pursuant to W. Va. Code §23-4-6b(g). The workers' compensation statutes provide that the Insurance Commission "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 maintained a discretionary policy under which the last employer with whom the claimant was exposed to hazardous noise in the course of and resulting from employment will be chargeable for hearing loss claims. Based on this, the Office of Judges ruled that the claimant's last employer was the sole chargeable employer. The Board of Review affirmed this decision.

The employer filed a petition to the *West Virginia Supreme Court of Appeals* as the Office of Judges and Board of Review decisions resulted from an acknowledged deviation from the plain language of the ***Workers' Compensation Act***. Specifically, the evidence on record established that the claimant only worked four days for the sole chargeable employer. Accordingly, said employer argued that it cannot be deemed the chargeable employer in this claim for occupational hearing loss, as it is clear that the claimant was not exposed to sufficient industrial noise to cause the hearing loss while working for that employer.

Although the Supreme Court recognized that its decision produced a capricious outcome, the Court concluded that the word *may* in the statute gave the Insurance Commission discretion whether to allocate and divide charges for a hearing loss claim between various employers. Because the

decision was made to not allocate and divide, there was no requirement that a worker be employed for sixty days. In making this decision, the Court adopted two new syllabus points:

1. 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.

2. By using the term “may” in W. Va. Code § 23-4-6b(g)[2009], 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 (1) employer.

This decision reverses a thirty year old rule of law that required sixty days of continuous exposure to a hazard (noise, fumes, repetitive motion) prior to chargeability attaching to that employer. West Virginia employers are now liable on day one of employment for occupational disease claims related to noise, exposure, or repetitive motion. This is a significant alteration of the plain language of the West Virginia Workers’ Compensation Act. Baseline hearing testing upon initiation of employment will become even more important now. Audiometric testing will be the only means employers have of shifting liability in hearing loss claims.

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