

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

KEVIN W. LACY,
Claimant Below, Petitioner

vs.) **No. 18-0472** (BOR Appeal No. 2052261)
(Claim No. 2017026734)

LIGHTNING CONTRACT SERVICES, INC.,
Employer Below, Respondent

FILED
November 2, 2018

EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kevin W. Lacy, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Lightning Contract Services, Inc., by Henry C. Bowen, its attorney, filed a timely response.

The issue on appeal is the rejection of a claim for occupational hearing loss benefits. The claims administrator rejected Mr. Lacy's claim on May 19, 2017. The Workers' Compensation Office of Judges affirmed the claims administrator's decision in a Final Order dated October 12, 2017. This appeal arises from the Board of Review's Order dated April 23, 2018, in which the Board affirmed the decision of the Office of Judges. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Lacy submitted an Employee and Physician's Report of Occupational Hearing Loss dated April 4, 2017. At the time of application, Mr. Lacy was working as a truck driver for All American Fabrication. Mr. Lacy has a work history of being a truck driver for Beckley Garbage from August 1, 2016, through November 24, 2016; West Virginia Parkways Authority from March 28, 2016, through July 28, 2016; Lightning Contract Services, Inc., from December 15, 2014, through February 14, 2016; and Pocahontas Coal Company from November 26, 2006,

through March 12, 2014. Mr. Lacy was a garbage truck driver for Beckley Garbage, a tandem truck driver for the West Virginia Parkways Authority, a coal miner for Lightning Contract Services, Inc., and a coal miner for Pocahontas Coal Company. Lightning Contract Services, Inc. was listed as the employer of record in the claim.

The physician's section of Mr. Lacy's application for benefits was completed by A. James Paine Jr., M.D., of Mountain State Ear, Nose and Throat. An audiogram was performed by Lori Zolkowski, a licensed audiologist. Ms. Zolkowski stated that the test reliability was fair because Mr. Lacy's speech reception thresholds were inconsistent with the pure tone averages in low frequencies. Mr. Lacy's four-frequency pattern was slightly asymmetric in the lower frequencies. However, his high frequency pattern was symmetrical and in a classic downward sloping pattern. The four-frequency scores were 210 in the right ear and 235 in the left ear. Mr. Lacy had 84% speech discrimination at sixty-five decibels on the left and 96% speech discrimination at sixty-five decibels on the right.

Attached to Mr. Lacy's application for benefits was an April 6, 2017, report by Dr. Paine. According to Dr. Paine, Mr. Lacy has a history of noise exposure to noise greater on the left due to operating heavy equipment in a coal mine. Mr. Lacy first noticed hearing loss a few years earlier. Dr. Paine noted that Mr. Lacy also complains of intermittent dizziness and imbalance. Dr. Paine concluded that Mr. Lacy has bilateral sensorineural hearing loss directly attributable or perceptibly aggravated by industrial noise exposure with a recommended percentage impairment of 13.016%. Dr. Paine believed that Mr. Lacy would benefit from an auditory brainstem response test and vestibular testing due to his history of dizziness and imbalance. Finally, Dr. Paine recommended that an updated audiogram be performed in order to obtain good reliability. Dr. Paine also recommended bilateral hearing aids.

The claims administrator denied Mr. Lacy's claim on May 19, 2017. In its Order, the claims administrator notified Mr. Lacy that liability is with his employer of last exposure. The Order noted that Mr. Lacy's application indicated that he worked for three other employers since ending his employment with Lightning Contracting Services, Inc. Mr. Lacy protested the decision.

Mr. Lacy testified at deposition on August 16, 2017. He testified that he worked as a truck driver for All American Fabrication from November 2016 to March 2017. During his time working for All American Fabrication, he was not exposed to loud or excessive noise in loading of the products on the truck. He also testified that he did not participate in the unloading of the truck. He testified that he worked as a garbage truck driver for Beckley Garbage from August 2016 to November 2016. Mr. Lacy stated that he wore hearing protection while his driving his garbage truck, and he further stated that he did not believe he was exposed to loud noise while working for Beckley Garbage. Mr. Lacy testified that he drove a dump truck for the West Virginia Parkways Authority from March 2016 to July 2016, but was not exposed to loud levels of noise.

During his deposition, Mr. Lacy did testify that he was regularly and continuously exposed to noise while working for Lightning Contract Services, Inc. Mr. Lacy was a coal miner

while working for Lightning Contracting Services, Inc. He described the noise exposure as “body shattering.” According to Mr. Lacy, while working as a miner for Pocahontas Coal, as well as working for Lightning Contract Services, Inc., he was exposed to piercing occupational noise even though he was supplied hearing protection. He denied any non-occupational exposure to noise, and also denied any medical conditions that could otherwise cause hearing loss.

By Order dated October 12, 2017, the Office of Judges affirmed the claims administrator’s May 19, 2017, Order rejecting the claim. The Office of Judges determined a preponderance of the evidence indicated that Mr. Lacy was exposed to occupational noise while working in the coal industry. However, because liability for workers’ compensation hearing loss claims is no longer allocated among employers¹, his last subsequent employment with Beckley Garbage was his last employment where he was exposed to occupational noise. The Office of Judges concluded that Beckley Garbage was liable for the entirety of Mr. Lacy’s hearing loss claim and that the claims administrator’s decision should be affirmed. On April 23, 2018, the Board of Review adopted the findings of facts and conclusions of law as affirmed by the Office of Judges.

After review, we agree with the decision of the Board of Review. It was not an arbitrary conclusion by the Office of Judges to determine that Mr. Lacy had enough noise exposure to charge a subsequent employer. Mr. Lacy worked for Beckley Garbage and was exposed to occupational noise after his employment with Lightning Contract Services, Inc. Because liability for workers’ compensation hearing loss claims is no longer allocated among employers, the last employment where Mr. Lacy was exposed to noise is liable for the entirety of his hearing loss.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 2, 2018

¹ In 2006, the West Virginia Office of Insurance Commissioner, in her discretion, discontinued the practice of agency allocation among employers in occupational hearing loss claims. The Legislature has provided that jurisdiction for hearing loss claims under West Virginia Code § 23-4-15(c) (2010) is based upon a single day: the claimant’s date of last exposure to unusual or excessive workplace noise. *See Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 791 S.E.2d 168 (2016).

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Elizabeth D. Walker

Justice Paul T. Farrell sitting by temporary assignment

Justice Tim Armstead

Justice Evan H. Jenkins

Justice Allen H. Loughry II suspended and therefore not participating.