IN THE SUPREME COURT OF MISSOURI

SC87689

DAVID PIERCE

Employee-Appellant

v.

BSC, Inc.

Employer/Appellee-Respondent

and

BUILDERS' ASSOCIATION SELF-INSURERS' FUND

Insurer-Respondent

Appeal from the Labor and Industrial Relations Commission

RESPONDENTS' SUBSTITUTE BRIEF

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II. JURISDICTIONAL STATEMENT

This appeal is from a final award issued by the Labor and Industrial Relations Commission of Missouri denying compensation to appellant for workers' compensation benefits. The appellant appealed that decision to the Court of Appeals for the Western District who reversed the Commission's decision. A timely application for re-hearing and or transfer to the Supreme Court was denied by the Appeals Court. Application by this Court was granted to respondents by its order dated June 30, 2006.

III. RESPONDENTS' STATEMENT OF FACTS

BSC, Inc. employed appellant for less than four months as a union steel worker. (Tr. 289) He left employment with BSC, Inc. voluntarily without reporting injury, making claim or seeking medical care for right shoulder complaints. Appellant then worked for four months with another construction company (Builders Steel) as a union steel worker. He left that line of work for Ford Motor Company working on the automotive assembly line. (Tr. 35) It was after working on the assembly line at Ford for approximately five months that he made a claim for repetitive motion injury to his right shoulder naming only BSC, Inc. as the responsible employer.[1] (Tr. 49)

Concurrent with the claim being filed against BSC, Inc. for right shoulder injury, appellant also reported right shoulder injury to his then employer of five months, Ford Motor Company. Ford provided authorized medical care for right shoulder injury wherein it was noted on radiography that appellant had a severely degenerative arthritic shoulder joint. (Tr. 52) Appellant received an MRI of his right shoulder, treatment, physical therapy and he was ultimately released at maximum medical improvement for his right

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1 Section 287.067.7 was amended and replaced by 287.067.8 effective August 31, 2006 to allow the three month exception to the last exposure rule to apply only to the "immediate prior employer" as opposed to "an employer" whereby BSC, Inc. would have no exposure under the new law evidencing the legislature's views on late claims for repetitive motion against prior employers.

shoulder complaints. (Tr. 101) It was noted within the medical records in evidence that appellant had complaints from the outset of his assembly line work at Ford. (Tr. 93) At page 93 it is clearly written: "Recalls pain began about 2 weeks after starting the repetitious work." That treatment began September 5, 2003 just two weeks after appellant filed his claim against respondent although he had not worked for respondent for a year. After a course of conservative treatment and work restrictions, appellant was released by the authorized doctors at Ford in November 2003. The records in evidence reveal that he was no longer having pain and that his shoulder is "good." (Tr. 101)

Nowhere within the medical records generated at the Ford Motor Company clinic did it refer to the substantial contributing factor to appellant's right shoulder complaints stemming from his previous steel work. Rather, the degenerative condition was clearly noted with pain increasing with "repetitious work" that began just two weeks into his line work at the Ford Motor Company plant.

Appellant did not file a workers' compensation claim against Ford Motor Company despite reporting significant injury there and being placed on modified duty with authorized medical care being provided. Rather he filed a claim solely against respondent despite the fact that he was receiving authorized medical care from Ford for the right shoulder. His apparent explanation for this is that he thought the work he did with respondent for four months was heavier than the admitted repetitive work at Ford even though clearly at Ford he reported injury whereas for respondent he never reported injury.

The undisputed evidence is that the arthritic shoulder condition dated back to a

fracture and dislocation from a serious automobile collision in 1989. There is a medical history in evidence replete with treatment for right shoulder complaints and a diagnosis of severe degenerative joint disease in his right shoulder in 2000 by Dr. Wilkinson, an orthopedic surgeon who at that time advised appellant to stop doing repetitive work. (Tr. 148-149)

Respondent had appellant evaluated by Dr. Edward Prostic, a board certified orthopedic surgeon of many years. Dr. Prostic was very clear in his report and testimony before the ALJ, any forceful repetitive activities would continue to aggravate the arthritic right shoulder. "It is easy to aggravate this by forceful use of the arm, especially heavy lifting or overhead activities. The more he uses his arm, the more it hurts, which is expected with osteoarthritis of the shoulder." (Tr. 00372) Hence, it is no wonder Mr. Pierce told the orthopedic doctor at the Ford Motor clinic, Ramon Nichols M.D., that the pain began just two weeks into the repetitive assembly line work that began on March 17, 2003. (Tr. 35) To be clear, appellant did not file his claim against respondent BSC, Inc. until August 12, 2003 nearly five months into the repetitious assembly line work at Ford and a year after having worked for respondent. (Tr. 350-351).

Following the evidentiary hearing, the administrative law judge found that the appellant had been exposed to the hazard of his repetitive use disease (aggravation to shoulder joint arthritis) for more than three months before filing his claim against a prior employer. She found that appellant had in fact worked for another steel workers construction company for more than four months which was undisputed and that he

worked for Ford Motor Company continuously doing repetitive work on the assembly line for approximately five months before filing his claim. Thus, she made the factual determination that there was substantial evidence showing that appellant had worked for two employers for more than three months being exposed to the hazard of aggravating injury to a shoulder condition of long standing. That factual determination was adopted by the Labor and Industrial Relations Commission who affirmed the denial of medical benefits sought by appellant against this respondent under the last exposure rule. The three month exception was rejected quite simply because it was clear more than three months had passed with not one but two employers where repetitive work clearly aggravated the pre-existing condition.

Appellant sought judicial review claiming that the work with respondent was more difficult and harder on his shoulder than the work for the two subsequent employers. There is no medical testimony in evidence that opines the work for the two subsequent employers failed to continue to aggravate the shoulder condition. To the contrary, all of the medical testimony is consistent that appellant continued to aggravate his pre-existing shoulder condition and even reported injury to Ford Motor Company and received authorized medical care through that employer being restricted at the very time he made claim against respondent.

IV. RESPONDENTS' POINTS RELIED ON

The Labor and Industrial Relations Commission properly denied the claim for medical benefits under the Missouri Workers' Compensation Act because the record is replete with substantial competent evidence that appellant worked for more than three months with two subsequent employers continuing to be exposed to the risk of the hazard of repetitive use injury when he brought his claim against respondent.

A. STANDARD OF APPELLATE REVIEW

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222-23 (Mo. banc 2003).

K & D Auto Body, Inc. v. Div. of Employment Sec., 171 S.W.3d 100, 103 (Mo. App. 2005).

B. CONTROLLING AUTHORITY

Endicott v Display Technologies, Inc., 77 SW3d 612 (Mo. banc 2002).

V. ARGUMENT

The Labor and Industrial Relations Commission properly denied the claim for medical benefits under the Missouri Workers' Compensation Act because the record is replete with substantial competent evidence that appellant worked for more than three months with two subsequent employers continuing to be exposed to the risk of the hazard of repetitive use injury when he brought his claim against respondent.

A. STANDARD OF APPELLATE REVIEW

It is only in "rare" cases that a Commission award is contrary to the overwhelming weight of the evidence. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-23 (Mo. banc 2003). The record is examined as a whole and even if there is evidence that would support a contrary finding, the appellate court should not substitute its opinion of the facts for that of the Commission. *K & D Auto Body, Inc. v. Div. of Employment Sec*., 171 S.W.3d 100, 103 (Mo. App. 2005).

Where an employee is subjected to the hazard of repetitive motion disease for more than three months in subsequent employment before filing his claim for benefits against a former employer, the last exposure rule applies and the prior employer is absolved of any responsibility under the Workers' Compensation Act. *Endicott v. Display Technologies et al.* 77 S.W.3d 612 (Mo. banc 2002).

B. THE APPLICABLE CASE LAW

Appellant worked less than four months with respondent yet sought medical care for a

long standing shoulder condition a year after leaving that employment. The Supreme Court of Missouri in Endicott v. Display Technologies, Inc. 77 S.W.3d 612 (Mo. banc 2002) analyzed and interpreted § 287.063 §§s 1 & 2. That statute provides:

> 1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of Section 287.067, RSMo.
>
> 2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which the claim is made regardless of the length of time of such last exposure.

Further, Endicott set forth a two part test under the three month exception to the last exposure rule under § 287.067.7.

> With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior

employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

Liability will only shift from the last employer that exposes an employee to the hazard of the disease when the employee has worked at his new employment for less than three months AND where the prior employment was the substantial contributing factor resulting in the condition. Id. at 615. In truth, application of this exception to the last exposure rule is more typically asserted by a subsequent employer seeking to deny benefits to a short time employee who comes to them with a pre-existing condition believed to be caused by former employment. Here, appellant only made claim against the employer he left a year prior to filing his claim. The appellant makes no explanation for his failure to file a claim against the only employer to whom he reported right shoulder injury and who voluntarily provided appellant medical benefits for his right shoulder complaints.

Regardless of the appellant's own failure to assert claims against both or all employments here, the key turning point is whether the employee was exposed to the risk of the hazard of his condition causing his disease for more than three months before filing his claim against a former employer. Here the disease is simply aggravation to his pre-existing degenerative arthritis. Using the analysis suggested by the points relied upon by appellant, this Court would have to find in each review of successive employments that the repetitive tasks from both employments were identical. He argues that swinging a sledge hammer is different from assembly line work and so, therefore, it is impossible to show that the employer was exposed to the hazard of the occupational disease that caused the condition.

To adopt the interpretation appellant requests, the fact finder would have to find the tasks from both employers were identical. Nowhere within the repetitive use occupational disease statutes is this required. Consider a person subjected to typing eight hours per day who left employment and then worked removing files eight hours per day. The employments require distinct repetitive hand movements but nonetheless are both capable of causing carpal tunnel syndrome. Under appellant's argument, the three month exception would not prevent a claim against the former employer at any time into the subsequent employment regardless of the last exposure rule. Such an analysis is absurd and certainly was not contemplated by the legislature in adopting a bright line three month exception to the last exposure rule for repetitive use injuries.

Under the foregoing example, the employments required distinct tasks yet both were repetitive and capable of causing the disease. The fact that one may or may not be more capable of causing the disease is irrelevant. Once the employee has been exposed to the risk of the hazard of the disease more than three months, a claim against the former employer filed after the three month deadline should be denied. In the present case, the claim was filed a year later and the employee had been subjected to nine months of work for two employers that involved repetitive tasks clearly capable of aggravating the pre-existing severe degenerative arthritis in appellant's shoulder joint. To adopt appellant's position would greatly reduce the application of the last exposure rule altogether in repetitive use cases because concurrent employments typically do not involve identical repetitive tasks, yet both contribute to the disease process.

Within the treatment notes of the authorized care by Ford doctors, it is clearly revealed that appellant began having his pain just two weeks into his work on the line at Ford. He worked five months in pain until his shoulder completely gave out when performing an exceptionally hard task at the same time he filed his claim against respondent in August of 2003.

The appellant argues that he was primarily a foreman for the four months after leaving respondent and working for competitor Builders Steel. He admitted that he was a working foreman but simply it was less intense than the work for respondent. He continues that line of argument where he claims the repetitive work on the assembly line was also less strenuous than the steel work he did for respondent.

This Court was clear in *Endicott* that the three month rule looks to exposure to the risk of the hazard of the disease for more than three months. Beyond that three month point of continued exposure, looking back to the prior employment with an eye towards medical causation becomes irrelevant. Appellant admits that the work he did for Ford was repetitive, that he worked in pain there, and that he reported injury there and received authorized medical care. (Tr. 329; 86-106)

As to evidence within the record of continued exposure to the risk of the hazard, at page 324 of the transcript appellant admitted that his first job on the line required him to reach overhead 40 to 50 times per hour and pull down a pneumatic power tool. While he tried to minimize the effort, he admitted that he did this continuously full time for up to ten hour shifts at a time. (Tr. 324) The clinic notes at Ford reveal his admission that the pain

began months before and just two weeks after starting the repetitive work at Ford in March of 2003. (Tr. 93) Both orthopedic surgeons opined that the repetitive work at Ford exacerbated and aggravated the pre-existing degenerative right shoulder condition. (Tr. 357 Stuckmeyer M.D.; & 372 Prostic M.D.)

Appellant argues that he was not exposed to the risk of the hazard of his occupational disease with his subsequent employments whatsoever. This argument would have merit had appellant moved into a line of work that did not require repetitive upper extremity tasks -- that is simply not the case. Appellant tempers this argument with the notion that the Administrative Law Judge should weigh the extent to which the repetitive work is harder from the prior employment. The fact finder must then examine under a microscope each of the repetitive tasks in a given occupation on a daily basis to determine if there are three months of continuous exposure. This is inconsistent with the Supreme Court's decision in Endicott v. Display Technologies, Inc., 77 S.W.3d 612 (Mo. banc 2002) and a truly unworkable application of the three months exception. The record clearly supports the finding that not only was appellant exposed to more welding and steel worker tasks for a subsequent employer, he was then exposed to repetitive tasks on an automotive assembly line where a year passed before he brought this claim.

The findings of fact by the Administrative Law Judge and adopted by the majority of the Commission included that appellant worked for more than three months with two subsequent employers AND continued to be exposed to the hazard of his disease before bringing this claim. This is supported by the record with the admission of pain beginning just

two weeks into the assembly line work at Ford, the admission of reaching overhead 40 to 50 times per hour for ten hour shifts from the very outset of his work at Ford, and with both orthopedic surgeons opining that the subsequent work continued to aggravate the condition. Clearly there was substantial evidence to support the factual determination of continuous exposure to repetitive tasks that aggravated the disease process in appellant's right shoulder for more than three months before the claim was filed.

When this claim was brought in August 2003, claimant had been long removed from his short stint of employment with respondent. He worked for two employers for a year that exposed him to repetitive heavy tasks with continued welding and bracing steel work and assembly line work that included repetitive overhead tasks. His own expert medical doctor testified: "While employed with Ford Motor Company, Mr. Pierce relates that he has to do extensive repetitive activities with the upper extremities, including using power tools and reaching overhead." (Tr. 357) It was within that employment that appellant reported his first work related injury to his right shoulder and went to the company doctors seeking treatment. Well into that treatment, but before being released by the Ford doctors to return to full duty, appellant filed the underlying claim against respondent. He seeks additional medical care through a claim for compensation that he filed at the very same time he reported injury to Ford Motor Company doctors for right shoulder injury. The Ford doctors noted a history of pain beginning just two weeks after starting at Ford and restricted him to no above shoulder work with the right arm, no lifting more than five pounds, and no pushing or pulling with the right arm. He treated for three months for his right shoulder. The claim for right shoulder injury

against respondent was filed August 12, 2003. Appellant treated with Ford from September 5, 2003 through October 15, 2003 when he was returned to full duty. Appellant nowhere explains how respondent was to accept this claim and provide medical care for the right shoulder at the very same time he was receiving authorized medical care through the Ford Motor Company doctors for reported injury there. He continued to work on the line at Ford where he works this date.

The evidence demonstrated that when appellant left the employment of respondent on September 25, 2002, he was not experiencing the kind of pain he had when he reported injury to Ford in August 2003. This would explain why there was no report of injury. A medical examination performed October 6, 2002 revealed: **"**the right shoulder is slightly loose on passive manipulation, but not acutely painful, old deformity of the outer third of the right clavicle, from reported fracture." (Tr. 229) Hence, appellant worked for a short period of time for respondent with a known right shoulder problem. He made no report of injury to respondent and the employment ended September 25, 2002 when the project was complete. If the shoulder pain at that time was similar to that at Ford a year later, why didn't the contemporaneous examination reflect that? The examiner on October 6, 2002 nowhere references injury with his employment with respondent that had just concluded days before the evaluation. At that time the diagnostic impression was:

"1) Motor vehicle accident with multiple trauma, April 11, 1989. This included a possible shoulder dislocation, with fractured clavicle."

A determination that appellant was not exposed to continuous aggravation to his pre-

existing arthritis simply defies logic. This is particularly true given that appellant made a report of right shoulder injury to Ford Motor Company at the same time he filed a claim for medical benefits against respondent and treatment was provided by Ford.

Appellant compares the facts of this case to *Maynard v. Lester E. Cox Medical Center/Oxford Healthcare, 111 S.W.3d 487 (Mo. App. S.D. 2003)* where the Southern District found that there was no substantial medical evidence to support that the subsequent employment exposed the appellant to the hazard of his disease. In fact, in *Maynard* there simply was no evidence whatsoever of repetitive tasks at all in the subsequent employment to even consider. The Southern District wrote at page 491: "Despite the fact that the employer had presented evidence that appellant had subsequent part-time employment following her last date of employment with employer, there was absolutely no evidence presented at the hearing proving that the duties appellant performed while at these subsequent employers were repetitive in nature." That is clearly not the case here where the subsequent employment was full time, ten hour shift assembly line work that began with overhead reaching for power tools 40 to 50 times per hour, ten hours a day.

As for the evidence, unlike in *Maynard*, the present case consists of the appellant's own medical expert writing that the repetitive tasks while working for Ford Motor Company "aggravated and exacerbated" the condition. (Tr. 357) Nowhere does appellant's own expert opine that appellant was not exposed to the risk of aggravating his degenerative arthritis from his subsequent employment. Yet that is what claimant argues.

Hence the appellant's own expert medical testimony does not even support his argument.

VI. CONCLUSION

The foregoing demonstrates that there was an abundance of significant and substantial evidence to support the finding of the Labor and Industrial Relations Commission. There was continued exposure to the risk of the hazard of the disease for more than three months before the claim was filed against respondent. It is respectfully requested that the Missouri Supreme Court affirm that decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above and a floppy disk with the foregoing in Word format were mailed postage prepaid to the attorney for the appellant, Jerry Kenter, 1150 Grand Suite 700, Kansas City, Missouri 64106 on this 7th day of August, 2006.

C. Anderson Russell

1. Pursuant to Rule 84.06 I certify that this brief contains 3,782 words in compliance with Rule 84.06 (b).
2. This brief contains 330 lines.
3. The disk submitted with this brief has been scanned and it is virus free.

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C. Anderson Russell

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