

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**FRANK E. PIERCE,
APPELLANT**

vs.

**ZURICH AMERICAN INSURANCE COMPANY,
RESPONDENT**

DOCKET NUMBER WD77095

DATE: September 9, 2014

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable John M. Torrence, Judge

Appellate Judges:

Division Three: Gary D. Witt, P.J., Joseph M. Ellis, J. and Thomas H. Newton, J.

Attorneys:

Jerrold Kenter, for Appellant

Larry D. Fields, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

FRANK E. PIERCE, APPELLANT

v.

ZURICH AMERICAN INSURANCE COMPANY, RESPONDENT

WD77095

Jackson County, Missouri,

Before Division Three Judges: Gary D. Witt, P.J., Joseph M. Ellis, J. and Thomas H. Newton, J.

In 2009, Appellant Frank E. Pierce sustained a knee injury while working for Bedrock Inc., d/b/a Tri-State Motors ("Employer"). Respondent Zurich American Insurance Company was Employer's workers' compensation insurer. Appellant visited the authorized treating physician selected by Respondent and eventually underwent two knee surgeries. The authorized treating physician subsequently opined that Appellant would need a total knee replacement but not because of the work-related accident. A physician hired by Appellant's attorneys, however, opined that the accident caused the need for the knee replacement.

In 2012, Appellant, Respondent, and Employer settled Appellant's workers' compensation claim by entering into a stipulation for compromise settlement ("the Settlement Agreement"). The Settlement Agreement included a handwritten provision stating that "medical remains open for 1 (one) year from the date this stip. is approved." The Settlement Agreement further provided that Appellant was forever closing out his workers' compensation claim against Respondent "except as provided by Section 287.140.8, RSMo."

After the Settlement Agreement was approved by an ALJ, Appellant sent a request to Respondent for knee replacement surgery. Respondent denied the request after the authorized treating physician again opined that the work-related accident did not cause the need for the total knee replacement.

Appellant subsequently filed a two-count petition for equitable relief. In his first count, Appellant claimed that he was entitled to a declaratory judgment that Respondent violated § 287.128.6(6) because Respondent knowingly made fraudulent and material misrepresentations for the purpose of denying him the medical benefits contemplated by the Settlement Agreement. In his second count, Appellant requested specific performance of the Settlement Agreement in that he timely requested the knee replacement surgery pursuant to the one-year, handwritten future medical provision.

Respondent filed a motion to dismiss the petition, or, in the alternative, a motion for judgment on the pleadings. In the motion, Respondent contended that the trial court lacked subject matter jurisdiction because the subject matter of the case was within the primary jurisdiction of the Division. Respondent alternatively argued that it was entitled to judgment on the pleadings on the basis of its affirmative defense of exclusivity of the Missouri Workers' Compensation Law. Appellant opposed the motion contending that the Division lost jurisdiction over the case when the parties entered into the Settlement Agreement.

Ultimately, the trial court granted Respondent's motion to dismiss, finding that "the Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation, has exclusive subject matter jurisdiction in this case." Appellant now appeals from the trial court's grant of the motion to dismiss.

REVERSED AND REMANDED

Division Three holds:

(1) The trial court erred when it dismissed the case for lack of subject matter jurisdiction because whether a case must first be determined by the Division does not affect a trial court's subject matter jurisdiction. Rather, such arguments must be raised as an affirmative defense to the trial court's statutory authority to proceed. Thus, the trial court did not lack subject matter jurisdiction in this case.

(2) The trial court should have entered judgment on the pleadings in favor of Respondent with respect to Count II because it is evident on the face of the pleadings that the relief requested by Appellant is specifically contemplated within the parameters of § 287.140.8 of the Missouri Workers' Compensation Law ("the Reactivation Provision") in that the Reactivation Provision permits for the reactivation of settled workers' compensation claims if the claimant requires the use of a new, or the modification, alteration or exchange of an existing prosthetic device and, Appellant is seeking a knee replacement (a new prosthetic device) following the settlement of his workers' compensation claim. Thus, the Reactivation Provision constitutes the exclusive remedy available to Appellant.

(3) The plain language of § 287.140.8 provides for the reactivation of a settled claim if the claimant requires (1) the use of a new prosthetic device or (2) the modification, alteration or exchange of an existing prosthetic device. Nothing in the language of § 287.140.8, therefore, suggests a previous award of a prosthetic device is a necessary prerequisite for reactivation.

(4) Nothing in the Settlement Agreement affects Appellant's ability to seek reactivation in that the Settlement Agreement explicitly provides that Appellant is forever closing out his workers' compensation claim against Respondent except as provided by § 287.140.8, which encompasses the Reactivation Provision.

Opinion by Joseph M. Ellis, Judge

Date: September 9, 2014

This summary is *UNOFFICIAL* and should not be quoted or cited.